DIARY FOR APRIL.

1. Fri.. Local School Supt. term of office begins.
3. SUN. *5th Sunday in Lent.*
4. Mon. County Court (York) Term begins.
7. Thur. Local Treasurers to return arrears of taxes due to County Treasurer.
9. Sat.. County Court Term ends.
10. SUN. *Palm Sunday.*
15. Fri.. *Good Friday.*
17. SUN. *Easter Sunday.*
18. Mon. *Easter Monday.*
22. Sat.. *St. George.*
24. SUN. *1st Sunday after Easter.*
25. Mon. *St. Mark.*
30. Sat... Articles, &c., to be left with Secretary Law Society, Last Day for L. C. to ret. occupied lands to Co, Tr. Grammar and Common School Fund to be apportioned. Co. Treas to make up books and enter arrears.

THE

Canada Law Journal.

APRIL, 1870.

RECENT MUNICIPAL CASES.

The usual crop of applications to unseat municipal councillors of various kinds and degrees is now nearly gathered in. There have not been many, but those of any general interest which we propose to notice are the following:—

Reg. ex rel. Ford v. *McRae*, which appears in another column, speaks for itself. The others are not as yet reported.

Reg. ex rel. Gibb v. *White* was a novel application, to test the right of an Indian, as such, to hold office as a Municipal Councillor. Mr. White, whose election was sought to be set aside, is the son of a Chief of the Wyandott or Huron Indians of Anderdon. For many years past he has been engaged in trade, and is the owner in fee simple of patented lands (apart from the Indian Reserve, to a share of which he is also entitled) on which he lives, the value being beyond the necessary qualification. It was contested that as he was not an "enfranchised" Indian under the provisions of the statutes in that behalf he had not become entitled to all the rights and privileges of other British subjects. It was however held that the provisions as to enfranchisement related only to the property acquired from that set apart for the tribe, and that there is no law in existence in this country which prevents an Indian, who is otherwise qualified, from holding any municipal office. We cannot regret that such is the law, and we should have been much surprised to have found it otherwise. It would certainly be a reproach to us if a descendant of the former owners of the soil—our allies and friends in many a hard fight for this very country—one who, in the opinion of his white neighbors, is of sufficient intelligence and position so to command their respect as to be elected in preference to a white man—should be debarred from holding the position to which he has been chosen.

Amongst the papers filed on shewing cause was a copy of the treaty between Sir Wm. Johnson and the Huron Indians of Detroit, dated 18th July, 1764, the original of which is in the posssesion of Mr. White's brother, and was produced on the argument. It may be interesting to many of our readers to know its contents:—

"Articles of Peace, Friendship and Alliance, concluded by Sir William Johnson, Baronet, his Majesty's sole Agent and Superintendent of Indian Affairs for the Northern District of North America, and Colonel of the Six United Nations, &c., on behalf of his Britannic Majesty, with the Huron Indians of the Detroit.

Article 1st.

Sir William Johnson, Bart., doth agree with the Hurons that a firm and absolute peace shall take place from the date of these presents between the English and them, and that they be admitted into the chain of Friendship and Alliance with his Britannic Majesty; to which end the Hurons are immediately to stop any attempts towards hostilities which might be meditated by any of their people, and they engage never to attempt disturbing the public tranquility hereafter, or to conceal such attempts of any others, but will use their utmost endeavours to preserve inviolable the peace they hereby enter into, and so hand it down to posterity.

Article 2nd.

That any English who may be prisoners or deserters, and any Negroes, Panis, or other slaves amongst the Hurons, who are British property, shall be delivered up within one month to the Cammandant of the Detroit, and that the Hurons use all possible endeavours to get those who are in the hands of the neighboring nations; engaging never to entertain any deserters, fugitives, or slaves, but should any such fly to them for protection, they are to deliver them up to the next commanding officer.

Article 3rd.

That they will not from henceforth maintain any friendship with any of his Majesty's enemies

or maintain any intercourse with those who may promote war and troubles, but will oppose their designs and treat them as common enemies; and that they will never listen to any idle stories of any White man or Indian who may spread false reports; but if any matter of grievance arises they are either through the channel of the Commandant of Detroit, or by personal application to Sir William Johnson, to represent their complaints.

Article 4th.

That they acknowledge his Britannic Majesty's right to all the lands above their village, on both sides the Strait to Lake St. Clair, in as full and ample manner as the same was ever claimed or enjoyed by the French.

Article 5th.

That they do to the utmost secure the Strait or Passage from Lake Erie to the Detroit, and do use their utmost endeavours to protect the navigation thereof, either with ships or boats, against any attempts of an enemy, as well as defend all persons who may have occasion to go or return from Detroit by land or water. And lastly, that they do now or at any other time, at the requisition of the Commandant of Detroit, or of any others his Majesty's officers, furnish such a number of their warriors as may appear necessary for the protection thereof or the annoyance of the enemy.

In consequence of the perfect agreement of the Hurons to the foregoing articles, Sir William Johnson doth, by virtue of the powers and authorities to him given by his Majesty, promise and declare that all hostilities on the part of his Majesty against the Hurons shall cease, that past offences shall be forgiven, and that the said Indians shall enjoy all their original rights and privileges, as also be indulged with a free, fair and open trade, agreeable to such regulations as his Majesty shall direct.

Given under my hand and seal at arms, at Niagara, the 18th day of July, 1764.

(Signed) Wm. Johnson.

[L.S.]

The Chiefs of the Hurons have, in testimony of their accordation to the foregoing articles, subscribed the marks of their respective tribes, the whole being first clearly explained to them."

We cannot undertake to give with any correctness the names of the chiefs who signed the; treaty but, aftertheir names appear their *totems*, the first being a tortoise, the second something said by the learned to represent a beaver, the third is the figure of a man, and the fourth another tortoise. It would be somewhat strange that if, after the lapse of more than a century, Her Majesty should call upon the Hurons, in the words of treaty, "to furnish such a number of warriors as may be necessary for the protection [of her subjects] or the annoyance of the enemy." Yet such circumstance is not only not impossible, but has even been contemplated within the past few months.

In *Reg. ex rel. Flater* v. *Vanvelsor*, the objection taken by the relator was to the property qualification of the defendant, who qualified on real estate rated on the roll at $470. It appeared to have been sufficient unless reduced by the amount of a mortgage for a large sum, which however was shewn to have been paid before the election, or unless reduced by the amount due on a *fi. fa.* lands, which was in the sheriff's hands as a lien at the time of the election. It was contended that the defendant had goods sufficient to cover the claim, and therefore, as the goods must have been exhausted first, that there was in reality nothing which could be looked upon as sufficient to reduce the qualification. It was unnecessary to decide this point, though Mr. Dalton, before whom the case came, thought as long as the *fi. fa.* lands was in the sheriff's hands it must be considered as a lien or incumbrance for all purposes; but he raised the point whether liens or charges of that nature could be taken into account at all—and he held that as the statute said nothing about incumbrances, and that they could not be taken into consideration; in fact that if a person appeared to be rated on the roll for a sufficient amount, that alone, so far as his property was concerned, was all that the statute required, even though his equity of redemption or beneficial interest in such property might be worth less than nothing. The point, though nearly approached in another case, was not before, curiously enough, expressly decided.

Another case was that of *Reg. ex rel. McGouverin* v. *Lawler*, which, though not deciding any question of qualification or disqualification is new on a matter of procedure.

The defendants election was not complained of, but the relator sought to unseat him on the ground that he had been convicted of selling liquor without a license, and had thereby under 32 Vic. cap. 32, sec. 17 (Ontario), forfeited his office. It was however held, that the

proceedings taken under sections 130 and 131 of the Municipal Act by summons, in the nature of a *quo warranto* summons, were not applicable to such a case as this, whatever the common law remedy might be in such a case; and reference was also made to sections 120, 124 and 125, as affecting the case.

COUNTY JUDGES' CRIMINAL COURTS.

A writer in the *Law Times* draws attention to the remarks that appeared in this Journal in November last on this subject, and speaks fully of the jurisdiction and procedure of the Courts as we detailed them. This article, which will be found in another place, shews that the conductors of that leading periodical fully comprehend the importance of the "gigantic stride in legislation" in the "remarkable act" referred to. Whilst fully concurring in the views we expressed as to its advantages, they think it advisable to wait till the Act is tested by time and experience before following our example, though at the same time they are bound to admit that it proceeds in the direction of the inevitable tendency, which will eventually give prisoners the option, in England as well as here, of being tried with or without a jury.

LEGISLATION.

Amongst the Bills before the present Parliament of the Dominion interesting to the lawyer, we notice several affecting Bills and notes; two for the purpose of providing for cases where stamps have not been affixed at the proper time or for the proper amounts, and innocent persons have become liable to penalties. Also, a Bill introduced by the Post-Master-General, intended to "assimilate the law of the several Provinces of the Dominion, as to Bills and Notes." This is a very important measure, and necessary for the convenience of mercantile men and most beneficial for the consolidation of the mutual interests of all concerned. The bill is in a great measure a re-enactment of the law already in force in this Province on the subject.

There are also two bills to amend the law respecting the extradition to the United States of persons charged with crimes committed in that country; a bill to amend section 71 of the Act respecting duties of Justices out of session in relation to summary convictions; a bill to amend section 3 of 32 & 33 Vic. cap. 23, respecting Perjury; and last, but by far the most important of all, is the bill to establish a Supreme Court for the Dominion of Canada. Of this we shall speak hereafter at length. It is of too much moment to be lightly passed over; and from what we hear, it is likely to stand until next session, which will give all an opportunity of discussing its provisions.

EXTRAORDINARY TRIAL IN CHINA.

A friend in China has sent us a paper, the *Overland China Mail*, published at Hong Kong, containing a report of a case of much interest and instruction to all persons concerned in the administration of criminal justice. During the absence in England of Chief Justice Smale, of the Supreme Court in the British Colony of Hong Kong, four Chinamen, Shek Aluk, Shek Achung, Shek Chung Leen, and Shek Qui Leen, the master and three of the crew of a junk, where tried, convicted and sentenced to be hung, for the murder of one Mahoney a police officer. This conviction was obtained upon the evidence of three Chinamen, Tung Pak Foo, Lee Akwai, and Lum Asang, who deposed to their presence at the date of the murder; the two latter deposed that they saw the four men and Tung Fak Foo, all armed, land from the Yee Lee junk on Saiwan Bay for Sowkewan; and Tung Pak Foo deposed that he was present participating with the four in the murder, and that he saw the wound which caused the death inflicted by the first prisoner.

The final decision as to their execution was fortunately delayed beyond the usual period, owing to special local circumstances.

On the 4th of November, some respectable Chinese residents in the Colony, being entire strangers to the four convicted men, presented a petition in which they alleged reasons for suspecting that the testimony of all the three witnessess was false, and they made out so strong a case as to induce the Governor in Council to commute the sentence of all four prisoners to penal servitude for life.

Suspicions were subsequently aroused as to the truth of the statements of these witnesses, and they were indicted for perjury, and ultimately convicted before Chief Justice Smale, on the clearest evidence of guilt.

The learned Chief Justice after reciting the facts and shewing the justice of the conviction

used the following language in sentencing the the prisoners:—

"Lum Assang and Lee Akwai, you have each been convicted of perjury in swearing on the trial of Shek Aluk, Shek Achung, Shek Chung Leen, and Shek Qui Leen, that they were landed from Saiwan Bay to near Sowkewan, on the night of the 17th of April last. You knew that they were on a trial for a crime for which you believed that there lives would, on conviction, be forfeited. You have admitted your crime, and you have made reparation as far as you can in the evidence you have repeatedly given; I have considered the excuse made by each of you, that you have each been subjected to imprisonment in the Police Chop, and to the pressure of the influence of the authority of the Water Police there to coerce you into perjury.

The learned counsel, Mr. Hayllar, after your trial, speaking for his client, the prosecutor, whilst he ably argued that all this forms no answer to the charge against you—that it did not exonerate you from legal guilt—admitted in expressive terms that the coercion which, as he said, had been proved, formed a very strong case of coercion as addressed to me in mitigation of punishment, that it formed quite a terrorism affecting your minds when you gave your testimony.

Concurring in all that has been humanely put forward, I must as judge blame you. Although I do not greatly wonder that the vile influences which were exercised prevailed over you, and although others were certainly far greater criminals, I cannot exonerate you from criminality.

I pass on each of you the lightest sentence, which considering all the circumstances of this case I can award.

The sentence of the Court on you, Lum Assang, is that you be imprisoned and kept to hard labor for six calendar months.

The sentence of the Court on you, Lee Akwai, is that you be imprisoned and kept to hard labor for six calendar months.

You, Tung Pak Foo, were defended by counsel who took every possible point and urged every possible topic in your favor. You are without excuse; no influence appears to have been exercised over you, and with great cunning (which all but succeeded), you deposed to facts and circumstances which you knew to be entirely untrue, as was demonstrated by your unsuccessful efforts by coercion and terror to suborn others to sustain your story by perjury. Your character as a person habitually on such terms with pirates as that a mere note from you was sufficient to protect honest trading boats from piracy, was proved on your trial. If you had your full deserts you ought to suffer the severest punishment possible.

The sentence of the Court on you for the crime of which you have been convicted, is that you be kept in penal servitude for seven years.

You, Choy Asam and Tung Pak Foo, have each been convicted of conspiracy, the object of which was in order to gain the Government reward of $500 to accuse in this Court, Shek Aluk, Shek Achung, Shek Chung Leen, and Shek Qui Leen of the crime of murder.

Neither of you had any excuse for your most wicked conduct.

The sentence on you, Choy Asam, is that you be imprisoned and kept to hard labour for five years.

The sentence on you, Tung Pak Foo, is that for this your crime of conspiracy, you be imprisoned and kept to hard labour for two years. This sentence and imprisonment to commence and take effect from and after the expiration or sooner determination of the sentence of penal servitude to which this Court has already sentenced you.

The result of these protracted trials is that it has been proved that Shek Aluk, Shek Achung, Shek Chung Leen, Shek Qui Leen, are not only "Not Guilty," of the murder of which they were convicted, but that they were innocent—absolutely innocent—indeed, that they are peaceable and honest sailors. Every right minded man must deeply sympathize with them for the mental tortures—worse than bodily tortures—to which they have been subjected in the fear of death—of an ignominious death—aggravated by the feeling that they were innocent.

The Government can, and I hope will largely (it is beyond its power adequately to) compensate these poor men for the wrongs done to them.

I see that Tuk Cheong and some of the other respectable Chinese residents to whose exertions so much praise is due, are present.

No words I can utter can increase the satisfaction which they must feel, that by exerting themselves they have proved the innocence of the four men, and with so good an effect. Every right minded man must feel indebted to them. I trust that the success of their efferts will well satisfy them for the money which they have with right good heart expended to bring together such a mass of conclusive evidence, as has enabled this Court to exercise its most noble function, the elucidation of innocence. These efforts have been well seconded by the very able way in which the facts of the case have been marshalled before the Court. I trust that this success will induce them and other respectable Chinamen to take in uture a more active part in effectually aiding

the Government in the suppression of crime and violence, and in securing good order, in which they have as deep an interest as any other persons in this Colony.

Reflecting persons may probably be shocked that four innocent men were so near being executed, and will ask what security there is that the irrevocable penalty of death has not often been inflicted in this Colony on innocent persons. I confess that I shuddered when this question forced itself on me; but on careful reflection, I feel satisfied that there is no just reason for alarm.

