DIARY FOR JUNE.

1. SUN... *Whit Sunday.* Hon. J. S. Macdonald died, 1872.
2. Mon... Fenian skirmish at Limeridge, 1866. P.D., Q.B. N.T.D., C.P.
3. Tues... Last day for notice of trial Co. Ct. N.T.D., P.B. P.D., C.P.
4. Wed... Open Day, Q.B. New Trial Day, C.P.
5. Thurs.. Open Day, Q.B. Open Day, C.P.
6. Fri.... New Trial Day, Q.B. Open Day, C.P.
7. Sat.... Ea. Tm. ends. Last day for Ar. Cks. and Stu. to give not. for prim. exam. and call to Bar. Open Day.
8. SUN... *Trinity Sunday.*
9. Mon.... Charles Dickens died, 1870.
10. Tues... Gen. Sessions and Co. Court Sittings in each Co. begin.
14. Sat.... Last day for Courts of Rev. finally to revise Assess. Rolls.
15. SUN... *1st Sunday after Trinity.* Magna Charta signed, 1215.
20 Fri.... Accession of Queen Victoria, 1837. 37th Vict. begins.
21. Sat.... Longest day.
22. SUN.... *2nd Sunday after Trinity.*
23. Mon... Hudson Bay Co.'s Territory transferred to Canada, 1870.
25. Wed... Lord Dufferin landed at Quebec, 1872.
29. SUN... *3rd Sunday after Trinity.*

CONTENTS.

THE
Canada Law Journal.

Toronto, June, 1873.

We call attention to the judgment of Mr. Dalton, on page 193 in a case of *Dain* v. *Gossage*. The point decided, that no County Court should be held in the County of York in May of this year, is not of very general interest, but the judgment is well worthy of careful perusal as a masterly and logical analysis of apparently conflicting clauses in a statute. The opinion of Mr. Dalton has been confirmed by the two Chiefs.

We notice the death of a well-known legal author who created no small stir in his own day. Charles Purton Cooper died last month at Boulogne, in his eightieth year. His works number nearly forty volumes of the most diversified character. He was an earnest advocate of law reform, and, by his letters on the Court of Chancery, did much to forward the amendment of many abuses in that Court. In this country, he is best known by his reports (*Cooper, C. P.*, "Chancery Reports, with Notes and Appendix,) and his edition of Lord Brougham's decisions, which has, however, failed to supersede the regular reports of Milne and Keen.

We note that it is proposed in England to let the offices of Registrar and of Record and Writ Clerk follow that of the Master into oblivion. It is proposed that a judge's secretary shall discharge all the essential parts of the duties of these functionaries. Decrees and orders will then be no longer entered of record, but will be drawn up by the solicitors, settled by counsel, and signed by the secretary. The filing of pleadings, affidavits, and the like will then be dispensed with, and all

purposes will be answered by the service of copies upon the opposite party. It is extremely probable that Ontario will in due course follow the example of England in all measures which tend to simplify and assimilate the practice of law and equity.

In *Erskine* v. *Deans*, the Master of the Rolls recently laid down a doctrine which will be somewhat startling to persons who own and rent farming land. The question arose upon the application of a tenant of a farm to recover compensation from the executors of his deceased landlord, for the loss of sheep alleged to be poisoned through browsing on yew trees growing on the demised premises. The Court held that the claimant was entitled to succeed, on the broad ground that as between landlord and tenant there is an implied warranty on the part of the former that the trees and shrubs which he plants or suffers to be on the land demised shall not be noxious or injurious to the tenant. One can hardly believe that this decision will be sustained, if appealed from.

We have before advertised the merits of Mr. Justice Ludlow, who graces the Pennsylvania Bench, as an admirable specimen of a "highfalutin" Judge. His Honour has been lately indulging in some judicial grandiloquence upon the English Marriage Law of George II. c. 13, relating to the marriages of Papists and Protestants. We are not seeking to defend this law, but it well becomes any Judge of the Republic where the law of divorce legalizes adultery to talk fustian after this fashion:

"If this nation, in the strength of its manhood, is to be respected; if it has achieved the right to speak and to be heard, its policy upon this subject ought to be marked and understood: and it surely will entitle itself to the grateful consideration of the civilized world, if it emphatically declares that upon the subject of marriage, and especially its destruction, it will determine every case by its own enlightened principles of morals and of public policy, and upon the policy of universal toleration."

An old friend has courteously handed us a copy of the judgment of the Judicial Committee of the Privy Council, in the case *The Town of Dundas* v. *The Hamilton and Milton Road Coy.*, delivered recently by Sir Barnes Peacock, Sir Montague Smith and Sir Robert P. Collier. Their Lordships concurred in the conclusions arrived at by the Court of Appeal, in several places quoting with approbation the language of the learned Chief Justice of that Court. The case in appeal is reported in 18 Grant 311. At p. 325, Chief Justice Draper says; "It, (the argument of the Road Company who built the obnoxious bridge), amounts to this—that, to abate a nuisance of omission in a place where it injures them, they may erect a nuisance in another place where it injures the party guilty of the first nuisance." Their Lordships thought he might have added "and where it injures the public who are not guilty of the nuisance intended to be abated". This point however, though not referred to in this place was not overlooked by the Chief Justice, for he says, on the next page, "I presume it will not be seriously contended that a fixed bridge which would prevent masted vessels, sloops, schooners &c., from navigating this canal would not be indictable as a nuisance."

LAW SOCIETY.

Easter Term, 1873.

The examinations for Call to the Bar resulted as follows:

Out of a maximum of 600 marks, Mr. Geo. A. Mackenzie obtained 451, and passed without an oral examination. The following were passed after an oral:

Mr. W. McDiarmid	obtained	410	marks.
" Vincent	"	389	"
" C. R. W. Biggar	"	388	"
" J. Reeve	"	387	"
" S. Kirkpatrick	"	356	"
" Carman	"	339	"
" Brennan	"	336	"
" H. Matheson	"	326	"
" S. Platt	"	300	"
" C. V. Warmoll	"	300	"
" A. H. Spragge	"	300	"
" Caddy	"	300	"

Mr. Henry J. Morgan, of the Quebec Bar, was also called to the Bar of Ontario.

The following gentlemen passed their examination as Attorneys, and received certificates of fitness :

Mr. C. R. W. Biggar who obtained 467 marks.
" T. McArthur " 455 "

out of a maximum of 600, were admitted without oral examination.

Mr. H. Matheson	obtained	419	marks.
" Dunbar	"	413	"
" G. A. Mackenzie	"	409	"
" Brennan	"	383	"
" S. Kirkpatrick	"	378	"
" D. G. Macdonell	"	356	"
" R. H. Dennistoun	"	353	"
" McMillan	"	347	"
" Bogart	"	334	"

The latter were admitted after an oral examination.

THE WILLS ACT, 1873.

[COMMUNICATED.]

Of the many Acts which engaged the attention of the Ontario Legislature during the past session, there are but few of more importance than "the Wills Act, 1873." The nature and extent of the changes effected by this statute can only be perfectly understood by comparing the present law, on those points in which alterations have been effected, with the provisions of the new Act.

By the Statute 32, Geo. 3, c. 1, (see Con. Stat. U. C., cap. 9, s. 1.), it was enacted, that in all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England, as they stood on the fifteenth day of October, 1792, as the rule for the decision of the same. The effect of this statute as connected with our present subject, was to make the law of England on the subject of wills (as it stood at the date mentioned in the Act) the law of this Province.

By the Imperial Act of 1 Vict., c. 26, from which our new Act has been mainly taken, many important changes were effected in the English law regarding the execution and revocation of wills and the testamentary power; but though the old law was in many respects strongly condemned by the real property commissioners, on whose report the English statute was chiefly based, and though the reasons for this condemnation were undoubtedly applicable to this Province, it was not until the year 1868 (by 32 Vict., c. 8,) that any of the provisions of the English Act were adopted by our Legislature. It was no doubt considered that the statute, 4 Wm. 4, c. 1, ss. 49-51, (Con. Stat. U. C., c. 82, ss. 11-13) sufficiently cured the most obvious defects of the old law, so far at least as wills affecting real estate were concerned, and, in regard to wills of personal estate, the impression which it is well known has generally prevailed outside of the profession, that such wills required signature and attestation, and could not be made by any person under 21 years of age, has, to a great extent, secured in actual practice a compliance with the requisites now prescribed by statutory enactment.

The construction put by the Court of Chancery, in the case of *Whately* v. *Whately*, 14 Grant, 430, on the 49th section of 4 Wm. 4, c. 1, (Con. Stat. U. C., c. 82, s. 11,) called attention, in a marked manner, to the defects of that Act as compared with the provisions of the English statute; and the subsequent case of *Loughead* v. *Knott*, 15 Grant, 34, served as a reminder that one of the most

indefensible doctrines of the English law, the doctrine of the revocation of a devise by a subsequent conveyance which created no substantial change in the interest of the devisor, was in force in this Province to the full extent to which it had been carried by the English decisions. The hope expressed by the learned judge who decided that case, "that the anomaly which compels this decision may soon be removed by the Legislature," was realized by the passing of the statute, 32 Vict., c. 8, by which the provisions of the English Act regarding the revocation of wills and the time at which they should be construed to speak and take effect, (as if executed immediately before death of the testator,) were made part of our law.

The provisions of the new statute are by the 2nd section limited to wills *made* after 31st December, 1873, unless otherwise expressly provided in the Act. All wills made before that date will therefore be governed by the present law. The same section provides, however, that every will re-executed or re-published, (whatever that may mean), or revived by any codicil, shall, for the purposes of the Act, be deemed to have been made at the time at which the same shall be so re-executed, re-published or revived.

The fourth section is devoted to the interpretation of the terms "will," "real estate," "personal estate," "person," "testator," and "mortgage." This interpretation clause requires careful consideration. Associated with the other provisions of the Act, it effects some important changes in the law in so indirect a manner that they might escape the notice of a casual reader. Thus the inclusion in the term "will" of "a disposition by will or testament, or a devise of the custody and tuition of any child made under the provisions of the Act of Charles the Second regarding wards, liveries, and tenures," taken in connection with the sixth section disenabling an infant to make a will, has the effect of abolishing the power which infants now possess, under the statute of Charles, of appointing guardians to their children; and the inclusion in the words "person" and "testator" of "a married woman," taken in connection with the words of the enabling clause of the Act (section 5), has the important effect of completely emancipating married women from the testamentary disability to which they have been hitherto subjected.

The provisions of the enabling clause of the statute do not materially extend the present power of testamentary disposition.

The power of devising real estate acquired after the making of the testator's will has existed in this Province for nearly forty years. It did not exist in England when the statute 32; Geo. 3, c. 1, was passed. The old doctrine was that a devise operated as a conveyance or appointment by will, and that therefore a man could not devise lands of which he was not seized at the time he made his will. "It resulted from this state of the law that whenever a man acquired real estate which he wished to dispose of by will it was necessary that he should make a fresh will, if he had made one before, and so from time to time as often as he acquired real estate, or it would go to his heirs" (per Spragge, V. C., in *Whately* v. *Whately*, 14 Grant, 433.)

To remedy this inconvenience, it was provided by the 49th section of 4 Wm. 4, c. 1, (Con. Stat. U. C., c. 82, s. 11,) that "When the will of any person who shall die after the sixth day of March, 1834, contains a devise in any form of all such real estate as the testator shall die seized or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land that may have been, or may be acquired by the devisor after the making of such will in the same manner as if the title thereto

had been acquired before the making thereof. The effect of this Act was to remove the disability to devise after acquired real estate which had theretofore existed, a step in the direction of improvement which was of the highest importance, and which our Legislature took some years in advance of the Imperial Parliament.

Contingent, executory, and future interests in any real or personal estate, and rights of entry for conditions broken and other rights of entry, are comprised in the enumeration of interests of which a testator is enabled to dispose by the fifth section of the new Act.

The statute contains but one disenabling clause. Section 6 provides that "No will, made by any person under the age of twenty-one years, shall be valid." This section abolishes the power which infants have hitherto possessed to dispose by will of their personal estate. The statute, 32, H. 8, c. 1, enabled all persons, including, of course, infants and married women, to dispose by will of their real estate, but by the explanatory act, 34-35, H. 8, c. 5, the power thus unguardedly conferred upon infants was expressly abridged, and it has never since been restored. The ecclesiastical courts, however, in dealing with testaments of personal property, adopted the rules of the civil law, and permitted a male infant of the age of fourteen and a female of the age of twelve to make a will of personalty. Such is in fact still the law of this Province.

A comparison of our new statute with the English Act, 1 Vict., c. 26, will show that the Legislature has omitted from the new statute the clause disqualifying married women which is contained in the English Act.

