DIARY FOR MARCH.

1. Mon. ..St. David's Day.
2. Tues...Co. Ct. sitt. for York begin. Court of Appeal sitt. begin.
3. Wed..Treaty of St. Stephano.
6. Sat. ..Name of York changed to Toronto, 1834.
7. Sun....Fourth Sunday in Lent.
14. Sun. ..Fifth Sunday in Lent.
17. Wed ..St. Patrick's Day.
18. Thur..Princess Louise born, 1848.
21. Sun. ..Sixth Sunday in Lent. Palm Sunday.
23. Tues...Sir George Arthur, Lieut.-Governor of U. C., 1838.
28. Sun. ..Easter Sunday. Canada ceded to France, 1632.
30. Tues...B. N. A. assented to, 1867.
31. Wed. ..Lord Metcalfe, Governor-General, 1843.

CONTENTS.

Canada Law Journal.

Toronto, March, 1880.

We advise our correspondent "A. B.' who writes on the legal bills before the Local House (see p. 92), to possess his soul in patience. Things *might* be worse, and a free country must suffer some inconvenience for its freedom. One would however have thought that a Commission, composed of the best of our judges, to enquire into the subject, and to report to, and consult with the Attorney General, would have been a safe course. We have not thought it worth while to review the proposed bills, but shall refer to them after they have become law.

The influence of Bret Harte and Mark Twain is beginning to make itself felt on the English Bench, and to modify the judicial utterances of the Lords of Appeal. The other day in *Ralph* v. *Carrick*, 28 W.R. 71, the Lords Justices were trying to discover the intention of a foolish, thoughtless and inaccurate testator. Among other cases cited was *Sibley* v. *Perry*, 7 Ves. 522, whereupon Brett, L. J., took occasion to observe, "I should have no objection to be present at the funeral of *Sibley* v. *Perry* as soon as that can take place."

The Attorney-General has introduced a bill for an Act to abolish priority of, and amongst execution creditors. This was, we presume, suggested by the expected repeal of the Insolvent Act this Session, though its coming into force is not made contingent upon that event. But, as the repeal may be looked upon as a foregone conclusion, it will not probably be necessary to consider wherein the provisions of this bill might clash

with the Insolvent Act. The Sheriffs, that unfortunate body who have recently been brought unto unenviable notoriety by one of their number, will, doubtless, be consoled by the thought that the whirligig of time is likely to bring them to the top, and smother the Official Assignees in the sea of obloquy, which they have prepared for themselves at the bottom.

For the benefit of the Students' Debating Society, and those wishing to hold Moot-courts, we will insert, from time to time, subjects which are propounded for discussion in the law-students societies in England. At Manchester the debate was on the subject: "A railway passenger gives his portmanteau to a servant of the company, who asks if he will have it with him in the carriage, and on the passenger consenting, places it in the carriage some time before the train starts. The portmanteau is stolen before the passenger enters the carriage. Is the railway company liable for its value?" At the united law students' debate, the subject was the rather advanced one: "That children born out of wedlock should be legitimatized by the subsequent marriage of the parents." Another topic discussed was one which fortunately possesses no interest for us in Canada: "Should the right of presentation to Church livings by private persons be abolished?"

As there seems to be a fair prospect of the English Judicature Act becoming engrafted in the legal system of this Province, it may not be amiss to notice the principle of decision which obtains in England where the former practice in law and equity has been diverse. The Lords Justices hold that preference should be given to that practice which appears to be the most reasonable, and and most in accord with natural justice. Thus in *The Newbiggin Gas Company* v. *Armstrong*, 28 W. R. 217, the question came up as to who should pay the costs when the action had been brought by the solicitor without any authority from the nominal plaintiff. Jessel, M.R., compared the roundabout practice in Chancery, which left the defendant to get his costs from the plaintiff, and the plaintiff to get them from the solicitor, with the more sensible practice at law, where the course was to serve the defendant with notice of the application and to order the solicitor to pay the costs of both plaintiff and defendant in the first instance. It was then held by all the judges that the latter practice was to be prerfered and should henceforth be the practice in such cases, under the Judicature Act. It appears that the Master of the Rolls had come to the same conclusion in *Nurse* v. *Durnford*, 28 W. R. 145, when sitting as a judge of first instance.

A correspondent gives us another advertisement illustrative of the subject of unlicensed conveyancers and—collection *bureaus*—let us call them (see p. 92). We presume he is aware, though perhaps all our readers are not, that one of the advertisers there referred to, is not only a Division Court Clerk but also a member of the Local Legislature. When this is realized, it will be easier to understand one of the reasons why the extension of the Division Courts is possible. We have so often expressed our opinion on the subject of unlicensed conveyancers, that we may seem to be monotonous; but we give the Benchers fair warning that we shall not cease agitation on this subject until something is done to remedy the present crying evil. We do not expect much from the legal members of

the Legislature. They appear to be so wrapt up in the daily necessities of their uncertain position as popular representatives as to be incapable of seeing the rights of the class to which they belong; and we would add, so far as the Division Courts extension is concerned, these gentlemen seem quite oblivious to the injurious effects of such legislation as that about to be adopted. It certainly is not very encouraging to those who wish to see the statute book a record of a thoughtful desire to "make haste slowly" to hear, on the one side, a Minister of the Crown say that the only pressure for the extension came from Division Court officers, and, on the other side, to hear the leader of the opposite party, himself a lawyer, declare his desire further to increase the jurisdiction, and apparently to do that which is so expressively crystalised in Western slang, "to go one better."

In Todd's Parliamentary Government of England, the functions of "Her Majesty's Loyal Opposition" are laid down as follows:—

> "They are the constitutional critics of all public affairs; and whatever course the Government may pursue they naturally endeavour to find some ground of attack. It is the function of the opposition to state the case against the administration; to say everything which may plausibly be said against every member of the ministry; in short, to constitute a standing censorship of the Government, subjecting all its acts and measure to a close and jealous scrutiny."

It is left to an opposition which styles itself *conservative* (whatever that may mean), to strike out a new line, and outherod Herod in its destruction of an existing order of things. It is not our province to discuss this subject beyond this limit; but it will scarcely be denied by any one conversant with the subject that one great curse of the country is over-legislation, superinduced by the supposed exigencies of party politics.

There are some who think the best way to improve the Supreme Court would be to improve it off of the face of the earth. We trust some less heroic remedy may be found, though the Court certainly has, both collectively and through some of its members, on several occasions and in various unnecessary ways, endeavoured to commit suicide.

Whilst, however, it has its own sins to answer for, it is not responsible for all the evil things that may have been alleged against it. A case in point is the manifest failure of justice which has occurred in the *cause célèbre* of *Moore* v. *Connecticut Mutual Life Insurance Company*; a circumstance more to be deplored in that the defendants, who have been, as is generally conceded by the Bar, improperly ordered to pay some twenty-five thousand dollars on a life insurance policy, are an American Company to whom, as strangers, we should have wished to have seen full justice accorded.

The difficulty in this case arose under the wording of the Supreme Court Act and not from any fault of that Court. The jury at the trial were asked a number of questions, which, being answered in favour of the plaintiff, the verdict was entered for her by the Judge. The Court of Queen's Bench set this verdict aside, as being contrary to the weight of evidence, and entered it for the defendants, a course which, as will be seen, eventually shipwrecked the party intended to be benefitted. An appeal to the Court of Appeal fell to the ground; the Court being divided.

When the case came before the Supreme Court, it took an unexpected turn, which brought out in strong light the provision of the Supreme Court Act which prevents that Court from ordering a new trial on the weight of evidence. It was held, in the first place,

that the Court of Queen's Bench had no power to enter a verdict for the defendants when questions were left to the jury and answered in favour of the plaintiff; though, at the same time, they agreed with that Court that the answers *were* against the weight of evidence and that the verdict should have been for the defendants. They thought that the proper course for the Court below to have taken was to have granted a new trial on the ground that the answers were against the weight of evidence, instead of ordering, as they did, a verdict to be entered for defendants; but, as the Supreme Court had no power to do this, all they could do was to reverse the judgment of the Court of Queen's Bench, which took the wrong means to arrive at a right end, and thus allow the verdict for plaintiff to stand.

The curious result was therefore arrived at, that the plaintiff succeeded in holding a verdict which both the Court below and the Court above considered contrary to the evidence adduced. It is difficult to conceive anything more absurd. But as we have said the Supreme Court has plenty of sins of its own to answer for without being saddled with this travesty of justice. We would commend the section of the Act in question to the consideration of the lawyers in the House of Commons.

AGREEMENT TO EXECUTE MORTGAGE.

The question of when a contract to execute a mortgage will be specifically enforced by a Court of Equity is one of some consequence, which is not discussed in the pages of Mr. Justice Fry's book. We propose to collect the cases which have been decided in reference thereto.

In *Barr* v. *Clively*, Taml. 80, specific performance was decreed of an agreement to lend money on a mortgage security; but this was really done by consent. It appears in the report at p. 81 that the defendant by answer submitted to have the agreement carried out, and asked that it should be done. Sir John Leach says in *Walker* v. *Barnes*, 3 Madd. 249, "if a man agrees to give a real security for a demand he may be obliged specifically to perform his agreement, though he has no real estate at the time, because he may procure it." This language is, however, to be read as applicable and limited to cases where this is one of the terms of a contract which is otherwise of such a nature as to justify the interposition of the Court; where, for instance, the agreement to give a mortgage is a part of the bargain in a contract relating to the purchase of land. *Arnold* v. *Hull*, 7 Grant, 47.

Taking, however, the case of an intended lender and borrower, the holding of the Court is different. Thus in *Rogers* v *Challis*, 27 Beav. 175, there was a proposal to borrow a certain sum of money on certain terms for a certain time on the security of a mortgage to be given. Shortly afterwards the borrower said he did not want the money, as he could get it elsewhere on better terms. A bill being filed to have the transaction carried out by the giving of the mortgage, it was dismissed. The Master of the Rolls said: "It is a simple money demand. The plaintiff says I have sustained pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is matter for the determination of a Court of Law: the question being, first, whether an action of *assumpsit* will lie upon a contract to borrow money, and second, the amount of damage which the plaintiff has sustained." So in the converse case, a mere agreement to lend upon mortgage security is one over which

the Court will not exercise its special jurisdiction. *Sichel* v. *Mosenthal*, 30 Beav. 371. See *Thorpe* v. *Hosford*, 20 W. R. 922.