A Blue Book published in 1866. Report of the Capital Punishment Commission, gives for three years, 1851-63, fifty-two as the number of executions in England, under fifteen judges, while during the same period thirty men were executed under sentences by one judge in this Colony. I have not the English Returns up to this date, but there have been since 1863, thirty-seven executions in this Colony, which I believe is in a ratio to the executions in England much greater than the proportion was in previous years. It appears that executions in this small Colony have been since 1860 more than half, probably two thirds part, in number of all the executions in all England.

With a responsiblity greater, I believe, than weighs on any other judge administering English Criminal Law, I have ever followed what the Chief Baron Sir Fitzroy Kelly stated in the same Report to be practiced in all English Courts. I have always 'exercised a degree of care, and caution in conduct of trials for life and death—vastly superior to that which formerly prevailed.' These cases confirm my resolution to exercise the like care and caution as long as I may preside in this Court.

I have obtained from Mr. Douglas, the very intelligent and able Superintendent of the Gaol, a return of all cases, 66 in number, which have ended in an execution, since I came in 1861 to this Colony. I find from Mr. Douglass that in nearly every case since he came to the Colony, the criminal has confessed his crime—indeed in every case where I have presided—and I have no reason to suspect that any one innocent man has been executed on the sentence of any judge in this Colony."

SELECTIONS.

THE FRENCH BAR.*

At a time like the present, when changes are taking place in the administration of the law, and when, as incident thereto, some changes, the extent of which it is not easy to measure, may take place in the organization of the legal profession in both its branches, the appearance of Mr. Young's book is most opportune.

In reading this most interesting and unpretending work, one cannot help being struck with the great differences which exist between the two professions in our own country and in France. Taken broadly, the ambition of the English barrister is to become a judge; he may have to be satisfied with something far short of that exalted dignity, but at the outset of his professional voyage the Bench is his goal, and "very sea-mark of his utmost sail." Political life, purely as such, with very rare exceptions he does not venture upon. The reason for this is partly due to the fact we have stated, and partly due to other causes, and among others to this, that political life in this country is the profession of the highest in station or the wealthiest in purse. The portfolio of the minister, on the other hand, is the ambition of the French advocate. The Bench in France is not recruited from the Bar, nor does it hold in public estimation that almost sacred place that it does with us; and, further, the social position of the judges is not so high as in this country, nor are the emoluments of the French judges upon the same scale. It is therefore to political life that the advocate in France looks, and in that he centres his hopes.

The work before us, within a compass of some 250 pages contains much varied and interesting information. If we may find fault with so admirable a book, we should say that it was somewhat overlaid with dates and detail. But, as the author terms the volume a *Sketch* of the history of the order of advocates, as well as of the biography of many of the illustrious members of the French Bar, perhaps this was unavoidable. The book travels over a great extent of ground, or rather of time, it speaks of events of great interest and importance, and traces dilligently and lovingly down the stream of five hundred years of history, the course of that great profession, the eloquence and ability of whose members have done such splendid service for France.

That the history of an "order as ancient as the magistracy, as noble as virtue, as necessary as justice," should be interesting is but natural. But the history of the French Bar is something more. It is the history of the courage, the devotion, and the patriotism of many

* An Historical Sketch of the French Bar, from its origin to the present day, with Biographical Notices of some of the principal Advocates of the Nineteenth Century. By Archibald Young (Advocate), Edinburgh. Edmonston & Douglas. 1869.

of the foremost men of their country, it is the history of the growth of liberal opinion, of enlightenment, and civilization.

The profession of advocate in France dates from a very early period, and although existing as a separate order earlier than the reign of Philip the Fair, the reign of that monarch is a very important epoch in the history of the French Bar. Philip made the parliament stationary, which formerly had followed the person of the king, and thus he greatly increased the power and influence of the Parisian Bar.

To a somewhat similar circumstance our own Bar owes perhaps its existence. In this country the 'Bar,' in the sense in which that phrase is commonly understood, cannot be traced further back than the thirteenth century, for it was not until after Magna Charta that the Courts of Law were permanently settled at Westminster, instead of following, as they previously had done, the king's person in his journeys through the country. Speaking generally, the French Bar is a provincial one, scattered over the country, while our own is metropolitan, the system of circuits in this country to a great extent obviating the necessity of barristers settling in different parts of the country.

The growth of business, however, has in England already attracted great numbers of the junior Bar into the provinces, and as unquestionably the present current of our long needed law reforms sets in the direction of centralization as from many centres, the result will be that our own Bar will become to a great extent provincial also. If this be so, we fear the result will be a degradation of the profession, which one would greatly deplore. The circuit system once destroyed, even the imperfect control the mess at present exercises would be destroyed, and all discipline would be at an end.

No one can read a book such as that of Mr. Young's without seeing how vastly the administration of the law, and how greatly its dignity, depend upon the character and conduct of those who are its ministers.

Already changes are at work (to which attention has been publicly drawn) which argue but ill for the maintenance of the traditionary honour and dignity of the profession in this country. It would be well for the Bar (if for once the body would act as their brethren in France have done repeatedly) to consider, in view of changes which must operate upon them, whether it would not be desirable to organize some new and distinct method of discipline throughout the provinces, in forming local bars, with appointed officers, or some system or machinery whereby professional decorum and order may be maintained. With this special evil of provincialism to contend against, and under all the changes and vicissitudes through which France has passed, her advocates appear to have maintained unchanged the traditionary character, dignity, and political power bequeathed them by their Roman forefathers. This is due, we think, to the more perfect organisation of the profession in France, and to its loyalty to itself. In France the status of the Bar, and the conduct of its members, has been considered matter of imperial concern, and the State has, by positive enactment, laid down rules for its guidance.

Laws have been passed from time to time in France, regulating the conduct of the Bar. One law provides that all arguments calculated to injure the opposite party should be spoken courteously, and another forbids the advocate to make any bargain with the party for whom he pleads for a share of the matter in litigation. This latter rule would seem to resemble our own, save that the rules of conduct which obtain at the English Bar are purely consuetudinary, and the disability which the English barrister lies under from enforcing by action the payment of his fees seems to apply also to the French Bar. A subsequent law of Philip the Bold, published in 1274, imposes upon advocates the obligation of swearing that they will only take charge of those causes which they believe to be just, the refusal to take the oath being punished with interdiction. This rule opens up, no doubt, matters which have been subjects of keen controversy, with which we here cannot deal, but we will only say that in our opinion such a rule has only to be made to be practically abrogated. "If an advocate refuses to defend," says Lord Erskine, in his defence of Thomas Paine against the charge of publishing a seditious libel (this was in 1792), "from what *he may think of the charge*, or of the defence, he assumes the character of judge, nay, he assumes it before the hour of judgment."

The conduct of advocates in this country has been subjected to very little legislative interference. But a statute lately in force, and for all we know it may be so yet, passed in the reign of Edward I., A.D. 1275, enacts, "That if any serjeant, counsellor, or others, do any manner of deceit or collusion in the King's Court . . . he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that Court for any man." And further, in that old book, the "Mirroir des Justices," c. ii., s. 9, it is, among other things, ordained "That every pleader is to be charged by oath that he will not maintain nor defend what is wrong or false to his knowledge, but will fight for his client to the utmost of his ability." This injunction, our Bar we think, fairly carries out. The second and third articles of the French law which we have mentioned treat of the fee of advocates, which were to be proportioned to the importance of the cause and the skill of the pleader. The fee was never to exceed a sum equal to about 27*l.* of our money.

In the year 1291, Philip the Fair confirmed the enactments of Philip the Bold concerning the fees of advocates and the prohibition to

receive anything beyond the amount fixed by law. From time to time further regulations were made with respect to the duties of advocates, and it is almost amusing to read the repeated recommendations and injuctions addressed to the advocates to be brief in their pleadings, prolixity having been evidently a fault with the Bar of France at all times in their history. The limitation as to the amount of fees seems soon to have fallen into disuse, as we find that in 1453 the advocates were recommended to be moderate in their fees. One usage, which obtains in England at the present time, namely, the signature of counsel under the fee marked upon their briefs, was the subject-matter of an ordinance in the time of Henry III., and forms the occasion of a memorable incident. The king enjoined the Bar to write with their own hands beneath their signatures the amount of fees they received. The Bar refused to obey the injunction, and in truth resented it as an insult, and to show their determined hostility went in a body to lay down their functions, declaring that they voluntarily abandoned the profession of advocate rather than obey a law injurious to their honour. Four hundred and seven advocates in all thus solemnly protested against the ordinance. When the Parliament met there were no advocates to plead and justice was at a standstill. In the end the Bar succeeded. This is a very strong instance of the internal discipline of the French Bar, and of loyalty to their order, and affords, perhaps, the first example recorded of a strike. Be this as it may, we doubt if the Bar here would ever act as resolutely or so completely in union.

Our author thus describes what may be termed the organization of the profession.

"From a pretty early period in its history the Bar of Paris was accustomed to arrange itself by benches, in order that its members might meet and confer more easily. These benches were placed in the great hall of the Palais de Justice or in the adjacent galleries. In 1711, the advocates, formerly divided into eleven benches, were arranged in twelve. The first was composed almost entirely of seniors, and a few seniors were placed at the head of each of the others, after whom came the younger members, according to the date of their admission into the order. This organisation, however, was found to be very imperfect, and in 1780 the fifth bench contained 101 advocates, the seventh nine, and the eighth seven; while the tenth had ninety-five, and the twelfth ten. In 1781, a reform took place, and the order was divided into ten columns, each containing from fifty to sixty advocates. Each column elected two deputies, whose functions lasted for two years, and who might be re-elected. These deputies from the different columns, along with the former presidents of the Bar, constituted the council of the order, elected its presidents, watched over its roll, and maintained its discipline. The advocates were further divided into three classes—listeners (*avocats ecoutants*), pleaders (*avocats plaidants*), and consulting advocates (*avocats consultants*). According to the ancient practice, the young licentiate from the University was presented to the court by one of the seniors of the Bar, and the president administered to him the oath to observe the laws, which he took standing upright, in his gown, with uncovered head, and right hand uplifted; in short, the ceremony of the oath seems to have been very similar to that at present observed at the Scotch Bar. A minute of the taking of the oath was then drawn up and signed by the senior, or, as he was termed in the olden times, the godfather of the young jurist. After taking the oath, the advocate might assume the gown, but he had not yet the right of pleading. He entered upon a period of probation, called *le stage*, which, by a decree of May, 1751, was extended to four years. Upon the lapse of this period, his name was inscribed in the roll of advocates upon the report of one of the chiefs of his bench or column. The pleaders (*avocats plaidants*) were highly respected, and had the right, not only of appearing in the Courts of Parliament, but also in all the inferior judicatories. The mutual exchange of papers was considered one of the courtesies of the profession, and, before pleading, the advocates were in the habit of making extracts from their briefs, containing the facts of the case, and communicating them to the plaintiff's counsel. Pleading and consultation for the poor was one of the established rules of the ancient Bar and every week nine advocates met in order to hold gratuitous consultations on the causes of the poor. The advocates, as at present, spoke with their heads covered, except when they pleaded before the King's Counsel. The consulting advocates—*advocati consiliarii*, as they are termed in the old ordinances—held the highest rank at the Bar. They gave their advice to the pleaders, they regulated the affairs of families, and were entrusted with many matters of the highest moment. They had a bench set apart for them in Parliament, and were entitled to a seat on the *fleur de lis*. The head or president of the French Bar was, and still is termed a *bâtonnier*. This title dates back to the middle of the fourteenth century; but for a long time after that period it was an office of little importance. The name is derived from an ancient usage, according to which the staff (*bâton*) of the banner of St. Nicholas, the patron of the confraternity of advocates, was carried at the head of the order in processions and ceremonies. He who carried it was termed *bâtonnier*. So late as 1602, however, the dean (*doyen*) held the first place at the French Bar, the *bâtonnier* only the second. The latter is mentioned for the first time as the head of the order in 1687; and it is only since July, 1693, that he has had a legal title to be considered the head of the Bar. Formerly, the senior member of the order, by date of inscription on the roll, used to be elected *bâtonnier*. But as the great age of the advocate thus chosen often unfitted him from efficiently discharging the duties of an office requiring watchfulness and tact in no ordinary degree, the order determined to give up this principle of election. The *bâtonnier* is chosen for one year only; but since 1830 it has been usual, at the close of his first term of office, to re-elect him for a second year. The *bâtonnier* has the privilege of making his business appointments at his own residence, even with those who

are his seniors at the Bar. The title of dean (*doyen*) belongs to the senior member of the Bar inscribed on the roll; but it confers no other privilege than that arising from seniority. The *bâtonnier*, the former *batonniers*, and the deputies from the columns form a council, which meets in the Advocates' Library, and whose chief object is the preservation of the discipline of the order. The *batonnier* himself adjudicates upon trifling complaints against members of the Bar; but if the matter is of consequence, he reports it to the council. If the suspension of a member, or the erasure of his name from the roll, is to be deliberated on, the *batonnier*, after examining into the matter, reports to the Crown counsel, and their decision is registered. In the most important and serious cases, the court is petitioned to give judgment in terms of the requisitions of the *bâtonnier*, and the conclusions of the Crown counsel. At the expiration of his term of office, the *bâtonnier* makes up the roll of advocates, with the assistance of the former *batonnier* and the deputies, and deposits it in the register before the 9th of May"

(*To be continued.*)

SLANDER.

Considering the very great importance of the rights of reputation, it is somewhat surprising that there is scarcely any branch of the law which is less generally understood than slander. Though the majority of persons have, at some period in their lives, been the victims of false and injurious reports, yet actions for slander are few and far between. The fact that the decisions are frequently obscure and conflicting, while the procedure for reparation is cumbrous and expensive, may account for the infrequent appearance of this class of cases in our law courts. Our daily experience of unhappiness in families in the higher, loss of trade in the middle, and violence and crime in the lower classes, originating from false and malicious statements, forbids our attributing this reticence from legal process to any other causes. It may, therefore, be interesting to consider somewhat briefly the present state of the law, and the defects therein, that from these considerations we may educe some suggestions for the further protection of the public against—

"The tongue that licks the dust,
But when it safely dares, is prompt to sting."

Slander is an injury for which, by law, an action for damages will lie. Criminal proceedings cannot be taken for mere spoken words, unless they are seditious, blasphemous, grossly immoral, or addressed to a magistrate while in the execution of the duties of his office, or with reference to those duties, or uttered as a challenge to fight a duel, or with an intention to provoke another to send a challenge. To be actionable, the accusation must be wilful, to the damage of another in law or fact, and be made without lawful justification or excuse. Express malice may be implied from the slander itself, and need not be proved. The allegation must be *false;* it must impute an indictable offence, a contagious or infectious disease, or be injurious to the profession or business of the plaintiff, or tend to his disherison. In the first case, not only a punishable offence must be alleged, but it must be such a crime or misdemeanour as incurs corporal punishment. The charging an offence, therefore, merely punishable by a pecuniary penalty, although, in default of payment, imprisonment should be prescribed, would not be actionable, the imprisonment not being the primary and immediate punishment.

But the more frequent ground of action is that of *special damage*, as where, by the wrongful act of the defendant, a servant was prevented from procuring a situation, a tradesman lost his custom, or a woman her marriage. It should, however, be borne in mind, that the damage must be the mere natural and direct consequence of the unlawful act.

