DIARY FOR NOVEMBER.

1. Fri.... *All Saints' Day.*
2. Sat.... Last day for Articles, &c., to be left with Secretary of Law Society.
3. SUN.. *23rd Sunday after Trinity.*
10. SUN.. *24th Sunday after Trinity.*
14. Thurs. Examination of Law Students for call with Honors.
15. Fri.... Examin. of Law Students for call to the Bar.
16. Sat.... Examination of Articled Clerks for certificates of fitness.
17. SUN.. *25th Sunday after Trinity.*
18. Mon... Michaelmas Term begins.
21. Thurs.. Inter-examination of Law Students and Articled Clerks.
22. Fri..... Paper Day, Q.B. New Trial Day.
23. Sat.... Paper Day, C.P. New Trial Day, Q.B.
24. SUN.. *26th Sunday after Trinity.*
25. Mon... Paper Day, Q.B. New Trial Day, C.P.
26. Tues .. Paper Day, C.P. New Trial Day, Q.B.
27. Wed... Paper Day. Q.B. New Trial Day, C.P. Last day for setting down and giving notice of re-hearing in Chancery.
28. Thurs.. Paper Day, C.P. Open Day, Q.B.
29. Fri. ... New Trial Day, Q.B. Open Day, C.P.
30. Sat. ... *St. Andrew.* Open Day.

CONTENTS.

THE

Canada Law Journal.

NOVEMBER, 1872.

The well-worn maxim, "*De minimis non curat lex*," is all very well in its way; but there are some small things which lawyers must take care of, and as to which the counter-maxim applies, "*Peccare in minimis maximum est peccatum.*" One small thing which has troubled us is the persistent way in which the printers of our Statutes and reports will truncate the proper abbreviation of Her Majesty's first Christian name. It may be in keeping for some of our very good friends of the adjoining republic to talk and write of "*Vic.*," because they cannot pronounce "*Vict.;*" but surely the latter is the correct mode of printing the reference to statutes passed in the present reign. "Vict." is the root or etymon of "Victoria," and, as such, forms its proper syllabic division, and should be regarded in abbreviating the name. In all English law books the citation of statutes passed in Her Majesty's reign is as we contend for.—Another small matter we may mention, though of less consequence: Is not the citation of the Queen's Bench Reports for this Province, as to the volumes subsequent to the statute of Ontario, 34 Vict. c. 8, by the initials "U. C. R.," incorrect? Yet we find in the reports references to cases indicated in this way. This statute, at all events, changed the name of the Court, if it did not in terms the title of the Chief Justice. The name of the Court is now "Her Majesty's Court of Queen's Bench for Ontario." It would be perhaps inconvenient to alter the number of the volume, and commence a new series of "Ontario Reports." It has been suggested that the series may be abbreviated and cited thus: "31 Q. B. (Ont.)." If any one has a better suggestion to offer, let the public get the benefit of it: we shall be glad to give him space.

The question as to what is waste by tenant for life in this country, where the land in question is uncleared, still remains undecided. The case of *Drake* v. *Wigle* in the Common Pleas last Easter Term came near it, but the

Court considered that the question was not brought up in such a way that they could properly discuss it. It was, however, discussed by the counsel in the case, and the court remarked:

"We have looked into the authorities, English and American, on the main question, together with the remarks made from time to time by our own Law and Equity Judges, and are prepared to express our opinion whenever the question is fairly presented to us."

Under these circumstances it may perhaps be a matter of regret that no opinion was expressed.

On the opening of the Court of Queen's Bench in Manitoba on a recent occasion, the Chief Justice of Manitoba, the Hon. Alexander Morris, delivered the following excellent charge to the grand jury:—

"Gentlemen:—It is my duty, and, I may say, my privilege, now to open the first term of the Court of Queen's Bench for the Province of Manitoba. The occasion is an interesting and important one. In years to come it will be looked back upon as one of the landmarks in the history of the rise and progress not alone of this Province, but of the North-west, to which it is the portal. The establishment of social institutions, the laying the foundation of law and order, are always eras in the history of a new country; and respect for the laws, and due and orderly regard for the requirements of the civil power, are prominent characteristics of the races who are under the British supremacy. Such respect I look for in Manitoba, and in discharging the functions I am called to exercise, it shall be my anxious desire to know neither race, creed nor party, but to administer the laws without fear, favour, or partiality; and, so acting, I am confident that the Court will be supported by the community. Every man who has a stake in the country, has a direct interest in the impartial administration of the law, and all such will rejoice that a Court, fully equipped, will henceforth interpret those Common, Dominion and Provincial Laws, which regulate and control all the relations of social life. There is, beyond question, and I am enabled to speak from an extended observation of various sections of Manitoba, a brilliant future before British North-western America. As an agricultural country, it must take the highest rank. But, to secure that rapid development which its advantages entitle it to, and to attract that great influx of population which its natural resources fit it for, there must be stability in the institutions of the country, and there must be confidence that British law and justice will be found in full and entire force. To aid in giving that assurance will be my duty, and I have all confidence that the people of this Province, of all classes, will rejoice that the Court of Queen's Bench is now in full operation. And here, before passing to other subjects, I would remark incidentally, that I look to the Bar of Manitoba for their aid in the discharge of my duties. The *esprit de corps*, inseparable from over twenty-one years at the Bar, will naturally lead me to respect and uphold the privileges of the Bar, though I will be ready, at all times, while treating the Bar with all courtesy, to uphold the dignity of the Bench; and I therefore look for the most kind relations as likely to prevail between the Bench and the Bar."

After alluding to the recent disturbances there, when certain printing offices were attacked by a mob, and much property destroyed, he continued:—

"If Manitoba is to be prosperous, there must be peace and order, there must be confidence in the administration of the laws, and there must be a fearless execution of these laws against all offenders, be they whom they may. I trust that, henceforth, British subjects in this Province will remember that free men are freest when they yield a ready obedience to the law; and that men of all classes in the land will resolve to work out the destiny of the Province, by the use of the free institutions of the country, without resort to acts of violence, which only bring disgrace on those who commit them, and discredit on the fair fame of the British Empire."

On the occasion of their late visit to Toronto, His Excellency the Governor-General and the Countess of Dufferin paid a visit to Osgoode Hall. After due inspection of the building, the Courts and the Library, they were entertained at luncheon by the Benchers; the reception was quite private. This reminds us that we have received from Messrs. Notman & Fraser, photographers of this city, two likenesses of Lord Dufferin. We presume we are indebted for the compliment to a very proper concatenation of ideas, running somewhat in the following train, thus: The Queen's representative—the Queen herself—the Fountain of Justice—Courts of Law—Lawyers, and so to the *Law Journal*. However this may be, the photographs are gems in the way of art, as well as perfect likenesses of the Governor-General, who in his gracious manner and lavish hospitality is the best repre-

sentative of our Gracious Queen that has ever honoured our *alma mater* with his presence.

The following effusion is too good to be lost. It must have struck the recipient with profound awe, not to say terror. Whether it had the desired effect we know not, but are informed that this effort of the worthy J. P. was too much for him, for the gentleman who sent us the document quaintly remarks, "You will not be surprised to learn that he has since died." The paper reads as follows, except that we disguise the names:—

"Province of Canada, } Thomas W.
"Counties of Huron and Bruce, } Smith, of the
"to witt: } Township of

McKillop maketh oath before the undersigned one of Her Majesty's Justices of the Peace in and for the said Counties for that Mr. Brown also of McKillop unlawfully holds two ewes the property of said Complant I advise you on receipt of this note to return said sheep to Thomas W. Smith save costs & verry much oblige

"Respectfully yours,
"Peter Smith J.P. (Seal.)"

We would suggest that Mr. Anderson should be instructed by the Benchers to ask students at next interim examination to define the nature of, and give the technical name to the above document.

The judges of the American Republic are manifestly girding up their loins against municipal and magisterial corruption. Finletter, J. in the Court of Quarter Sessions of Philadelphia, upon a prosecution for taking extortionate fees by a Justice of the Peace, commences his judgment after this fashion: "Complaints of the rapacity of the local magistracy have come down to us continuously from the earliest periods. Its history is written in the statutes which were vainly intended to punish and suppress it. Its portraiture is found in the current literature of the times. 'Shallow' and 'Dogberry' and the justices of Fielding, himself a magistrate, are photographs of living actors of the past and present. The common law abhorred it; and its condemnation is dotted all along the highway of judicial decision in indignant language."

One of the most astounding pieces of judicial statistics which we have recently come across reaches us from the State of Illinois. It appears that the Supreme Court of that State has determined one hundred and thirty-eight appeals from inferior courts, and that the judgments in the eight have been upheld, and those in the one hundred and thirty reversed. Here, surely, is an intolerable amount of sack to a penny-worth of bread. We fancy suitors must be in a happy and contented frame of mind, when they ascertain that the court below has gone against them. Indeed, it seems to us that the judges below had better decide the cases by "skying a copper," because then, as somebody has remarked, "*Heads* might have something to do with the matter;" and, we might add, many a scandalous *tail* be saved.

LAW SOCIETY, MICHAELMAS TERM.

CALLS TO THE BAR.

Of the eighty-three Students who gave notice of call, only thirty-three presented themselves for examination. Those who passed without an oral examination are given in order of merit, the rest are not.

The following gentlemen were called to the Bar; seven having been rejected:

C. H. Ritchie, Toronto; R. M. Fleming, Toronto; A. F. McIntyre, Cornwall; J. A. Paterson, Toronto; J. Fletcher, Brampton, (without oral examination). J. B. Smith, Lindsay; H. J. Macdonald, Ottawa; T. Langton, Toronto; R. Sedgwick, Halifax; W. R. Mulock, Toronto; J. Akers, Toronto; C. Corbould, Picton; N. W. Hoyles, Toronto; W. Roaf, Hamilton; G. Dormer, Lindsay; J. A. Barron, Lindsay; J. White, Hamilton; J. A. Gemmell, Ottawa; F. W. Monro, Toronto; R. L. Roblin, Picton; G. McNab, London; M. Malone, Toronto; J. Rome, Berlin; B. W. Vidal, Sarnia; J. R. Strathy, Toronto.

R. J. Wicksteed, Esq., of the Quebec Bar, Ottawa, was also called to the bar of Ontario.

The following Attorneys were admitted. The names are given in order of merit:

G. Luton, Toronto; C. H. Ritchie, Toronto; T. Langton, Toronto; H. J. Macdonald, Ottawa; W. F. Ellis, Chatham; G. A. Watson, Goderich; J. A. Paterson, Toronto; A. F. McIntyre, Cornwall; W. R. Mulock, Toronto; J. R. Strathy, Toronto, (without oral examination). S. Wallbridge, Toronto; R. H. Bowes, Toronto; R. B. Carman, Belleville; J. F. Bell, Toronto.

RESIGNATION OF VICE-CHANCELLOR MOWAT.

Our readers cannot but be aware that the senior Vice-Chancellor has resigned his seat on the Bench to take the position of Attorney-General for Ontario, in the place of Hon. Adam Crooks, and to become Premier of the Government of Ontario, instead of Hon. Edward Blake.

The "decline and fall" of the Hon. Oliver Mowat is an episode in the nature of history-making, that would form sufficient subject-matter for a Canadian Gibbon to produce a book of no small interest or importance. We do not propose, however, to encroach on the general ground; nor on grounds better adapted for discussion in a political paper, but simply to notice the aspects which the facts present from the stand-points of the judiciary and the profession.

Whatever view the outside world may take of the matter, it will not prevent strong expressions of opinion from astonished lawyers and more guarded utterances from surprised judges, at the untoward event which at once has lost to the Court a learned brother, and found for the profession a co-labourer in the common ranks. A rude shock has been given to the stability of the judicial position, which the judge himself ought to have been the last to have occasioned. It is not the fact simply that a judge has for good cause, or for no assigned cause, retired, directly and promptly, from the bench, as that he might have done, and as has been done before with dignity and honour, both maintained and perpetuated; the trouble is that a descent like this is not a retirement, nor even an abandonment; but has the appearance of a fall, by reason of an improper pressure that should not have been tolerated by the custodian of an office so sacred and so important. The decline is what gives impetus and force to the fall. The lever that gave to the bench the descending inclination is one of the objectionable features in the movement, and the facts point too pointedly to an inclination in the direction of the fall not to believe in its existence. We do not say that a judge is bound to continue on the Bench at the sacrifice of his health, or of an increased income, (though this has been done time and oft by judges jealous of the traditions of their order); but there is a glaring impropriety in this step, and in the precedent negotiations, which cannot but strike the most superficial observer; though, strange enough, it seems to have escaped the attention of the late learned Vice-Chancellor himself. For his own sake, we regret that it did so.

Individuals may or may not believe that a judge who leaves the bench for politics, at the request of the leader of a party with which he was formerly allied, has all along been an ardent politician. This, however, in itself, is no real grievance, so long as it does not interfere with, or in any way affect the judicial mind, as, for example, in the case of the Lord Chancellor in England; and, as far as Mr. Mowat is concerned, there has never been the slightest evidence of a tendency to fear, favor or affection. But whilst we are prepared to assert, and do assert this, as well of him as of all our judges, it is nevertheless a fact that the great mass of the people will certainly begin to attribute improper motives to judgments, which to the profession may be most unassailable, and will look upon judges as politicians in disguise, when a judge leaves the Bench directly and avowedly to go into politics, without any interval even to "give colour" to the change. What will be the confidence of the public in the trial of election petitions by judges, if the very judge who one day tries the case and unseats a sitting member, is the next day found leading a government to which the respondent was violently opposed. Better repeal that which was till now a most wise and proper enactment, and let the right to the seat be fought out by partisan committee men.

This view of the matter, if entertained generally, would introduce into the forum a bone of contention in addition to the "pound of flesh" usually in dispute by litigating Shylocks. Counsel would not only be bound to prepare himself for, and apply himself to the conviction of the mind judicial, but also to the mind political of the court. Those judges whose zeal for politics blinded their judicial discernment, would give greater attention to the political charlatan than to the counsel learned in the law. Desperate efforts would be made by suitors of a recognized political stripe to get their cases before the judge tinged with the hue of their party. In such cases political proclivities would lead to the selection of counsel adapted to the ear of the supposed partisan judge. In this way the worst features of political corruption would be

transplanted from the lobby to the corridor; from the halls of legislation to the halls of justice. One of the objectionable characteristics of the American judicial system, as distinguished from the English, has in this instance been given the weight of a name heretofore regarded as eminently honorable and upright, both from a personal and judicial point of view. This every lover of his country will lament.

Respect for the law is intimately associated with respect for the law-giver or law-administrator. If law is administered by undignified persons, or by those suspected of partisan feelings, the popular mind at least will be prone to regard the law itself as unworthy and partial, and it will fall into general contempt. Loss of respect for the Bench at once weakens the whole framework of society, and woe betide any country whose judges have been subjected to even the breath of suspicion.