Different considerations arise when a person is indebted to another and agrees to give him a mortgage by way of security. This is, of course, an agreement which is within the Statute of Frauds as pertaining to land, and requires to be in writing. Here the authorities are at variance as to when the Court will enforce it. According to *Dighton* v. *Withers*, 31 Beav. 433, this agreement forms of itself an equitable mortgage. There a person was indebted to A. and gave him a memorandum in writing promising, whenever required, to execute a legal mortgage of his equity of redemption in certain premises. The Master of the Rolls held it was a perfectly good equitable mortgage, and enforced it. But in *Crofts* v. *Feuge*, 4 Ir. Ch. 316. Brady, L. C., held that an antecedent debt was not *per se* any consideration in equity for an agreement to give additional security. He says if the creditor wishes to obtain further security by a new agreement there must be further consideration. An agreement to forbear to sue would be sufficient for that purpose. It may be that the report in *Dighton* v. *Withers* omits to state that forbearance was given, as would probably be the case. See also *Carew* v. *Arundel*, 5 L. T. N. S. 498; s. c. 8 Jur. N. S. 71. In *Ashton* v. *Corrigan*, L. R. 13 Eq. 76, it appears from the facts that the defendant had agreed to execute a mortgage to the plaintiff with absolute (*i.e.* an immediate) power of sale in consideration of an antecedent debt. It does not appear what the consideration was. Vice Chancellor Wickens doubted whether a contract by which the mortgagee may enforce the power of sale a day after the execution of the mortgage was one which the Court will specifically enforce; but he granted the relief sought in that case, because there was no contest, and on the authority of some unreported cases referred to in Seton on Decrees. These cases, taken together, leave the matter still doubtful whether the Court will, in a litigated case, give specific effect to an agreement to execute a mortgage for an antecedent debt, if there is no stipulation that the intended mortgagee shall forbear to sue.

On the other hand, in *Herman* v. *Hodges*, L. R., 18 Eq. 18 an advance of money had been made upon an agreement to execute a mortgage therefor with an immediate power of sale. The defendant had actually received the money and then refused to give the security. Lord Selborne said he had no doubt in making a decree therefor unless the defendant was prepared to pay off the advance at once. This was, of course, a plain case of fraud on the part of the defendant, and the Court will be astute to hold him to the letter of his engagement, after he has aeceived the consideration agreed upon.

In connection with this subject two other cases may be noted. In the absence of an express contract, the mortgagee has no claim against the intended mortgagor for the costs of investigating the title where the treaty ends, even through the mortgagor's default: *Wilkinson* v. *Grant*, 18 C. B. 319. When the treaty ends because the mortgagee is dissatisfied with the security after investigation, the mortgagor has no claim for costs attending the investigation, but this is otherwise if the negotiations go off without such reason.: *Carter* v. *Merriam*, 32 L. T. N. S. 663.

UNNECESSARY AND DISCORDANT JUDICIAL OPINIONS.

When one considers how cases involving adjudication upon new, and even upon

old points, have to run the gauntlet of judicial criticism: how they are considered, observed upon, explained, doubted, not followed, questioned, disapproved of, impeached, and finally over-ruled, and how on the other hand they are commended, affirmed, extended and followed, it is marvellous that judges impose so much extra work on each other by extra-judicial deliverances. They seek not only to dispose of the matters in hand, but also to give their views on other points not necessary for the decision and which are commonly called *obiter dicta*—observations dropped by the way. It is amazing to look over catalogues of impugned decisions and to find how many relate to the *dicta* of discursive judges. No doubt many of these over-ruled *dicta* in the older cases proceed from the inaccurcy of the reporters. As Lord Mansfield remarked in *Saunderson* v. *Rowles*, 4 Burr. 2068, "It is impossible for any man to take down in a perfect and correct manner every *obiter* saying that may happen to fall from a judge in a long and complicated delivery of his opinion and the reasons of it." But where, as is usually the case in the country, the judge puts his reasons into writing, the blame of inaccuracy cannot be cast upon the reporter. The modern reporter cannot act on the advise given by Lord Coke "in doing wisely by omitting opinions that are delivered accidentally, and which do not conclude to the point in question" (1 Co. R. 50), for he has to print what the judge hands out. Indeed it would never do to vest such a discretion in the modern reporter, as it would in effect make him to sit in judgment on the judge —although this is what Campbell boasted he did with Lord Ellenborough's decisions at *Nisi Prius*.

The observation long ago made by Chief Justice Willes, that great mischief arises from judges giving *obiter* opinions (Willes, 666), is well founded and could be amply illustrated from Canadian examples, were any good purpose to be served thereby. Litigation is encouraged or suggested by general observations which upon examination it is found cannot be sustained. The proverbial uncertainty of the law is increased by the utterance of judicial doubts and queries and dicta which so far from settling anything contribute to the general unsettlement of what is thus agitated. All these evils exist in a more marked degree where the judges, guilty of the incaution, occupy seats in an Appellate Court and *a fortiori* in an Appellate Court of last resort.

This journal has all along deprecated the practice of each judge in an Appellate Court giving his individual views and reasons for decision upon the matter in controversy. We have before discussed this question at some length, and pointed out the mischief and disadvantages of such a course. By way of example it is only necessary to refer to some of the recent decisions of the Supreme Court of Canada. It is premature to discuss the confusion which has arisen from the decision in the famous "Great Seal" or "Queen's Counsel" case, because the text of the various judgments has not yet been officially promulgated. But one need not go beyond the last number of Duval's reports to be assured of the mischief of delivering and reporting manifold discordant judgments as representing the conclusion of the Supreme Court on cases there appealed. How notably different is their course from that which obtains in the other court of ultimate appeal for the colony (the Privy Council) where one judge alone clearly and fully gives the decision of the Court.

The main difficulty that meets one in considering some of the judgments of the Supreme Court, is upon what grounds

does the judgment of the Court rest—what is and what is not extra-judicial in each particular judgment—and in the united result which forms the decision of the Court? Consider for instance *McLean* v. *Bradley*, 2 S. C. R., 535. One question raised was, whether a mining company, having failed in its operations, could sell under the provisions of a Nova Scotia statute, and had sold the goods in question to the plaintiff. The present Chief Justice (then Ritchie J.) held in the affirmative, with him agreed Mr. Justice Strong. But Mr. Justice Henry held, that the statute "only applied to a going concern and could not be applied to the expiring flicker of a bankrupt company." Ritchie J. held, that the sale of the goods did not require to be under the corporate seal. Henry J. held, that such a sale, if valid, must be under the corporate seal. Henry J. further held, that the statute did not apply to the company because it was not incorporated as a trading company. Strong J. held, that "there was no doubt that the company was one to which the statute was applicable." There is a plain point on which the decision of all the judges (except Ritchie J.) could be based harmoniously and that is that the plaintiff failed because he complained of the sale of the goods by the sheriff as a conversion and that sale was justified by the order of the Court to sell the goods which had already been seized by the sheriff under a writ of attachment.

The judgment as reported emphasizes the want of harmony in the court, and by consequence weakens the authority of its decisions and sows the seeds of future litigation by the diversity of opinions expressed on points which are left undetermined by the Court, though peremptorily and often diversely passed upon by individual judges.

NOTES OF CASES

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

COURT OF APPEAL.

From Osler. J.]

PALMER v. SOLMES.

Slander—Incest—Special damage—Pleading.

In a declaration in slander by a married woman, the words charged imputed that she had commited incest and adultery with her father, and alleged, as grounds of special damage (1) the loss of the *consortium* of her husband, and (2) the loss of the *society* of friends *Held*, in demurrer, good, although the second ground was clearly insufficient.

McMichael, Q. C., for plaintiff.
Clute, contra.

SULLIVAN v. CORPORATION OF THE TOWN OF BARRIE.

Municipal corporations—Defective drainage—Pleading.—R. S. O. c. 174, *sec.* 491.

To a declaration charging defendants with negligence in the construction of certain drains and sewers, whereby they became choked, and the drainage and sewage matter overflowed into the plaintiff's premises, causing damage, the defendants pleaded that the cause of action did not arise within three months before action: *Held*, on demurrer, plea bad, as sec. 491 of the Municipal Act, R. S. O., c. 174, did not apply to a case of the kind.

Pepler, for plaintiff.
Lount, Q. C., contra.

From Armour J.]

RE HARRIS v. HAMILTON.

Municipal corporations—Market regulations—Power of Provincial legislatures—Definitions of by-law.

A City Council, acting under the authority of R. S. O., cap. 174, sec. 446, passed a by-law prohibiting vendors of "small wares

from practising their calling in the James Street Market" or in the public streets adjacent thereto: *Held*, that the Provincial Legislature possesses the power under the British North America Act to pass Acts to regulate markets, and that the above section was not *ultra vires*. *Held* also, that the term "small wares," being used in the Act, it is sufficient to use it in a by-law passed under the Act, although difficulty might arise as to what is included under it. *Held* also, that the prohibition agrinst selling "in the public streets adjacent," was bad for uncertainty.

Robinson, Q. C., for applicant.

McKelcan, Q. C., contra.

From Blake, V.C.]

Dilk v. Douglas.

Mortgages—Discharge by surviving Mortgagor.

C. created two mortgages in favour of M. B. and her two sisters to secure repayment of moneys advanced by them. C. then sold portions of the land to D. and E., who had full notice under the Registry Laws that the original mortgages were charges against the property, giving them his covenant against incumbrances. Subsequently, and after the death of the two sisters, C. procured M. B. to execute discharges of these mortgages, giving her a mortgage for $3,500 on other lands of ample value, by way of security. After the registration of these discharges, he sold the rest of the land comprised in the original mortgages to others. C. afterwards induced M. B. to accept in lieu of the mortgage for the $3,500 which she discharged, a mortgage upon other lands which were wholly insufficient in amount. Upon the death of M. B. the personal representatives of herself and her sisters filed a bill seeking to charge the land embraced in the original mortgages with the amount remaining due upon these securities.

Held, that the decree of Blake, V. C., that the discharges by M. B. were valid and effectual so far as the subsequent purchasers were concerned, as when they received their conveyances and paid the consideration therefor, a discharge by M. B., the person entitled by law to receive the money, was registered; but that the discharges were inoperative as against C. D. and E. to extinguish the interest of the deceased sisters other than M. B., as the statute refers to payment of the debt in money, and not to the acceptance of another security.

Mowat, Q. C., for appellant.

Bethune and *Cox* for respondents.

Appeal allowed.

From C. P.]

Donly v. Holmwood.

Joint Stock Company—Insolvency.

Held, affirming the judgment of the Common Pleas, that the directors of a joint stock company, incorporated under the "Canada Joint Stock Companies' Letters Patent Act, 1869, 32-33 Vict, c. 13, D.," and subject to the provisions of the Insolvent Act of 1875, cannot, without being authorized by the shareholders, make a voluntary assignment in insolvency.

McCarthy, Q.C., for the appellant.

Appeal dismissed.

From Q.B.] [Jan. 20.

Cross v. Currie.

Promissory note—Accommodation—Endorser—Insolvent holder.

B. one of the defendants who had endorsed a promissory note, made by C, the other defendant, for his accommodation, endorsed another promissory note made by C. for the purpose of renewing the former note. Instead of retiring this note, C. parted with the renewal to the plaintiff, who was aware at the time that B. had been assisting C. in money matters. After the note had been endorsed by C. to plaintiff, C. procured B.'s endorsement of another note at a shorter date, stating that the holders of the original note would not accept the first renewal, and promising to return the latter with the original note. It was found that there was no bad faith on plaintiff's part in taking the note.

Held, affirming the judgment of the Cou

of Queen's Bench, that the plaintiff was entitled to recover against B.

Bethune, Q.C., and *Ewart* for appellants. *Miller* for the respondent.