To the mind of a layman not versed in the nice distinctions of the law, the definition of what is, or what is not slander, is most perplexing. For example, it is not actionable to say, "J. S. is a murderous villain," as this simply implies an inclination; but to say, "J. S. is a murdering villain," would be actionable because it imports a crime committed. To charge another with a crime of which he cannot be guilty, as having killed a person still living, is not actionable, no matter how much the accused may have suffered in reputation therefrom. It is also a matter of difficulty to ascertain what is an infamous punishment.

No one, we think, will be prepared to say that a greater injury can be inflicted by slander than when an imputation is made on a woman of loss of chastity, yet, as the law stands, no damages can be recovered from the traducer, unless specific damage can be proved, which, in many instances, is simply impossible. Chief Justice Cockburn has said, "I think the law very cruel in preventing a woman who has been thus wantonly slandered from bringing an action for the purpose of vindicating her character." Lord Brougham considered the law not only "unsatisfactory" but "barbarous," while many other judges have regretted the state of the law in this respect, and expressed their dissatisfaction that they were not at liberty to determine differently. Illness may ensue from the excitement produced by the slander; a wife may become ill and incapable of managing her domestic affairs; her husband may be put to expense in curing her, and yet it is held, that mere mental suffering or sickness, supposed to be caused by words not actionable in themselves, would not be special damage to support an action. Let, however, the words be written, and the libeller would be liable to either imprisonment or damages.

We would here invite attention to the punishment of the slanderer. In the time of Alfred, the *publicum mendacium* was punished by the cutting out of the tongue, subject to redemption, *juxta capitis æstimationem.* The Greeks

inflicted a penalty on the offender, and the Romans added to the fine the mulcting of the defendant in damages. Until very recently, the Ecclesiastical Court had jurisdiction in cases of defamation, and we find in the *London Chronicle* of 1790, that a lady was publicly excommunicated in that year—

"For defaming the character of another lady acquaintance. She was put in the Spiritual Court some time since, but refused to make any concession, although repeatedly applied to by the friends of the other lady. The consequence of excommunication is she cannot enjoy any legacy, inherit an estate, or receive benefit by law except in criminal cases."

By the 18 & 19 Vict. c. 41, the jurisdiction of the Ecclesiastical Court in cases of slander has been abolished, and the only remedy now left is by action of damages.

It has been said by a learned writer:—

"It would be highly inexpedient and mischievous to subject the utterer of every expression which might possibly provoke offence and retaliation, and ultimate violence, to a penal prosecution; it would be attended with fearful evils, legal as well as moral, if men's mouths were to be closed to all communications in which the character or reputation of others might possibly be involved. What, then, is to be done if the evil cannot wholly be excluded, and cannot be tolerated without some restraints?"

We think that the same necessity of proving legal malice as now would exist should slander be made punishable in a Criminal Court, and it would certainly have as strict proof. We respectfully differ from the great authority we have quoted in thinking that men's mouths would then be closed in any fair or just communications respecting the character of others; and we think that the present law places the poorer classes, to whom not unfrequently their character is their one chance of livelihood, in an unequal position before the law. A working man who has been foully slandered, and who has sustained special damage, must bring his action, and must give security for costs. This with many is an impossibility; and so the slanderer may reiterate his falsehoods, and ruin his victim without the latter having any means of redress. What wonder, then, that the experience of Criminal Courts will show a long array of crimes of violence, arising from unchecked slander. Libel is in law worse than slander, because (it is said) of the more durable publicity, and the deliberation of the slanderer in reducing the statements to writing; and therefore it has been made penal, while slander is comparatively free. We do not urge that the same punishment should be awarded to the slanderer as the libeller, but we can see no reason why the utterer of a false and malicious falsehood, tending to the damage of another, should not be compellable before magistrates to enter into recognizances for his good behaviour for the future, and that words which if written would be libels, should for the purposes of binding over be considered slanders if spoken.

In the consideration of this subject, we have derived considerable advantage from the perusal of the recent edition of "Starkie's Law of Slander and Libel," edited by Mr. Folkard.—*Law Magazine.*

CRIMINAL TRIALS WITHOUT JURIES.

The Canadian Parliament last year passed a very remarkable Act, making a radical change in the constitution of criminal courts by dispensing with juries. A writer in the *Canada Law Journal* for November says, "It is one of those gigantic strides in legislation, the full bearing and extent of which is not at first fully perceived, but when brought into use, and its value seen, we all are apt to wonder why it was not long before placed on the Statute Book."

This is certainly an accurate description; it is a gigantic stride in legislation, and one which requires strong evidence of its beneficial operation to induce approval in this country. A correspondent, in a position which gives him an opportunity of learning the general feeling of the country, tells us that the statute was introduced by the head of the Government of Ontario, the Hon. Mr. Attorney-General Macdonald, and "that the measure has been most favourably received by the Judges, the Bar, and the general public."

From the artcile in the journal before mentioned we find the scope of the statute to be this. Each local judge in Ontario sittting under the provisions of the statute, and for every purpose connected with or relating to the trial of offenders, is created a court of record. No regular sittings are appointed, but the court sits from time to time as occasion may require. The Clerk of the Peace is appointed to act as clerk of the court, and the sheriff acts in the same way as in other criminal courts.

The *jurisdiction* of the court, as respects the nature of the charge, extends to "all offences for which a prisoner may be tried at a general session of the peace," in other words, *to nearly every crime, short of a capital felony, known to the law;* and if convicted, "such sentence as the law allows and the judge thinks right" may be passed upon the convicted persons. The jurisdiction, however, is limited to persons committed to gaol on such charges and consenting to be tried by the Judge.

The *procedure* is this: Within twenty-four hours after a prisoner is committed to gaol for trial upon any such charge, the sheriff notifies the Judge of the fact, and when the local prosecutor is ready to proceed (having received and examined the depositions and papers which the law requires to be laid before him for the purpose) he informs the Judge, and an order is at once issued, and under it the prisoner is brought before the Judge in open court. A formal accusation in the nature of an indictment describing the offence (prepared in the mean time by the public prosecutor from the

depositions, &c.) is then read to the prisoner by the Judge, as the charge against him. The prisoner is then informed by the Judge that he has the option of being forthwith tried by the Judge without the intervention of a jury, or remaining untried till the next court of general session of the peace, or oyer and terminer. If the prisoner, as he has a right to do, declines the jurisdiction and demands a jury, he is remanded to gaol. If he consents to be tried by the Judge, he is at once arraigned and called upon to plead to the accusation. If the prisoner plead "guilty" sentence is at once passed. If his plea be "not guilty," his trial is at once proceeded with, if the Crown and prisoner are both ready, or, if not ready, the proceedings are adjourned to an early day. On that day the trial is entered upon, but may be further adjourned in the discretion of the Judge for the purpose of completing the evidence for the Crown; that is, before the prisoner has gone into his evidence: or to enable the prisoner to produce other and further evidence, of which he was not aware at the time he entered on his defence, as being material thereto. The rule as to the other proceedings, and as to evidence at the trial, is the same as in ordinary cases, and before passing sentence upon the prisoner, the same questions will be asked as in other criminal courts; and if the prisoner has anything to urge why judgment should be arrested, or why sentence should not be passed, it is to be heard and determined by the court. None but barristers-at-law will be heard as counsel.

The arguments advanced in favour of this procedure are, (1) speedy trial of prisoners, and thereby a saving of expense; (2) the prevention of the lengthened association of young with hardened criminals before trial; (3) provision against the injustice of keeping innocent persons incarcerated who are unable to find bail. The one argument in favour of a trial before a single Judge, instead of before twelve, is obvious. "What intelligent man," it is said, "conscious of innocence, would not prefer being tried before an educated man, trained to the investigation of facts and above the reach of irregular influences, rather than by a number of men taken from the general community, utterly unacquainted with the investigation of facts, and with but little scope for the exercise of their reasoning powers." This is the whole question, and it is a question which is coming more nearly to the surface in England, and our criminal courts are now the only courts in which a Judge cannot by any possibility be called upon to decide upon facts. In Chancery, Bankruptcy, Common Law, and Divorce, the Judges are now in various ways selected by the parties to adjudicate upon facts. It would be in the last degree unconstitutional to compel any person to submit to judicial decision upon both law and fact, and more particularly so where the subject matter is a criminal charge. But we can easily believe that even in England the time is not far distant when it will be made optional for the prisoner to be tried with or without a jury.

At any rate we fully concur in the views of our Canadian contemporary, and consider the experiment one which in a new country might be safely made with possibly useful results. And we in the old country may derive advantage from observing the operation of the statute, and if we see that it works well, may in time follow the example thus set us.—*Law Times.*

ONTARIO REPORTS.

ELECTION CASES.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Reg. ex Rel. Ford v. McRae.

Treasurer—Annual appointment—Election—Contract with Corporation—Notice to electors of disqualification.

The Treasurer of a Township was appointed by annual by-laws, which were silent as to time, in 1859, 1860 and 1861. In 1861 the defendant became his surety by bond, which, however, did not state the duration of the liability. In 1863 the same Treasurer was also appointed by a similar by-law. In 1864 the by-law limited his liability to the year 1864. From thence to 1868 no time was specified, but was in that year. In 1869 the Treasurer's accounts were audited and found correct. *Held*, that this bond was only a continuing security until the expiration of the Treasurer's term of office, and that the liability ceased on his re-appointment in 1863, and that therefore the defendant had not an interest with the corporation so as to disqualify him as a councillor.

To entitle a candidate to the seat claimed by him on the ground of his opponents disqualification, it must be shewn that the qualification was objected to at the *nomination*, so that the electors might have an opportunity of nominating another candidate.

[Chambers, February, 1870.]

This was a writ of summons in the nature of a *quo warranto*, calling upon Farquhar McRae to show by what authority he exercised or enjoyed the office of Reeve of the Village of Colborne, and why Charles Raymond Ford should not be declared duly elected to the office of Reeve and admitted thereto.

The statement and relation of Ford complained that he Ford was duly elected Reeve, and ought to have been returned, &c., &c. He stated the following cause why the election of the defendant to the office should be declared invalid, and he, Ford, duly elected thereto—First, that the defendant was disqualified by reason of his having at the time of such election, an interest in a contract with the Corporation of the Village of Colborne, in that he was bound in a bond to the said corporation in $2,000, for the faithful performance by one Merriman of the duties of Treasurer of the Municipality, of which the electors had notice. That before the opening of the poll on the 3rd of January last, he Ford notified the Returning Officer and the electors then present, that he claimed to be duly elected Reeve for the present year, and protested against any poll being opened or votes taken by the Returning Officer for candidates, and delivered to him and to the defendant printed copies of the following notice:—"Take notice that I claim to be duly elected Reeve for the Village of Colborne for the year 1870, on the ground that I

am the only person duly qualified, who was nominated and seconded for that office, at the nomination of Reeve and Councillors for the Village of Colborne, for the year 1870. Mr. F. McRae, the only other person nominated for Reeve, being disqualified on the ground that he is surety for J. M. Merriman, Treasurer of this Municipality. I hereby protest against any votes being received by the Returning Officer for any candidate for Reeve, and notifiy the electors that any votes given by them for candidates for Reeve, will be thrown away,

(Signed) C. R. Ford."

The relation further stated that printed copies of such notice were posted up in conspicuous places, prior to the opening of the poll.

Robt. A. Harrison, Q.C., supported the summons, and contended that it did not matter whether there was any liability on the bond, but the question was whether there was a contract with the Corporation, and it was admitted that there was, and no discharge was shown. The bond, too, was conditional, to the effect that the Treasurer should at all times, during which he held his office, do certain acts enumerated. The office is not an annual office. The re-appointment of the Treasurer from year to year was an unnecessary Act. He cited secs. 161 and 177 of the Act of 1866; *In re McPherson, and Beeman*, 17 U. C. Q B. 99; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44; *Reg. ex rel. Rollo* v. *Beard*, 1 U. C. L. J. N. S. 126. The notice being given before the day of voting was sufficient to entitle the relator to the seat if the defendant should be disqualified; for if the electors had the notice, they threw away their votes, which was all that was required.

Armour, Q. C., shewed cause, and contended that the appointment of Treasurer was an annual one, and the bond was of no effect after the year was up: *Peppin* v. *Cooper*, 2 B. & Al. 431; *Liverpool Water Works Co.* v. *Atkinson*, 6 East, 507; *Angero* v. *Keen*, 1 M. & W. 390; *Bamford* v. *Iles*, 3 Exch. 380; *Mayor of Berwick* v. *Oswald* 1 E. & B. 295, 3 E. & B. 653, 5 H L. Cases, 856; *Pybus* v. *Gibb*, 6 E. & B. 902; *Reg.* v. *Hall*, 1 U. C. C. P., 406; *Reg. ex rel. Hill* v. *Betts*, 4 Prac. Rep. 113 He also contended that the objection to the election was taken too late; it should have been taken at the nomination, and the notice was given just before the election: *Reg. ex rel. Tinning* v. *Edgar*, 4 Prac. Rep. 36; *Reg. ex rel. Adamson* v. *Boyd*, 4 Prac. Rep. 204: *Reg.* v. *Mayor of Tewksbury*, L. R. 3 Q B. 629.

Affidavits were filed on both sides. The material facts are referred to in the judgment of

Morrison, J.—In this case there are no disputed facts. It appears that on the 20th of December last, at the nomination of Reeve for the Village of Colborne, for the present year, the relator and defendant were duly nominated as candidates for the office—no objection at such nomination being made to the qualification of the defendant. A poll being demanded, the polling was fixed under the statute for the first Monday in January; on that day the relator publicly notified the electors, as stated in the notice set out in his statement, that he claimed to be elected Reeve, on the ground that the only other person nominated being the defendant, he the defendant was disqualified, on the ground that he was surety for the Treasurer of the Municipality, and he notified the electors that any votes given by them for Reeve would be thrown away. The election nevertheless proceeded, and the defendant was declared elected—having a majority of votes.

On the 12th of January this application was made.

It appears from the affidavits filed that Mr. Merriman, for whom it is alleged the defendant was a surety, was first appointed Treasurer by a by-law for the year 1859, again by by-laws for the years 1860 and 1861, respectively. In the latter year the defendant became one of his sureties. The bond contains no recital, but the condition is—"That if Merriman do and shall from time to time and at all times during his said office as Treasurer of the said Municipality, to which he has been appointed, well and truly account for all monies which he may from time to time receive, &c., and pay over and deliver any sum or sums ordered to be paid by the said Municipal Council, their successors or assigns, and in all things duly execute and perform the duties of his said office, and if upon his discharge or at the expiration of his term of office, he shall render up quiet and peaceable possession of the books and accounts belonging to his said office as Treasurer, &c., unto the said Municipality, their successors or assigns, then the obligation to be utterly void, &c."

Now it appears that this Council annually appointed by by-law their Treasurer: that Mr. Merriman, as already stated, was so appointed in the years 1859, 1860 and 1861, and in the latter year the defendant became his surety. Mr. Merriman was afterwards re-appointed Treasurer by by-law in 1863, and also in 1864, in the previous years his appointment was, as to time, silent; in 1864 the by-law specifically limits his appointment to the year 1864; in the following years he was also re-appointed without specifying the period, until 1868, when his term of office was again limited to that year. At the end of all these years, including 1869, the Treasurer's accounts were duly audited and found correct. Attached to the Treasurer's affidavit is the bond in question, and it further appears by an indorsement on it, that by a resolution of the Council it has been cancelled. This was done since this application was made, and could have no effect on my decision, but I only note the fact as shewing that the Municipality consider they have no claim under it. I also may remark, that in the year 1863 this defendant was elected a member of the council.