This frailty or weakness, it is to be feared, may be thought by the intensely interested public to be general or epidemical. It is deeply to be regretted—very much to be deplored, that the foundations of judicial power have been weakened by the weakness of a weak brother. The remaining pillars of justice will have to be strengthened by some legislative or administrative application, that will prevent political barnacles from wasting away their firmness and stability.

The profession has been wont to admire the Bench as a place of permanent honor and practical usefulness. It will now be subject to the reproach of fickleness and temporizing utility Many will look upon it as an elevated vantage-ground from which to scan the contending elements of faction, and from which the occupants are prepared to step down into the arena of conflict, when the prospects of extended patronage, or the gratification of a taste vitiated by the expectation of enlarged emoluments are in view.

The profound respect and traditional deference paid to the Court by the Profession would be perceptibly diminished in proportion to the probability that the judge might one day be "your lordship," and the next, "my learned friend;" one day an authority whose oracular dicta would be sustained by the whole civil and military forces of the Empire, and the next day a speaker whose utterances and arguments would be tattered and torn into shreds of illogical incoherencies by his opponents.

The profession, as such, has a special duty to perform between the Bench and the people, than which there is nothing more important for the due and impartial administration of the law. This duty is to maintain and promote before the public a becoming respect for the Court. This educates the popular mind as much or more than anything else. Where this is wanting, regard for the authority of the Court is wanting; and when once that is gone, the strongest element in obedience is destroyed, and insubordination and anarchy are necessary consequences.

We cannot but most seriously regret the resignation of Mr. Mowat, and his immediate acceptance of the position of a political party leader, and the undoubted necessity of accepting the position of practising at the Bar with those whom he formerly presided over as a judge.

We trust this experiment will not be repeated; that the present daring contempt of judicial traditions and judicious rules will not be accepted, or acted upon, as a precedent hereafter. We hope that the public opinion educed, and the professional reprobation almost universally manifested at the act, will for the future prevent political intrigues from culminating in judicial declensions. We know of no precedent to fit this case, though possibly one might be found in the United States, but Heaven forbid that we should seek for one there; any analogy from miscalled precedents in England is against such a step. These may perhaps be considered in a future number.

LAW REFORM.*

It is almost impossible to take up any journal, whether lay or legal, without finding somewhere in it a reference to the topic which we have placed at the head of this article. The alterations which have taken

* We have much pleasure in inserting this article, from the pen of a valued occasional contributor. He expresses his views clearly and well; but whilst we admit this, we cannot say that he has convinced us that the practice in Chancery should prevail, in case of a fusion, over that at Law. We are not yet prepared to believe that the Common Law Procedure Act is inferior to the ever changing orders of the Court of Chancery, as a basis of procedure. And without going into a further discussion at present, it is an item for consideration that the practice under the C. L. P. Act is more familiar with the profession at large than the other, and could, as is believed by many good judges, more easily be adapted to the future requirements of the country, than the practice of equity; but we will not spoil a good cause by a brief notice of only a few of the arguments which may be adduced in favor of the opinion which seems to us the soundest.—Eds. C. L. J.

place in English law within the last few years have been neither few nor small, yet they seem to be but shadows of coming changes of far wider scope and consequence. Unquestionably, there is in the legal circles of the mother country a strong tendency towards the codification of the laws; we think it needs no great wisdom to predict that this will be a result, the accomplishment of which is no more than a question of time. Probably before this consummation is reached, there will be many intermediate changes and modifications of the existing system, such, for instance, as are foreshadowed in Sir John Coleridge's address at the Social Science Congress. By these the various branches of the law in the matter of evidence, of commercial law, of real property law, and the like, will be systematized by way of codification. By process of complete codification the principles of law will be more or less changed: matters doubtful will be reduced to certainty; harsh rules will be mollified by direct enactment; consistency and logical development will supersede the disjointed and anomalous conglomeration of case-made law.

But in the immediate future, perhaps, there is no more pressing question than that of uniformity of curial procedure, and, coupled with this, the re-adjustment of the jurisdiction of the courts, so that any person who has a valid cause of action, whether legal or equitable, or both, may obtain an adjudication of his case upon the merits, without being driven from one court to another, on technical objections to the jurisdiction.

In this Province there has been a gradual assimilation of the practice in the courts of law and equity. This is especially noticeable in the mode of trying causes by the Court of Chancery under the circuit system, where the evidence is given *viva voce* in open court, the case argued at once and disposed of by the judge, just as in Nisi Prius cases, where a jury is not asked for. So in the establishment of local offices to facilitate the transaction of equity work, the Court of Chancery in Ontario has departed widely from English precedent, though it has acted in conformity with the common law mode of distributing business. As regards the jurisdiction of the courts: when one looks at the Common Law Procedure Act, and observes in how many points the systems of law and equity touch, and when one looks at the reports, and observes in how many cases litigants have been prejudiced because courts of law and equity have not had co-ordinate jurisdiction,—one cannot but wish that some scheme were devised whereby the vexatious lines of demarcation might disappear and (in the language of a well-known pleader, who now adorns the bench of one of the common law courts) "the course of justice flow unobstructed."

The conditions for the successful consummation of such a plan are more favourable in Ontario than in England. Besides the present similarity of procedure, to which we have adverted, which does not obtain in the English courts, we have not the numerous, well-disciplined, and devoted Chancery and Common Law Bar, which in England is powerful enough to delay the adoption of changes, beneficial to the public, though conceived to be detrimental to the privileged few.

There are two modes whereby the injustice to suitors which we have indicated may be remedied. The first is to leave things as they now are in respect to jurisdiction and procedure, and to confer upon the superior courts, by statute, the power to transfer causes from one court to the other, so that a common law cause of action which has strayed into chancery may be relegated to its proper forum, and so that an equity which could not be worked out at law by reason of the insufficient machinery of the court, may be passed over to a competent tribunal. This scheme, properly worked out, could, without doubt, be made an adequate provisional remedy, but it would be manifestly only a half-way stage to effectual relief. The ultimate goal of all such amendments can only be that to which the Attorney-General of England adverts in these words, "the fusion of our two systems of law and equity, a thing, in my opinion, which is absolutely certain one day to be done."

Now, in setting about any scheme of fusion there are a few principles to be borne in mind by law reformers in Canada. It is impossible to satisfy every person, or class of persons, affected by the changes. New, and perhaps unpleasant work will be thrown on the bench and on the bar. Solicitors and attorneys will be unable to agree which class is to swallow up the other. This will be, however, a matter of small concern to the great body to be benefitted,—the people—in whose eyes, according

to Jekyll's joke, there is as much difference between attorney and solicitor as there is between crocodile and alligator. Yet all classes will agree that one chief end to be sought is the *maximum* of general good with the *minimum* of change. This will necessitate a choice of one of the two, or between the two systems of procedure which obtain at present in common law and Chancery practice. Now, the simpler and more direct mode of procedure is the most suitable for modern times. For this reason, other things being equal, the writer would prefer, where the two modes of procedure are so inconsistent that they cannot be amalgamated, that the practice as settled by the general orders and decisions of the Court of Chancery, should prevail over the practice at law, which has been mainly imported from England, and the great triumph of which was to simplify considerably time-honoured complexities of the ancient practice. The equity judges have been astute to frame orders from time to time adapted to the wants of the country and the requirements of suitors. The consolidated orders as they stand embody the results of the experience and sagacity of many eminent judges, who were obliged from the position of the Court of Chancery to adapt its procedure to the special circumstances of this Province.

If the three superior courts were consolidated, with a common jurisdiction, and their official machinery enlarged, there would be work enough for them all to do. It is idle and ignorant talk that some of our daily newspapers indulge in, when they recommend the abolition of Chancery. Two sentences of Sir John Coleridge's admirable address put the matter in its true light. He says: "It must be remembered always that the things themselves, law and equity, and the rights and liabilities arising out of them are inherently distinct. The distinction is in the nature of things, and has not been created nor can be abolished by act of Parliament." Nor do we think that the changes need be so excessive or so alarming as some persons imagine. There can always be power given to the judges to *classify* and *apportion* the work which is brought before them, so that judges of equity training may be assigned to equity business, and judges of common law training and aptitude to common law and criminal causes. At all events, there is an ample field open for our legislators and law-officers. Any man or set of men who achieves success in this direction shall well merit the benediction of Coke,—"Blessed be the amending hand!"

WHO IS TO BE VICE-CHANCELLOR?

The usual greeting between lawyers since Mr. Mowat's resignation (of which we speak in another place) has been, "Who is to be the new Vice-Chancellor?" Various wild rumours are afloat, and it is abundantly evident that there is no one now at the bar likely to accept the office who is head and shoulders above his fellows. Some will have it that a learned judge on the Common Law bench will be asked to accept the office. He would be eminently fitted for it, but we can scarcely fancy him exchanging his present position for a more arduous one, and entailing a certain amount of labour in getting up the present practice of the court. By the way we can scarcely fancy the remaining very learned Vice-Chancellor would like to have a senior to himself translated to his court. The name of a learned Queen's Counsel in much favour in the west was also mentioned, but he is said to have modestly replied that he was as much fitted to be made an Archbishop as a Vice-Chancellor. The name of Mr. Proudfoot has also been mentioned; and when speaking of Hamilton, one could easily fancy an excellent appointment in the person of Mr. Burton. We have also heard allusions made in this connection to the appointment of a present member of the Dominion Cabinet, but whilst giving this gentleman credit for much ability we doubt his present fitness for the office; though it does not follow that he would not, after a comparatively short time by hard work, make himself competent. Mr. Blake would not of course accept the vacant seat, but possibly Mr. Crooks might, and if he would, his claims should not be overlooked. Mr. Thomas Moss might perhaps be induced to give up his lucrative practice, but we doubt if such a young and so rising a man would be content to be shelved just yet. If, however, he should feel constrained to accept it, the appointment would be as creditable to the Executive as it would be beneficial to the country. Mr. Maclennan, again, has many qualifications for the office, as have also several younger men at the Equity Bar. Such a sound real-property lawyer as Mr. Leith, though not at present

very familiar with the practice of the Court, would not be out of place on the Chancery Bench. Mr. D. B. Read had at one time a large Chancery business, and his appointment would not be unacceptable to many in the profession.

The fact is, there is a dearth of material at the equity bar, if we except those few eminent men who, perhaps, for political reasons, might not be offered the vacant seat, or who, if offered it, might refuse to accept an office which would entail greater labours and give less remuneration, than fall to their lot as counsel; to say nothing, we were almost going to say, of being shut out from politics and other objects of ambition, but this, alas, is now one of the traditions of the "good old times;" the action of the late Vice-Chancellor has taught us something new in this respect.

Whoever the recipient of this office may be, and it is no bed of roses, we hope (1) that the appointment may soon be made, (2) that it may *not* be made a matter of party politics, and (3) that the time is approaching when all our judges may receive salaries which will not be as they now are, both disgraceful to the country, and most injurious to its best interests.

VENTILATION.

Mr. Justice Wilson has spoken out well and boldly at the Hamilton assizes, in condemnation of the wretched ventilation of Canadian court-houses. It is well known that his name-sake, Mr. Justice John Wilson, was poisoned by the abominable atmosphere of the court-house at Owen Sound. The *Lancet* takes up the same theme with reference to the deeply-lamented death of Mr. Justice Willes. It says that his mental aberration was, in consequence of physical disease, intensified, if not incurred, by the bad ventilation of the law courts, in which he spent so much of his intellectual activity. The *Lancet* proceeds thus: "Dr. Angus Smith records a visit to a London court, which, at the moment of entering, was extremely warm and unpleasant, and after some minutes intolerable. He stayed long enough to collect specimens of the air, which he found, on analysis, to contain a smaller amount of oxygen than any place above ground, 'except the gallery of an extremely crowded theatre at half-past ten at night.' But he adds the court air was still worse than that of the theatre, its temperature being very high, and the organic matter from perspiration in proportion. A handkerchief which had wiped from one of the windows a little of the animal steam, by which they were dimmed, smelt offensive afterwards. Law reform is a large subject; but the improvement of the courts in which it is administered ought to find a place in its programme. We are afraid to think of the valuable lives which may be slowly yielding to influences like those so disastrous to Justice Willes—bad air breathed during mental strain of the severest kind. How long will it be before the judge on the bench is as well off in the matter of oxygen as the prisoner in the gaol?" No court-house in the Province requires reformation in this respect more than Osgoode Hall. The new benchers have shown themselves not remiss in attending to needed reforms. Let them now address themselves to this duty, and set an example in the metropolis which the county towns may well copy.

LEGISLATION IN NOVA SCOTIA.

Our attention has been drawn to two measures which it is proposed to bring before the Legislature in Nova Scotia, at its next session. One is an Act for establishing County Courts, and the other an Act to confer criminal jurisdiction on the County Courts. Their purport will be best seen from the synopsis given below, some of the clauses being copied in full:

AN ACT FOR ESTABLISHING COUNTY COURTS.

Be it enacted as follows:

1. There shall be established in each of the Counties of this Province, except the County of Halifax, a Court of Law and of Record, to be called the County Court of (the name of the county). The sittings shall be held at the Court House, &c.

2. [Names of Districts—Judges to hold office during good behaviour, &c.]

3. [Provision in case of inability of Judge to hold Court.]

4. No Judge of any such Court shall practice, carry on or conduct any business in the profession or practice of the law, while being such Judge, on pain of forfeiture of his office.

5. [Judge's oath of office.]

6. The practice, forms and modes of proceeding shall be according to the practice of the Supreme Court of this Province; and the Judges of such County Courts shall at all times be governed by the decisions of the Supreme Court.

7. The table of fees shall be the same as in such Supreme Court, for the like services.

8. The Courts shall not have cognizance of any action:—

1st. Where the title to land is brought in question,—or

2nd. In which the validity of any devise, bequest, or limitation is disputed, except as hereinafter provided, or

3rd. For criminal conversation or seduction, or

4th. For breach of promise of marriage,

5th. Of any action against a Justice of the Peace, for anything done by him in the execution of his office.

9. Subject to the exceptions in the last preceding section, the County Courts shall have jurisdiction, and hold plea in all actions *ex contractu*, when the debt or damages claimed do not exceed the sum of two hundred dollars, and in all actions of tort, when the damages claimed do not exceed one hundred dollars, and in actions on bail bonds given to a Sheriff in any case in a County Court, whatever may be the penalty or amount sought to be recovered.

10. [Pleadings setting up title to land to be verified by affidavit.]

11. [Courts to hold four Terms in a year, and Judge may adjourn to a future day.]

12. [When and where Courts to be held.]

13. If the Judge shall be satisfied, by either party in a cause in his Court, that such cause can be more conveniently or fairly tried in some other County Court, he shall order that the venue be changed, and that the cause be sent for hearing to such other County Court; and the Clerk of the Court shall forthwith transmit by post, to the Clerk of the Court to which the cause is sent, all papers and proceedings in the cause on file in his office, and a certified copy of the order for changing the venue; and such cause shall be dealt with in such Court, as if originally brought therein.

