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DIARY FOR MAY.

1. Wed .. *St. Philip & St. James.* Grammar and Common School Funds apportioned. Co. Treasurer to make up books and enter arrears.
4. Sat. ... Articles, &c., to be left with Secretary of L. S.
5. SUN... *2nd Sunday after Easter.*
12. SUN... *3rd Sunday after Easter.*
15. Wed... Last day for service for County Court.
19. SUN... *4th Sunday after Easter.*
20. Mon... Easter Term commences.
24. Friday Queen's Birth-day.
25. Sat. ... Declare for County Court.
26. SUN... *Rogation.*
29. Wed... Appeals from Chancery Chambers. Notices for Chancery re-hearing Term to be served.
30. Thurs. *Ascension.*
31. Friday Last day for Court of Revision finally to revise Assessment Roll.

THE

Upper Canada Law Journal.

MAY, 1867.

OSGOODE HALL—EASTER TERM, 1867.

CALLS TO THE BAR.

Students to the number of twenty went up for examination this Term, but fourteen only were considered competent. The names of the successful candidates are:—

Messrs. James Fisher, B.A., Stratford (without an oral examination); S. C. B Dean, Millbrook; C. Givins, M.A., Toronto; P. McCarthy, Toronto; T. W. Thompson, Ottawa; G. W. Ostrum, Belleville; D. H. Preston, L.L.B., Toronto; Thomas Dixon, Toronto; W. R. Bain, M.A., Goderich; H. Thorne, Toronto; F. E. Kilvert, Hamilton; F. Holmested, Toronto; J. N. Blake, Toronto; R. H. R. Munro, Hamilton.

ATTORNEYS ADMITTED.

Out of twenty-five who presented themselves only one gentleman, Mr. J. Magee, of London, was at once declared entitled to be admitted, he not being required to undergo the oral test. Of the others, R. S. Kinnings, Goderich; John McLean, Toronto; Thomas Dixon, Toronto; C. Givins, M.A., Toronto; John Matheson, Woodstock; A. P. Devlin, St. Catharines; N. G. Bigelow, B.A., Toronto; W. Bell, Hamilton; James Gowans, Sarnia, passed the necessary written examination, but not being so successful in the oral, were required to present themselves again during this Term, when they will doubtless receive certificates.

It is a highly honorable position to be a member of the legal profession, but the advantages in a material point of view are not, if we are to believe the complaints we hear on every side, so great as the fond anticipations of those choosing the law as a profession would lead them to suppose.

When we remember that, if any thing, there is less for lawyers to do now than there was some years ago, and that this business is divided between nearly twice as many practitioners, and that fees have in some cases been reduced, whilst the expenses of living have increased in a very marked and appreciable manner, the prospects are anything but encouraging. And in speaking of this, the propriety of making any reduction in fees at the present time, such as has lately been done in the certain cases in the Court of Chancery, has been questioned.

The first of the three-weeks Terms commenced on Monday, the 20th of this month. The new arrangement is likely to be an improvement upon the old, unless indeed, practitioners and counsel allow the business to lie over till the last week or so, and then vainly try to crowd into one week what could easily and comfortably have been done in two.

We notice that the beginning of the end, with regard to the much talked of fence in front of Osgoode Hall, has been reached by the commencement of the iron railing which is to surmount the stonework. It is almost too soon to express an opinion as to the effect of the design—but as there are always those that are never happy unless they are grumbling, and as "tastes differ" even amongst those willing to be pleased, an endless variety of opinions will be entertained; so far however there is the promise of a massive and handsome structure. But whether handsome or otherwise, we are glad to see the fence approaching completion.

The first number of the fourth volume of the Practice Court and Chambers Reports, commencing with cases decided in Michaelmas Term last, has been issued by Mr. O'Brien under the new arrangement. The third volume will be completed by Mr. Robinson, we are informed, without delay.

The judgment in *Hammond* v. *McLay*, given on the first day of this Term in the

Court of Queen's Bench, decides that the dismissal from office of the plaintiff by the John Sandfield McDonald administration was illegal, and that Mr. Hammond is, notwithstanding, entitled to the fees of the office. It is not likely that the office will be given up without a further struggle, and the decision will doubtless be carried to the Court of Appeal.

Mr. Vice-Chancellor Spragge has returned, and is again engaged in the arduous duties of his position. We trust that his health has received material benefit from his well-earned holiday.

An error crept into the notice of the termination of the proceedings in some of the Jamaica prosecutions (against Nelson and Brand), in speaking of the address to the Grand Jury as having been delivered by Chief Justice Erle. It should have been Chief Justice Cockburn.

LONG VACATION.

The recent decision of *Anderson* v. *Thorpe*, (*ante* p. 101) does not seem to have altogether satisfied the minds of the profession practising in Chancery, as to the subject discussed in that case, some objecting to the views expressed and others complaining of the practical effects of the judgment.

The argument against the decision may shortly be put thus:—The order referred to in the judgment of the Honourable the Chancellor in this case—No. 77 of the orders of the 12th July, 1841—is expressly abrogated and discharged by the first order of the orders of May, 1850, and is not re-enacted by the orders of May, 1850, which also are abrogated and discharged by the orders of June, 1853. The orders of May, 1850 (orders 5 and 9) refer to vacation.

As to how this matter was regarded by the profession in 1851, the following from a legal work on the practice of that date, may be quoted, from which it appears that the order No. 77 of the orders of 12th July, 1841, was *not then acted upon*, and was considered to be abrogated and discharged by the orders of May, 1850. In remarking upon this order it is said:—

"This is copied from the English order 34 of 1845.

On the principle *expressio unius est exclusio alterius*, it would seem that the time of vacation does count for all proceedings except those above mentioned, which produces a somewhat anomalous result. For instance, the time for answering must count, and so for want of answer a traverse ing note may be filed and followed up by a replication. Then the defendant would be put to a motion for leave to answer, and although vacation, if the court do not sit, the plaintiff for all that appears by the orders, must appear and answer the motion, or run the risk of its being granted. The time for passing publication also counts, and therefore the examination of witnesses may often be necessary in vacation, although it is generally supposed that the court does not sit in vacation, except under circumstances of a special nature—such as to hear motions for injunctions, which will not admit of delay. It is a question whether it would not be preferable to abolish the vacation or extend its effect to other proceedings than those named in the order."

It is also argued from the foregoing that the long vacation at the date of 1850, only applied to "certain cases" mentioned in order No. 9 of the orders of May, 1850, and that a proceeding in the masters office as well as the "other" proceedings referred to, were *not* within the terms of that order.

The decision in this case will operate injuriously to country masters, and be a source of great inconvenience to some practitioners, and possibly render void a variety of proceedings taken under an impression at variance with the decision in this case. On the other hand it is contended that a contrary decision would do away with many of the benefits of the vacation, and enforce the transaction of business which it was never intended should be required to be done in vacation.

No steps were taken to obtain a re-hearing in this case; if otherwise and the decision had been reversed, an order perhaps would have been promulgated, settling the practice more definitely.

JUDGMENTS—EASTER TERM, 1867.

QUEEN'S BENCH.

Present—Draper, C. J.; Hagarty, J. and Morrison, J.

Tuesday, May 21, 1867.

Hammond v. *McLay*.—Action by plaintiff, claiming to be Registrar of the County of Bruce, for fees received by defendant.—Verdict for plaintiff.—Rule nisi for new trial discharged.

McKay v. *Lees*.—Rule nisi for new trial discharged.

Dartnell v. *Quarter Sessions of Prescott and Russell*.—Rule discharged. The Court remarked upon the fact of there being a variety of services required from Clerks of the Peace for which no remuneration is provided.

Fitzgibbon v. *The City of Toronto* was referred to by the Court, but no judgment could be given as the facts were not sufficiently before the court.

Some of our young friends might like further to discuss the knotty point presented to them in a case taken from an old volume of Reports, entitled,

STRADLING v. STILES.

Le report del case argue en le common banke devant touts les justices de le mesme banke, en le quart. An du raygne de roy Jacques, entre Matthew Stradling, plant. and Peter Stiles, def. en un action propter certos equos coloratos, Anglice, pied horses, post. per le dit Matthew vers le dit Peter.

Sir John Swale, of Swale Hall, in Swale Dale, fast by the river Swale, knt. made his last will and testament; in which, among other bequests, was this, viz.:

"Out of the kind love and respect that I bear unto my much honored and good friend, Mr. Matthew Stradling, gent., I do bequeath unto the said Matthew Stradling, gent., all my black and white horses." The testator had six black horses, six white horses, and six pied horses.

The debate therefore was, whether or no the said Matthew Stradling should have the said pied horses by virtue of the said bequest.

Atkins apprentice pour le pl. moy semble que le pl. recovera.

And first of all it seemeth expedient to consider what is the nature of horses, and also what is the nature of colors; and so the argument will constantly divide itself in a twofold way; that is to say, the formal part and the substantial part. Horses are the substantial part, or thing bequeathed; black and white the formal or descriptive part.

Horse, in a physical sense, doth import a certain quadruped or four footed animal, which by the apt and regular disposition of certain proper and convenient parts, is adapted, fitted and constituted for the use and need of man. Yea, so necessary and conducive was this animal conceived to be to the behoof of the commonweal, that sundry and divers acts of Parliament have from time to time been made in favor of horses.

1st Edw. VI. Makes the transporting horses out of the kingdom no less a penalty than the forfeiture of forty pounds.

2nd and 3rd Edward VI. Takes from horse-dealers the benefit of their clergy.

And the statutes of the 27th and 32nd of Henry VIII. condescend so far as to take care of their very breed; these our wise ancestors prudently forseeing that they could not better take care of their own posterity than by also taking care of that of their horses.

And of so great esteem are horses in the eye of the common law, that when a knight of the Bath committeth any great and enormous crime, his punishment is to have his spurs chopped off with a cleaver, being, as Master Bracton well observeth, unworthy to ride on a horse.

Littleton, section 315, *saith*:—

"If tenants in common make a lease reserving for rent a horse, they shall have but one assize, because saith the book, the law will not suffer a horse to be severed."

Another argument of what high estimation the law maketh of a horse!

But as the great difference seemeth not to be so much touching the substantial part, horses, let us proceed to the formal or descriptive part, viz., what horses they are that come within this bequest.

Colors are commonly of various kinds and different sorts; of which white and black are the two extremes, and, consequently, comprehend within them all other colors whatsoever.

By a bequest, therefore, of black and white horses, gray or pied horses may well pass; for when two extremes or remotest ends of anything are devised the law, by common intendment, will intend whatsoever is contained between them to be devised too.

But the present case is still stronger, coming not only within the intendment but also the very letter of the words.

By the word black, all the horses that are black are devised; by the word white, are devised those that are white; and by the same word, with the conjunction copulative and, between them, the horses that are black and white, that is to say, pied, are devised also.

Whatever is black and white is pied, and whatever is pied is black and white; ergo, black and white is pied, and, vice versa, pied is black and white.

If therefore black and white horses are devised, pied horses shall pass by such devise; but black and white horses are devised; ergo, the plaintiff shall have pied horses.

Catlyne, Serjeant,—

Moy semble al' contrary, the plaintiff shall not have the pied horses by intendment; for if by the devise of black and white horses, not only black and white horses, but horses of any color between these two extremes may pass, then not only pied and gray horses, but also red and bay horses would pass likewise, which would be absurd, and against reason. And this is another strong argument in law—*Nihil, quod est contra rationem, est licitum;* for reason is the life of the law, nay the common law is nothing but reason; which is to be understood of artificial perfection and reason gotten by long study, and not of man's natural reason; for *nemo mascitur artifex*, and legal

reason *est summa ratio;* and therefore if all the reason that is dispersed into so many different heads were united into one, he could not make such a law as the law of England; because by many successions of ages it has been tried and retried by grave and learned men! so that the old rule may be verified in it,—*Neminem oportet esse legibus sapientiorem.*

As therefore pied horses do not come within the intendment of the bequest, so neither do they within the letter of the words.

A pied horse is not a white horse neither is a pied a black horse; how then can pied horses come under the words of black and white horses?

Besides, where custom hath adapted a certain determinate name to any one thing, in all devises, feofments and grants, that certain name shall be made use of, and no uncertain circumlocutory descriptions shall be allowed; for certainty is the father of right and the mother of justice.

Le reste del argument jeo ne pouvois oyer, car jeo fui disturb *en mon place.*

Le court fait longement en doubt' de c'est matter, et apres grand deliberation eu.

Judgment fuit donne pour le pl. *nisi causa.*

Motion in arrest of judgment that the pied horses were mares; and thereupon an inspection was prayed.

Et sur ceo le court advisare vult.

SELECTIONS.

LAW IN ROMANCE.

(*Continued from p* 94.)

The novel commences with a recital of circumstances which had occurred twenty years prior to the commencement of the tale. Sir Joseph Mason, knight, dying, had left issue by his first wife,—one son, Joseph Mason, and three married daughters; also a second wife, a lady forty-five years his junior, and by her one son two years of age. His real estate consisted of Groby Park and Orley Farm, the latter the smaller of the two. His will left both these estates to his eldest son, with moderate provision for his second wife and her boy Lucius. But a codicil was found, by which Orley Farm was bequeathed to Lucius, and £2,000 settled on one Miriam Usbech, the daughter of Jonathan Usbech, an attorney who attended Sir Joseph at the making of the will and codicil. This money was, however, not to come out of the son Joseph's portion, but out of the second wife's. The validity of the codicil was contested. It was in the handwriting of the widow, witnessed by Jonathan Usbech, John Kennedy, a clerk, and Bridget Bolster, a maid-servant. Jonathan Usbech was dead. The clerk swore to his signature and that of the testator, remembered witnessing a document about that time, and that Usbech was present. The maid remembered signing, and seeing her master sign, and recollected seeing Usbech have a pen in his hand. She remembered that the matter had been explained at the time. The widow testified that she had drawn up the codicil at Usbech's dictation, in her husband's hearing, because the latter had the gout, and had seen all parties sign. This is substantially the material testimony. Mr. Trollope, not being a lawyer, also puts into his novel testimony, reminding one of the "red kidney pertaties which was three pound tuppence happenny" of Mrs. Cluppins, and which would not find its way into "Ten Thousand a Year." For instance, Miriam Usbech, the legatee under the codicil, is called. She is "a simple girl of seventeen," and testifies "Her father had told her once he hoped Sir Joseph would make provision for her. . . . She had known Sir Joseph all her life, and did not think it unnatural he should provide for her" and so on. Mr. Trollope, however, in spite of his ignorance of the rules of evidence, has the sense not to go into estoppels and base fees. He does not venture out of his depth into abstruse legal technicalities; and the only question in his book is one of fact as to the will.

The will is admitted to probate. The mother and son take possession of the disputed farm, and, twenty years after, the story opens with the recital already given. Here the author takes up the thread, and advances, with his careful, and sometimes tedious minuteness, to the working out of his plot. Miriam Usbech, "the simple girl of seventeen," is now naturally thirty-seven, and has a disagreeable attorney for a husband named Dockwrath, a tenant to Lady Mason. Lucius, assuming charge of his property, expels him from his tenancy; and hence the wrath, which, like that of the son of Peleus, μυοὶ Αχαιοῖς ἄλγε' ἔθηκεν. Dockwrath, enraged, goes home, searches among his father-in-law's papers, and finds a certain document, takes the cars for Groby Park, and lays it before Joseph Mason, the unsuccessful contestant of the will. This is a deed of separation of partnership between Sir Joseph Mason and one Martock, dated July 14, 18—, the same date as the codicil, and witnessed by Jonathan Usbech, Bridget Bolster, and John Kennedy, the same witnesses. Consultation is had with attorneys in London. The witnesses are visited, and they declare that they signed but one paper on that date. It is therefore determined as the best means of gaining the estate, as well as to satisfy the indignant elder son's thirst for revenge, to have Lady Mason indicted for perjury at the former trial. She is brought before a magistrate, and committed to take her trial at the next Assizes.

