DIARY FOR JUNE.

5. Sat. ..Easter Term ends.
6. Sun. ..Second Sunday after Trinity.
8. Tues...County Court sittings (except York) begin.
13. Sun. ..Third Sunday after Trinity.
14. Mon...County Court Term for York begins.
15. Tues...Magna Charta signed, 1215.
17. Thur..Burton and Patterson, J. J. Ct. of Appeal, sworn in, 1874.
18. Fri. ...Earl Dalhousie, Governor-General, 1820. Battle of Waterloo, 1815.
19. Sat.. ..County Court Term ends.
20. Sun. ..Fourth Sunday after Trinity. Accession of Queen Victoria, 1837.
21. Mon. ..Galt, J., sworn in C. P., 1869.
23. Wed. ..Hudson's Bay Company Territory transferred to Dominion, 1870.
27. Sun. ...Fifth Sunday after Trinity.
28. Mon. ..Queen Victoria crowned, 1837.

CONTENTS.

Canada Law Journal.

Toronto, June, 1880.

A recent return to Parliament gives a number of figures as to the insolvencies in the various Provinces, in the years 1878 and 1879. In Ontario the number in 1878 was 752, with liabilities to the amount of $10,929,622, whilst in 1879 the number increased to 788, but with liabilities reduced to $8,612,907. The corresponding figures, as to Quebec, are 518, and $11,081,035, for 1878, and 638 and $13,650,914, for 1879. The average dividend per cent. was, for Ontario 38·3 in 1878, and 33·4 in 1879; and for Quebec, 21·9 in 1878, and 34·8 in 1879.

Is there any diversity of opinion regarding the following deliverance of the *Solicitor's Journal?* "The tendency of the day in all matters—and legal matters form no exception—seems to us to be towards over-elaboration. Essays such as Lord Bacon's could never be produced at the present day; where he would write an essay on a topic in a couple of pages, a thinker of the present day would occupy forty. The same kind of observation applies to many judgments of the present day." In this connection we would commend the singular succinctness—the comprehensive brevity of the opinions—of Chief Justice Waite of the Supreme Court of the United States. They are models of judicial directness for which the over-worked advocate is thankful in this age of voluminous judgments.

We had hoped before this to have furnished our readers with a review of Mr. Alpheus Todd's recent able work upon "Parliamentary Government in the Brit-

ish Colonies." It has, however, taken longer in preparation than we had anticipated, and it would be scarcely worth while to refer to such an important subject during the "dog days;" but when our friends return refreshed from their holidays, we hope to treat it in a manner worthy of its importance. We shall, at the same time draw the attention of those of our readers who have not already perused them to two minor works upon kindred subjects, which have recently appeared, viz: "The Powers of Canadian Parliaments," by Mr. S. J. Watson, and "A Manual of Government in Canada," by D. A. O'Sullivan. The obvious bearing, which the subjects of which they treat have upon the still imperfectly developed constitutional law of the Dominion is quite sufficient reason for a somewhat lengthy notice of their contents in these pages.

The views which we have from time to time advocated in these columns, with reference to the advantages of there being but one judgment embodying the reasons of the Judges sitting in Appeal, have received weighty confirmation on the floor of the Dominion House, as will appear from the following extracts from the speech of the Honourable Edward Blake, delivered on the occasion of the Bill to repeal the Supreme Court:—

"I believe it would be a very great advantage to adopt, to a large extent, the rule of the Privy Council, as the mode of delivering judgment. The opinion of the Appellate Court, which is practically a Court of Final Appeal, should be confined to the precise matter in hand, and any judicial divergence of opinion, or subject not necessary to be decided, should be absolutely eliminated. The course pursued in the Privy Council is well known, I presume, to all lawyers. The Judges, after hearing argument, deliberate at the earliest moment, and, having come to general conclusions, it is arranged that some one of them shall prepare and deliver the judgment in the particular case. This Judge prepares a draft, conveying, as well as he can, the arguments which have led to the agreed conclusion. The draft is printed and laid before each of the other Judges, who note on it any remarks which may occur to them. If necessary, there is another meeting for deliberation, and the judgment in the end is the general finding of all delivered by one. Thus, instead of uncertainty and confusion in matters which are not necessary for decision being raised by *obiter dicta*, the judgment is confined to the real question in issue; and upon that question it presents the views which are common to the event. I believe such a mode of delivering judgments would have conduced largely to the confidence which should be reposed in the Supreme Court."

Up to this time we do not remember ever having had occasion to object to anything in our valued contemporary the *Albany Law Journal*, which is undoubtedly one of the best conducted legal journals in the United States, as being in bad taste; but we think the reference to the fiasco of the, then, impending prize fight in their issue of the 22nd May is hardly fair. After referring to "dead letter laws" the writer says: "So in regard to the prize fight; it was notorious for some weeks that the principals were in training, and they might have been arrested while on their way to Canada. But nothing of the sort was done, and the ruffians might have pounded themselves to their hearts' contents but for the vigilance of the Canadian authorities." Now, so far, this is all true. The writer might also have referred in this connection to the time when it was notorious for some months that the Fenian ruffians were preparing for a raid on Canada, and actually marched through Buffalo with arms in their hands and flags flying, and they might have been arrested while on their way to

Canada. But nothing of the sort was done and the ruffians might have ravaged our country to their hearts' content (and apparently without any regret on the part of the people of the United States) but for the vigilance of the Canadian authorities. This unneighbourly conduct, however, is as much forgotten and forgiven as is the way in which our claims for injuries were ignored in connection with that same raid; and this at a time when the world saw the spectacle of a great nation fighting over money obtained from England to pay for bogus claims and claims for injuries which never took place, and which money should in common honesty have been returned. But what we do object to is this further remark of the writer:—"It is even intimated that these authorities would not have interfered but for the importunate intelligence conveyed by the backer of one of the principals who desired a postponement." This may be the reason for the authorities acting in like cases in the United States, and the above sentence would seem to indicate that such a thing would not in that country excite much surprise. But the writer is mistaken if he thinks that part of the Anglo Saxon race to the north of the lakes are as "advanced" in this respect as that to the south of them.

LEGAL METAPHORS.

There can be little question that an amusing and even a beautiful and instructive article might be written upon the use of metaphors by judges and legal writers. Few can have failed to have been struck from time to time by the recurrence of such breaks in the tedium of the Reports or the Text books. Few, again, could deny that many of them are as beautiful as they are to the point. One such, for example, occurs in *Bright* v. *Legerton*, 2 D. F. & J. 607, where it is remarked with respect to the emblem of Time, who is depicted as carrying a scythe and an hour-glass, that while with the one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed. Nor can a certain beauty be denied to the method by which, in the old Year Book, 9 Hen. VI. 24 b, the sale by executors under power in a will is illustrated: et issint (thus) on aura loyalment franktenement de cesty qui n'avoit rien, et en meme le maniere come on aura *fire from flint*, et uncore nul *fire* est deins le *flint*, et ceo est pour performer le darrein volonte de le devisor.

And, perhaps, the observation of the American judge in *Farmers and Mechanics' Bank* v. *Kingley*, 2 Doug. (Mich.) 379, is worthy to rank with these, where he says, "It would be as difficult for me to conceive of a surety's liability continuing after the principal's obligation was discharged, as of a shadow remaining after the substance was removed."

Of all text writers, Mr. Joshua Williams is, perhaps, pre-eminent in his liking for the use of metaphors. There is one, which is especially amusing, and which, as perhaps a little too pointed, he omits altogether in subsequent editions of the work in which it occurs. In a former edition of his work on Real Property he remarked, with reference to the Act to render the assignment of satisfied terms unnecessary (Imp. 8 & 9 Vict. c. 112, sec. 1), an enactment which, by the way, does not appear to have been adopted in Ontario—that it was like saying that everyone should leave his umbrella at home, except that such umbrella, which shall be so left at home as aforesaid, shall afford to every person, if it should come on to rain, the same protection, as it would have afforded to him if he had it with him. And, again (Real Prop. Ed.

11, p. 460), he speaks of the present fashion of tinkering the laws of real property, preserving untouched the ancient rules, but "annually plucking off, by parliamentary enactments, the fruits which such rules must, until eradicated, necessarily produce."

Even the Judicature Act has received its metaphorical adornments. Thus last year, in the Court of Appeal, at Lincoln's Inn, in the course of a case involving the doctrine of a wife's equity to a settlement, Lord Justice Bramwell said: "There's no such thing as an equity since the Judicature Acts came into operation—is there?" Counsel ventured to suggest that it was rather law than equity which had been abolished. "It's like shot silk," observed Lord Justice James, "both colours are there, and it depends upon the light in which you look at it which colour you see."

As an illustration of the reverse process, that is, of illustrating general subjects, by metaphors borrowed from the law, may be mentioned Sir Fitzjames Stephen's remark in his note on Utilitarianism in his "Liberty, Equality and Fraternity," where he says that "to suppose that Christian morals can ever survive the downfall of the great Christian doctrine of a future state of rewards and punishments, is as absurd as to suppose that a yearly tenant will feel towards his property like a tenant in fee simple. To say that, apart from the question whether there is or is not a future state of rewards and punishments, it is possible to compare the merits of Christian and heathen morality, is as absurd as to maintain that it is possible to say how the occupier of land ought to treat it without reference to the nature and extent of his interest in the land."

F. L.

WITNESSES AND WITNESSES.

It is said that Dugald Stewart had strong Scottish prejudices against trial by jury in civil cases which were converted into admiration by the accident of his hearing an able cross-examination in an English Court on a case of trespass to real property. But his admiration was not so much of the jury system as of the mode in which the truth was elicited for adjudication. Long experience has demonstrated that no means for obtaining truth was comparable to those whereby the parties can be fully examined both on their own behalf and by the adversary, and when the testimony is elicited *viva voce* in open court. These two, *viva voce* evidence and the examination of parties, have been well likened to a pair of powerful implements sharp as two edged swords for the dividing asunder of truth from falsehood.

It is a favourite topic with the lay-press and the lay-public to insist upon the brow-beating of counsel and the badgering of witnesses, but experience demonstrates that witnesses are seldom treated worse than they deserve, and have in most cases to thank themselves for any want of consideration shown to them. Any frequenter of the courts must have observed how unsatisfactory witnesses are in general; how some are utterly unable to answer the simplest question straightforwardly; how others answer one question by asking another; how others ramble from one topic to another and fail to appreciate the particular thing as to which information is sought. All this arises no doubt, in the upright witness, from habits of loose, indefinite thinking, and from the confusion and embarrassment arising from the novelty of his position. But how seldom does one meet with the perfectly upright witness! From the experts of whom Lord

Campbell once said "they come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence" (10 Cl. & Fin. 191), down to the humble friend and neighbour—they all endeavour instead of answering the questions fairly and directly to state something which would qualify the effect of an answer favourable to the questions if opposed to their own side. It is not the business or duty of the witness to trouble himself with explanations; these will be attended to by the opposite counsel who will adjust the latter if the facts have been distorted or insufficiently brought out.

Every counsel will have made mental notes for himself of the different classes of witnesses and their peculiarities, and of the various indications of their insincerity or credulity. Thus, for example, the late David Paul Brown, of Philadelphia, after much experience and observation at the bar, said that one most certain rule to determine that a witness was giving false testimony was when he uniformly repeated the questions put to him on cross-examination—the object being to gain time for making his answer, and to concentrate his mind upon the nature of the answer to be made. So the witness who proclaims his indifference and protests his honesty, and the witness who has no memory of facts when he can be contradicted by others, but has all the minutiæ of transactions at his finger's ends where he is the sole witness, and the witness who flippantly answers before he has heard the question—all these declare their own condemnation.

So too we have all come across the timid witness who cannot be got to speak above a whisper, the stupid witness whose testimony is so contradictory or imperfect that he had better have left your questions unanswered, the eager witness whose testimony is so exaggerated or effusive that you wish he had said more or said less, the pompous witness who generally leaves the box feeling that he is a very much aggrieved man.