14. [Direction of process to and execution by Sheriffs.]

15. The Evidence Act, and the law relating to the deposition before trial shall apply to the County Courts as far as applicable.

16. [Duties of Clerks, &c.]

17. No defendant shall remove any action commenced in the County Court, into the Supreme Court, by *Habeas Corpus*, or *Certiorari*; and, if any action be brought in the Supreme Court, that could have been brought in a County Court, or any action be brought in a County Court, that ought to have been brought in the Supreme Court, the plaintiff shall not be allowed any costs, unless the presiding Judge shall certify there was good cause for bringing the action in the Supreme Court or County Court, as the case may be. In case such cause shall be transferred to the Supreme Court or County Court, as the case may be, all further proceedings held therein shall be carried on as if such cause had been originally brought in the Supreme Court or County Court, as the case may be.

18. [General powers of Court and Judge defined, similar to those of our County Courts.]

19. [Appeal given to the Supreme Court.]

20. The County Courts shall have and exercise jurisdiction in all cases under the act for overholding, and under the absent or absconding debtor act, as the same is now exercised by the Supreme Court.

21. No privilege shall be allowed to any person to exempt him from the jurisdiction of the several County Courts; but members of the Legislature shall not be arrested or imprisoned by civil process issued out of any such Courts.

22. Judgment from the County Courts shall bind the lands of the defendants from the time of registry, as in the Supreme Court. Writs of execution shall be in the same form, and of like effect, as those out of Supreme Court.

23. [Writs and process to other Counties.]

24. [Juries same as Supreme Court.]

25. The Judge of any County Court may try and determine causes brought to issue before him without the intervention of a jury, if both parties agree thereto.

26. Appeals from the Magistrates' Courts shall be to County Courts, and shall be tried and determined by the Judge thereof, either summarily or by a jury; and there shall be no appeal from the decision of such judge or jury.

27. [As to pending suits.]

28. The summary jurisdiction of the Supreme Court, except in the County of Halifax, is abolished. Acts inconsistent herewith repealed.

29. The Judge of each County Court shall be, *ex officio*, a Justice of the Peace, in and for the district for which he is appointed; but shall not issue any civil process.

30. Only Attorneys of the Supreme Court may practice in the County Courts.

31. [Seal and books to be provided.]

32. [Fees to Clerk, &c.]

AN ACT ENTITLED AN ACT TO CONFER CRIMINAL JURISDICTION ON THE COUNTY COURTS.

1. The several County Courts in the Province, shall have exclusive jurisdiction of all misdemeanors committed within the body of the respective Counties, and original concurrent criminal juris-

diction within the respective Counties with the Supreme Court, of all crimes and offences, which are not capital, committed within their respective Counties, which crimes and offences shall be triable by whichever Court, the Supreme or County, shall first hold Court in the County, next after the committal of the party charged with such crime and offence, and the judges shall have full power and authority to hear, enquire into, try, determine, deal with and punish all such crimes, offences and misdemeanors aforesaid, in manner prescribed by law, provided always that the Attorney-General of the Province may, at any time and in any stage of the proceedings, relating to all crimes and offences, except misdemeanors proceeded under in any County Court, take charge of, and control such proceedings, as fully as if cognizance were being had in the Supreme Court of such crimes and offences, and may at any time, previous to the commencement of any trial, in any County Court for any crime and offence, cognizable in such Court, except misdemeanors, issue his fiat, and transmit the same to the Clerk of the County Court, where such crime or offence would be triable, which shall have the effect of determining the jurisdiction of said County Court as far as regards such crime and offence, and giving to the Supreme Court of the said County exclusive jurisdiction over such crime or offence. All acts, and part of acts, touching and concerning the criminal laws and the administration of criminal justice in the Province, or relating to jurors, witnesses, evidence or proceedings of any kind now in force, and applicable to the Supreme Court, when exercising criminal jurisdiction, shall be in force and apply to the several County Courts, except as herein modified or altered; and the County Courts shall be clothed with and exercise all the like powers, rights and privileges, in all cases cognizable by them as now appertain to, or are exercised by the Supreme Court, as Courts of criminal jurisdiction; provided that no grand jury shall be summoned to attend any County Court, except upon the order of the Judge of such court directed to the Sheriff for that purpose, who upon receiving such order shall immediately summon seven grand jurors to attend such court, who shall be sworn and charged and due presentment make of any matter submitted to them by the Judge of such court.

2. All warrants of committal issued by, and all examinations and recognizances taken by any justice of the peace, or relating to parties committed for trial for any offence or crimes which are not capital, shall be by him immediately after transmitted to the Clerk of the County Courts of the County within which such crimes and offences have been committed—if such court shall sit in said county—previous to the Supreme Court; and all warrants of commitment issued by, and all examinations and recognizances taken by any justice of the peace, or relating to persons committed for trial at any County Court, for misdemeanors, shall immediately thereafter be transmitted to the Clerk of such County Court.

3. The several Judges of the County Court may admit to bail any person charged with any offence (except capital offences) in the same manner and to the same extent as may be now done by a Judge of the Supreme Court.

4. In any and every case of summary or other conviction, before any justice or justices of the peace for any county, or the Stipendiary Magistrate for the city of Halifax, an appeal from such justice, or justices or Stipendiary Magistrate may be made to any Judge of the County Courts—which appeal the said justice or justices or Stipendiary Magistrate shall grant, on the party so committed giving bonds, with sureties, in such sum as the justice or justices or Stipendiary Magistrate shall deem proper, to appear and prosecute said appeal at the next sittings of the County Court in the county, and the Judge thereof shall try the matter, *de novo*, summarily, and the justice or justices or Stipendiary Magistrate shall bind over, by recognizance, the witnesses to appear and give evidence at such court.

5. No petit jury shall be summoned, or hereafter attend at any General Session of the Peace for the county of Halifax.

6. [Special provisions as to County of Halifax.]

7. The Judge of the County Court may, upon good cause shewn, from time to time, postpone the trial of any criminal matter to any future sittings of the court, and in such case shall bind over the offender, by recognizance, (and if at his instance with sureties) in such sum as he thinks proper, to appear and take his trial at such future court; and he shall also bind over, by recognizance, the witnesses to appear and give evidence at such court.

8. [The County Judge may order the examination *de bene esse* of all witnesses sick or infirm or about to leave the Province before the Clerk of the Court.]

9. The jury for the trial of criminal offences in the County Court shall be seven, all of whom must agree upon the verdict.

10. The senior Queen's Counsel resident in the county, and if no Queen's Counsel reside in the county, the senior or Queen's Counsel present at the opening of the County Court, and in their absence the senior practising attorney shall be appointed by the Judge to conduct all criminal

prosecutions during the term; who shall take all proceedings for the trial of all offences in the county, and over which the County Court shall have jurisdiction: prepare indictments and prosecute; and take proceedings for compelling attendance of witnesses, &c.

11. The Clerk of the County Court shall perform all the duties connected with offences cognizable by the County Courts heretofore performed by the Clerk of the Crown, including the necessary proceedings to carry out any sentence imposed by the County Court; the binding over all witnesses in any cause, &c.

12. It shall be lawful for the presiding Judge at any County Court to tax and allow to the Queen's Counsel or attorney, for his services, reasonable costs and fees, as the Judge shall deem adequate, for the services actually performed on such prosecution; but the costs taken shall not exceed for any one prosecution the sum of six dollars for each criminal appeal, and twenty dollars for all writings, papers and counsel fees on each criminal trial; and to tax and allow to the Clerk of the County Court, for his services in each criminal appeal, a sum not exceeding two dollars, and on each criminal trial a sum not exceeding four dollars.

The above Bills seem to be well drawn, and that concerning criminal jurisdiction contains suggestions which it might not be amiss for us to profit by on some future occasion. The idea of giving a limited criminal jurisdiction to County Courts seems to us a good one, our plan being in some respects a clumsy one. The first section is an improvement on our law, which leaves many points of jurisdiction open as questions of construction The clause before us is brief, comprehensive, and complete, as regards the higher crimes: we doubt, however, the propriety of giving to these courts exclusive jurisdiction in all cases of misdemeanor. We would, moreover, suggest a careful review of the bill to see if any of its provisions are not beyond the jurisdiction of a Local Legislature. The second to the eleventh sections, excepting perhaps the fifth, seem to be unconstitutional and beyond the power of the Local Legislature. They relate either to criminal procedure or criminal law, both which classes of subjects are by the British North America Act expressly reserved for Dominion Legislation. The principle of the bill to establish the County Courts as Criminal Courts is good, and whatever provision is necessary to accomplish this may be passed by the Local Legislature; but the alternation of a substantive provision of law relating to criminal matters is clearly beyond the power of the Provincial Parliament.

It would appear that it is proposed to retain the Quarter Sessions in one county. The system should be uniform throughout the Province, unless, indeed, there are local reasons to the contrary of which we know nothing, and cannot see the force. Sections 7 and 8 refer to procedure only, and should be embodied, we think, in a general code of rules, which must also contain various other regulations to prevent uncertainty, and provide for uniformity in all the courts.

Clause 9 would make a change, the merits of which have often been discussed, and more especially with reference to civil causes. Possibly a general provision to this effect, applicable to the whole Dominion, would be desirable, and, at present, we feel rather inclined to favour such a change, but every effort should be made to assimilate our laws, and induce uniformity in all the Provinces of the Dominion.

As to the County Courts Act, some of the clauses seem too general, and those that do go into details are not sufficiently exhaustive, but it would be impossible within our limits to discuss them more at length; doubtless many of these provisions will be added to, and others made, when the bill comes before a committee of the House, and many of them will occur to the framer of the bill before that time. A careful perusal of some of our recent statutes might be found useful in this connection. The ninth clause of this Act is a more definite provision than in our County or Division Court Acts. We strongly recommend our friends not to encumber their lands with the provision for registering judgments (Sec. 22). It will be found much better to make suitable machinery for a speedy seizure and sale of the property by the sheriff under an execution. We had the same process here and had to do away with it.

But it is, perhaps, unfair to criticise further without a more perfect knowedge of what provisions the other statutes of Nova Scotia may make in the premises. We shall, therefore, conclude our brief notice by again complimenting the framer of these proposed acts upon many excellent suggestions, and an evident desire to promote the due administration of justice in his Province.

SELECTIONS.

SLANDER AND LIBEL.*

A distinguished writer upon jurisprudence has said, "I will venture to affirm, that no other body of law, obtaining in a civilized community, has so little of consistency and symmetry as our own. Hence its enormous bulk, and (what is infinitely worse than its mere bulk) the utter impossibility of conceiving it with distinctness and precision. If you would know the English law, you must know all the details which make up the mess. For it has none of those large coherent principles which are a sure index to details; and, since details are infinite, it is manifest that no man, let his industry be what it may, can compass the whole system. Consequently, the knowledge of an English lawyer is nothing but a beggarly account of scraps and fragments. His memory may be stored with numerous particulars; but of the law as a whole, and of the mutual relations of its parts, he has not a conception." †

The law of slander and libel is beset with questions of a perplexing character. It seems to have no general principle for its foundation. Although from the time of the year-books to the present the reports abound with cases upon this branch of the law, and although text-book after text-book has been written upon the subject, the questions remain as perplexing as ever. There is no simple and general rule for determining what words will and what will not support an action. While a suit can be brought for any defamatory written words, only certain classes of defamatory spoken words are actionable. Again, while written defamation is punished by indictment, redress for spoken words is given only by a civil action. No entirely satisfactory reason has ever been given for the existence of these distinctions between the law of libel and the law of slander. The reason usually given is, that written defamation has a more extended circulation than spoken words. This would seem to imply (inasmuch as the grossest slander is not, while the most trivial libel is, indictable) that the injury done to the person defamed is rather in proportion to the extent over which the defamatory matter is spread, than to the gravity of the charge itself. But the greater part of the injury done by defamation is comprised within the narrow circle of one's associates and acquaintances. The defamation of an unknown person is as void of effect as the defamation of a fictitious person would be. Within the circle to which defamation extends—and in regard to a common person that circle is more readily reached by speech than by writing—the extent of the injury done depends upon the nature of the charge made. Generally, more harm is done to character by whispered than by outspoken malice. It is the baneful effect of slander, and not of libel, which is depicted by the poet and the novelist. Again, a public denunciation by word of mouth may surely have a wider circulation than an insinuation in a confidential letter sent by post. Another reason given for the distinction is, that the tendency of libel to a breach of the peace is more direct than the tendency of slander. But this is questionable. The tongue, in matters not of government concern, has caused more bloodshed than the pen ever did. Neither can the distinction rest upon ethical grounds. A woman's chastity or a man's integrity may be called in question by word of mouth, and the law is wholly silent; but printed ridicule of the set of her dress, or the carriage of his person, lays the groundwork not only for vindictive damages, but for setting in motion the criminal law against the offender.

Certain classes only of spoken defamatory words are actionable. Why are those particular classes singled out as actionable, while other words, equally defamatory, not embraced within them, will not support an action? Oral language is, with some slight limitation, actionable *per se* when it charges an indictable offence. To charge one with such an offence tends to degrade him in the estimation of his fellows, and often to expose him to the peril of a public prosecution. Is it the degradation to which the slandered person is subjected, or is it the peril to which he is exposed, or is it both of these things together, which furnish the ground of action? Baron Parke, in *Heming* v. *Power*, 10 M. & W. 564, says, "The ground of the matter being actionable is, that a charge is made which, if it were true, would endanger the plaintiff in point of law." But it is actionable to charge the plaintiff with having committed a crime, and having been already punished for it; for example, to say that he is a returned convict. Yet by such an accusation the plaintiff is not endangered in point of law. Is it the social degradation to which the plaintiff is exposed which constitutes the ground of action? To call one a rogue, a rascal, a cheat and a swindler, is to expose him to social degradation; but it is said that such an accusation is not actionable, because it does not "endanger the plaintiff in point of law." In Alabama it has been held (*Coburn* v. *Harwood*, Minor, 93), that to charge one with the commission of a crime against nature is not actionable, because such a thing is not indictable at common law, and was not in that State a statutory offence. Sometimes it is said that the social degradation is the gravamen of the action, and that the charge of the crime is the test by which to determine whether the words are actionable. This amounts only to saying that words which tend to degrade one are actionable when they charge a crime; which is returning to the starting point, instead of giving a reason. Why must such

* A Treatise on the Wrongs called Slander and Libel, and the Remedy by Civil Action for those Wrongs. By John Townsend. Second Edition. New York: Baker, Voorhis & Co. 1872.

† Austin's Jurisprudence, Lec. xxiv.

words charge a crime in order to be actionable? To this question a satisfactory answer is wanting.