Married women were disqualified from devising real estate by the 14th section of the Statute of Wills, (34-35, H. 8, c. 5), and the harsh principles of the common law also disqualified a married woman from bequeathing her personalty except by the license or authority of her husband. The tendency of modern legislation has been to remove the disabilities to which married women have been hitherto subjected, and the law of "*separate estate*," as administered by the Courts of Equity, has to a great extent relieved married women from the disabilities imposed on them by the common law and the old statute of wills. When it is considered that the Courts of Equity have held (see *Taylor* v. *Meade*, 11 Jur., N. S. 166, and *Hall* v. *Waterhouse*, 11 Jur., N. S. 361,) that a married woman may devise the equitable fee in real estate settled on or conveyed to her for her separate use, and that her heir at law may be compelled to convey the legal estate to her devisee, it will be seen that the old statute has to a great extent been repealed by the doctrine of the Court. In speaking of separate estate and of the power of disposing by will of such estate, which the Court has secured to married women, Lord Westbury remarks (*Taylor* v. *Meade*, 11 Jur., N. S. at p. 167) that "the violence thus done by the Courts of Equity to the principles and policy of the common law as to the *status* of the wife during coverture, is very remarkable, but the doctrine is established and must be consistently followed to its legitimate consequences."

The statute, 22 Vict., c. 34, (Con. Stat. U. C., c. 73,) confers (by sect. 16) on a married woman a limited power of testamentary disposition, enabling her to devise her property to her children, or failing there being any issue, then to her husband, or as she may see fit; but the "Act to extend the rights of property of married women (35 Vict., c. 16), operating in connection with the doctrine of separate estate, may probably be regarded as empowering a married woman to dispose by will absolutely of her equitable interest in all the classes of property which are,

by the Act, made separate property, including her real estate. It is remarkable, however, that the Act contains no provision settling a married woman's general personal property to her separate use.

It will thus appear that the omission from the new statute of the clause contained in the English Act, disenabling married women, is of less importance than would at first appear; but it is still important, inasmuch as a married woman is empowered by the Act to dispose of the legal estate in her lands, a valuable power, but one which the Courts of Equity could not, in view of the express wording of the old statute, venture to give to her; and it is also important, inasmuch as a married woman will acquire by the Act a power of disposing, by will, of her *general personal property* not settled to her separate use.

For the construction of the former Act, see the cases of *Royal Canadian Bank* v. *Mitchell*, 14 Grant, 412; *Chamberlain* v. *McDonald*, 14 Grant, 447; *Wright* v. *Garden*, 28 U. C. Q., B. 609; and the recent case of *Mitchell* v. *Weir*, 19 Grant, 568; also *Davison* v. *Sage*, not yet reported, which is the only direct authority on the construction of sect. 16.

(To be Continued.)

TRAVELLING BY RAIL.

A railway company is liable to an action for false imprisonment, if that imprisonment be committed by its authority; and such authority need not be under seal. But the plaintiff must give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the company to do so. "In the ordinary course of affairs, a company must decide whether they will submit to what they believe to be an imposition, or, for their protection, use the summary power (given to them in many cases) of arresting offenders; and as, from the nature of the case, the decision whether a particular person shall be arrested or not must be made without delay, and as the case may be one of not infrequent occurrence, we think it is a reasonable inference that, in the conduct of their business, the company have on the spot officers with authority, without the delay attending on convening the directors, of deciding whether the servants of the company shall or shall not, on the company's behalf, apprehend a person accused of travelling without paying. We think that the company would have a right to blame those officers if they did not on their behalf apprehend the person, if it seemed a fit case: and if so, the company must be answerable if, in the exercise of their discretion, these officers on their behalf apprehend an innocent person." Blackburn, J.: *Goff* v. *Northern R. W.*, 3. E. & E. 672.

In *Moore* v. *Metropolitan R. W.*, L. R. 8 Q. B. 36,—the latest case on the subject, the plaintiff had a return ticket from M. to N., and getting out at E., a station short of M., refused to pay an extra 2d. demanded: he thereupon was arrested by the inspector of the station, (the company being empowered to arrest persons committing frauds by the non-payment of fare,) and the charge being dismissed by the magistrate, the plaintiff brought an action of trespass and false imprisonment. The Court held that as the inspector was the defendant's representative at E., it must be presumed, in the absence of evidence to the contrary, that he had authority from the defendants to arrest persons supposed to be guilty of defrauding the company, and that the defendants were liable for his mistake. If the plaintiff had committed the offence charged, that would have been a defence on the merits, as the company were liable on the ground that their servant made a mistake. In giving judg-

ment it was stated that *Goff* v. *Great Northern R. W.*, was a well considered case, and the principles there laid down have never been deviated from. Where a railway company are carrying on business there are certain things which are necessary to be done for the carrying on of the business and the protection of the company, and there are things which if done at all must be done at once, and therefore the company must have some person on the spot to do these things, a person acting with common prudence and common sense, clothed with authority to decide as the exigency arises, what shall be done. *Giles* v. *Taff Vale R. W.*, 2 E. & B. 822, which was followed by *Goff* v. *Great Northern Railway*, laid down the rule that if such person, intending to exercise his authority, makes a mistake and does an act which cannot be justified, the company are responsible, because he is their agent. The latter case also decides that where there is a necessity to have some one on the spot to act on any emergency and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority, is *prima facie* evidence that he had authority, and the presumption that he had authority must be rebutted by the company. Where one who is clothed with authority to do all that is right and proper in the premises happens to make a mistake, or commits an excess while acting within the scope of his authority, his employers are responsible for it: but where he does an act which the company themselves have no authority to do, the company will not be liable for his acts: *Poulton* v. *London & S. W. R. W.* L. R. 2 Q. B. 534. In this case it was held that the railway company had power to arrest a person travelling without having paid his own fare, but that they could not apprehend him for not having paid for a horse that he had in the train; their authority only extending to detain the horse. And so the plaintiff, who had been arrested, got nothing for his false imprisonment: though had the station-master given him into custody under the erroneous supposition that he had not paid the fare for himself as an individual, that being an act which the company were authorised to do, and had empowered their agent to perform for them, they would have been liable. As Keating, J., remarked in *Edwards* v. *London & N. W. R. W.*, L. R. 5 C. P. 445, the cases decided are cases where a company has made by-laws, and an act of Parliament has given authority to the company's servants to apprehend persons committing offences against the by-laws; and it has been held, that under such circumstances, the servants may be considered to have authority to enforce the by-laws, and to do whatever is necessary for the purpose.

A foreman porter, who in the absence of the station-master is in charge, has no implied authority to give into custody a person whom he suspects is stealing the company's property; and if he arrests an innocent person the company will not be liable: *Edwards* v. *London, &c., ante.* Though it would appear that if an officer, appointed expressly to watch the company's property, took an innocent person into custody on the charge of stealing, it might be said that the company were liable: *Ibid, per* Brett, J.

The clerk at the ticket office of the London and South Western Railroad wished a Mr. Allen to take a French coin (two sous) as change. Mr. A. objected and demanded a British penny; and as the clerk would not take back the sous Mr. A. attempted to put his own hand into the bowl of the till containing coppers, to help himself; for this the clerk gave him into custody on the charge of attempting to rob the till. In an action brought against the company for

false imprisonment, it was held, that as such arrest, after the attempt had ceased, could not be necessary for the protection of the Company's property, but was merely to vindicate justice, the clerk had no implied authority to arrest the man: his authority only extended to the doing of such acts as were necessary for the fulfilment of the duties entrusted to him; and that the company was, therefore, not liable for the act of the clerk, nor for that of the policeman who took A. into custody. Blackburn, J., was inclined to think that if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender: or if the clerk had reason to believe that the money had been actually stolen, and he could get it back, by taking the thief into custody, and he took him into custody with a view of recovering the property taken, it might be that that also could be within the authority of the clerk: *Allen* v. *London & S. W. R. W.* L.R. 6 Q. B. 65. From the above cases the rule, as to the liability of companies for the acts of their servants, may be deduced.

Under section 49 of the Railway Act, 1868, constables may be appointed to act on the line of any railway, who shall have full power to act as such for the preservation of the peace, and for the security of persons and property against felonies and other unlawful acts, on such railways and on its works, and in all places not more than one quarter of a mile distant therefrom; and to take before a justice of the peace any person guilty of an offence punishable by summary conviction under the act, or any of the acts and by-laws affecting such railway.

Any person who uses violent and threatening language towards the conductor of a train, and interrupts him in the discharge of his duty, is liable to be apprehended and punished as for a misdemeanor. Where a man who had been apprehended and brought before a magistrate for such misconduct, was discharged by the Justice, and afterwards brought an action against the conductor, it was held that the complaint having been made and prosecuted by the defendant in his character as a railway conductor,—under sanction of an act of parliament,—he was entitled to six months notice of action, and that without such notice no action could be sustained: *Lauzeau* v. *Leonard*, 20 U.C. Q.B. 481.

As a learned judge remarks, no actions have been more frequent of late years than those against railway companies, in respect of injuries sustained on or through them: a few of these will be noticed now, although *ex necessitate* most will be left unreferred to.

It is the duty of a company to use due and proper care and skill in conveying travellers. The duty thus laid upon them does not arise from any contract made between the company and the persons conveyed by them, but it is one which the law imposes. If railways are bound to carry, they are also bound to carry safely: it is not sufficient for them to bring merely the dead body of their passenger to the end of the journey, and there deliver him up to those entitled to the remains: *Collett* v. *London & N. W. R. W.*, 16 Ad. & Ell. N. S. 984. Every person is a passenger and entitled to be carried safely, (so far as due care will provide for his safety), who is lawfully in the carriage of the carrier: *Great Western of Canada* v. *Brand*, 1 Moore, P.C., N.S. 101.

If one is lawfully on the road and is injured by the negligence of the defendants, he is entitled to recover, notwithstanding that he is a "dead-head," being

a stockholder in the company, travelling by the invitation of the president, and not in the ordinary passenger car: *Philadelphia & Reading R. W.* v. *Derby*, 14 Howard U.S., Rep. 468. So, though the contract for the conveyance of mails has been made with the Postmaster General, still a clerk, who is injured while travelling free in charge of the bags, has a right of action: *Collett* v. *London & N. W. R. W.*, *ante*: see also *Austin* v. *Great Western R. W.*, L.R. 2 Q. B. 442, as to the right of injured parties to recover, even where they have paid no fare. Where the action is founded on breach of duty, and not on contract, it is not necessary to allege in the pleadings, or prove at the trial, that reward was to be paid by the plaintiff: *Marshall* v. *York, Newcastle &c. R. W.*, 11 C. B. 655. And where the Printers' Pension Society hired a train of the defendants, for an excursion from London to Brighton and back, for a certain sum, and the defendants gave tickets to the treasurer of the society, from whom the plaintiff purchased one, and an accident, in which the plaintiff was hurt, having occurred, it was held that the plaintiff was a passenger to be carried by the defendants, for whose safety they were liable: *Skinner* v. *London B. & S. C. R. W.*, 5 Ex. 787.

Where an accident happens to a passenger, either by the carriage breaking down or running off the rails, that is *primâ facie* evidence for the jury of negligence on the part of the company; and such evidence, if not rebutted by evidence given by the defendants, will justify a verdict against the company which the Court will not set aside: *Dawson* v. *Manchester S. & L. Ry.*, 5 L. T. N. S. 682. In this case, the engine ran off the track, and it was found that its fore-axle was broken; but no evidence was given as to whether the accident caused, or was caused by, the breakage. The plaintiff's shoulder was contused, and he had received a blow on his head which crushed in his hat: for a time he was insensible, and for a longer period sick: as a salve, the jury gave him a large sum which the Court allowed him to keep. The doctrine laid down in this case is sustained and enforced by *Skinner* v. *London B. & S. C. Ry.*, 5 Ex. 787, *Carpue* v. *London B. & S. C. Ry.*, 5 Ad. & E. N. S. 747, and *Reid* v. *Great Northern Ry.*, 28 L. J. (Ex.) 3. In the first of these it was decided that it was not necessary for the plaintiff to shew specifically in what the negligence of the defendants consisted, and that if the accident arose from some inevitable fatality it is the duty of the defendants to prove it.

The plaintiff being a passenger in one of the defendants' cars the axle of the tender broke, and the tender and car in which he was were thrown off the track and his arm was broken. At the trial the defendants called the engineer who had been in charge of the train, who proved that he had examined the axle shortly before the accident when it appeared in good order. The jury having found a verdict for the plaintiff upon this evidence, and with a charge favorable to the defendants, the Court refused to set it aside, on the ground that it was for the jury to determine on the evidence, whether or not there was negligence on the part of the company: *Thatch* v. *Great Western R. W.*, 4 U. C. C. P. 563. Chief Justice Macaulay, in delivering judgment, remarked that the accident having happened unaccountably, and without any proximate or active cause to account for it, constituting as the cases say some evidence of negligence, it rested with the defendants to explain and reconcile it with perfect innocence on their part, and having failed to do this to the satisfaction of the jury, he could not see sufficient ground for sending the case to a second trial, when the same evidence and no more might again be submitted to another jury.