With regard to the evidence of *servants* and *children*, and their tendency to colour or exaggerate, some acute observations are found in Macaulay's "Essay on History": "Children and servants are remarkably Herodotean in their style of narrative. They tell everyting dramatically. Their *says he's* and *says she's* are proverbial. Every person who has had to settle their disputes knows that even when they have no intention to deceive, their reports of conversations always require to be carefully sifted. If an educated man were giving an account of the late change of administration he would say, 'Lord Goderich resigned, and the King, in consequence, sent for the Duke of Wellington.' A porter tells the story as if he had been hid behind the curtains of the royal bed at Windsor. 'So Lord Goderich says, I cannot manage this business, I must go out. So the King says, says he, well, then, I must send for the Duke of Wellington, that's all.'"

The weight of judicial opinion appears to be in favour of the grim proposition that a woman can tell a lie better than a man. Baron Huddlestone in a recent trial for perjury discussed this matter before a jury. He said it was a remarkable circumstance that when a woman was determined to say that which was untrue, she did it a great deal better than a man. Whether it was that a man was more conscious of his dignity (?). was a metaphysical question he could not answer; but it was certain that a woman did tell a story much more logically and perseveringly than a man could. He was glad that it was a question for the jury to say whether the girl should be believed, for he himself admitted his in-

capacity to gauge the veracity of a woman when she appeared in the box. In accord with this view the observations the other day at Owen Sound by a learned judge, when he said it was an established fact, recognised by the legal profession in general, that it was much more difficult to break down, in cross-examination, a false statement when made by a woman than when made by a man, the reason being that women have greater self-possession under such circumstances than men. It would seem as if the Common Law bench had never forgiven frail women for what Douglas Jerrold calls that matter of the apple. Somewhat more generous views have been expressed by some equity judges as for instance by the then Master of the Rolls, Lord Romilly, in *Thomas* v. *Finlayson*, 19 W.R. 255, where he said that the court had never made a man pay costs for believing the word of a woman, and he would not be the first judge to do so. But we fear that even equity judges have not recognised or adopted this line of decision to any great extent.

PRACTICAL JOTTINGS.

SIMILITERS.

Similiters are not abolished by the Common Law Procedure Act (Harr. 2nd ed. p. 132). Indeed, if the plaintiff *takes issue* on affirmative pleas of the defendant, it appears that he should add a similiter for the defendant (Paterson's Com. Law, vol. 1, p. 203). But if the plaintiff has served notice of trial, he is estopped from denying that the cause is at issue (*Wilkes* v. *Wilkins*, 1 P. R. 90; *Archibald* v. *Cameron*, 1 P. R. 138); and, although, if plaintiff *joins issue* on negative pleas of the defendant, it is not necessary to add a further pleading for the defendant, the cause being then at issue (Paterson, *ubi sup.*), yet, in such case, if defendant wants a jury, and plaintiff has filed no jury notice, he may file and serve a similiter with a jury notice annexed, it being legitimate to use a similiter as a last pleading in this way (*Quebec Bank* v. *Gray*, 5 P. R. 31); and even if plaintiff has served a notice of trial with his joinder, yet defendant may do this (*McLaren* v. *McCuaig*, 8 P. R. 54). But plaintiff can forestall a defendant in respect of this, unless a defendant, who wishes for a jury, serves his jury notice with his pleas. For where the plaintiff's pleading is a mere negative to the defendant's, the plaintiff can, by the practice of the Courts, add a joinder for the defendant (R. S. O. c. 50, s. 117). If, then, the plaintiff joins issue, and files a similiter for the defendant, there now remains nothing to which the defendant can annex a jury notice, as there can only be one similiter (*Hyde* v. *Casmea*, 8 P. R. 137).

DISCOVERY OF DOCUMENTS.

R. S. O. c. 50, sec. 169, enacts that discovery may be ordered, "upon the application of any *party* to a cause or civil proceeding *stating his belief upon affidavit*, etc." This corresponds to sec. 50 of the Imp. C. L. P. Act, 1854 (17 & 18 Vict. c. 125), which enacts that discovery may be ordered, "upon the application of either party to any cause, etc., upon an affidavit by such party of his belief, etc." In *Hirschfield* v. *Clark*, 25 L. J. N. S. 113 (1856), and in *Christopherson* v. *Lotinga*, 33 L. J. N. S. 121 (1864), followed in our own Courts, in *Earwick* v. *De Blaquiere*, 4 P. R. 267, it was held that, under the above enactments, a discovery cannot be ordered except upon an affidavit by the *party* himself, that a judge of the Court has no power to dispense with such affidavit, and that an affidavit by the attorney of the party is not sufficient. In

Christopherson v. *Lotinga*, the whole question was argued as to whether the words of the statute were directory, or imperative, and all four judges held, reluctantly, that they were imperative. But in the case of a corporation, though no provision to that effect is contained in the statute, since a corporation is incapable of making an affidavit, and perhaps of forming a belief, the affidavit of the attorney is admitted, on the principle of the beneficial construction of remedial statutes. (Maxwell on Stat. 206). This was decided in *Kingsford* v. *G. W. Ry. Company*, 16 C. B. N. S. 761 (1864), the ground being that it was the intention of the Legislature that its benefits should be extended to all suitors. In that case Willes, J. (p. 769) says: "All that the Court decided in *Christopherson* v. *Lotinga* is . . . that distance and inconvenience are not ground for dispensing with the affidavit of the party, . . . or to speak more correctly, that the Legislature cannot have intended to make an exception when the making of an affidavit by that party is extremely inconvenient, it being still possible." This case is referred to with approbation in *Tiffany* v. *Bullen*, 18 U. C. C. P. 97. A curious question arises as to whether the same indulgence should be granted to corporations under R. S. O. c. 50, sec. 71, which provides for the giving of security for costs in *qui tam* actions. The section enacts that the application is to be made "upon an affidavit made by the defendant applying." In the recent case of *Martin* v. *The Consolidated Bank* (not yet reported), Mr. Dalton held that an affidavit of the attorney of the corporation was not sufficient, on the ground that the statute did not extend to, and had not provided for, the case of a corporation. This decision was grounded mainly on the case of *Bank of Montreal* v. *Cameron*, 2 Q. B. D. 536, and stands enlarged before the full Court. The last-named case was on Order XIV., Rule 1 (Judicature Act), which says that, when the defendant appears on a writ of summons specially endorsed, the plaintiff may, "on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action," call on the defendant to show cause why the plaintiff should not be at liberty to sign final judgment for the amount endorsed. And it was held such an order cannot be obtained where the plaintiff is a corporation, because the Rule requires an affidavit to be made by the plaintiff himself as to his own belief. One of the judges, who had been concerned in framing the Orders, confessed that the framers had not had before their mind the case of corporations. Should Mr. Dalton's decision in *Martin* v. *The Consolidated Bank* be upheld by the full Court, it is to be hoped the Legislature will amend an obvious oversight in R. S. O. c. 50, sec. 71. It, for example, could never have been intended that if some worthless informer should proceed against a bank under 37 Vict. c. 47, sec. 3 (C), as was the case here, the defendant should be unable to obtain security for his costs.

Certiorari.

R.S.O. c. 43, sec. 24, enacts:—"Whenever it appears in any action otherwise of the proper competency of the County Court, that such Court has not cognizance thereof from the title to land being brought in question, &c., any Judge of either of the Supreme Courts of Common Law, or the Judge of the County Court before whom such cause is pending, may order a writ of *certiorari* to issue," &c. It may be useful to point out what appears to be the history of the enactment. In *Powley* v. *Whitehead*, 16 U.C.Q.B. 589, the defendant put in a plea, and annexed to it an affidavit, as required by 8 Vict. c. 13,

sec. 13 (R. S. O. c. 43, sec. 28). In the course of his judgment there, Burns, J., says :—"The course which the plaintiff should have pursued was, upon the plea in bar being put in, the trial of which could not take place in the County Court, to have removed the cause into the Superior Court by *certiorari*, and have proceeded with the case there." But in a later case, viz., *O'Brien* v. *Welsh*, 28 U. C. Q. B. 394, Wilson, J., adverting to *Powley* v. *Whitehead*, and other cases, discusses whether a plaintiff really could so act, and he says: "We cannot form any satisfactory opinion upon anything decided in this Province, nor can we find any English decision at all bearing directly on the question. . . . While the rule of law is, that, when the Court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and all parties are liable who act under it, it appears to us we cannot take up such proceedings and legalize them merely by transferring them to another Court which has jurisdiction. The jurisdiction founded on the void initiation must be as vicious as the process on which they rest. . . . We come, therefore, to the conclusion that when an action has been begun in a County Court which had jurisdiction to entertain it, *as well as when the action has been rightly begun there, but the jurisdiction has been lost by matter of pleading or of evidence upon the pleadings in the cause*, that the whole proceedings are *coram non judice*, and that they cannot be removed for the purpose of prosecuting the suit in the Superior Court which has jurisdiction in such an action." A few months after this expression of opinion, the above enactment was passed, doubtless with a view to putting the law upon a more satisfactory footing.

F. L.

FEMALE ATTORNEYS.

In our June number for last year we noticed the admittance of Mrs. Bella Lockwood to the roll of attorneys of the Supreme Court of the United States. Her's is the first female name on the roll of attorneys, and we naturally watch her career with interest. In another part of our June number for last year we recounted the severe lecture she received from Judge Magruder, upon attempting to act as attorney in his court, on which occasion, it will be remembered, she was informed, on judicial authority, that "the sexes are like the sun and moon moving in their different orbits. The greatest seas have bounds, &c., &c." Now June is round again, and Mrs. Bella Lockwood has again been brought to our notice. The *Chicago Legal News* informs us as follows :—

"There was a novel scene in the United States Supreme Court room on Monday. Joel Parker, of New Jersey, democratic candidate for presidential nomination, had just had his admission to the Bar of the United States Supreme Court moved, when Mrs. Bella Lockwood, who was admitted to practice before that court by special act in the last Congress, rose, and in a clear, audible tone moved the admission of a lawyer from South Carolina, who, she certified upon honour, possessed the necessary qualifications to practise before the Supreme Court of the United States. The lawyer whose admission she moved rose, and proved to be a negro. Joel Parker, democratic candidate for president, and this negro, then stepped forward to the clerk's desk, placed their hands on the same Bible, and were sworn in together, very near to the niche where the bust of Chief Justice Taney, the author of the Dred Scott decision is placed. The most visionary prophets of the last decade would scarcely have ventured to predict that a negro upon motion of a woman, who is a qualified counselor before that court, would have been enrolled among the counselors of the Supreme Court of the United States to-

gether with a democratic candidate for the presidency."

Female aspirants for the Black Robe meet with far less encouragement in the region of Temple Bar, than they have received in America.

The *Solicitors' Journal* says :

"Almost simultaneously with the request by a young lady to be examined at the preliminary examination for solicitors, an application in writing from another lady has been received at one of the Inns of Court with reference to the preliminaries for call to the bar. The applicant has been informed that, under the regulations of the Inns of Court, ladies are not allowed to enter as students. With regard to the young lady candidate for the solicitors' examination, we are informed on authority that she has no intention whatever of presenting herself for examination in February next, in face of the reply of the Council of the Incorporated Law Society. That ungallant body, according to our correspondent, have definitely said that they do not feel themselves at liberty to accept the notice of any woman."

Perhaps, however, we need not exclaim *proh pudor !* but should rather rejoice that the authorities in the mother-country, having convictions, have the firmness to abide by them. As conveyancers, or as compilers of text-books, there may be no reason why some women should not succeed as well as some men : but to refuse to allow them to embark upon the rough and troubled sea of actual legal practice, is, as it appears to us, being cruel only to be kind.

EXPERT TESTIMONY.