The character of the accused lady is well drawn. She is represented as a woman of considerable beauty and dignity, of unblemished character, and still retaining in her middle age much of the fascination of her youth. At the previous trial, she had given her testimony with clearness, firmness, and apparent truth. All the county believe her innocent. One of

its first men, Sir Peregrine Orme, proposes marriage to her after the accusation is made public. No act of her life can be brought forward against her, and sympathy is universal. The barrister retained to defend her, Mr. Furnival, had appeared at the previous trial, and recourse had been at once made to him. Perhaps the art of the master is better displayed in the delineation of this barrister's character than in any other portion of the book. There is a truth, a nicety, in the lights and shades, which Mr. Warren, with all his wit and experience, has failed to show in Mr. Subtle or Mr. Lynx. Not simply is this effected by the description of his appearance or his attainments, but in the development of his character in the progress of the story; so that, without long quotation, no justice can be done to it here. There is a reality about the whole which makes us almost suspect that Mr. Trollope has copied a living man into his tale. A man of fifty-five, who, up to forty, had attained little success,—then won it by hard work; tall, square, with nose straight and long, gray eyes; practised, not in the Old Bailey, but in the Queen's Bench, and especially in the Divorce Courts,—"any cause was sound to him when once he had been feed for his support; and he carried in his countenance his assurance of this soundness, and the assurance of unsoundness in the cause of his opponents." And now begins a lesson of ethics, which Mr. Trollope would thus delicately give the profession. The course of preparation for the trial is minutely described; and though no word is said to the barrister, yet, in spite of the regard, almost lover-like, which he entertains towards his fair client, he begins to feel she is guilty. And guilty she is, and has confessed her guilt to Sir Peregrine to prevent the marriage which he has offered her. She has confessed that she has forged the codicil. Yet her counsel knows nothing of this except as surmise. Thus he is led to retain Mr. Chaffanbrass, the great Old Bailey lawyer; and, as attorney, one Mr. Solomon Aram, whose practice is in the criminal courts. Consultations are had; and though neither of those persons express to Mr. Furnival their belief in their client's guilt, he sees it in their faces.

"Why," say Mr. Chaffanbrass's thoughts, "why am I retained, unless she is guilty? Innocent people do not need me." Associated with these counsel is a younger man, Mr. Felix Graham,—the hero, or walking gentleman, of the book,—the antipodes of Mr. Chaffanbrass, who talks in this wise, with indorsement, we suspect, of the author:—

"We try our culprit as we did in the old days of the ordeal. If luck will carry him through the hot ploughshares, we let him escape, though we know him to be guilty: we give him the advantage of every technicality, and teach him to lie in his own defence, if nature has not sufficiently so taught him already.... We teach him to lie, or rather we lie for him, during the whole ceremony of his trial. We think it merciful to give him chances of escape, and hunt him as we do a fox, in obedience to certain laws framed for his protection. A guilty man, as such, should have no protection, none which may tend toward concealing his guilt. *Till that be ascertained,* proclaimed, and made apparent, every man's hand should be against him.... For the protection of his innocence, let astute and good men work their best; but for the concealment of his guilt, let no astute or good man work at all. Let him have his defender, the defender of his possible innocence, not the protector of his probable guilt."

This is pretty, but hardly practical. How counsel could practically play this extraordinary part; and why, before trial, innocence should be assumed as only possible, and guilt as probable, and not the reverse; and whether this be not the doctrine that every man is "presumed guilty until he is proved innocent," it is not worth while to discuss. It is the text to the lesson of the trial; let us go to that. The three counsel take their places, each with the feelings we have described, and alike ignorant, as a matter of fact, of their client's guilt or innocence. Dockwrath the attorney is called, and describes how he found the deed of separation. His cross-examination by the Old Bailey lawyer, is amusingly described:—

"It was pretty to see the meek way in which Mr. Chaffanbrass rose to his work; how gently he smiled; how he fidgeted about a few of the papers, as though he were not at first quite master of the situation; and how he arranged his old wig in a modest, becoming manner, bringing it well forward over his forehead. His voice also was low and soft, so low that it was hardly heard through the whole court; and persons who had come far to listen to him began to be disappointed:" later, "he had pushed back his wig a little, and his eyes had begun to glare with an ugly red light."

Mr. Dockwrath's malice is exhibited: then follow the evidence as to the accused, and her testimony at the former trial, and the proof of the genuine document. Then the two witnesses to the deed are brought to swear they signed but one paper on that day. Kennedy's testimony is badly broken on cross-examination, but the maid Bridget Bolster's testimony is stronger. No witnesses are called for the defence. The character of the accused is too well known. It is evidently a close case. The two senior barristers do their work well. The junior is disgusted because Mr. Chaffanbrass exposes Dockwrath's motives of malice towards the accused, which he thinks not material to the merits of the case, and because he thinks his client *may* be guilty. Furnival closes. His address is stated to have occupied three hours. His peroration is given at length. It concludes thus:—

"'And now I leave my client's case in your hands. As to the verdict you will give I have no apprehension. You know as well as I do that she has not been guilty of this terrible crime. That you will so pronounce, I do not for a moment doubt. But I do hope that that verdict will be accompanied by some expression on your part which may show to the world at large how great

has been the wickedness displayed in the accusation.'"

"And yet," says Mr. Trollope, "yet, as he sat down, he knew that she had been guilty. To his ear her guilt had never been confessed; but yet he knew that it was so, and, knowing that, he had been able to hold them up to the execration of all around him, as though they had committed the worst of crimes from the foulest of motives! And more than this, stranger than this, worse than this, when the legal world knew—as the legal world soon did know—that all this had been so, the legal world found no fault with Mr. Furnival, conceiving he had done his duty by his client in a manner becoming an English barrister and an English gentleman."

Let us be more just to Mr. Furnival and to the legal world. He neither *knew* the guilt of his client nor the probity of the witnesses. He judged so. He *knew* nothing about it. Nor is this a fallacy. Supposing him to have been mistaken in this judgment, supposing Lady Mason to have been unjustly accused with the strongest circumstances against her, if this advocate had failed in his duty, what would then, not only his own conscience and the legal world, but Mr. Trollope, have said to him? Let the author write a book, and represent this. But he will not; for he whose aim is to paint men as they are, well knows, that, as the profession which, more than all others, is governed by the rules of logic and common sense, no counterpart for such an advocate can be found. And, without another line of ours, let Samuel Johnson, once reputed a moralist, be heard for a moment:—

"'Sir," said Mr. Johnson, 'a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir, what is the purpose of courts of justice? It is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what he knows to be a lie, he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge and determine what shall be the effect of evidence what shall be the result of legal argument. . . . If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.'"*

And again, on another occasion,—

"*Boswell:* 'But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are, in reality, of another opinion, does not such dissimulation impair one's honesty? Is there not some danger, that a lawyer may put on the same mask in common life, in the intercourse with his friends?'—*Johnson:* 'Why, no, sir. Everybody knows you are paid for affecting warmth for your client; and it is therefore properly no dissimulation: the moment you come from the bar, you resume your usual behaviour.'"†

* Boswell's Johnson, Aug. 15, 1773. † *Ib.*, Sept. 18, 1768.

One word to conclude "Orley Farm." The jury return a verdict of "Not guilty." The estate is voluntarily returned to its rightful owner, and the story ends.

Of the class of novels which we have termed the second, where we are merely brought into court in one or more of the chapters, two of the most entertaining come from the clever pen of Mr. Charles Reade. Mr. Reade seems to have a fondness for law both in reality and fiction; for he not only sues his adverse critics before tribunals of flesh and blood, but he has introduced into two of his later novels, "Very Hard Cash" and "Griffith Gaunt," long and elaborate reports of cases in which the creatures of his fancy take part. These are very striking and animated; though it does not do to look too closely at the rulings of the "shrewd old judges," as he calls them. For instance: a real court would hardly admit, that, in an an action for false imprisonment, where the issue was the insanity of the plaintiff, the dying declaration of the plaintiff's sister to his sanity could be given in evidence, as in "Very Hard Cash;" or that evidence of want of chastity of a female witness was admissible to affect her character for veracity, as in "Griffith Gaunt" (*Comm.* v. *Churchill*, 11 Met. 538). Still they are amusing, and full of wit. In "Very Hard Cash," after the author has lashed insane asylums to his heart's content, his hero is represented as bringing his action for false imprisonment. Then follows a dissertation on pleading. The defendant makes three pleas: 1st, not guilty; 2nd, that the plaintiff was insane; 3rd, that physicians so certified and advised the defendant, and that the defendant believed it. Then follows an amusing chapter on what is termed the "Postponement Swindle."

"In theory," says Mr. Reade, "every Englishman has the right to be tried by his peers; but in fact there are five gentlemen in every court, each of whom has, by precedent, the power to refuse him a jury by simply postponing the trial, term after term, until the death of one of the parties, when the action, if a personal one, dies too. And, by a singular anomaly of justice, if a defendant cannot persuade A. or B., judges of the common law court, at what I venture to call—

THE POSTPONEMENT SWINDLE,

he can actually go to C., D., E., one after another, with his rejected application; and the previous refusal of the judges to delay and baffle justice goes for little or nothing, so that the postponing swindler has five to one in his favour."

So we have a most amusing chapter of medical certificates as to parties and witnesses, especially of one obliging female witness, already nursing her deceased sister's children, sick with scarlatina,—who replied so promptly and obediently to the telegraph; "You must have scar. yourself, and telegraph the same at once, certificate by post."

Finally, *Hardie* v. *Hardie* comes on; and the demurrer filed to the third plea is argued by Colt, Q.C., who disapproves thereof because

pleaded by advice of Garrow, Q.C. Still Colt, Q.C., "was briefed with Garrow's views, and delivered them in court with more skill, clearness, and effect than Garrow ever could; then sat down, and whispered over rather contemptuously to Mr. Compton (the attorney), 'That is your argument, I think.' 'And, admirably put,' whispered the attorney in reply: 'Well, now hear Saunders knock it to pieces.'" The court, however, maltreat Sergeant Saunders, and sustain the demurrer: so the cause is tried on issue joined in the first two pleas. Every one reads Charles Reade: so we all know, that the plaintiff had it all his own way, and a verdict of £3,500. We only quote one amusing instance of examination. Julia, the plaintiff's lady-love, is undergoing cross-examination:—

"*Saunders.*—You are warmly interested in the plaintiff's success?

Julia.—Oh, yes, sir.

Saunders.—You are attached to him?

Julia—Ah, that I do!"

And one o'er-true saying of a Yankee witness, that in Westminster Hall, they sell justice "darnation dear, *but* prime."

Griffith Gaunt is fresh in all our recollections. Whatever may be the merits of the book, the trial is ingeniously told, and the lady's defence courageously and artistically conducted by herself. She is indeed a second Portia at the law, and has hardly, we think, a counterpart in nature. But Mr. Reade thinks a clever woman can do any thing. "She bristled," he says, "with all those fine arts of defence that nature lends to superior women. She entered on that defence before she spoke a word, for she attacked the prejudices of the court by deportment." Of course, we all know that the stupid sot of a husband whom she was accused of murdering had unhappily not even been drowned, and would be made to turn up at the last moment. Yet the cleverness of the dialogue, and the freshness imparted to it by the ancient phrase in which it is couched, carry one along agreeably to the end.

Among other fictitious scenes that rise before the memory is the life-like trial of Effie Deans in the "Heart of Midlothian," where the great Wizard of the North resumed for a time his wig and gown; and then the court-room in Miss Edgeworth's "Patronage," where the forgery is detected by the discovery that a sixpence placed under the seal of a deed bears a later date than the instrument itself,—which in boyhood we used to think a sign of extraordinary acuteness on the part of the counsel who discovered it, but which has since struck in our opinion, while our impression of the nonsense of the incident has increased.

But what praise is sufficient for the great suit of *Bardell* v. *Pickwick*,—that most laughable but truthful satire on trial by jury! From the commencement of the chapter, Mr. Perker's formula, that "hungry or discontented jurymen always find for the plaintiff," to the conclusion, in the elder Weller's sad apostrophe, "O Sammy, O Sammy! vy worn't there a alleybi!" it is replete with shrewd observation. The surprise of Mr. Pickwick, that Sergeant Buzfuz, who was counsel for the opposite party, dared to presume to tell Mr. Sergeant Snubbin, who was counsel for him, that it was a fine morning; the refusal of Mr. Starleigh to excuse the apothecary from jury duty on the ground that he had no assistant, whereas he ought to be able to afford to hire one in the place of the boy, on whose mind the prevailing impression was that epsom salts meant oxalic acid, and syrup of senna laudanum; Mr. Skimpin's look at Mr. Winkle, on asking his name, "inclining his head on one side to listen with great sharpness, and glancing at the jury meanwhile, as if to imply that he rather expected Mr. Winkle's natural taste for perjury would induce him to give some name which did not belong to him,"—all these have so much of truth and nature mingled with the fun, that we can hardly believe Mr. Dickens has not passed his days in a court-room. "Chops and Tomato Sauce," and "Put it down a wee, my Lord: put it down a wee," have become household words; and we have been surprised not to find them in our edition of "Familiar Quotations."

Mr. Thackeray has never carried us into court, except very briefly, in the painful episode of Barnes Newcombe's brutal treatment of his wife. Such matters do not suit his genius; but he introduces us to counsel in vacation, and gives the profession a fair hit at their unseasonable persistence at law-talk.

"The British lawyers," says Mr. Titmarsh, travelling at Baden, "are all got together; and my friend Lamkin, on his arrival, has been carried off by his brother sergeants, and become once more a lawyer. 'Well, brother Lamkin,' says old Sir Thomas Minos, with his venerable kind face, 'you have got your rule, I see.' And they fall into talk about their law matters, at a dinner-table, at the top of Chimborazo."*

It is the Rhenish circuit, and on the stranger's book:—

"Sir Thomas Minos, Lady Minos, nebst Begleitung aus England.
Sir John Œachus, mit Familie und Dienerschaft aus England.
Sir Roger Rhadamanthus.
Sergeant Brown and Mrs. Brown aus England.
Sergeant Tomkins, Anglais. Madame Tomkins.
Mesdemoiselles Tomkins."

Both Mr. Dickens and Mr. Thackeray take us into the chambers of the profession, but put the matter rather differently. Mr. Thackeray lets us into Mr. Percy Sibwright's and Mr. Bangham's chambers in their absence. Mr. Sibwright has written things in the nobility's albums. The food of his meditations are "an infantile law library, clad in skins of fresh new-born calf, a tolerably large collection of classical books which he could not read, and English and French works of poetry and fiction which he read a good deal too much.

* Kickleburys on the Rhine.

His invitation-cards of the past season still decorated his looking-glass; and scarce any thing told of the lawyer but the wig-box beside the Venus upon the middle shelf on the book-case, on which the name of P. Sibwright was gilded." Mr. Bangham was a sporting man, who married a rich widow, had no practice, and "went a circuit for those mysterious reasons which make men go circuit."* Mr. Dickens, hammering away at Chancery, makes Mr. Vholes' office scarcely as charming:—

"Three feet of knotty-floored dark passage led to Mr. Vholes' jet-black door, in an angle profoundly dark on the brightest midsummer morning, and encumbered by a black bulk-head of cellarage staircase, against which belated civilians generally strike their brows. Mr. Vholes' chambers are on so small a scale, that one clerk can open the door without getting off his stool, while the other, who elbows him at the same desk, has equal facilities for poking the fire. A smell as of unwholesome sheep, blending with the smell of must and dust, is referable to the nightly (and often daily) consumption of mutton fat in candles, and to the fretting of parchment forms and skins in greasy drawers. The atmosphere is otherwise stale and close. The place was last painted or whitewashed beyond the memory of man; and the two chimneys smoke, and there is a loose outer surface of soot everywhere; and the dull cracked windows in their heavy frames have but one piece of character in them, which is a determination to be always dirty, and always shut unless coerced."†

Perhaps there is something extravagant in this, still there is a good deal of truth; and there is certainly no reason in the nature of things why so many of the profession should permit the place where they are to pass the greater part of their lives to become so hideous to the eye and uncomfortable to the body, unless, indeed, it is a dogma in law, that practice is to increase in the same ratio as dust, and retainers with opaqueness of window-panes.