But where it has been agreed that, in consideration of a free pass, the passenger shall travel at his own risk, such agreement will be held good, and will be taken to exclude all liability on the part of the company for any negligence—even though gross or wilful,—for which they would otherwise have been liable. Of course, it would be different were an action brought for an independent wrong, such as an assault or false imprisonment: nor does such agreement take away any liability that might be incurred as to criminal proceedings: *McCawley* v. *Furness R. W.*, L. R. 8 Q. B. 57.

So long ago as the days of Sir James Mansfield, it was held in *Christie* v. *Griggs*, 2 Camp. 79, that there is a difference between a contract to carry goods and a contract to carry passengers. In the former case the carrier is liable for his freight in every event, but he does not warrant the safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safe conveyance. So if the breaking of a coach is purely accidental, the plaintiff will have no remedy for the misfortune he has encountered. The contract made by a general carrier of passengers is to take due care (including in that term the use of skill and foresight), to carry his living freight safely: and it does not amount to a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, *i.e.*, free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected their existence: *Readhead* v. *Midland R. W.*, L. R. 4 Q. B. 379 (Ex. Ch.) also L. R. 2 Q. B. 412, and the cases therein cited. An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from defects likely to cause peril, when from the nature of things, defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man by implication of law and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to the maxims of law, "Lex non cogit ad impossibilia," "Nemo tenetur ad impossibilia." "Due care," however, undoubtedly means, (having reference to the nature of the contract to carry,) a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due and proper care, however widely construed, however rigorously enforced, will not, as the plaintiff Readhead sought to do, subject a railway company to the plain injustice of being compelled by law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could have prevented or detected. In this case, the accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to a latent defect in it, which was not attributable to any fault on the part of the manufacturers, nor was it discoverable previously to the breakage. *Crois* v. *Chester & Holyhead R. W.*, 2 Ex. 251, shows that when a competent person is employed to make the tire of a wheel, for instance, and employs proper materials for the work, the company will not be liable for any damage arising from a defect in the tire which it was impossible to detect, and so prevent the accident. In the Court of Appeal of the State of New York, however, it was held that a warranty was annexed to the contract to carry made by railway companies, *Alden* v. *New York Central R. W.*, 12 Smith 102: but the American cases on this

point are far from being uniform: *Ingalls* v. *Bills* 9 Metcalf 15.

Lord Campbell's act, 9 and 10 Vict. c. 93 (of which our act, Con. Stat. Can. ch. 78, is a transcript), has proved a great boon to the relations of persons deprived of their lives by railway accidents, and many have been the actions decided thereunder. It is now definitely settled that a jury in estimating the damage sustained by the wife, husband, parent or child of a person killed by misfeasance, cannot take into consideration mental suffering endured or loss of society, but must give compensation only for the pecuniary loss sustained. If the jury were to enquire into the degree of mental anguish which each member of a family suffers from a bereavement, then not only the child without filial piety, but a lunatic child and a child of very tender years, and a posthumous child, on the death of the father may have something for pecuniary loss, but cannot come in *pari passu* with other children, and must be cut off from the solatium. If a jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of the defendants: especially would the consequences be disastrous if all the relatives mentioned in the fifth section of the Imperial Act, (the sixth of ours), the father and the mother, grandfather and grandmother, stepfather and stepmother, grandson and granddaughter, stepson and stepdaughter, not only got compensation for pecuniary loss, but a solatium for their shattered affections and broken hearts: *Blake* v. *The Midland R. W. Co.*, 18 Ad. & Ell. N.S. 93. *Pym* v. *Great Northern R. W. Co.*, 4 B. & S. 306 (Ex. Ch.,) also, decides that no solatium for grief or the loss of the society of the deceased can be recovered.

The Scotch law is more generous, for by it a solatium is given for wounded feelings, even where the death of the sufferer, instead of being a loss to his family, might be regarded as a benefit to them, from his bankruptcy or dissipated habits: Ersk. Inst. 592, note 13. It also grants a solatium to a man injured in his happiness and circumstances by the death of his wife and child: whereas in England a widower will not get anything unless the death of his wife causes him some pecuniary loss, (in argument *Gilliard* v. *Lancashire & Yorkshire R. W. Co.*, 12 Law Times 356): it being a pure question of pecuniary compensation, and nothing more, which is contemplated by the act. (See also *Armsworth* v. *South Eastern R. W. Co.*, 11 Jurist 758.)

On one occasion when Byles, J., was leaving the matter to the jury, he said, "If the deceased had a fatal disease which would be sure to kill him, but if his death was precipitated by the collision, the defendants were liable. As to the damages, the plaintiff was only entitled to recover for actual pecuniary loss. If sound, the deceased might have lived some years; if unsound he might have died in a short time, and so the amount of damage would be less: *Birkett* v. *Whitehaven Junction R. W. Co.*, 4 H. & N. 732.

When after a man was injured the defendants paid him, and he accepted a sum of money in full satisfaction and discharge of all claims and causes of action he might have against the company; if he subsequently dies from the effects of such injuries no fresh cause of action accrues to his representatives: *Read* v. *Great Eastern R. W. Co.*, L. R. 3 Q.B. 555. But a remark of Erle, C. J., in *Pym* v. *Great Northern R. W. Co.*, 4 B. & S., at page 406, to the effect that the statute gives to the personal representative a cause of action beyond that which the deceased would have had had he survived, and based on a different principle—

and the words of Coleridge, J., in *Blake* v. *The Midland R. W. Co.*, *ante*, that "the statute does not transfer the injured party's right of action to his representative, but gives to the representative a totally new right of action on different principles," would appear to give some color to an opposite doctrine. (See also, *Franklin* v. *South Eastern R. W. Co.*, 3 H. & N. 211 (Ex. Ch.,) and *Dalton* v. *South Eastern R. W. Co.*, 4 C. B., N. B. 296.)

The remedy given by the statutes is to *individuals* and not to a *class;* and therefore on the death of a person whose income arose from lands and personalty, (quite independently of any exertion of his own; and no portion of it was lost to his family by his demise) an action under the act is still maintainable, if in consequence of that death the mode of distribution of his income among the different members of his family is changed to the detriment of some of them. As for instance in this case—the eldest son took the bulk of the property as heir-at-law, leaving but a small settlement for the widow and younger children, who accordingly brought an action and obtained from the jury £1000 for the widow, and £1500 for each of the eight young children; and the court sustained the verdict: *Pym* v. *Great Northern R. W. Co.*, 4 B. & S. 397, Ex. Ch. And it was also decided that the loss of the reasonable probability of pecuniary benefit from the continuance of the life of the deceased, was a sufficient damage to maintain the action.

The insurances on a man's life, if they go to the benefit of his family, may reduce the amount recoverable for damages. In an unreported case at *Nisi Prius*—*Hicks* v. *Newport, Abergavenny & H. R. W. Co.*, mentioned in 4 B. & S. 403,—Lord Campbell told the jury to deduct from the amount of damages the amount of an insurance against accidents, and any reasonable sum that they should think fit in respect of the life insurances. This was the only case mentioned to Pollock, C. B., in reply to a question of his as to whether there was any case in which notice had been taken of insurances left by the deceased.

Robinson, C. J., on one occasion, confessed himself utterly at a loss to make a satisfactory computation of the amount of damages to be awarded, or of the pecuniary loss sustained by a widow and her children by the death of the head of the family: he said, he had no means of determining whether they would have been better off if the father's life had run its natural course; it was mere conjecture. He (the father) might have become extravagant or intemperate and squandered his property, or from too great eagerness to grow rich, might have lost it by grasping at too much, or might have died from natural causes within a year or a month, leaving his family no better off than he did leave them when carried off by the sad accident. The Court will not interfere to reduce the damages assessed, unless they are clearly excessive; but where an industrious, well-to-do farmer was killed at the disastrous Desjardins Canal accident in March 1857, the Court held that £3000 was not an exorbitant compensation for the widow and three children: *Secord* v. *Great Western Ry. Co.*, 15 U. C. Q. B. 631.

As to attempts to mitigate the damages in the case of *Ferrie*, another Desjardins Canal victim, in 15 Q. B. at p. 517, McLean, J., said, "if, for instance, the deceased had his life insured, and the plaintiff as his executor had received after his death for such insurances an amount, the interest of which would exceed the annual income of the testator while living and exercising his ordinary avocations, it must surely be competent for the defendants to shew that the wid-

ow can have sustained no pecuniary damage by the death of her husband; and, the action being for the injury arising in a pecuniary point of view, nominal damages only, if any, could in such a case be recovered."

In all actions for injury by negligence, the damage should be a compensation for the actual injury, and it is error to leave the measure and amount of damage, as well as the rules by which they are to be estimated, entirely to the jury. *Pennsylvania R. W. Co.*, v. *Brooks*, Am. Law. Reg. 524.

(To be continued.)

CRITICISMS ON THE REPORTERS.

We now proceed to redeem a promise which we made in these columns about a year ago—that is to publish from our memoranda, comments, chiefly judicial, which have been from time to time made upon the Reporters. Many notices which we had culled were forestalled by a selection we then availed ourselves of from the *American Law Review;* and more recently (last month) we find that a continuation of the same selections, in the same periodical, also republished by us, has still further diminished our store. Still we can supply some points that the collector on the other side has not gathered up, or has mislaid, and we hasten to disclose what is left in our Note-book.

Of course everyone knows that Mr. Wallace's book on "The Reporters" is *the* text-book on the subject. We are glad to learn that a second edition of this scholarly work is in process of preparation. What we publish now will not go over ground already traversed by the American author, or by the articles above referred to. We have endeavoured to lop off from our extracts everything so easily accessible as the contents of Mr. Wallace's pages, and of the columns of the *American Law Review.* At present we shall confine ourselves to the reporters,—afterwards we may pass to notices of the text-writers and legal authors.

Ambler's Reports.—It has been a frequent subject of regret, that a gentleman, who by a constant practice in the Court of Chancery for upwards of 40 years, was apparently so well qualified to publish the results of his industry, should have failed so remarkably in the task which he undertook. His reports are well known to be an extremely careless and imperfect production. The facts of most of the cases are stated shortly and defectively; in many the dicta of the judges, in some even the points themselves, have been erroneously reported. The only notice which some of the most important cases in the book have received, is a short memorandum of the point determined. The notes taken in the earlier part of his life evidently bear few marks of subsequent revision; and as no editor has yet come forward to verify his statements by reference to the Registrar's Books, the frequent discovery of errors has given a reputation for inaccuracy to the publication: Hon. R. H. Eden in preface (1818) to his reports, *temp.* Lord Northington. In Mr. Wallace's book on "The Reporters," it is said, "Ambler as originally printed was of imperfect authority. A new and much improved edition was given to the profession in 1828, by Mr. Blunt."

Brown's Chancery Cases.—"These cases are generally considered as too shortly taken; and this may be accounted for by the brief manner in which Lord Thurlow pronounced his decrees, seldom giving his reasons for his decisions." Bridg. Leg. Bib. 40.

"An inaccurate reporter." Per Lord Eldon, as noted in 20 Law Mag. 62.

Brown's Parliamentary Cases are reported in such a form that the grounds upon which they are decided can never be positively ascertained. 17 Law Mag, 58.

Bulstrode.—"One of the best reporters of his day. His writings are at once elegant and excellent." Woolrych's Serjeants, xxvi. *n.* and 380.

Burrows' Reports.—Having occasion to point out an error in the statement of facts in a case in Burrows, Lord Eldon goes on to observe, "Speaking with all deference, but with due anxiety for the information of those for whom these books are written to instruct, I cannot

help saying, this is not the only instance, how extremely difficult it is to rely upon the circumstances stated as reasons for the judgment." *Clarke* v. *Parker*, 19 Ves. 20.

In Greenleaf's Overruled Cases, p. 73. it is said, "Burrows' reports were not published till 9 years after the decisions with which they commence were given; and they contain but a small part of the cases decided by jury and in *bank*; the whole number being about 800 annually; or about 25,000 for the 32 years during which Lord Mansfield was Chief Justice."

Campbell's Reports.—"One of the most valuable collections of Nisi Prius Cases we possess." Per Ball, J. in *O'Malley* v. *O'Malley*, 12 Ir. L. R. 112.

"Whoever looks through Campbell's reports, will be greatly surprised to see among such an immense number of questions, many of the most important kind, which came before that noble and learned Judge, Lord Ellenborough, not that there are no mistakes, but that he is in by far the most of the causes, so wonderfully right, beyond the proportion of any other Judge." Per Mansfield, C. J., in 5 Taunt. 195.

Carrington & Payne's Reports contain many unimportant cases, and compare unfavourably with Moody & Malkin's Reports: 3 Law Mag. 210; and see *Readhead* v. *Midland Railway Company*, 17 W. R. 739.

Carter's Reports.—In a copy once the property of C. J. Treby, there was written during the lifetime of the reporter by the Judge on the fly-leaf of the volume, this memorandum: "These Reports are published by Samuel Carter, a Barrister of Inner Temple, who lives at Birmingham, in Warwickshire, but they are said to have been taken by some other person." Albany Law Journal, Dec. 2nd, 1871.