Looking at the conditions of the bond, from which I must gather the contract between the parties, it refers to Merriman's then appointment as Treasurer, and the limit of the sureties in point of time is that of his discharge or the expiration of his term of office. Now, considering that this office of Treasurer was by the uniform rule and action of the Municipality an annual one and under the authority of an annual by-law, and the condition of the defendant's bond contemplated an expiration of the treasurer's term of office, it is, I think, only reasonable to assume, that the Municipality and the Treasurer acted upon the assumption that the term of office expired at the end of each municipal year, and

that the sureties joined in the bond knowing such to be the case and only for the year, as sworn to by the defendant. It is true, as argued by Mr. Harrison, if the Treasurer had not been re-appointed, that under the 177th section of the Municipal Act he would hold office until removed by the Council. But the fact of his re-appointment in 1863 implied at all events that his term of office expired at the end of 1862, and his re-appointment by by-law in 1864, expressly limiting his appointment to that year. At the end of that year his term of office certainly expired, and as he made no default but faithfully performed his duty, &c , as Treasurer, up to that period, his sureties under the bond in question were discharged from all liability—if they had not been discharged at the end of 1861 or 1862. There are no words in the condition indicating that the sureties engaged to be liable upon his re-appointment from time to time. The council might have taken a bond continuing the liability of the sureties upon fresh re-appointments, but such an intention should expressly appear in the bond. What was said in giving judgment in the case of *Mayor of Cambridge* v. *Dennis*, E. B. & E. 659, which was the case of a treasurer's bond, has a strong bearing on this case There the learned judges were of opinion that the sureties did in fact look beyond the current year, but they were constrained to give judgment for the sureties. Coleridge, J., said, "I incline from what generally passes on these occasions to believe that the parties did not think much about the point, but knowing that the office was annual gave their security for it as they found it. However supposing that not to be so, we are clearly not at liberty to resort to such considerations in construing this instrument; we must take its words and apply the law to them. It is admitted that, *prima facie*, the security would be limited to the time for which the office was appointed, and it lies on the plaintiff to displace this—and that seems to be just. The obligor knows at the time to what extent he is bound, and may estimate the liability which will devolve on him during the time, but he cannot know what liability may devolve on him at a distant time. Suppose two different instruments in writing were presented to him and he were asked, will you be surety for one year or for the whole life of the officer if he continues in office, would not any man consider there was a great difference between the two. I think therefore the presumption is, the defendant proceeded upon the rate of things which he knew to exist, and that was, that the officer was appointed for a year, and was liable to be not appointed for a second year; if that was presented to the mind of the surety he would execute the bond with the knowledge of his liability, unless the terms of the instrument were altered, would be over at the end of the year." And Crompton, J., said, "It is important that we should judge by the rules of law and not by guess. Nothing is better established than that a surety executing such an instrument as this is to be taken to be giving security only in respect of the existing office. When there is a re-appointment he has a right to say the office is not the same." I refer also to the various authorities cited in that case.

On the whole I am of opinion that this bond was only a continuing security until the expiration of the Treasurer's term of office, which term ended upon his re-appointment in 1863, and at the furthest ended in 1864 under the by-law limiting it to that year, and as it appears that up to that period, and years after, the Treasurer duly performed the duties of his office, and the liability of the defendant ceased under the bond. And that at the time of the nomination of the defendant and of his election he had no interest in a contract with the corporation arising under the bond in question, and this application must therefore be discharged.

It is not necessary that I should give any judgment on the other point raised I however considered the question, and I arrived at the conclusion, that as the defendant's qualification was not objected to at the nomination but at the time of the polling, when the electors could not nominate another candidate, it would be unjust to the electors and unreasonable under such circumstances, to deprive them of a further opportunity of electing a person of their choice.

The application must be discharged with costs.

Order accordingly.

COMMON LAW CHAMBERS.

In the Matter of Mary Therese Kinne.

Custody of infant—Right of father.

A girl aged thirteen years and ten months, who had lived with her aunt from infancy, was allowed, on an application by her father for her custody, on allegations that she was illtreated by her aunt, to elect whether she would remain with her aunt or go to her father.

Semble, That if the child had recently left or been taken away from her father she would be ordered to return to him without reference to her own choice, at all events up to the age of sixteen.

[Chambers, January 12, 1870.]

On the 6th December, 1869, *O'Brien*, on behalf of Thomas Kinne, the father of Mary Therese Kinne, obtained a writ of *habeas corpus* under the provisions of 29 & 30 Vic. cap. 45, on the fiat of Mr. Justice Galt, commanding Stephen Keever and Lucy Keever, and such other person as might have the custody or control of the said Mary Therese Kinne, to have her body before the presiding judge in Chambers, &c.

The order for this writ was founded on the following affidavit of the father of the girl who described himself of the Town of Hopewell, in the County of Albert, in the Province of New Brunswick, farmer:

"Mary Therese Kinne, now to the best of my belief residing in the Township of Harwich, in the County of Kent, of Canada, is my daughter by my late wife, Mary Kinne, now deceased. She was born in Harvey, in the County of Albert aforesaid, on the fifth day of March, one thousand eight hundred and fifty six, and for the greater part of her life she has resided with her aunt Lucy Keever, wife of Stephen Keever, of Harwich aforesaid, yeoman. Her mother died about three years ago.

In August last I received letters from the said County of Kent, from persons acquainted with said Keever, and from the information they contained I was induced to travel from my home in New Brunswick to Chatham in Kent

aforesaid, to look after the child, and from the information I have received from inquiries made since my arrival in Chatham, I have no doubt that she is and has been most brutally and inhumanly treated by her aunt aforesaid, and that it is absolutely necessary that I should take her in my charge and provide for her myself at my home in New Brunswick.

Upon my arrival in Chatham, I had interviews with the said Keevers, and informed them of my desire that the child should return to New Brunswick with me. They seemed at first disinclined to allow this, but afterwards appeared quite willing, and Mrs. Keever said she had only wanted a little delay to prepare clothing for the girl's departure, but this appears to have been only done to lull suspicion, as both the Keevers now absolutely refuse to give up the child, and state that she has left them, and they do not know where she is, but Mrs. Keever said she could find her."

On 17th December, Stephen Keever and Lucy Keever, made and filed a return to the writ to the effect that they could not produce the said child as commanded, as she was not and had not for some weeks past been in their custody or control. This return was verified by their affidavits.

An enlargement was thereupon obtained to enable Thomas Kinne to object to the sufficiency of the return to the writ, and to contradict the truth of the facts set forth in the return, under sec. 3 of 29 & 30 Vic. cap. 45.

Pending this examination of the truth of the return, and of an intended application under sec. 2 of the same act, for the apprehension of the Keevers for disobedience of the writ, Mrs. Keever appeared in Chambers with the child, alleging that since the filing of the return she had ascertained where the child was, and that she then produced her in obedience to the writ. The next day, Thomas Kinne, Mrs. Keever and the child being in court,

O'Brien moved for an order for the delivery of the child to her father. He filed affidavits charging Mrs. Keever with neglecting the child's education, with severe and improper punishment of the child: with gross acts of cruelty to her, which were alleged specifically: that Mrs. Keever was of such an ungovernable temper, that she was not fit to be entrusted with the care of a child: that the child was of weak mind from the effects of the ill treatment; and, from her youth, ill treatment and fear of her aunt, was not fit to judge for herself as to with whom she would prefer to remain. He contended that the father was legally entitled to the custody of the child, at all events as against a stranger, which, in the eye of the law, the aunt must be taken to be, and that an order should be made for the delivery of the child to the father: that the affidavits established improper treatment of the child generally, and several specific acts of personal violence towards the child of an outrageous kind: that the child should not be allowed to choose which she would prefer going to, being of such tender age, and not being of sufficient intelligence to exercise a reasonable judgment; and, that even if so very intelligent as the aunt contended, such precocity itself might be required to be guarded against: that being under fourteen years of age, she would in law be deemed incapable of exercising an election; that she was in fear and dread of her aunt, and would act under the influence of that fear, and that the aunt had taught the child to dislike her father: that it would be improper in every way, and contrary to the law of nature that a father should be deprived of his child whom he had not abandoned and was willing to support, and whom he had evinced his determination to protect by coming the great distance he had, upon hearing the reports of her ill treatment by her aunt, and that it would be great cruelty to the father to let him return home believing that his child was ill treated, and induced to dislike him.

J. B. Read, in reply, filed affidavits stating that the child was, when about seventeen months old, taken by its aunt, then unmarried, to bring up, with the consent of her father and mother: that the aunt had continued to have the care of the child until its mother's death: that after that event, with the consent of the father, the child continued to remain with the aunt: that with the same consent and permission the child was brought to the Province of Ontario from New Brunswick, where all the parties resided: and that the child had ever since remained with the aunt. The charges of cruelty, both general and specific, were denied by Keever and his wife, and their statements were corroborated by others. It was also stated that the child was sent to school and well taken care of: that there were feelings of hostility between Mrs. Keever and the relatives of her husband, who were said to be afraid that Keever, who was well off, would leave his property to the child: that the child's father had no house of his own but boarded out, and that the future welfare of the child rquired that she should remain with her aunt.

He urged that in addition to the evidence in the affidavits, that the very appearance of the child refuted the charges of neglect of her bodily wants or mental culture: that the child was resolved not to go with her father, but to remain with her aunt: that if the Judge was satisfied that the case was met on the affidavits, the father could not complain, as he had suffered the child to grow up from infancy with the aunt, who had all the care and trouble of training and providing for her, and was attached to her: that in law the father was not legally entitled to the custody of the child under the circumstances: that all the court or a judge could do would be to order that the child should be removed from any restraint on the part of her aunt, and be given to understand that she was free to go with whom she pleased, without fear of the consequences: that if she preferred to go with the father she should be allowed to go with him, if with the aunt, then to go with her.

The following cases were cited: *Rex* v. *Smith*, 2 Strange, 982; *Rex* v. *Greenhill*, 4 A. & E. 624; *Rex.* v. *Isley*, 5 A. & E 441; *Reg.* v. *Smith*, 22 L. J. Q. B. 116; *Ex parte Barford*, 3 L. T. N. S. 467; *Reg.* v. *Howes*, 17 Jur. N. S. 22; 3 El. & El. 332.

The case was argued before the Chief Justice of the Common Pleas and Mr. Justice Gwynne,

who examined the child for some time apart from her father and aunt, to ascertain the degree of intelligence she had attained, and explained to her fully that she was free from all restraint of her aunt, and was then under their protection.

Judgment was thereupon given by

Hagarty, C. J., C. P.—We have carefully examined this child and explained to her her position. We have also read with much care the affidavits filed on both sides. We think that the father, upon hearing the reports of the alleged cruelty, acted very properly in making this application, and did what we should expect a parent to do in such a case, but we do not think he can succeed in his present contention.

The affidavits are certainly conflicting, but there is a very satisfactory denial, well supported, of the alleged cruelty of the aunt; and the circumstances connected therewith are somewhat unusual, because it is seldom that parties are so fortunate as to be able to procure such strong corroboratory evidence in denial of such specific charges as is now produced. We consider the charge of want of intelligence of the child not in any way supported; her manners and answers establish to our satisfaction that the child is a peculiarly intelligent one, and fully understands her position.

The only order we can make is, that the child is free to go with whom she chooses. It is perhaps only natural that having lived nearly all her life with her aunt and not knowing her father, she will, if the latter has treated her well, prefer to remain with her aunt than go with her father; and it is important to be remembered that the aunt and her husband have, since the child was an infant, taken care of her and provided for her, at their own expense, and the father has not, until now, made any effort to get the child to return to him, and has paid no part of the expense of maintaining her. If she has not been well treated she has now an opportunity of leaving her aunt and going to her father and other relatives in New Brunswick.

We should regard the case very differently if this girl had recently left or been taken away from her father. In such a case the law apparently orders her to return to her father, without reference to her own choice, at all events until she attain the age of sixteen.

The case of *Reg.* v. *Howes, ante*, cited by Mr. O'Brien, is very strong as to the general rule. Our Statute, Con. Stat. Can. ch. 91, sec. 26, supports that general view.

We decide this case on its particular circumstances without infringing, as we believe, on the principles laid down in *Reg.* v. *Howes*.

Upon the child electing with whom she will go, the disappointed party must be careful not to resort to any improper means to deprive the other of the child.

The learned Chief Justice then told the child that she might go away either with her father or her aunt, and she at once with apparent willingness went to the latter.

Queen v. Robinson.

[Chambers, January 26, 1870.]

Extradition—Evidence—Deposition—31 Vic. cap. 94.

Under sec. 2 of the above Act, the depositions that may be received as evidence of the criminality of the prisoner must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing it.

A writ of *habeas corpus* was issued directing the keeper of the gaol of the county of York, to bring up the body of John O. Robinson. The body of the prisoner was accordingly produced before Morrison, J., with the writ and return.

The cause of detention was shewn to be a warrant of Alexander McNabb, Esq., the Police Magistrate of the City of Toronto, dated the 22nd day of January, 1870, setting out that the prisoner was charged, on the oath of one Warren, a deputy United States Marshal, and others, that he did on or about the 10th April feloniously &c. burn and consume a certain dwelling house in the town of Somerville, &c., in Massachusetts, one of the United States; to be detained in custody until surrendered according to the stipulations of the treaty between Her Majesty and the United States of America, or until discharged according to law.

A writ of *certiorari* was also issued at the same time under which the Police Magistrate retained all the proceedings had before him. It appeared from them that an information had been laid before Mr. McNabb on the 22nd December last, by one John C. Warren, a Boston Deputy United States Marshal, stating that he had been informed, and believed, that the prisoner on or about the 10th April last, did feloniously &c. burn and consume a certain dwelling house (not stating the owner), at the Town of Somerville, in the County of Middlesex, in the State of Massachusetts—and not even stating that the prisoner fled to Canada. On this the Police Magistrate issued his warrant on the same day for the prisoner's apprehension, and upon which warrant he was arrested. He was remanded until December 24th, when John C. Warren examined and deposed that — he knew the prisoner: that he left Somerville last June or July: that he was charged with setting fire to a house owned by one Bassett. A paper was produced to the witness which contained statements and depositions made by three persons, named Patton, Horton, and Fingay, stating conversations and facts with the prisoner relative to the burning of the house in question—underneath which statements and depositions was written—"Middlesex, December 18, 1869. There personally appeared the above named (naming the parties), and made solemn oath to the truth of the above statements by them subscribed. Before me, Isaac S. Muse, Justice of the Peace." The witness Warren stated he was present when these statements were made, and that he saw the Justice of the Peace, Muse, sign them; he also stated that he was not aware that any warrant issued on these statements or depositions—he said that a warrant had issued for the prisoner's arrest before the depositions in question—but he was not aware that any depositions were taken under such warrant; he also stated that he knew Patton and Horton, that he had had a bench warrant in July last against the prisoner upon a criminal

charge, arising out of the bankruptcy of the prisoner, upon which it appeared the prisoner had been arrested, and that Patton and Horton had became bail for him in the charge. The prisoner was remanded to the 31st December, when Warren was again examined, and a certificate being shewn to him, he stated it was a certificate of one John W Pettingill, Trial Justice for the County of Middlesex; he proved this certificate, and that he Pettingill was a Trial Justice—no evidence was given as to what was meant by a Trial Justice. The certificate was dated 28th December, 1869, and it certified "that the within complaint and warrant are true copies of the original complaint and warrant before me; also, that the within named John O. Robinson hath not appeared or pleaded to the said complaint since the date of the same." Attached to this certificate was a complaint—commencing as follows: "To John W. Pettingill, Esq., a Trial Justice, &c., Calvin Horton on behalf of the commonwealth of Massachusetts, on oath complains, that John O. Robinson, &c., on the 18th of May, 1869, &c., the dwelling house of one Barrett, in Somerville, &c, feloniously &c., set fire to &c.,"—and he prayed that he might be apprehended and held to answer to said complaint, &c.—underneath, on the same sheet was warrant to take the prisoner and bring him before the said Trial Justice, or any other Trial Justice, in any Police Court, &c., to answer to the foregoing complaint of Calvin Horton &c. The witness stated that he saw the original warrant and information in September last; that he compared the copy made then with the original information and warrant, and he said he knew the copies produced to be true copies; he stated however, that he never compared them with the original, nor did he see them compared.