The value of expert testimony appears to be the subject of a good deal of discussion just now, and it does not require a prophet to anticipate, before long, the introduction of new regulations in regard to it. In October last, the correspondent of the *Times* at Naples wrote as follows :—

"In several recent letters I have noted it as a flagrant defect in the administration of justice in Italy that the plea of '*impulso irresistibile*' is so often urged in extenuation of crime—so often, indeed, that it has awakened the attention of the press and of some of our most distinguished medical men. Professor Tomassi, whose name is well known throughout Europe, announced at an early meeting of the congress of medical men assembled in this city that he would bring the subject forward for their consideration, and this he did at the closing meeting. He had observed, he said, in criminal cases, the introduction of a practice of late, which is *inqualificabile* in the presence of justice, of science, and of common sense, and that is the selection of experts for the defence by the advocate, and experts for the accusation by the Attorney-General. Whether this distinction was sanctioned by the law, or had crept in from some abuse, he was not aware, but undoubtedly it was an enormity which ought to be abolished. The expert for the defence having been selected by the advocate, is almost under an obligation to find excuses for the prisoner at the bar, while the expert for the accusation, having been selected by the Attorney-General, is disposed to support the views of the legal authorities. Of what value, then, can be the addresses of men which are, or appear to be, obligatory ? It could not be denied that sometimes conscientious experts, and possessing much medical learning, may act differently, but such cases are rare ; in general, experts follow the lead of the advocates in excusing or accusing the prisoner. This cannot continue ; it is contrary to justice, to the dignity of medicine and of the magistrate. Certain statements which are made by advocates, especially those for the defence, are perfectly incredible. As remedies for this state of things, the Professor proposed, first, that in every province a body of experts should be instituted who had made legal medicine their special study, and who had undergone a corresponding examination, from whom, when there was any necessity, a selection should be made.

Secondly, that the distinction between experts for the accusation and the defence should be abolished; that they should be selected by the advocate for the defence and the Attorney-General conjointly, and the number required should be drawn by lot. I may have trespassed too much on your space in bringing this subject before you, but any one who has watched the proceedings of criminal courts in Naples, and has noted the excuses for crime which are urged almost as a matter of course, will acknowledge the importance of the question. That it has been brought to the attention of the public by such a man as Professor Tomassi, at a congress of the medical men of Italy, is certain to insure some reform. Had his proposals at the time been the law, we should not have such ridiculous exhibitions of so-called medical science on the occasion of the trial of the cook of Salerno, the would-be assassin of the King. Nor would our courts be so frequently disgraced by the often unjustifiable plea of '*forza irresistibile.*'"

And in a recent issue, the Albany *Evening Times*, in commenting upon the opinion of Surrogate Calvin, in relation to the weight to be given to expert testimony, says:—

"The actual value of experts in legal trials continues to receive merited attention. The drift of public opinion coincides with that of the *Evening Times*, as published a few days since. We then said, that as experts only favour the side that calls them, they are of little or no value to courts or juries as aids in administering justice. Surrogate Calvin, in the hearing of the Hesdra will case in New York on Saturday last, expressed a similar opinion, after an exhibition of experts regarding the genuineness of a certain signature.

The surrogate said that he was becoming more and more convinced of the dangerous character of expert evidence. It invariably happens that the expert's testimony supported the theory of the side by which he was retained, and it was as little to be expected that any expert's evidence would not help those by whom he was paid, as that a lawyer would give an argument or opinion in court contrary to the interests of his client. The result was that the expert's opinion had come to have about the same value as that of the lawyer.

The surrogate thought that this might be cured by a law which should make skilled experts officers of the court instead of servants of parties. The court might then name three experts to be agreed upon, who should not be retained by either side, but who would decide the question brought to them for decision without regard to the effect upon the case. Their pay would not be contingent upon the success of either side, and they would be under the same restrictions and control as a referee now is."

NOTES OF CASES

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

QUEEN'S BENCH.

VACATION COURT.

Hagarty, C. J.] [May 7.

In re Birdsall et al. and the Corporation of the Township of Asphodel.

Municipal corporations — By-law to close road—Insufficiency of notice—Application to quash.

Held, that the notice of intention to pass a by-law to close a road should state the day on which the Municipal Council intended considering the by-law.

Semble, that actual knowledge on the part of a relator of the day on which the by-law was to be so considered did not disqualify him where he was a party interested, from moving to quash.

Bethune, Q. C., for relators.

Marsh, contra.

Galt, J.] [May 11.

Fryer v. Shields et al.

Action for wages—Discharge in insolvency—Pleading.

To an action by the plaintiff, a clerk of defendants, for the full amount of his wages,

defendants pleaded a deed of composition and discharge in insolvency, to which the plaintiff replied that the claim was privileged.

Held, on demurrer, replication good, as it did not appear that the plaintiff ever gave any express consent to the discharge of the defendants, and was not therefore bound by it.

Muloch, for demurrer.
G. Kerr, *contra*.

CHANCERY CHAMBERS.

Godfrey v. Harrison.

Referee.] [March 3.

Where a married woman married before the passing of 35 Vict. c. 16 (2nd March, 1872) files a bill in respect of property, whether acquired before or after that date, she is required to sue by a next friend.

Shelley v. *Gering*, 8 Pr. Rep. 35, explained.

Richardson v. Richardson.

Proudfoot, V. C.] [17th Feb. 1879.
Spragge, C.] [10th March, 1880.

Pending an alimony suit and before decree, a writ of *ne exeat provincià* was issued against the defendant. Two parties were joined as sureties on the bond, which was the usual statutory one, and $450, the sum at which the defendant was held to bail, paid to the sheriff by one of the sureties as collateral security. The defendant was surrendered to the sheriff, and then applied for his discharge, which was granted, but so as not to prejudice the liabilities of the sureties. The sureties now applied for their discharge, and that the sum of $450 be repaid.

Held by Proudfoot, V.C., that, under the state of the authorities, no order should be made for the discharge of the sureties, and that the $450 should not be repaid to the surety who paid it, as the other surety only signed the bond on the condition of that deposit.

The plaintiff afterwards applied for payment to her of the $450 in the sheriff's hands, on account of arrears of alimony.

Held by Spragge, C., that where a party is entitled to an assignment of the bond and to realize it for his own benefit, his rights will be the same in regard to money deposited, and that plaintiff is entitled to have money paid into Court and applied as asked for. Costs against the surety who had paid the $450 to the sheriff.

Spragge, C.] [March 10.

Fraser v. Lunn.

Vendor and purchaser.

At a sale on the 25th March, 1879, under a decree, Wesley Abel purchased the land in question.

On the 19th April, 1879, he transferred his interest to Peter Wood, and on the 26th April Robert Hunter purchased and took an assignment of the dower of one Barbara Stewart in the land.

On the 16th February, 1880, Abel applied to the Court to be relieved from the contract to purchase on the ground of the outstanding dower.

Held, assuming the evidence of the application to show that Barbara Stewart had agreed with the heir at law of the vendor to accept a gross sum in lieu of her dower; that Wood really purchased her dower but took the assent in Hunter's name, and that this application, though in Abel's name, was really made by Wood—that no relief could be granted, the applicant having himself created the obstacles by means of which he sought to prevent the sale being carried out.

He who comes into equity must come with clean hands.

Robertson, Q. C., for applicant.
Teetzel, *contra*.

Blake, V. C.] [May 3.

Re Heywood.

Infant—Maintenance—Guardian.

In 1875, Margaret H., the mother of certain infants herein, died, directing by her will that her property should vest in trustees, who should invest same and pay the interest to the guardian named in the will or

to such guardian as the Court might appoint, except the father of the infants, and if the Court appointed the father guardian the interest was to accumulate until the infants came of age. The infants resided with their aunt (the petitioner) and had so resided from shortly before their mother's death. Their father never claimed their custody. The guardian named in the will received the interest from the trustees till 1878, when he refused to act, and thereupon the trustees refused to pay any interest till a guardian was appointed by the Court. The aunt of the infants then applied by petition to the Court, on notice to the father, for an order declaring her entitled to be paid for past maintenance and to be appointed guardian of the infants.

The father did not appear on the application, and in his absence Proudfoot, V. C. granted the application.

H. Cassels, for petitioner.

The Referee, Proudfoot, V. C. [May 17.

Morden v. Booth.

Staying proceedings.

The defendant Stevenson demurred for want of parties to the plaintiff's bill.

Demurrer allowed with liberty to plaintiff to amend within 14 days and on payment of costs of demurrer, and if bill not amended within the 14 days that plaintiff should pay defendant costs of suit.

The plaintiff then moved before the Referee for an order extending the time for amending bill until after the rehearing of the order made on the demurrer, and until 14 days after judgment on such rehearing, and for a stay of proceedings under the order of Blake V. C. in the meantime.

The Referee refused the application on the ground that he had no jurisdiction to stay proceedings other than those to enforce the payment of money, following *Campbell* v. *Edwards*, Prac. Rep. 159, and *Butler* v. *Standard*, 6 Prac. Rep. 41.

On appeal, Proudfoot, V. C., reversed this decision, holding that the Court has jurisdiction in any proper case to stay proceedings, and under recent legislation that power is conferred on the Referee.

H. Cassels, for defendant Stevenson.

T. H. Spencer, for plaintiff.

CANADA REPORTS.

ONTARIO.

IN THE COUNTY COURT OF THE COUNTY OF SIMCOE.

Currie v. L. McCallister and James Russell.

Action against magistrate, for not returning conviction—Joint liability—Statutes affecting tabulated and discussed—Declaration—Pleading.

[Barrie, Jan. Term, Ardagh, J. J.

This was a *qui tam* action against the defendants as Justices of the Peace, for not making a return of conviction. Defendants demurred to the declaration.

Lount, Q.C., for the demurrer.

Moberly, in support of the declaration.

The facts and other matters sufficiently appear in the judgment of

Ardagh, J. J.—The plaintiff declares in a *qui tam* action against two defendants, claiming a penalty of $80 for non-return of a conviction by them of one Peter Currie.

The defendants demur to the declaration on the following grounds :—

1. The defendants are not jointly liable.

2. The declaration is not founded on or authorised by any statute.

3. The declaration does not disclose the nature of the offence whereof the defendants convicted Peter Currie.

4. The declaration does not disclose that the defendants had jurisdiction.

5. The declaration does not allege that that the conviction was a joint conviction.

6. The declaration does not aver that the return of the said conviction was not made contrary to the statutes in that behalf.

And on the argument, Mr. Lount further objected that the declaration did not state where the conviction took place, *i. e.*, that it took place within the County of Simcoe,

of which county the defendants were Justices of the Peace.

Some of these objections are, so far as I can find, new, that is, that upon them no decisions have ever been pronounced, as the law now stands.

In some of the cases cited at the argument, a difficulty seems to have arisen, as to what particular statute, whether a Dominion or Ontario one, the proceedings were founded upon.

Our earliest Act seems to have been the old 4 & 5 Vict. c. 12. This Act was incorporated into the C. S. U. C. chap. 124, and that Act (so far as the matter now in question is concerned) was repealed by the 32-33 Vict. c. 36, such repeal not extending to matters relating solely to subjects as to which the Provincial Legislature have, under the B. N. A. Act of 1867, exclusive powers of legislation.

In order more clearly to arrive at a conclusion as to what Acts, both of the Dominion and the Local Legislature, are now in force, I have tabulated all the legislation on the subject since Confederation, and subsequent to chap. 124 of C. S. U. C. above alluded to—premising first, that that Act required every Justice of the Peace (acting alone) to make a return of any conviction before him, to the then next General Court of Quarter Sessions; but, in the case of a conviction before *two or more* Justices, they were required to make an *immediate* return,—and (by section 2), *each and every* of them were liable to the penalty for non-compliance.