Carthew's Reports.—"Carthew is a book of great authority and accuracy, and I find that Chief Justice Willes says, 'I own Carthew was a good and faithful reporter;' and Lord Kenyon says that he is 'in general a good reporter.'" Per Fitzgerald J. in *Scovell* v. *Gardiner*, 16 Ir. C. L. R. 347.

Chancery Cases, (Vol. II).—"Not entitled to any great attention." Per Sir W. Grant in *Richards* v. *Chambers*, 10 Ves. 580.

Chitty's Reports.—"A reporter of no great authority." Per Blackburn, J., in *Attorney-General* v. *Dakin*, 18 W. R. 1117.

Coke's Reports.—"It may not be out of place here to observe that the resolutions of the Judges, as reported by Sir Edward Coke, often go beyond the facts of the cases in which we find them reported; but this has not been held to detract from their authority. Such is the weight attached to those positions of law which are handed down by the 'Great Reporter,' and have received the sanction of his approbation, that they have been generally received and venerated as maxims in our law." Per Crampton, J., in *Coppinger* v. *Bradley*. 5 Ir. L. R. 274.

"The authority of Lord Coke on Admiralty Jurisdiction is inaccurate and untrustworthy," Per Sir W. Phillimore in *The Sylph*, L. R. 2 Ad. & Ec. 27.

"I am afraid we should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law." Per Best C.J., in 2 Bing, 296.

"The 12th part is not so accurate as the rest, not having been published by him, but from his notes after his death." Per Holroyd, J., in *Lewis* v. *Walter*, 4 B. & Ald. 614. Mr. Hargrave in 11 St. Tri. 40, says they were posthumous and loose collections of papers, neither digested nor intended for the press by the writer. And see also in *McPherson* v. *Daniels*, 10 B. & C. 275, where Parke, J., after referring to these Comments says the 12th Rep. is "not a book of any great authority."

Cooper, C. P. Select Cases, temp. Brougham.—A curious disclosure respecting this work will be found in 15 Law Mag. 146, from which it appears that the publication was undertaken at the instance of Lord Brougham with a view to correct certain erroneous propositions advanced by him, and reported as actually delivered in Mylne and Keen. These latter reports are there said to be of greater accuracy and ability than this collection.

APPOINTMENT OF QUEEN'S COUNSEL.

The following is the correspondence brought down to the House of Commons, between the Government of Canada and that of Ontario, relating to the appointment of Queen's Counsel. It commences with a communication from the Governor-General to the Earl of Kimberley:—

Appointment of Queen's Counsel.

Ottawa, 4th January, 1872.

My Lord,—I have the honor to enclose for Your Lordship's consideration a report drawn up by the Honorable the Minister of Justice (Sir John A. Macdonald), on a question which has been raised as to the power of appointing Queen's Counsel for the Provinces.

2. I shall feel obliged if Your Lordship will have the goodness to procure the opinion of the Law Officers of the Crown, and communicate to me your decision on the question of Prerogative.

3. Questions will probably be put upon the subject to the Ministers soon after the commencement of the approaching Session of Parliament, *i. e.*, soon after the middle of next month.

I have, &c.,

Lisgar.

To The Right Hon. Earl of Kimberley.

Department of Justice,
Ottawa, 3rd January, 1872.

The undersigned has the honor to report to Your Excellency that the question has been raised by the Government of the Province of Nova Scotia, as to whether they have the power of appointing Queen's Counsel for the Province, their opinion being that they have no such power.

The undersigned is of the opinion that, as a matter of course, Her Majesty has directly, as well as through her representative the Governor-General, the power of selecting from the Bars of the several Provinces, her own Counsel, and, as *fons honoris*, of giving them such precedence and pre-audience in her Courts as she thinks proper.

It is held by some that Lieutenant Governors of the Provinces, as they are now not appointed directly by Her Majesty, but by the Governor-General, under "The British North America Act, 1867," clause 58, do not represent Her sufficiently to exercise the Royal prerogative without positive statutory enactment.

This seems to have been the view of Her Majesty's Government in 1864, when they refused to confer the pardoning powers on the Lieutenant Governors.

(See despatch of Mr. Cardwell, of 3rd December, 1864; also, Lord Granville's despatch of 24th February, 1869.)

On the other hand, it is contended that the 64th and 65th clauses continue to the Lieutenant Governors the powers of appointing Queen's Counsel which they exercised while holding Commissions under the Great Seal of England.

Reference is also made to the 63rd section, by which the Lieutenant Governors of Ontario and Quebec appoint Attorney Generals, and the Lieutenant Governor of Quebec also a Solicitor General.

However this may be, it will be seen that by the 92nd clause of the Act, it is provided that, "The Legislature of each Province may make laws in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."

Under this power, the undersigned is of opinion, that the Legislature of a Province, being charged with the administration of justice and the organization of the Courts, may, by statute, provide for the general conduct of business before those Courts; and may make such provisions with respect to the Bar, the management of criminal prosecutions by counsel, the selection of those counsel, and the right of pre-audience, as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the Royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation.

As the matter affects Her Majesty's prerogative, the undersigned would respectfully recommend that it be submitted to the Right Honorable the Secretary of State for the Colonies, for the opinion of the Law Officers of the Crown and for Her Majesty's decision thereon.

The questions for opinion would seem to be:

(1.) Has the Governor General (since 1st July, 1867, when the Union came into effect) power, as Her Majesty's representative, to appoint Queen's Counsel?

(2.) Has a Lieutenant-Governor, appointed since that date, the power of appointment?

(3.) Can the Legislature of a Province confer by statute on its Lieutenant Governor the power of appointing Queen's Counsel?

(4.) If these questions are answered in the affirmative, how is the question of precedence or pre-audience to be settled.

All of which is respectfully submitted.

John A. Macdonald.

Downing Street, 1st Feb., 1872.

My Lord,—In compliance with the request contained in your despatch, No. 1, of the 4th January, I have taken the opinion of the Law Officers of the Crown on the questions raised therein, with regard to the power of appointing Queen's Counsel in the Provinces forming the Dominion.

I am advised that the Governor General has now power, as Her Majesty's representative, to appoint Queen's Counsel, but that a Lieutenant Governor, appointed since the Union came into effect, has no such power of appointment.

I am further advised that the Legislature of a Province can confer by statute on its Lieutenant Governor the power of appointing Queen's Counsel; and, with respect to precedence or pre-audience in the Courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor General and the Lieutenant Governor, as above explained.

I have, &c.,

Kimberley.

To The Governor-General.

Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in Council on the 2nd October, 1872.

On a memorandum, dated 28th September, 1872, from the Hon. the Minister of Justice, reporting that it appears by the Ontario "Official Gazette," of the 16th of March last, that the Lieutenant Governor of that Province appointed the following gentlemen to be Queen's Counsel:—

Danl. McMichael,	of Osgoode Hall,	Esq.,	Barrister-at-law
William Proudfoot,	"	"	"
Chris. Salmon Patterson,	"	"	"
Edmund Burke Wood,	"	"	"
John Anderson,	"	"	"
Samuel Hume Blake,	"	"	"
Thomas Moss,	"	"	"

The Minister states that, being of opinion that in the absence of legislation on the subject, the Lieutenant Governor of a Province of the Dominion had not, since the 1st July, 1867, the right to exercise the Royal prerogative in the appointment of Queen's Counsel, but that such power was vested in the Governor General, as Her Majesty's representative; he made a report to that effect, and His Excellency the late Governor General transmitted such report to the Secretary of State for the Colonies, for the purpose of obtaining the opinion of the Law Officers of the Crown on the subject.

That by a despatch, dated 1st February last, Lord Kimberley informed Lord Lisgar that the Governor General had the power, but that a Lieutenant Governor appointed since the union came into effect had not the power of appointment.

That under the circumstances, great doubt must exist as to the validity of the commissions issued to the gentlemen named.

That by the law of Upper Canada, Queen's Counsel can, in certain cases, at the request of a Judge of the Superior Courts, perform certain judicial duties, such as the trial of civil and criminal cases. That their authority to act might be disputed, and that if it were eventually decided to be illegal, a failure of justice would be the consequence.

That under these circumstances, as the gentlemen mentioned are fully qualified to perform the duties of Her Majesty's Counsel, the Minister of Justice recommends that commissions be issued by the Government of Canada to those gentlemen, or such of them as desire to receive the same.

The Committee submit the above recommendation for Your Excellency's approval.

Copy of a Minute of Council, approved by His Excellency the Lieutenant Governor, the 23rd day of October, A. D. 1872, and sent to the Secretary of State for the Provinces.

The Committee of Council would respectfully call your Excellency's attention to the fact, that some of the gentlemen whom your Excellency appointed Queen's Counsel for Ontario, on the 16th March last, have during the present month received from the office of the Honourable Secretary of State for Canada, letters in the following form:—

Department of the Secretary of State,
Ottawa, 7th October, 1872.

Sir,—I have the honour to inform you that the question having been raised in the Province of Nova Scotia as to where the power of appointing Queen's Counsel rested since the Union of the Provinces, His Excellency the Governor-General, on the 4th January last, obtained through the Right Honourable the Secretary of State for the Colonies, the opinion of the Law-Officers of the Crown in England on the subject. These officers advised that the Governor General has now the power, as Her Majesty's Representative, to appoint Queen's Counsel, but that a Lieutenant Governor appointed since the Union came into effect, has, in the absence of legislation, no such power of appointment.

Under these circumstances, and to remove all possible doubt as to the legality of your status as one of Her Majesty's Counsel for the Province of Ontario, I am commanded by His Excellency the Governor General to inform you that a Commission will be issued under the Great Seal of Canada, appointing you Queen's Counsel for Ontario should you desire it.

I have the honour to be, &c.,

E. Parent,
Under Secretary of State.

The Committee regret that the Government of Canada, entertaining the view that the opinion of the Law Officers referred to in this letter was applicable to Ontario, should not have thought fit to transmit a copy of it for your Excellency's information. Although your Excellency's Government is of the opinion that your Excellency is invested with the power to make such appointments without Legislation, yet had they been made aware of the view of the Law Officers, they would have thought it proper to propose the Legislation requisite for the removal of any possible doubt on the subject, and having now become aware of it, it is their intention to propose such Legislation during the Session which is to commence within a few weeks. It appears to the Committee that grave inconveniences and complications may arise from the proposed action of the Government of Canada.

The Committee entertain the view that appointments of this description fall properly within the local, and not within the federal jurisdiction, and they trust that having regard to their expressed intentions as to legislation, the Government of Canada may see fit to abstain at present from issuing the proposed Commissions.

Should that Government, however, be of opinion that, notwithstanding the proposed legislation, the power of issuing such Commission would remain with and should be exercised by His Excellency the Governor General, it appears to the Committee that before acting on that view, the opinion of the judicial Committee of the Privy Council should be taken on a joint case to be argued on behalf of the respective Governments.

The Committee purposely abstain from entering into any discussion of the constitutional point, but they are bound to state that in their opinion the proposed action involves questions of local and federal jurisdiction far wider than the single question under discussion, and this renders them the more anxious that the course they propose should commend itself to His Excellency the Governor General.

The Committee advise that your Excellency should communicate this minute of Council to the Secretary of State for the Provinces.

Copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council on the 13th December, 1872, and sent to the Lieutenant Governor of Ontario.

The Committee of the Privy Council to whom was referred the despatch of the Lieutenant Governor of Ontario, dated 28th October, 1872, covering a Minute of the Executive Council of that Province, on the subject of the appointment of Queen's Counsel, beg leave to report :—

That considerably more than a year ago, the attention of the Government was called to the expediency of appointing Queen's Counsel in Nova Scotia.

It appeared that, according to the practice that obtained in that Province, criminal prosecutions are generally conducted by Queen's Counsel, and it was stated that there was not a sufficient number of professional gentlemen, holding that rank, to perform the criminal business satisfactorily.

As the question, where the power of appointment rested, had been mooted in the newspapers, and it was one that affected the Royal Prerogative, it was deemed expedient to pursue the usual course in such cases, and to submit the question for Her Majesty's consideration, and for the opinion of the Law Officers of the Crown.

This opinion was obtained, and it was to the effect that the Governor General has the power, as Her Majesty's Representative, to appoint Queen's Counsels, but that a Lieutenant Governor, appointed since the Union came into effect, has no such power of appointment.

Her Majesty was further advised in such opinion that the Legislature of a Province could confer, by statute, upon the Lieutenant Governor, the power of appointing Queen's Counsel, and of settling the practice as to precedence or pre-audience in the Courts of the Province.

No appointments of Queen's Counsel for Ontario have yet been made by the Governor General.

The Lieutenant-Governor of Ontario has given Commissions as Queen's Counsel to seven members of the Bar, as appears by the *Ontario Gazette* of the 16th March last.

The validity of these appointments was at once questioned by the profession and in the press. Had the question been merely one involving pre-audience in the Courts, the Government would have left it to the decision of those Courts, but by law a Superior Court Judge in Ontario has the power of deputing any of Her Majesty's Counsel to perform his judicial duties, both civil and criminal, at the assizes.