The prisoner called witnesses, from whose testimony it appeared that he left the United States on account of the charge arising out of his bankruptcy, and that Horton and Patton were his bail, and that Horton boasted he would have the prisoner brought back: that the house in question was only partially injured by fire on 19th April last. The person who contracted to build the house was also examined. The house was not finished but in course of construction at time of fire, and no person resided in it at the time; other evidence was given to shew that the owner Barrett was suspected to have burnt it. Upon this evidence the Police Magistrate committed the prisoner for the purpose of his extradition.

D. B. Read, Q. C., and *Dr. McMichael* for the prisoner, took various objections to the proceedings:—The information upon which the Police Magistrate acted was insufficient, and did not warrant him to order the arrest of the prisoner, and the subsequent proceedings: that the depositions of Patton, Horton, and Fingay, taken in the United States, were not depositions that could be used or received as evidence of the criminality of the prisoner: that if they were receivable they were not properly certified and attested: that the complaint and warrant made before and issued by the Trial Justice were not receivable, being only copies of copies, and that no explanation or proof was given of the duties or authority of a Trial Justice: that it appeared that the prisoner was not guilty of arson, the building set fire to being an unfinished and unoccupied house, and not the subject of arson, and that the warrant under which the prisoner was now detained was insufficient, in not stating whose house the prisoner set fire to.

John Patterson on the part of the Minister of Justice, contended that the depositions were such as could be received, and that they were properly before the Police Magistrate.

Morrison, J.—The first and most material point for determination is whether there appears upon these papers returned before me, as provided by the statute 31 Vic. c. 94, s. 1, of the Dominion (Reserved Act, see stat. 32,33 Vic. p. 12) such evidence, as, according to the laws of this Province, would justify the apprehension and commital for trial of the prisoner if the crime had been committed here. Under the statute it is the duty of the officer (in this case the Police Magistrate), to examine upon oath, any person or persons, touching the truth of the charge; and by sec. 2, in addition, it is provided, that upon the return of the warrant of arrest, copies of the depositions upon which the original warrant was granted in the United States, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended. In this case no oral testimony was given by any witness touching the truth of the charge against the prisoner; all that was done was the laying of an information by an officer who deposed that he was informed and believed, that the prisoner did burn and consume a certain house, without stating whose house it was, on the 19th April, 1869.

The truth of the charge must therefore wholly depend upon the depositions upon which the original warrant was granted in the United States. On this argument it was conceded that unless the statements or depositions of Patton, Horton, and Fingay, taken before Isaac S. Muse, the Justice of the Peace, on the 13th December, 1869, were receivable and could be read against the prisoner, the case must fail, these depositions containing the only evidence to justify the prisoner's committal. The original, and the only warrant that appears to have been issued in the United States was the one before me, issued on the 20th September, 1869, by one Pettingill, styled a Trial Justice (whom I assume, although no explanation was given at the time, to be an officer like our Police Magistrate), upon a complaint made and addressed to him, that the prisoner on the 18th May, set fire to the dwelling house of one Barrett. As our Statute permits depositions taken in a foreign court to be read in lieu of oral testimony, and where the case depends wholly upon such depositions, we must be strict in seeing that they are depositions coming clearly within the meaning and provisions of the 2nd section of the Statute. Now the state- or depositions that were received as evidence of the criminality of the prisoner and objected to, were made on the 13th December, three months after the original warrant issued, They are not depositions made before the Trial Justice who issued the warrant, but before another officer, a Justice of the Peace. They have no caption, nor do they state or indicate in any way, on their

face or otherwise, nor does it appear by any testimony, written or oral, with what object or for what purpose they were made, whether with a view to the issuing of a warrant, or in reference to any antecedent warrant or legal proceedings; they are not certified or referred to by the Trial Justice who issued the warrant, or the Justice of the Peace before whom they were made. For all that appears, these statements may have been made for some other purpose quite distinct from any criminal charge against the prisoner. It is to me quite clear, under the 2nd section of the Act, that the depositions that may be received as evidence of the criminality of the prisoner, are depositions upon which an original warrant was granted in the United States, certified under the hand of the person issuing it. Now the statements or depositions in question are certainly not depositions upon which the original warrant was granted, for they were, as I have stated, made several months after, and are not in any way connected with the warrant; and in my opinion, they were clearly not receivable as evidence touching the truth of the charge, or the criminality of the prisoner; and as without them there was no evidence to justify the committal of the prisoner for extradition, he is entitled to be discharged Such being the decision I have arrived at, it is quite unnecessary for me to consider or decide the other points raised, some of which it appears to me, upon consideration, would entitle the prisoner to be discharged.

The prisoner will be discharged out of custody upon this warrant.

Bonathan v. Bowmanville Furniture Manufacturing Company.

Patent—Injunction.

In an action for an infringement of a patent, an application under the C. L. P. Act for an injunction to restrain the defendant was refused, the patent having been very recently granted, and their being conflicting affidavits as to the rights of the plaintiff to the patent, and *held* that the plaintiff must establish his title at law before he would be entitled to an injunction.

Semble 1.—That the application would also have been refused under the Patent Act of 1869, sec. 24.

2.—That to entitle a plaintiff to an interim injunction or account he must waive all claim to more than nominal damages at the trial. [Chambers, Feb. 11, 1870.]

This was an application made after appearance and before declaration, for an injunction to restrain the defendants from infringing a patent granted to the plaintiff on the 15th October, 1869, in pursuance of the Acts of that year. The patent was for an invention called the "Economical Bending Apparatus," to be used in furniture making, and was stated in the plaintiff's affidavit to be an improvement on machines in ordinary use for bending wood for making chairs and other purposes.

Mr. Green, (Patterson & Beatty), on behalf of the plaintiff contended that the letters patent themselves being granted under the seal of the Commissioner of Patents, obtained after compliance with the formalities required by the Act, afforded a strong presumption in favour of the plaintiff's right to the invention patented: that no case was made out by defendant's affidavit throwing any real doubt on the plaintiff's titles, and that at all events, if the plaintiff was not entitled to an injunction the defendants should be ordered to keep an account until the trial of the action. 1 Maddock's Ch. Prac. 191, 192; *Bacon* v. *Jones* 4 Mylne & Craig 433: Patent Act 1869, ss. 24, 25.

Elmes Henderson for the defendants filed several affidavits made by the manager and workmen of the defendants to the effect that this process of bending wood was originally introduced from the United States (it was not sworn to be patented there), into this country, and that the only differences between the process so originally introduced and that patented were a few immaterial improvements in the latter, consisting of a screw being used instead of a wedge, and a few others of a like nature: that these improvements were the result of frequent experiments made during working hours and on defendants' materials by the manager along with the plaintiff and the other workmen of the defendants, when each suggested any improvement that occurred to him; and, it was sworn in all these affidavits, that in the opinion of the deponents, any one of them would have been as much entitled to the patent as the plaintiff was; and the manager further swore, that the improvement in the use of the screw before alluded to, which was stated to be the most material improvement introduced by the patent, had been suggested to the plaintiff by the manager himself. He cited *Cosyton* on Patents, 321.

Gwynne, J.—The law of the Court of Chancery as stated by Sir W. Page Wood, V. C., in *Betts* v. *Menzie*, 3 Jur. N. S. 358, is, that where the patentee has had long enjoyment then he shall have an injunction to protect his right until trial, even though his right under his patent be doubtful. Here the patent is not only very recently granted, but there are several affidavits filed by defendants not only to shew that the patented article was in use by the defendants when the patent was granted to the plaintiff, but that the plaintiff acquired his knowledge of the article when hired as a servant of the defendant, employed by them in the course of their business in the use of the article patented, and in experimenting for improvements, which experiments resulted in the very improvements which have been patented. Under these circumstances, upon the authority of *Gardner* v. *Broadbent*, 2 Jur. N. S., 1041, I refuse to grant any injunction, and consequently any interim account. The summons will be discharged with costs to be costs in the cause to the defendants.

I have regarded the application as made under the Common Law Procedure Act, but assuming that a judge in Chambers can act under the Patent Law Amendment Act during Term, and that any judge, other than a judge of the court in which the action is pending, can make an order under that Act, my decision would be the same in this case.

To entitle a plaintiff to an interim injunction or order for an account under that Act, it would seem that the plaintiff must accept the condition of waiving all claim to recover more than nominal damages at the trial of the action, *Vidi* v. *Smith*, 3 El. & Bl. 976. In this case I think the plaintiff must establish his title at law before he can obtain the aid of the court by way of injunction or account, the latter being only granted in substitution for the former.

Summons discharged.

ENGLISH REPORTS.

Re Phené's Trusts.

Presumption of death—Person not heard of for seven years—Period of death—Survivorship—Evidence.

There is a presumption of law that a person who has not been heard of for seven years is dead, but there is no presumption of his death at any particular period of the seven years.

There is no legal presumption that a person shewn to be alive at a given time has continued to live for any particular period after that given time.

A person whose title depends upon A. having survived B. must prove affirmatively by evidence that A. did survive B.

Review of all the authorities on the subject.

Re Benham's Trusts, L. R. 4 Eq. 416, 15 W. R. 741, disapproved.

F., by his will, bequeathed the residue of his estate to his nephews and nieces, share and share alike. F. died on the 5th January, 1861. N. P. M., one of the nephews, left his home in Germany, on the 19th August, 1853, and always wrote home regularly until August, 1858. The last letter received from him was addressed to his mother, from on board the United States' frigate *Roanoke*, 15th August, 1858. He was never directly heard of again by any of his family. In 1867, upon inquiries being made of the United States' naval authorities, information was received that N. M., a sergeant of marines in the service of the United States, deserted June 16th, 1860, while on leave from New York to join the Philadelphia station, and had not since been heard of. This information was in answer to a letter of inquiry which stated the letter of N. P. M. of the 15th August, 1858, to his mother. A petition was, in 1869, presented by the administrator of N. P. M. for payment to him of a share of a residue of the estate of F., which was in court to an account entitled "The account of the share intended for N. P. M." Vice-Chancellor James, contrary to his own view of the law, but in deference to previous authorities, ordered the fund to be paid to the administrator of N. P. M.

On appeal,

Held, that the administrator of N. P. M. not having proved that N. P. M. survived the testator, had not established any title to the fund.

The Vice-Chancellor's order was, therefore, discharged.

[18 W. R. 303.]

This was an appeal from a decision of Vice-Chancellor James, which is reported 17 W. R. 1087.

The question was whether Nicholas Phené Mill, who had not been heard of for more than seven years, survived his uncle, Francis Phené, who died on the 5th January, 1861. Francis Phené by his will gave the residue of his estate to his nephews and nieces, share and share alike. A sum representing the share to which Nicholas Phené Mill, one of the nephews, would have been entitled in case he survived the testator, was standing in court to "The account of the share intended for Nicholas Phené Mill," and his administrator petitioned for payment of the fund to him.

Nicholas Phené Mill left his home in Germany on the 19th August, 1853, and went to America. He was in the habit of writing home regularly, until August, 1858. The last letter received from him by any of his family, was addressed to his mother, and was dated the 15th August, 1858, on board the United States' frigate *Roanoke*, Boston Navy Yard. He was never afterwards directly heard of by his friends. In fact, the only subsequent information about him was obtained in the following way. In 1867 inquiries were made about him of the United States' naval authorities, and in answer to a letter which stated the letter of the 15th August, 1858, information was received that Nicholas Mill, a sergeant of marines, in the naval service of the United States, deserted on the 16th June, 1850, while on leave from New York to join the Philadelphia station, and had not since been heard of. The Vice-Chancellor, contrary to his own opinion, but in deference to decisions of Vice-Chancellor Kindersley, and a decision of Vice-Chancellor Malins, held that Nicholas Phené Mill must be taken to have survived the testator, and ordered the fund in question to be paid to the administrator of Nicholas Phené Mill. The other surviving nephews and nieces appealed.

Bristow, Q C., and *Everitt*, for the appellants. —The *onus* is upon those who seek to displace our title. There is no presumption of the period of death within the seven years, but the time of death must be proved by positive evidence. The petitioner has not proved that Niceholas Phené Mill survived the testator, and, therefore, has not established his title. They cited *Doe* v. *Nepean*, 5 B. & Ad. 86; *Nepean* v. *Knight*, 2 M. & W. 884; *Underwood* v. *Wing*, 3 W. R. 228, 4 D. M. & G. 633; *Wing* v. *Angrave*, 8 H. L. Cas. 183; *Re Green's Settlement*, 14 W. R 192, L R 1 Eq. 288; *Dunn* v. *Snowden*, 11 W. R 160, 2 Dr. & Sm. 201; *Lambe* v. *Orton*, 8 W. R. 111; *Thomas* v. *Thomas*, 13 W. R. 225, 2 Dr. & Sm. 298; *Re Benham's Trust*, 15 W. R 741, L. R 4 Eq. 416; s. c. on appeal, 18 W. R. 180; *Dowley* v. *Winfield*, 14 Sim. 277; *Re Beasney's Trust*, 17 W. R. Ch. Dig. 140, L. R. 7 Eq. 498; *Lakin* v. *Lakin*, 34 Beav. 443, 13 W. R. 904.

Amphlett Q. C. and *Bagshawe*, for the respondent—The question of survivorship is a question of fact for a jury, and, in the absence of evidence to the contrary, they may infer that a person who was alive at a particular period continued to live for some time afterwards. We have shown that Nicholas Phené Mill was alive seven months before the death of the testator, and the reasonable inference for the jury is that he survived the testator, there being no evidence to the contrary. If, as is said on the other side, we are bound to show positively that Nicholas Phené Mill survived the testator, the result would be that if he was seen alive in New York, in robust health an hour before the death of the testator, still positive evidence that he survived the testator must be adduced. This would be absurd. *Re Benham's Trust* goes further than we need. We are content to take the rule of *Doe* v. *Nepean*, which is merely that each case must depend on its own circumstances. In *Rex* v. *The Inhabitants of Harborne*, 2 Ad. & E. 540, which is approved in *Doe* v. *Nepean*, the only evidence of a first wife having been alive at the date of her husband's second marriage, was a letter from her, dated twenty-five days before the second marriage, and yet a finding upon that evidence that she was alive then was upheld. In the recent case of *Reg.* v. *Lumley*, 17 W. R., 685, L R. 1 C. C. R. 196, an indictment for bigamy, the Court of Appeal held that the survivorship of the first husband was a question for the jury. The question is one of probabilities, and we say that in the present case it is more probable that Nicholas Phené Mill survived the testator. In *Underwood* v. *Wing*, there was no evidence at all of survivorship, and the Court, therefore, could only look at the *onus probandi*. *Re Green's Settlement*, *Dowley* v. *Winfield*, and *Re Beasney's Trusts*, are all distinguishable from the present case. In the

Re Benham's Trust Lord Justice Rolt merely said that he desired to have further evidence; he did not say that, if no further evidence could be adduced, he should not act on the rule of Vice-Chancellor Malins. In the case before Vice-Chancellor Kindersley he merely acted as a jury, and that is what the Court has to do now. They referred also to *Rex* v. *Twyning*, 2 B. & Ald. 386; *Sillick* v. *Booth*, 1 Y. & C. C. C. 117; Hubback on Succession, 175, *et seq.*; *Doe* v. *Jesson*, 6 East 80.