The subsequent *Dominion* legislation is is follows :—

32-33 Vict. c. 36 (1869), repeals chap. 124, C. S. U. C., except, as above stated, as to matters within the control of the Provincial Legislature.

32-33 Vict. c. 31 (1869), s. 76 of which required every Justice to make a return to the next General or Quarter Sessions, or to the next Court to which an appeal might be made—while *two or more* justices were to make a joint return—by sect. 78, such justice *or justices*, to forfeit and pay $80 for neglect to return.

33 Vict. c. 27 (1870), by sect. 3 of which, every justice was to make the returns required by sec. 76 of 32-33 Vict. c. 31, to the Clerk of the Peace, on or before the second Tuesday in the months of March, June, September and December. No alteration was made by this Act, as to the penalty, which therefore remains as before, a *joint* one against all the justices who might be guilty of neglect in making the joint return required to be made of any particular conviction.

This, then appears to be the present law, as regards the return of any conviction made under any Act of the Dominion Parliament.

Next, as to the Acts of the Ontario Legislature.

When Confederation took place, the law, as before stated was contained in chap. 124, C. S. U. C., and this Act was in force till the passing of

32 Vict. c. 6 (1868), sec. 9 of which required *all* returns to be made quarterly to the Clerk of the Peace, on or before the second Tuesday in the months of March, June, September and December —the penalty still remaining against *each and every* justice.

Rev. Stat. c. 76 (1877). In this Act, the time to make the returns was left as before—but *two or more* justices were to make an immediate return—and by sec. 3, such justice *or justices* neglecting to make a return, were to forfeit and pay $80.

The declaration alleges the neglect of the defendants to make the return in question, under the provisions of chapter 76 of the Revised Statutes.

As to the first objection, that the defendants are not jointly liable, it will be seen on reference to the Act last mentioned, that the penalty is a joint one, the words "and each and every of them," found in the old Act (chap. 124, C. S. U. C.), being now omitted. Under the old Act, the words permitted a separate action (as the cases shew) against *each* justice. The Dominion Legislature, while repealing chap. 124, re-enacted it by sec. 78 of chap. 31, 32-33 Vict., omitting however, the words, "and each and every of them," thus apparently limiting the right of the informer to sue for a single penalty

against them jointly, where more than one. Upon this Statute, was decided the case of *Drake* v. *Preston*, 34 U. C. R. 257, where Mr. Justice Wilson says, "As the act to be done is single in its nature, to make a return, for that can be only one return, a joint return, and if that be not done, the one forfeiture, the single payment of the penalty will acquit the two." As regards the Acts of both Legislatures then, I think the action must be a joint one, against all, where there is more than one justice. The right to sue each separately, under the Ontario legislation, existed till the passing of chapter 76 of the Revised Statutes, when it was taken away by the omission of the words "and each and every of them" (found in chapter 124 U. C. C. S) from section 3 of said chapter 76. So it appears, that whether the conviction was made by two or more justices, under a Dominion or an Ontario Statute, and they neglect to return the conviction, "such justices" (to use the words employed by both Legislatures) "shall forfeit and pay the sum of $80." The action appears to be, therefore, rightly against both defendants, if they were present and joined in the conviction—though it was otherwise when *Drake* v. *Preston* (quoted in the argument) was decided—and so the remarks of Wilson, J., on page 265 of that judgment, as to the necessity for proceeding against the defendants separately, where the conviction was under an Ontario statute, have now no force.

Before we proceed to the next point, it may be well to arrange chronologically, the statutes above referred to, and the cases cited on the argument—this will enable us to see what particular statute was in force when each case was decided:

1. *Ontario*, 124 C. S. U. C. . . 1859
   " 32 Vict. c. 6 . . . 1868
2. *Canada*, 32-33 Vict. c. 31 . 1869
   " 33 Vict. c. 27 . . 1870
3. *Drake* v. *Preston*, *ante* . . 1873
4. *Corsant* v. *Taylor*, 23 C. P. . 1874
5. *Darragh* v. *Patterson*, 25 C. P. 1875
6. Rev. Stat. c. 76 (Ontario). . 1877

The second objection is, that the declaration is not founded on, or authorized by, any statute. In the face of what I have already said, that the whole law on the subject is now consolidated in the Revised Statutes, chap. 76, and the declaration alleging the duty of the defendants to be under that statute, this objection must also be disallowed.

The third objection is, that the declaration does not disclose the nature of the offence whereof the defendants convicted Peter Currie.

The case of *O'Reilly* v. *Allen*, 11 U. C. R., decided that this was not necessary, and so did *Keenahan* v. *Egleson*, 22 U. C. R. 626. The point was raised in *Drake* v. *Preston*, *supra*, but not decided. When, however, that case was argued, a different return was required, and a different penalty imposed, as regarded neglect to return convictions for offences under Dominion and Local jurisdiction, respectively. *Now* there is no difference in the penalty; and no difference as to the return, except that, when made by two or more justices, the Ontario Act requires an immediate return, the Dominion Act does *not*. The declaration alleges the duty of the defendants, to be under Revised Statutes, chap. 76. In *Drake* v. *Preston*, *supra*, Mr. Justice Wilson, says: "It may be proper, under the different enactments of the two Legislatures, to shew the nature of the offence for and upon which the conviction was made, otherwise we shall not, in the case of two justices of the peace, know whether there is to be a separate penalty on each justice, or a single penalty against both for the one default, or whether they should be joined, or should not be joined, in the same action."

When we find, as above stated, that there is now no difference between the two legislations (except as to an *immediate* return by two or more justices) we must come to the conclusion that there need not now, in a case of this sort, be any statement as to the nature of the offence, any more than when *O'Reilly* v. *Allen*, *supra*, was decided. Until I see some further authority, I must consider this allegation not necessary—though, if no reference had been made to any particular statute, it might perhaps be necessary to consider the point further.

The *fourth* objection is that the declaration

does not disclose that the defendants had jurisdiction. The declaration alleges that it was "a matter within the jurisdiction of the said justices." The objection, I take it, refers to the nature of the offence (inasmuch as the seventh objection is as to *place*). It is possible that plaintiff is unable to acquire all the information, to the absence of which the defendants object. They have all the means of knowing the facts, but making no return of the conviction—perhaps not returning the conviction itself, may be the very cause why plaintiff cannot allege all that they require, and it does not seem unfair to invoke against them the maxim, *omnia præsumuntur*, &c., in respect of their own magisterial duties—all the plaintiff may know is that defendants sitting in open Court assumed the right to sit upon a case, did sit upon and hear it, and did publicly make adjudication, both appearing to join in it, and both appearing to sign it. If Justices of the Peace undertake to lock up, so to speak, all the proceedings connected with such a case, and make no retnrn respecting it, no one would be in a position to bring such an action as the present if too much minuteness were required—and thus the very mischief which the statute was intended to guard against, would constantly be effected. It might be said, too, that defendants are bound to make some return in the matter, even if it was one over which they had no jurisdiction, or that, if they had no jurisdiction, they should plead it in bar. At all events the plaintiff alleges they had jurisdiction. In the case of *Bagley* v. *Curtis*, 15 U. C. C. P. 366, it was held that defendant, having actually convicted and imposed a fine, could not except to the declaration, on the ground that it did not shew that he had jurisdiction to convict. Mr. Justice John Wilson, in his judgment, says, "The duty of the magistrate to make a return arises from the fact that he made a conviction, whether right or wrong, and if he neglect his duty to return it he incurs a penalty." In *Keenahan* v. *Egleson* (*supra*), the C. J. remarks, "it does not lie in the defendant's mouth to say he had no jurisdiction when he has actually convicted and imposed a fine. As against the defendant, the conviction affords evidence that he claimed and exercised jurisdiction to convict and impose a fine, and having done so, it became his duty to make a return." See also *O'Reilly* v. *Allen* (*supra*).

The *fifth* objection is that the declaration does not allege that the conviction was a joint one. The words of the statute are, "two or more Justices, such Justices being present and joining" in the conviction. This, it appears to me, is directory, more than anything else, as to who are to make the return—that is, for instance, if there were a number of Justices present, but all did not join in the conviction, only those who so joined, would be required to make the return. If either of them could shew that he did not join in the conviction, and so did not come within the Act, he would be entitled to a verdict. To quote again from Mr. Justice Wilson in *Drake* v. *Preston*, "the act to be done is single in its nature, to make a return, for that can only be one return, a joint return." So where the declaration alleges a conviction by two, it may be said to be a joint conviction. Sec. 3 of the Act (R. S. O. chap. 76), which provides for the penalty, says nothing in reference to the Justices being present and joining in the conviction; but only sec. 1, which refers to the return to be made. The wording of the declaration is the same as that in *Drake* v. *Preston*, and no objection was taken to it there.

The *sixth* objection is that the declaration does not aver that the return of the said conviction was not made contrary to the *statutes* in that behalf. As there is only one statute now for Ontario governing such returns, and as that is set out in the declaration, the remarks I have made as to the second objection will apply here.

Lastly, as to the further objection, of which no notice was given to the Court, that the declaration does not state where the conviction took place—on looking at the declaration in some of the reported cases I find that the place is sometimes given, sometimes not—it may be they are not always set out in full. In consequence of the conclusion I have come to as to the fourth objection, I must also disallow this one, referring to the remarks there quoted from *Bagley* v. *Curtis*, and *Keenahan* v. *Egleson*. The

defendants assumed jurisdiction, and even if they had none, I do not think they would be relieved from making a proper return of the conviction thus made.

Judgment for plaintiff on demurrer.

FOURTH DIVISION COURT, COUNTY OF ONTARIO.

POLLARD v. HUNTINGDON.

Chattel mortgage—Defective jurat.

The omission of the word "sworn" in the jurat to the affidavit of *bona fides* is fatal.

[Whitby, April 18th, 1880.

This was an interpleader case, and the plaintiff claimed the goods under a chattel mortgage, which complied with the statute in every respect, except that in the *jurat* of the affidavit of *bona fides* there was a blank space, where the word "sworn" is usually placed.

DARTNELL, J. J.—I think the omission fatal, and that the reasons which governed the court in *Nesbitt* v. *Cock* (4 App. Rep. 200) apply with equal force here. The blank could have been filled in with the words "taken," "affirmed," "signed," "declared," "read over," or others of like nature, and it would be necessary here, as in the case cited, to call the Commissioner to prove what was actually done. The creditor is entitled to have *on record* complete evidence of the due and proper administration of the oath of *bona fides*. This is lacking here, and the plaintiff must fail. Independent of this the transaction in question is void under R. S. O. cap. 118, sec. 1.

Judgment barring the claimant with costs.

UNITED STATES REPORTS.

SUPREME COURT OF MISSOURI.

SMITH *v.* THE ST. LOUIS, KANSAS CITY, AND NORTHERN RAILWAY COMPANY, APPELLANT.

1. *Railroad Companies.—Duty to Employés as to Mechanical Appliances.*—Railroad Companies are bound to use appliances which are not defective in construction; but as between them and their employés they are not bound to use such as are of the very best or most approved description. If they use such as are in general use, that is all that can be required. This principle is applied to the use of the T rail for a guard to railroad switches, it appearing that, although a guard made of U rail would be safer for employés and would answer the purposes of the Company equally as well, yet the T rail was the one in general use.

2. *Continued.—Knowledge of Danger.*—A brakeman who continues in the service of a railroad company with knowledge that the guard of a switch is made of T rail, cannot recover for injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that if the guard had been made of a different rail it would have been less dangerous.

[*American Law Review*, 1880, *p.* 289.]

This was an appeal to the Supreme Court of Missouri from the Circuit Court of Jackson County. Hon. S. H. Woodson, presiding.

The case is stated in the opinion of the court.

Wells H. Blodgett, for appellant.