Bulwer has painted two dark scenes in court in "Eugene Aram" and "Paul Clifford;" Mrs. Edwards, a pretty sunny one in her charming novel of "Archie Lovell." Trials are multifold in sensation novels, so called. They harmonize with the violent contrast of light and shade; and in the literature of crime, whether murder, bigamy, forgery, it would be strange if the aid of justice were not sometimes appealed to. So Miss Braddon, Mrs. Wood, and the rest, often go to the circuit. It is satisfactory to see that the innocent are always acquitted, and that the guilty generally come to grief. There is naturally a great deal of nonsense in fact, and curious, if not wise, rulings of law. "The Missing Bride; or, Miriam the Avenger," by Mrs. Emma D. E. N. Southworth, is a fair example of this class. "The venerable presiding judge is supposed to be unfriendly to the accused." When asked guilty or not guilty, "some of the old haughtiness curled the lip and flashed from the eye of Thursten Willcoxen." The jury are not drawn as usual by the sheriff, but by "idle curiosity," and, of like the judge, arrive "quite unprejudiced." The charge is of course murder: but, also, of course, the murdered party, in this case "the missing bride," appears just at the nick of time, and all goes merry as a marriage bell.

And so we end law in romance. The fallen accused is restored to the bosom of his family, the perjured witness has fallen in a fit, or gone to jail (who cares?); the judge has retired to his venison and port; the jury are discharged; the contestant counsel are jesting and hobnobbing at their inn, and we will close our note-book.—*American Law Review.*

* Pendennis, vol. ii. † Bleak House.

TESTIMONY OF PARTIES IN CRIMINAL PROSECUTIONS.

Mr. Chief Justice Appleton, of Maine, under date of February 22nd, 1865, wrote a letter to *the Hon. D. E. Ware, of Boston*, which appeared in the *Register* of August following, wherein he states that the Legislature of Maine, in 1859, passed an act, by which any respondent in any criminal prosecution for "libel, nuisance, simple assault, and assault and battery," might, by offering himself as a witness, be admitted to testify; and that, in 1863, the law as to admission of testimony was further extended, and it was enacted that, "in the trial of any indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, and not otherwise, be deemed a competent witness—the credit to be given to his testimony being left solely to the jury, under the instructions of the court."

Chief Justice Appleton also wrote a second letter, bearing date the 24th February, 1866, to John Q. Adams, Esq., Chairman of the Committee on the Judiciary of Massachusetts (*vide Law Register* for October last), wherein he gives his views at length upon the change in criminal evidence, and argues with much legal acumen and plausibility the justice of the new law in his State. The opinion emanating from a gentleman who has made the subject of evidence a specialty for many years, demands at least a candid consideration by the profession, and all who desire the administration of equity and justice.

As the suggestion of the Chief Justice was adopted by the Judiciary Committee, and reported to the House of Representatives in the form of a bill, and which may, from present appearances, become a law of the Commonwealth of Massachusetts, it is desirable that the question be fully discussed and digested; and we therefore deem it not ill-

Note.—*Since the foregoing article was written, our attention has been called to a letter in the "Pall Mall Gazette" of Feb. 11, 1867, dated Lincoln's Inn, and signed "Middle Conveyancer," in which the same view of the law in "Fish v. Holt" is upheld as that which we have taken, though without citation of authorities.—American Law Review.*

timed to offer a few reasons why, in our opinion, the establishment of such rule would not only fail to prove practicable, but be far from subserving the public good. The proposed rule, as yet being almost wholly untried, can be argued only upon general principles of propriety.

The honorable advocate of the change concedes the principle of evidence, that the accused is deemed innocent, and all trials for crime proceed with that presumption. "Yet during the trial," he observes, in speaking of the established rule, "when the question of guilt or innocence is to be determined, the party injured or alleging he is injured, is admitted to testify, while the respondent, presumed innocent, is denied a hearing. *Audi alteram partem. Hearing both sides of a controversy is* so obvious a dictate of impartial justice, that one may well marvel that its wisdom and propriety should ever have been called in question, much more that it should have been denied."

It may be observed here, that one of the principles upon which the rule of law disallowing a party in criminal proceedings to testify, is, it redounds to the benefit of the accused, and thus carries out the fundamental legal presumption of innocence. The guiltless is thus protected. Taking into consideration the overwhelming shock which a man of nervous and delicate sensibilities must realize upon being arraigned for some heinous crime, before a judge, perhaps, who has the reputation of being not only severe in his manner of trying a case, but unmerciful in convicting and passing sentence; and considering, also, the liability of such person being not only overcome, and therefore incoherent in his testimony, but of actually criminating himself, the rule can but work great hurt and injustice. The human mind, under the pressure of calamity, is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitation may prevail. Taking advantage of his confusion, in the cross-examination, subtle or designing counsel might make out a much stronger case than if the party had not testified, as was found to be the injurious result of the rule in Connecticut. And the honorable gentleman admits that he has known cases where, notwithstanding the innocence of the prisoner, "as was abundantly proved," and *notwithstanding his own testimony, the jury found him guilty.* Our time-honored and time-tried rule, therefore, upon this showing and aspect of the case, may be said to be wiser, and safer for the accused (and that is the aim of the law), in the majority of cases, than by the rule adopted in Maine.

Although in France, and some other countries, the accused is allowed to testify, yet in England, for centuries, going back before William of Normandy conquered that island, the rule of the common law has been adhered to, and been found to subserve justice. The rule has obtained time out of mind.

The Chief Justice admits, that when the accused is permitted to testify, he will be pressed with question upon question, and that evasion would be suspicious, and silence be tantamount to confession. "All this," he remarks, "may be disastrous to the criminal, but justice is done." We would ask, wherein? If disastrous to the party arraigned, how is justice done? It would assuredly be disastrous to the accused, and justice would not certainly be done, if the party, being allowed to testify, should tell such a confused, incoherent story (as is usual with an ignorant person in such cases), through embarrassment and fright (as it is with those who, circulating in good society, are arraigned for crime), that the minds of the jury would take his incomprehensible answers as evasions, and his testimony, in the main, as implicating and condemning himself. Nothing could be said of avail in palliation of his conduct. And how often do we see instances, even in civil matters, where men cannot make a statement on the stand, with clearness enough to be understood by a lawyer, much less by those who comprise an average panel of jurymen; and how much more is this confusion and incoherency aggravated naturally, in criminal cases, thus militating in an incalculable degree against the prisoner. And it is fair to presume, a man having the right to be heard, whether innocent or guilty, if he remains silent, the suspicions of the jury would at once be keenly aroused.

These we deem cogent reasons why it is safer, and wherein justice will be administered and subserved better, by not allowing parties to be heard in their own defence. The same objections cannot, of course, be equally pertinent in civil cases. We do not, therefore, agree with our advocate, in thinking that the guilty would be "less likely to escape," or the danger of unjust conviction of the innocent "diminished;" for the history of criminal law proves, the *guilty* person, having committed a crime, steels his mind and heart to the "sticking point," and never fails to tell a plausible story; while the innocent usually breaks down under the rigid, perhaps confounding examination.

The time-honored maxim, *Stare decisis et non quieta movere*, has been revered in all ages as the bulwark of safety in jurisprudence; and while we are not among those who cry out *Stare decisis!* (with as much emphasis as the elder Cato ejaculated *Delenda est Carthago*, on all occasions) whenever a reform in law is proposed, and not unmindful that society is constantly being educated, growing in truth, yet, we hold the reform, or rather change in the code of Maine, to be too radical, untimely, and we can but predict a speedy repeal of the law, as was done in Connecticut. And thus we essay to take issue with the Chief Justice, and against any State adopting said rule, for these obvious reasons.

To wisely prune and graft the law has in every age been considered beneficial; but true

reform, since the Spartan law-giver's time, has never been accomplished by ploughing too deeply or planting too abundantly. For, as the prince of reformers, Bacon, somewhere remarks, "The work which I propound tendeth to pruning and grafting the law, and not to ploughing up and planting it again: for such a remove I should hold indeed for *a perilous innovation*."

And thus to plough up the prime root and element in criminal jurisprudence, which is made the more worthy of veneration from its duration and time-tried wisdom, would indeed be perilous. And Lord Erskine thus eloquently and eulogistically says of evidence: "The principles of the law of evidence are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life." (24 Howell's State Trials, 966.) And likewise observes Chief Justice Story, in the case of *Nichols* v. *Webb* (8 Wheat. 326–332): "The rules of evidence are of great importance, *and cannot be departed from without endangering private as well as public rights*."

It is peculiarly fitting to consider and ponder these wise opinions, when a proposition is made to undermine and overthrow a charitable rule of law, whereof the mind of man runneth not to the contrary.

Some jurists have held that confession alone is a sufficient ground for conviction, even in the absence of independent evidence. (Best on Pres. p. 330, and cases there cited.)

But by the established law of England, a voluntary and unsuspected confession is not sufficient to warrant conviction, unless there is independent proof of the *corpus delicti*. This rule is certainly more in accordance with the principles of reason and justice. Those who would hold a confession competent for conviction, would doubtless advocate the rule which is adopted in Maine. The voice, whether bold or timid, of the accused, would doubtless turn the scale for conviction or acquittal, in the minds of disciples of that school.

By an ordinance of France, passed in 1667, the testimony of relatives and allies of parties, even down to the children of second cousins inclusively, is rejected in civil matters, whether it be for or against them. This institution has, in modern times also, been considered sound and reasonable (1 Seld. 1497, Wilk. ed.); for it becomes not the law to administer any temptation to perjury. By the civil law, relatives could not be compelled to attest against those to whom they were allied; thus showing that fundamentally the law has not favored the testimony of prisoners, or of their friends and relatives.

The able and pointed contributor, "B.," in the *Register*, of January, 1866, avers that it is owing to prejudice in the minds of men, which prevents their acquiescence to give fair scope for the experiment of allowing parties in criminal prosecutions to testify, and states that, Connecticut having passed an act, wherein the Legislature inadvertently made the provision so broad as to cover criminal proceedings, it was repealed from "prejudice." It is true, mankind are naturally opposed to innovation, but especially so when it is aimed to root up a fundamental principle; and, too, when the injustice and iniquity of such innovation is palpable, and been so proved to the satisfaction of a state or people. In the State of Connecticut, where the "new rule" had a fair trial, it was found to work incalculable hurt to innocent persons; for adroit and cunning lawyers were prone either to hold up to the minds of the jury the fact—the astounding fact!—that the prisoner at the bar had not testified, as was his privilege, or had evaded questions, and therefore suspicion should attach. So that, whichever position the accused might assume, he placed himself in a critical and unfavorable aspect. Like the very ancient custom among the Romans, to prove a man's guilt, or indebtedness, by the "water test"—if he floated, he was guilty; if he sunk, he was innocent: so that he lost his life, or case, in either event.

The contribution referred to by "I. F. R.," in his editorial remarks upon Chief Justice Appleton's judiciary letter aforementioned, which was apparently written by an able member of the bar of Connecticut, says, in so many words, that "prejudice had nothing to do with the repeal of the act in that State, but that after one year's trial, the impression with the profession and judges was, that *mercy to the accused demanded its repeal;*" and then proceeds to say, he thinks "those usually denominated criminal lawyers * * * were loudest in calling for a repeal of the act." The repeal was therefore the result of one year's experiment, and not from mere "prejudice," as charged in the January article referred to.

It was in the early part of the session of the Connecticut Legislature of 1848, that a bill, which was substantially drawn by Judge McCurdy, and introduced by the Hon. Charles Chapman, was passed, in these words: "No person shall be disqualified as a witness in any suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credit."

The introducer of that bill informs the writer that it was not intended to make a man indicted for crime a competent witness in his own case, and that he presumes Judge McCurdy had no such purpose. At the first term of the Supreme Court after the passage of the act, it may be seen, the presiding judge held that by said law the accused was made a competent witness, and the decision was concurred in by all the judges.

At the following session of the Legislature it was, that an act was passed to the effect that, "so much of the 141st section of said act (it being the feature in question) as autho-

rizes a party to testify regarding the same, be and is hereby repealed."

The presumption of law, that an accused person is innocent until proved guilty, becomes a mere mockery when such traps are set for guilty men as the one in Connecticut, in 1848, and the one now being used in the State of Maine.

It is a shameful fact that, practically, in Massachusetts and Maine, every person arraigned for a criminal offence is presumed to be guilty until he is proven innocent, in contradistinction to the theory of the common law. If the rule advocated by *Chief Justice* Appleton were to become the law in Massachusetts, "it would be the last turn in the screw," says our informant, "and few men would ever after be successfully defended there." A cross-examination of a person arraigned for crime is indeed a terrible test, and the skilful trier who conducts it might well say, with Hamlet,

> "If circumstances lead me, I will find
> Where truth is hid, though it were hid indeed
> Within the centre."

We think it is abundantly shown, the trial of the rule in Connecticut proved—as loubtless will be proved in Maine—that innocent persons were more likely to be convicted thereby, than under the old common-law rule of England; for it works in contravention of the wise maxim in criminal law, that "it is better that ten guilty persons should escape, than that one innocent man should suffer." A citation or two may not be ill-timed in this connection.

The notorious trial of Eugene Aram, which took place at the York assizes in 1759, is a strong case illustrative of our theory, that more certainty of conviction follows when the prisoner is allowed to speak or testify. Readers of criminal law and history will agree, that the testimony adduced in Aram's case was entirely inadequate and insufficient to convict him.

The body of Daniel Clarke, the murdered man, was found in a cave, fourteen years after the deed was committed. Richard Houseman, who was indicted, turned "king's evidence," and Aram was named as the principal perpetrator of the crime. The skull of the murdered man was produced in court, but the only medical testimony was that of Mr. Locock, who deposed that "no such breach as that pointed out in the skull could have proceeded from natural decay; that it was not a recent fracture by the instrument with which it had been dug up, but seemed to be of many years' standing." The prosecution proved, in fact, nothing, and Aram called no witness in his defence. The sage principle in English law, that no man can be condemned for murder, unless the body of the person supposed to have been murdered be found and identified, was entirely ignored in this case; the *corpus delicti* was not proved; no satisfactory proof that the skeleton was that of Clarke. Neither the age, the sex, nor any of the many points of identity which at the present day would be required, were proved.

Trusting to his genius, eloquence, and ingenuity for defence, Aram delivered a written speech of great power, denying any knowledge of the bones exhibited, and presented weighty arguments to prove they belonged to some hermit, who had in former times dwelt in the cave, "as the holy Saint Robert was known to have done." Although Aram's argument was most powerful, the jury failed to be convinced of his innocence. It is confidently believed that the astonishing abilities he exhibited on his trial, contributed only to the clearer establishment of his guilt. The celebrated Dr. Paley, who was present at the trial, was afterward heard to say that Eugene Aram had "got himself hanged by his own ingenuity." If he had remained silent, the jury could not have convicted him upon the evidence presented.

There is little doubt, from different authorities on the subject, that he unwittingly pleaded for his own conviction. He doubtless did more to throw light (or what was considered light) upon the gossamer-threaded evidence, and prove "unknown facts of guilty acts," than a dozen witnesses. And it is conceded that the jury not only indulged in conjectures, and magnified suspicions into proof, but weighed probabilities in *gold scales*.

We have cited this case as tending to show that when a prisoner undertakes to exculpate himself, the nature of man is such, that it begins to distrust and finally rebels against his words of exculpation, even if the accused does not entangle himself in some link or chain of the evidence, as is most likely to be the case.

Other and parallel cases might be cited to show that when a party in criminal prosecution speaks in his own behalf, he usually has "a fool for his client," and that it invariably fails at least to improve his position before the court.

We conceive that, for any State to adopt the act or rule, which Connecticut found unwise and impracticable, and repealed, as working great injustice to the innocent; which Maine has adopted, and which is urged upon Massachusetts, would not only be a "perilous innovation," but be instrumental in furthering the acquittal of bold and desperately bad men, and convicting those who are timid and wholly innocent.