C. J. Hill for the trustee.

Langworthy, and *G. O. Edward*, for other parties.

Everitt, in reply.

Giffard, L. J., offered the parties an opportunity of endeavoring to obtain further evidence, but the offer was declined on both sides.

Judgment was reserved.

Jan. 14.—Giffard, L. J.—This is an appeal from so much of an order of the Vice-Chancellor James as directs the residue of a fund which is standing in court to "The account of the share intended for Nicholas Phené Mill" to be paid to his administrator. The order was made upon the hypothesis that Nicholas Phené Mill survived Francis Phené, the testator. The learned Vice-Chancellor, in making the order, stated that he did so in deference to the authority of three cases which were decided by the Vice-Chancellor Kindersley, and a fourth which was decided by the Vice-Chancellor Malins, but at the same time he dissented from their opinions, and expressed a wish that the whole matter should be brought before the Court of Appeal. The testator died on the 5th of January, 1861. According to one view of the evidence, Nicholas Phené Mill was last heard of in August, 1858; according to another view, about seven months previously to the testator's death. That he survived the testator was treated by the Vice-Chancellor, in deference only to the four cases referred to, as to be presumed. It will be desirable, therefore, to examine those cases and such others as bear materially on the subject, before dealing with the evidence more particularly. The cases decided by the Vice-Chancellor Kindersley were *Lambe* v. *Orton*. *Dunn* v. *Snowden*, *Thomas* v. *Thomas*. They were all decided on the same general principles. The propositions enunciated were, in substance, these:—1st. That the law presumes a person who has not been heard of for seven years to be dead, but, in the absence of special circumstances, draws no presumption from that fact as to the particular period at which he died. 2nd. That a person alive at a certain period of time is, according to the ordinary presumption of law, to be presumed to be alive at the expiration of any reasonable period afterwards. And, 3rd. That the *onus* of proving death at any particular period within the seven years lies with the party alleging death at such particular period. The case decided by the Vice-Chancellor Malins was *Re Benham's Trust*. He adopted and acted on the decisions of Vice-Chancellor Kindersley, but went somewhat further, laying it down "that if you cannot presume death at any particular period during the seven years, then, at the end or expiration of the seven years, you must presume for the first time that he is dead, and you must also presume that within that time he is alive." *Re Benham's Trust*, was appealed, and the Lord Justice Rolt, in November, 1867, discharged the Vice-Chancellor's order, directing further inquiries, and simply stating, according to the only report I am aware of (16 W. R. 180), that "there was no evidence for the Court to act upon, and that it was a case, not of presumption, but of proof." In *Dowley* v. *Winfield*, the testator died in September, 1833. One of his two sons went abroad in September, 1830, and was heard of for the last time about twenty months previously to his father's death. The Court ordered a share of the father's residue bequeathed to him to be transferred to his brother as the sole next of kin of the father living at the father's death. Security to refund was taken. In *Mason* v. *Mason*, 1 Mer. 308, a father and son were shipwrecked together. The rules of the civil law and of the Code Napoleon were relied on. Sir Wm. Grant said: "There are many instances in which principles of law have been adopted from the civillians by our English courts of justice, but none that I know of in which they have adopted presumptions of fact from the rules of the civil law. . . . In the present case I do not see what presumption is to be raised, and since it is impossible you should demonstrate, I think that if it were sent to an issue, you must fail for want of proof." An issue was directed whether the son was living at the death of the father. Nothing appears to have come of it. In *Underwood* v. *Wing*, which was also a case of *commorientes*, a testator bequeathed personal estate to J. W., in the event of his wife dying in his lifetime. The testator and his wife were shipwrecked and drowned at sea. On the question being raised between the next of kin of the testator and J. W., who claimed under the will, it was held, first, that the *onus* of proof that the husband survived his wife was upon J. W.; secondly, that it was necessary to produce positive evidence in order to enable the Court to pronounce in favor of the survivorship; and thirdly, that no such evidence having been produced, the next of kin were entitled.

Underwood v. *Wing* was heard before Lord Cranworth, Mr. Justice Wightman, and Mr. Baron Martin. Mr. Justice Wightman, in the course of delivering judgment, stated:—"If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide, independant of age or sex; and, if there be no evidence, the case is the same as a great variety of other cases, more frequent formerly than at present, where no evidence exists, and, of consequence, no judgment can be formed;" and afterwards added:—"We think there is no conclusion of law upon the subject; in point of fact, we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which of them was the survivor." In *Wing* v. *Angrave*, another branch of the same case, the House of Lords concurred in the view which had been taken by Lord Cranworth and the learned judges who sat with him. In *Re Green's Settlement*, Mr. Green was murdered in the Indian Mutiny on the 3rd June, 1857; Mrs. Green on the 16th of November following. Mr. and Mrs. Green's child escaped with its native nurse on the same 3rd of June, but was never

afterwards distinctly heard of. After the lapse of seven years and upwards, a petition was presented, and the present Lord Chancellor, then Vice-Chancellor, delivered the following judgment:—"I think that the rule which the Court should follow in this case is analogous to that laid down in *Underwood* v. *Wing*. The whole question is, on whom is the *onus* of the proof thrown. The lady on the devolution of whose estate the question arises is shown to have died on the 16th of November; her husband is shown to have died before her. A number of persons claim as her relations, and prove their kindred within a certain degree, and, so far as now appears, there is no one nearer in kindred. On the other hand, the representative of another person claims the property also, and shows that the person through whom he claims was nearer of kin than the petitioners, and would have been entitled if he survived his mother; but a person claiming under such a title must go further, and must show not only that the person through whom he claims would have been entitled if he survived, but that he acually was entitled, or, in other words, that he did survive. I am of opinion also that in this case there was some evidence to go to a jury that the child died in the mother's lifetime; the letter of Mrs. Green shows that at the time it was written the child, an infant in arms, was separated from its father and mother, and was in the hands of a native female nurse, in a time and place where it was almost improbable that it should escape destruction. But I do not rest my decision on this evidence, I prefer to rely on the grounds which I have before stated." There are three other cases in equity—viz., *Lakin* v. *Lakin*, *Re Beasney's Trusts*, and *Re Henderson*, referred to in that case. In all of these the period of the death was inferred as a matter of fact from the circumstances proved; not in any sense presumed.

This appears to be the state of the authorities in the equity courts. The leading case, however, is one at law—viz., *Doe* v. *Nepean*, which is reported before the King's Bench, 5 B. & Ad. 86, and before the Exchequer Chamber, 2 M. & W. 894. In that case the lessor of the plaintiff claimed as grantee in reversion of a copyhold estate on the death of Matthew Knight. Knight went to America. The last account that was heard of him was by a letter written by him from Charleston, and received in England in May, 1807. Ejectment was brought within twenty-five years from the date he was last heard of, and within twenty from the date of the right accruing, if he was taken to have died at the end of the seven years from 1807. The Court of King's Bench was of opinion that the lessor of the plaintiff, who gave no other evidence of Knight's death than his absence, failed in establishing that his death took place within twenty years before the ejectment brought. With reference to the argument of inconvenience, Lord Denman said:—"If, for the sake of preventing inconvenience, we were arbitrarily to lay down a rule that seven years absence abroad (the party not having been heard of) was *prima facie* evidence of his death *at the end* of the seven years, such a rule would, in the very great majority of cases, nay, in almost every case, cause the fact to be found against the truth; and, as the rule would be applicable to all cases in which the time of death became material, it would in many be productive of much inconvenience and injustice." The Exchequer Chamber adopted the doctrine of the of the Court of King's Bench in these terms—viz., "We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death. whenever it is material, must be a subject of distinct proof." It is obvious from these passages that there is an inconsistency between that which the Courts of King's Bench and Exchequer Chamber laid down, and what I have quoted from the judgment of the Vice-Chancellor Malins, as going beyond what was laid down by the Vice-Chancellor Kindersley. The Vice-Chancellor Kindersley, however, seems to have grounded his opinion on certain portions of these two judgments. There are, therefore, other parts of them which it will be desirable to quote and examine. Thus, in the Court of King's Bench it is stated, "There is no doubt that the lessor of the plaintiff must recover by the strength of his own title, and, in order to do so, must prove that he had a right to enter on the lands sought to be recovered within twenty years from the ejectment brought; and consequently, as the presumption is that a person once alive continues so until the contrary is shown, the lessor of the plaintiff is bound to prove, first, the death of Matthew Knight; and secondly, that it took place within twenty years before the ejectment brought." And in the judgment of the Exchequer Chamber the following are the material passages bearing on this part of the subject:—"The Court is called on to review the decision of the Court of King's Bench in *Doe* v. *Nepean*. The doctrine there laid down is, that where a person goes abroad and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or at the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. After fully considering the arguments at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I., relating to bigamy; more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the *fact* of death, not of the *time*; it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rex.* v. *Inhabitants of Harborne*. It is true the law presumes that a person shown to be alive at ag[illegible]m remains alive until the contrary be shown, for which reason the *onus* of shewing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death, by proving the absence, of Matthew Knight, and his not having been heard of for seven years; whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the *onus* is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of

Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time during which he was not heard of has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years." The Vice-Chancellor Kindersley appears to have acted on the passages in both these judgments which are to the effect that the *onus* of proving the death of Matthew Knight lay on the plaintiff, because the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown. Those passages are not essential to the conclusion arrived at, or sound in point of reasoning. The other parts of the same judgments go to prove that there is not, and ought not to be, any such presumption of law. If there was such a presumption, it would be no ground for throwing the *onus* of proof on the plaintiffs, where seven years had elapsed from the date of the last proof of existence; on the contrary, it would carry the period of death, as suggested and laid down by Vice-Chancellor Malins, to the end of the seven years. But both the decisions are that it did not, and because it did not the plaintiff failed, and did not recover the property he sought. In the recent case of *The Queen* v. *Lumley*, it was held, consistently with another judgment delivered by Lord Denman in *Rex.* v. *The Inhabitants of Harborne*, 2 A. & E. 540, that there was no presumption of law in favor of the continuance of a life up to a particular period, but that it was a question for the jury as a matter of fact. The case was heard before the Chief Baron, Mr. Justice Byles, Mr. Justice Lush, Mr. Justice Brett, and Mr. Baron Cleasby; and Mr. Justice Lush delivered the judgment of the Court in these terms:—"We are of opinion that the direction to the jury in this case, viz., that, there being no circumstances leading to any reasonable inference that he had died, Victor must be presumed to have been living at the date of the second marriage, was erroneous. In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is surely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceeding the second marriage the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. But the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Rex.* v. *Twyning*, *Rex.* v. *Harborne*, and *Nepean* v. *Doe*, appear to us to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage there is no question for the jury. The provision in the Act then comes into operation and exonerates the prisoner from criminal culpability, though the husband or wife be proved to have been living at the time when the second marriage was contracted. The legislature by this provision sanctions a presumption that a person who has not been heard of for seven years is dead; but the provision affords no ground for the converse proposition—viz, that where a party has been seen or heard of within seven years a presumption arises that he is still living—that, as we have said, is always a question of fact."

True it is that *The Queen* v. *Lumley* was a criminal case, and that the seven years had not elapsed from the date of the first husband having last been heard of; but, though a jury might be more ready to draw an inference in a civil than in a criminal proceeding, it cannot be that the rules of evidence in each should be so far different as that there should be a positive legal presumption in the one proceeding, and no legal presumption in the other. A prosecutor and a person seeking to recover property have each to prove his case, and in each instance the object is to arrive at, and act upon, the real truth.

Lord Denman, who delivered both judgments in *Doe* v. *Nepean*, thus expressed himself in *The King* v. *The Inhabitants of Harborne*:—"I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe* v. *Nepean* the question arose much as in *Rex.* v *Twyning*. The claimant was not barred if the party were presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff, because, if there was a legal presumption, there was nothing to be submitted to the jury. But this Court held that no legal presumption existed, and set the verdict aside. That is quite consistent with the view which we take in the present case, and *Rex.* v. *Twyning* may be explained in the same way. I am aware that in the latter case Mr. Justice Bayley founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it." Other learned judges concurred in this opinion. The notion of a legal presumption in favor of life, originated, I believe, with the civil law, and we

have Sir William Grant's opinion, in *Mason* v. *Mason*, as to adopting presumptions of fact from that law. It is a general well-founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in *Doe* v. *Nepean*, and to assert, as an exception to the rule, that the *onus* of proving death at any particular period, either within the seven years or otherwise, should be with the party alleging death at such particular period, and not with the person to whose title that fact is essential, is not consistent with the judgment of the present Lord Chancellor, when Vice-Chancellor, in *Re Green's Settlement*, or with the dictum of Lord Justice Bolt when he said, in *Re Benham's Trust*, that the question was one, not of presumption, but of proof; or with the real substance of the actual decisions, or the sound parts of reasoning, in *Doe* v. *Nepean*, or with the judgments in *Rex.* v. *The Inhabitants of Harborne*, and *Reg.* v. *Lumley*, or with the principles to be deduced from the judgments in *Underwood* v. *Wing*. The true proposition is that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence The evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail. This case happens to be one of an alleged member of a class of legatees. A legatee's survivorship of a testator is requisite to clothe him with that character, is a tacit condition annexed by law to every ordinary immediate gift by will, and it follows that the representatives of a person alleged to be a legatee must prove, as against the other members of ther class who prove their survivorship, that he survived the testator, otherwise he was not a legatee at all. For these reasons, and upon a review of the authorities and the judgments on which they rest, I am opinion that there is no presumption of law as to the particular period at which Nicholas Phenè Mill died; that it is a matter of fact to be proved by evidence, and that the *onus* of proof rests on his representative. This brings me to an examination of the evidence. At the hearing a further inquiry as to the facts was offered and was declined by each of the parties. It was not admitted by the appellants that Nicholas Phenè Mill was the Nicholas Mill referred to in the communications from the American officials, but those communications were not objected to, and were read and commented on by both sides. There are three affidavits. The earliest in point of date is that of Nicholas Phené Mill's mother. She states that she is the widow of William Mill the elder; that she left England many years ago to reside abroad; that Nicholas Phené Mill was born at Ostend in the year 1829; that on the 19th of August, 1853, he left home and went to reside in America; that he wrote letters to her and her family from America; that she received from him a letter addressed from on board the United States' frigate *Roanoke*, dated the 15th August, 1858; that neither she nor, as she believes, any member of the family has heard from him since, and that she believes him to be dead. She speaks of inquiries that have been made for him. The next affidavit is that of the petitioner in the court below. He is a brother of Nicholas Phené Mill. He speaks of his brothers and sisters, and says that the last that has or can be ascertained or heard about Nicholas Phené Mill is that, being a sergeant of marines in the United States naval service, and unmarried, he deserted from the United States' frigate *Roanoke* on the 16th June, 1860. He further states that he was himself in America from August, 1853, till April, 1862; speaks of many fruitless inquiries and advertisements, and adds that his information as to Nicholas Phené Mill's desertion was derived from an offcial letter, written in answer to one from his solicitors to the Government authorities in America. The last affidavit is that of the clerk to the petitioner's solicitors. He speaks of letters of administration being granted to the petitioner, and proves the correspondence with the Government officials in America. There were two letters from the petitioners's solicitors; each was answered. The answer to the second was the most explicit, and the only one necessary to refer to. It is endorsed on the letter to which it is an answer, and is in these terms:—

"Navy Department, Bureau Equipment and
"Recruiting, Washington, Dec. 11, 1867.