L. C. Slavens, for respondent.

HENRY, J. Plaintiff was employed as a brakeman by defendant, and, in attempting to uncouple some cars, was knocked down and his foot was run over by the car next behind him, inflicting an injury of so serious a nature as to render amputation of the leg above the knee necessary. He went between the cars while they were in motion, removed the coupling-pin, then went back to take out the link, and, while walking between said cars, his right foot outside, and his left foot inside of the rail, his left foot was caught and held fast between the guard-rail and that of the main track. It was thus that the accident occurred, and this action is to recover damages for the injury. The particular negligence alleged in the petition was, first, that the guard-rail was unnecessary where it was placed; and, second, that said guard-rail was constructed of railroad iron, known as the T rail, instead of a different kind of rail, which would have been as serviceable to defendant and less dangerous to its employés. The first ground was abandoned on the trial, and plaintiff, relying on the second, introduced evidence tending to show that a guard-rail of railroad iron, known as U rail, would have been as serviceable to the company and less dangerous to its servants; that, owing to the form of the U rail, his foot could not have been caught and held as it was in the T rail.

Donnelly, who testified for plaintiff, stated that the T rail is in general use in this country; that there are some U rails in use on the bridge at Kansas City; that he knew of no other place where that kind of rail was in use. Knickerbocker, for plaintiff, testified that he had had about twenty years' experi-

ence in the construction of railroads, laying tracks, &c.; that he worked on the Illinois Central Railroad in 1854, and on an Iowa railroad in 1856, and subsequently on the Fort Scott and Hannibal & St. Joseph railroads; that he never had anything to do with any except the T rail; never saw the U rail; that he knew nothing of it but from the works he studied. The evidence showed conclusively that the T rail is that generally used, and that the U rail is but little used by railroad companies.

The plaintiff had been about six days in defendant's employment when the accident occurred. He had, before entering into defendant's service, been engaged three or four years on the Illinois Central, on which road the T rail was in use. He knew there was a switch at that place where he was injured, and that it was of T rail, and testified that generally there were guard-rails where there were switches, and could not say that he ever saw a switch without a corresponding guard-rail. J. M. Buckley and Mr. Emerson both testified to an experience in railroading of several years, on different roads, and to an acquaintance with the roads running into Kansas City, also the Illinois Central, the Pennsylvania Central, the Lafayette & Indianapolis, the New Albany & Salem, and others, and that they never saw any other than the T rail used in the construction of guard-rails.

For the plaintiff, the court instructed the jury as follows:—

1. If the jury find from the evidence in this cause that the guard-rail belonging to and used by defendant in operating its road, and carrying on its business as a part of said road or appurtenances, was, from the situation or construction thereof, unsafe for employés of said railroad company employed in operating said road, and that the same, *i. e.* said guard-rail, might have been so made, situated or constructed as could have answered as well all the uses of said defendant in operating its said road, and at the same time have been safe for its employés while engaged in the discharge of their duties in operating said road, and that the defendant knew this, or might have known it by the exercise of reasonable care and diligence, then the jury are instructed that the defendant is liable to the plaintiff for damages for any injuries which, from the evidence, they find he has received in consequence of such unsafe guard-rail, after such want of safety of the same was known, or, by the exercise of reasonable care and diligence, might have been known to the defendant; and provided, also, they believe from the evidence that plaintiff, when he received such injuries, was exercising ordinary care and diligence, and did not know of such unsafety of such guard-rail.

2. If the jury find from the evidence in this case, that the guard-rail used by the defendant when the plaintiff was injured, was, from its make or construction, unsafe, and that defendant knew thereof, or might have known thereof by the exercise of reasonable care or diligence, and that plaintiff was injured by his foot being caught in said guard-rail, the jury are instructed that the defendant is liable to plaintiff for any injuries he has received in consequence of such defect in the make and construction of said guard-rail after it was known, or could have been known by the defendant; if they further believe that the defendant was exercising ordinary care and prudence at the time he received the injury, and did not know of the defect in said guard-rail in its make and construction.

The following, asked by the defendant, were refused:—

3. The plaintiff was bound to exercise such care and prudence as was commensurate with the danger of the employment in which he was engaged, and if you believe that, at the time of the happening of the injuries complained of, plaintiff was not exercising such care and prudence as was commensurate with the danger incident to his employment, when by the exercise of such care and prudence he could have avoided the injury, then he cannot recover in this action.

15. If the evidence shows that the defendant used, at the place where plaintiff was hurt, the most approved style or kind of tracks and guard-rails, and that the same were in general or universal use in this country, or this part of the country, and that the same were placed or located in the usual or approved methods in use by the best constructed and conducted roads of the country, then, in such case, the plaintiff cannot recover.

There is a perplexing confusion and conflict in the authorities with regard to the duty of a railroad company to its employés, in the matter of furnishing implements and machinery for them to work with. In some of the cases dangerous and defective machinery and implements are confounded. Machinery is not necessarily defective because dangerous. The most perfect steam-engine requires skill and care in its management, and is a dangerous agent. Circular saws, planing-machines, and nearly all machines used in wood-work are dangerous, but not, therefore, necessarily defective. This distinction must be kept in view in determining all questions which arise in suits for injuries received by em-

ployés in using implements and machinery furnished them by the employer.

If the employer furnish defective machinery to an employé ignorant of a defect which was, or might have been, known to the employer by the use of proper care and vigilance, he is liable to the employé for any injury the latter may sustain in operating the machine with proper care on his part. This is all that was decided in *Porter* v. *The Hannibal & St. Jo. R. R. Co.*, 60 Mo. 162. As was said by Bacon, J., in *Warren* v. *Erie R. R. Co.*, 39 N. Y. 471: "We are not now dealing with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects, which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognise in the case of an employé, and which is answered if the care bestowed accords with that reasonable skill and prudence which men exercise in the transaction of their accustomed business and employments. *Lewis Admr.* v. *St. Louis & Iron Mountain R. R. Co.*, 59 Mo. 530, is not in conflict with the foregoing views of the New York court in the decision of the question before the court. The plaintiff's intestate was a brakeman, and, in coupling cars, stepped along as they moved, partly forward and partly out toward the rail, until he reached the rail, when, taking a step sideways, to get clear of the rail, his right foot went into a hole, which caused him to fall, and in falling his left foot was caught by the wheel of the car, which ran over and crushed it. The hole had been dug by steamboat men for a purpose of their own, and had, to the knowledge of other brakemen, been there several days, and the attention of the section-foreman, had been called to it. The evidence tended to show that plaintiff's intestate was ignorant of its existence. The principal question in the case was whether the instruction for plaintiff was correct, which declared that defendant was responsible if the risk of injury to the plaintiff was increased by the hole being there, and it was allowed to remain after defendant knew of its existence, or might, by the exercise of reasonable diligence and care, have known thereof, and that the injury was received in consequence of the hole remaining after defendant knew or might have known of its existence. Upon the hypothetical case thus put to the jury, no doubt could be entertained of defendant's liability. The instruction was proper, and the court so held, but the principle controlling that case is wholly inapplicable to this. In discussing the questions involved in that instruction, Wagner, J., who delivered the opinion, remarks: "The rule has long been established, and is founded in reason and justice, that it is the duty of railroad companies to keep their roads and works, and all portions of their track, in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passenger, or servants, or others. They are bound to furnish a safe road and sufficient and safe machinery or cars. The legal implication is that the roads will have and keep a safe track, and adopt all suitable instruments and means with which to carry on their business." This paragraph of the opinion is relied on by respondent, and, if it is to be taken literally, without qualification, it furnishes some support to the doctrine announced in plaintiff's first instruction. What is meant by a safe track is not very clear. An absolutely safe track is one on which no accident could occur attributable to the track. On the best roads in construction and management accidents do occur, and a strictly safe track is nowhere to be found. The remarks we have quoted, taken literally, without qualification, are disapproved.

The plaintiff who avers must prove negligence. Is the fact that there is another kind of rail, of which a guard-rail might be constructed which would be safer for employés, and would equally answer its purpose, sufficient to render the company liable to an employé for injury received by him in consequence of the failure of the company to use that other kind of rail? Is proof of that fact proof, or any evidence, of negligence on the part of the company? Plaintiff's first instruction declares that it is. Wharton, in his Law of Negligence, section 213, says: "An employer is not required to change his machinery in order to apply every new invention, or supposed improvement in appliance, and he may even have in use a machine, or an appliance for its operation, shown to be less safe than another in use, without being liable to his servants for the non-adoption of the improvements; provided the servant be not deceived as to the degree of danger that he incurs." Again, in section 244: "When an employé, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure. Hence, to turn specifically to the consideration of the employer's liability, an employé who contracts for the performance of hazardous duties, assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of

which causes he has had opportunity to ascertain." The authorities cited by him in support of these propositions fully sustain the text. Take the case of an engineer who for years has been operating just such an engine as that he is employed to run, and is injured by an explosion which would not have been so likely to occur if an improvement or appliance had been furnished by the employer, in use elsewhere, would the employer be liable to him in an action for damage, because he had not furnished such improvement or appliance? If the railroad companies are required to take up their rails whenever a better rail is manufactured, because it would afford greater security to their employés, and to discard their machines whenever a more perfect machinery is invented, or be liable to any employé who may be injured in using the old machinery, it would impose upon them pecuniary burdens which would compel them to suspend the operations of their roads.

In *Winder* v. *The Baltimore & Ohio R.R. Co.*, 32 Md. 411, the court remarks: "In the case before us, the question depending upon a diversity of opinion as to whether the eye-bolt or the hook is the better mode of fastening the brake is immaterial, as both seem to be approved appliances, tested by trial and experience; and if it were conceded that the eye-bolt has superior merits, it by no means follows that the defendant was bound to discard the hook that had been used for a long time and on so many trains without accident. A master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliances, and he may even have in use a machine or an appliance for its operation shown to be less safe than another in general use, without being liable to his servants for the consequence of the use of it. If the servant thinks proper to operate such machinery, it is at his own risk, and all that he can require is that he shall not be deceived as to the degree of danger that he incurs." Wood, in his Law of Master and Servant, says, section 331: "The employer is not bound to employ the latest improvements in machinery, and is not liable for an injury which might have been avoided if such improved machinery had been in use."

In *T. W. & W. Ry. Co.* v. *Asbury*, 84 Ill. 434, which was an action by his administrator to recover damages for an injury received by an employé, the court remarked: "They (railroad companies) are not required to seek and apply every new invention, but must adopt such as are found, by experience, to combine the greatest safety with practical use." That case goes far enough in that direction, and we think too far, in regard to the duties it exacts of the employer to the employé. The principle announced in the above extract applies to the relation of carrier and passenger, but is more exacting of the companies, with respect to employés, than we think warranted by the authorities. There is no fault to be found with what was decided in the case. It is an authority, we think, against this plaintiff's first instruction, considering the evidence in the cause. Even the doctrine announced in the paragraph quoted from that case will not sustain the judgment in this. The evidence does not show that the U rail "has been found by experience to combine the greatest safety with practical use." Reason and the weight of authority alike condemn the first instruction given for the plaintiff. The liabilities of railroad companies to their passengers, and their liability to their employés, are to be distinguished, as in *Warren* v. *The Erie R.R. Co.*, 39 N.Y. 471, and *Tinney* v. *The Boston & Albany R.R. Co.*, 62 Barb. 218. The highest degree of diligence is required in the one case, and the lowest standard in the other.

Applying these principles to this case, what right has plaintiff to recover from the company? He was an experienced railroad man, thirty-five or forty years of age, had worked for years on railroads constructed as defendant's was. He had never seen any other than a T rail used. He knew that the guard-rail was at the place where he was injured, and that it was made of T rail. This was his own testimony, and he proved by other witnesses that the U rail would have been less dangerous, although it was but little used in this country; his own witnesses stating that the most they knew of the U rail they had learned from books, and not from observation. This, with evidence of the particular manner in which he received the injury already detailed, and the extent of his injury, was the case made by the plaintiff, and his evidence neither proved, nor had any tendency to prove, negligence on the part of the defendant which made it liable in damages for the injury plaintiff received. The instruction asked by defendant at the close of plaintiff's evidence, that it was not sufficient to warrant a verdict for plaintiff, should have been given. The first instruction for plaintiff, as already indicated, was also erroneous. Defendant's third instruction should have been given if there had been any evidence tending to show carelessness on the part of plaintiff, but there was none.