It is actionable to charge one with having the leprosy, the plague, or the syphilis; but it is not actionable to charge him with having any other disease. Such a charge is said to be actionable because it tends to degrade the person charged in the estimation of the public. A person is not degraded in public estimation by having the leprosy or the plague, but is degraded by having the syphilis. Still it is as disgraceful to have any other venereal disease as to have the syphilis, although a charge of having other venereal diseases is not actionable. In *Bloodworth* v. *Gray*, 8 Scott, N. R. 9, Tindal, C. J., says such words are actionable, "inasmuch as they import a present unfitness to be admitted into society." But this is true of the charge of having the small-pox, or an infectious fever, though such a charge is not actionable.

Again, "words spoken of a man, which scandal him in his profession or function by which he gains his living, will bear an action." To call a merchant a bankrupt is actionable, while to impute to him all the moral vices (if they are not imputed to him in the conduct of his business) is not actionable. And, lastly, opprobrious words spoken of one become actionable if they produce a special damage. In these two instances the law comes squarely down to a pecuniary test of liability. An exclusive consideration of these two instances has sometimes led judges to declare that pecuniary loss is in all cases the gist of the action. But it must be borne in mind that in the case of words actionable *per se*, it is not open to the defendant to prove that the speaking was followed by no pecuniary loss; and moreover such words would be actionable, even if it could be proved that they were followed by a pecuniary benefit. At other times it is said that pecuniary loss was originally the gist of the action, and that the law has been extended by a fiction to embrace opprobrious words in other cases where there has really been no pecuniary loss; that is to say, to give redress the court feigned that there must necessarily have been a pecuniary loss. Unfortunately for this explanation, the progress of the law appears to have been in a contrary direction. The earlier cases proceed upon the ground that a man's honorable reputation is the thing which is dearest to him. The three earliest reported cases—one in the year 1463, and two in the year 1476—are for calling the plaintiff a villain, in the feudal sense of the word; that is, for an imputation that he was base-born, and had not the rights of a freeman. Of the five next following cases, one is for calling the plaintiff a heretic, one for accusing him of perjury, and the other three are each for calling the plaintiff a thief. These eight cases are all the reported cases down to the year 1539, and in none of them is pecuniary loss the gist of the action.

It is said that to constitute slander, the speaking of the words must be with malice. Malice, if it be the name of anything, is the name of a motive—the motive of malevolence or ill-will. Words spoken without ill-will, from mere thoughtlessness, may be actionable; but in such case it is said the law implies the malice from the act of speaking, and will not admit evidence to the contrary. Hence this kind of malice which the law is said to imply is called legal malice, as differing from malevolence, which is called malice in fact; and legal malice is said to consist in speaking defamatory matter without legal excuse, because when words are thus spoken the law implies malice. Why is it not as simple to say the speaking defamatory matter without legal excuse is actionable, as it is to say defamatory matter to be actionable must be malicious, but the law implies the malice? What need is there of bringing into the law of slander the cumbrous machinery of malice for the sole purpose of necessitating the construction of other machinery—the machinery of legal implication—to take it out again? If legal malice means the want of legal excuse, which appears to be the most approved definition of it, then it means so much that it means nothing, for in that sense every act which is the groundwork of an action is malicious. In other words, malice is an ingredient of every action at law as much as it is of slander; and it is because money is maliciously retained, that is, that it is retained without legal excuse, that the plaintiff can maintain assumpsit. How came this doctrine of implied malice to be brought into a portion of the law where it has no meaning?

As the English law upon this subject was never constructed upon a plan, it cannot be resolved into one. It is a mass which has grown by aggregation, and special and peculiar circumstances have, from time to time, shaped its varying surfaces and angles. Undoubtedly the crooked and wrenched form of the law of slander and libel can be accounted for, but it must be accounted for in the way we account for the distorted shape of a tree—by looking for the special circumstances under which it has grown, and the forces to which it has been exposed. This branch of the law, like the greater portion of the English common law, is of Roman origin. Born of the Roman, and nurtured by the canon law, its distorted person evidences the violence with which it was torn from its nurse.

Before the Roman conquest, the Britons were governed by their Druids, who possessed whatever there was of civil and of criminal jurisdiction. Whether at that time there was anything worthy of the name of law, may be doubted. After the conquest, during a period of more than three centuries, Britain acquired and kept "the elegant and servile form of a Roman province." The inhabitants became Roman Britons. The emperors Hadrian, Constantius, Constantine, Maximus and Carausius at various times were there, and were severally

concerned in its government. The famous jurist, Papinian, presided in the forum at York. The judicial tribunals were Roman tribunals, and they administered the Roman provincial law. At the time of the Saxon invasion, the laws and customs of the country could have been little else than Roman laws and Roman customs.

But the conquest by the Saxons was slow and gradual, extending over the greater part of five centuries. The Roman law still held its supremacy. In the year 597 Christianity was reintroduced. Three years later Augustine and his fellow-missionaries arrived. Ten thousand persons were baptized in two years. In a very short time the idols throughout the kingdom were destroyed. A code was drawn up. The Witan, by whose advice this code was made, was partly composed of Roman missionaries. From this time forth, till long after the Norman conquest, the clergy were constituent members of the council. Literary and scientific acquirements were found exclusively among the clergy, and education was wholly in their hands. The study of Roman jurisprudence was an ordinary branch of that education. St. Aldhelm speaks of it as being so. Alcuin, who was sent for by Charlemagne to give his assistance in founding those schools which have made the name of Charlemagne so famous, and which laid the foundation of the scholastic system, was in the year 766 the principal of the school of York. He speaks of the course of instruction there as comprising grammar, rhetoric and jurisprudence. The relation between England and Rome was very intimate. The Saxon kings made frequent pilgrimages to Rome, and Ossa, king of Mercia, made a yearly donation to the pope for the support of an English college there.

Many legal duties were expressly placed upon the clergy. It was made their general duty to support every just right, to protect the weak against the powerful, the low against the high, and not to let any man be greatly injured. All the tribunals were presided over by ecclesiastics. These things were not changed by the Norman conquest. William of Normandy fought the battle of Hastings under a banner presented to him by the pope. He brought with him into England a very large number of ecclesiastics, distinguished for their knowledge of Roman jurisprudence. Indeed the clergy monopolized learning, and their services were indispensable in the business of common life. Whenever a written instrument was to be drawn, a priest must be resorted to. For a long time they were the only persons competent to act as advocates. Many of the judges of the king's court, and perhaps the great majority of all other judges and of all judicial officers for nearly a century at least after the conquest, were ecclesiastics. The law that these men administered was the Roman law, in which they were educated. Indeed there could not have been much other law in practice.

William, claiming to reign as the successor of the Anglo-Saxon kings, introduced no violent change in the form of the laws. He found a kingdom largely governed by the Roman law, the judges whom he appointed were educated in that law, and there was no reason for any such change.

But an ecclesiastical law, founded upon and growing out of the Roman law, was administered in England as well as in the rest of Europe. In England it appears to have been at this time administered in the same courts and by the same judges as the common law. By the constitutions of the Roman emperors, large judicial powers had been given to the bishops. By one constitution the bishops were charged to see that the merchants did not defraud in selling. This in itself might be no small branch of jurisdiction. By another constitution any civil matter whatever could, by consent of the parties, be litigated before the bishop. By another the judgment rendered by the bishop in such case is put upon the same footing as a judgment of an imperial court, and the judges of the imperial courts are ordered to see that the decrees of the ecclesiastical courts are executed. By other constitutions the determination of questions of testament and guardianship, of dowry, of marriage and of divorce, were given to them. Besides these matters, in England the bishops appear to have had jurisdiction of cases of buying and selling, of letting and hiring, of pledging and of fraud,* and of various matters embraced in the Roman law under the title of injuries. An injury in the Roman law meant an insult. The technical word *injuria* is synonymous with the word *contumelia*. A person might be insulted in many ways by direct force, as by beating and wounding him; or without direct force, as by shouting after him in the street, so as to cause a crowd to follow him. It was also an injury to follow an honest woman in the street, or in any way to solicit her chastity. Any reproachful language which lessened one's good fame was also an injury. This class of injuries grew in ecclesiastical law into a distinct title, that of defamation. "Diffamation, or defamation, properly so called, is the uttering of reproachful speeches or contumelious language of any one with an intent of raising an ill fame of the party thus reproached: *Defamare est in malâ famâ ponere*, according to Bartolus. And this extends to writing, as by defamatory libels; and also to deeds, as by reproachful postures, signs and gestures." †

William separated the canon from the civil law by ordering that no bishop or archdeacon should for the future hold pleas relative to ecclesiastical matters in the county court, which appears to have been the practice till this time.

There were many causes which gave the

*Glanville, Beames' tr., pp. 257, 273, 274.

†Ayliffe, Parergon, p. 212.

vast jurisdiction to ecclesiastics which they exercised in the middle ages—causes which at the present time cannot be accurately weighed or estimated. According to Bentham, they gained this great jurisdiction "imperceptibly and in the dark, in the pitchy darkness of the very earliest ages." It is easy to see that the jurisdiction was possessed by them, and it is not important for our present inquiry to ascertain the precise manner in which it was gained. To account for the growth of the ecclesiastical jurisdiction, as a jurisdiction independent of and co-ordinate with the jurisdiction of the courts of common law, we must consider that throughout Europe a great government existed independent of the separate local governments. The ecclesiastics were a nation by themselves. There was a spiritual and a temporal government. The temporal government was local, but the spiritual government was universal. The church, by its power, had taken, and each particular state, from its weakness, had granted to the church, the regulation of the larger portion of all that concerned the peaceful occupations of life. After the Norman conquest, the pope even claimed direct personal jurisdiction in England; and the claims for ecclesiastical jurisdiction and his own claims were continually strengthened and confirmed, until, in the time of Henry the Second, he had "well nigh recovered full and sole jurisdiction in all causes ecclesiastical and over all persons ecclesiastical, with power to dispose of all ecclesiastical benefices in England, whereby he had upon the matter made an absolute conquest of more than half the kingdom (for every one who could read the psalm of *miserere* was a clerk, and the clergy possessed the moiety of all temporal possessions); there remained nothing to make him owner and proprietor of all, but to get a surrender of the crown, and to make the king his farmer, and the people his villains, which he fully accomplished and brought to pass in the times of King John and Henry the Third." *

In the reign of King John, an alteration took place in the form of the king's court. By an article of his *Magna Charta* it was declared that Common Pleas should no longer follow the king. The Court of Common Pleas was fixed at Westminster, with a jurisdiction over pleas of land and wrongs not indictable. Indictable wrongs were *punished* civilly and criminally by the Court of Kings Bench, which had also further jurisdiction (to prevent a failure of justice) over suits brought against those persons who were at the time of the commencement of the suit in its custody. The Court of Exchequer, which was established by William the First, had jurisdiction to recover the king's debts and duties. The ecclesiastical courts had jurisdiction of spiritual matters. What is the meaning of the expressions, ecclesiastical matters or causes, or spiritual matters or causes, for all these expressions mean the same thing? "Let us see when this distinction of ecclesiastical or spiritual causes from civil and temporal causes did first begin in point of jurisdiction. Assuredly for the space of three hundred years after Christ, this distinction was not known or heard of in the Christian world. For the causes of testaments, of matrimony, of bastardy and adultery, and the rest, which are called ecclesiastical or spiritual causes, were merely civil, and determined by the rules of the civil law, and subject only to the jurisdiction of the civil magistrate, as all civilians will testify with me. But after that the emperors had received the Christian faith, out of a zeal and desire they had to grace and honor the learned and godly bishops of that time, they were pleased to single out certain special causes wherein they granted jurisdiction unto the bishops. . . .

"This, then, is most certain, that the primitive jurisdiction in all these cases was in the civil magistrate, and so in right it remains to this day; and though it be derived from him, it remaineth in him as in the fountain. For every Christian monarch (as well as the godly kings of Judah) is *custos utriusque tabulæ;* and consequently hath power to punish not only treason, murder, theft, and all manner of force and fraud, but incest, adultery, usury, perjury, simony, sorcery, idolatry, blasphemy. Neither are these causes, in respect of their own quality and nature, to be distinguished one from another by the names of spiritual or temporal; for why is adultery a spiritual cause rather than murder, when they are both alike against the second table? or idolatry rather than perjury, both being offences likewise against the first table? And, indeed, if we consider the nature of these causes, it will seem somewhat absurd that they are distinguished by the name of spiritual and temporal; for, to speak properly, that which is opposed to spiritual should be termed carnal, and that which is opposed to temporal should be called eternal. And, therefore, if things were called by their proper names, adultery should not be called a spiritual offence, but a carnal. But shall I express plainly and briefly why these causes were first denominated some spiritual or ecclesiastical and others temporal and civil. Truly they were so called, not from the nature of the causes, as I said before, but from the quality of the persons whom the prince had made judges in those causes. The clergy did study spiritual things, and did profess to live *secundum spiritum*, and were called spiritual men; and therefore they called the causes wherein princes had given them spiritual jurisdiction spiritual causes, after their own name and quality. But because the lay magistrates were said to intend the things of this world, which are temporal and transitory, the clergy called them secular or temporal men, and the things wherein they were judges temporal causes. This distinction began first in the court of Rome; . . . and as all their courts are called spiritual courts, so all causes

* Davies Rep. The case of Præmunire.

determinable in those courts are called spiritual causes." *

Defamation appears to have been a spiritual cause. Not only defamatory matter, which is now actionable at law, was actionable in the spiritual court, but that court had jurisdiction over all injurious language, whether verbal or written. Indeed it is hard to see how courts of law could entertain suits for defamation, for such suits could not (as far as we at the present time have the means of judging) be brought within the form of any then known action.

By the statute of the 13th of Edward the First, called the Statute of Westminster the Second, the clerks of the chancery were empowered to form new writs. This statute thus gave a process by which delicts similar to trespasses, but which were not committed with force—as, for instance, slander and libel—could be brought before the common law courts. In the same year was enacted the statute *Circumspecte agatis*, which is commonly regarded by lawyers (though perhaps not by historians) as a statute passed in an endeavor to diminish the jurisdiction of the spiritual courts. According to this statute, "in case of defamation it hath been granted already, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin." The statute defines certain cases in which "the king's prohibition doth not lie" to the ecclesiastical courts. The writ of prohibition was the writ used by the superior courts of common law to restrain other courts from taking jurisdiction of causes over which the court issuing the writ wished itself to take jurisdiction. Several cases are to be found where prohibitions were issued against suits brought in an ecclesiastical court for debt; several are to be found where prohibitions were issued against suits brought in an ecclesiastical court for trespass, and for other causes of action, over which the courts of common law had undoubted jurisdiction.

When these statutes were passed, it had long been the endeavor of the government to restrain and to fix within some bounds the jurisdiction of the ecclesiastical courts; but that endeavor met with a strenuous opposition. The common law courts resorted to prohibitions in cases where the ecclesiastical courts took cognizance of matters which might have been litigated in the common law courts. The ecclesiastical courts on their side wielded, against those who opposed them by suing out such writs, the terrible weapon of excommunication; and it was owing to the use of this weapon against King John by the pope that the barons were enabled to extort from that unhappy monarch the first *Magna Charta*. This struggle was a protracted one.