"Nicholas Mill was a sergeant in the Marine Corps, and deserted June 16th, 1860, while on leave from New York to join the Philadelphia station. He has not been heard of from since that date. M. Smith, Chief of Bureau."

This was in answer to a letter which stated that Nicholas Phené Mill wrote to his mother on the 15th August, 1858, from on board the United States' frigate *Roanoke*, Boston Navy Yard, Massachusetts, stating that he expected to be long absent, but would write on his return from his voyage. If this correspondence is excluded, there is no other evidence than that Nicholas Phené Mill was last heard of in 1858. There would, therefore, be no sufficient evidence of his having survived the testator. Nor does the admission of the correspondence supply the necessary proof; for though I assume that the Nicholas Mill therein mentioned was the Nicholas Phené Mill who wrote from the *Roanoke*, I cannot infer from the statement of his desertion on the 16th June, 1860, that he was alive when the testator died in January, 1861. I should not do so if it was a simple statement of desertion and no more. The statement, however, is not simply that he deserted, but that he deserted while on leave from New York to join the Philadelphia station, June 16th, 1860, and has not been heard of from since that date; the reasonable conclusion from which is that he never reappeared after he went on leave; that his leave was up on or before the 16th June, 1860; and that being so his name was on the books as a deserter. If I am to draw a conclusion at all, I should infer that a person in the position of a sergeant having nothing against his character would not desert, and that he had died while on leave, and so was not heard of by the authorities. It is enough, however, for me to state that, in my opinion, the burden of proof is on the representative of Nicholas Phené Mill, and that he has not proved affirmatively that Nicholas Phené Mill survived the testator—a proof which I consider essential to his title. The order of the Vice-Chancellor must, therefore, be discharged.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR AUGUST, SEPTEMBER AND OCTOBER, 1869.

(Continued from Vol. VI. page 82.)

Jurisdiction—*See* Foreign Government.

Landlord and Tenant.

In 1860, A. made a lease to B., who covenanted therein not to assign or part with the possession of the premises without A.'s written consent, and there was a re-entry clause. In 1865, B. with A.'s written assent to the transfer on the old terms, sold to C., and let him into possession without a formal assignment. In 1867, C., with A.'s written assent, assigned the term to trustees for creditors. The trustees sold to defendant, who took possession. *Held*, that there had been no forfeiture. There was never an assignee of the whole term, so as to be subject to the covenants in the lease, and B.'s covenant was not broken by letting C. into possession as he did, nor by the transfer by the trustees to defendant—*West* v. *Dobb*, L. R. 4 Q. B. 634.

See Covenant, 2.

Law of Nations—*See* Foreign Governments.

Lease—*See* Covenant, 2; Landlord and Tenant.

Legacy.

1. A testator gave to his wife "any money that I may die possessed of, or which may be due and owing to me at the time of my decease." He had insured his own life. *Held*, that the debt accruing under the policy at his death passed by the above bequest.—*Petty* v. *Willson*, L. R. 4 Ch. 574.

2. Bequest to A. and B. as tenants in common, "and their respective heirs or representatives." A. died before the testator. *Held*, that A.'s share lapsed. The words were words of limitation.—*Appleton* v. *Rowley*, L. R. 8 Eq. 139.

3. A contingent legacy which is given to an infant, and which, or the income of which, the executors are empowered to apply for his maintenance, or education, or benefit during minority, as they shall think proper, carries interest from the death of the testator, although he may not have stood *in loco parentis* to the infant.—*In re Richards*, L. R. 8 Eq. 119.

See Power; Will, 5.

Lex Loci—*See* Foreign Government.

Libel.

To charge A. in the newspaper with ingratitude in politically opposing B., and to allege that at a past time A. was in pecuniary straits, and was aided by B., and had since paid his debts, as the only support of the charge, is libellous.—*Cox* v. *Lee*, L. R. 4 Ex. 284.

Lien.

A policy of insurance was assigned by A. to B. as a security for a judgment debt due from A. to B., on which B. had created a charge in favor of C. The premiums were paid by B. during his life, and after his death by his administrator, at first of his own authority, and afterwards by the direction of the court in an administration suit. *Held*, that, as against C., the administrator of B. had a lien upon the money payable under the policy for the premiums paid by him, but not for those paid by B.—*Norris* v. *Caledonian Insurance Co.*, L. R. 8 Eq. 127.

See Vendor and Purchaser of Real Estate.

Marriage—*See* Revocation of Will.

Married Woman—*See* Wife's Equity.

Marshalling of Assets—*See* Mortgage, 2.

Master and Servant.

Defendant sent his carman and clerk with a horse and cart to deliver some wine, and bring back some empty bottles. Instead of returning directly, as was his duty, the carman, when about a quarter of a mile from the defendant's offices, drove off in another direction on business of the clerk's; and, while he was thus driving, negligently ran over the plaintiff. *Held*, that defendant was not liable.—*Storey* v. *Ashton*, L. R. 4 Q. B. 476.

Mistake—*See* Specific Performance, 2.

Money Had and Received.

The defendant received money for a married woman, and wrote to her that he held it at her disposal. The wife died, and then the husband, (who had not interfered in the matter,) and the wife's administratrix sued the defendant for money had and received to the use of the wife. *He'd* (Kelley, C. B., *dissentiente*), that the action could be maintained, and by the wife's representative (Exch. Ch.)—*Fleet* v. *Perrins*, L. R. 4 Q. B. 500; s. c. L. R. 3 Q. B. 536; 8 Am. L. Rev. 273.

See Bankruptcy, 1.

Mortgage.

1. A mortgagee is bound to convey the legal estate in the mortgaged property, and to deliver up the title deeds, to a person from whom he has accepted a tender of his principal, interest, and costs, although such person may have only a partial interest in the equity of redemption—*Pearce* v. *Morris*, L. R. 8 Eq. 217.

2. A party entitled to funds A. and B. made

three mortgages: (1) of A. and B.; (2) of A. only; (3) of the surplus of both funds after payment of 1 and 2. Fund A. was absorbed in paying mortgage 1. *Held*, that fund B. must be applied in satisfaction of mortgage 2 in full, in priority to mortgage 3.—*In re Mower's Trusts*, L. R. 8. Eq 110.

3. A second mortgagee, with notice of a prior mortgage to secure a sum and future advances, is not affected by advances made by the first mortgagees after they have notice of the second mortgage.

The mortgagor was a publican, the first mortgagee a brewer, the second a distiller. A contrary custom was alleged in such cases. *Held*, that it was not proved, and was bad for want of mutuality and defined limits.—*Daun* v. *City of London Brewery Co.*, L. R. 8 Eq. 155.

See Fixture; Lien; Trust.

Mutual Credits—*See* Bankruptcy, 2, 3.

Navigable Water—*See* Statute.

Negligence.

1. A bank received gratuitously a box of which the owner kept the key. The box was placed in the outer of three strong rooms, together with other customers' boxes and much property of the bank. The cashier of the bank had access to this room and abstracted some of the contents of said box. After this was discovered some further precautions were taken by the bank. *Held*, that there was no evidence on which the jury could properly find that the bank was wanting in ordinary care.—*Giblin* v. *McMullen*, L. R. 2 P. C. 317.

2. The plaintiff on getting into a railway carriage, having a parcel in his right hand, placed his left hand on the back of the open door to aid him in mounting the step. It was after dark, and he could see no handle, if there was one. The guard, without warning, slammed the door, throwing the plaintiff forward and crushing his hand between the door and door-post. *Held*, that the defendants were not entitled to a nonsuit. The jury were justified in finding that the guard was negligent and that the plaintiff was not. (Exch. Ch.)—*Fordham* v. *Brighton Railway Co.*, L. R. 4 C. P. 619; s. c. L. R. 3 C. P. 368; 3 Am. L. Rev. 105.

See Master and Servant.

Notice—*See* Cheque.

Novation.

A. advanced money to B., with which to build a railway; then B. transferred his business to C. and afterwards gave his note to A. for the above money, A. writing that he looked to B. and knew nothing of C. in the matter. C. had the benefit of A.'s advance. A year afterwards, A. applied to C. for a year's interest, which C. paid, and sent to A., B.'s cheque for the sum remaining to his credit, directing A. to place it to the credit of C. *Held*, that C. had not become debtor to A. in B.'s place, and that A. could not prove against C.'s estate.—*In re Smith, Knight & Co.*, L. R. 4 Ch. 662.

Parliament.

Members of either House of Parliament are not criminally liable for a conspiracy to make statements which they know to be false, in the House, to the injury of a third person.—*Ex parte Wason*, L. R. 4 Q. B. 573.

Partnership—*See* Company, 2; Tenancy in Common.

Patent.

A. filed a provisional specification and obtained provisional protection. B. afterwards did the like and obtained a patent for a similar invention within the period of A.'s provisional protection. A. then petitioned for a patent dated as of the date of his provisional protection. *Held*, that A. could only have a patent for such part of his invention as was not covered by B.'s patent, to be dated with the actual date of the petition.—*Ex parte Bates & Redgate*, L. R. 4 Ch. 577.

See Discovery.

Payment—*See* Principal and Agent.

Perils of the Sea—*See* Insurance, 3.

Perpetuity.

1. A power coupled with a term for five hundred years given to trustees to enter and manage an estate during the minority of successive tenants in tail, for life, in tail, again for life, and so on, is void for remoteness, although all the tenants for life are *in esse*.—*Floyer* v. *Bankes*, L. R. 8 Eq. 115.

2. A., having a power under her marriage settlement to appoint a fund in favor of the children of the marriage, appointed part of the fund by will to her son C. for life, with remainder to such persons as he should by will appoint. There was a general residuary appointment of the fund, subject to all other appointments of the same, to A.'s daughters, to whom A. left other property also. *Held*, that the appointment to C.'s appointees was too remote, and that A.'s daughters took that part of the fund; also that said daughters were not put to their election.—*Wollaston* v. *King*, L. R. 8 Eq. 165.

Pilot—*See* Collision.

Pleading.

1. To a declaration on a bill of exchange by the drawer and payee, the defendant pleaded that he accepted the bill on the condition agreed on by him and the plaintiff as part of the consideration for the bill; viz., that in a certain event which had occurred the plaintiff would renew the bill. *Held*, on demurrer, that the plea must be taken as alleging a written agreement, and was therefore good.—*Young* v. *Austen*, L. R. 4 C. P. 552.

2. Action on an award adjudging the price to be paid for shares in a bank which the plaintiff had elected, under 25 & 26 Vic. c. 89, s. 161, to have purchased by the bank before it was voluntarily wound up and its business transferred to another company. Equitable plea, that plaintiff in consideration, &c., promised to consent to the winding up, &c., and to exchange his shares for shares in the new concern. *Held*, that the plea was bad. The defendant's remedy, if any, was a cross action for breach of contract.—*DeRosaz* v. *Anglo-Italian Bank*, L. R. 4 Q. B. 462.

Pledge—*See* Foreign Government.

Power.

A testatrix, having a general power of appointment over sums of money, gave pecuniary legacies followed by a bequest of the residue of her property. *Held*, that the legacies as well as the residuary bequest operated as appointments under the power, under 1 Vict. c. 26, s. 27.—*In re Wilkinson*, L. R. 4 Ch 587.

See Perpetuity; Revocation of Will.

Practice—*See* Costs; Production of Documents.

Principal and Agent.

The defendant, A., having purchased copyhold land, was admitted by C., who had acted as his attorney in completing the purchase, and had been appointed by the steward of the manor as his deputy for that turn to admit A. Nine days afterwards A. gave C. a cheque on A.'s bankers for a sum including the lord's fine, steward's fees, and C.'s charges as A.'s attorney. A. crossed the cheque at C.'s request to C.'s bankers. The amount of the cheque was paid by A.'s bankers to C.'s bankers, who retained the money for a debt due to them from C. The lord sued A. for the fine. *Held* (*per* Bovill, C J., & Montague Smith, J., Byles, J., *dissentiente*), that if C. had power to receive the fine, he could only receive it in cash or the equivalent of cash, which might be handed over as it was received to the lord; and that as against the lord the crossed cheque for a large sum was no payment.—*Bridges* v. *Garrett*, L. R. 4 C. P. 580.

See Company, 2; Master and Servant; Sale; Specific Performance, 1.

Priority—*See* Mortgage, 2, 3.

Privilege—*See* Parliament.

Privileged Communication—*See* Production of Documents

Production of Documents.

In an action against a railway company for a personal injury sustained by a passenger on their railway, the court allowed inspection of communications made by agents of the company in the ordinary course of their duty, to inform the company on the subject, whether made before or after litigation was begun, the same not being made confidentially with a view to litigation: those made with such a view are privileged.—*Woolley* v. *North London Railway Co.*, L R 4 C. P. 602.

Promissory Note—*See* Bills and Notes.

Proximate Cause—*See* Insurance, 8.

Railway—*See* Negligence, 2; Production of Documents.

Recoupment—*See* Tenant for Life and Remainder-man.

Representation—*See* Contract.

Restraint of Trade—*See* Benefit Society; Covenant, 1.

Revocation of Will.

By the will of A. a power was given to B. to appoint by will, and in default of her appointment, the property was to go to the persons who at her decease should be her "next of kin." B. appointed by will to C. and afterwards married him. C. died in B.'s lifetime. *Held*, that the above words "next of kin" did not imply the same class as under the Statute of Distribution, and that therefore the will was not revoked. 1 Vict. c. 26, s. 18.—*Goods of Mc Vicar*, L. R. 1 P. & D. 671.

See Codicil; Will, 3.

Sale.

The plaintiff, in England, sent an order to P., in Brazil, to buy cotton for him. P. bought cotton, and shipped it in the defendant's vessel; the invoice was made out as shipped on account and risk of the plaintiff, but the bill of lading was taken deliverable to P.'s order or assigns. P. wrote to the plaintiff, advising the shipment and saying, "Enclosed please find invoice and bill of lading; we have drawn upon you for the amount in favor of our agents, to which we beg your protection." The invoice was enclosed, but the bill of lading, indorsed in blank by P., was sent with the bill of exchange to P.'s

agent in England. The agent sent the two documents to the plaintiff, who retained the bill of lading, but returned the bill of exchange unaccepted, on the ground that P. had not complied with his order. The plaintiff presented the bill of lading to the defendant, but he, being advised by P.'s agent, refused to deliver the cotton. On a case stated, the court having power to draw inferences of fact: *Held* (Cleasby, B., *dubitante*), that P.'s intention was, that the bill of lading should not be handed over until the bill of exchange was accepted; that no property, therefore, passed to the plaintiff, and the defendant's refusal was right. (Exch. Ch.)—*Shepherd* v. *Harrison*, L. R. 4 Q. B. 493; s. c. *ib.* 196; 3 Am. L. Rev. 713, 714.