We think that under the circumstances of this case, the fifteenth instruction asked by defendant should have been given. The

evidence showed that the plaintiff was fully acquainted with the risk he incurred from the nature of his employment and the kind of rails used for guard-rails on defendant's road. It might not be a proper instruction in a case where the employé was inexperienced and ignorant of the danger he incurred in the work he was employed to perform. The judgment is reversed. The other judges concur.

Reversed.

Comments on the foregoing case, by Editor of American Law Review.

As indicated in the foregoing opinion, there are cases holding otherwise; but they ignore the general principles founded in reason and justice, which the English and American courts have generally agreed upon as governing the master's liability to his servant.

§ 2. *The governing principle stated.* The governing principle of all such cases is this: The servant, when he enters into the service, is deemed to agree with the master that he will assume all risks which are ordinarily and naturally incident to the particular service. On the other hand, the master impliedly agrees with the servant that the former will not subject the latter, through negligence, fraud, or malice, to risks greater than those which fairly and properly belong to the service in which he is about to engage. If, without the consent of the servant, express or implied, the master subjects him to risks beyond these, and he is thereby injured, the master must pay to him the resulting damages. The negligence for which the master may be thus liable to the servant is generally classified under three heads:—

1. Negligence in subjecting the servant to the risk of injury from defective or unsafe machinery, buildings, premises, or appliances.

2. Negligence in subjecting him to the risk of injury from unskilful, drunken, habitually negligent, or otherwise unfit fellow-servants.

3. Negligence where the master or his vice-principal personally interferes, and either does or commands the doing of the act which caused the injury.

For the purpose of this discussion, negligent injuries of the third class may be left entirely out of view. In the first two cases, the unfitness of the building, premises, machine, appliance, or fellow-servant, must have been known to the master, or must have been such as, with reasonable diligence and attention to his business, he ought to have known. It must also have been unknown to the servant, or such as a reasonable exercise of skill and diligence in his department of service would not have discovered to him.

If the master has not been personally negligent in any of these particulars, and hurt nevertheless happens to the servant, the master will not be answerable in damages therefor; but the servant's misfortune will, accordingly as the facts appear, either be ascribed to his own negligence, or ranked in the category of accidents, the risk of which, by his contract of service, he is deemed voluntarily to have assumed.

The master's obligation is not to supply the servant with safe machinery, with machinery not defective, or with any particular kind of machinery; but it is an obligation to use ordinary and reasonable care not to subject him to unreasonable or extraordinary dangers, such as he did not impliedly agree to encounter, by sending him to work in dangerous buildings, on dangerous premises, or with dangerous tools, machinery, or appliances. If the master has failed in his duty in this respect, and the servant has, in consequence of such failure, been injured, without fault on his part, and without having voluntarily assumed the risk of the consequences of the master's negligence, with full knowledge, or competent means of knowledge, of the danger, he may recover damages of the master.

§ 3. *Degree of care exacted of the Master.*—In the preceding case the learned judge correctly says that the liability of railroad companies to their passengers, and their liability to their employés, are to be distinguished. But the statement that "the highest degree of diligence is required in the one case, and the lowest standard in the other," is, to say the least, an extraordinary statement. If railroad managers were to get the impression that this is the law, it would tend greatly to lessen the security of the lives of their employés. We do not believe that any well-considered case can be found which contains even a *dictum* which lends support to this statement. The lowest standard of care which we can imagine one person as owing to another is that which one person may be supposed to owe to another who, at the particular time, is committing an aggravated trespass upon his rights. Trespassers, whether men, children, or dumb beasts, cannot be injured with impunity; and while the person upon whom the trespass is being committed may use the necessary force to expel the trespasser, he is under an obligation to use reasonable care not to inflict another or greater injury than that which may result from the application of this necessary and reasonable force. The rule is undoubtedly as firmly settled as any rule can well be, that a carrier of passengers is bound to exercise, to promote the safety of those whom he undertakes to carry, a very high degree of care. Whatever may be said against the soundness of dividing care, or its antithesis, negligence, into degrees, we must ignore the teaching of all the adjudications before we can reach the conclusion that the carrier of passengers is held only to the exercise of ordinary care. We must do the same in order to reach any other conclusion than that, in order to avoid subjecting his servants to risks beyond those which he impliedly agreed to assume, the master must exercise reasonable and ordinary care. He duty of selecting and maintaining safe machinery and competent servants is not an absolute one. He is not an insurer of the safety of his servants in this respect. He does not warrant the competency of his servants or the sufficiency of his machinery. His duty to them is discharged by the exercise of reasonable or ordinary care; and this, as in every other situation, is measured by the character, the risks, and the exposure of the business.

He is not bound even where the element of skill or art comes in, as against a workman without special skill, to exercise exhaustive care or the highest degree of diligence.

The test of liability is therefore said to be, not whether the master omitted to do something which he could have done, and which would have prevented the injury, but whether he did anything which, under the circumstances, in the exercise of care and prudence, he ought not to have done, or omitted any precaution which a prudent

and careful man would have taken. Accordingly, where it appeared that the servant was killed by the fall of a portion of an overhanging bank of earth, which was being excavated under the direction of the master, it was held error to charge the jury to the effect that if the defendant *could have done anything* which would have prevented the accident, his omission to do so was negligence.

Tested by the same rule, it has been held, with obvious propriety, that a declaration in an action by a railway engineer for injuries sustained in consequence of his engine running off the track, which merely alleges that the engine "ran off the track in spite of the reasonable care and diligence of the plaintiff, and which running off was in consequence of the imperfect and insufficient connection of the track where the said track crossed other tracks, the defendants being bound to keep said track in good running condition," is bad on demurrer, because it fails to allege negligence on the part of the defendant, and asserts an absolute duty to keep its track in good repair.

The master is under the continuing duty of supervision and inspection. He does not discharge his duty in this regard by providing proper and safe machinery, or fit servants, in the first instance, and then remaining passive. "It is a duty to be affirmatively and positively fulfilled and performed." He must supervise, examine, and test his machines as often as custom and experience require. The same care requisite in hiring a servant in the first instance must still be exercised in continuing in the service; otherwise the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant whom he continues in his employment after a knowledge of such incompetency or carelessness, or when, in the exercise of due care, he should have known it, as if he had been wanting in the same care in hiring. The same may very properly be said of the machinery. The servant has no more control of the repairs than of the purchase —no more responsibility for the one than for the other. The use of it is for him; and the risk of that use, whatever it may be, he assumes. That comes within his contract; but, as part of the same contract, the employer provides the means of carrying on the business, and, as a matter of course, he assumes the responsibility that his work shall be done with due care; and as the responsibility continues so long as the means are used, so must the same be exercised in keeping the required means in the same safe condition as at first.

Upon the question whether the master has exercised reasonable or ordinary care in the discharge of his duties towards his servant, it is obvious that his *knowledge*, or want of knowledge, of the thing which subsequently caused the injury to the servant will sometimes have a very important bearing. But it by no means follows that the want of knowledge will exonerate him. He being under an affirmative duty of inspection and inquiry, negligent ignorance will operate to charge him the same as knowledge.

§ 4. *When the Servant is deemed to waive the Danger or Defect.*—Juries are frequently misled by the habit of courts in charging them concerning this obligation of the master, without at the same time bringing to their attention the correlative duty of the servant. In ordinary cases (for there are exceptions), they should be told that to authorize a recovery these two things must stand in conjunction,—knowledge on the part of the master, or its equivalent, negligent ignorance; and a want of knowledge on the part of the servant, or its equivalent, excusable ignorance. The general rule here is, that if the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover that the building, premises, machine, appliance, or fellow servant, in connection with which or with whom he is to labour, is unsafe or unfit in any particular; and if, notwithstanding such knowledge or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him. "Much of the work of the country is done without the employment of the best machinery or the most competent men, and it would be disastrous if those prosecuting it were held to insure the safety of all who enter their service. If persons are induced to engage, in ignorance of such neglect, and are injured in consequence, they should be entitled to compensation; but if advised of it, they assume the risk. They contract with reference to things as they are known to be, and no contract is violated and no wrong is done if they suffer from a neglect whose risk they assumed. '*Volenti non fit injuria.*'" It may be stated as a general proposition that the master is under no higher duty to provide for the safety of his servant than the servant is to provide for his own safety. It follows that, if the knowledge or the ignorance of the master and that of the servant in respect to the character of the machine are equal, so that both are either without fault or in equal fault, the servant cannot recover damages of the master. But this rule can only be predicated of cases where the servant and the master have equal means of knowledge; for though the servant and the master be equally ignorant, yet if the servant be ignorant without fault, and the master be negligently ignorant, the servant will have a cause of action against the master. In these cases the real question then is, whether the servant has had equal opportunities with the master to observe the defect in the machinery or the materials, or whether, having had such opportunities, he intends to waive any objections to them. This is well illustrated by a case in Illinois, where it appeared that a railway switchman and car-coupler was constantly employed in running damaged cars to the shop for repairs. While so engaged, in attempting to couple such cars, he was thrown to the ground and killed. It was held that the rule that the master must furnish the servant with safe machinery had no application; that the deceased must be deemed to have accepted the service subject to all the risks involved in it, among which was the risk of such an injury as that which caused his death. Moreover, the existence of a damaged car, under such circumstances, implied no negligence on the part of the company. These principles are subject to material exceptions and qualifications *in favour of the servant*, which we could point out if we had space; but it is not necessary, because the discussion in the principal case is so framed as to draw in question only the obligation of the master, and not the contributory negligence of the servant.

(*To be continued.*)

LAW STUDENTS' DEPARTMENT.

The following questions and answers are taken from the *Bar Examination Journal*, published by Stevens & Haynes. The answers are given *in extenso* as they will be useful in giving some of our young friends an idea of how similar questions should be answered when their time comes to go through the ordeal at Osgoode Hall :—

COMMON LAW.

Pass Paper.

Q.—1. State and explain the principal rules to be observed in the construction of contracts.

A.—(1.) The construction must be reasonable, that is, according to the apparent intention of the parties ; *e.g.*, if a party to a contract promise payment, without saying *to whom*, it is to be understood that he promised payment to the party from whom the consideration for the promise proceeded.

(2.) The construction must be liberal ; that is, the words of a contract may be taken in their most comprehensive sense ; *e.g.*, the word *men* may sometimes be understood to include both men and women.

(3.) The construction must be favourable ; that is, must be such as may, if possible, support the contract. Hence, if the words of a contract will bear two senses, one agreeable to and the other against law, the former sense is to be adopted.

(4.) Words are to be construed according to their ordinary signification ; unless by usage or custom they have acquired a different meaning, or the context shows that they were not intended to be used in their ordinary sense.

(5.) A contract is to be construed with reference to its object and the whole of its terms ; hence, the whole instrument must be considered, even though the immediate object of inquiry be the meaning of a single clause.

(6.) A contract is to be construed according to the *lex loci contractus* if it is to be performed in the country where it is made. If it is to be performed elsewhere, it is to be construed according to the law of the country where it is to be performed.

(7.) The construction is to be taken most strongly against the contractor. This rule, however, is only applicable where other rules of construction fail.

(8.) If there are two repugnant clauses in a contract the first is to be received and the latter rejected.

(9.) The construction of a written contract belongs to the Court alone ; but the jury have to determine, as a matter of fact, any question as to the meaning of the words in which it is expressed.