Appeal dismissed.

From Proudfoot, V.C.] [Jan. 26.

RE ROSS.

Production, Affidavit of.

On appeal from an order of the Master at Barrie demanding the production in his office of the books of creditors, who had produced promissory notes as vouchers for their claim, Proudfoot V. C. held that an undertaking by the creditors to permit inspection by the executors or their agent of their books and accounts at their place of business in Toronto, and to permit the executors to make extracts, was satisfactory, and set aside the direction with costs. *Held*, on appeal from this decision, that the executors were also entiled to an affidavit identifying the books and documents as being all in their possession relating to the claim.

Mulock for the appellant.

McDonald for the respondent.

Appeal allowed.

From C.P.] [Jan. 26.

FITZGERALD v. GRAND TRUNK RAILWAY.

Agreement—Additional parol term—Railways—Conditions.

The plaintiffs declared upon a contract by the defendants to carry, in covered cars, a quantity of petroleum. The oil was shipped by the plaintiffs from London upon a request note signed by them, and a corresponding receipt granted by the defendants, by which they undertook to carry it to Halifax subject to the terms and conditions endorsed upon it, by which they stipulated, and the plaintiffs agreed that they should not be responsible unless the goods were signed for as received by a duly authorized agent; that they would not be liable for leakage or delays and that oil would under no circumstances be carried except at the owner's risk. The receipt said nothing about covered cars, but a verbal contract between the plaintiffs' and defendants' agent was proved, whereby the defendants agreed to carry the oil in covered cars. The oil was, however, carried in open cars, and delayed at different places on the journey, in consequence of which a large quantity was lost.

Held, affirming the judgment of the Common Pleas, that even if the verbal contract was admissible the defendants were not liable thereon, as it was one which the evidence shewed the agent had no authority to make; but that the condition providing that the oil should be carried at the owner's risk did not absolve them from negligence in carrying it, which was clearly shewn, although they had power to make such a stipulation, and that the plaintiffs were therefore entitled to recover for the damage sustained, and the declaration was amended accordingly.

Per MOSS, C. J. A., that the verbal evidence was admissible, as the nature of the transaction shewed that the parties did not intend the documents to be the record of the contract.

Per BURTON, J. A., that it was inadmissible, as there was no evidence to show that the parties did not contemplate that the consignment note and the receipt should be the final and complete contract.

McMichael, Q. C., and *Bethune*, Q. C., for the appellants.

Glass, Q. C., and *Fitzgerald* for the respondents.

Appeal dismissed.

From C.P.] [Jan. 26.

RYAN v. RYAN.

Statute of Limitations—Possession as caretaker v. agent—Subsequent entry of owner—Tenancy at will.

Held, reversing the decision of the Common Pleas 29 C. P. 449, PATTERSON, J. A., dissenting, that the evidence shewed that the plaintiff occupied the lands in question as tenant at will, not as caretaker and agent of his father, and that there had been no determination of the tenancy.

Bowlby for the appellant.

McCarthy, Q.C., for respondent.

Appeal allowed.

QUEEN'S BENCH.

IN BANCO.

REGINA v. HART.

Private prosecution at suit of Crown—Costs.

There is no power to impose costs in the case of an unsuccessful private prosecution, at the suit of the Crown.

Aylesworth for prosecutor.

McCarthy, Q. C., contra.

LA VASSAIRE v. HERON.

Distress clause in mortgage—Seizure of goods of a stranger on premises—Abandonment of distress.

Under a mortgage in fee, from V. to M., on certain lands, the interest was payable yearly on January 30. The mortgage contained a power to the mortgagee to distrain for arrears of interest in the usual form contained in the short form in R.S.O. c. 104. Two years' arrears of interest had accrued, and were in arrear on 30th January, 1879. On 23rd May, 1879, the defendants under power of attorney from the mortgagee, and as his agents, entered upon the mortgaged lands and seized the goods of the defendant under a distress warrant for the arrears of interest. The plaintiff was tenant of the mortgagor, and entered after the making of the mortgage. Defendants served a notice on the plaintiff that they had distrained; they did not remove the goods, but left them in possession of the plaintiff on the premises. On the 18th August, 1879, defendants served another notice on plaintiff as subtenant of the mortgagor, that they had on that day distrained plaintiff's goods for $8.75 and costs, in addition to the seizure and demand on the 23rd May; the $8.75 being for half a year's arrears of interest ending 30th July, 1879. At this time defendants again seized and removed the goods, which were afterwards sold under the distress warrant.

Held, that the defendants had abandoned the first seizure, and could not seize a second time for the same demand. *Held* also, that the half-year's interest demanded by the second seizure was not due by the terms of the mortgage, and that the distress was for that reason illegal.

Quære—Whether the goods of a stranger on the mortgaged premises are liable to distress under a mortgage containing the usual distress clause under the Short Form Act.

McMichael, Q.C., for plaintiff.

Spencer, contra.

IN RE CHAMBERLAIN AND STORMONT, DUNDAS & GLENGARRY.

High School districts — Power of County Councils - Leave to rehear after lapse of time.

Since the repeal of 37 Vict., c. 27, sec. 38, by 40 Vict. c. 16, sec. 18, subs. 2, a County Council has no power to determine the limits of high school districts.

Leave was granted, notwithstanding the lapse of two terms, to rehear a rule made absolute, to set aside a by-law on no cause being shewn, and the Court refused to rescind the rule granting the leave to rehear.

Richards, Q. C., and *Rose*, for applicant.

Bethune, Q. C., contra.

VACATION COURT.

Osler, J.

REGINA v. CUTHBERT.

Transient trader—Summary conviction.

Where goods are consigned to be sold on commission, and they are so sold in the shop or premises of the consignee, and by him or on his behalf, the owner of the goods is not a transient trader (within the Municipal Act, R.S.O. c. 174, sec. 466, sub-s. 53, as amended by 42 Vict. c. 31, s. 22), and a conviction of the manager or owner of the goods sold under such circumstances, partly by the consignee and partly by the manager, for infraction of a by-law passed under the said Act, was therefore quashed.

In this case, also, the conviction was *held* bad, because it imposed imprisonment *with hard labour* in default of sufficient distress; sec. 400 of the above Act authoring imprisonment. *Held*, also, that there

being this special provision in the Municipal Act, the procedure under the Dominion Act relating to summary convictions could not be adopted under that Act. *Quære*, whether if the Dominion Act were applicable, the Provincial Legislature would have power to authorize imprisonment with hard labour?

Held, also, that the validity of the by-law might be questioned on a motion to quash the conviction made under it.

Ferguson, Q.C., for plaintiff.
McMichael, Q.C., *contra*.

COMMON PLEAS.

January 13.

CRUICKSHANK v. CORBY.

Arbitration—Parol submission—Reception of evidence in absence of party—Setting aside award.

Where there is a written submission of existing differences to the award of an arbitrator to be appointed by a person named in the submission, and in pursuance thereof such person verbally appoints the arbitrator who enters upon the reference and makes his award,

Held, that the submission cannot be deemed to be a parol submission merely because the arbitrator is appointed verbally, and that therefore the submission could probably be made a rule of court.

The arbitrator herein received evidence in the absence of one of the parties: *Held* that the award must be set aside with costs.

Bruce (of Hamilton) for the plaintiff.
E. Martin, Q.C., for the defendant.

February 6.

PALMER v. SOLMES.

Slander—Incest—Whether criminal offence—Special damage.

In an action for oral slander the words spoken consisted in charging the plaintiff with having had incestuous intercourse with his daughter.

Held, that the offence charged did not constitute a crime cognizable in our courts, so as to be actionable without proof of special damage.

The special damage alleged was that the plaintiff had been shunned and avoided by divers persons, and had lost the society of friends and neighbours who refused to and did not associate with him as they otherwise would have done, whereby illness of body and great pain of mind and injury to his feelings had been caused, and that he had been put to and incurred great loss and expense in procuring and paying for medicines and medical attendance in and about curing himself of the said illness.

Held insufficient.

McMichael, Q. C., for plaintiff.
Clute (Belleville), for defendant.

CANADA REPORTS.

ONTARIO.

COUNTY COURT OF THE COUNTY OF MIDDLESEX.

McINTYRE v. McCORMICK.

Practice—Non-compliance with order to examine.

Held,—Defendant not bound to attend to be examined during sitting of Court at which cause entered for trial.

[London, Jan. 20, 1880.

Action for deceit; plea not guilty; issue joined; order to examine defendant, and appointment for 1st December (the first day of sittings of Court) duly served. The defendant refused to attend, although present at sitting of Court on that day. The record was entered, and the cause came on for trial on the fifth day, when the plaintiff's counsel, upon proof of above and other material facts, moved for an order to strike out the defence, on the ground that defendant had failed, without sufficient excuse, to comply with the order. This motion was refused, and counsel for defendant pressed on the case, but the plaintiff's counsel declined to proceed until after examining defendant. The learned judge directed the jury to find a verdict for defendant.

In January Term, 1880, *Bartram* obtain-

ed a rule *nisi* to set aside verdict for defendant and strike out his defence, or for a new trial, with costs to plaintiff.

R. M. Meredith shewed cause, opposing the rule upon a number of grounds, not now material, and upon the ground that defendant had a sufficient excuse in attending Court, upon advice of his attorney.

Bartram supported his rule. *Senn* v. *Hewitt*, 8 P. R. 70, shows that an examination during sitting of Court is unobjectionable. The statute does not limit the right of one party to examine the other during the sitting. The defendant was guilty of contempt of Court. There must be a new trial, and defendant should pay costs, otherwise plaintiff would be punished for the crafty trick of defendant in not submitting to be examined for fear of benefitting the plaintiff's case.

Elliot, Co. J.—In this case an order was made by my brother judge, on the 27th of November, at the instance of the plaintiff, for the examination of the defendant before Mr. Horton, who appointed the 1st of December following for that purpose. The County Court sittings commenced on that day. At the trial, the counsel for the plaintiff offered no evidence, but asked to have the defence struck out, because the defendant had not appeared before Mr. Horton for examination, pursuant to the order and appointment. This application was made under 41st Vict. c. 8, s. 9, by which it is enacted, "If any person fails, without sufficient excuse, to comply with an order for examination, . . . he shall, if a plaintiff, be liable to have his action dismissed for want of prosecution, and if a defendant to have his defence struck out and to be placed in the same position as if he had not defended, and the Court or a Judge may make an order accordingly." I declined to accede to this application, and the plaintiff's counsel having declined to accept a non-suit, I directed the jury to find a verdict for the defendant, which they did.

It is true that by the 156th section of the Common Law Procedure Act it is enacted that either the plaintiff or defendant may at any time after the cause is at issue obtain an order for the examination of the opposite party; but I think these words ought to be interpreted in a reasonable sense; and I think it would be unreasonable that the defendant, having received notice of trial from the plaintiff for the 1st December, at the Court House in London, should also be required by another notice from the plaintiff to appear elsewhere, on the same day, to be examined. The defendant, certainly, could not be at two places at once, and his paramount duty was to be in attendance for his trial. I think much inconvenience would result from the allowance of such a practice. There was ample time in this case for an examination after issue was joined, and before the trial. I don't therefore see any reason for changing the opinion I formed at the trial. But it is not desirable that the plaintiff should be debarred from having his case, tried in consequence of what may have been a mistake. In this view the plaintiff may have a new trial on payment of costs.