Our time-revered rule not only obviates the possibility of the accused criminating himself, but prevents perjury. And who can doubt, if we were to adopt the proposed rule—this unhingement of the law—in the State of New York, that persons guilty of the crime with which they are arraigned, would on every occasion commit perjury; and whether they did or not, the jury would believe they did, and so be loth to accredit *the testimony of any one*. Thus the rule would inevitably become an engine of self-conviction. The act

of administering the oath to a prisoner, and likewise his testimony, would be deemed futile, idle words. At the present time the accused is at liberty to say whatever he pleases, after the case is submitted, and his statements are taken for what they are worth.

So that, under the old-established law, there is as much efficacy in hearing the prisoner, as there could possibly be were the proposed rule adopted. And, finally, in all candour to Mr. Chief Justice Appleton and those who adhere to his school, we can only account for their earnest advocacy, and the people's opposition (where it has been tried) to the new rule, upon the principle of the old proverb, that *a looker-on seeth more than a gamester.*

F. F. B.

—*American Law Register.*

THE NEW REPORTS.

A circular from the Council of Law Reporting announces at the close of the first year the complete success of the experiment. A uniform series of authorised reports, issued at a moderate price, and with reasonable rapidity, has been found to be practible, acceptable to the Profession, and self-supporting. The work is not without the faults that necessarily attend inexperience, but which time and practice will cure. The complaints are, however, few. It is rightly said that there is not sufficient discrimination in the selection of cases to be reported; that one of the principal objections to the other reports was, that temporary cases, such as mere practice cases, questions of fact involving no law, cases that are mere repetitions of previous decisions were thrust in, causing needless bulk, and that it would be the special virtue of reports not printed for profit that they would preserve only such decisions as would be of value for permanent preservation. It must be admitted that the Council have not faithfully observed this portion of their programme, and the volumes for the last legal year contain a multitude of cases that should not have found admission into a series of reports intended to be the authentic record of judge-made law. But, as the editors gather experience and confidence, we trust they will exercise a more severe judgement in this respect, and that this departure from the scheme, so justly and generally complained of, will be avoided for the future.

The time will soon come when the Council will be entitled to call upon the courts to recognise their authority so far as this—that when a case has been there reported, no other report of it shall be cited. Of course, until its appearance there, it will be citable from any authenticated source.—*Law Times.*

UPPER CANADA REPORTS.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister at-Law, Reporter in Practice Court and Chambers*)

Boomer v. Anderson.

Security for costs—Insolvency—Representative capacity.

Proceedings stayed until security for costs should be given in an action brought in the name of a surviving partner who was in insolvent circumstances, by the personal representative of the other partner, under an award giving such representative a right to collect the debts of the firm. [Chambers, June 2, 1865.]

This was an action brought in the name of George Boomer, surviving partner of the firm of Connor & Boomer, by the executrix of Mr. Connor, the other partner, under an award giving her the right to collect the debts of the firm and to use the name of the surviving partner for that purpose.

The defendant obtained a summons for security for costs on the ground of the alleged insolvency of the plaintiff, who was moreover suing for the benefit of another.

Snelling shewed cause.

The insolvency of the plaintiff is not proved, only that he is in insolvent circumstances, which is not sufficient.

The defendant cannot stand in a better position owing to this assignment or right to sue, because, as between plaintiff and another, by no act of the plaintiff had the assignment taken place, and the money if recovered goes to another party.

It is in the discretion of the judge to order security or not, and this is not a case for it, the real plaintiff being an executrix and personal representative.

He cited Ch. Arch. p. 1405, and all the cases there cited; *Morgan* v. *Evans*, 7 J.B. Moore, 344; *Reid* v. *Cleal*, 1 U.C. Cham. Rep. 128; Taylor Ev. 3rd Ed. 647; *Ridgway* v. *Jones*, 6 Jur. N.S. 223.

Murphy contra.

John Wilson, J.—The general rule is, that if the plaintiff on the record is suing for another, and is in insolvent circumstances, the defendant is entitled to security for costs.

This the attorney for the plaintiff does not deny, but he contends that she who is really interested is herself suing, not in her own name, but in her representative capacity of executrix, and therefore ought not to be compelled to give security for costs. While the law so stood that she would not have been liable to pay costs, this was reasonable, and the cases were in accordance with it; but since the change in the law, which our Legislature adopted by the 7 Wm. IV. cap 3, sec. 3, executors are liable for costs. But if this executrix would have been liable by this statute to pay costs, as plainly she would, there can be no distinction made between her representative capacity and her own right. I think she ought to give security for costs.

Summons absolute.

See also *Hearsey* v. *Peckell et al.* 7 Dow. 437; *Andrews* v. *Marris et al.* 7 Dow. 712; *Elliot* v. *Kendrick*, 9 Dow. 195; *Perkins* v. *Adcock*, 15 L.J. Ex. 7.

Lucus v. Taylor.

Venue—Change of, by plaintiff—Fear of losing debt.

Where the record did not reach the place of holding the assizes in time to be entered on the commission day, the plaintiff, on showing that due diligence had been used, and that if he did not get down to trial before the fall assizes he would be in danger of losing his debt, was allowed to change the venue, so as to go to trial at the spring assizes, on payment of costs of the day, costs of the application, and any extra expense occasioned to defendant by the change.

[Chambers, 20th April, 1867.]

In this case the venue was laid in the county of Wellington, and the writ issued in the county of Middlesex. The defendant was under terms to go down to trial at Guelph. The pleas were served on the 13th March, at Guelph, and reached the plaintiff's attorney at Fergus on the following day.

The plaintiffs' attorney filed and served issue and had record passed in London on the 16th March, on which day it was mailed to Guelph, but did not reach that place in time to be entered for that assizes.

On the 18th March plaintiff obtained a summons to change the venue to the county of Kent, where the assizes were to be holden on the 30th April. The affidavits filed, in addition to the above facts, showed that the defendant was making away with his property, and that unless plaintiff got down to trial before autumn, he would be in danger of losing the debt.

In support of the summons were cited *McDonald* v. *Provincial Ins. Co.*, 5 U. C. L. J. 186; *Mercer* v. *Voght*, 4 U.C. L.J. 47.

A. Wilson, J.—I think that application should have been made to the judge who held the assizes at Guelph, as soon as the record reached there, for leave to enter it. This would have been the proper course. But the affidavits do not show that any such application was made. As the delay is accounted for, and plaintiff's affidavit not contradicted, I will make the order to change the venue; but the plaintiff must pay the costs of the day, for not going down to trial at Guelph, as well as the costs of this application, and any extra expense that may be occasioned to the defendant by having the trial at Chatham instead of at Guelph.

Order accordingly.

CHANCERY.

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

The City Bank v. McConkey.

A. obtained a judgment against B. and registered same, and issued *fi fas* against lands, kept them in force, and filed bill on judgment before act abolishing registration of judgments. C. had obtained judgment against B and registered it, but subsequent to A. C. filed his bill to set aside a prior sale made by B. to D. not making A. a party. A decree was pronounced in his favor, sustaining the sale, but giving him a lien on the purchase money. A. applied by petition to be made a party and have his priority declared in such suit.

Held, that he could not by petition make himself a party to that suit, and that his remedy, if at all, was by bill.

Quære, had he any remedy at all.

This was a petition presented in this suit by Charles Fitch Kemp (as assignee in bankruptcy of John Gladstone and Thomas Hall Gladstone) and Alexander Morrison, not parties thereto. The City Bank had obtained judgments at law against the defendant Burnett, and Gladstone and Morrison had also obtained a judgment against Burnett. The latter had registered their judgment before the City Bank in the County of Simcoe, in which county the lands in question in this cause were situated, and had kept their judgment alive by writs of *fi. fa.* against lands, and by filing a bill in this court on their judgment within the period limited by the act abolishing registration of judgments. The City Bank prosecuted this suit to set aside a sale of lands made by Burnett to McConkey before either the Bank or Gladstone & Morrison had registered the certificates on their respective judgments. The court upheld the sale as good, but gave the City Bank a vendor's lien on the purchase money. To this suit Gladstone & Morrison had not been made parties, and this petition was filed at their instance, setting forth in detail the facts hereinbefore stated, and claiming that they were entitled to a priority over the City Bank by virtue of their prior registration, and of their having kept that priority alive by continuous writs of *fi. fa.* lands, and by filing a bill on their judgment (but which had not been served), and they prayed that further proceedings by the plaintiffs to enforce the payment of the said purchase money might be stayed; that the petitioners might be made parties to this suit, and might have the benefit thereof in the same manner and to the same extent as they would have had if the decree in this cause had directed the accountant to enquire as to other incumbrancers upon the said purchase money and lien therefor, and to make such incumbrancers, if any, parties in his office, and had so made the petitioners parties accordingly.

Blake, Q. C., and *Snelling*, in support of the petition. As to objections to the form of the application, they referred to the following authorities: *Foster* v. *Deacon*, 6 Madd. 59; *Brandon* v. *Brandon*, 3 N. R. 287; *Baner* v. *Mitford*, 9 W. R. 135; *Scale* v. *Butler*, 6 Jur. N. S. *Hall*, 989; *Gifford* v. *Hort*, 1 S. & L. 409; *White* v. 1 R. & M. 332; Calvert on parties, 2nd edit., 65; *Cook* v. *Collingridge*, C. P. Cooper (1837), 255; *Paine* v. *Edwards*, 10 W. R. 709.

Crooks, Q. C., for the City Bank, submitted that the rights of Gladstone & Morrison could not be enforced by petition, but must be the subject of a new bill, and he referred to *Slater* v. *Young*, 11 Grant, 269.

Strong, Q. C., and *D'Alton McCarthy* for McConkey and Burnett (but who took no part in the argument).

The petition was, however, argued on the merits, and as to the effect of the filing of the Bill by Gladstone & Morrison on their judgment the same not having been served or any further proceedings in the suit having been taken. On this point the following authorities were referred to: *Tylee* v. *Strachan*, Grant's Cham. R. 319; *Coppin* v. *Gray*, 1 Y. & C. C. C. 205; *Boyd* v. *Higginson*, 5 Ir. Eq. R. 97; *Foster* v. *Thompson*, 4 Dru. & War. 303; *Purcell* v. *Blennerhasset*, 3 Jones & L. 24; *Carroll* v. *D'Arcy*, 10 Ir. Eq. R. 321; *Dixon* v. *Gayfere*, 17 Bea. 421; *Hill* v. *Lord*

Bexley, 20 Bea. 127; *Morris* v. *Ellis*, 7 Jur. 418; Sugden's Ven. & Pur. 13th edit. 403.

The Chancellor before whom the petition was argued, delivered the following judgment.

With regard to the petition in this case I think the petitioners cannot by means of it intercept the payment to the plaintiffs of the money to which they are entitled under this decree. If the petitioners have any right at all I think they should have proceeded by bill according to the decision in *Slater* v. *Young*, 11 Grant 268.

It is important that there should be uniformity in the practice, and though authority may be found in some of the English cases for such a course of procedure as that adopted here, in certain cases, yet I prefer in such matters to stand by a clear decision of our own courts.

I doubt, however, if on bill filed the petitioners could now have any relief. The plaintiffs have succeeded by the decree in subjecting this piece of land to the extent of the vendor's lien thereon to their judgments, and they are in the position of a party who by a superior diligence has fastened the first charge upon the property, as when a first execution in the sheriffs hands takes effect. The petitioners here had executions in the sheriff's hands, but they had no operation upon the property here unless indeed the petitioners could treat the conveyance to McConkey as fraudulent and void. The writs could only give the petitioners a right, or put them in a position to come to this court and seek for equitable execution. This they have not done, *non constat*, till the filing of this petition. that they even intended to do so; they might have intended, and from their delay in coming here it is the more reasonable to suppose that they intended proceeding at law to sell, treating the conveyance to McConkey as a nullity.

I must refuse the petition with costs.

(*Reported by* S. G. Wood, Esq., *Barrister-at-Law.*)

In re Dillon's Trusts.

New Trustees—Two appointed in place of one—Vesting order—Imp. Stat. 13, 14 *Vic. cap.* 60—*C. S. U. C. cap.* 12, *s.* 26—*Practice.*

Where it becomes necessary to apply to the Court for the appointment of a new trustee, it is only under very special circumstances that the Court will be satisfied with *one*; therefore

Where the trustee appointed by a will had died, and he who was named by the testator to succeed him was out of the jurisdiction, and shewn to be an unsuitable person to act in the trust, the Court appointed, in substitution for him, a *cestui que trust* under the will, whom the testator had named as a trustee thereof under certain contingencies which had not occurred; but under the circumstances, directed another to be associated with him, although the will provided for one trustee only acting in the trust at one time.

[Chancery, Feb. 18, 25, April 8, 1867.]

This was a petition presented *ex parte* on behalf of the *cestuis que trustent* under the will of the late G. G. Dillon, setting out the will of the deceased, whereby, after devising his real and personal estates to J. G. Bowes, in fee, to be held by him in trust for the *cestuis que trustent* therein named (being the petitioners and J. Dillon, jun.) the testator directed as follows: "Provided also that in case my said trustee shall die, or become unable from any cause to act, then I will and direct and hereby appoint John Hall to be the trustee of this my will, in the place of the said J. G. Bowes; and in case the said John Hall shall die, or refuse to accept the said appointment, in such case I nominate and appoint my father to act in this behalf; and failing either, then I request the said J. G. Bowes, John Hall, my father, or either of them, to name some trustee to act in the matter of this my will; and failing this, I desire my brother John to act as my trustee in this behalf; hereby vesting in such one trustee as shall consent to act all the trust estates, moneys and premises, which shall be then vested in the trustee so dying or refusing or becoming incapable to act as aforesaid."

The petition further alleged the death of Mr. Bowes, the departure from Canada of Mr. Hall, his residence out of the jurisdiction, and other circumstances which rendered it desirable that a new trustee should be appointed, and prayed that John Dillon, jun., the testator's brother, named in the will, should be appointed trustee thereof, and that the trust property might vest in him for the estate devised by the will to the trustee thereof, to be held by him upon the trusts of the will or such of them as were subsisting and capable of taking effect.

S. G. Wood for the petitioners.

As to the jurisdiction of the Court. Under C.S.U.C. cap. 12, sec. 26, the Court of Chancery for U. C. has the power conferred upon the Court in England by Imp. Stat. 13, 14 Vic. cap 60 (Trustee Act 1850), secs. 32-40.

Application should be by petition, not by bill. —Tripp's Forms, 212; Morgan's Acts and Orders, 91; *Thomas* v. *Walker*, 18 Beav. 521; and should be made in Court, not in Chambers.—*In re Lash*, Chy. Cham. Rep. 226. (As to cases where application in Chambers is proper, see Tripp, 212; 2 Set. 812; Morgan, 526.)

Service on former trustee not necessary when he is out of the jurisdiction.—Tripp, 95, 96, note *f*; Lewis on Trusts, 4th Edit. 687, note *c*. *In re Sloper*, 18 Beav. 596, the old trustees appear to have been within the jurisdiction.

A trustee going out of the jurisdiction is not thereby incapable, unwilling, or unable to act, within the terms of a power to appoint new trustees, and an application to the Court is proper. —*Re Harrison's Trusts*, 22 L. J. N. S. Chy. 69; following *In re Watt's Settlement*, 20 L. J. N. S Chy. 337; S. C. 15 Jur. 459.*

As to misconduct of trustee affording ground for the application.—Lewin, 547, 548. As to bankruptcy.—*Re Bridgman*, 1 Drew. & Sm. 164. see 170; *Harris* v *Harris*, 29 Beav. 107.