According to Bracton, it was the rule of the courts, ecclesiastical and civil, that the *accessorium* must come under the same law and jurisdiction as the *principale;* that is, that the jurisdiction over a thing drew to it the jurisdiction over all things accessory. It was by means of this rule that the Court of King's Bench, by the fiction that the defendant was in its custody, and the Court of Exchequer, by the fiction that the plaintiff was indebted to the crown, were enabled to extend their respective jurisdictions over most of the matters originally pertaining exclusively to the Court of Common Pleas. Upon this rule the common law courts appear to have worked in getting from the spiritual courts jurisdiction in matters of defamation, when, after the establishment of actions upon the case, they themselves had the means of determining such classes of injuries.

Before the invention of printing, libels were generally published by scattering the papers containing them in the streets, or by posting them in public places. Such libels were generally against the government, or against persons high in authority; and by the Theodosian code the publication of such libels seems to have been looked upon as an offence akin to treason, and was punished as a high crime. The common law of England appears anciently to have taken the same view of libel, and from the earliest times the publication of a libel has by that law been punished as a crime. Before the invention of printing, libels upon private persons must have been of rare occurrence, though two instances of such libels in the reign of Edward the Third are mentioned by Coke. In each of these cases the libeller was criminally punished. The art of printing was introduced into England in 1474, nearly two hundred years after the introduction of the action upon the case. When the knowledge of reading and writing became common, and the less injurious kinds of private libel came to the attention of the courts, they naturally would be held to be indictable as coming within the definition of the crime sanctioned by precedent; all defamatory matter in writing being libellous, and being indictable upon the criminal side of the court. After the introduction of the action upon the case, the court could consistently give a civil action for damages, both upon the ground that the principal matter—that is to say, the crime—being within its jurisdiction, that fact drew after it a civil remedy in damages as an incident, and also upon the ground that, having by the usual fiction the possession of the criminal's person, it was proper that a civil remedy should be sought against him in the court where he was, rather than that the plaintiff should be sent to the ecclesiastical court for a redress which that court, without the custody of the person of the delinquent, might be powerless to give.

Let us see what actually took place in reference to the statutes of *scandalum magnatum*. In 1275 the first, and in 1378 the second of these statutes was passed. By these statutes, slanders upon great men are made criminal

* Davies Rep. The case of Præmunire.

offences. It is enacted by the second of these (2 Ric. 2 st. I. c. 5), that "none shall devise or speak false news, lies, or other such false things of the prelates, dukes, earls, barons, and other nobles or great men of the realm," &c., upon pain of imprisonment. Under these statutes the courts gave a civil remedy coextensive with the criminal one, and the "great men of the realm," though not the common people (because the common people are not within the statute), can maintain actions for slander for any spoken defamation without alleging special damage; although the words spoken do not impute a crime or a specific disease, and although they are not spoken of the plaintiff in reference to his trade or occupation. In other words, as to great men of the realm, there is no distinction between slander and libel in respect to what words will support an action, oral and written defamation of such men being alike indictable.

Spoken words which impute an indictable crime are actionable. A court of law having jurisdiction of the offence charged, and it being the business and the duty of that court to investigate charges of crime for the purpose of punishing the offender, this jurisdiction might well be held to draw after it as an incident the right to investigate the charge, for the purpose of compensating the party injured by such a charge if it were false. But to give this jurisdiction, the imputation must be direct: a crime must be *charged*.

One might suffer as much pecuniary damage and as much loss of character from being called a thievish knave as from being called a thief. But to call one a thievish knave imputes a disposition to commit crime, and not a crime committed; and as there is nothing to which the jurisdiction of the court can attach, such an accusation is not actionable, while to call one a thief is a direct charge of crime, and is actionable. In the first case supposed, the person defamed would be left to his redress in the ecclesiastical courts; but in the second case, if the person defamed should seek redress in those courts, a court of common law might issue a writ of prohibition.

The fact that it is actionable to impute to one the present having of the leprosy, syphilis, or plague, while it is not actionable to impute the having of any other disease, and not actionable to impute the having had even those particular diseases, may probably be accounted for in the same manner. "When a person became affected with the leprosy, he was considered as legally and politically dead, and lost the privileges belonging to his right of citizenship. The church took the same view; and on the day on which he was separated from his fellow-creatures, and consigned for the remainder of life to a lazar-house, they performed over and around the yet living sufferer the various solemn ceremonials for the dead, and the priest terminated the long and fearful formula of his separation from his fellow-creatures by throwing upon the body of the poor outcast a shovelful of earth, in imitation of the closure of the grave."* The form of the writ *de leproso amovendo* was as follows: "The king, to the sheriff, &c., or to the mayor and sheriffs of London, greeting. Because we have received information that I. of N. is a leper, and is commonly conversant amongst the men of the city aforesaid, and hath communication with them as well in public as in private places; and refuses to remove himself to a solitary place, as the custom is, and as he ought to do, to the great damage and manifest peril of the men aforesaid, by reason of the contagion of the disease aforesaid; we, being willing to take precaution against such danger, as to us appertains, and which is just and hath been used to be done touching the premises, command you, that, taking with you certain discreet and lawful men of the city aforesaid, not suspected, who have the best knowledge of the person of the said I. of N., and of such disease, you go to him the said I., and cause him to be seen and diligently examined in the presence of the said men; and if you find him to be a leper, as before is said, then without delay, in the best manner you can, cause him to be carried away and removed from the communication of the said men to a solitary place, to dwell there, as the custom is, lest, by such his common conversation, damage or peril should in any wise happen to the said men. Witness," &c. As the leper was subject to this writ, the accusation of leprosy as well as the accusation of a crime might be held actionable, and upon the same ground. Persons suspected of having the plague were likewise by law removed to pest-houses and confined, so that the accusation of having this disease rests upon the same basis as the accusation of having the leprosy. To account for a charge of having the syphilis being actionable is more difficult. That disease was not known till the end of the fifteenth century. Whether upon its first appearance it was regarded as contagious, and so exposed the sufferer to a writ like the writ *de leproso amovendo*, or to any other legal form of removal and confinement, or whether the disease itself was so like in its outward manifestations to the appearance of that form of leprosy prevalent in England (which, from the best description given of the two diseases, appears to have been a fact), is a matter of conjecture. It was a disease very prevalent among the clergy, and there is abundance of evidence to show that the having it was considered no more disgraceful, at any rate to a man, than the having any other severe disorder.

Defamatory words spoken of a man, which touch him in his office or the means by which he gains his livelihood, are actionable. The earlier cases appear all to relate directly to the administration of justice. To bring such slanders as these within the jurisdiction of the common-law courts would not be difficult.

* Encyclopædia Britannica.

The following are specimens of such cases: "Skinner, a merchant of London, said of Manwood, Chief Baron, that he was a corrupt judge; adjudged, the words were actionable." "Stuckly, a justice of the peace, brought an action for these words: 'Mr. Stuckly covereth and hideth felonies, and is not worthy to be a justice of the peace.' Adjudged the action would lie, because it is against his oath, and the office of a justice of the peace, and good cause to put him out of commission, and for this he may be indicted and fined." "Cotton, justice of the peace, brought an action against Morgan for these words: 'He hath received money of a thief that was apprehended and brought before him for stealing of certain sheep, to let him escape, and to keep him from the gaol.' Adjudged the action would lie."

The growth of the law upon this point is shown by this case, decided Mich. 4 Jac.: "Carre brought an action against Rande for words, and declared that he was steward to divers great lords of their court-barons, and of the leets within their manors, and that he was steward of one A. of his court-baron, and of the leet within his manor. The defendant, of this not ignorant, said these words: 'Mr. Carre hath put a presentment into the jurors' verdict against me for 3*s.* 4*d.* for suing of Peter West forth of the court, contrary, &c., without the consent of the jury.' By the whole court, the action lies, because he doth accuse him of falsity in his office; but by the better opinion, if he had not alleged in his count that he was steward, the action would have lain."* The following case, quoted from March† (Pasch. 17 Car.), shows that at that time the rule was not well settled. "Sir Richard Greenfield brought an action against Furnace for these words: 'Thou (*inuendo* Captain Greenfield) hast received money of the king to buy new saddles, and hast cozened the king, and bought old saddles for the troopers.' It was objected that the action would not lie; and it was likened to these cases which I will cite, because they are worth the knowing: 8 Car., The Major of Tiverton's case. One said of him that the Major had cozened all his brethren, &c. Adjudged not actionable. 9 Jac., in the King's Bench: The overseer of the poor hath cozened the poor of all their bread. This was likewise said to be adjudged not actionable; but I do somewhat doubt of this case, because the words do scandal the plaintiff in his office of overseer; but to this it may be said, that this is an office of burden and trouble, and not of profit. 26 of the Queen, in the King's Bench, Kerby and Walter's case: Thou art a false knave, and hast cozened my two kinsmen; adjudged the words were not actionable. 18 of the Queen, in the King's Bench: Serjeant Fenner hath cozened me and all my kindred; adjudged the words would not bear an action. Out of which case we may, by the way, observe this for law: that if a man say of another (without any precedent communication of his office, place of trust, or profession), that he is a cozening or a cheating knave, or that he hath cozened any man thus and thus, that no action will lie for such words generally spoken; otherwise if they be spoken in reference to a man's office, place of trust, or profession. And in the principal case, it was resolved by Heath, Justice, and Bramson, Chief Justice (the other Justices being absent), that the action would lie, because the words did scandal him in his place of trust, and they said it was not material what employment the plaintiff had under the king, if by the speaking of these words he might be in danger of losing his trust or employment."

There also is an early class of cases, in which the plaintiff was an attorney. But an attorney is an officer of the court, and words spoken of an attorney in his conduct in the office of an attorney, touch the administration of justice as nearly as words spoken of a judge. To call a merchant a bankrupt was to subject him to the statutes of bankruptcy, and was held actionable upon the same principle that the accusation of a crime was actionable. That pecuniary loss was the gist of the action, or that damage to a man's business would of itself furnish a ground of action in a temporal court, appears to be an idea which originated after the Reformation, when ecclesiastical courts had lost nearly all power, and had fallen into general contempt among the people. It is founded upon the idea that every thing relating to money or business is temporal, as pertaining to the matters of this world. The ecclesiastical courts, however, retained their jurisdiction over things connected with marriage, marriage having been made by the Church a sacrament, and over matters connected with testament, from the association in the mind between religion and preparation for death. There is much evidence to show that prior to the Reformation the spiritual courts were very unpopular with the people, and an inspection of the ecclesiastical proceedings in criminal causes from the year 1475 to 1640‡ makes one wonder at a state of society in which such courts could exist. Suitors, it is to be presumed, seldom resorted to them when they could obtain redress elsewhere. It is plain that those courts had two main guiding principles—one to protect the clerks, and the other to plunder the laity.

If this account of the origin of the common law jurisdiction in matters of slander and libel is correct, it furnishes a reason for the slight mention of slander and libel to be found in the early books, and for the rapid increase of such actions after the Reformation; which led to the complaint that the intemperance and malice of men's tongues had wonderfully increased; whereas the fact was only that the intemper-

* March on Slander, p. 51. † Ib. p. 53.

‡ Hale.

ance and malice of men's tongues was more taken notice of by common-law lawyers.

By the Roman law, to constitute an *injury*, under which head defamation came, an *animus*, an intention to do wrong, was necessary. In this respect *injuries* differed from cases falling within the *lex Aquilia*. In cases falling within the *lex Aquilia*, the mere happening of the event gave the cause of action without reference to the intention of the person doing the act. By the canon law, also, a bad intent, called *malitia*, was necessary to constitute defamation. The defendant was punished *pro salute animæ*, and the matter was not looked at in a legal, but in a moral point of view, to see if the speaking of the words was a sin. When courts of law took jurisdiction of defamation, they seem to have applied to this *animus* of the Roman, or *malitia* of the canon law, the elaborate scholastic structure of malice which was being framed in the common law, and the doctrine of implied malice was introduced into the law of slander. They affirmed that malice was in all cases necessary to maintain the action, and to find a malice which did not exist they implied it. They were like men who should persist in viewing all things through smoked glass, and should light candles to enable them to see through the glass; if they should remove the glass they would save their candles and see at least as clearly as before. The whole doctrine of legal malice is pure scholasticism, and obscures with a thick fog every thing it envelopes. In actions for malicious prosecution alone has it a semblance of a meaning, while in cases of homicide it means no one knows what, and in actions of slander it means nothing.

In the case of *Toogood* v. *Spyring*,* it was decided that a statement made by a person in the discharge of a duty, public or private, legal or moral, or in the conduct of his own affairs, is a privileged communication. This is a direct return to the ecclesiastical law, resting the question of the maintenance of the action upon the question whether the publication were, or were not, in the opinion of the court, justifiable morally. Yet even in arriving at this simple conclusion the machinery of malice, express and implied, is used. Baron Parke says, "An action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice." A legal duty is a moral duty, and so is the prudent conduct of one's own affairs. Would not the meaning of Baron Parke be fully expressed by saying, An action lies for the publication of statements which are false and injurious to the character of another (within the well-known limits as to verbal slander), unless such statements are fairly made by a person in the discharge of some moral duty?

Coke was one of the principal authors of the doctrine of implied malice, and he was deeply imbued with scholasticism. There are many passages both in his Institutes and in his reports which show the tendency of his mind toward such kinds of reasoning. For instance, in *Keighley's Case*,† it is said, "And it was well observed, that every statute, ordinance, and provision which is made by force of the commission of sewers, ought to consist upon four causes: 1. The material cause, and that is the substance; 2. The formal cause, and that is the matter with convenient circumstances; 3. The efficient cause, and that is their authority according to their commission; 4. The final cause, and that is *pro bono publico, et nunquam pro privato*."‡ Indeed scholastic philosophy flowed both into theology and into law; and theology, law, and a meaningless kind of jargon which passes for philosophy, are curiously blended in some of the old legal writers.§ It is very clearly exhibited in the doctrine of implied malice. Coke divides malice in law into three kinds: 1. In respect to the manner of the homicide; 2. In respect to the person killed; 3. In respect to the person killing. Sir Michael Foster considers implied malice to mean "a heart regardless of social duty, and fatally bent on mischief." Therefore the old allegation in an indictment, "moved and instigated by the devil," is an allegation that the homicide was committed with malice in law. Coke thought that a felony was a deed done *felleo animo*, with an intention acted upon by gall. Hale says the reason a lunatic cannot commit a crime is, that he has no gall. If he had any meaning, he must have meant that the gland necessary to secrete that fluid was absent in the lunatic, or else that it did not discharge its office.

The science of special pleading probably owes its origin to the scholastic education of the lawyers. The oral pleadings, as seen in the year-books in the time of Edward the Second, have an unmistakable similarity to the forms of scholastic disputation. The peculiar and exceptional mode of framing the declaration in actions of slander and libel, by which the words spoken are thrown into a direct proposition by means of averments and inuendoes (and which form was probably adopted for the purpose of showing the court that it had jurisdiction of the subject-matter

* 1 C. M. & R. 181.