REFERENCE FROM THE COMMON PLEAS.

Evans v. Volney.

Reference from Nisi Prius—Notes not properly stamped—Right of referee to allow payment of double duty—Time when application must be made and leave granted.

This case was referred, at the Brockville Spring Assizes of 1879, to H. S. McDonald (County Judge of Leeds and Grenville).

At the hearing in October it appeared from the evidence of a witness or witnesses that the notes sued on (19 in number), or a number of them, had not been properly stamped, or that the stamps had not been properly cancelled.

Reynolds, for the plaintiff, applied to restamp the notes, or to stamp them in such a manner as would make them valid. The referee allowed the application to stand.

On a subsequent day, Mr. Reynolds renewed his application, under 42 Vict. (Dom.) cap. 17, sec. 13. He cited *La Banque Nationale* v. *Sparks*, 2 App. Rep. 112.

Fraser, Q.C., contra, contended that the Referee was acting under an Ontario Act, which could not give him any jurisdiction under a Dominion Act. That even if the words of the Dominion Act were wide enough to enable a Referee to make such an order, the order of reference in this case was too limited to enable the power to be exercised. That, even by consent of both parties, the Referee could not and would not have authority. That the order must be made or permission given by "Court or a Judge," and that a Referee is not either the one or the other. That the Court or Judge could not delegate the power, and it has not been done.

Further, that the stamps should have been affixed on the day when the error was discovered,—nearly a week previously.

That the only issue on the record was, that the notes are not properly stamped, and that if plaintiff were now allowed to double stamp, a new issue would be raised as to whether the double stamps were affixed at the proper time.

He cited *Le Banque Nationale* v. *Sparks*, 2 App. Rep. 112; *Waterous* v. *Montgomery*, 36 U. C. R. 1; *Boyd* v. *Muir*, 26 C. P. 21; *House* v. *House*, 24 C. P. 526; *3rd National Bank* v. *Cosby*, 43 U. C. R. 58; *Boustead* v. *Jeffs*, 44 U. C. R. 255.

McDonald, Co. J., the Referee, reserved his decision, and on the following day gave judgment, holding that he had power to permit the double duty to be paid, and allowed it to be done. As to the lapse of time, he held that, as the plaintiff's counsel had applied for permission when the evidence showed the necessity, and he (the Referee) had allowed the application to stand, the plaintiff was not in fault.

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH, AND APRIL, 1879.

Account Current.—See Mortgage, 2, 4; Surety.

Action.

A claim for goods lost by a common carrier, alleging a contract to carry the goods safely for hire, and a breach, was *held* to be an action "founded on contract," not on tort.—*Fleming* v. *The Manchester, Sheffield, & Lincolnshire Railway Co.*, 4 Q. B. D. 81.

See Judgment.

Adjacent Support.—See Easement.

Administration.—See Will, 4.

Advances.—See Mortgage, 4.

Agent.—See Director.

Appropriation.—See Surety.

Arbitration.—See Partnership, 2.

Attorney and Client.—See Lien, 2.

Attornment.—See Mortgage, 2.

Bank.—See Mortgage, 2, 4; Surety.

Bill of Sale.—See Misdescription; Sale, 3, 4.

Broker.—See Lien, 1.

Caveat Emptor.—See Sale, 1.

Charter-party.—See Insurance.

Children.—See Will, 1.

Class.— ee Will, 2.

Condition.—See Limitations Statute of.

Construction.—See Insurance; Mortgage, 3; Right of Way; Will, 5, 6.

Contract.—See Action; Corporation.

Conversion.

G. bequeathed personal estate, in trust, to be converted by the trustees into real estate. They converted portions of it, and subsequently all the limitations of the trust failed. *Held*, that the portions turned into real estate before that failure, went direct to the next of kin, as real estate, not to the executor for distribution as personal estate. The heirs-at-law or devisees of deceased next of kin, not their personal representatives, took. *Reynolds* v. *Godlee*, (Joh. 536, 582), overrulled.—*Curteis* v. *Wormald*, 10 Ch. D. 172.

See Sale, 2.

Copyright.

Two books entirely different in contents and character, were published, each under the title, "Trial and Triumph." *Held*, that a copyright in the title might be claimed, though the books were quite different. — *Weldon* v. *Dicks*, 10 Ch. D. 247.]

Corporation.

By act of Parliament, it was provided that every contract involving above £50, made by a public corporation like the defendant, should "be in writing and sealed with the common seal." The jury found that the defendant corporation verbally authorized its agent to order plans for offices of the plaintiff; that the plans were made, submitted, and approved; that the offices were necessary, and the plans

essential to their erection; but the offices were not built. *Held*, that the plaintiff could not recover.—*Hunt* v. *The Wimbledon Local Board*, 4 C. P. D. 48; s. c. 3 C. P. D. 208.

Covenant.—See Mortgage, 3.

Custody of Children.—See Husband and Wife.

Damnum absque Injuria.—See Injunction.

Demurrer.—See Injunction; Trust, 1.

Devise.—See Will, 3.

Director.

Where a fraudulent and misleading prospectus is issued by the agent of a company, or by directors, a director who did not authorize the fraud, or tacitly acquiesce in it, is not liable therefor. Per Fry, J., commenting on *Peek* v. *Gurney* (L. R. 6 H. L. 377), and *Weir* v. *Barnett* (3 Ex. D. 32).—*Caryill* v. *Bower*, 10 Ch. D. 502.

See Company.

Discretion.—See Trust, 2.

Distress.—See Mortage, 2.

Divorce- See Jurisdiction.

Domestic Relation. — See Husband and Wife; Jurisdiction.

Domicile.—See Jurisdiction.

Double Legacy.—See Legacy.

Easement.

Two houses, belonging respectively to plaintiff and defendant, had stood adjoining each other, but without a party wall, for a hundred years. In 1849, the plaintiff turned his house into a coach factory, by taking out the inside and erecting a brick smoke-stack on the line of his land next the defendant's, and into which he caused to be inserted iron girders for the support of the upper stories of the factory. The lateral pressure on the soil under defendant's house was thus much increased. The owner did not object to the girders, but it did not appear that he understood the full character of the changes made in 1849. He had since then made no grant by deed of the right to support. More than 20 years after that date, the defendant contracted with one D. to take the house down and excavate the soil for a new building. D. employed N. to do the excavating. N. did it without negligence, but nevertheless, from the withdrawal of the support, the smoke-stack toppled over, dragging the factory along with it. *Held*, that the enjoyment of the support for twenty years raised a presumption that the plaintiff had it of right, but that the defendant was at liberty to rebut the presumption, either by showing (1) That the defendant did not know the character of the alterations made when the house was turned into a factory; or (2) that he had no capacity to make a grant. The defendant might be liable, though the work was actually done by a contractor empowered by him, and although he had given the contractor proper caution as to the dangerous character of the work.—*Angus* v. *Dalton*, 4 Q. B. D. 162; s. c. 3 Q. B. D. 85.

See Watercourse.

Equitable Mortgage.—See Mortgage, 4.

Estate Tail.—See Trust, 1.

Evidence.

The plaintiff, a clergyman, saw an advertisement, signed by H., an agent of the defendants, to loan money on personal security, and, applying for a loan, was told that he must insure his life in the defendant company, pay the premium, and deposit the policy with H. as collateral, whereupon the loan would be made. The plaintiff did so, whereupon H. wrote, enclosing a parcel of "draft securities" for the plaintiff to have executed, of a sort which it was quite impossible for him to furnish. It was claimed that the transaction was a fraud perpetrated by the company through H. as its agent, and that the premium was divided between H. and the company, and that no loan was intended. Evidence of other specific transactions of the same or a similar sort was admitted at the trial, and a new trial was granted on the ground that such evidence was inadmissible. *Held*, that the evidence was admissible. — *Blake* v. *The Albion Life Insurance Society*, 4 C. P. D. 94.

See Libel; Misdescription; Will, 1.

Executor.—See Will, 4.

Extradition.

The English Extradition Act, 1870, includes "crimes by bankrupts against bankruptcy law." The treaty with Switzerland includes "crimes against bankruptcy law." One T. was arrested in England, on a warrant, stating that he was accused of "the commission of crimes against bankruptcy law" in Switzerland. The English Extradition Act, 1870, provides that a magistrate, on receiving an order from the Secretary of State, shall issue a warrant for the arrest of a fugitive "on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed . . . in England." *Held*, that the warrant was sufficient.—*Ex parte Terraz*, 4 Ex. D. 63.

Extrinsic Evidence.—See Will, 1.

False Pretences.—See Sale, 2.

Firm Name.—See Partnership, 1.

Flow of Water.—See Watercourse.

Foreigner.—See Jurisdiction.

Forfeiture.—See Will, 7.

Fraud.—See Director; Evidence; Judgment; Sale, 2.

Fraud, Statute of.—See Trust, 1; Will, 3.

Freight.—See Insurance.

Grant.—See Easement.

Guaranty.—See Surety.

Highway.—See Right of Way.

DIGEST OF ENGLISH LAW REPORTS.

HUSBAND AND WIFE.

In 1864, A., a Protestant, married a Roman Catholic, promising that the children should be brought up as Roman Catholics. A son, born in 1864, was baptized by a Catholic priest, with the father's reluctant consent, and died in 1872. Of three daughters, born respectively in 1866, 1867, and 1869, the first and third were secretly baptized as Roman Catholics, without the knowledge and against the commands of the father. The second was baptized as Protestant. Subsequently, the father had the three children, baptized as Roman Catholics, formally received into the Protestant church, against the mother's protest. The mother secretly brought them up in the Roman Catholic tenets, and had them go to confession once a month from their attaining eight years of age. She had them confirmed by a bishop. In 1878, instigated by their mother, they refused to go to the Protestant church with their father. On actions brought both by the husband and by the wife for directions as to the bringing up of the children, *held*, that the husband had complete authority to have them brought up in any proper manner, as he saw fit, nothwithstandiug his promise, and that the wife be enjoined from doing anything inconsistent therewith. The court refused to examine the children.—*In re Agar-Ellis; Agar-Ellis* v. *Lascelles*, 10 Ch. D. 49.

See JURISDICTION.

ILLEGITIMATE CHILDREN.—See WILL, 1.

INFANT.—See HUSBAND AND WIFE.

INJUNCTION.

The plaintiffs alleged that their house had been called "Ashford Lodge" for upwards of half a century, and that a house adjoining had been during nearly all that time called and known as "Ashford Villa," and that the defendant had recently bought the latter house, and had proceeded to call it "Ashford Lodge," to the material damage of the plaintiffs and the confusion of their friends. No malice was alleged. The house was the respective private residences of the plaintiffs and of the defendant. To the first belonged sixteen acres of land; to the second, nine. *Held*, that there was no ground for an injunction, and a demurrer was allowed.—*Day* v. *Brownrigg*, 10 Ch. D. 294.