Seal—*See* Company, 1.

Set-off—*See* Bankruptcy, 2, 3.

Settlement—*See* Wife's Equity.

Ship—*See* Admiralty; Collision; Insurance, 2, 4.

Slander—*See* Libel.

Specific Performance.

1. In a bill filed by a purchaser for specific performance of a contract to sell land, it was alleged that the defendant P. informed the plaintiff that a written agreement was executed, and "that P. entered into the said agreement . . . as the agent for" the plaintiff, but that P. refused to give the plaintiff the benefit of the contract. It appeared by the bill that the agent was appointed orally. Demurrers by the two defendants, the agent and the vendor, were overruled. A written contract was sufficiently alleged, and would be enforced, although there was no written appointment of the agent.—*Heard* v. *Pilley*, L. R. 4 Ch. 548.

2. The whole of an estate, except a small plot, was put up for sale in lots, subject to the restriction that no public house should be built upon "the property." In the particulars of sale the property was described as the M. estate, and in the plan annexed, all the lots were colored, but the excepted plot was uncolored like the lands of adjoining owners, though, unlike them, it was not marked with the owner's name. There was nothing else to show that the vendor owned said plot. It was improbable that a public house would be built on any of the adjoining estates. A suit for specific performance was brought against one who had purchesed a lot within a hundred yards of the excepted plot, believing that the whole of the vendor's estate was included in the particulars, and so would be subject to the restriction. *Held*, that the vendor could only compel it on entering into a restrictive covenant as to the excepted plot.—*Baskcomb* v. *Beckwith*, L. R. 8. Eq. 100.

Stamp.

1. S. agreed by writing to become a member of a mutual insurance company in respect of an insurance for £300 on his own ship; but no stamped policy was ever executed. He paid a call for losses of other members, and made a claim for a loss of his own, but before it was paid the association was ordered to be wound up. *Held*, that S. was not a contributory. The contract was invalid for want of a stamp under 35 Geo. III. c. 63.—*In re London Marine Insurance Association*, L. R. 4 Ch. 611.

2. A., a married woman, was next of kin to one who died domiciled in England, intestate, and leaving personal property there. A.'s husband, B., did not reduce said property to possession in A.'s life, and after A.'s death did not take out administration to her. A. and B. were always domiciled in America, and died leaving a child, C., there. C. empowered D., in England, to take out administration for him. D. took out one to C.'s father, B., and one to A. *Held*, that this was right, and that a stamp duty was payable on each. Lord Westbury *diss.* on the ground that by the law of A.'s domicile, of which the court were bound to take notice, it would have been sufficient to take one out to A.

When interest is recoverable by the letters of administration it is chargeable with duty under 55 Geo. III. c. 184.—*Partington* v. *Attorney-General*, L. R. 4 H. L. 100.

Statute.

The defendants being empowered by a private act of Parliament to render navigable the River B., in doing so erected staunches therein, which, together with weeds, caused silt to accumulate, and thus caused the river to overflow the plaintiff's bank. The weeds might have been cut, or the silt dredged so as to prevent this. *Held*, that, as neither cutting nor dredging was shown to be necessary for purposes of navigation, and no negligence was proved, defendants were not liable.—*Cracknell* v. *Mayor of Thetford*, L. R. 4 C. P. 629.

See Bankruptcy, 1–3; Codicil; Collision; Fraudulent Conveyance; Insurance, 1; Patent; Revocation of Will; Stamp, 1; Voter.

Statute of Frauds—*See* Specific Performance, 1.

Tenancy in Common.

Co-owners of lands worked a quarry on part

of them, and let the rest to agricultural tenants. Other lands were purchased from time to time out of the profits and for the purposes of the quarry, and were conveyed in fourteen cases in trust for said co-owners, in ten cases without any trusts declared. One of the co-owners, a woman, married, and her share was settled, being treated as real estate, to her separate use for life, remainder to her husband for life, &c. Afterwards other lands were purchased, as above, without any trusts declared. *Held*, that the latter lands must be taken to have been held on like trusts with the former, and that said woman's share passed as real estate to her heirs; also that the husband took no interest by the settlement in the after-acquired lands —*Steward* v. *Blakeway*, L. R. 4 Ch. 603; s. c. L. R. 6 Eq. 479, 3 Am. L. Rev. 717, 718.

Tenant For Life and Remainder-man.

Where during the minority of a tenant for life part of the income has been expended under the order of the court in improving the estate, although the order was made in the presence of remainder-men, and was expressed to be without prejudice to the right of the tenant for life to have the amounts so expended recouped out of the *corpus* of the estate, and although the tenant for life die an infant, there cannot be such a recoupment.—*Floyer* v. *Bankes*, L. R. 8 Eq. 115.

Trover—*See* Bankruptcy, 1.

Trust.

A woman conveyed land to her sons in trust for her children for life, remainder to her grandchildren. After giving large powers of management and powers of sale to the trustees, the deed provided that any child advancing money to the settlor should have a charge by way of mortgage on the land, and any child paying off any part of an outstanding mortgage on said land should stand in the place of the mortgagee for the sum so paid. One of the trustees advanced large sums to the settlor and paid part of the mortgage debt. *Held*, that he was only entitled to a sale and not to a foreclosure; both by the construction of the deed and because he was trustee as well as mortgagee. *Held*, also, that he could not bid at the sale against the objection of some of the *cestuis que trust*. Perhaps if no purchaser at an adequate price could be found, the trustee might purchase under proposals to the court. *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.

See Contract; Curtesy; Equitable Assignment; Will, 5.

Vendor and Purchaser of Real Estate.

A purchaser of real estate upon a sale by the court was kept out of possession for a year by the plaintiff in the cause, who was himself in occupation of the estate. He was then let into possession by virtue of a writ of assistance issued by the court. The plaintiff became bankrupt. *Held*, that the purchaser was entitled to have paid to him out of the purchase-money in court; (1) the costs ordered to be paid him by the plaintiff by the orders for said writ; (2) an occupation rent for the time during which he was kept out of possession; (3) compensation for deterioration of the property during the same period; (4) arrears of tithes which he had been compelled to pay.—*Thomas* v. *Buxton*, L. R 8 Eq. 120.

See Specific Performance.

Voter.

By 30 & 31 Vict. c. 102, s 3, every "man" having certain qualifications and not subject to any legal incapacity is entitled to the franchise. By a previous act, 13 & 14 Vict c. 21, s. 4, "in all Acts, words importing the masculine gender shall be deemed and taken to include females, . . . unless the contrary . . . is expressly provided." *Held*, that women could not vote for members of parliament under the first-mentioned act: (1) because subject to a legal incapacity; (2) because the word "man" in said act does not include women.—*Chorlton* v. *Lings*, L. R. 4 C. P. 374; *Chorlton* v. *Kessler*, *ib.* 397.

Warranty.—*See* Insurance, 3.

Wife's Equity.

A married woman wrote out an assignment to her husband of her reversionary interest in a trust fund, dating it before her marriage and signing it in her maiden name. She did so to enable him to borrow money upon it, and moved thereto, as she alleged, by his threats. He sold said interest, and before completion, about six months after signing the above paper, she signed and gave to the purchasers a letter to one of the trustees of the fund, stating that she had before her marriage assigned her interest in the same to her husband. The latter was at this time in prison. *Held*, that she had been guilty of a fraud which precluded her from claiming her equity to a settlement against the purchasers.—*In re Lush's Trusts*, L. R. 4 Ch. 591.

Will.

1. A will was witnessed by an attorney and his clerk. After the testator's death an affidavit was written out by the clerk and sworn to by the attorney, that, *inter alia*, the wit-

ness signed in the presence of the testator. After the attorney's death the clerk for the first time stated and testified that the witnesses did not sign in testator's presence. The court declined under the circumstances to set aside the will on the clerk's recollection, alone.—*Wright* v. *Rogers*, L. R. 1 P. & D. 678.

2. The deceased wrote on the back of his will, which was not duly executed, a document headed "2 codicil." This document was properly executed, according to the law of the country where it was made, but could not by that law stand apart from, or establish, the will. *Held*, that neither will nor codicil could be admitted to probate.—*Pechell* v. *Hilderley*, L. R. 1 P. & D. 673.

3. Deceased at the foot of his will wrote: "This my last will and testament is hereby cancelled, and as yet I have made no other," signed this in presence of two witnesses who attested the execution. Administration was granted with the memorandum annexed.—*Goods of Hicks*, L. R. 1 P. & D. 683.

4. If a testator of sound mind reads a will and then signs it, the presumption that he understood it is conclusive.—*Atter* v. *Atkinson*, L. R. 1 P. & D. 665.

5. A party gave personalty to his son T., by will, subject to legacies thereinafter given, and then gave legacies to his daughters A. and E. He next devised his real estate to T. and appointed him sole executor, and directed that A. should reside with and be maintained by T. so long as A. should remain unmarried. A., after living for a time with T., left of her own accord and resided elsewhere. *Held*, that A. was only entitled to be maintained by T. during his life and while she resided with him, T. being always willing that she should do so. *Wilson* v. *Bell*, L. R. 4 Ch. 581.

See Codicil; Legacy; Perpetuity, 2; Power; Revocation of Will.

Witness—*See* Will, 1.

Words.

"*As damages*"—*See* Insurance, 4.
"*Man*"—*See* Voter.
"*Money due me at the time of my decease*"—*See* Legacy, 1.
"*Next of Kin*"—*See* Revocation of Will.
"*Perils of the Sea*"—*See* Insurance, 3.
"*Person in Charge*"—*See* Collision.
"*Port of Loading*"—*See* Insurance, 2.
"*Under Way*"—*See* Admiralty.
"*Warren of Conies*"—*See* Deed.

REVIEWS.

Law Magazine and Law Review. London: Butterworths, February, 1870.

The contents for this number are: Life Assurance; the City Courts; Exemption of Private Property on the Ocean; the Land Question; the Charters of the City of London; the New Bankruptcy Act; Slander; the Law of Limitation; Trades-Union Legislation; the Works of George Coode; the French Bar; Sanitary Law; also the usual notices of New Books, Events of the Quarter, &c.

A Report of the Case of The Queen v. Gurney and others in the Court of Queen's Bench, with an Introduction containing a History of the Case. By W. C. Finlason, Esq., Barrister-at-Law, Editor of Crown and Nisi Prius Reports, &c. London: Stevens & Haynes, 11 Bell Yard, Temple Bar, 1870.

It is well that a report of this celebrated trial which has attracted so much attention should be preserved. The questions raised were such as may be raised any day in commercial life. The respectability of the accused and the seriousness of the charge gave to the case an extraordinary interest. But the more one reads of it the greater is the surprise that the mayor of London ever committed the accused for trial; though it is still a greater wonder that an intelligent Grand Jury found a true bill. No fraud was shown from first to last; indeed there was not even misrepresentation. In equity it may be difficult to draw the line between exaggerated praise and equitable fraud; but at law there can be no criminal raud unless there be misrepresentation or deceit. There was nothing in the case to shew the absence of *bona fides*. On the contrary, the conduct of the accused throughout went to shew entire good faith; there was scarcely even suspicion. Those who took stock in the venture and lost were in a humour to see proof of guilt where there was at most suspicion. Their number was so great that the commercial community of the metropolis was much convulsed; and this caused that outside pressure which is so dangerous to the fair administration of justice, and which unperceptibly affected both the committing justice and the Grand Jury. Had there been a responsible

public prosecutor there never would have been a prosecution. The facts which transpired at the trial and which are succinctly given by Mr. Finlason in his introduction to the report, entirely fail to bring home criminalty to any of the accused. Mr. Finlason's dissertation on the law governing the case is valuable, and his industry is indefatigable. The volume contains 270 pages, and more than one-third of the book is occupied by the Editor in a review of the cases showing what is and what is not commercial fraud cases at law, cases in equity and cases in bankruptcy are all made to do tribute. In addition to this summing up of the learned Chief Justice, revised by himself, gives much additional value to the work. The report should be in the possession, not merely of members of the legal profession concerned in the administration of commercial law, but of Bankers, Directors of Joint Stock Companies, and others who, from time to time, are called upon to make annual reports to Shareholders of their doings. In documents of the kind there is more or less of a tendency to the bright side. When this tendency is so strong as to lead to a wilful misrepresentation of facts, and persons are thereby deceived, the criminal law may be invoked with success.

OBITUARY.

THOMAS KIRKPATRICK, Esq., Q. C.

Thomas Kirkpatrick, Esq., Q.C., the Member of the Dominion Parliament for Frontenac, died at his residence in Kingston, on Saturday, the 26th March.

Mr. Kirkpatrick was born in Ireland, at Coolmine, near Dublin, in the year 1805, and was therefore in his sixty-fifth year at the time of his death. He was educated at Trinity College, Dublin. In 1823, he came to this country, and immediately afterwards commenced the study of the law in the office of the late Judge Hagerman. He was admitted as an attorney and called to the Bar in 1828, and commenced the practice of his profession in the city of Kingston. He at the same time held the office of Collector of Customs at Kingston, to which he was appointed on the elevation of Mr. Hagerman, the former Collector, to the Bench. Such combinations as these, which, strange as it would seem now, often occurred in those days. In 1844 an Act of Parliament was passed, which compelled him to resign either this office or his profession, and he chose the former alternative. In 1846, he was made a Queen's Counsel, at the same time as Hon. J. H. Cameron, Sir Henry Smith, and the present Minister of Justice, Sir John A. Macdonald. In 1857, he was appointed a Commissioner to settle the boundary line between Upper and Lower Canada; and in 1860, he was appointed one of the Provincial Arbitrators, Col. VanKoughnet and Hon. Mr. Morin being the others.

In politics he was a Conservative, and in 1867, was elected to represent the County of Frontenac in the Dominion Parliament. He was defeated, however, in 1858, by the Hon. Alex. Campbell, in a contest for the Cataraqui Division.

Mr. Kirkpatrick married in 1838 a daughter of Alexander Fisher, Esq., Judge of the Midland District, by whom he had five sons and two daughters, who survive him. He was greatly respected by all who knew him, as a citizen, as a lawyer, and in the various ways in which he appeared before the public. In private life he was beloved, and his death will leave a blank in the old city of Kingston which will not soon be filled up.

THE HON. M. H. FOLEY.

The Hon. Michael Hamilton Foley died suddenly at Simcoe, in the County of Norfolk, on the 8th instant.

Mr. Foley was born in Sligo, in Ireland, in 1819, and came to Canada in 1832. He commenced life as a schoolmaster, and subsequeutly edited several papers in the Reform interest. He was for some years a prominent politician, and was Postmaster General in the Brown-Dorion administration in 1858, and again in 1862.

Mr. Foley was admitted as an Attorney in May, 1851, and was called to the bar in 1864. Of late years he practised his profession in the Town of Simcoe.

Curious Tenures.—Middleton Cheney, or Chenduit.—It is the custom in summer to strew the floor of this Church with hay cut from Ash Meadow, and in Winter straw is found at the expense of the Rector. A peculiar tenure also prevails in the lordship of this parish; when estates descend in the female line, the elder sister inherits by law.—*Oxford Journal.*