† 10 Rep. fol. 139.

‡ See also case of Sutton Hospital, 10 Rep. fol. 1.

§ 3 Inst. 229; Plowden, 354; Popham, 43.

to which the defamation was regarded as an accessory), sometimes led the judges to apply logical tests to the words spoken, as if the words were propositions in themselves, and as if as such they were a distinct subject of predication. They sometimes lost sight of the question whether the matter was defamatory in seeing whether the matter could be stated logically as a proposition true in fact. For instance, take Hasselwood and Ganet's case: "'Whosoever is he that is falsest thief and strongest in the county of Salop, whatsoever he hath stolen or whatsoever he hath done, Thomas Hasselwood is falser than he.' Resolved that the words were actionable, with an averment that there were felons within the county of Salop; but for default of such averment the judgment given in the Common Pleas was reversed in this court."* Here if the defendant intended to call Hasselwood a thief, and the bystanders understood that he was called a thief, he was slandered whether there were or were not thieves within the county. The courts of the present day would not require an averment and proof of the existence of a devil before holding a publication libellous which should impute to one the commonly understood attributes of Satan. This way of looking at the subject accounts for the unreliability of many of the old decisions.

Mr. Townsend has an introductory chapter upon language as a means of effecting injury. We do not think injuries done by language can be classified together for any useful purpose. One who instigates an assault by offering money to one who will commit it, inflicts an injury by means of language for which he is civilly responsible in damages. We think that for any useful purpose of legal classification, such an injury might as well be classed with defamation as those injuries called malicious persecution, fraudulent representations, or even those called slander of title. The treating together of distinct things because they have an unessential similarity cannot tend to the clearness of ideas. The author has five chapters in which he endeavours to analyze the subject of slander and libel and to ascertain its general principles. His effort is ingenious and his work well done, but we cannot agree with him, because we do not believe in the existence of any such principles in this branch of the law. The book exhibits evidence of great pains and thought, and of a remarkable thoroughness of research. It is an endeavour to treat this branch of the law philosophically, but from its philosophy we dissent totally.

This is the best treatise upon the subject of slander and libel, because by it one gets ready access not only to the early but to the latest decided cases. The latest decided cases upon this subject *make the law*. We are sorry to see so much learning and talent and patient research expended in an attempt to classify under general principles a branch of the law which in our opinion does not admit of such classification. Any one having occasion to use a book upon slander and libel for practical purposes will find this well adapted to his need. What fault we have to find is not with the author but with the subject.

* March on Slander, 113.

Note.—During the time of the civil wars, and indeed throughout the middle ages, and till a much later time (as the practice of duelling shows), those holding the rank of gentlemen were not backward to right themselves if they were defamed by those holding an equal rank. The following letter, written the tenth of July, 1461, and preserved among the Paston letters, throws light upon society at the time it was written.

"To the worshipful John Paston, and William Rokewode, Esquires, and to every each of them.

"Right worshipful Cousins, I recommend me to you; and for as much as I am credibly informed how that Sir Myles Stapylton, knight, with other ill-disposed persons, defame and falsely noise me in murdering of Thomas Denys the coroner; and how that I intend to make insurrections contrary to the law; and that the said Stapylton farthermore noiseth me with great robberies, in which false defamations and false noisings the said Stapylton (in that his saying), he is false; that know it God. And for my plain acquittal, if he or any substantial gentleman will say it and avow it, I say to it contrary; and by license of the King to make it good as a gentleman. And in this my plain excuse, I pray you to open it unto the lords, that the said Stapylton, &c., make great gatherings of the King's rebels lying in wait to murder me; and in this I may make open proof. Written in haste the 10th day of July, in the first year of the reign of Edward IV. "John Berneye."

—*American Law Review.*

THE LAW OF COPYRIGHT.

For some thirty years, reprints of English copyright works have been supplied to Canada by United States publishers. When the work was registered in Canada, our custom houses collected a duty of ten per cent., and the Government paid the amount over to the author. But most authors, by neglecting to register, lost the benefit of the provision in their favor. When the Canadian market increased in dimensions, and enough reprints were sold here to justify a separate republication for this country alone, our publishers began to ask themselves why all the profits of this business should go into the coffers of foreign publishers. One of them, Mr. Lovell, of Montreal, set up a printing establishment on the American side of the lines, at Rouse's Point; and by this means made his reprints foreign in order to place himself on a level of advantage with the American publisher in competing for the supply of this market. Strong efforts were made, principally through Sir John Rose, to bring English publishers to

some amicable agreement as to the conditions on which Canadian reprints could be issued, but in vain. Last session the Ottawa Government introduced a measure to cut the knot of the difficulty. It provided for the republication of English copyrights, in this country, on condition of the payment of a royalty of ten per cent. to the author. The bill met the opposition of authors and publishers in England; and the Copyright Association proposed a substitute which we apprehend it will be impossible to accept. Under the bill of last session, American reprints would be excluded from Canada; a provision, it is to be feared, more in the interest of publishers than of the public. The number of English works that could be reprinted in Canada is comparatively small; and if we are to lose the advantage of the cheap American reprints, the general public would probably lose as much as it would gain by the measure. The Copyright Association wish to make republication in Canada a matter of arrangement in every case; and to retain the right of registering for American reprints, in case no Canadian edition were published. They went farther, and insisted on a power to compel Canadian publishers of reprints to take up every work indiscriminately. These conditions should be regarded as out of the pale of negotiation.

Meanwhile the Canadian copyright bill is arrested by the exercise of the Imperial veto. This act of the Imperial authority is not intended finally to destroy the work of our Parliament or even as a protest against the principle of the bill. It is found that the Dominion Parliament overstepped the limits of its authority in passing the measure, and the veto is an official declaration of that fact. But there is no desire, on the part of the Imperial Government, to thwart the wishes of Canada, on this question; and it is understood that if our Parliament shows that it has undergone no change of view, by re-enacting the vetoed bill, the necessary constitutional authority will be given to allow it to go into operation.

English authors and publishers claim as absolute a right to property in their copyrights in Canada as in England. That claim Canada, a self-governing country, cannot admit. They might as well claim that a copyright should not be restricted to limits of time, as to deny this limitation of space. For reasons universally recognized to be well-founded, the enjoyment of copyrights is restricted in point of time. Have they not an equally well grounded limitation in point of space? More so, it would seem, for all limitations of time are more or less arbitrary, but the limitation of the powers of self-government arise out of the nature and are founded on the necessity of things. We deal with English patents as we please; the taking out of a patent in England does not give the Englishman a monopoly of the Canadian market. The argument that an author has a right to the enjoyment of property he creates, in all countries, proves too much; it proves that, by the copyright laws of all nations, various as they are, he is robbed of his rights by the limitation of the time he is permitted to enjoy them. When a man is on the point of making all the rest of mankind wrong, he will do well to consider whether he be so certainly right himself.

In its main features the vetoed bill will of course be re-enacted. If it be found that, on the point above mentioned, it is less favorable to the general public than to publishers, it will be necessary to consider whether an amendment cannot be introduced. The Copyright Association may use hard names; but all we need care about is to feel convinced that we do not deserve their censure. The bill of last session secured the author ten per cent. on the retail price of the book; a very fair remuneration, seeing that he can prove no absolute right to a monopoly of this market. Under the old law he hardly ever registered; and he ought to thank us if we save him the trouble. We trust there will be no negotiation with the Copyright Association; for we cannot hold the exercise of our rights subject to conditions. English editions are, as a rule, made for public libraries, and are too costly for this market. English authors hardly ever take the trouble to profit by the American reprints circulated in Canada; and if we carry into effect a law by which reprinting for this market will be transferred to our publishers, and authors are secured a ten per cent. royalty upon the work, they will certainly be gainers by the change; though we have no intention of attempting to convince them of the fact against their will. We only say this in self-justification.—*Monetary Times and Trade Review.*

REFUSING TO RECEIVE GUESTS AT A HOTEL.

The recent ejection of Mrs. Woodhull and Miss Claflin from a New York hotel on the ground that they were disreputable characters; and the still later refusal of the proprietor of the Grand Union, at Saratoga, to receive as a guest Miss Josephine Mansfield,—a witness in the impeachment trial—call attention to the rights and obligations of a hotel or innkeeper in regard to receiving guests.

It is a very old and very well-settled rule of the common law, that an innkeeper is not, if he has suitable rooms, at liberty to refuse to receive a guest who is ready and able to pay for accommodation. There are said to be exceptions to all rules, and we have turned over the cases to discover if there is an exception to this, allowing a hotel keeper to reject a guest of doubtful character.

So venerable an authority as Rolle's Abridgment lays down this rule: "*Si un hôtelier refuse un guest sur pretence que son maison est pleine de guests, si cet soit faux, action sur le case git.*" (1 Roll. Abr., 3 F.;) and Lord Bacon says, "If one who keeps a common inn refuse

either to receive a traveller as a guest into his house, or to find him victuals and lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case at the suit of the party grieved, but also may be indicted and fined at the suit of the king." Bac. Abr., *Inns and Innkeepers.*

In *White's case*, Dyer, 158 "It was argued *per curiam*, that if a guest come to a common innkeeper to harbor there, and he say that his house is full of guests, and do not admit him, etc., and the party say he will shift among the other guests, and he there be robbed of his goods, the innkeeper shall not be charged because he refused the guest. And if the cause of the refusal be false, the guest may have his action on the case for his refusal." And Lord Kenyon, in *Kirkman* v. *Shawcross*, 6 T. R. 17, says, *arguendo:* "Innkeepers are bound by law to receive guests who come to their inns; and are also bound to protect the property of those guests. They have no option, either to receive or reject guests, and as they cannot refuse to receive guests, so neither can they impose unreasonable terms upon them." See, also, *Bennett* v. *Mellor*, 5 T. R. 274; *Thompson* v. *Lacy*, 3 B. & Ald. 285; *Newton* v. *Trigg*, 1 Sower 270; *Hawthorne* v. *Hammond*, 1 C. & K. 404.

But the guest is not entitled to be received and entertained unless he tender the innkeeper a fair remuneration for his accommodation; for the latter is not obliged to give credit. Bro., *Action Sur Case*, 76; Bro., *Contracts*, 43; 9 Co. 87, b. When, however, a guest is rejected, the fact that he had not tendered the price of his entertainment is no defence to an action against the keeper where the rejection was not on that ground; nor is it a defence that the guest was travelling on a Sunday and at an hour of the night after the keeper's family had gone to bed, nor that the guest refused to tell his name and abode, as the innkeeper has no right to insist upon knowing those particulars: but if the guest come to the inn drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him: *Rex* v. *Ivens*, 7 C. & P. 213. In this case Coleridge, J., said: "The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received." See, also, *Howell* v. *Jackson*, 6 C. & P. 723. While travelers are entitled to proper accommodations they have no right to select a particular apartment nor to use it for purposes other than those for which it was designed: *Fell* v. *Knight*, 8 M. & W. 269.

So far there appears to be nothing in the cases indicating a right in a publican to exclude persons on any ground save disorderly conduct and, undoubtedly, drunkenness. But some of the American cases go farther and intimate a right to exclude persons of bad habits or character. In *Jencks* v. *Coleman*, 2 Sumn. 221, which was an action for refusing to take plaintiff on board defendant's steamboat, the ground of the refusal was that plaintiff was agent of a rival line, and had been in the habit of going aboard defendant's steamboat to solicit passengers for his line. Story, J., charged the jury that the defendant had the right to refuse to admit on board persons "who refused to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, or whose characters are doubtful, or dissolute, or suspicious; and *a fortiori* whose characters are unequivocally bad."

The analogy between the rights and duties of common carriers and innkeepers is very close, so that this decision of Judge Story has a strong bearing on the rights of innkeepers to refuse guests. But in *Markham* v. *Brown*, 8 N. H. 523, we have some remarks directly in point: Parker, J., after speaking of the duty of an innkeeper to receive guests, said: "But he is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition. * * * He is indictable if he usually harbor thieves, and he is answerable for the safe-keeping of the goods of his guests, and he is not bound to admit one whose notorious character as a thief furnishes good reasons to suppose that he will purloin the goods of his guests or his own. * * * So he may prohibit the entry of one whose misconduct in other particulars, or whose filthy condition would subject his guests to annoyance." See *Pinkerton* v. *Woodward*. 33 Cal. 557.

We have been able to discover no other American cases having a bearing on the subject, and even the two cases above quoted did not involve the question, and the remarks were obiter. But we have little doubt that the courts would sustain an exception to the general rule, sufficiently broad to permit hotel keepers to exclude persons of undoubtedly disreputable character.—*Albany Law Journal.*

At a Livingston justice's court a somewhat too willing witness was placed upon his *voir dire* by a suspicious attorney, and inquired of touching his interest in the event of the suit. The witness was too ready to acquit himself of the charge, and replied in the negative with great alacrity. The lawyer pressed his interrogatories closer home, thus: "Witness, do you pretend to say, under your oath, that you have no interest in the event of this suit?" "Not the first red," was the prompt reply. "Do you mean to be understood that you would as soon see one party beat as the other?" "Yes, your honor," was the answer, "and if anything a little rather." The last answer did the business.—*Pittsburgh Legal Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

Nordheimer v. Shaw.

34 Vic. cap. 12 sec. 12 (Ont.)—Notice of trial—Computation of time—Ejectment.

Held, that the "two clear additional days to the time now allowed by law" for service on the agent of a country attorney, under the above statute, mean the insertion of two days between the day of service and the day of the happening of the event to which the notice relates. A service of notice of trial on the Toronto agent of a country attorney on Saturday for Monday would be sufficient.

[Chambers.—*Mr. Dalton—Galt, J.*]

Ejectment—The plaintiff obtained a summons, calling on the defendant, his attorney or agent, to show cause why the order changing the attorney for the defendant, herein made on the 29th day of December, 1871, should not be rescinded, and the service thereof, and the notice limiting the defence, and the service thereof, should not be set aside with costs, on the ground that the said order was not obtained, and the change of attorney was not made *bonâ fide*, but as a tricky abuse of the practice of the Court, for the purpose of throwing the plaintiff over the next Toronto assizes, and that the said notice is only given for the same reason and on grounds disclosed in the affidavit and papers filed; or why the plaintiff should not be at liberty to amend his issue book served herein by adding thereto the notice limiting the defence, or to serve a new issue book without prejudice to the notice of trial served for the next Assizes, which shall stand good on the ground that the said notice was given after the service of an issue book and notice of trial, and on grounds disclosed in the affidavits and papers filed, and on reading the affidavits and papers filed on obtaining the said order changing the attorney.