See MORTGAGEE, 1.

INSURANCE.

A charter-party entered into by the plaintiffs contained this clause: "If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate." The plaintiffs, who owned the ship, got a policy of insurance with this clause: "To cover only the one-third loss of freight in consequence of sea-damage as per charter-party." A portion of the cargo was sea-damaged, and the plaintiffs lost one-third the freight on that portion. The total freight on the cargo was £3,871; one-third of that amounted to £1,290, and the amount of insurance on that portion was £1,200. The one-third freight lost equalled £293; hence, the plaintiffs claim £273 insurance; *i. e.* the proportion of loss which the amount insured bore to the value of one-third of the freight. The underwriters contended that the amount due was to be fixed by the proportion of the sum insured to the whole of the freight. *Held*, that the plaintiffs were entitled to their claim.—*Griffths* v. *Bramley-Moore*, 4 Q. B. D. 70.

See EVIDENCE; LIEN, 1.

JUDGMENT.

There was a controversy over an alleged infringement of a patent, and it was agreed that an expert should examine the lithographic stones in controversy in use by the defendants, and judgment was entered accordingly. Afterwards the plaintiffs brought an action to have it declared that the former judgment was obtained by fraud, alleged that the defendants had fraudulently cancelled certain stones used by them from the expert, and had made certain false statements to him. *Held*, on the facts, that the fraud was not proved; and *semble* that a judgment could not be attacked on such grounds.—*Flower* v. *Lloyd*, 10 Ch. D. 327.

LANDLORD AND TENANT.—See MORTGAGE, 2.

LITERAL SUPPORT.—See EASEMENT.

LEASE.—See MORTGAGE, 2, 5.

LEASEHOLD.—See WILL, 5.

LEGACY.

A testator gave £2,000 to his grand-nephew, R. K., and £1,000 to each of R. K.'s brothers. R. K, was the third son, and had eight brothers. His eldest brother, Sir T. K., was residuary legatee of the testator to the extent of one-half his large property. *Held*, that Sir T. K., was nevertheless entitled to the £1,000 legacy.—*Kirkpatrick* v. *Bedford*, 4 App. Cas. 96.

LIBEL.

The Statute 6 and 7 Vict., c. 96, § 7, provides that, "whenever upon the trial of any indictment for the publication of a libel, under a plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant, by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge." The defendants, proprietors of a paper, employed an editor, to whose discretion they "left it entirely" as what should be put in; he had "general authority to conduct the business;" they never complained of the articles, nor took notice of them "one way or another." The jury found the defendants guilty, apparently on the ground that the general authority given the editor was evidence of itself that they had authorized the article complained of. *Held*, that there must be a new trial.—*The Queen* v. *Hilbrook*, 4 Q. B. D. 42; s. c. 3 Q. B. D. 60.

(To be continued.

LAW STUDENTS' DEPARTMENT.

The following is an address of the President of the New York State Bar Association, delivered before that body last November. It will be of interest, especially to students about to enter on the active practice of their profession.

POSITION OF THE LAWYER IN MODERN SOCIETY.

Before I conclude this address, however, I cannot refrain from making one or two remarks upon the position of the lawyer in our modern society. That he is at least a necessary evil in all civilization, would seem to be proved by his presence in some garb in all civilized communities, in all ages, from the earliest time to the present hour. In the dawn of nations he generally is found combining the attributes of priest with those of lawyer, the laws being supposed to be the gifts of the gods to men, and to be known by, as especially communicated to, their ministers. The lawyers were, among the early Hindoos and Egyptians, a privileged class or caste having alone and preserving jealously and secretly the knowledge of the laws. They were thus regarded with almost superstitious veneration as, to this day, they are still regarded among the Hindoos, where so many features of man's early institutions, as they existed in the world's infancy are, wonderfully preserved, like fossils of a former geological era.

Yet it must be confessed that, in modern times, there has been strongly impressed upon the world's imagination a dark view of the lawyer and his pursuits. Rabelais, Ben Jonson, Beaumont and Fletcher, and many other writers, all have found an appreciative audience for their satires and flings against the legal profession. Hear Ben Jonson describe us in the age of Shakespeare :

> I oft have heard him say, how he admired
> Men of your large profession, that could speak
> To every cause, and things mere contraries,
> Till they were hoarse again, yet all be law ;
> That, with most quick agility, could turn
> And return ; make knots and undoe them ;
> Give forked counsel : take provoking gold
> On either hand, and put it up : these men
> He knew would thrive with their humility
> And (for his part) he thought he would be blest
> To have his heir of such a suffering spirit
> So wise, so grave, of so perplexed a tongue
> And loud withal, that would not wag nor scarce
> Lie still without a fee : when every wor
> Your worship but lets fall is a zecchin.

The picture which Rabelais gives of the "furred cats," as he called the advocates of his time, is absolutely ferocious in its bitterness.

Turning to the contemporary dramatists, Boucicault and others, we find the advocate generally handsomely used, but the attorney most outrageously maltreated and abused. Indeed, it is difficult to imagine any thing more revolting than the figure usually cut by a stage attorney. He is depicted as meanness itself—vulgar, impudent, prying, without modesty or veracity, to whom honour is nothing but a word, offering his person to be kicked and himself to be reviled, if, by that means, any money can be made. I do not know how it may be with others, but when this libel on us appears on the stage, I can hardly keep my countenance. It is needless to say that, whatever else may be true of us, these disgusting pictures are not even good caricatures. They have not the merit of suggesting the reality. It is difficult to conjecture how they could have originated, or what circumstances retain them in dramatical composition, for they have not the most remote resemblance, even in caricature, to the real average attorney, either English or American.

Nevertheless, the fact we cannot disguise, that these delineations are received with some favour in the community, and do not seem to inspire much aversion by their improbability. Indeed, any slighting allusion to the profession in public utterances of any kind, jokes upon their assumed indifference to truth, and upon their alleged unprincipled adroitness, seem sure to raise a malicious laugh among the vulgar. As to the cause of this, so far as it exceeds the usual appetite for satire upon all established institutions, I have, I confess, always been somewhat puzzled.

But putting aside all satires, jokes, calumnies and denigrations and looking at the lawyer, as he should be, learned in the law, skilful in debate, yet upright and honourable, the question will, nevertheless, sometimes recur :

Is, after all, our art a useful art, in the best sense of the term, or are we, by our very constitution, an anomaly and a needless incumbrance in society? Can we, when challenged, give a good reason for our existence in the world as it now is ; much more, can we vindicate the propriety of our existence in the world, organized as it should be? There are those who will answer all these questions decidedly, nay violently, in the negative. Sociologists, economists, constitution mongers, communists, there are, who deny the necessity or propriety, in human society, of any lawyers at all. Surgeons and doctors, according to them, we must always have. Men

cannot dispense with them. So with engineers, schoolmasters, bakers, carpenters, possibly priests, but by no means lawyers. In society, constituted as it should be, and certainly will be in the future, say they, justice and the protection of laws will be free. Magistrates will sit learned in the law, wise and just, to whom there shall be free access to all. They will decide all controversies; the parties will themselves come before them and submit their cases; they will examine witnesses, and if necessary, will send officers to bring such witnesses before them, and the allegations of the parties having been heard, the witnesses examined, the law considered, a just and unbought judgment will be pronounced, and the citizen will have it as a right as he has all other blessings of government. When society shall be reorganized, it will be thought monstrous that there ever was interposed between the citizen and a magistrate, a class who must be paid before a man can have justice, through whom it is necessary to approach the judgment seat, and whose vocation it is to live upon the differences and strifes of their fellow-men. It will be thought that society fails of its purpose, if a citizen who had sold his property and is cheated of the price, or who has been assaulted or personally injured, or who has suffered any of the many wrongs to which he may be liable from the fault or faithlessness to obligation of others, cannot demand and obtain from the authorities redress from wrongs and justice for his cause, unless he stands ready to pay a class for presenting his case, and incurs the danger of reimbursing his opponent the money he also has been obliged to pay out to the same class.

To all this the answer is, that the function of the lawyer is really, as it has been found to be in all ages and in almost all civilized societies, a necessary function for the carrying on of social life among men. That function is two-fold. One branch of it is to acquire a knowledge of the laws and to impart that knowledge to the client, sometimes advising him beforehand with reference to a transaction, and sometimes, after the event, advising him as to his rights and remedies and his means of enforcing them. This branch is that of the counsel. Another branch is to present his client's claim for redress to the magistrate, or to resist an unjust claim presented against that client, in either case to bring out the facts before such magistrate, by the close and skilful examination and cross-examination of witnesses; to call the attention of the court to the law applicable to them, and to look to it that the client, whom he represents in his legal controversy with another, shall suffer no wrong—and in saying "suffer no wrong," I mean legal wrong—a violation of the law in his person—not what this one or that one shall think a wrong, but what the laws have declared to be wrong. This branch is that of the advocate. The performance of these functions are necessary to the smooth working of every civilized community. They cannot be exercised but by a trained and skilful class. If, as Burke has said, the ultimate aim of the whole machinery of government—kings, lords and commons—is to get into the jury box twelve honest, impartial jurors to decide upon the rights of a citizen, the accomplishment of that aim would be useless, unless when collected there, the facts and law of the case could be presented fully and completely. To do this the legal profession is a necessary instrument.

Laymen sometimes speak and think as if every case presented a clear issue of right and wrong which could be easily discovered by the mere statement of the parties. But in a civilized community the question of rights of property and person, which actually arise, are infinitely various, and frequently present complex aspects in which the morally right and the morally wrong cannot be discovered. The point to be decided is sometimes, whether, where a loss is inevitable, which of two innocent parties is to be the loser; sometimes whether the terms of a contract, that of an underwriter for instance, throw a burden upon a party, as to which he has no moral obligation whatever; sometimes a question of the descent of property; of liability for the acts of others and a thousand other difficulties *which are not invented by lawyers*, but which inevitably arise in complex relations and dealings of civilized peoples, and which must be disposed of and decided one way or the other. To the disentanglement of these matters, to the presentation of the many considerations and principles which should apply to their decision, the assistance of a trained class is absolutely necessary. The attempt to dispense entirely with it has, in some Mahometan countries, converted the administration of justice into an arbitrary chaos of iniquity, confusion and corruption.

Such a class is obviously the most important and most influential that can exist in a community. It should be skilled and cultured. It should be upright and inflexible, free from all taint of trickery or knavery, pure and blameless in its dealings with men, spotless in its conduct as the robe of Justice herself whose ministers it is.