As to the appointment of a *cestui que trust*— As a general rule, such an appointment is considered objectionable —*Wilding* v. *Bolder*, 21 Beav. 222. Yet in this case, the *cestui que trust* is the nominee of the testator (although the precise circumstances under which the trust was to devolve upon him have not occurred); and *cestuis que trustent* were appointed in *Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W R 458; *Re Clissold's Settlement*, 10 L. T. N S. 642

As to the appointment of one trustee. The testator, by his will, manifested an intention that only one trustee should act at one time, and

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* But see contra, *Mesnard* v. *Welford*, 1 [Sm. & Gif. 426; S. C. 22 L. J., N. S. Chy. 1053; Morgan, 89.—Rep.

where one trustee only was originally appointed the Court will appoint one.—*Re Roberts*, 9 W.R. 758; *Re Reyneault*, 16 Jur. 238; and in *Re Tempest*, 1 L.R. Chy. Appeals, 485; S C. 35 L J. N.S. Chy. 632, it is said that "the Court will regard the wishes of a testator expressed or demonstrated" in regard to the appointment of trustees.

By consent of parties concerned, a trustee will be appointed without a reference—*In re Battersby's Trusts*, 16 Jur. 900; *Robinson's Trusts*, 15 Jur. 187; *In re Tunstall*, 15 Jur. 645, 981; S.C. 4 De G. & Sm. 421

The proposed trustee being a nominee of the testator, the Court in appointing him will be merely giving effect to the testator's wishes and intentions, and therefore he will take all the powers conferred by the will on the trustee thereof for the time being; the decisions in *Lyon* v. *Radenhurst*, 5 Gr. 544, and *Tripp* v. *Martin*, 9 Gr. 20, not being applicable to the present case.

Mowat, V. C.—I think the petition and affidavits make out a case for the appointment of new trustees, but not of one trustee. The testator had a right to appoint one if he chose; but when it becomes necessary to apply to this Court for an appointment in a case not provided for by the testator, it is only under very special circumstances that the Court of Chancery will be satisfied with one trustee. The circumstances here are not sufficient for this purpose. The petitioners must therefore procure another to be associated with Mr. Dillon, and, on proper affidavits of the fitness of the trustee so proposed, the two will be appointed.*

Upon a consent by another proposed trustee, and affidavits of fitness being filed, his Lordship afterwards granted a fiat for the order as prayed, appointing the two trustees proposed and vesting the trust estates in them.

CHANCERY CHAMBERS.

(*Reported by* J. W. Fletcher, Esq., *Solicitor.*)

Barker v. Pyne.

Practice—Receivor—Infants—Setting up defence—Act pleaded by ancestor.

Where, after a decree, infants have been made parties to a suit by order of revivor, they stand in the same position as their ancestor, the deceased defendant, with regard to the plaintiff, and cannot be let in to set up a defence to the suit which their ancestor has not pleaded, except where actual fraud or mistake have prevented the ancestor from pleading such defence, and not under any circumstances where the deceased debtor has been guilty of great laches.

[Chambers, 1867.]

This was a common mortgage suit in which the decree, on default in payment of the amount found due by the Master, ordered a sale of the mortgaged premises.

Default was made in payment by the defendants by bill. A sale was attempted, but proved abortive, for want of bidders.

The usual order after abortive sale, directing a subsequent account, and in default of payment, foreclosure, was made.

The time for payment under this order having expired, an application was made on behalf of the defendants by bill for an extension of the time for payment on the usual grounds. The extension was granted, but before the expiration thereof the suit abated by the death of the defendant William Pyne. The suit was revived in the names of his widow and children, and a guardian *ad litem* was appointed to the said children, all of whom were infants.

The amount found due by the Master's subsequent report not having been paid, although a considerable further extension of the time had been given for that purpose by the plaintiff's solicitors, this was an application on notice to a judge in Chambers for a final order of foreclosure against all the defendants, including the incumbrancers made parties in the Master's office, default having been made by all the defendants.

The bill had been taken *pro confesso* against all the defendants by bill.

S. H. Blake, for the plaintiffs.

The plaintiffs are beyond a doubt entitled to the order as against all the defendants except those added by revivor, and as to those last-named defendants it is submitted that they stood in the same position as the deceased defendant whom they represented in the suit, and that as he could have had no better rights than his co-defendants had he been living, having in common with them made default, the plaintiffs are therefore entitled to an order foreclosing all the defendants.

Hector Cameron, contra.

The widow claims a portion of the mortgaged premises in question as being her separate estate, and the infants have such an interest in the same as entitles them to some consideration. The Court favors infants, and it is submitted that the infant defendants in this suit ought to be let in to answer on the merits, and allowed to set up their rights in respect of the part of the equity of redemption in which they have an interest. At all events, under the circumstances, he submitted that the Court should give them an opportunity of redeeming, or extend the time still further for payment.

The Judge's Secretary.—The infants in this suit stand in no better position than the deceased defendant, their ancestor. I allow the bill to be taken *pro confesso* against him. Further time has been asked for by him in common with the other defendants. The widow had known her rights, if any, for years; the suit had been pending for some years; the plaintiffs had been lenient, and afforded the defendants every opportunity of redeeming. Unless actual fraud or mistake were clearly proved, it is too late now to set up merits. At all events the deceased defendant has been guilty of such gross laches that his representatives cannot be afforded any relief of the description asked.

I must grant the final order of foreclosure.

* See 2 Set. 824; *Re Tunstall*, 4 De G. & Sm. 421; S. C. 15 Jur. 645; *Re Dickinson's Trusts*, 1 Jur. N. S. 724.

ENGLISH REPORTS.

Huntley v. Franchi.

Practice—Bail bond—Insufficient affidavit.

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff "for money lent and goods sold and delivered," but omitting "by the plaintiff to the defendant," is sufficient.

Garth, Q C., had obtained a rule calling on the plaintiff to show cause why a certain bail-bond, given to the sheriff of Middlesex, should not be delivered up to be cancelled, and why the plaintiff should not pay the defendant the costs of and occasioned by the arrest, and of the proceedings at chambers, and of this application, and all proceedings on the bail-bond be stayed.

The affidavit to hold to bail, in substance, was this:—"The above-named defendant is well and truly indebted to me in the sum of £132 2s., for money lent and for goods sold and delivered;" but the words "*by the plaintiff to the defendant*" were omitted.

C. P. Butt showed cause.—The only question is whether the absence of these words renders the affidavit insufficient. Affidavits more informal than this have been allowed: *Moultby* v. *Richardson*, 2 Burr. 1032; *Tyler* v. *Campbell*, 3 Bing. N. C. 675. There is no authority exactly in point.

Garth, Q C., was not called upon to support the rule.

Kelly, C.B.—I am of opinion that there should be a rule absolute in this case. It is of the utmost importance that the affidavits should show enough to enable perjury to be assigned on them if the cause of action be falsely sworn to.

Channell, B.—I am of the same opinion. The affidavit would have been defective under the old law, and that arrest on *mesne* process is abolished, we ought not to give any greater latitude of construction.

Pigott, B.—I was inclined to think myself that the affidavit was sufficient without the addition of the words "by the plaintiff to the defendant," but I will not dissent from the opinion expressed by the rest of the Court

Rule absolute.

Re Brady, a Solicitor.

Costs—Taxation—Agreement beforehand between solicitor and client—Payment—Unnecessary correspondence.

An agreement beforehand between a solicitor and client to pay a specific sum in lieu of costs is not legal.

A retainer of a sum by a solicitor out of moneys received for his client, is not a payment of his bill by the client.

Letters written by a solicitor to his client which are not properly required for the interests of the client in the business for which the solicitor is engaged will not be allowed on taxation.

In a proceeding by summons for taxation, it is not necessary to specify palpable overcharges by affidavit.

[M. R., March 11, 20.]

This was an application by summons to have a solicitor's bills taxed.

In the year 1864 Mr. Weston, the applicant, required a loan of £2,000, and applied to Mr. Brady, who was the solicitor for a loan society, to furnish the sum he required. Mr. Brady agreed that the loan society should provide the money upon condition that he should be employed as solicitor to Mr Weston in the transaction, and that he should be paid the sum of £105 in lieu of costs. The security for the advance was a second mortgage on Mr. Weston's property. The mortgage was ultimately effected, and Mr. Brady retained £105 out of the loan, and handed over the remainder to Mr. Weston. The second bill amounted to £160, of which £100 was stated, and was not denied to be for money lent, and the remaining £60 was said to be "for other business," of which no detailed account was given. The third bill was to the amount of £335 3s. 10d. It was delivered on the 24th of August, 1866. It was for charges alleged to have been incurred in preparing and carrying out a trust deed by which Mr. Weston assigned his property to trustees upon trust to pay his creditors the amount set opposite their names. The deed was dated the 17th of April, 1865. There were three trustees, one of whom was appointed by Mr. Brady in respect of the debt of £2,000 to the loan society. Mr. Brady was entered as a creditor, and the £60 was set opposite his name, but no account was ever furnished in respect to it. The bill of £335 3s. 10d. included a voluminous correspondence carried on by Mr. Brady with the trustees and Mr. Weston. The last item in the bill was dated the 8th of August, 1866. On the 26th of September, 1866, an action was brought by Mr. Brady on the bill for £335 3s. 10d., and on the 13th of October, 1866, an application was made to Mr. Justice Lush for taxation of the bill, but refused by him on the ground of want of jurisdiction. Judgment was afterwards obtained in the action, and at the end of November, 1866, the bill was paid in full. there was a fourth bill, the taxation of which was not contested.

Jessel, Q. C., and *Roberts*, for the applicant, contended as to the first bill that an agreement beforehand to pay a solicitor a fixed amount was illegal, and that the retention by Mr. Brady of the £105 was not a payment. As to the second bill, they contended that the fact of £60 having been entered opposite Mr. Brady's name in the schedule to the deed did not make it a charge against Mr. Weston, when in fact no bill had ever been made out in respect to it. As to the third bill, they contended that a year had not elapsed since its payment, and that it contained palpable overcharges. There were 165 letters, many of which were at least wholly unnecessary. They referred to *Re Drake*, 22 Beav. 438; *Re Moss*, 17 Beav. 340.

N. Higgins, for Brady, contended as to the first bill that the retainer of £105 out of the loan of £2,000 was a payment, and that as this was made more than a year ago the Court had no jurisdiction except by bill filed. As to the £60 he contended that it was a debt proved under a creditors' deed, which was equivalent to a proof in bankruptcy; and as to the £335 3s. 10d., that it had been recovered in an action at law, and that no overcharges were specified in the summons. He referred to *Blagrave* v. *Routh*, 5 W. R. 95, 2 K. & J. 509, 8 D. M. G 621; *Turner* v. *Hand*, 27 Beav. 561.

Jessel, in reply, said that the reason the whole sum of £335 3s. 10d. was recovered in the action was that there was no jurisdiction to tax at common law. It was unnecessary in proceedings by summons to specify overcharges. He

referred to *Re Bignold*, 9 Beav. 269; *Re Ingle*, 21 Beav. 275; *Re Blackmore*, 13 Beav. 154; *In Re Newman*, 30 Beav. 196.

March 20. — Lord Romilly, M.R. — Upon perusal of the affidavits and examination of this case, I think that an order to tax ought to be made. There are four bills. The fourth it is admitted must be taxed, but no application was necessary for that purpose. The real objection is as to the other bills, which have been paid or allowed in account. As to the bill of 100 guineas, I am of opinion that the agreement beforehand to accept a sum in lieu of costs is not legal, and that the only agreement sought to be established here is an agreement of that character. It is also admitted that the bill was never delivered. I am also of opinion that it has not been paid in such a manner as to preclude taxation under the statute. *Re Bignold* is precisely in point. This is merely a retention in account of 100 guineas in discharge of the bill according to agreement on the charge for raising the money from the society for which Mr. Brady acted. As to the £60, I do not well understand what it is for; it is said that it is for other business, but this is clear that the bill for it has never been delivered. My opinion is that this must be done before the £60 can be allowed, and both these bills must be delivered and taxed.

There is more doubt and question about the bill for £335 3s. 10d. which was delivered 24th August, 1866, and which has been paid after it was delivered, and after an action had been brought to recover the amount of it, and under ordinary cirrumstances such a bill never could be taxed, but on examination of the bill itself it does appear to me that there are grounds arising upon the face of the bill, coupled with the evidence produced, which make it proper that this bill should be taxed.

The items to which I refer are the accumulation of letters charged for, which are obviously very numerous. I have not counted them, but I am informed that they are 165 in number; for each of which 5s. is charged, being about £40. It is difficult to understand how the business could have required so many letters to be written. What sort of letters some of them were appears from those which are given in evidence, and of these it may certainly be said that they were not required for the purpose of advancing the interests of his client. If a solicitor were to write every day to his client, giving him information even though useful and interesting, he cannot charge for them unless properly written in his character of solicitor, and for the purpose of advancing the business of the client. If a solicitor were to write daily to his client, complaining of one thing and making inquiries about another thing, unless they properly relate to the business he is conducting he cannot charge for them. They must really relate to the subject matter of the business he is conducting to entitle him to charge for them to the client, and the client taxing the bill may require the judgment of the taxing master.

I think that this judgment in most cases should be exercised liberally towards the solicitor, but in this case there are unquestionably many letters which ought never to have been written at all, and still less to have been charged against the client. It is therefore solely on account of the character and number of these letters that I think that it is fit that the bill should be submitted to the judgment of the taxing master. I shall therefore order the first bill to be delivered, and all the four bills to be taxed. I shall make the costs of this application costs in the taxation.

Rooth *v.* The North Eastern Railway Company.

Railway Company—Carrier—Special Condition—Reasonableness—Delivery.

A railway company carried cattle upon special conditions. The first condition stipulated that "the owner undertakes all risk of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or from imperfection in the station, platform, or place of loading or unloading, or of the carriage in which they may be loaded or conveyed, or from any other cause whatsoever." A subsequent condition stipulated that "the company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them."

Held, that the first taken by itself was unreasonable and void.

Held, secondly, that, even assuming the first condition to be severable, the subsequent condition could not have the effect of making it reasonable, so far as it related to risks over which the persons sent under the subsequent condition had no control, such as defects of stations.

Semble, (per Channel, B.)—Such conditions relating to a single subject-matter are not severable, and cannot be good in part and bad in part.

[Ex., Jan. 25, 1867.]

This was an action for not duly delivering cattle carried for the plaintiff by the defendants from Boroughbridge to Chesterfield.

The first count alleged a bailment upon the terms that the defendants should safely and securely carry the cattle from Boroughbridge to Chesterfield, and there deliver them to the plaintiff. It alleged a breach of this duty whereby some of the cattle escaped on to the railway and were destroyed.

The second count alleged a bailment on the terms that the defendants should safely and securely carry the cattle from the one place to the other and there deliver them to the plaintiffs at a safe and proper place. It alleged for breach that they delivered them at an unsafe and improper place, whereby they escaped as in the first count.

The defendants traversed the bailments and the breaches.

The case was tried before Mr. Justice Smith at the last Summer Assizes at Derby, when the facts proved were as follows:—

The plaintiff resided at Chesterfield, and was in the habit of sending cattle by the defendants' line. On the 27th April he delivered ten heifers and five cows to the defendants at Boroughbridge to be carried to Chesterfield. The defendants had no line to Chesterfield themselves; but the station there belonged to the Midland Company. The plaintiff received a ticket for the beasts and signed the counterfoil. The ticket contained conditions as follows:—"This stock is received by the company subject to the following conditions: That the owner undertakes all risks of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station platform or place of loading or unloading, or of the carriage in which they may

be loaded or conveyed, or from any other cause whatsoever. That the company will not be responsible for the non-delivery of the stock within any certain or reasonable time. The company will grant free passes to persons having the care of live stock as an inducement to owners to send proper persons with and to take care of them." The plaintiff sent a drover with the cattle, and he sent his nephew to meet them at the Chesterfield station. They arrived there late in the evening, and the night was dark. At that station there was a wharf for landing cattle, but it was only large enough for one truck to come alongside at once. There was no pen to put cattle in, and no fence round the wharf, but it was open to the line. The heifers were in one truck and the cows in another. On arriving at the station the drover gave up his ticket. The truck with the heifers was first brought to the wharf, and a porter and the plaintiffs nephew opened the doors of the truck and let them out; the drover stationing himself at what was admitted to be the proper place for preventing their escape. The other truck was then brought up and unloaded, and while this was being done some of the heifers out of the first truck escaped up the line. They were only missed as the others were being driven out of the station-yard, when search was made for them, and they were found to have been killed by a train.