The writ in this case was issued on the 9th December last. On the 11th, service was accepted by Mr. R., defendant's attorney, and on the 27th he appeared, and by his notice claimed all the land described in the writ. The next day the plaintiff served issue book and notice of trial. On the evening of the day after (29th December), a clerk in the firm of M. & B. served the plaintiff's attorney with an order made that day, changing the attorney from Mr. R. to a Mr. W., and a notice limiting the defence to a part of the land claimed. The next day the plaintiff's attorney inquired of M. & B. who Mr. W. was, and was told that they did not know, as they had served the papers for S. R. & M., in whose office the papers served, and the affidavits on which founded had been prepared. Mr. R. was the booked agent for Mr. W.

C. S. Patterson (instructed by Mr. R.) shewed cause, and filed an affidavit of the latter, stating that the notice limiting the defence was given in good faith, and for the purpose of limiting the defence to about seven or eight acres out of twenty or thirty claimed in the writ, and being all the premises of which the defendant had possession, and for which he intended to defend.

Hector Cameron supported the summons.

Several points were touched upon on the argument, but it is only material here to refer to that upon which the case was decided, viz: as to the meaning of the words "two clear additional days to the time now allowed by law for such service shall be added," given in the 34 Vic. cap 12, sec. 12, when papers are served on the Toronto agent of an attorney residing in the country.

The following authorities were cited: *Morell* v. *Wilmott*, 20 C. P. 378; *Vrooman* v. *Vrooman*, 17 C. P. 523; *Phillips* v. *Winters*, 3 P. R. 312, 10 U. C. L. J. 161; *Buchanan* v. *Bette et al.*, 2 C. L. J. N. S. 71; *Harrison* v. *Caul*, 3 F. & F. 277; *Grimshawe* v. *White*, 12 C. P. 521; *Ikin* v. *Plevin*, 5 Dowl. 594; *Blake* v. *Done*, 7 H. & N. 464; *Chadsey* v. *Ransom*, 17 C. P. 629; 34 Vic. ch. 12 sec. 12 (*O.*); C. L. P. Act sec. 222; Eject. Act secs. 8, 12.

Mr. Dalton.—The only ground upon which the plaintiff can complain of the matter alleged, must necessarily include injury to himself. Under proper circumstances all the acts done the defendant had a right to do, but the plaintiff objects to the alleged motive for the acts, the time and manner of doing them, and the intention with which they were done to gain by indirect means an advantage over him, which he alleges is an abuse of the practice. The first question, therefore, is, has the plaintiff suffered any embarrassment from the acts he complains of.

The defendant's notice limiting his defence was served on Friday. That would render necessary the delivery of an amended issue, and new notice of trial, and I will suppose an application in Chambers. So that the morning of Saturday was the earliest time that these steps could be taken. Would that have enabled the plaintiff to get down to trial by Monday, for the following Monday is a good notice of trial, when served on the attorney—not on his agent in Toronto. Sec. 12 of 34 Vic. cap. 12, enacts that when served upon the agent of the attorney in the cause *in Toronto* "two clear additional days to the time now allowed by law for such service shall be added."

The expression "clear days" when applied to the time for a notice, is very well understood. It means the days included *between* the day of service, and the day for the performance of the act, or the happening of the event, to which the notice relates—in common terms, the first and last days are both excluded. This is the meaning of the term "clear days," and it is the only meaning.

Now Monday for Monday is *six* clear days—Saturday for the Monday week next following is *eight* clear days. Then would not the service in this case on the Toronto agent of defendant's attorney have given the two clear additional days which the statute prescribes? I think it would.

The use of the word "clear" in the statute is unfortunate. In *lengthening* a notice, it is not possible to add days which are not clear days, for there are already in the original notice a first and a last day, and there are no more in the lengthened notice, so that the added days must be clear days.

If I am right in the construction of the statute, *both* parties were, I think, in error in supposing

that a service on Saturday would have been insufficient.

I think under the circumstances of the case the summons should be discharged without costs.

From this judgment the plaintiff appealed by summons to a judge, which came on for hearing before Mr. Justice Galt, when

C. S. Patterson shewed cause.

Osler, contra.

Galt, J.—I felt some doubt upon the point decided by Mr. Dalton, but after consideration, I think the view he takes is the correct one. The question of the *bonâ fides* of the defendant's attorney does not properly come before me on this summons. I am not, therefore, called upon to make any remark on the circumstances which are detailed by the plaintiff to set aside the proceedings of the defendant on the ground of trickery.

Summons discharged.

IN CHANCERY—MASTER'S OFFICE.

Re McMorris.

Dower.

A widow who has barred her dower in a mortgage, given by the husband for his own debt, is entitled to have the mortgage paid off by the husband's assets. If she claim dower merely out of the equity of redemption, she has priority over creditors, but if out of the *corpus* of the property, she is postponed to them. On a sale of the lands, as soon as the debts of the husband are paid, she takes precedence over the heir and volunteers, claiming under the husband, and becomes absolutely entitled to her rights as dowress in the balance of the proceeds. *Sheppard* v. *Sheppard*, 14 Grant, 174, noticed.

[May, 1872, *Mr. Boyd.*]

In this case land mortgaged by the testator was ordered to be sold, and by consent of the widow her rights as dowress were to be ascertained in the master's office. She also claimed dower in lands for the purchase of which her husband had been in treaty with the Crown.

Mr. Holmested for the widow.

Mr. McWilliams for the legatees.

Mr. Boyd.—The widow's position in equity seems to be this: having barred her dower in a mortgage in fee given by her husband for his own debt, he covenanting to pay it, she surviving her husband is, in one aspect, in the position of surety for the debt, and can claim that the mortgage should be paid out of the husband's assets, so as to relieve her estate in the land. If she claims dower merely out of the equity of redemption, that would be given her of course in priority to creditors, but if, as here, she claims dower out of the whole *corpus* of the mortgaged land, then she cannot do this to the prejudice of creditors. According to the decisions of this court, general creditors would have the right to marshall the mortgage debt upon the land mortgaged to the prejudice of the widow's dower. But after payment of creditors her rights as dowress accrue absolutely to a life estate in one-third of the lands mortgaged or of the proceeds of the sale thereof. When the mortgage is paid out of the testator's assets, as in this case, by a sale of the lands, it is equivalent to a payment by the testator himself, so far as the dowress is concerned. Had the mortgage been redeemed by the heir out of his own moneys, questions of contribution by the widow would have arisen, which do not arise in the present case. The wife simply bars her dower with a view to secure the debt due by her husband; when that debt is paid by the husband's estate, she is remitted, as against the heir and volunteers claiming under the husband, to her full rights as dowress in the whole estate mortgaged. *Sheppard* v. *Sheppard*, 14 Grant, p. 174, and the passage from Park cited with approval therein are authorities for these positions. I do not regard this case as over-ruled save in so far as it decides that creditors are to be postponed till dower is paid out of the mortgaged estate, see *White* v. *Bastedo*, 15 Gr. 546, and *Thorpe* v. *Richards*, ibid, 403. I do not see upon what principle her claims to dower should be postponed to the legatees in the will named, and indeed by the decree, on further directions, they are only to be paid after the satisfaction of all other claims. As to arrears she can only have these upon contributing one-third of the interest on the mortgage debt since the death to the time of the sale.

Craig v *Templeton*, 8 Gr. 483, goes to the limit of the law, and that case cannot be extended to meet the present, where the right to a patent was cancelled in the testator's life, and by a mere act of grace was it given to his child afterwards.

McMaster v. Hector.

Computation of subsequent interest.

Former practice in respect to computation of subsequent interest now altered, except in certain cases. Subsequent interest should be computed upon the aggregate of principal, interest and costs, which the puisne incumbrancer has paid for redemption money.

Upon the principal money, subsequent interest should be regulated by the rate fixed in the mortgage security—upon the interest and costs, only statutory interest should be computed.

[June, 1872, *Mr. Boyd.*]

This was a foreclosure suit in which a second mortgagee had redeemed the plaintiff. A question arose as to what subsequent interest should be allowed the party who redeemed.

Mr. Boyd. — By the old practice of the court, a master's report computing interest on the principal money secured by mortgage, ascertaining what was due and fixing a time for payment, was equivalent to a judgment at law in converting such interest into principal money. If the sum so found due was not paid, subsequent interest would be computed on the whole, interest and principal, *Bacon* v. *Clerk*, 1 P. Wms. 478; *Creuze* v. *Hunter*, 2 Ves. Jr. 159; *Perkyns* v. *Baynton*, 1 B. C. C. 574. The same rule applied where part of the sum found due by the report consisted of *costs*, *Bickham* v. *Cross*, 2 Ves. Sr. 471; *Bruere* v. *Wharton*, 7 Sim. 483. The old rule, however, is now otherwise, and only the principal carries interest, except where a favour is asked by the mortgagor in the way of extending the time for payment, *Whatton* v. *Cradock*, 1 Keen, 267; *Holford* v. *Yates*, 1 K. & J. 677; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268, and where a later mortgagee or incumbrancer

pays off a prior mortgagee under a foreclosure or redemption decree, *Thackwray* v. *Bell*, Fish. on Mortgages, app. 671; Daniell, prac., 4th ed., p. 1125; Seton, 144, 375, 439.

Subsequent interest, therefore, should be computed upon the aggregate of principal, interest, and costs, which the puisne incumbrancer has paid for redemption money. This, in Seton, is said to be "the settled practice of the court," page 375. As to the rate of interest upon the principal money, that should be regulated, I think, by the rate fixed in the mortgage security, which has been redeemed. In the present case that is 8 per cent.: to lessen it would be to give the mortgagor a benefit which he has no right to claim. Subsequent incumbrancers cannot complain that the same rate of interest is maintained till the mortgagor himself redeems. The incumbrancer who redeems is substantially in the position of an assignee of the mortgage. As to the subsequent interest upon interest and costs, that being allowed by the *cursus curiæ* should be not eight per cent. as in the mortgage, but only the statutory rate of six per cent; see *Astley* v. *Powis*, 1 Ves. Sr., 496.

McMillan v. McMillan.

Administration suit—Examination de bene esse—Costs.

If in an administration suit fraud is charged in the pleadings, it may be proper for defendants to examine the plaintiff thereupon in order to disprove the charge, even though they succeed in the objection that a proceeding by bill was not necessary.

In examinations *de bene esse* if the evidence is not used and the witnesses are within reach of subpœna, the costs of the examination should not be allowed. Where the evidence is material and is used, the costs become costs in the cause.

[13th September, 1872, *Mr. Boyd.*]

This was a case where the defendant was allowed his costs, occasioned by the plaintiff having set the case down for examination of witnesses and hearing. The defendant claimed the costs of an examination of the plaintiff before a special examiner, and the costs of certain evidence taken *de bene esse*.

Mr. McDonald for the plaintiff.

Mr. McGregor for the defendant.

Mr. Boyd.—This is an administration suit in which a bill was filed because certain specific charges of fraud were made against the executors. It was not necessary to file a bill so as to charge fraud in the pleadings, as all the matters complained of could have been investigated in the master's office under the usual administration order. Yet if a charge of fraud is made in the pleadings, it may be proper for the defendants to show that such a charge is unfounded, and to address evidence to this point. Had the examination of the plaintiff herein been with a view to show that the charge of fraud was without foundation, I should have inclined to allow the costs, but so far from this being the case there is not a single word of the examination which relates to these fraudulent charges: so far as the fraud is concerned the whole is irrelevant, and relates to matters of account. This is evidence which the court would in no view have listened to at the hearing, and the costs of the examinations should be disallowed for the same reason that costs of witnesses to immaterial circumstances are invariably disallowed.

It is also claimed to tax the costs of the examination of some witnesses who were examined *de bene esse*. This evidence was not used at the hearing, and, as I understand, it could not have been used, as the witnesses themselves were then within reach of a subpœna. In such a case the costs cannot be taxed. If such evidence is material and is used then the costs of it become costs in the cause to the successful party. I find no express decision upon this point, but the reasoning of Macaulay, C.J., in *Pegg* v. *Pegg*, 1 Cham. R. 193, applies, though upon the facts and the previous practice his decision was over-ruled by S. C., 7 U. C. R. 220. In suits to perpetuate testimony the defendant's costs are as a rule paid by the plaintiff, as the preservation of the evidence is regarded as a favour granted to him. In examinations *de bene esse* it depends upon the event whether the costs go to the party instituting such an examination. Here, it may be, the evidence will be available in questions of account in the master's office, and in that view the defendant may yet get the costs. Reference may be made to *Curling* v. *Robertson*, 2 D. & L. 307, S. C. 7 M. & G. 525; *Bridges* v. *Fisher*, 1 Bing. N. C. 510; *Hawkins* v. *Baldwin*, 16 Q. B. 375, 380; *Bölin* v. *Mellidew*, 20 L. J. C. P. 172.

CORRESPONDENCE.

Ontario Law Reports.

To the Editor of the Canada Law Journal.

Sir,—There seems to be a pretty mess with that question—*law-reporting*—although why there should be, it is very hard to understand. The following observations may attract the attention of the Benchers who have charge of the business, if they read your journal, which I hope they do.

1. The third volume of the Chancery Chamber Reports is still *incomplete*. The last case reported therein was argued on 19 December, 1871. Nothing has occurred in Chancery Chambers to justify a report since—such is the inference, but such is not the fact. Ten months, and no case in Chancery Chambers worthy of a report!—bosh! I could mention fifty cases at least which ought to have been reported during that period; cases—the judgment, in which would be found most useful to the profession; cases which ought to have been reported. The *authorized* reports had better be abolished than exist as a mere farce. Is it not a farce to say we have an authorized edition of Chancery Chamber Reports, that the third volume was commenced in January, 1870, is now incomplete, having in nearly

three years managed to get into a shape of 488 pages, with no reported case since December, 1871. Mr. Cooper is not now the reporter. In July last Mr. Grant was by the Benchers continued as reporter to the Court of Chancery, and was also requested to report the Chamber cases. I do not pretend to fix the responsibility on the *late* or the *present* reporter. I leave the authorities to do this, as to them may seem just.

2. Mr. O'Brien has very properly completed his volume of Common Law Chamber Reports (volume 5.) This gentleman is not now the reporter, having also, in July last, been superseded by the reporters to the Court of Queen's Bench and Common Pleas. The last case reported in his volume (No. 5) was decided on 27th December, 1871; and so in this court the same difficulty as to the reporting also exists, with this difference, that the current volume of Common Law is complete, and that of the Chancery Chambers is not so. Mr. O'Brien has, however, being one of the editors of the *Canada Law Journal*, through that publication, continued the Common Law Chamber Reports since his last vol. (No. 5.)

Your obedient servant,

Chambers.

Toronto, Nov. 12, 1872.

[As to the Chancery Chamber Reports, we find, on enquiry, that the first number of the coming volume is printed, though not issued. We understand the Digest is in course of preparation.

With reference to cases in Chancery Chambers and in the Master's office, we may mention (though this is not material to the gist of our correspondent's remarks) that a large number of these cases have been reported by us, and thus seen by the great majority of the profession.