(10.) As a general rule parol evidence is not admissible to assist the Court in construing a written contract ; but it is admissible in the case of a latent ambiguity ; also to explain the meaning of words used in a particular sense in trade, art, or science, or words written in a foreign language ; and to prove the existence of a local custom or custom of trade by which the contract is governed. (Chitty on Contracts, ch. 1, sec. 3 ; as to parol evidence, see *Bar Ex. Journal*, Vol. IV. p. 236, No. 23.)

Q.—2. Give instances of contracts void on the ground of contravening public policy.

A.—Marriage brocage agreements, that is, agreements for the procuring of marriages ; agreements not to marry, where the intention is to restrain marriage altogether ; agreements made in contemplation of the future separation of husband and wife ; agreements made with a view to compromising prosecutions for felonies and misdemeanours ; agreements in general restraints of trade ; agreements involving champerty and maintenance. (For other instances, and on the subject generally, see Pollock on Contracts, 2nd ed. 273—317.)

Q.—3. Explain the nature of a contract of guarantee, showing how the surety may be discharged from his liability.

A.—A contract of guarantee is an agreement whereby the promisor becomes liable to the promisee to answer to the payment of some debt or the performance of some duty in the event of the failure of a third person, who is, in the first instance, liable for such payment or performance. (Broom, C. L. 5th ed. 377.)

It is of the essence of this contract that there should be some one liable as principal (that is, in the first instance) ; hence, where one person agrees to be responsible for another the former incurs no liability as surety if no valid claim ever exists against the latter. (*Lackeman* v. *Montstephen*, L. R. 7 H. L. 17 ; Chitty on Contracts, 475.)

Under the Statute of Frauds (sec. 4), no action can be brought on a contract of guarantee unless there be a note or memorandum in writing of the contract, signed by the party to be charged or his agent.

By 19 & 20 Vict. c. 97 (s. 3), the consideration for a guarantee need not appear in the note or memorandum required by the Statute of Frauds. But there must, of course, be a valuable consideration for the promise of surety, unless the contract be

under seal; and the mere existence of the debt, default or miscarriage in respect of which the promise is given, is not a sufficient consideration.

A surety will be discharged from his liability: (1.) By any material misrepresentation or concealment whereby he has been induced to enter into the contract of suretyship: (2.) By the failure of an intended cosurety to execute the instrument of guarantee; (3.) By a release given by the creditor to the principal; (4.) By the liability of the principal becoming extinguished in any other way (except operation of law, as on bankruptcy, *Ex parte Jacobs*, L. R. 10 Ch. App. 211); (5.) By the creditor entering into a binding contract to give time to the principal, unless the creditor at the same time reserves his rights against the surety, so that the latter may at once pay the debt and proceed against the principal; (6.) By any material alteration (without the surety's consent) of the terms of the agreement between the creditor and the principal in respect of which the surety becomes bound; (7.) By the creditor giving up (without the surety's consent) any collateral securities held by him for the debt of the principal, in which case the surety will be discharged to the extent of the value of the surety given up.

Q.—4. Define a "common carrier," and the extent of his liability for goods entrusted to him,—shewing how far he is protected by modern legislation.

A.—A "common carrier," is one who undertakes for hire to transport from place to place, either by land or water, the goods of such persons as may choose to employ him (Chitty on Contracts, 445).

By the Common Law a carrier was liable for loss or injury to goods by any cause except the act of God or of the King's enemies, or some defect in the goods carried (Chitty, 448; *Nugent* v. *Smith*, 1 C. P. D. 423); unless he limited his liability by a contract made for that purpose with his customer. A notice limiting the carrier's liability put up in his office, and shown to have come to the customer's knowledge, was formerly held to constitute such a contract; but the Carriers' Act, 11 Geo. IV. & 1 Will. IV. c. 68, provides that no such notice shall have any effect. And by the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, no special contract between the carrying company and any person as to the forwarding and delivering of any goods is to be binding unless signed by him or the person delivering the goods.

The common law liability of carriers by *land* was materially altered by the Carriers' Act, 11 Geo. IV. & 1 Will. IV. c. 68, under which the carrier is not liable for the loss of or damage to certain articles specified in the Act, when the value exceeds £10, unless the value be declared at the time the goods are delivered to the carrier, and an increased charge, notified in the carrier's office, accepted by him. The Act, however, does not protect the carrier when he does not properly notify or demand the increased charge, or when the loss of or damage to the goods arises from his own misfeasance or the felonious acts of his servants.

The Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, limits the liability of Railway and Canal companies for loss of or damage to horses and other beasts to certain specified amount, unless the higher value is declared and an increased rate paid.

Carriers by *sea* are protected by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, from liability for loss caused by fire, or by the fault of any pilot where the employment of such pilot is required by law, or (as regards certain valuable articles) by robbery or embezzlement, happening without their privity or default, unless a notice in writing of the nature and value of such articles has been given to the master or shipowner. And by the Merchant Shipping Act, 1862, 25 & 26 Vict. c. 63, they are not liable in respect of injuries to ships or goods to an aggregate amount exceeding £8 per ton of the ship's tonnage where the loss or damage arises without their default or privity.

Q.—5. What is the origin and nature of the remedy by distress, and in what cases can it be resorted to?

A.—Distress is a legal mode of obtaining satisfaction for certain wrongs by the mere act of the party injured without action or suit in a court of justice. It was originally regarded as a remedy for wrongs which could not be redressed by ordinary process of law, owing to the courts of justice in early times being unable in many cases to effectually enforce their judgments. It consists in "the taking of a personal chattel out of the possession of the wrong-doer into the custody of the person injured to procure satisfaction for the wrong committed."

The remedy by distress is given by the Common Law for (1.) Recovery of rent in arrear, in which case chattels found on the premises subject to the rent may (with some exceptions) be distrained; (2.) Trespass by cattle, where a man finds on his land another's cattle *damage feasant*, that is, doing damage by treading down grass, &c., in which case the owner of the land may in general distrain them; (3.) Neglect of certain feudal duties, now of no practical importance.

By statute the remedy by distress is given in certain special cases, for the recovery of duties and penalties imposed by Act of Parliament.

At Common Law goods and cattle distrained were merely held as a pledge or security for satisfaction of the debt or damages due; and this is still the law with regard to cattle taken *damage feasant*; but goods distrained for rent may now under the provisions of several statutes (2 W. & M. c. 5; 8 Anne, c. 14; 4 Geo. II. c. 28; 11 Geo. II. c. 19), be sold and the proceeds applied in satisfaction of the rent and charges. And goods taken under statutory powers of distress for recovery of duties and penalties may in general be sold. (See 3 Steph. Comm. Book 5 V. ch. 1.)

Q.—6. Under what circumstances will an action lie in respect of injury sustained through an act done in the exercise of statutory powers?

A.—An action will not lie if the act was authorised by the statutory powers and has not been done negligently. But an action will lie—(1.) Where the injury has been caused by negligence in the exercise of the statutory powers; (2.) Where the act done was beyond the scope of the statutory powers; (3.) Where the statute which gave the powers also created a special duty as to the manner in which they were to be exercised, and the act done is a breach of such duty; unless the statute has annexed to the breach of the duty a special penalty recoverable by the party injured, in which case, as a particular remedy is given by the statute, an action for damages will not lie.

Q.—7. In what cases will a plaintiff be compelled to give security for costs?

A.—(1.) Where he is permanently resident abroad. (2.) Where he brings an action for the recovery of land after he has been unsuccessful in a prior action for the same against the same defendant. (3.) Where the action is brought by a limited joint stock company and there is reason to believe that if the defendant is successful the assets of the company will be insufficient to pay his costs. (4.) Where the plaintiff in an action of tort, brought in the High Court, has no visible means of paying the defendant's cost in the action if he fail, and the action is not fit to be brought in the High Court; the plaintiff, in this case, being compelled to give security for costs, or to have the action remitted to the County Court. (5.) Where the plaintiff brings an appeal, and the Court of Appeal orders him to give security for the cost of the appeal. (Prentice, 99, 112, 213, 217; Foulkes' Action at Law, 107—110.)

Q.—9. What is the writ of habeas corpus ad subjiciendum *? When will it be granted, and what is the procedure thereupon.*

A.—The writ of *habeas corpus ad subjiciendum* is the writ which issues in case of illegal imprisonment or detention, for the purpose of effecting the deliverance of the person so imprisoned or detained. It is directed to the person who has the other in his custody, and commands him to produce the body of the person detained, with the true statement of the time of his caption and the cause of his detention. It lies to any part of the Queen's dominions not having a Court with authority to issue such writ and enforce its execution. (See 25 Vict. c. 20.) The writ is obtained by motion to a Superior Court or application to a Judge, supported by affidavits of the facts, and will be granted on sufficient ground for its issue being shown. The return to the writ is made by producing the person detained, and setting forth the grounds and proceedings upon which he is in custody. If the return presents a sufficient justification of the prisoner's detention, he is remanded to his former custody; if insufficient he is discharged.

The remedy by *habeas corpus* for illegal detention existed at Common Law; and was improved and extended by the Habeas Corpus Act, 31 C. II. c. 2, in cases of commitments on criminal charges, and by 56 Geo. III. c. 100, in other cases of detention of the person. The latter statute contains important provisions, enabling the Court to examine into the truth of the facts stated in the return to the writ. (Broom, C. L. 5th ed. 245—247; Steph. Comm. Book V. c. 12.)

Q.—10. Under what circumstances can goods which have been stolen, and sold by the thief be recovered by the owner from an innocent person.

A.—If the goods be sold by the thief otherwise than in market overt, the owner can recover them from any person into whose possession they have passed, even though he be an innocent purchaser.

Prior to the statute 7 & 8 Geo. IV. c. 29, goods sold by a thief in market overt could never be recovered by the owner of an innocent purchaser; except in the case of a stolen horse which might be recovered, unless it had been exposed in the market prior to the sale for an hour between ten in the morning and sunset, and certain particulars respecting it had been taken down by the bookkeeper; and, even then it might be reclaimed within six months on tender of the price paid for it in market overt (2 & 3 P. &. M. c. 7; 31 Eliz. c. 12). And this is still the law as to the effect of a sale

in market overt where the thief has not been convicted; but the statute 7 & 8 Geo. IV. c. 29, on conviction of the thief, the property in the goods now reverts in the original owner, who may recover them from any person in whose possession they may be found (7 & 8 Geo. IV. c. 29.)

Q.—11. Enumerate the offences which are now excluded from the jurisdiction of quarter sessions, pointing out which of them are felonies?

A.—(1.) Treason, murder, and every capital felony. (2.) Every felony which when committed by a person not previously convicted of felony is punishable by penal servitude for life. (3.) Every newly created offence, unless otherwise provided by the statute which creates the offence. (4.) Certain offences which do not fall under the above heads, the most important being the following *felonies*, viz., treason-felony, certain forgeries, setting fire to crops, &c., bigamy, abduction of women, stealing, &c., records of Courts, wills or title deeds of real estate, and offences against the False Personation Act, 1874—and the following *misdemeanours*, viz., offences against religion, perjury, subornation of perjury, concealment of birth, abduction of girls under sixteen, libel, bribery, certain conspiracies, pursuing game by night, certain fraudulent misdemeanours by agents, trustees, &c. (Harris, Cr. L. 295—297.)

THE English Law Students have been debating the following questions :—

(1) "When a will contains a devise of real property to a person in fee simple, and also a devise of the same property in fee simple, 'in case the first-named devisee does not dispose of the same, but not otherwise,' and the first devise lapses, will the second devise take effect?"

(2) "Is it desirable that women should be admitted to professions, and to a larger and more direct influence in public life than they now possess?"

(3) "Bequest of a sum of money to trustees on trust to repair certain tombstones therewith, and to pay the surplus to A. The first trust being void, is A entitled to the whole fund?"

(4) "Is it desirable to increase the number of national holidays?"

(5) "Should the English law which compels (*a*) ministers of religion and (*b*) medical men to give evidence of matters communicated to them in professional confidence be assimilated to the laws of the Continent which protect such communications?"