Upon these facts it was contended that there was no evidence of any bailment on the terms alleged, the conditions being inconsistent with it; and secondly, that there was no evidence of any breach.

The learned judge left it to the jury to say, first whether there was a complete delivery; and secondly whether the delivery was in a safe and proper place.

The jury found for the plaintiff upon both points, with £67 damages; leave being reserved to the defendants to move to enter a verdict for themselves if the Court should think that the condition exempted them from liability.

Field, Q. C., in Michaelmas Term obtained a rule *nisi* to enter a verdict for the defendants pursuant to the leave reserved; or for a new trial on the ground that there was no evidence of non-delivery, or of delivery at an unsafe place, and that the verdict was against the evidence.

Cave now showed cause.—As to the conditions, they can afford no protection to the defendants, for they are clearly unreasonable. It could not be disputed that the first part of the condition repudiating all responsibility would be unreasonable if it stood alone. Such a condition has often been held to be so; *M'Manus* v. *The Lancashire and Yorkshire Railway Company*, 7 W. R. 547, 4 H, and N. 327; *Peek* v. *The North Staffordshire Railway Company* 11 W. R. 1023, 10 H. L. C. 473; *Gregory* v. *The West Midland Railway Company*, 12 W. R. 528, 2 H. & C. 944. The contention on the other side will be that the subsequent condition entitling drovers to free passes makes the first reasonable; and *Pardington* v. *The South Wales Railway Company*, 5 W. R. 8, 1 H. & N. 392 will be relied upon. But it is not in point. No doubt a company may reasonably decline liability of any particular kind, if they offer a reasonable alternative security instead; *Peak* v. *The North Staffordshire Railway Company*, *supra*; *Robinson* v. *The Great Western Railway Company*, 14 W. R. 206, 35 L. J. C. P. 123. But the alternative they offer must itself be reasonable; *Lloyd* v. *The Waterford and Limerick Railway Company*, 15 Ir. C. L. R. 37. In *Pardington* v. *The South Wales Railway Company*, *supra*, the condition exempted the company in respect of "damage on the loading or unloading, or from suffocation in transit." and free passes were to be given for drovers. The loss there was from accidental suffocation in the transit, one of the very matters which the drovers were sent to guard against. But here the exemption is in respect not only of loading and unloading and other things which the drovers might well be responsible for; but defect of carriages, negligence of the defendants' servants, defect of stations and so on, against which the presence of drovers can afford no security. There is no consideration for the exemption claimed. The presence of the drover is for the benefit of both parties, for it diminishes the risk of both. Therefore the owner sacrifices his time, and the company his carriage. As to the breaches, the question was one for the jury, and their verdict is fully supported by the evidence. There was nothing here amounting to a delivery at all; and at all events, it is clear that the place was not a safe one. *Roberts* v. *The Great Western Railway Company*, 4 C. B. N. S. 506, may be cited on the other side, but it does not apply. There the plaintiff alleged an absolute obligation to fence the station-yard, and it was held that no such obligation existed. But it was admitted that the company was bound to provide a safe landing-place, per Williams, J., p. 523. And that is all we contend for here.

Field, Q. C. and *A. Wills*, in support of the rule.—First, there was a complete delivery. The drover had given up his ticket, and he and the plaintiff's nephew had received the cattle on the wharf. And secondly, the place was a reasonably safe one. It was the place where the plaintiff intended them to be delivered; and he knew the station, and knew that it did not belong to the defendants. Nothing has been shown that the defendants ought to have done to make the place safer. And if it had been attempted to bind them to take any special precaution, *Roberts* v. *The Great Western Railway Company* (*supra*) would have been an answer.

But, at any rate, the defendants are protected by the condition. The condition is severable, and may be good in part, though bad in another part. This is so with bye-laws: *Rex* v. *Fishermen of Faversham*, 8 T. R. 352. And so far as it relates to loading and unloading, this condition is perfectly reasonable. At any rate, it is made so by the subsequent clause with respect to drovers: *Pardington* v. *The South Wales Railway Company* (*supra*).

Kelly, C.B.—I am of opinion that our judgment must be for the plaintiff. Several points have been raised, and I shall first consider that relating to the conditions. The condition is as follows. [His Lordship read the conditions.] Now, it is admitted that the first clause of the condition taken by itself is unreasonable in part, so far as it relates to risks of carriages and defects of vehicles. But it is said first that it is severable,

and is good as to the remainder. I shall not undertake to say whether such a condition is partible or not. It is said, secondly, that the subsequent clause with respect to drovers cures any defect in the first and makes it binding. Now, the authorities no doubt show that a condition, which would otherwise be bad, may become good if a reasonable alternative be offered to the public. But to have this effect it must be left to the choice of the party to accept or decline that alternative And here it is not so. Therefore, if the oppurtunity of sending a drover could have removed the effect of the condition, it has not that result here, for no choice was offered.

But even suppose there were no such rule as this, this condition is admitted to be bad as to the greater part of it. In part it may be good, namely as to loading and unloading. If the company leave the loading and unloading to the owner, and the owner chooses to undertake it, I do not see why a stipulation exempting the company from risks of loading and unloading may not be good. But Mr. Field must go the length of saying that this applies also to defects of the station; and the owner's undertaking the unloading cannot affect the company's liability to provide a safe and proper place for the purpose. Therefore upon no view can the conditions protect against risks from defect of stations.

Then as to the other points. It is said that the delivery was complete. Suppose it to be so, that still leaves the obligation to provide a safe exit. And whether the plaintiffs servant contributed to the loss or not, the only substantial question was whether the defendants had discharged their duty of giving a safe means of transit and exit. As to this there was evidence on both sides; the jury have found for the plaintiff, and there is no reason to disturb their verdict The case of *Roberts* v. *The Great Western Railway Company* which has been cited, has no bearing upon this. The pleader there alleged an absolute duty to fence the station yard and it was held that no such duty existed. Upon all points the defendants have failed.

Martin, B.—I am of the same opinion It will be convenient, in the first place, to consider the case without reference to the conditions. [His Lordship stated the facts] Now, I think it is a fallacy to call what took place a delivery at all. Cattle are not like goods which can be put into the hand. In this case they were merely turned loose upon the defendants' own premises. Then, at common law, what would be the consequence of a man being sent in charge? I think it would be very like the case which has arisen of a nurse and child. If any injury occurred through the negligence of the drover, the company would not be liable; if by the negligence of their own servant, they would.

Then, look at the condition. It is clearly unreasonable as it stands. But assuming it to be divisable, and to be rendered reasonable in part by the stipulation as to drovers, still it can only be rendered reasonable so far as it relates to accidents arising through default of the drovers; and therefore it leaves the common law liability exactly as it was before. Either at common law or under the condition thus construed, if a man is sent in charge, whether his fare be paid or not, the company are not liable for injury arising from negligence in his department, but for other injuries they are.

Channell, B.—I am of the same opinion. The defendants' counsel would have done much, if they could have shown that there had been such a delivery as to put an end to their liability at common law, for they would then have displaced my brother Martin's view. But I do not think there was any such delivery as to determine their liability and exclude all question of safe delivery, and delivery in a safe place. I think, therefore, the verdict was right.

Then, as to the conditions. The question arises on a traverse of the bailment; and if the conditions be reasonable, the declaration is not proved. It is admitted that the first condition is bad as it stands; but it is said that it is rendered reasonable in either of two ways. First, it is said that we may strike out a part of it—that which relates to risks of carriage, and look only at the remainder, and that the remainder is then good. If it were necessary to decide, I should strongly think that such a condition is not severable. If it applied to several subject-matters, it might be otherwise, but not as to one subject-matter. But even if risks of carriage could be struck out, the condition would still remain unreasonable. But it is further said that the third condition cures the first. Now it cannot be better for the company than if it had come first, and been prefaced by "inasmuch as." Then reading it so, the whole remains clearly unreasonable if risks of carriage are included. Otherwise, loss from a collision, through the defendants' negligence, would be protected. And if risks of carriage be struck out, the defect is not cured, for there still remain defects of stations and places of unloading, against which the presence of drovers can afford no protection. And this is the actual cause of loss in the present case. On all points, therefore, I think the rule must be discharged.

Pigott, B., concurred.

Rule discharged.

—*Weekly Reporter.*

English Law Reports.—An erroneous idea seems to have taken possession of the legal mind in this country that the *New Law Reports* necessarily superseded all others.

That this is not the fact is palpable to us, for we are in possession of the latest numbers of the *Weekly Reporter*, now in its fifteenth year, which contain full and accurate reports of cases in all the courts, up to March 15th. These reports are authoritative, and the *Solicitors' Journal and Weekly Reporter* is now *the* journal of both branches of the profession in Great Britain. It would, in our opinion, be found a most useful and interesting addition to the library of every member of the profession, as it would enable him to keep pace with the progress of those reforms in the code and practice, which have so greatly improved English jurisprudence of late years.

It is published by Edward Johnston Milliken, Esq., 89 Casey St., Lincoln's Inn C. W.—*Philadelphia Legal Intelligencer.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR THE MONTHS OF JULY, AUGUST, SEPTEMBER, AND OCTOBER, 1866.

(*Continued from page* 112.)

Accruer.—*See* Deed.

Administration.

1. A decree having been made in an administration suit brought by the residuary legatees, it appeared that proceedings ought to have been taken in equity against one who had had dealings with the testator. The executor was willing to conduct them, and no case of misconduct was established against him. An order, giving the plaintiffs liberty to take proceedings in the name of the executor, was discharged on appeal, and the executor directed to take them.—*Harrison* v. *Richards*, Law Rep. 1 Ch. 473.

2. After decree in an administration suit, the court is not bound to disallow claims barred by the statute of limitations, if the personal representative, and such of those beneficially interested as are parties to the suit, or have come in under the decree, do not set up the statute; but the personal representative waives the objection of the statute at his own risk as against absent parties beneficially interested.—*Alston* v. *Trollope*, Law Rep. 2 Eq. 205.

See Executor; Marshalling of Assets.

Agent.—*See* Principal and Agent.

Agreement.—*See* Contract.

Ancient Light.—*See* Light.

Annuity.—*See* Will, 11.

Appeal.

1. Where a party enrolled a decree as quickly as the practice of the court allows, his knowledge that the other party intended to appeal is not a ground for vacating the enrolment.—*Hill* v. *Curtis*, Law Rep. 1 Ch. 425.

2. If evidence has been rejected on an inquiry in chambers adjourned into court, a party desiring to appeal should wait for the certificate, and then move to vary.—*Rhodes* v. *Rhodes*, Law Rep. 1 Ch. 483.

3. On the hearing of an appeal at quarter sessions against an order of justices for the payment of small tithes, &c., the respondent may adduce additional evidence.—*The Queen* v. *Hall*, Law Rep. 1 Q. B. 632.

4. A colonial court having revoked a leave to appeal, the privy council, under the special circumstances of the case, gave leave to appeal on security being given for costs in England.—*Webster* v. *Power*, Law Rep. 1 P. C. 150.

5. Judgments in several actions in a colonial court, in the nature of petitions of right, were obtained against the crown; in some of the cases the amount recovered was under the appealable value. The privy council gave leave to appeal without the colonial attorney-general giving security for costs, and directed the appeals to be consolidated.—*In re Attorney-General of Victoria*, Law Rep. 1 P. C. 147.

Arbitrator.—*See* Award.

Assault—*See* Conviction, 1.

Assumpsit.

The plaintiff, under a bill of sale, seized goods on the defendant's premises, and with his knowledge, but without any request by him, allowed them to remain till rent was due. The landlord having distrained them, the plaintiff paid the rent and expenses. *Held*, that he could not recover the amount so paid as a compulsory payment for the benefit or at the implied request of the defendant.—*England* v. *Marsden*, Law Rep. 1 C. P. 529.

Attainder.—*See* Descent.

Attorney.—*See* Solicitor.

Award.

1. A judge's order, made by consent of the plaintiff and defendant in a suit, referred all matters in dispute to an arbitrator, and directed that the parties should perform the award: subsequently, an indorsement, signed by both parties, was made on the order, that the arbitrator might order what the parties should do to prevent a repitition of the injuries complained of. The arbitrator having ordered the defendant to do certain things, and he having neglected to do them, *held*, that the plaintiff might bring an action for non-performance of the award.—*Lievesley* v. *Gilmore*, Law Rep. 1 C. P. 570.

2 A motion to set aside an award cannot be made, even with the consent of both parties, later than one term after the award has been published.—*In re North British Railway Co.*, Law Rep. 1 C. P. 401.

3. An award was made by commissioners acting under a statute, whereby they apportioned lands and a rent charge between the rectors of B. and the curates of U. *Held*, on bill by a curate of U., that, on the true construction of the statute, the commissioners had power to make the award, and *semble*, that, had they acted *ultra vires*, the court could not have rectified the award.—*Bateman* v. *Boynton*, Law Rep. 1 Ch. 359.

See Contract, 3.

Bailment.—*See* Carrier; Detenue.

Digest of English Reports.

Bankruptcy.

The obligation to pay money under an order of a court of equity is merely an equitable debt, and so is not a good ground for a petition for adjudication in bankruptcy.—*Ex parte Blencowe*, Law Rep. 1 Ch. 393.

Barratry.—*See* Collision, 1.

Bill of Lading.

A bill of lading represented more goods to have been shipped than really were. This arose from the mistake of the mate, which there was evidence to show was caused by the fraud of the person who put the goods on board. The latter was either agent of the shipper or of his vendor. *Held*, there was evidence for the jury, that the misrepresentation was caused "wholly by the fraud of the shipper or of the holder, or some person under whom the holder claimed," within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), § 3. —*Valieri* v. *Boyland*, Law Rep. 1 C. P. 382.

See Collision, 1; Freight.

Bills and Notes.

1. An acceptor for honor of a bill of exchange is liable to one who has discounted it on the faith of his acceptance, if the name of the maker is forged, and the payee who is purported to have indorsed it is a fictitious person.—*Phillips* v. *im Thurn*, Law Rep. 1 C. P. 463.

2. A railway company incorporated in the usual way cannot accept a bill of exchange; and this defence may be taken on a plea denying the acceptance, though the acceptance was ordered by the directors, and is under the seal of the company.—*Bateman* v. *Mid-Wales Railway Co.*, Law Rep. 1 C. P. 499.

See Freight.

Bond.

The plaintiff agreed to purchase of S. the ship D. for a sum of money and the transfer to S. of the plaintiff's ship L. He also agreed to lend S. £6,000, on mortgage of the L., and S. agreed to repair her, so as to class her eight years A 1 at Lloyd's; and also to do anything remaining to be done to the D. within two weeks after that ship's arrival in London. The defendant, as security for S., gave his bond to the plaintiff, conditioned to be void if S. forthwith repaired the L., and if S., within the said two weeks, did all that remained to be done to the D. The plaintiff and S. afterwards, without the defendant's knowledge, made another agreement, altering the terms relating to the completion of the D. *Held*, that the conditions in the bond were distinct and separate, and that the defendant, though released by the alteration from his liability in regard to the completion of the D., was not released from his liability in respect to the L.—*Harrison* v. *Seymour*, Law Rep. 1 C. P. 518.

Capital.—*See* Partnership, 2.

Carrier.

1. A common carrier of goods is not, in the absence of a special contract, bound to carry within a given time, but only within a time which is reasonable, looking only to the circumstances of the case; and therefore the defendants, a railway company, are not liable for damage to goods arising from delay which was caused by an unavoidable obstruction, resulting solely from the negligence of another company, who, by agreement with the defendants, sanctioned by statute, had running powers over the defendants' line.—*Taylor* v. *Great N. Railway Co.*, Law Rep. 1 C. P. 385.