As regards the Common Law Chamber Reports, cases worth reporting have been given to the profession in this journal, this course being thought the most advisable, pending the final settlement of the arrangements regarding Law Reporting, which, we doubt not, the Benchers will put into a satisfactory shape the ensuing Term. When this is done, we shall advise our readers of the result of the deliberations of those who have the matter in hand.]—Eds. C. L. J.

REVIEWS.

The Southern Law Review: Oct., 1872. Vol. i, No. iv. *Nashville: Reid & Purvis.* The earlier numbers of this handsome quarterly have not, with one exception, reached us. This number which completes the first volume, contains five papers or essays on legal subjects; a number of book notices, and three series of digests of cases; one of the English reports, another selected from the reports of various States, and the third of Tennessee decisions. Among the original articles there is a very good *resumé* of the law relating to life insurance, as expounded by recent decisions. A paper on "Bank Cheques" acutely criticizes the faulty definitions of various authors, as to what a cheque is and what it is not, and discusses the legal effect of a draft upon a banker payable so many days after sight. In the article entitled "Roman Law," the author anticipates the "glorious era when Papinian and Ulpian shall be of equal authority with Hardwicke and Mansfield, and Pothier and Savigny shall be quoted with Kent and Story." He points out the great obligations of the English law and the old English authors to the civil law, and then elucidates some of the peculiarities of the Roman system. It is a scholarly, well-written paper—by far the best in the number. The remaining articles on "Acceptance of bills of exchange," and on "Presentment for acceptance" are by the same author, and are, we should say, two chapters of a treatise to be published on bills of exchange and promissory notes. Great industry in the citation of cases from English, as well as American sources, is apparent on the face of its pages, and we judge them to be well suited to the exigencies of the practising lawyer. Altogether, we are most favourably impressed with this new enterprise. It betokens the re-establishment of learned leisure in the south. We shall be most happy to place it on our list of exchanges.

The American Law Register *for July and August* have only lately come to hand, owing to some delay in the publication, we believe. The specialty of this journal is the monthly collection of leading cases from the various courts of the republic, with annotations thereon by the eminent jurists who are among its contributors. Prominent among these is Dr. Redfield, whose fearless comments upon judicial conclusions are always pointed and suggestive. There is an admirable paper by James Parsons in the August number, entitled, "The Ancient Commonwealth," which condenses the results of the treatise of M. de Coulanges upon Greek and Roman institutions. This, though lengthy, we shall endeavour to find room for in a subsequent number. Why does not Mr. Parsons translate and annotate this *magnum opus* of the French author for the American public? And by that we mean

to refer to the Canadian part of the continent, as well as that other larger part, which larger part sometimes forgets that it does not comprise the whole Continent.

The United States Jurist *for July and October* received. We are particularly pleased with the book notices for their vigour and impartiality, and the legal intelligence for its piquancy and variety. The editor suggests that the English council of law-reporting would confer an especial favour if they made up lists shewing the causes appealed and the results of the appeal, as to the judgment of the court below being affirmed, reversed or modified, so that the reader consulting reports of an English court of first instance might see readily whether any particular case had been considered in appeal, and, if so, with what result. This is a kind of compilation which may very well be made a part of the new system of reporting in this Province.

APPOINTMENTS TO OFFICE.

COUNTY JUDGE.

DANIEL MACAROW, of the Town of Picton, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County Court of the County of Prince Edward. (Gazetted July 27th, 1872.)

DEPUTY JUDGE.

JAMES ALEXANDER HENDERSON, of the City of Kingston, of Osgoode Hall, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of the County of Frontenac. (Gazetted June 22nd, 1872.)

SHERIFFS.

JAMES FLINTOFT, Junior, of the Town of Sarnia, Esquire, for the County of Lambton, in the room and stead of James Flintoft, Esquire, resigned. (Gazetted July 6th, 1872.)

GEORGE KEMPT, of the Town of Lindsay, Esquire, for the County of Victoria, in the room and stead of Neil McDougall, Esquire, deceased. (Gazetted July 20th, 1872.)

COUNTY ATTORNEY.

JOHN O'DONOHOE, of Osgoode Hall, Esquire, Barrister-at-Law, to be County Attorney in and for the County of York, in the room and stead of Rupert Mearse Wells, Esquire, resigned. (Gazetted Sept. 14th, 1872.)

DEPUTY CLERK OF THE CROWN AND CLERK OF THE COUNTY COURT.

JOHN YATES ELWOOD, of Osgoode Hall, Esquire, Barrister-at-Law, for the County of Huron. (Gazetted September 14th, 1872.)

INSPECTOR OF DIVISION COURT CLERKS.

JOSEPH DICKEY, of the Village of Uxbridge, Gentleman, Inspector of the Offices that are not situated in County Towns throughout the Province of Ontario. (Gazetted September 28th, 1872.)

NOTARIES PUBLIC FOR ONTARIO.

GEORGE WILLIAM HERBERT BALL, of the Town of Galt, Esquire, Barrister-at-Law.

JAY KETCHEUM, of the Town of Lindsay, Gentleman, Attorney-at-Law. (Gazetted June 1st, 1872.)

HENRY HATTON STRATHY, of the Town of Barrie, Esquire, Barrister-at-Law.

EDWARD BURNS, of the Village of Elora, Esquire, Barrister-at-Law. (Gazetted June 8th, 1872.)

LINDSAY HALL, of the Village of Aurora, Esquire, Barrister-at-Law. (Gazetted June 15th, 1872.)

JOHN CRERAR, of the City of Hamilton, Esquire, Barrister-at-Law.

JOHN FRANCIS CAMPBELL HALDAN, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted June 22nd, 1870.)

HENRY ALFRED WARD, of the Town of Port Hope, Esquire, Barrister-at-Law. (Gazetted June 29th, 1872.)

FRANCIS HENRY CHRYSLER and PHILEMON PENNOCK, junior, of the City of Ottawa, Esquires, Barristers-at-Law. (Gazetted July 6th, 1872.)

JOHN HOSKIN, of the City of Toronto, Esquire, Barrister-at-Law, and GEORGE REDMOND, of the Town of Brockville, Gentleman, Attorney-at-Law. (Gazetted June 20th, 1872.)

GEORGE WASHINGTON BADGEROW, of the City of Toronto; VALENTINE McKENZIE, of the Town of Brantford; JAMES O. LOANE, of the Town of Stratford; and G. LEFROY McCAUL, of the Town of Guelph, Esquires, Barrristers-at-Law; and IVAN O'BEIRNE, of the Town of Peterborough, Gentleman, Attorney-at-Law, (Gazetted July 27th, 1872.)

JOHN CRICKMORE, of the City of Toronto, and THOMAS GREIG, of the Village of Carleton Place, Esquires, Barristers-at-Law; and FREDERICK WILLIAM MONRO, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted August 3rd, 1872.)

WILLIAM M. MERRITT, of the Town of Guelph, Barrister-at-Law. (Gazetted August 10th, 1872.)

JOHN ARTHUR WELLESLEY HATTON, of the Village of Cayuga, Esquire, Barrister-at-Law. (Gazetted August 17th, 1872.)

ROBERT C. SMYTH, of the Town of Brantford, Esquire, Barrister-at-Law. (Gazetted August 31st, 1872.)

ALFRED PASSMORE POUSSETTE, of the Town of Peterborough, Esquire, Barrister-at-Law; and PETER McGILL BARKER, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted Sept. 21st, 1872.)

HENRY BECHER, of the City of London, and JOHN CAMERON, of the Town of Strathroy, Esquires, Barristers-at-Law. McLEOD STEWART, of the City of Ottawa; and JOHN McFAYDEN, of the Village of Mount Forest, Gentlemen, Attorneys-at-Law. (Gazetted Sept. 28th, 1872.)

JOHN MARTIN, of the City of London, Esquire, Barrister-at-Law. (Gazetted October 5th, 1872.)

JOHN BLEVINS, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted October 12th, 1872.)

ASSOCIATE CORONERS.

THOMAS SWAN, Esquire, M. B., for the County of Waterloo.

DAVID BURNET, Esquire, M. B., for the United Counties of Northumberland and Durham.

JOHN DOUGALD McLEAY, Esquire, M. D., for the County of Middlesex. (Gazetted June 1st, 1872.)

FRANCIS LAMB HOWLAND, Esquire, M.D., for the County of Oxford.

NOBLE BENJAMIN HALL DEAN, Esquire, M.D., for the United Counties of Northumberland and Durham.

WILLIAM O'DELL ROBINSON, Esquire, M.D., for the County of Waterloo. (Gazetted June 15th, 1872.)

GEORGE DAVID LOUGHEED, Esquire, M.D., for the County of Lambton.

MARSHALL MARSELLUS PULASKI DEAN, Esquire, M.D., for the County of Peterborough. (Gazetted June 22nd, 1872.)

LOTHROP PAXTON SMITH, Esquire, for the United Counties of Northumberland and Durham. (Gazetted June 29th, 1872.)

ALEXANDER STEPHENS, Esquire, M.D., for the District of Parry Sound. (Gazetted July 6th, 1872.)

PHILIP HOWARD SPOHN, Esquire, M.D., for the County of Simcoe. (Gazetted July 13th, 1872.)

RICHARD KING, Esquire, M.D., for the United Counties of Northumberland and Durham. (Gazetted July 27th, 1872.)

GEORGE NIEMEIER, Esquire, M.D., for the County of Bruce. (Gazetted August 10th, 1872.)

ROBERT HERBERT HUNT, Esquire, M.D., for the County of Grey. (Gazetted August 17th, 1872.)

CHARLES D. TUFFORD, Esq., M.D., for the County of Middlesex. (Gazetted August 31st, 1872.)

JOHN CHURCH CHAMBERLAIN, Esquire, M.D., for the County of Lennox and Addington. (Gazetted Sept. 14th, 1872.)

Appointments to Office.—Items.

ALGERNON WOOLVERTON, Esquire, M.D., for the County of Wentworth. (Gazetted September 21st, 1872.)

WILLIAM DeWITT CLINTON LAW, Esquire, M.D., for the County of Simcoe. (Gazetted Sept. 21st, 1872.)

WILLIAM B. FOWLER, Esquire, M.D., for the County of Huron. (Gazetted October 5th, 1872.)

GEORGE MILLER AYLSWORTH, Esquire, M.D., for the County of Huron.

BALDWIN LORENZO BRADLEY, Esquire, M.D., for the County of Oxford. (Gazetted October 12th, 1872.)

The Press and the Bar.—Many years ago resolutions were passed by the members of the Oxford and western circuits declaring it to be incompatible with the status of a barrister to report proceedings for the public press. The resolution on the Oxford circuit was aimed at Mr. Cooks Evans, who then represented the *Times*, and on the western circuit at Mr. H. T. Cole (now a Queen's counsel), who then reported for the *Morning Chronicle*. The dictum of the Oxford and western circuits was warmly resented by the press. By way of retaliation the *Times* adopted a plan that was followed by many other journals, and which soon led to the rescinding of the obnoxious resolutions. The leading journal stated that it was of no importance to the general public, however important it might be to the legal gentlemen themselves, to know what particular counsel appeared in any case. Accordingly instructions were given to the *Times* representatives on the Oxford and western circuits to suppress the names of all the barristers who appeared in cases reported in that paper. Hence for some time in the reports of these circuits, the public read that "the counsel for the plaintiff," "the counsel for the defendant," "the counsel for the prosecution," and "the counsel for the prisoner," said or did so and so. This was a serious matter for the bar, and no doubt materially hastened the withdrawal of the objectionable stigma sought to be cast upon the press.—*Gentlemen's Magazine.*

In Connecticut it is proverbially said of a discontented man that he would "grumble if he were going to be hanged." And, indeed, it is remarkable to see how even the slight peril of death involved in a trial for a capital offence by a petit jury rouses all the captiousness in the nature of the man who is the subject. For a long time the counsel for the defence in criminal cases have been dissatisfied with the ordinary juror, and, so far as the case was concerned, yearned for a man whose mind up to the time of his summons to serve had been a virgin blank. Him they have now found, and they have rejected him. In the Stokes case a juror was called, Peter Eckhardt by name, who had drunk deep at the Pierian spring of metaphysics, and was fully aware of the relativity of knowledge. This astute person not only disbelieved whatever he saw in the papers, but he also declared, that "for all he knew Fisk might be alive still, as he had never seen him shot." Upon this confession of unfaith one would suppose that the counsel for defence would have exclaimed that this was the man they had long sought, and mourned because they found him not, and had him sworn in by acclamation as a paragon of petit jurors. But it is painful to record that even Eckhardt did not meet their views, and he was dismissed with an ignominy painfully in contrast with the joy wherewith we have so long been assured he would be greeted. The fates never forgive. It is impossible that we should ever hereafter have a chance of getting so exemplary an idiot as Eckhardt in a panel to try a capital case, and we have missed our only opportunity for observing the procedure and recording the conclusions of the model juror.—*Pittsburg Legal Journal.*

Nisi Prius.—The origin of the term *nisi prius* was rather curious, and illustrates the startling fictions that our fathers delighted to honor. Formerly, in order to send a cause to trial at the assizes, two writs were directed to the sheriff. By the first writ, called a "venire," the sheriff was commanded to cause a jury to come to Westminster. The second writ, called a "distringas," supposed the jurors to have disobeyed the first writ, and commanded the sheriff to distrain their goods, so as to compel them to come to Westminster on a certain day, unless before that day a judge of assize should come to the place where the cause was intended to be tried, as in practice he always did. The words of this writ *nisi prius* gave the name to the ordinary sittings for trying causes. The fiction maintained by these writs was not only useless, but pernicious, for an irregularity in returning them might deprive a plaintiff of the benefit of his verdict. All that was really necessary was, that the sheriff should take care to have in attendance at the assizes a number of jurymen sufficient for the trial of the causes likely to be entered.—*Albany Law Journal.*

The Decisions of Justices.—The unpaid magistracy is the most abused institution of the country. Very likely some of their decisions are wrong; but it is ridiculous to form an opinion from the newspaper reports, because important incidents of the case are omitted. Writers who propose to abolish the "great unpaid" do not take the trouble to consider the subject. The substitution of paid magistrates would be costly if it were possible, but, however willing the public might be to pay the cost, it would be impossible to find the requisite number of men. Besides, the magistrates are fully qualified to discharge their duties, and, with some exceptions, they do so satisfactorily. The abolition of the unpaid magistracy would be a disastrous social revolution. A writer in the *Times* complains that the decisions of justices cannot be reversed unless the justices themselves reserve any question for the Court of Criminal Appeal. What would be the result of giving an unlimited right of appeal? We apprehend that two Courts of Appeal would be fully and constantly occupied in disposing of such appeals. Perhaps in the instance cited by "Stuff-gown," the justices were wrong, but as a rule, when any point is raised, the bench is ready to grant an appeal. Besides, the justices do not sit with closed doors, and their critics in the press are extreme to note the slightest error. We see no danger to the public, and a great convenience, in reserving to the justices the right to refuse an appeal from their decisions.—*Law Journal.*