In case any of the Counsel who have lately received commissions from the Lieut. Governor should act for a Judge at the Assizes, and the invalidity of the Commission be afterwards established, serious consequences might ensue, as all

the proceedings in Court before him would be illegal, and *coram non judice* to the great disturbance of the administration of Justice both Civil and Criminal.

Under the circumstances, and to remove all doubt, the Minister of Justice recommended that his Excellency the Governor General should grant commissions to such of the gentlemen appointed by the Lieut. Governor as desired to receive the same.

The Minute of the Executive Counsel of Ontario states, that although they are still of opinion that the Lieut.-Governor had the power to grant such commissions, it is their intention, in order to remove all doubts, to submit a measure to the Provincial Legislature on the subject.

The Committee of the Privy Council can make no objection to that course being taken. They do not, however, see that such Legislation can in any way affect the power of Her Majesty through Her Representative to appoint Her own Counsel, and to grant them commissions as such, and they cannot recommend the surrender or relinquishment of the prerogative of appointment.

The Executive Council of Ontario recommended a reference of this question to the Judicial Committee of the Privy Council.

Had this suggestion been made before the assumption of the power of appointment by the Provincial Government, it might properly have been adopted, but under present circumstances it would seem that the question should be dealt with in the first instance by the Courts of Ontario.

The Committee of Council do not apprehend that any inconvenience or complications can arise from the Queen's Representative exercising the Royal prerogative in making such appointments.

It is obvious that when the Supreme Court, or other Dominion Courts are established, commissions issued by the Lieut. Governor would not, as of right, give precedence or position in those Courts. At the same time it might be advisable that such commissions should be recognized.

The Committee of Council are therefore, on the whole, of opinion, that His Excellency the Governor General, as the Queen's Representative, should not refrain from appointing Her Majesty's Counsel; but they think an arrangement might advantageously be made between the Government of the Dominion, and the several Provinces, by which Queen's Counsel, appointed by the Governor General, would receive proper status and position in the Provincial Courts, and commissions issued under Statutory authority by the Lieutenant Governors would be recognized in the Courts of the Dominion.

Certified. (Signed,)
Wm. A. Himsworth,
C. P. C.

CONTEMPT OF COURT.

A case has recently been decided by the Court of Queen's Bench in England, *(Ex parte Joliffe)* which is the latest authority with reference to contempts of Court, referring especially to contempts of inferior Courts.

An attorney published in a newspaper a letter complaining of the conduct of a County Court judge in a cause in which he was interested. Thereupon the judge ordered the writer of the letter and the publisher of the newspaper to appear before him to answer for their contempt. These then applied to the Court of Queen's Bench for a prohibition to restrain the County Court judge from further proceedings. The Court of Queen's Bench made the rule for a prohibition absolute. They said there was no authority in favour of the proposition that the judge of an inferior Court has power to deal summarily with contempt not committed in the face of the Court, and there was no reason upon principle in favour of such a power. Cockburn, C. J., also expressed his opinion that the fact that the County Courts Act, 9 & 10 Vict. c. 95, ss. 113, 114, (similar to the provisions in our Division Courts Act, Con. Stat. U. C., cap. 19, sec. 182), gave a limited power of summarily dealing with contempt committed in face of the Court, but was silent as to contempt committed out of Court, was a strong, if not conclusive argument against the summary power claimed by the County Court judge.

The *Law Journal* thus discourses upon the case we have referred to :—

"It was admitted that, for a contempt committed in the face of the Court, the County Court judge has full power to commit the offen-

der; but the power to punish for a contempt of Court, not committed in the face of the Court, is a power that appertains only to the Superior Courts. This power can be traced to a time when all the Courts were *curia regis;* but the County Courts are the creation of an Act of Parliament, and their power of punishing for contempt of Court is clearly limited to a contempt committed in the face of the Court. It is true that a County Court is a Court of record, but that does not confer upon it the power that belongs to the Superior Courts, which were the Supreme Courts of the Sovereign. We apprehend the ruling of the Court of Queen's Bench is correct beyond question.

A County Court judge is not without means of redress if he is calumniated, or if anyone is guilty of conduct calculated to affect the administration of justice. The County Court judge can proceed against the offender by indictment or by criminal information. Mr. Justice Quain remarked that the power of committal for contempt not committed in the face of the Court was exercised by the Superior Courts under the greatest possible sense of responsibility, and that 'to confer such a power upon some sixty judges sitting about the country would be very dangerous and detrimental to the due administration of justice.' No doubt about it. A County Court judge is not subject to the same ordeal of public criticism as the judge of a Superior Court, because the proceedings of his Court are not so fully or so regularly reported. Now, if complaint of the conduct of a County Court judge—*not in Court*, but out of Court—subjected the complainant and the publisher of the paper to imprisonment during the pleasure of the County Court judge, the public confidence in the County Courts would be shaken.

We do not say that the County Court judges would abuse their power, but, whether they did so or not, they would be suspected. It would, therefore, be inexpedient to confer such a jurisdiction on County Courts. It is also needless, because the Act gives them authority to punish offenders for a contempt committed in the face of the Court, and for contempts committed out of Court they have the protection of the general law."

There is a great deal of business before the Common Law Courts this term, but so far little has been done, the reason apparently being that counsel are not ready with their cases.

SELECTIONS.

THE LAW OF CLUBS.

A Club is not a partnership, and the rights and liabilities of its members *inter se*, and towards the public, are not regulated by the law of partnership. In the matter of the St. James' Club, 2 D. G. M. & G. 383, Lord St. Leonard said: "The law, which was at one time uncertain, is now settled that no member of a club is liable to a creditor, except so far as he has assented to the contract in respect of which such liability has arisen." And again he says: "The individuals who form a club do not constitute a partnership nor incur any liability as such." This case decided also that clubs are not "associations" within the meaning of the winding-up acts of 1848–9. The later acts relative to "winding-up" do not change the law as to clubs as laid down in this case. The case of *Fleemyng* v. *Hector*, 2 M. & W., 172, decided in 1836, is the leading case in England in respect to the liability of individual members of clubs for supplies furnished to the club. The "Westminister Reform Club" was organized under the following rules: That the initiation fee should be ten guineas; that the annual subscription should be five guineas; that if any subscription was not paid within a limited time, the defaulter should cease to be a member; that there should be a committee to manage the affairs of the club; and that all the members should discharge their club bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them. The court held, in an action by an outsider against a member to recover for supplies furnished, that the individual members were not personally liable; for that the committee had no authority to pledge the personal credit of the members. Baron Parke, in his opinion, used the following language: "The rules of the club forms its constitution. . . . This action is brought against the defendant on a contract, and the plaintiff, must prove that the defendant, either himself or by his agent, has entered into that contract. That should always be borne in mind. . . . It is upon the construction of these rules that the liability of the defendant depends." In order to

render a member of a club liable, it must be made to appear that the rules of the club specially authorized the incurring of the personal liability, or that the members distinctly asserted to it. *Todd* v. *Emly*, 8 M. & W., 505, was an action against a member to recover for the price of wine furnished to the committee of a club. Baron Alderson said, that, "in order to establish the liability of the defendant, the jury should have been satisfied that what was done was not only within the knowledge of the committee generally, but also within the particular knowledge of the defendant." See, also, *Reynell* v. *Lewis*, 15 M. & W., 517; *Wood* v. *Finch*, 2 F. & F., 447. There are a few cases in which personal liability was held to exist upon grounds not at all infringing upon the doctrine of the above cases. In *Cross* v. *Williams*, 7 H. & N., 675, R. 302, an officer of a volunteer rifle corps was held responsible for uniforms furnished to the corps by a tailor, upon the principle that the officer had pledged his personal credit. In *Cockerell* v. *Aucompte*, 26, L. J. C. P., 194; 2 C. B. N. S., 440, the members of a club were held liable for coal purchased by the secretary, on the ground that the constitution of the club authorized the pledging of their personal credit.

Waller v. *Thomas*, 42 How., 237, was an action for rent against the members of the "City Club," a body consisting of over seven members, and therefore coming within the company laws of the State, in which the principal question was, whether under the New York statutes of 1849, 1851, and 1853, the members could be prosecuted in their individual capacity before exhausting the remedy against them in their collective capacity. The court held that mode of action was optional, in the first instance. This case is not inconsistent with the general English law on the subject of club liability.

The relations of committees to the remaining members of the club have not been judicially established, but where committee-men incur positive liability, their remedy over against the other members would depend upon the nature of the agency.

With regard to the funds of the club, it may be remarked that a court of equity will interfere to prevent waste or improvidence: *Charitable Corporation* v. *Sutton*, 2 Atk., 400; 7 Beav., 301. The court will not usually interfere to reinstate an expelled member. In *Hopkinson* v. *Marquis of Exeter*, 37 L. J. Ch., 173; L. R., 5 Eq., 63, by the rules of the club of which plaintiff was a member, it was made the duty of a general committee to arraign any member whose conduct or character was injurious to the interests of the society. Plaintiff was expelled in the prescribed manner, but the court would not interfere, no caprice or wrong motive being proved. In *Gardener* v. *Freenalte*, 19 W. R., 256, the power of expulsion was placed in the discretion of the committee, and the court would not interfere.

We are not aware of any cases that have been decided in Scotland with regard to clubs.—*Edinburgh Law Magazine.*

FORENSIC ELOQUENCE.

The successful advocate must be a man of quick sensibility. He must, for the time being, place himself in the situation of his client. To many men this is impossible; cold and impassioned, the joys or sorrows of others produce in them but little emotion. By one of this temperament the wrongs of his client are described with an unruffled countenance and unfaltering voice.

It is doubtless true that a man of enlarged mind can feel no very deep interest in the result of many of those disputes which seem to the immediate parties of the very highest consequence; yet it is equally true that he who can most completely identify himself with his client will be most successful. It does not necessarily follow that the advocate must use the same language that his client would use. What would seem very natural and proper in the mouth of the latter, would seem unnatural and improper in the former. As the smallest object held close to the eye appears of vast size, so every thing connected with our own interest assumes an importance entirely disproportioned to its real value. To the poor man the robbery of his hen-roost is of far more consequence than the overthrow of a distant empire, nor would he think the most glowing language misapplied in the description of his loss.

The more just the advocate's perception of the relative value of the things, the quicker his sense of the ridiculous, the less inclined will he be to sympathize with his client, and to indulge in that inflated style which the latter would himself use. Hence, he may appear to the parties interested, cold and indifferent, when in fact he has adopted the only course that would save him from the open ridicule of the court and jury.

Perhaps no man ever entered more entirely into the feelings of his client than Erskine. The fear of compromising his dignity by appearing deeply interested in trivial matters, he never felt; without passing over the limits prescribed by good taste he was ever earnest and impassionate. This warmth and sensibility, while they gave him that influence over a jury which earnestness always exerts, preserved him from those mere oratorical displays which men of colder temperament are apt to make. In all his pleadings he never introduces a topic to show his own learning or eloquence. There is no brilliant declamation, composed in the closet and thrown in for the purpose of exciting the admiration of the audience. Every thing seems naturally to arise from the subject, and tends to help forward the argument. He speaks just as he would have spoken had he been arguing his own cause, never using those gaudy decorations, or seeking those fanciful illustrations which suggest themselves only to the cool and indifferent mind. Nothing can be more striking than the contrast in this respect between him and Sir James Mackintosh. Sir James, when at the bar, never lost sight of himself. Between himself and his client there was a great gulf fixed, which he could never bridge over. His famous oration in behalf of Mr. Petien was a learned, ingenious, and in some parts eloquent performance; but much of it would have found quite as appropriate a place in his lectures on the law of nations. So little connexion had it with the immediate subject-matter of the prosecution, that Mr. Petien is said to have complained bitterly that he was sacrificed to the personal vanity of the advocate.

There is, it must be confessed, something a little ludicrous in the spectacle of a man pleading with the greatest vehemence and energy in defence of those interests which he would have attacked with equal vehemence and energy had he been retained upon the other side. To superficial observers, this earnestness and apparent conviction of the goodness of his cause seem feigned, yet we see no reason to doubt that in the great majority of cases he is perfectly sincere. He acts under the guidance of a principle which governs to a greater or less degree the conduct of every man. Every day men argue in support of opinions which they have adopted without mature consideration. He who strives to convince another of the truth of any proposition, however unsuccessfully, almost always ends by convincing himself. Many a religious and political disputant has become, by the force of his own reasoning, a convert to those doctrines which he at first defended only in sport. With the advocate it is a matter of entire indifference which side he espouses. Nor can this indifference be charged upon him as a serious offence; it is but rarely possible for him to know in advance the merits or demerits of his cause; and when, by the examination of witnesses, the facts fully appear, his feelings are then too much enlisted to allow him to weigh the arguments with impartiality. Like the soldier on the battle-field, he is but ill fitted, in the ardour of the contest, for a calm investigation whether it is not possible that he may be fighting on the wrong side.