Neither do I believe, notwithstanding what is sometimes claimed, is there anything in the proper exercise of its duties, having the slightest tendency to crook the moral rectitude or undermine the manly

character of its professors. Listen to the saying of wise, just and disinterested critics on this subject :

"I asked Dr. Johnson," says Boswell, "whether, as a moralist, he did not think the practice of the law, in some degree, hurt the nice feeling of honesty." Johnson : "Why, no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion ; you are not to tell lies to a judge." Boswell : "But what do you think of supporting a cause which you know to be bad ?" Johnson : "Sir, you do not know it to be good or bad till the judge determines." (And let me pause here to ask how many times, in your experience, the cause which you thought to be good turns out to be adjudged bad, and more rarely the cause which you were inclined to believe to be bad in law turned out to be good ?) But to return to Dr. Johnson "I have said," he continues, "you are to state facts fairly, so that your thinking or what you call knowing a cause to be bad, must be from reasoning, must be from supposing your argument to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it, and if it does convince him, why, then, sir, you are wrong and he is right. It is his business to judge, and you are not to be confident, in your own opinion, that a cause is bad, but to say all you can fairly for your client and then hear the judge's opinion."

If the doctor here appears to reason a little too narrowly and subtly, let us turn to a mind of wider, and perhaps, more equitable vision—to Coleridge :—"An advocate as a right," he says, "it is his bounden duty to do every thing which his client might honestly do, and to do it with all the effect which any exercise or skill, talent or knowledge of his own may be able to produce. But the advocate has no right, nor is it his duty, to do that for his client which his client, *in foro conscientiæ*, has no right to do for himself, as for a gross example, to put in evidence a forged deed or will, knowing it to be so forged." * * * "It is of the utmost importance," he says again, "in the administration of justice, that knowledge and intellectual power should be, as far as possible, equalized between the crown and the prisoner or plaintiff and defendant. Hence, especially arises the necessity for an order of advocates—men whose duty it ought to be to know what the law allows and disallows, but whose interest should be wholly indifferent as to the persons or character of their clients. If a certain latitude in examining witnesses is, as experience seems to have shown, a necessary means towards the evisceration of the truth of matters of fact, I have no doubt, as a moralist, in saying that such lattitude, within the bounds now existing, is justifiable."

So much for the opinons of these great men upon the duties of the lawyer and their moral tendencies.

That there is nothing in the proper exercise of our profession that at all conflicts with the most rigid and exact requirements of the moral code, we all feel certain. However keen our abilities, however persuasive our rhetoric, however profound our knowledge, keeping within the bounds of professional ethics, we may boldly, unhesitatingly, and with a clear conscience, exercise them all to their full extent. No client buys, or should ever be able to buy from his counsel, his conscience, his sense of honour, or his manly character. He has a right to the exercise of all his knowledge and all his faculities as his representative in the court. He has a right to his most strenuous efforts to place before the court or the jury, as the case may be, all the facts, all the arguments, and all the favorable aspects of his case which can be reasonably presented. More than that he cannot ask ; more than that no honorable counsel will ever give.

Let me say, in conclusion, to me, it seems, that to be conversant with the laws and to be engaged in interpreting them and applying them to the exigencies of human affairs, is not only morally, a permissible career, but perhaps the highest, the noblest secular pursuit in which man can be employed. So far from tending to deteriorate the moral tone, it intensifies every feeling for, and renders acute every sense of righteousnesss, of equity and of uprightness.

The laws, after all, but attempt to bring to the government of human affairs those eternal rules of action which are among the loftiest conceptions of the human mind. They are all but imperfect translations of that law of nature which Cicero himself, the greatest of advocates, in a fragment preserved to us by Lactantius, so nobly describes. "Law," he says, "is no other than right reason agreeing with nature spread abroad among all men, ever consistent with itself, eternal. whose office is to summon to duty by its commands, to deter from wrong by its prohibitions. In contradiction to this law nothing can be laid down, nor does it admit of partial or entire repeal ; nor can we be released from this law, either by vote of the Senate or decree of the people, nor will there be one law at Athens and another at Rome, one now and another hereafter ; but ONE ETERNAL, IMMUTABLE LAW WILL EMBRACE ALL NATIONS AND EXIST IN ALL TIMES."—*Albany Law Journal.*

Second Year Scholarship.

Snell's Equity.

1. Distinguish between trusts executed and trusts executory. Give an example of each. In what respect will their construction differ?

2. In what respect may the Court of Chancery be said to favour charities?

3. In whose favour will the Court presume an advancement when property is purchased in the name of another? Does a married woman, with respect to purchases made out of her separate estate, stand in the same position as a man in respect to purchases made by him in the name of another?

4. What are the rules as to devolution of property where the purposes for which *conversion* has been directed have partially failed before the instrument directing the conversion has come into operation?

5. Can a mortgagee in possession after default of payment of the money due upon the mortgage make a valid lease? Discuss the position of the parties.

Third Year's Scholarship.

Taylor's Equity Jurisprudence.

1. In what cases will the Court aid the defective execution of a power?

2. In what cases will the court relieve on the ground of mistake? Two persons are jointly bound by a bond; the obligee releases one, supposing that the other will remain bound. Is there any relief in Equity?

3. In what cases will the Court relieve on the ground of misrepresentation?

4. Distinguish between contracts of insurance and contracts of suretyship, as to the effect of non-disclosure of material circumstances.

5. After a contract for the sale of real estate has been made in writing, a variation of the terms is agreed to. Can evidence of this variation be given in a suit for the specific performance of the agreement?

Third Year Scholarships.

Fisher on Mortgages—Real Property Statutes.

1. Show clearly the distinction between a mortgage and an absolute conveyance with the condition that the grantor may repurchase within a certain time.

2. After litigation commenced, the plaintiff and defendant agree to settle their differences, the defendant paying to the plaintiff a certain sum. The plaintiff then refuses to pay his solicitor's bill of costs, and being worthless, the amount cannot be recovered from him. Has the solicitor any claim for his costs against the defendant? Answer fully; state the ground of the right, the circumstances under which it would arise, and the mode of its enforcement.

3. When will an account against a mortgagee in possession be taken with rests, and when not?

4. Is there any obligation upon an adult or infant tenant in tail, or upon a tenant for life, or upon a tenant for life with an absolute power of appointment, to keep down interest upon a mortgage?

5. What are the rules as to the costs of a defendant in a mortgage case who disclaims?

REVIEWS.

Munger on the Application of Payments by Debtor to Creditor: A treatise on the application of payments by debtor to creditor; being a complete compilation of the law pertaining to the rights of debtor and creditor respectively; and also giving the various rules for the guidance of the Courts when no appropriation has been made by the parties. George G. Munger, late Judge of Munroe County, N.Y. New York: Baker, Voohris & Co., 66 Nassau St., 1879. Carswell & Co., 66 Adelaide St., Toronto.

This supplies a want to many who would otherwise have collected their information from a number of books. The author, in his preface, says:—

"Having occasion to make a thorough examination of the principles regulating the Application of Payments by Debtor to Creditor, he found the learning upon the subject in a very fragmentary condition. He discovered that not only was there no separate treatise embodying the law in clear and concise form, but even that there was not any systematic and exhaustive collection of its doctrines and rules anywhere."

The law on this subject being general the book will be of as much advantage here,

apart from our own decisions, as if written here. Judge Munger seems to have done his work well, and, although exception may be taken to the headings of his chapters as inexpressive, the mode of treatment in stating a proposition of law, which is there amplified and sustained, is convenient and scientific.

A Digest of the Law of Evidence as Established in the United States, adapted from the English work of Sir James F. Stephen, K.C.S.I., by William Reynolds, of the Baltimore Bar. Chicago, Ill.: Callaghan & Co., 1879.

This is an adaption for the use of American lawyers of Sir James Stephen's well-known book. The author gives all the information there given, which is applicable to the Courts in the United States. The compiler gives the author's admirable introduction and preface to his third edition. Mr. Reynolds has so arranged his book that the reader can readily distinguish between the original and the new matter. It cannot but be of great assistance to his professional brethren in the United States, and for us, in this Province, the citation of the leading authorities in that country will often be very useful. The general appearance of the book is most inviting.

American Law Review. Little, Brown & Co., Boston, U.S.

This valuable publication is now published monthly instead of quarterly. We wish the enterprising editors and publishers every success. This review is one of the ablest, as it is certainly the most thorough in its leading articles, of all the legal serials. The expectation of the publishers that it will receive the support of the scholarly as well as the popular side of the profession is not likely to be disappointed, if the past is any criterion of the future. The writers have been and are men of distinction and ability and the staff is said to have been increased. We cordially recommend this periodical to our readers.

Albany Law Journal. Weed, Parsons & Co., Albany, N.Y.

This periodical takes the same position amongst the United States weekly journals as the *American Law Review* now does amongst the monthlies. The amount of information given is immense, and the sprightly and at the same time accurate way in which the editorials are written is very attractive. A recent number gives the obituary notices of its first editor and founder Mr. Isaac Grant Thomson. An examination of its earlier volumes will show the extent to which the *Journal* was indebted to his clever and facile pen.

Criminal Law Magazine. Fred. D. Linn & Co., Jersey City, U.S.

This is a new venture, and if we may judge from the first number likely to be a success in a country with such a large constituency to draw from as the United States. The leading article, on Presumptions in Criminal Cases, is from the pen of Francis Wharton, L.L.D. A number of important cases are given in full as also a full digest of recent criminal cases. We welcome this magazine amongst the list of our exchanges.

Littell's Living Age, Boston, U. S.—The number of *The Living Age* for the weeks ending February 7th and 14th respectively, have the following contents: "The Force Behind Nature," by Dr. Wm. B. Carpenter, *Modern Review;* "The Roman Breviary," "Bush-Life in Queensland," "Contrarieties of Medicine," and "Pindar's Hymn to Persephone," *Blackwood;* "The Character and Writings of Cyrus the Great," "The Letters of the Late Mr. Dickens," and "Justinian," *Contemporary;* "Old Fashioned Gardening," *Nineteenth Century;* "Earth-bound: A Story of the Seen and the Unseen," by Mrs. Oliphant, *Fraser;* "Fighting Fitzgerald, *Cornhill;* "Windfalls, Confidants, and The Restoration of the Jews," *Spectator;* "The Colour of the Sea," *Science for All;* "Flow of Viscous Materials, a Model

Glacier," *Nature;* with an instalment of "He who will not when he may," by Mrs. Oliphant, and the usual amount of poetry.

CORRESPONDENCE.

Sheriffs' Fees.

To the Editor of The Law Journal.

Sir,—In the February number of your journal I observe a letter signed "B" alluding to a pamphlet I have issued entitled "The Sheriffs' Petition with statement of grievances, &c." The letter contains several statements which call for a reply and corrections from me; but it is neither my intention nor desire to enter into a correspondence upon the subject; my book, with the facts I have gathered, is before the public, and in the hands of the Legislature, and I am ready and willing to give proofs of the correctness of any charges I have made before any tribunal selected for that purpose. For the present I only ask the privilege of inserting in your journal this letter with the correction of some mistatements which "B" has made, that are likely to mislead his readers, and which may be taken as a fair specimen of the correctness of "B's." criticisms throughout.

"B" demurs at my charging some legal practitioners with collecting Sheriff's fees and "much more," giving as his reason for denying that they do so, that, with the exception of Mr. Cahill, none have actually so named their overcharges; I argue that the overcharges in the taxed bills of cost which I have given amount to more than the legal fees and the Sheriff's fees combined; and, therefore, those gentlemen cannot claim that they served the papers for the sake of reducing costs to the litigant, though some of them have, in the House of Parliament, and through the press, declared that such was their sole motive; and from these premises, I think, I may fairly infer that the 9,317 writs and bills not served by the Sheriffs have been served by the attorneys, and for their own benefit. "B" is in error in saying that the transaction in the case of *Gearing* v. *Whipple* was between Mr. Cahill and my "own deputy." The person whom he assumes to have been my Deputy was a young man who acted as clerk in my office—since dismissed.