2. An injunction was prayed by A. against a railway company, under 17 & 18 Vict. c. 31, § 3, to restrain them from unduly prejudicing A., by refusing to admit, after a certain hour, goods collected by A., and by receiving at a later hour goods collected by themselves and by B., to be forwarded the same night. It appeared that the hour was reasonable; that the company, in admitting their own goods, acted without intending to gain an advantage over other collecting carriers; and that they admitted B.'s goods in consequence of an injunction obtained by him. In two similar cases, injunctions had been granted to restrain railway companies from admitting their own goods at a later hour than those of others. *Held* (by Erle, C. J., and Montague Smith, J.), that the exercise of this jurisdiction, being subject to no review, and depending on the special facts of each case, cases previously decided under it are not binding as precedents of law are binding, and that the injunction prayed would interfere with traffic, and ought not to be granted. *Held* (by Willes and Keating, JJ.), that the above cases were binding precedents, and were also rightly decided; and that the injunction ought to be granted.—*Palmer* v. *London and S. W. Railway Co.*, Law Rep. 1 C. P. 588.

See Collision; Stoppage in Transitu.

Charter Party.—*See* Freight.

Collision.

The provision in the 17 & 18 Vict. c. 104, § 299, that a loss, arising from the non-observance by a ship of the rules laid down in the act, shall be deemed to have been occasioned by the wilful default of the person in charge of the deck, does not render an unintentional breach of the rules barratry.

A collision arising from the negligence of the crew is not damage of the seas within the meaning of an exception in a bill of lading.

Therefore, if a ship-owner, by a bill of lading, undertook to deliver goods safely, "barratry of master or mariners, accidents or damage of the seas or navigation excepted," and the ship came into collision with another by starboarding her helm contrary to the rules of the above act, and sank and was lost, the ship-owner was liable for the loss of the goods.—*Grill* v. *General Iron-Screw Collier Co.*, Law Rep. 1 C. P. 600.

See Evidence, 1.

Commission to Examine Witnesses.

1. A commission was issued to examine witnesses by interrogatories and *viva voce*. An agent, appointed by the defendants to execute the commission, conducted the examination entirely *viva voce*, not putting the written interrogatories that had been prepared. *Held* at the trial, against the defendant's objection, that the deposition was admissible, there being no suggestion that any advantageous question had been omitted. — *Grill* v. *General Iron Screw Collier Co.*, Law Rep. 1 C. P. 600.

2. A requisition, with interrogatories and cross-interrogatories annexed, issued to a French court to examine a witness. The judge of that court, having the interrogatories and cross-interrogatories before him, examined the witness by putting such questions as he deemed convenient; and no questions were put or suggested by the counsel and agents of the parties who were present. The court of divorce doubted whether the deposition was admissible, but declined to reject it.—*Hitchins* v. *Hitchins*, Law Rep. 1 P. & D. 153.

Common Carrier.—*See* Carrier.

Company.—*See* Corporation.

Conflict of Laws.—*See* Executor, 3; Will, 13.

Contract.

1. By a written agreement, A. agreed to purchase from B. certain lands, and all the mines of coal, &c., under the same, at a certain price; and B. agreed to purchase from A. all coal that he might from time to time require, at a fair market price. *Held*, that A. could not sue B. for not taking the coal, without averring a readiness to perform his part of the agreement. *Bankart* v. *Bowers*, Law Rep. 1 C. P. 484.

2. A. contracted with B. to erect machinery on the latter's premises, the works being divided into different parts, but no time fixed for payment. All the parts were far advanced towards completion; some were so nearly finished that B. had used them, but no one was entirely complete, though much of the necessary material was on the premises, when the premises, with the machinery and materials, were destroyed by an accidental fire. *Held*, that A. could not recover the whole contract price; but that, as the machinery was to be fixed to B.'s premises, so that the parts of it, when fixed, would become his property, and as the contract involved an implied promise on B.'s part to keep up the building, A. could recover the value of the work and materials actually done and provided under the contract *Appleby* v. *Meyers*, Law Rep. 1 C. P. 615.

3. A railway company agreed with a contractor, that, if he should be guilty of any delay, they might take the execution of the works out of his hands, and might use all or any of his plant or materials; that, in addition to all other rights and remedies, they might apply any moneys to which the contractor would otherwise be entitled in satisfying all losses or expenses occasioned by the delay; and that all the plant and materials, at the time of the delay, in or about the site of the works, should thereupon become the absolute property of the company and be valued or sold, and the amount of such valuation or sale credited to the contractor, in reduction of the moneys (if any) recoverable from him; but that the company should not be bound to use the plant and materials. The company under this agreement having taken the execution from the contractor, he brought an action for breach of contract, which, with all matters in difference was referred to arbitration. *Held*, that the plant and materials did not become the property of the company, unless loss or expense had been occasioned; and they were restrained, by an interlocutory injunction from removing and selling the plant and materials pending the arbitration. —*Garrett* v. *Salisbury and Dorset Junction Railway Co.*, Law Rep. 2 Eq. 358.

See Assumpsit, 1-3; Corporation; Covenant; Frauds, Statute of; Principal and Agent, 1; Sale; Specific Performance; Warranty.

Conviction.

1. The 24 & 25 Vic. c. 100, sec. 45, makes a conviction before a magistrate a bar to a civil action for the same assault. A police magistrate, after hearing a case of common assault, ordered the accused to enter into recognizances and pay the recognizance fee, but did not order him to be imprisoned or to pay any fine. *Held*, that this was not a conviction within the statute. — *Hartley* v. *Hindmarsh*, Law Rep. 1 C. P. 553.

2. A conviction before a magistrate can be proved only by the production of the record of the conviction or an examined copy.—*Hartley* v. *Hindmarsh*, Law Rep. 1 C. P. 553.

Corporation.

1. The plaintiff supplied coals to the defendants, a corporation, the guardians of a poor-law union, for the use of their workhouse, under a written agreement executed by the plaintiff, but not under the seal of the defendants. The defendants received the coals, used some of them, and offered to return the rest. In an action for goods sold and delivered, *held*, that as the coals had been supplied and accepted, and were such as must necessarily be supplied for the purposes for which the defendants were incorporated, the defendants were liable for all that they had received, though the contract was not under seal.—*Nicholson* v. *Bradfield Union*, Law Rep. 1 Q. B. 620.

2. Where the corporation of a city had been empowered by a statute to make certain public improvements, and for that purpose to take land compulsorily, to raise money on the credit of it, and to sell superfluous land to pay off the debt; such statute, though only impliedly authorizing the taking of more land than is absolutely necessary for the desired improvements, may be construed more favorably to them, being an existing public body, than it would be to persons on whom special powers had been conferred by Parliament for a particular purpose: lands so taken may be treated as taken "for the purposes of the statute;" and a contract made by the corporation with another person, to obtain lands under the statute and sell them to such person, as soon as the statute shall pass, is not illegal.—*Galloway* v. *Mayor and Commonalty of London*, Law Rep. 1 H. L. 34.

3. A corporation was instructed by statute to maintain certain public docks, to receive tolls for their use, and to appoint a harbor-master, who should have power of regulating the entry of vessels. *Held*, that the corporation was liable for damage caused by the negligence of its harbor-master, although the tolls were not applicable to the use of the corporators or corporation, but only to the maintenance of the docks.—*Mersey Docks Trustees* v. *Gibbs*, Law Rep. 1 H. L. 93.

4. The prospectus of a mining company described in favorable terms a mine, the purchase of which had been contracted for, and referred to the articles which empowered the directors to carry out or rescind any contract. The mine proving worthless, the directors rescinded the contract, and agreed to purchase another. *Held*, that a shareholder who had subscribed on the faith of facts stated in the prospectus, which were false, and which the directors had no reasonable cause to suppose true, should have an injunction against an action for calls.—*Smith* v. *Reese River Co.*, Law Rep. 2 Eq. 264.

5. A prospectus of a company stated that a certain invention, for working which the company was formed, had been tested, and that, according to experiments, the material could be produced at a specified cost, but that it was intended to test the invention further: the invention turned out worthless, but there had been some testing. *Held*, that there was not such misrepresentation as would enable a purchaser of shares to set aside the contract, especially where he had not sought redress in a reasonable time.—*Denton* v. *Macneil*, Law Rep. 2 Eq. 352.

6. A trading company can give a bill of sale as security for work done for them.—*Shears* v. *Jacob*, Law Rep. 1 C. P. 513.

See Equity Practice, 6-7; Production of Documents, 2; Railway.

Covenant.

The owner of Blackacre mutually covenanted with the owner of Whiteacre to bear the expense of repairing a way for their joint use, in proportion to the area of their said properties, by a deed containing a proviso, that the expense of such repair should be considered as a charge in equity, and, as far as circumstances would admit, at law also, on the owners for the time being of the said properties. *Held*, that this proviso did not create a charge on the lands, and therefore that, on the registration of Blackacre with an indefeasible title, under 25 & 26 Vic. c. 53, the owner of Blackacre was not entitled to have notice of the proviso recorded.—*Drew's Estate*, Law Rep. 2 Eq. 206.

See Contract; Lease.

Criminal Law.

The 2 & 3 Vic. c. 71, sec. 24, which enacts that any one brought before a magistrate, charged with having in his possession, or conveying in any manner, any thing which may be reasonably suspected of being stolen, and who shall not give an account to the magistrate's satisfaction of how he came by the same, shall be guilty of a misdemeanor, is supplemental only to 2 & 3 Vic. c. 47, and the sections apply only to things in the streets, and not in a house.—*Hadley* v. *Perks*, Law Rep. 1 Q. B. 444.

See Conviction; Embezzlement; Larceny.

Digest of English Reports.

Damages.

1. In an action for fraudulently misrepresenting that a cow sold to the plaintiff was free from infectious disease, if the plaintiff has placed the cow with five others, who have caught the disease and died, the plaintiff can recover as damages the value of all the cows. —*Mullett* v. *Mason*, Law Rep. 1 C. P. 559.

2. One who for his own purposes brings, collects, and keeps on his land any thing likely to do mischief if it escapes, must keep it in at his peril, and is *primâ facie* answerable for all damage which is the natural result of its escape, without proof of negligence on his part. —*Fletcher* v. *Rylands*, Law Rep. 1 Ex. 265.

3. If the plaintiff fails to establish any agreement of which special performance can be directed, a court of equity cannot grant relief in damages under 21 & 22 Vic. c. 27.—*Lewers* v. *Earl of Shaftesbury*, Law Rep. 2 Eq. 270.

See Easement; Escape; Lease, 1; Light, 2, 3; Pleading, 2.

Deed.

By voluntary deed a settlor gave property to A., B., C., and D., in equal shares. He provided, that, if any of the four should die in his lifetime, leaving issue, the share of her so dying should be in trust for her children; and that if any of the four should die in his lifetime, without leaving issue, her share should go over and be added to the other shares. A. and B. were dead at the date of the deed, the former leaving issue, the latter without issue; but *held*, that the gifts over of their shares did not fail. —*Barnes* v. *Jennings*, Law Rep. 2 Eq. 448.

See Covenant.

Deposition.—*See* Commis. to Examine Witnesses.

Descent.

A marriage in a foreign country by one who has been attainted of treason and escaped thither, and who was afterwards executed on the same attainder, is valid and the children legitimate; and, as the descent of property between brothers is immediate, the descendants of one of the children can inherit property from the descendants of another.—*Kynnaird* v. *Leslie*, Law Rep. 1 C. P. 389.

Detinue.

A. deposited debentures with B. as security for the payment of a bill at maturity, on the agreement that B. might sell or otherwise dispose of the debentures, if the bill should not be paid when due. Before the maturity of the bill, B. deposited the debentures with C., to be kept as security till the repayment of a loan from C. to B. larger than the amount of the bill. The bill was dishonored; and, while it was still unpaid, A. brought detinue against C. for the debentures. *Held* (by Cockburn, C. J., Blackburn and Meller, JJ.; Shee, J., *dissenting*), that A. could not maintain detinue without having tendered the amount of the bill.—*Donald* v. *Suckling*, Law Rep. 1 Q. B. 585.

Devise.—*See* Will; Separate Estate, 2; Vested Interest, 1.

Discovery.—*See* Patent, 2; Production of Documents.

Domicil.—*See* Executor, 3; Will, 13.

Easement.

A. dug a well near B.'s land, which sank in consequence, and a building, erected on it within twenty years, fell. It was proved that if the building had not existed, the land would still have sunk, but the damage would have been inappreciable. *Held*, that B. had no cause of action against A.—*Smith* v. *Thackerah*, Law Rep. 1 C. P. 564.

See Watercourse.

Embezzlement.

One employed to get orders and receive payment for goods, but who is at liberty to get the orders and receive the money where and when he thinks proper, and is paid by a commission *on the goods sold, is not a clerk or servant* within 24 & 25 Vict. c. 96, § 68, against embezzlement.—*The Queen* v. *Bowers*, Law Rep. 1 C. C. 41.

Equity Pleading.—*See* Equity Practice.

Equity Practice.

1. Under an order to amend by adding parties, the plaintiff cannot introduce allegations making a new case against the original defendants, though material as to the new defendants.—*Barlow* v. *McMurray*, Law Rep. 2 Eq. 420.

2. In an *ex parte* examination, the examiner ought not to refuse to allow questions to be put, unless on matters clearly and palpably not evidence.—*Surr* v. *Walmsley*, Law Rep. 2 Eq. 439.

3. A defendant cannot add a new issue of fact, not in any way suggested by his answer to the issues already directed for trial.—*Morgan* v. *Fuller* (1), Law Rep. 2 Eq. 296.

4. A decree dismissing a bill was by arrangement passed and entered at the registrar's office by the defendant's solicitor, acting, as the registrar knew, on behalf of the plaintiff. The defendant's solicitor afterwards obtained it from the office, and enrolled it. *Held*, that the decree ought not to have been delivered except to the plaintiff's solicitor; and, as the irregularity had delayed the plaintiff in appealing, the enrollment should be vacated.—*Fryer* v. *Davis*, Law Rep. 1 Ch. 390.

5. When a sole plaintiff dies, the suit may be revived after decree without bill filed.—*Colyer* v. *Colyer*, Law Rep. 1 Ch. 482.

6. A defendant, by putting in an answer, has not waived his right of calling on a plaintiff company to give security for costs, if, at the time of answer, he had not reason to believe that the plaintiff's assets were insufficient to pay costs; nor is he deprived of such right by having himself sued the plaintiffs, if the plaintiffs' bill is more than a mere defence to his bill. —*Washoe Mining Co.* v. *Ferguson*, Law Rep. 2 Eq. 371.

7. A limited company, when plaintiff in equity, may be required to give costs to an amount greater than £100.—*Imperial Bank of China* v. *Bank of Hindustan*, Law Rep. 1 Ch. 437.

See Appeal, 1, 2; Interrogatories, 3, Patent; Production of Documents; Service of Process.

Escape.

In an action for an escape, the jury, in estimating the value of the custody, may take into account not only the debtor's own means, but all reasonable chances, founded on his position in life and surrounding circumstances, that any part of the debt would have been paid had he remained in custody.—*Macrae* v. *Clarke*, Law Rep. 1 C. P. 403.

Estate by Implication.—*See* Trust.

Estoppel.—*See* Husband and Wife; Patent, 1.

Evidence.

1. In a case of collision, the books containing the entries made by the coast-guard, and sent to the coast-guard office, are admissible to show the state of the weather at the time of collision, without calling the person who made the entries.—*The Catharina Maria*, Law Rep. 1 Adm. & Ecc. 53.

2. A statute enacted that the court might make a certain order on production of a certificate signed by the speakar of the House of Commons. The standing orders of the House provide, that, in the unavoidable absence of the speaker, the deputy speaker may perform his duties and exercise his authority. *Held*, that the court would take notice of the standing orders of the House, and the order was made accordingly.—*Stockbridge* v. *Railway Bill*, Law Rep. 2 Eq. 364.

See Appeal, 5; Collision, 2, 3; Commission to Examine Witnesses; Conviction, 2; Equity Practice, 4; Insurance, 3; Interrogatories; Jurisdiction, 2; Negligence, 4; Patent, 2, 3; Production of Documents; Trustee; Vendor and Purchaser, 4; Will, 1.