With the judge the case is entirely different. He sits as a moderator—one who moderates and restrains the warmth of the contending parties. It is his duty to sum up, impartially and dispassionately, the arguments on both sides. There is no sight in the universe of greater moral sublimity than that of an able, upright and impartial judge sitting on the seat of judgment. His clear and capacious intellect disentangles the most complicated and intricate questions. He penetrates, at a glance, through the subtile sophistries of the advocate. With a word he dissipates the spell which his ingenious and seemingly unanswerable reasoning has thrown over the minds of the jury. He lifts the veil from successful villainy, and illumines the darkest recesses of crime with a flood of light. Persecuted innocence reposes at his feet in safety. The high and the low, the rich and the poor, in his sight, as in the sight of the great Judge, are all equal. It is not he himself

that speaks; it is the law that speaks through him. The words fall from his calm and passionless lips as from the lips of a marble statue; human sympathy and feeling he puts far from him as delaying or diverting the free course of justice. He ceases to be a mere man; he is the impersonation of law. We stand before him as in the presence of a divine power —an oracle of God, whose voice is uttering the decrees of infinite wisdom.

It is not solely by the strength of his reasoning or the force of his eloquence that the advocate persuades the jury. They have, like other men, their prejudices and prepossessions, often strong in proportion as they are unreasonable; these must be understood and humoured. Their modes of thought, depending upon their pursuits, their positions in society, their degree of intellectual cultivation, are to be carefully studied; their countenance, their dress, their attitudes, must be carefully noticed. He who passes these by as matters of little moment, will often find himself defeated by an opponent far his inferior in learning and ability, but who better understood the character of the persons whom he is addressing. The contrivances of counsel to obtain the good will of the jury are sometimes very ungenerous and amusing. It was said by an eminent lawyer in one of the eastern States, when speaking of a learned brother, that the latter had the advantage of him in one respect. He was in the habit of using tobacco, and when engaged in his argument, would turn to some prominent juryman, who was a lover of the weed, and in an off-hand, familiar way ask him for a quid. The juryman flattered at finding such a similarity of tastes and habits between himself and the dignified counsel, would follow the example, and the good impression made on his mind was not unfrequently transferred from the advocate to his cause. Even so eminent an orator as Patrick Henry did not disdain to have recourse to vulgar phrases and vulgar modes of pronunciation, to gain the favourable ear of the illiterate; and Mrs. Martineau relates that Webster, at the trial of the Knapps, made careful inquiries into the dispositions of those to whom he was about to speak.

Juries often complain, and with great justice, of the tediousness and perplexity of the speeches to which they are obliged to listen. However wearied they may be, they can express their dissatisfaction only in dumb show. Coughing and stamping, and the other well-known means to which other audiences resort to drive away oratorical bores, are forbidden to them. So long as the advocate shall choose to speak to them, they cannot choose but hear. Something, perhaps, should be ascribed to the prejudices of clients, who estimate the goodness of speeches by their length, and who think that their interests have been neglected because little has been said about them. It should, however, be borne in mind, that although the hearer may be convinced early in the trial, yet it is impossible that the speaker should know that he is so convinced. He is bound by his duty to present all the arguments that he can think of, even at the risk of wearying those whose opinions are already formed. But for the series of tautology and repetition which are so common in congress as well as at the bar, there is no excuse.

Of all the eminent lawyers in this country, Aaron Burr was most distinguished for his power of condensation. Even when replying to a speech of Alexander Hamilton (no illogical reasoner), which had occupied nearly six hours in its delivery, he spoke only for an hour and a half. He never sacrificed his logic to his rhetoric; metaphors, similes and illustrations, of all kinds he unsparingly rejected when they contributed nothing to the force of his argument. In every thing he aimed at an energetic brevity. Strike out a single word from one of his sentences and, like an arch that has lost its keystone, the whole fabric falls. It may indeed be questioned whether he did not carry his love of brevity to excess, and did not fall into the error of clothing his thoughts in so plain and unadorned a dress as to render them distasteful to uncultivated minds. In what we have said we had reference solely to argument before juries. Argument before judges on technical points of law require talent of a very different order. No knowledge of human nature is required. There is no necessity for graphic description. Brilliancy of imagination and warmth of colouring are but stumbling-blocks in the advocate's way. There is no dispute about the facts. It is the knowledge of the precedents, the power of making subtle

distinctions, the vigour of the logic that we now seek. The ability to make comprehensive generalizations, which regardless of the letter of statute and precedents, shall be true to their spirit, is indispensable. The utmost precision in the use of terms is demanded, and no grace of language can supply the want of accurate definitions. Maps and figures would be here as much out of place as the demonstrations of Euclid. The avidity of Littleton is preferable to the gorgeous imagery of Burke. The end is indeed persuasion, but it is persuasion through the understanding.

From what has been said it is plain that there is little room for comparison between the eloquence of the bar and the eloquence of the senate and the pulpit. The merits of the forensic orator are peculiarly his own. The qualities which most attract the admiration of the world, are by no means those which best conduce to his own success in his own proper sphere. It is the quick and acute, not the philosophical and comprehensive intellect that acquires distinction at the bar. An Erskine succeeds where a Burke would fail. A Coke takes precedence of a Bacon. The inevitable effect of reasoning day by day, upon a great multitude of insulated facts, is to narrow the mind, and render it more and more incapable of those general classifications which are the boast and glory of philosophy. Were the study of the law pursued as it should be; the student looking at precedents but as the exponent of principles; separating that which has its origin in accident or caprice, and is therefore mutable and temporary, from that which is founded in the nature of man, and is therefore permanent and unchanging; understanding as well the scope of the whole as the practical working of the parts; in a word, regarding law as the science of legislation, it would, in Burke's words, be the noblest of all sciences. That it will be so studied, except here and there by some master mind, we have no reason to expect or hope. Most will be satisfied when they have found a case in point, and *sic ita lex* terminates all further investigation. If, indeed, law books and reports continue to multiply with the same appalling rapidity that they have done for a few years past, it will be absolutely impossible for the most powerful mind to do more that master the details. To look for stability and permanence in our jurisprudence is to look for fixed landmarks among the shifting sandhills of the desert. The last legislature outruns the acts of its predecessors. The last volume of reports can alone be looked upon as settling what is the existing law. So long as this shall continue the great body of our lawyers will be acute practitioners and but little more. Pre-eminent in their own department, they will make but little figure out of it. Ceasing to be learned and intellectual men, standing forth in the full development of all their faculties, and enriched with the treasures of all knowledge, they will sink to mere professional drudges. This is to some extent already the case. We see the man of most profound professional learning, ignorant of the elements of literature and philosophy, and boastful of his ignorance. We see the man of what is called "business habits," arrogating to himself a superiority over those, the extent of whose knowledge is, as compared to his, like the ocean to the smallest island that sleeps upon its bosom; we see Congress filled with third and fourth-rate men. But the evil will in time cure itself. From the very womb of darkness will spring forth light; the innumerable dark, winding passages which lead to the temples of justice, will give place to plainer paths. The axe of reform will hew down the venerable trees which have so long shaded the recesses, and will let in the clear light of day. When this has been done, when law shall cease to be an art and become a science, then will our country find among the members of the profession her greatest ornaments.—*Knickerbocker Magazine.*

The prospects of the Judicature Bill are at this moment very good. It has been read a third time and passed in the House of Lords, and a bill which reaches the House of Commons in the second week in May, which is backed by the whole power of the Government, and which has been settled by a select committee of persons most competent to deal with it, has more than a fair chance of becoming law. We shall expect to see the bill emerge from the Commons in substantially the same state as it is now in.

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

COMMON PLEAS—HILARY TERM, 1873.

EX REL. BATE V. THE CORPORATION OF THE CITY OF OTTAWA.

By-law granting sum of money to an individual.

Where a Municipal Corporation passed a By-law granting $1000 to an individual, in consideration of his having advanced the amount in aid of a Railway Company. *Held*, not within the powers of the Corporation and therefore quashed.

Semble, that it would make no difference even if they had surplus funds in hand.

ROE V. ROPER.

Incomplete distress—Possession taken under chattel mortgage—Replevin.

Where a bailiff seized certain goods under a landlord's distress warrant for rent in arrear, but did not remain in possession, or take any further steps to execute the warrant, and after the lapse of more than a month, a person having a chattel mortgage on the goods, took possession under the mortgage, and removed the goods, for which the landlord brought replevin. *Held*, that under the circumstances, the landlord was not entitled to maintain the action.

HARRISON V. PRESTON.

Action for balance of purchase money of land—Receipt under seal for whole—Estoppel.

In August, 1867, plaintiff sold and conveyed to defendant certain land, the deed containing a receipt for the purchase money. It appeared, however, that when this conveyance was made, some question was raised as to plaintiff's title to the property, and defendant did not pay over the whole of the purchase money, but retained $100 of it, and in October following gave the plaintiff the following agreement:—"Harriston, October 1st, 1867, 15 months after date, I promise to pay to the order of William Harrison, or bearer, the sum of $100, providing that the title is good, on lots known as Town Hall, Court House, and Fair Ground, situated on the north side of Elora street, for value received," these being the lots conveyed by the deed. Plaintiff sued defendant on this agreement, and on the common counts, to which defendant pleaded amongst other pleas, payment.

Held, that as the promise was merely to pay the balance of the consideration money mentioned in the conveyance, and by the deed and receipt endorsed admitted to be paid, the plaintiff was estopped and could not recover.

IN RE GREAT WESTERN RAILWAY COMPANY AND THE CORPORATION OF THE TOWNSHIP OF NORTH CAYUGA.

By-law—Repeal of.

The Corporation of the Township of North Cayuga, under power given them by 33 Vict. ch. 33, sec. 18, Ont., an act incorporating "The Canada Air Line Railway Company," afterwards amalgamated with the Great Western Railway Company, passed a By-law which recited the Statute, and that the Railway had been located in North Cayuga, and provided that all the real property in the Township should be rated at $12.00 per acre (the average rate,) for 50 years. This By-law was subsequently repealed by a By-law formally passed for that purpose, but it did not appear that upon the special faith and consideration of the original By-law that the applicants had in fact altered their position, or done anything which they otherwise would not have done, but that the Railway would have traversed the Township, whether the Municipality had or had not exercised their statutable powers.

Held, on an application to quash the repealing By-law, that the Court under the circumstances could not interfere.

IN THE MATTER OF THE TRUSTEES OF THE PORT ROWAN HIGH SCHOOL AND THE CORPORATION OF THE TOWNSHIP OF WALSINGHAM.

High School Trustees—Description of—Demand—Sufficiency of—Maintenance and School accommodation—Meaning of.

In an application for a mandamus to compel a municipal corporation to provide $286.74 for a Board of School Trustees, they were described in the proceedings as "The Trustees of the Port Rowan High School;" and it appeared that on the 1st July, 1872, a demand was made on the Township Corporation, headed "School Section, No. 12, Walsingham. Port Rowan, July 1st, 1872," and stating that the amount required was "for expenses of conducting High School," and was signed "William Ross, Secretary and Treasurer of Port Rowan High School Board." Subsequently to this, on the 19th August, 1872, the Secretary of the Board sent a letter to the Clerk of the Township Corporation, headed, "Office of the High School Board, Section No.

12; Port Rowan, August 19, 1872," stating, that in making up the estimates for the "current expenses of High School" an error had been made, and that the amount actually required was $286.74, which amount he was required to make immediate demand for from the Council. In reply to this, the Township Clerk sent a letter, addressed, "To —— Ross, Secretary Port Rowan High School Board," enclosing copy of a resolution passed by the Township Council, stating that they declined to pay "the demand of the Port Rowan High School Trustees."

Held, 1. Description of Trustees sufficient; for, although "The Trustees of the Port Rowan County High School" would appear to be the more correct one, yet the Act 34 Vict., ch. 33, Ont., did not in express terms require it, and the Township Corporation, by their action, had shown that they fully understood the body with whom they were dealing.

2. Demand sufficient; (*a*) for, though only signed by the Secretary and Treasurer, yet he was the officer and organ of the Board, and the resolution of the Township Council recognises it as the demand of the Board. (*b*) That it was not necessary to give the estimates on which the sums required were based. (*c*) That the purposes for which money was stated to be required, viz., "for expenses of conducting High School," and "current expenses of the High School," fell within the meaning of the words "maintenance and school accommodation."

HUMPHREY v. WAIT.

Rooms let to lodger—Defective passage leading to—Owner—Liability of.

Where plaintiff rented a room in a house held by, but not in the personal occupation of the defendant, who lived in an adjoining house, the only mode of communication to this and the other rooms on the same story being by means of a certain passage in which there was an uncovered stove-pipe hole; and the plaintiff having agreed with the defendant to change her room for another one adjoining it, was in the act of moving her furniture from one room to the other when she put one of her legs through the stove-pipe hole and was injured.

Held, that the defendant was not liable to the plaintiff for the injury sustained by her, as he was not under any legal obligation to keep the premises in repair.