Again "B" copies from my book showing that the fees on the 20,380 bills in chancery and writs of summons issued in 1876 would amount to $43,744.95, and from this data (which is correct) arrives at the conclusion that had all the services in that year been made by the Sheriffs each of the thirty-seven would have received the average sum of $1,182.92. "B" seems to have entirely forgotten the existence of such officers as bailiffs who must be kept and paid by the Sheriffs; there are upwards of forty of these officers constantly employed in the Province who, as a rule, are paid by receiving half the fees for process-serving; therefore we must deduct $21,872.48 as the bailiffs' share of the fees, leaving the other half to be divided amongst the Sheriffs, giving each an average of only $591.46, instead of $1,182.48 according to "B's" calculation. But whether $591.46 was not the actual average received by the Sheriffs, in consequence of the fact that of the number of bills in chancery and writs of summons, no less than 9,317 were served by others than the Sheriffs. The fees belonging to these 9,317 bills and summonses would have amounted to $20,506.05 which must be deducted from the $43,744.95, leaving only $23,238.90 as the gross receipts received by the Sheriffs for process-serving in 1876. From this sum deduct one half for bailiffs' services, and we have left $11,619.45 for the Sheriffs themselves, an average of $314.03 instead of the large sum of $1,182.95 as stated by "B." "B" has kindly undertaken to enlighten myself and the public as to the amount of fees I would have received had I served all the 1,346 bills and writs of summonses issued in Wentworth in 1876. He shows correctly enough from my own book that the serving fees on these papers would have amounted to the sum of $2,755.75; but here again he overlooks that one-half of this sum would have been paid the bailiffs for serving them, reducing my share to $1,388.85, but not more than half of these papers were issued for service in this county. But if that half had been served,

my net emoluments after deducting the bailiffs' fees would have been $674.42, and for "B's" information I will state the exact number of these papers served by me with the emoluments derived therefrom :

Of the 163 bills in chancery I served 36 at $2.25	$81 00
Of the 404 summonses in S. C. I served 75 at $2.70.....	202 50
Of the 779 summonses in C. Court I served 191 at $1.80.....	343 80
	$627 30
Deduct for bailiffs' fees (one half)	313 65
	$313 65

Sheriffs' net proceeds for serving papers issued for service in my county in 1876 being less than one ninth the sum "B" would lead the public to believe I should have secured. I shall leave it for "B" to answer who served the balance of the 1,346 bills and writs and got the fees. There are several other statements in "B's" letter quite as fallacious as the examples I have given ; but I shall touch on no more at present, hoping to have an opportunity at no distant period of discussing the subject before a committee of the Legislature, perhaps in "B's" presence, where the public will be enabled to judge between us. In conclusion I beg to say that I fully agree in some of "B's" remarks. His proposal to have an Inspector of Sheriff's Offices is one which I highly approve ; and have already pressed upon the Attorney General, believing it to be a step calculated to benefit the lawyers, the Sheriffs and the public.

Were such an officer now in existence the grievances of which the Sheriffs complain would be investigated, and the result of the inquiry communicated to the Government by a reliable officer of their own. "B's" suggestion that the Sheriff's fees should be curtailed in the same way as the Registrars is a good idea, and will commend itself to the Legislature. The emoluments of some of the shrievalties are very small, the Sheriffs receiving less than the Division Court bailiffs. Let the services be made as proposed in my Bill and upwards of $20,500 now lost to the Sheriffs through others doing their work would be secured to them, thus enabling them to contribute to a fund which might be called the "Supplementary and Inspection Fund," from which the Inspector could be paid, and the poorer shrievalties supplemented and brought to a fair and reasonable income, without doing injustice to any of the Sheriffs or adding any additional burdens on the people. I simply propose that the 9,317 bills and summonses now served by others than the Sheriffs, and the emoluments accruing therefrom, amounting to upwards of $20,500 annually should be given to the Sheriffs and not to the Process-serving Attorneys as is the case at present. By doing this the proposed fund would be ample to give the necessary aid to the poorer Sheriffs and bailiffs. I shall do all I can to assist "B" in giving effect to his excellent idea ; but I shall expect him to reciprocate by assisting me to secure the services and the emoluments I have named which is necessary to create such a fund as he proposes.

While "B," whom I presume is a professional gentleman, sees how the Sheriff's fees can be curtailed and sounds a note of warning, he seems oblivious to the fact that his own fees may be curtailed also. It was only the other day that I was asked by a member of the Legislature "if the bill of costs in *Whipple* v. *Gearing* which I published, could be taken as a fair sample of lawyer's costs," adding that if it were so the time had arrived for taking the matter into the hands of the Legislature and revising the whole tariff of fees. If this should be done the fees are not likely to be increased.

I regret very much that "B." did not publish his letter in some paper more generally read than the Law Journal, which, I presume, is principally seen by the members of the Legal profession. The subject is one in which all classes of the community are interested, and all should have an opportunity of forming a judgment as to the question at issue ; thence my desire to give it all the publicity in my power.

Yours, &c.,

Arch'd McKellar,
Sheriff Co. Wentworth.

Hamilton, Feb. 19, 1880.

[We willingly publish the above letter in answer to the criticism of our correspondent on the pamphlet referred to. It is for Mr. McKellar, of course, to judge whether it strengthens his case by attempting to tackle only one part of the undoubtedly strong case made against him. Whether he has done so or not the reader can judge for himself by examining both arguments. Mr. McKellar says he is "willing to give proofs of the correctness of any charges he has made." All that can be said as to this is, that such proofs would be, in many cases, in contradiction of his pamphlet.

But, after all, it is of little moment, for we understand that the ventilation given to that production has rendered copies somewhat scarce; and so much the better for the credit of its author, who would probably be as well pleased as the rest of his brethren if it had never gone beyond the few members of the Legislature amongst whom it was distributed.

As to the threat of a reduction of lawyer's fees, they are so small now that it would be beneficial to the profession if they were done away with altogether, as the result would be that fees would practically be whatever the lawyer might choose to make his own client pay. Instead of a successful plaintiff making all his costs out of a defendant who had wrongfully contested a claim, he would have to pay his own lawyer. In some countries tariffs of costs are either unknown or a dead letter; and when a client wants a suit brought he has to pay a good round sum to the lawyer before the suit is brought. We doubt, however, if this would suit the mercantile men of this country.

We understand that "B" has published his letter in pamphlet form, so that the want of publicity which Mr. McKellar says he regrets will be to a certain extent overcome.—Eds. L. J.]

Unlicensed Conveyancers.

To the Editor of The Law Journal.

Your correspondent "An old Subscriber," in your issue in January last, seems to think the remedy to apply to this case is for lawyers to charge no larger fees than the unlicensed conveyancer. If he will try it I think he will find himself disappointed with the result. Those who employ the unprofessional man, do so in most cases, I believe, not on account of any saving, but because they prefer having as few questions asked about their title as possible; lawyers knowing the irresponsibility are, of course, compelled to ask the purchaser if he requires the Solicitors to be responsible for the title, and it so frequently leads to difficulties that the seller prefers going to an unprofessional man who will "do the deed" and hold his tongue, or if he searches the title be satisfied with a look at the abstract index in the Registry Office.

And I think he will find in the great majority of cases where a Solicitor is employed that it is at the instance of the purchaser, and not the seller.

If I am correct in this view of the case the Legislature should intervene and protect the public, the principle being already admitted by our law.

Yours,
Wm. B.

Walkerton, Feb. 13th, 1880.

To the Editor of the Law Journal.

Dear Sir,—I am sincerely glad that your powerful Journal has consented at last to aid those members of the profession practising outside County Towns, in obtaining some protective measure against "Unlicensed Practitioners." I use the word advisedly, as there are few of the so-called conveyancers who do not also pretend to practise law; in fact there are two of these gentlemen residing in a village not over fifteen miles from here who openly give advice, charge for it, and take and defend suits in all the Courts; carrying on their Superior and County Court cases through the agency of attorneys at the different County Towns who undertake the work on even better terms than they do for a brother attorney. It has been truly remarked by one of your correspondents "that if you take away from a country practitioner Division and Surrogate Court work and conveyancing, there is but little left for him to do," for after pay-

ing Toronto and County Town agents, there is a very small margin remaining in a Superior or County Court cause to the country solicitor, and even for this morsel he is obliged to contend with these "pettifoggers." Again in this County, to say nothing about the number of self-styled lawyers (and their name is legion) we have ten or eleven Division Court clerks, and nearly as many bailiffs, nearly all of whom undertake to do conveyancing and to act as attornies or agents in the collecting of debts. Some even go so far as to engage two or more partners to assist them in raking up suits for their Division Court mill. For example, notice the enclosed advertisement clipped from a local paper. They are all in a row in the following suggestive fashion :—

I might add that Mr. R. Hay is the Division Court Bailiff. One is irresistibly reminded of the chorus in the "Pinafore."

Now surely we are not asking too much from the Benchers to at least endeavour to put a stop to attornies at County Towns acting for pettifoggers in outlying places, for it is certainly unfair that we should be compelled to submit to this, and if the Legislature is indifferent to our interests, then on the grounds of public policy, if for no other reason, something should be done to prevent Division Court clerks and bailiffs interfering with matters outside their duties, particularly as these gentlemen will no doubt succeed in lobbying through the Bill, extending the jurisdiction of these Courts. It is beyond contradiction that over one-third the actions brought in the Division Courts of many counties are at the instigation of the clerks and bailiffs themselves, and in fact placed in Court by them or their partners acting as agents or collectors, and I need hardly refer to the evil which must result if such proceedings are permitted. Many a poor and honest debtor knows to his sorrow what it is to have the clerk or bailiff of his division acting as his creditor's attorney, and many an unfortunate creditor has realized that if the debt was not collected there was one certainty left him, viz., that the bill of costs would be large enough. Now, sir, it must be apparent to the members of the profession practising outside the County Towns, that with an increased jurisdiction for the Division Court, and when clerks and bailiffs act as agents in collecting debts, when any person is permitted to act as counsel in these Courts, and when no protection is given against conveyancers and unlicensed practitioners, it is useless to continue our allegiance to a Society which permits any outsider without cost or even responsibility, to enjoy all the privileges and benefits supposed to belong only to the duly qualified attorney, and it certainly seems a loss of precious time and money to strive to obtain a profession when any one may practise at your very door with impunity.

Yours &c.,

Country Practitioner.

Legal Legislation.

To the Editor of The Law Journal.

Dear Sir,—I am glad to see that the Judicature Act, the Division Court Act, and other questions of so called amendments to legal procedure, are at present under the careful consideration of the Local Legislature. The Legislature is composed of a large number of farmers, some storekeepers, a Doctor or two, a Division Court Clerk, a few lawyers, and some of their illegitimate brethren, the "unlicensed conveyancers," editors of country papers, &c. These gentlemen, I am told, can all read and write, and even the most unlearned have served as jurors or had suits of their own. I congratulate the country upon the prospect of the result of these deliberations.