Execution.—*See* Interpleader, 3; Negligence, 3; Practice (at Law), 3.

Executor.

1. A married-woman executrix, who has proved the will and survived her husband, is liable for a *devastavit* committed by him when alive.—*Soady* v. *Turnbull*, Law Rep. 1 Ch. 494.

2. A. died, leaving his wife B. sole executrix and residuary legatee. She proved the will, married, made a will under a power, appointing C., her daughter by the first husband, her sole executrix and residuary legatee, and died, leaving her second husband and C. surviving. C. took limited probate of her will, and afterwards, with the consent of B.'s husband, who had assigned her all his interest in the residue of his wife's estate, administration of the rest of her personal estate. *Held*, that C. was entitled to administration of the unadministered goods of A.—*Goods of Richards*, Law Rep. 1 P. & D. 156.

3. A testator, domiciled in the Isle of Man, by deed duly executed as a will, conveyed his property to a trustee, on trust, to pay the income to his widow for life, and on her death to divide it among his children. The ecclesiastical court of the Isle of Man granted probate of it to the trustee, as executor according to the tenor. The court of probate followed this grant so far as to admit the document to probate, without inquiring whether or not it was testamentary, but not so far as to make the grant to the trustee as executor according to the tenor. Being satisfied that the testator intended to deprive the widow, who was primarily entitled to the grant, of any control over the administration, the court decreed administration with the will annexed to the trustee, under 20 & 21 Vict. c. 77, § 73.—*Goods of Cosnahan*, Law Rep. 1 P. & D. 183.

See Administration; Marshalling of Assets; Will, 3, 10.

Forgery.—*See* Bills and Notes, 1; Vendor and Purchaser of Real Estate, 2.

Frauds, Statute of.

1. A written proposal, signed by the party to be charged, and accepted by parol by the party to whom it is made, is a sufficient memorandum to satisfy the fourth section of the Statute of Frauds. — *Reuss* v. *Picksley*, Law Rep. 1 Ex. 342.

2. A. sold some cheeses and candles, and sent an invoice of them to B.; B. returned the invoice with a note, signed by him on the back, to the following effect: "The cheese came to-day, but I did not take them in, for they were badly crushed. So the candles and cheese

is returned." *Held*, that the invoice and note constituted a sufficient memorandum to satisfy the Statute of Frauds.—*Wilkinson* v. *Evans*, Law Rep. 1 C. P. 407.

3. The following memorandum, "A. agrees to buy the marble purchased by B., now lying at L., at 1*s.* per foot," does not bind A.; because, in a valid memorandum of a contract for sale under the Statute of Frauds, § 17, the names of the parties to the contract must appear as such parties, and B. is not here mentioned as a seller.—*Vandenbergh* v. *Spooner*, Law Rep. 1 Ex. 316.

Freight.

Goods were shipped on the plaintiff's account under a charter-party between M. and the owner of the vessel, whereby and by the bill of lading they were deliverable to A., "to order or assigns," on payment of freight as per charter-party. The charter-party provided: "The freight to be paid on delivery, less advances in cash; one-half of the freight to be advanced by freighter's acceptance at three months, on signing bills of lading; owner to insure the amount, and deposit with charterer the club policy, and to guarantee same." M. gave his acceptance at three months' date for one-half of the freight to the ship-owner, who indorsed on the bill of lading: "Received on account of the within freight, 300*l.*, as per charter-party." M. indorsed the bill of lading in blank, and forwarded it to the plaintiff at A., who, on the ship's arrival before the expiration of the three months, demanded the goods on payment of the balance of the freight; but the master having learned of the bankruptcy of M., refused to deliver the goods unless a guarantee was given for the payment of the full freight. Such guarantee was given, and the full freight finally paid under protest. *Held*, that the ship-owner had no lien on the cargo for the half-freight represented by M.'s acceptance, and that the plaintiff could recover back the money paid by him.—*Tamvaco* v. *Simpson*, Law Rep. 1 C. P. 363.

Guardian.

Three applications were made for the guardianship of infants, one for the appointment of H., their maternal grandmother; another for the appointment of A. and B., their paternal aunts, both married women; the third for the appointment of C., a friend of the family. *Held*, discharging an order of Stuart, V. C., appointing B. sole guardian, that, though the discretion of a judge appointing a guardian ought not to be interfered with, except on very strong grounds, yet H. and C. should be appointed guardians, because (1) the appointment of a married woman to be sole guardian was improper; (2) the vice-chancellor had not approved of A., who was acting with B.; (3) the father had shown great confidence in H., and allowed the children, who had very little intercourse with his relations, to live much with her; and (4) their mother, though she had no power to appoint guardians, had made a will purporting to appoint H. and C. guardians.—*In re Agar* Law Rep. 1 Ch. 387.

Highway.

A certificate of justices under 5 & 6 Wm. IV. c. 50, § 85, for diverting a highway, is valid though it alleges that a new highway is more commodious, without alleging that it is nearer, and though it states that the old highway "will be" unnecessary when the proposed alterations are completed; and the addition of land to an old highway, so as to widen it and make it more commodious, is a sufficient substitution of a new highway.—*The Queen* v. *Phillips*, Law Rep. 1 Q. B. 648.

See Turnpike.

GENERAL CORRESPONDENCE.

Our Law Reports and Reporters.

To the Editors of the Law Journal.

Gentlemen,—The Benchers having taken the matter of the Law Reporting into their especial care, the profession naturally expected such changes as would conduce to perfecting the system of reporting, ensure promptness in placing the reports in their hands, and leave little, if any, room for complaints or fault-finding. It is to be regretted that such a result has not ensued. Before a Chancery Chamber Reporter was specially appointed by the Society we did receive with moderate promptitude, and with most creditable accuracy, reports of Chamber decisions, edited and conducted by the Chancery Reporter, Mr. Grant, and a most valuable volume such decisions have made. The only complaint *then* was, that they were not produced with sufficient rapidity—the value of a decision affecting the practice of our courts, is to have it promulgated as quickly as possible.

In consequence of the present arrangement Mr. Grant has ceased to report Chamber decisions, and Mr. Cooper, the gentleman appointed three months since, *has not commenced* (at any rate the profession have nothing as the result of his labours). The profession

will have to look to your *Journal* for these reports. Before his appointment Mr. Cooper started a volume of Chamber Reports known as "Cooper's Chancery Chamber Reports," since his appointment he has discontinued that work, so that by the *intended* beneficial arrangements of the Society we are deprived of Mr. Grant's labours, of the continuation of Mr. Cooper's own selection, "Cooper's Chambers Reports," and Mr. Cooper's (as appointed Reporter) "Chancery Chamber Reports."

Your obedient servant,

A Solicitor.

Wellington, April 30, 1867.

REVIEWS.

The Municipal Manual for Upper Canada. By Robert A. Harrison, D.C.L., Barrister-at-Law. Second edition. Toronto: W. C. Chewett & Co.

(From the *Leader*, May 11, 1867.)

We acknowledge with pleasure the receipt of the above, containing as the title inform us, "The new Municipal and assessment act, with notes of all decided cases, some additional statutes and a full index."

As compared with the learned editor's first manual, the present is much more complete and valuable, in the first place from the more consolidated form in which the legislation affecting municipal matters, has been put under the new act; in the next place from the number of doubts as to construction and interpretation which have been removed by the court, and which have been carefully collected and noted; and again from the increased experience of the editor and the greater thought and research displayed, and lastly owing to the improved appearance and "get up," so to speak of the volume before us.

The subject of contested elections is treated in an exhaustive manner and the experience of the editor, being constantly retained in cases of contested elections, renders his notes and collection of cases on this subject all the more useful.

Our readers can perhaps better judge of the value of the work by a few extracts taken at random; for example—section 73 as amended by chapter 52 of the same section, regulates the subject of disqualification of candidates for municipal honors, enacting amongst other things that no person interested in a contract with a corporation shall be qualified as a member of such corporation. In one of the notes to this section, he says:—

"The object of this part of the section, like that of sec. 28 of the English Mun. Cor. Act of 5 & 6 Wm. IV. cap. 76, is clearly to prevent all dealings on the part of the Council with any of its members in their private capacity, or, in other words, to prevent a member of the Council, who stands in the situation of a trustee for the public, from taking any share or benefit out of the trust fund, or in any contract in the making of which he, as one of the Council, ought to exercise a superintendence. (Rawlinson's Mun. Man. 58.) The evil contemplated being evident, and the words used general, they will be construed to extend to all cases which come within the mischief intended to be guarded against, and which can fairly be brought within the words, *Ib.* The words of our enactment are that "no person having by himself or his partner an interest in any contract with or on behalf of the corporation shall be qualified, &c.;" and the words in the English Act are that "no person shall be qualified, &c., who shall directly or indirectly, by himself or his partner, any share or interest in any contract *or employment* with, by, on or behalf of such Council, &c." The difference deserves to be noticed. Under an old act, of which the section here annotated is a re-enactment, it was held that a person who had executed a mortgage to the corporation containing covenants for the payment of money, was disqualified. *The Queen ex rel. Lutz* v. *Williamson*, 1 U. C. Prac. Rep. 91. Where defendant, before the election, had tendered for some painting and glazing required for the city hospital, and his tender having been accepted, he had done a portion of the work, for which he had not been paid, but afterwards refused to execute a written contract prepared by the City Solicitor, and informed the Mayor of the city that he did not intend to go on with the work, he was notwithstanding held to be disqualified. *The Queen ex rel Moore* v. *Miller*, 11 U. C. Q. B. 465. So where the person elected had tendered for the supply of wood and coal to the corporation. *The Queen ex rel Rollo* v. *Beard*, 1 U. C. L. J., N. S. 123. In such a case it is immaterial whether there is or is not a contract binding on the corporation, *Ib.* So where it was shown that the candidate elected was at the time of the election surety for the Treasurer of the Town and acting as the Solicitor of the Corporation, he was held to be disqualified. *The Queen ex rel. Coleman* v. *O'Hare*, 2 U. C. Prac. Rep. 18. So a surety in any sense to the Corporation. *The Queen ex rel. McLean* v. *Wilson*, 1 U. C. L. J., N. S, 71. Whether the contract be in the name of the party himself or another, is immaterial, at all events in equity. *Collins* v. *Swindle*, 6 Grant, 282; see also *City of Toronto* v. *Bowes*, 4 Grant, 489, S. C. 6 Grant 1. But an agent of an insurance company paid by salary or commission, who both before and since the election, had, on behalf of his company, effected insurances on several public buildings the property of the corporation, and who at the time of the election had rented two tenements of his own to the Board of School Trustees, for Common School purposes, was held not to be disqualified. *The Queen ex rel. Bugg* v. *Smith*, 1 U. C. L. J., N. S., 129.

"*Quære*, is insolvency a ground of disqualification for election? It is not made so in express terms, but as hereafter declared a forfeiture of office. See sec. 121; see also *The Queen* v. *Chitty*, 5 A. & E. 609."

To make this note more complete we find in the "additions and corrections" at the end of the volume, reference to late cases of *Reg. ex Piddington* v. *Riddell* and *Reg. ex rel. Mack* v. *Manning*, which were not decided until after the first part of the book had been printed.

Great change had been made in the law by the last act, most of which however are by this time so familiar to our readers that it is unnecessary to refer to them at length. The one which principally affects ratepayers, at least in cities, towns and villages, at the present time is making *actual value* the basis of assessment. Ratepayers in counties, and townships who have been used to this do not feel the same difficulty. The perplexity which has evidently taken possession of the minds of the former class on this subject, is great, and time only can accustom persons who will not take the trouble, or who are not capable of thinking over the matter in a reasonable temper, to the change.

In connection with this we may quote the note to section 30 of the Assessment Act.

"There is nothing that men so much differ about as the value of property. It is, to a great extent, a matter of opinion. Men's opinions on such a subject are very materially affected, more so than they are perhaps aware of, by the point from which they consider it. A man who is impressed with a consideration of how much a thing is worth, will entertain a widely different opinion from him who simply looks at it as a thing to be purchased in expectation of profit whether by the employment of it or selling it again. Per Draper, C. J. in *McCuaig* v. *The Unity Fire Insurance Company*, 9 U. C. P. 88. Perhaps, after all, the best standard of value is that mentioned in this section—'actual cash value,' such as the propriety would be appraised 'in payment of a just debt from a solvent debtor.' (See further notes to sec. 179.) But it is no defence to an action for taxes, that the property was excessively rated. *The Municipality of London* v. *The Great Western Railway Company*, 17 U. C. Q. B 267. The only remedy in such a case is by appeal to the Court of Revision. (Ib.)"

The powers and duties of assessors, collectors and Courts of Revision are also fully treated of, and the information as to the various points arising under the assessment law especially recommends the book to all those not only connected with the administration of the law, but to all persons complaining of improper assessments, and this may be taken note of in these days of complaints innumerable.

The appendix of additional statutes adds to the practical use of the book and leaves scarcely anything unnoticed which affects the municipal laws of Ontario; whilst a well arranged index gives the key wherewith to unlock the store of knowledge contained in the preceeding pages.

The price of the book, well printed on good paper and substantially bound in full lawsheep is only $4 00, and as the edition is limited we should recommend parties wishing to purchase to do so speedily.

The Canadian Conveyancer and Hand-Book of Legal Forms, with Introduction and Notes. By J. Rordans. Second Edition. Toronto: W. C. Chewett & Co., 1867. 8vo.

This is a second edition of the useful little compendium issued by Mr. Rordans in 1859.

To the professional man who can provide himself with the elaborate works of Davidson and others on Conveyancing, &c., this volume might not be of much value; but to others it is found of much practical benefit, and all will find in it many forms which are not otherwise attainable without the loss of time and trouble. The size of the volume before us is more compact than the former edition, and appears to contain more information.

The Introduction gives a sketch of the laws relating to real property in the Province of Ontario, and may be read with advantage by students and others desiring elementary information on the subject.

APPOINTMENTS TO OFFICE.

CLERKS OF COUNTY COURT.

CLARENCE C. RAPELJE, Esquire, to be Clerk of the County Court, in and for the County of Norfolk. (Gazetted April 27, 1867.)

NOTARIES.

ANGUS MORRISON, Esquire, Barrister-at-law, to be a Notary Public for Upper Canada. (Gazetted April 13, 1867.)

JOSEPH ROOK, of Clarksburg, Esquire, to be a Notary Public for Upper Canada. (Gazetted April 13, 1867.)

FREDERICK HENRY STAYNER, of Toronto, Esquire, Attorney-at-law, to be a Notary Public for Upper Canada. (Gazetted April 27, 1867.)

STEPHEN FRANCIS GRIFFITHS of the Village of Ollsprings, Esquire, Attorney-at-law, to be a Notary Public for Upper Canada. (Gazetted April 27, 1867.)

WILLIAM McKINLAY, of the Village of Thamesville, Esquire, Attorney-at-law, to be a Notary Public for Upper Canada. (Gazetted April 27, 1867.)

GEORGE MILNES MACDONNELL, of Kingston, Esquire, Barrister-at-law, to be a Notary Public for Upper Canada. (Gazetted April 27, 1867.)

CORONERS.

CHARLES SCHOMBERG ELLIOT, of Orillia, Esquire, M.D., to be an Associate Coroner for the County of Simcoe. (Gazetted April 6, 1867.)

HENRY USSHER, of Walkerton, Esquire, M.D., to be an Associate Coroner for the County of Bruce. (Gazetted April 6, 1867.)

DANIEL CLINE, of the Village of Belmont, Esquire, M.D., to be an Associate Coroner for the County of Middlesex. (Gazetted April 6, 1867.)

J. P. KAY, of Belmore, Esquire, M.D., to be an Associate Coroner for the County of Bruce. (Gazetted April 6, 1867.)

JAMES MURPHY, of the Village of Teeswater, Esquire, M.D., to be an Associate Coroner for the County of Bruce. (Gazetted April 27, 1867.)