(6) Testator bequeaths residue of his estate to A, with gift over to B, "in case A should die before he shall have actually received the same." A. dies fourteen months after testator without having actually received any part of such residue. Is A.'s legal representative entitled to the bequest?

(7) Is it desirable that the law should be altered thus :—No presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband?

ACTS OF PARLIAMENT.

The following are the Acts of interest to the profession passed during the late session of the Parliament for the Dominion :—

An Act to repeal the Acts respecting Insolvency now in force in Canada.

(Assented to 1st April, 1880.)

An Act to provide for the salaries of two additional Judges of the Supreme Court of British Columbia.

An Act further to continue in force for a limited time "The Better Prevention of Crime Act, 1878."

An Act for the final settlement of claims to lands in Manitoba by occupancy, under the Act thirty-third Victoria, chapter three.

(Assented to 29th April, 1880.)

An Act to authorize making certain investigations under oath.

An Act further to amend the Acts respecting Dominion Notes.

An Act for extending the Consolidated Act of 1879, respecting duties imposed on promissory notes and bills of exchange, to the whole Dominion.

An Act to further amend "The Supreme and Exchequer Court Act."

An Act to amend the law of evidence in Criminal Cases, as respects the taking and use of depositions of persons who may be unable to attend at the trial.

An Act to amend the Act intituled "An Act respecting offences against the person," and to repeal the Act intituled "An Act to provide that persons charged with common assault shall be competent as witnesses."

An Act relating to interest on moneys secured by mortgage of real estate.

An Act for the relief of Permanent Building Societies and Loan Companies.

(Assented to 7th May, 1880.)

BOOKS RECEIVED.

The Principles of the Law of Contracts, by Sir Wm. R. Anson—American edition. Chicago : Callaghan & Co.

A Compendium of the Law of Executors and Administrators, by W. Gregory Walker. London : Stevens & Haynes.

New Law Dictionary and Compendium of the Whole Law, by Archibald Brown. Second edition. London : Stevens & Haynes.

The Elements of Jurisprudence, by Thomas Erskine Holland, D.C.L. Oxford : Clarendon Press.

FLOTSAM AND JETSAM.

As to the possibility of substituting for the gallows some form of death likely to be less painful, Dr. Henry Natchel, a distinguished French physicist, now in New York, says that the garrotte does not always kill the first time, and could not be made successful except in the hands of a skilful surgeon ; that administering chloroform violently is very painful ; that prussic acid in the eye does not always produce instantaneous death, and must be administered by a physician ; that death by strychnine is sometimes accompanied by terrible convulsions and great pain ; and that even electricity is not sure, for a man in England was struck by lightning and stripped of his clothing, and many bones were broken, and yet he survived it. "Hanged by the neck until dead" seems likely to remain on the statute books for the present.

As questions of precedence are now considered of much importance, and as it is rather difficult to ascertain how this matter stands as among the twenty-nine Judges occupying the bench in England, we copy the order as given in the *Solicitor's Journal* :

(1.) The Lord Chancellor (who is placed above all Dukes, except Royal Dukes).

(2.) Judges of the Judicial Committee (as Privy Councillors).

(3.) Chancellor of the Duchy of Lancaster.

(4.) The Lord Chief Justice of England.

(5.) The Master of the Rolls.

(6.) The Lord Chief Justice of the Common Pleas.

(7.) The Lord Chief Baron.

(8.) The Lords Justices of Appeal.

(9.) The Vice Chancellors.

(10.) The Puisne Judges of Queen's Bench, Common Pleas, and Exchequer, according to seniority of appointment.

(11.) Judge of the Court of Probate.

(12.) Judge of Court of Admiralty.

A lawyer's wit, sometimes, does more than enliven a dull hour in court. It so opens the eyes of the Judge that he sees with clearness a point that otherwise he would have ignored. An illustration of this penetrating wit once occurred at the trial of a sailor in a New England seaport.

The sailor, after having drunk to excess in a low saloon, had quarrelled with the landlord, and beaten him severely with a bottle snatched from the bar.

As the case admitted of no legal defence, the sailor's lawyer, putting in a plea of guilty, addressed himself to the court in order to secure as light a sentence as possible. He urged that the prisoner had acted under the influence of liquor—and very poor liquor at that.

"But, sir," said the court, not inclined to view the appeal with favour, "we are to consider the aggravated character of the offence. Your client admits he assaulted this man with a bottle."

"Yes, your honour," interposed the witty lawyer, "we admit all that ; but I beg you to remember that this man first assaulted my client *with its contents*.

The court smiled at this unexpected point, and Jack got the benefit of it in a light sentence.—*Chicago Legal News*.

The *Law Times* says : The British juryman is a personage of so much importance, that one hesitates to question the propriety either of what he does or what he says. At the risk of committing an impropriety, however, we refer to some remarks by a juryman, who took part in a coroner's inquiry into the cause of death of a seaman of the Royal Navy in one of our southern seaport towns : The juryman to a witness.—Are you an independent witness? Answer.—Yes. Juror.—By whose solicitation do you come here? Solicitor for one of the parties.—I protest against such an imputation. Juror.—I saw some witnesses come from your office. Solicitor.—There is no reason why I should not see witnesses before they come here. Juror.—I was surprised to see them march out of your office. Solicitor.—I have a right to examine any witness who comes and makes statements to me. This is a most improper imputation. Now, with all respect for this juror, it will certainly take the whole of the solicitors' profession by surprise, to learn that there is a reflection on a professional man, who takes down the

statement of a witness to an event, which afterwards results in legal proceedings, such statement being taken down during the progress of such proceedings. It will, no doubt, be something new to this scandalized juryman to learn that nine-tenths of the witnesses in courts of justice have, before giving evidence, attended at a solicitor's office, for the purpose of a full note being taken of the evidence they intend to give. And there is something to be said for the witness to whom this juryman referred, for it is an iniqui tous thing to impute to a witness giving evidence upon oath, that because he has been seen to come out of a solicitor's office, such a circumstance tends to discredit his evidence. Really so much unbecoming fuss is sometimes made of jurymen, that if when exercising a little brief authority, they have an exaggerated notion of their functions as jurymen, it is not to be wondered at.

A lawyer writes to the *Law Times* as follows concerning conveyancing and English Grammar: "During the said term." I believe this phrase is not understood by everybody, and certainly not by the editors of "Woodfall's Landlord and Tenant," who have conceived some grim-gribber in its place, namely, these phrases, "during the continuance of the said term," and "during the continuance of this demise." The former phrase is found in the eleventh edition and the latter in the third edition of Woodfall. Will you, on behalf of good English writing, allow me to correct these gentlemen and all others who have erred through them, and so prevent in some measure these disgraceful phrases finding a place in every well-drawn lease. The word "during" is a verb (called by grammarians an adverb), and the same verb as "enduring;" but placed at the beginning of the sentence it is scarcely recognised as a verb. "The said term enduring," "the said term during," "enduring the said term" and during the said term," all mean the same, and the last phrase is a beauty in the English language, because it is so rare. Of course it might be translated into Latin by the ablative absolute. The following is Messrs. Leyly & Co.'s blunder:—"Enduring the continuance of the said term." They will be surprised to hear that these phrases, "during the continuance of the said term" and "continuing the continuance of the said term," mean exactly the same thing, and that the former is a new-fangled arrangement of the wanton verbosity so dearly loved by the old school of conveyancers. Mr. Prideaux has always been content with the right phrase. The verb dure is common enough in Chaucer, and in Man of Lawestale are these lines:—

> And al his lust, and al his busy cure,
> Was for to love her while his life may dure.

Of the verb "to dure" the present participle is the only remnant in use, and Messrs. Leyly & Co. are almost guilty of a sort of sacrilege in trying to push it out of use and placing it under a bushel of words.

Logan E. Bleckley, one of the associate justices of the Supreme Court of Georgia, resigned his seat on the bench on the 2nd inst. "In many respects," writes our regular Georgian correspondent, "he was the most extraordinary judge that ever sat upon the Supreme Bench in our State. His decisions evince great learning and research, and are clothed with a quaintess of phraseology which has made them favourite sources of quotation everywhere. He was born in the mountains of North Georgia, and still retains about his appearance something of the backwoodsman; but he is a true poet and a profound metaphysician as well as a great lawyer. In the language of Hallam, he 'scatters the flowers of polite literature over the thorny breaks of jurisprudence.' On the morning he delivered his last decision on retiring from the bench, he read the following lines. It may be added that in his letter to the Governor, Judge Bleckley based his resignation upon the ground (dictated by genuine modesty) of inability to discharge the duties of the office satisfactorily to himself, and of his failing health under the stress of the labours imposed by his position." The following are the lines referred to:

In the Matter of Rest.

Bleckley, J.

1. Rest for hand and brow and breast,
For fingers, heart and brain!
Rest and peace! a long release
From labour and from pain;
Pain of doubt, fatigue, despair—
Pain of darkness everywhere,
And seeking light in vain!

2. Peace and rest! Are they the best
For mortals here below?
Is soft repose from work and woes
A bliss for men to know?
Bliss of time is bliss of toil;
No bliss but this, from sun and soil,
Does God permit to grow.

They were ordered to be spread upon the minutes of the court.—*Central Law Journal.*

Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 43RD VICTORIÆ.

During this Term, the following gentlemen were called to the Bar, (the names are not in the order of merit, but in the order in which they stand on the Roll of the Society) :—

GEORGE WHITFIELD GROTE.
WILLIAM COSBY MAHAFFY.
P. A. MACDONALD.
WILLIAM LAWRENCE.
WILLIAM LEIGH WALSH.
JOHN J. W. STONE.
COLIN SCOTT RANKIN.
HORACE COMFORT.
ALEXANDER V. MCCLENEGHAN.
MARTIN SCOTT FRASER.
WILLIAM PATTISON.
WM. REUBEN HICKEY.
GEORGE MONK GREEN.
JAMES THOMAS PARKES.
MICHAEL J. GORMAN.
HARRY EDMUND MORPHY.
CHARLES AUGUSTUS KINGSTON.
JOHN HY. LONG.

Special Cases.

JAMES C. DALRYMPLE.
JOHN JACOBS.

The following gentlemen have been entered on the books of the Society as Students-at-Law and Articled Clerks .—

Graduates.

PETER L. DORLAND.
LEWIS CHARLES SMITH.
MATTHEW M. BROWN.
PETER D. CRERAR.
RUFUS ADAM COLEMAN.

Matriculants.

ANDREW GRANT.
JAMES MACOUN.
FRANCIS R. POWELL.
JOHN TYTLER.
THOMAS JOHNSTON.

Primary Class.

ROBERT VICTOR SINCLAIR.
HECTOR COWAN.
WILLIAM BEARDSLEY RAYMOND.
WILLIAM ALBERT MATHESON.
ARTHUR B. MCBRIDE.
FRANK HORNSBY.
WILLIAM AUSTIN PERRY.
JOSHUA DENOVAN.
M. J. J. PHELAN.
ARTHUR EDWARD OVERELL.
ROBERT SMITH.
HUGH MORRISON.
JOHN MCPHERSON.
AMBROSE KENNETH GOODMAN.
J. A. MCLEAN.
THOMAS IRWIN FOSTER HILLIARD.
RANALD GUNN.
PHILIP HENRY SIMPSON.
JOHN GEAEE.
EDWARD A. MILLER.
JOHN GREER.
DANIEL FISKE MCMILLAN.
CHARLES ADELBERT CRAWFORD.
FREDERICK ERNEST COCHRANE.
WILLIAM PEARCE.
ANDREW GILLESPIE.
G. A. KIDD.

Articled Clerks.

G. R. VANNORMAN.
E. M. YARWOOD.
J. HEIGHINGTON.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

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

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

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

Students-at-Law.

CLASSICS.

1880 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.