It is not expensive either, and will no doubt be thorough, as they are all so familiar with the subjects. The lawyers of course take their part in the debates, and I am glad to see that they are unselfishly anxious to sacrifice their profession and the administration of justice to popular prejudices.

Yours, &c.

A. B.

Unlicensed Conveyancers—County Court Clerks.

To the Editor of THE LAW JOURNAL.

DEAR SIR—The last issue of your Journal contains some correspondence and an editorial on the subject, which must meet the approval of the legal profession, and which should have the approval also of every intelligent man outside of the profession, including those who feel that they are competent to act as conveyancers.

If it were made necessary for non-professional persons practising as conveyancers to obtain a license or certificate, as suggested by your correspondent, those who were able to pass an examination would occupy a much better position than they do now, and no one can deny that weeding out the incompetent would be a benefit to the whole community.

I quite agree with the suggestion that County Court Clerks should be prohibited from practising as conveyancers. If it were proper to interfere in the case of Registrars, it must be equally so in respect to those who have the custody and registration o chattel mortgages, and bills of sale.

County Court Clerks are no doubt, as a body, men of good standing and reputation, but so are County Registrars, and the rule which applies to one should be made to apply to the other. The temptation to do wrong should not be placed before anyone, and there can be no doubt but that allowing persons occupying the position which County Court Clerks do towards the public, to draw up the instruments they are to have the custody of, gives to them, or their assistants, an opportunity of committing frauds with almost entire immunity from detection.

I know a County Court Clerk who draws more chattel mortgages than half the conveyancers in his County do, together, and, although he is a person above the suspicion of wrong doing, it is impossible for conveyancers who are responsible for what they undertake to do, not to feel, that in such a case, there is a lack of protection to themselves and the public, for which there is no reasonable excuse.

Yours,

D. W.

[We would commend this matter to the attention of the Attorney General. It is very important in the interest of the public. EDS. L. J.]

TO CORRESPONDENTS.—J. M.—We have received your letter as to the Law School; but have no space for it in this number.

A. G. M.—Judgment as to School Trustee Election received, will appear in next issue.

CHANCERY SPRING CIRCUITS.

The Hon. The CHANCELLOR.

Toronto	Tuesday	May	18

EASTERN CIRCUIT.

Hon. The CHANCELLOR.

Lindsay	Tuesday	March	30
Peterborough	Friday	April	2
Cobourg	Tuesday	"	6
Belleville	Monday	"	12
Kingston	Tuesday	"	20
Brockville	Monday	"	26
Cornwall	Friday	"	30
Ottawa	Wednesday	May	5

HOME CIRCUIT.

Hon. V. C. BLAKE.

St. Catharines	Thursday	May	6
Whitby	Monday	"	10
Brantford	Monday	"	17
Simcoe	Thursday	"	20
Guelph	Tuesday	"	25
Barrie	Monday	"	31
Owen Sound	Friday	June	4
Hamilton	Tuesday	"	8

SPRING CIRCUITS.

WESTERN CIRCUIT.

Hon. V. C. PROUDFOOT.

Stratford	Wednesday	March	24
Walkerton	Monday	"	29
Goderich	Monday	April	5
Woodstock	Tuesday	"	13
Sarnia	Monday	"	19
Sandwich	Wednesday	"	21
Chatham	Monday	"	26
London	Thursday	"	29

SPRING ASSIZES.

EASTERN CIRCUIT.

Hon. Mr. Justice PATTERSON.

1. Pembroke	Monday	29th	March.
2. Perth	Monday	5th	April.
3. Cornwall	Monday	12th	"
4. Ottawa	Monday	19th	"
5. L'Original	Monday	3rd	May.

MIDLAND CIRCUIT.

Hon. Mr. Justice OSLER.

1. Belleville	Monday	15th	March.
2. Kingston	Thursday	1st	April.
3. Brockville	Monday	12th	"
4. Napanee	Monday	26th	"
5. Picton	Thursday	6th	May.

VICTORIA CIRCUIT.

Hon. Mr. Justice BURTON.

1. Brampton	Monday	29th	March.
2. Whitby	Monday	5th	April.
3. Cobourg	Monday	19th	"
4. Lindsay	Monday	3rd	May.
5. Peterborough	Monday	10th	"

BROCK CIRCUIT.

Hon. Mr. Justice ARMOUR.

1. Stratford	Monday	8th	March.
2. Woodstock	Monday	15th	"
3. Goderich	Monday	22nd	"
4. Walkerton	Tuesday	6th	April.
5. Owen Sound	Tuesday	13th	"

NIAGARA CIRCUIT.

Hon Mr. Justice MORRISON.

1. Milton	Monday	29th	March.
2. Hamilton	Monday	5th	April.
3. Welland	Monday	19th	"
4. St. Catharines	Monday	26th	"
5. Cayuga	Monday	3rd	May.

WATERLOO CIRCUIT.

Hon. Mr. Justice CAMERON.

1. Barrie	Tuesday	30th	March.
2. Guelph	Tuesday	13th	April.
3. Berlin	Monday	26th	"
4. Brantford	Monday	3rd	May.
5. Simcoe	Tuesday	11th	"

WESTERN CIRCUIT.

Hou. Chief Justice WILSON.

1. Sandwich	Tuesday	9th	March.
2. Sarnia	Tuesday	16th	"
3. Chatham	Tuesday	23rd	"
4. St. Thomas	Tuesday	30th	"
5. London	Tuesday	6th	April.

HOME CIRCUIT.

Hon. Chief Justice HAGARTY.

Toronto (Assize and Nisi Prius)	Thursday	16th March.
Toronto (Oyer and Terminer).	Thursday	22nd April.

The Hon. Mr. Justice Galt will remain in Toronto to hold the sittings of the Queen's Bench and Common Pleas each week, and for the transaction of business by a Judge in Chambers.

FLOTSAM AND JETSAM.

We are sorry to hear that the condition of Mr. Baron Huddleston is such as to cause serious anxiety, and there are grave doubts whether he will be able to resume his seat on the bench.

The *Albany Law Journal* says: A correspondent writes us in regard to the "yew tree case," where the horse died by cropping the leaves of a yew tree planted in a burial ground adjoining his pasture, that it was an appropriate application of the maxim, "sick yew-tree, chew-oh."

A book has recently been published in London, entitled "Over One Thousand Useful and Entertaining Legal Facts for one Shilling." Among other startling facts we find the following: "When a house is taken on an ordinary yearly tenancy, notice must be given so as to expire at the same time as the tenancy commenced, unless there is a special agreement to the contrary." That is what one would call a short lease. Again: "A child born w.th n nine months after

marriage is legitimate"—a statement, says the *Law Journal*, "not so much startling in itself, as in the inference from it that children born ten months after marriage are illegitimate."

The following important judgment has recently been given by the Supreme Court of the United States, in the case of *The New York Central and Hudson River Railroad Company*, v. *Fraloff*.

It is competent for passenger carriers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable, and not inconsistent with any statute or its duties to the public, to protect itself against liability, as insurer, for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk.

As a condition precedent to any contract for the transportation of baggage, the carrier may require information from the passenger as to its value, and demand extra compensation for any excess beyond that which the passenger may reasonably demand to be transported as baggage under the contract to carry the person.

The carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it is bound to assume in consideration of the ordinary fare charged for the transportation of the person.

In absence of legislation, or special regulations by the carrier, or of conduct by the passenger misleading the carrier as to value of baggage, the failure of the passenger, unasked, to disclose the value of his baggage is not, in itself, a fraud upon the carrier.

To the extent that articles carried by a passenger for his personal use when travelling exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer.

Whether a passenger has carried such an excess of baggage is not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance as to the law of the case, and its determination of the facts—no error of law appearing—is not subject to re-examination in this court.

Obituary.

The Right Hon. Sir William Erle, formerly Chief Justice of the Court of Common Pleas, died on Wednesday, the 28th ult., after a few days' illness, at his residence, Bramshott Grange, near Liphook, Hampshire. Having long outlived his successor, Sir William Bovill, he has passed away at the age of eighty-seven, having thus come near to the longevity of such lawyers as Lord Brougham, Lord Lyndhurst, and Lord St. Leonards. Sir William Erle was born in the year 1793, and was the third son of the late Rev. Christopher Erle, of Gillingham, Dorsetshire, by Margaret, daughter of Mr. Thomas Bowles, of Shaftesbury, in the same county, a relative of the late eminent poet, the Rev. William Lisle Bowles. He was educated at Winchester College, from which he passed with a fellowship to New College, Oxford, where he graduated in due course, but not in honours, being a member of a college at that time privileged. He took his degree of Bachelor of Civil Law in 1818, and in the following year was called to the bar at the Middle Temple, and joined the Western Circuit, on which he rose to distinction. He obtained a silk gown from Lord Brougham in 1834, and at the general election of 1837 he entered the House of Commons as one of the members for the City of Oxford, having succeeded, after a severe contest, to the seat formerly held by Mr. Hughes-Hughes. He did not, however, hold a seat for Oxford beyond one Parliament, for in 1841 he declined to seek re-election. In 1845 he was promoted—not by his own party, but by Lord Lyndhurst—to a pusine judgeship of the Court of Common Pleas, in the room of Mr. Justice Maule. In the following year he was transferred to the Court of Queen's Bench, on which he held a seat down to 1859, when the promotion of Sir Alexander Cockburn placed at the disposal of the Ministry the chief judgeship of the Common Pleas. In both Courts he gained a reputation of a very high class, and will be remembered as a sound lawyer and able expositor of the law, as well as an acute, painstaking and conscientious judge. Since his retirement from the bench, which took place in 1866, Sir William Erle has lived the life of a country gentleman and a resident landlord on his estate at Bramshott, in the picturesque neighbourhood of Liphook and Haslemere. Here he was foremost in good and charitable works, subscribing largely to the erection of churches, schools, and parsonages. Sir William Erle received the honour of knighthood on his elevation to the bench. He was sworn a Privy Councillor in 1859. He married, in 1834, Amelia, daughter of the late Rev. Dr. Williams, Warden of New College, Oxford.

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 GEAKE.
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.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

Mathematics.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, B. I., II., III.

English.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem :—

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

History and Geography.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek :—

French.

A Paper on Grammar.

Translation from English into French Prose—

1880.—Souvestre, Un philosophe sous les toits.

1881.—Emile de Bonnechose, Lazare Hoche.

or Natural Philosophy.

Books.—Arnott's Elements of Physics, 7th edition, and Sommerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

For Call.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Law, and Book III. & IV. of Broom's Common Law, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

For Call, with Honours.

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

For Certificate of Fitness.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Haynes's Outline of Equity, C.S.U.C. c. 12, C. S. U. C. c. 42, and Amending Acts.

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

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings, Equity Pleading and Practice in this Province,

The above Changes shall be in force after next Easter Term.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the 2nd Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.