HELY v. THE CANADA COMPANY.

Ejectment—Landlord and tenant—Forfeiture—Lease to persons in possession—General proviso for re-entry, and special power to determine lease on notice—Construction.

In ejectment against one M., the defendants appeared and defended, by order, as landlords in lieu of M. The plaintiff claimed under a covenant in a lease from him to M., on right of re-entry for non-payment of rent, and non-performance of covenants, and the defendants, besides denying the plaintiff's title, claimed as grantees of the Crown. It appeared that the instrument set up by plaintiff as a lease, was an agreement dated 2nd April, 1867, whereby plaintiff agreed to sell the land to M. for £100, M. paying £10 each year and interest at 6 per cent. till the whole was paid; provided that if payments not made the interest due to be considered as rent, for which the plaintiff might enter and distrain; M. not to commit waste, &c., and to pay taxes; and in case of default in making the payments for three months, then he should surrender the premises to plaintiff; and M. agreed not to let or assign without leave. It also appeared that plaintiff held under a lease dated 23rd March, 1865, from the defendants for ten years, being one of the company's printed leases, which gave a right of re-entry for non-payment of rent and taxes and for assigning without leave; that four years rent was in arrear; defendants had paid the taxes for 1867 and 1869; and that there was no written authority to plaintiff to sell to M. The lease also contained, besides the general proviso for re-entry, a special power to determine the lease on a given notice. In February, 1872, defendants executed a lease to M. for seven years, but no evidence was given to show when it was actually delivered, nor whether the defendants were proceeding to entry or forfeiture; or had threatened M. with dispossession.

Held, that if it had been shown that M. took the lease from defendants to save himself from eviction, there would be no necessity for his going out of possession and then re-entering under the new demise, but as this evidence was wanting, a verdict found in the defendant's favor was set aside, and a new trial granted.

Held, also, that the general proviso for re-entry was not controlled or affected by the special power given to determine the lease on a given notice.

Held, also, that under the agreement between the plaintiff and M., plaintiff had the right to re-enter and take possession on default; and

the covenant to surrender possession after three months default could not alter the plaintiff's right.

Arnot v. Bradly.

Constable—Fine, Tender of to—Demand of perusal and copy of Warrant—Refusal—Issuing Warrant of Commitment in first instance —31 Vict., c. 60., C.

Held, that a constable acting under a warrant issued under the Fishing Act, 31 Vict., Ch. 60, C., directing him to convey plaintiff to gaol, and directing the gaoler to hold him for thirty days absolutely, and not until the fine, &c., be sooner paid, for the non-payment of which the warrant was issued, is not bound to receive a tender of the fine.

Where the plaintiff demanded from the constable the perusal and copy of the warrant, which was not given, the constable's excuse being that he had lodged it with the gaoler.

Held, no excuse, as he could have procured it from the gaoler within the six days, and so complied with the demand.

On the argument in term, it was urged that the defendant, being placed in the same position as the convicting magistrate, was bound to produce the conviction.

Held, that as no such objection had been raised at the trial, which, if raised, the judge would have naturally suggested, if necessary, its being then drawn up; and from all that appeared, the defendant might have produced it if called for; its non-production could not now be held to prejudice the defendant.

Held, also, under the Fishery Act, 31 Vict., c. 60, C., a warrant of commitment may issue in the first instance, the Statute not requiring before doing so that a distress warrant should issue.

Henderson *et al* v. White.

Ejectment—Lease—Demand of possession—Necessity of joinder of plaintiff at trial.

In an action of ejectment, it appeared that in 1863 the defendant entered on certain land belonging to St. John's Church, in the parish of Mono, with the assent of V., the then Incumbent, and the churchwardens, under a verbal agreement for a lease for sixteen years, the defendant to clear so many acres each year, put up certain buildings, and pay taxes. A lease was said to have been afterwards executed by one of the churchwardens, but it was not produced at the trial. It appeared that defendant had been in possession ever since, cleared about forty acres, erected the required buildings, regularly paid the taxes, and performed statute labor. It appeared also, that at the time the agreement was made the lot was held by Church Society, the patent having issued to them on account of their having, at the request and on behalf of the Parish, advanced the purchase money, upon the understanding, however, that upon re-payment by the Parish, the Society would convey the lot to them. In 1864 the Parish re-paid the Society, and a deed was executed by them, containing a recital of the terms on which they held, and granting it to the plaintiff, (who had succeeded V. as the incumbent), and his successors, incumbents from time to time of the said church. Habendum to plaintiff and his successors incumbents as aforesaid for ever, in trust for the endowment of the church and parish, with the proviso that no lease, or other disposition of said lands, should be made by any incumbent, without the consent in writing to be annexed to such lease of the churchwardens for the time being. It also appeared that at the time the action was brought, F. was the incumbent, having succeeded the plaintiff, and that neither he nor the plaintiff had in any way recognized defendant as a tenant, and although no demand was ever made by the plaintiff, yet F. had done so.

Held, that the alleged lease could not be upheld, as prior to the conveyance to plaintiff there was no one who had any authority to deal with the land, and subsequent to it, the defendant's right to be on the land was never in any way recognized, but on the contrary, always denied.

Held, also, that the proper course on the evidence was to allow a recovery in plaintiff's name as the grantee of the Society; the demand of possession (if necessary) made by F. enuring to plaintiff's benefit.

Semble. That no demand of possession, or notice was necessary, as it could only be as a tenant at will, or as in rightfully at one time under the person claiming, or some one in prioity with him that such demand would be necessary, and as against the plaintiff, the grantee of the Society, the defendant could show nothing.

On the argument in term, it was objected, that as F. who had been joined as a plaintiff at the trial, was not present when the amendment was made, his consent in writing should have been filed.

Held, that though this objection was raised at the time the amendment was made, yet as F. afterwards appeared and was examined as a

witness, and no question was then raised as to his assenting, or non-assenting, and the judge reported that there really was no question about it, the court would not entertain the objection.

COMMON LAW CHAMBERS.

(Reported by Mr. Frank Pepler, *Student-at-Law.)*

Levy v. Wilson.

Setting aside Judgment—Affidavit wrongly entitled.

[Mr. Dalton, 8th Jan., 1873.]

Judgment on default of appearance set aside for irregularity, on the ground that affidavit of service of writ entitled in the County Court instead of in the Queen's Bench.

Ansell v. Smith.

Venue—One party living out of the jurisdiction.

[Mr. Dalton, 14th Jan., 1873.]

In moving to change the venue the fact that one party lives out of the jurisdiction does not affect the equities between the parties.

Bank of Commerce v. White.

34 Vict., c. 12, s. 12, O.—Eight days notice to town agent.

[Mr. Dalton, 15th Jan., 1873.]

Held, that a notice to plead, within *eight* days, served on a Toronto agent, may be set aside as not being in compliance with 34 *Vict.*, *c.* 12, *s.* 12, O.

Re Credit Valley Railway & County of Peel Bonus.

36 Vict., c. 36, sec. 14—Ex parte Application for Enquiry—Particulars.

[Galt, J., after consultation with other Judges, 18th Jan., 1873.]

Held, 1. An application under the above section must be by summons, and if an order be obtained in the first instance, it will be set aside.

2. The enquiry must be confined to the particulars finally given by applicant.

Fleming v. Livingstone.

Jurisdiction—Prohibition—County Court—Set off.

[Gwynne, J., 24th Jan., 1873.]

Held, 1. On applications for prohibition, &c., the judge's notes at the trial should be accompanied by his report of the case.

2. Plaintiff in a County Court suit gives credit on a claim of $300 (for board, &c.,) for $170, being the value of an article received by him from defendant. Then although the agreement as to setting off the one against the other is made before the debt for which the action is brought is contracted, yet if (*a*) the amount to be allowed to defendant for the article can be treated as a payment of a portion of plaintiff's claim and not merely an unliquidated set off against it; or (*b*) the transaction can be viewed as a sale, first, of the article, upon an agreement that payment of it was to be made in board, &c., to be furnished by plaintiff to defendant —the court has jurisdiction.

Nicholson v. Coulson.

29-30 Vict., c. 42, sec. 1—Staying proceedings till Costs of day in same suit paid—In Forma Pauperis —Abuse of Process.

[Mr. Dalton, 30th Jan., 1873.]

Held, 1. That 29-30 Vict., c. 42, s. 1 does not refer to costs of day in *same* suit, and consequently proceedings cannot be stayed in a suit in which costs of day have not been paid.

2. That, nevertheless, this can be done on the ground of abuse of the process of the Court where the proceedings are vexatious.

CHANCERY CHAMBERS.

(Reported by Thos. Langton, Esq., *Barrister-at-Law.)*

Re Tobin—Cook v. Tobin.

Representation to deceased party—Gen. Order, 56.

[Blake V.C. on appeal from Referee, 10th Feb., 1873.]

An order had been made for the administration of the estate of an intestate, accounts had been taken under it, and the Master had made his report, but before it was filed or confirmed the administratrix died. No one could be found who was willing to administer to the estate, which was insolvent.

The Court therefore under Order 56, made an order appointing as administrator *ad litem* the person who had been guardian of the infant heirs of the intestate, on the application for the administration order, he having also been Solicitor for the administratrix in her lifetime.

Fraser v. Home Ins. Co.

Production of documents.

[The Referee, 28th Feb., 1873.]

The Court will not act merely upon an allegation by a party seeking to protect documents from production, that they are not material, if it appear from their nature or otherwise that they may afford material assistance to the party seeking production in establishing his case.

When a party having a joint interest in documents with a stranger to the suit, has the sole legal possession thereof, production will not be ordered unless the suit be of such a nature that

the Court can say that the party having the legal custody sufficiently represents the other party interested.

But in such case the party in whose possession the documents are, will be required to give discovery of their contents, and to furnish the information in his affidavit on production with as much particularity as was required in answering interrogatories as to documents under the former practice.

Merchants' Bank v. Tisdale.

Production of documents—Materiality of the issue in the cause.

[The Referee, 7th March, 1873.]

Before decree no discovery will be ordered which appears to the court to be immaterial to the question to be tried at the hearing.

Creswick v. Thompson.

Opening biddings—Gen. Order 388—Special grounds.

[The Referee, 8th March, 1873.]

The Court is strongly disinclined to open biddings, unless very special grounds are shown.

The fact alone that a price can be obtained in advance upon that realized at the sale, does not constitute such a special ground.

An inadequate description of the property in the advertisement will be a sufficient ground, if calculated to mislead or deter the public from purchasing, but not otherwise. Exceptions of this kind amounting only to a complaint that all the advantages of the property have not been sufficiently dwelt upon in the advertisement should be taken upon the settling of the advertisement.

Paxton v. Dryden.

Motion to commit for disobedience of a direction of a Master—Evidence of default.

[The Referee, 8th April, 1873.]

A party moving to commit for disobedience of any order or direction of a Master, must show that the person moved against has disobeyed the order, and is in default, by means of a certificate of the Master.

It will be insufficient in Chambers to prove by any other means the service of the order, and that it has not been complied with, as the Master is the proper person to decide both these facts.

Smith v. Smith.

Interim Alimony.

[Strong V.C., on appeal from Referee, 24 Feb. 1873.]

A plaintiff makes out a *primâ facie* case for interim alimony by producing (1) an office copy of the Bill which need not be verified by affidavit, and (2) proof of marriage; but if the defendant oppose the application on the ground that the plaintiff has ample means of support, unless she can show the contrary to be the case the application will be refused.

Redman v. Brownscombe.

Married Women—Next Friend—Security for Costs—Statutes—35 Vict., c. 16, s. 9 and 29-30 Vict., c. 45, § 1.

[The Referee, 12th April, 1873.]

A married woman brought a suit in her own name for redemption of lands in which she claimed an estate for life under a lease made in 1866. *Held*, not her *separate* property so as to enable her to sue without a next friend under 35 Vict. c. 16, § 9.

A former suit in respect of the same subject-matter, in which the Bill had been dismissed with costs to be paid by the next friend of the plaintiff, was considered as substantially a decree against the plaintiff with costs, and proceedings were stayed in a second suit until security should be given for the costs of the second suit.

A stay of proceedings until the costs of the former suit were paid was refused, there being a distinction in this respect between suits by married women and suits by persons *sui juris*.

Re Western Insurance Co.

Petitions—Practice as to—Irregularity—Dismissing for want of Prosecution.

[The Referee, 18th April, 1873.]

It is unnecessary and irregular to file a petition before it is heard. The proper proceeding in order to bring it before the Court is to serve a copy with a notice of a day for hearing endorsed.

This practice is applicable to petitions under the Insurance Co.'s Act, 31 Vict., c. 48. But as by this Act no special procedure is provided for making application under it to the Court, when proceedings were initiated by a *Petition* which had been filed but not served upon the Respondents, nor brought to a hearing after a lapse of fourteen months, it was treated as a Bill and ordered to be taken off the files for want of prosecution.

Re Goodhue.

Appeal—Costs of reference under a Decree reversed on appeal.

[The Referee, 6th May, 1873.]

The Court of Error and Appeal having reversed an order of Court of Chancery and directed

a Petition to be dismissed with costs, *held* that this did not entitle the applicants to costs of proceedings in the Court below subsequent to the order which was reversed.

Grant v. Winchester.

Security for costs—limiting time for putting in security.

[The Referee 25th March, 1873.]

A plaintiff who subsequent to filing of bill had gone to reside in Connecticut was held entitled to the same time for putting in security as a defendant served in Connecticut would under General Order 90 have been entitled to for answering a bill—such time to commence from the date of application to limit the time.

REPORTS.

COMMON LAW CHAMBERS.

Dain v. Gossage.

Administration of Justice Act, Secs. 59, 64—Construction of Statute—"Expressio unius, &c."

Held, 1. That under secs. 59 and 64 of the Administration of Justice Act, 1873, there should be no County Court Sitting in May of that year.

2. That the word "Section" does not necessarily mean one of the divisions of an Act numbered as such, but may refer, if the context requires it, to any distinct enactment of which there may be several included under one numbering.

3. Consideration of conflicting clauses in same Act.

4. Application of the maxim, "*Expressio unius est exclusio alterius.*

[Chambers, May 1-5, 1873. *Mr. Dalton—Richards, C.J.*]

This was an application to set aside a notice of trial given for the County Court of the County of York, at a sitting of that Court, which the plaintiff assumed was then about to be held on the 13th of May then next.

The question in dispute arose on the construction of secs. 59 and 64 of the Administration of Justice Act of 1873. Section 59 will be found on p. 139 *ante*; sec. 64 is as follows:—

"Sections 46, 47, 51, 56, 57, 58, 62, and 63, of this Act, and so much of the 59th section as relates to the sittings of the County Court in September of every year, shall go into force forthwith, and the other sections shall go into force on and after the first day of January next."

Delamere shewed cause.

Francis, contra.

Mr. Dalton.—The important question is whether upon the construction of clauses 59 and 64, of the Administration of Justice Act lately passed, a sitting of the Court will be held on the 13th of May next. I have come to the conclusion that no such sitting can be held—and I have been led to it by the following consid rations:—

The date of the assent shall be the date of the commencement of an Act, if no later commencement shall be therein provided: Stat. 31 Vict. cap. 1, sec. 4—(Interpretation Act.) Therefore the Administration of Justice Act of 1873 would be in force now in all its clauses, were it not for clause 64, which postpones its operation as, and to the extent in clause 64 expressed. In all respects in which that clause does not postpone the operation of that Act, it is in force now. Then clause 64 brings into immediate operation clauses 46, 47, 51, 56, 57, 58, 62, and 63, and *so much of section 59 as relates to the sittings of the County Court in September*, and it enacts that "the other Sections" shall go into force on and after the first day of January, 1874.

The question is as to the residue of clause 59. Is it in force now or not? Is the residue of clause 59 included in "the other sections" in clause 64?

I will first suppose it is not. Then by the express enactment of sec 64, that part of sec. 59 which relates to the Sittings of the County Court in September is in force now, and as to all the rest of clause 59, that too must be in force now, if it is not included in the words "the other sections," for if it is not postponed by sec. 64, it must fall under the general rule, and be in force from the assent to the Act. From this it would follow that the whole of sec. 59 is in force—that part as to the September County Court by express enactment, and the rest of the clause because its operation is not in any way postponed, and if this be so there will be a County Court and General Sessions in May, and a County Court and General Sessions in September. But can that possibly be the intention? I think not, as may be demonstrated.

The construction of an Act, whatever the rules which are to guide in arriving at it, must be what we believe is the *expressed intention.*

I would say that the clauses 59 and 64 do not raise an inconsistency which it is necessary to reconcile. Clause 64 is inserted for the purpose of defining the times at which the several clauses shall come into operation, and so regulating those other clauses, and for no other purpose. If it is inconsistent with any other clause it must be regarded as an afterthought and change of intentions in this respect. (See as to this the judgment of Lord Tenterden in *Rex* v. *Justices of Middlesex*, 2 B. & Ad. 821, citing *Attorney-General* v. *Chelsea W. W. Co.*, Fitzgibbon 159—the latter a case very much in point). As far as clause 64 enacts it must therefore govern, and from the very purpose of

clause 64, it follows that it must necessarily be inconsistent with the other clauses, or it would not have been inserted at all. Further the expression in clause 59 "*including the present year*" (which applies only to the May Courts) is nothing more than the law would imply if those words were not there.

I think the residue of clause 59 cannot be excluded from the words "the other Sections" in clause 64, from the following considerations:—

Clause 64 seems to be intended to declare the times for the Act coming into force, and it does declare them as to every part of the Act—unless it be those portions of clause 59, and it seems not likely that it could have been the intention to omit so small a part, where all the rest is declared. In saying this I do not lose sight of the words "*including the present year*" in the 59th clause. And if any one shall attribute force to these words, an answer is, that they are not applied at all to the enactment of sec. 59, as to the September General Sessions. This fact must be borne in mind in all that I have further to say.

Then, as to the expressed intention, what could be the purpose of inserting in clause 64, an express provision as to "*so much* of the 59th sec. as relates to the Sittings of the County Court in September?" If it were intended that the whole clause should come into operation forthwith, why was not clause 59 inserted in sec. 64 after clause 58, without any special mention of the September County Court? That would have been the natural way of expressing such a purpose. To my apprehension those words are meant to contradistinguish the enactment as to the September County Court, from the rest of clause 59. And if so, at *what time* is the rest of clause 59 to come into operation?

Again can this half section, with propriety, be held to be included in the words "the other sections" in clause 64? First observe that it says "*the* other sections." The word section has no technical meaning, nor indeed any very exactly defined meaning. No doubt it is usually applied to the numbered paragraphs of an Act, and in this very clause 64 it is used in that sense, but it does not necessarily mean that. It means a part divided or cut off, and it seems to me that after excepting a portion of clause 59, and then referring to "*the* other sections" of the act in a clause like 64 which seems to be purposed to declare the time of the Act taking effect, it may without any straining of language be held to apply to the residue of clause 59—if the apparent dominant intention of the Legislature require it. If a piece of chalk were broken in two each half would be a piece of chalk, and so if the section of an Act consisting of distinct parts, be divided, I do not see why each part should not, in one sense, be called a section, because each is really a distinct enactment, although each would not be a numbered paragraph. In our Real Property Act the same word "Rent," occurring repeatedly throughout the Act, is construed in three different senses, because the general intention required it. (See Leith's Blackstone pp. 206, 208). I put great stress here upon the expression, "*the* other sections," as though it were intended to include all the rest of the Act.

Then, as to the necessity of construing the Act, as in the last paragraph suggested. If the enactment in clause 59, as to the September General Sessions, is not within the words "the other sections," in clause 64, it seems to me it must come into force at the passing of the Act, or never come into force at all. Should any one think this proposition untrue, I would ask him to consider *at what time*, in such case, it comes into force, if not at the passing of the Act, and why. I think the proposition is true, but the supposition that the enactment is intended never to come into force is absurd—therefore it must come into force at the passing of the Act. Remembering then that it is the *expressed intention* that we are looking for, and that clause 64 enacts that "*so much*" of 59 as relates to the County Court in September, shall come into immediate operation, and that it is silent as to the General Sessions for that term, and as to all the rest of clause 59, the spirit of the maxim, "*Expressio unius est exclusio alterius*," applies, and to ordinary apprehension, what is said and what is omitted, together distinctly convey the intention of the Legislature that the residue of clause 59 shall *not* come into immediate operation. It is indeed a very strong expression, by exclusion, of that intention. The above maxim of construction has been lauded as one naturally arising—being a principle of logic and common sense, and never more applicable than when used in the interpretation of a Statute: Broom's Legal Maxims, 5th Ed., 664, 667. But, I take it, it affords from necessity just as strong an indication of another intention, which is, that the words "the other sections" shall include the residue of clause 59, because, if not, the enactment as to the September General Sessions must either come into force at the passing of the Act, which I think is proved to be against the intention, or never at all. The words in section 59, which apply to the holding of the May Courts,—"including the present year,"—can

make no difference—for they merely express what the law, in the construction of section 59, would imply, if those words were not there, and the enactment as to the May Courts must still be controlled by section 64, as being within "the other sections."

I therefore feel forced, step by step, to the conclusion that the whole of section 59 is postponed till January, except the part as to the County Court in September, and that, consequently, there is no sitting of the County Court this May.

The notice of trial must be set aside, but without costs.

From this judgment the plaintiff appealed to

Richards, C. J. :—I quite concur in the conclusion arrived at by Mr. Dalton in his able judgment. I have also had the opportunity of consulting the Hon. the Chief Justice of the Court of Common Pleas on the subject, and he authorises me to say that he is of opinion that that portion of the 59th Section of the Act for the better Administration of Justice which provides for the Sitting of the County Court of the County of York, on the second Tuesday in the month of May, does not come into force until the first day of January next.

If that portion of the Act is now in force, then the whole section would seem to be in force, and if that was the intention of the Legislature it would have been much easier to have said that the 59th section shall go into force forthwith, than merely that so much of it as relates to the Sitting of the County Court in September of every year, shall go into force forthwith. I do not think, however, there is any mistake or inconsistency in the matter. It is probable when the Statute was introduced it was intended to bring the whole Act into operation at once. On further consideration it was no doubt thought better to postpone the bringing into force the principal enactments until after the first of January next, and therefore it was quite proper to postpone, until that period, the operation of all the sections that were framed with a view to carrying out the main portions of the Bill.

One of the prominent features of the Act was a fourth sittings of the Courts of Assize and Nisi Prius and Oyer and Terminer for the County of York. That sitting was to be held between the end of Easter Term and the beginning of the long vocation in July. Now the end of Easter Term of this year is Saturday the 7th of June. The second Tuesday of the month of June will be the 10th of June. If the County Court were to sit for a fortnight it would cover a portion of the same period for which the additional Assize Court would be sitting, under the new enactment for that purpose, if it had come in force. To prevent this, the change was provided for in the Bill of having the sittings of the County Court on the Second Tuesday of May instead of the second Tuesday in June. But as it was thought better that the additional sittings of the Assizes should not be held this year, therefore it was unnecessary to change the time for holding the County Court and the Court of General Sessions from June to May, and consequently that portion of section 59 which relates to the change need not be brought into operation until the rest of the Act was.

It was felt to be an evil that County Court cases were rushed in upon and swelled the dockets at the Assizes, particularly in the Fall, to the prejudice of the legitimate business belonging to the latter court. The County Court sittings in the County of York, for the trial of issues of fact, being in June, were not held again until December, a period of six months, and the Fall Assizes intervening, the evil referred to was felt to be pressing, and would be quite as much felt at the coming Fall Assizes as at any time. Principally to relieve this undue pressure of County Court business on the Assizes, the fourth sittings of the County Court and General Sessions was provided for in the Bill, and as no practical inconvenience would result from bringing that provision of the Statute into force, it would naturally occur to any one who knew of the evil complained of, that the pressure of business of the Fall Assizes of this year might be very much relieved by having a sitting of the County Court in September. If that idea was present to the mind of the framer of the sixty-fourth section he would be likely to make some provision in it for holding the September sittings of the County Court, and the words he has used shew that he did entertain the intention, and he seems to have used words to carry it out.

I see no reason why the simple, plain intent to be gathered from the 64th section, that only so much of the 59th section as relates to the sittings of the County Court in September should go into force immediately, and that the operation of the rest of the Act not brought into force immediately by the words of the 64th section, should be postponed until after the 1st January next.

I think the summons to set aside Mr. Dalton's order should be discharged. I do not understand the parties supporting the order ask or desire costs, and therefore I say nothing about costs.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 36th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law :

Robert Heber Bowes.
Allan John Lloyd.
James R. Roaf.
John George Killmaster.
Isaac Baldwin McQuesten.

And the following Gentlemen received Certificates of fitness :

R. McMillan Fleming.
J. Bruce Smith.
J. George Killmaster.
James R. Roaf.
Allan J. Lloyd.
Isaac B. McQuesten.
Peter Cameron.
Rupert E. Kingsford.
Alexander Sampson.
Wicksteed.

And on Tuesday, the 4th February, the following Gentlemen were admitted into the Society as Students of the Laws, their Examinations having been classed as follows :

University Class.

James Joseph Wadsworth, M. A.
Alexander Haggart, B. A.
Samuel Clarke Biggs, B. A.
Elliott Travers, B. A.
Julius Lefebvre, B. A.

Junior Class.

Charles H. Connor.
Thomas G. Meredith.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

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

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3 ; Virgil, Æneid, Book 6 ; Cæsar, Commentaries Books 5 and 6 ; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Cæsar, Commentaries Books 5 and 6 ; Arithmetic ; Euclid, Books 1, 2, and 3 ; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams; Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows :—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1*st year.*—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2*nd year.*—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3*rd year.*—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4*th year.*—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.