Canada Law Journal.

Vol. XVII. NOVEMBER 1, 1881. No. 20.

DIARY FOR NOVEMBER.

1. Tu... Harrison, C. J., died. Second Intermediate Exam
2. Wed.. Second Intermediate Examination.
3. Thur.. Draper, C. J., died 1877. First Intermediate Exam.
4. Fri.. First Intermediate Examination.
5. Sat... Sir. J. Colborne, Lieut.-Governor, U. C., 1838.
6. Sun.. *21st Sunday after Trinity.*
8. Tu.. Primary Examination. Court of Appeal sittings begin.
9. Wed.. Primary Examination.
10. Thur.. Primary Examination. University Men.
13. Sun.. *22nd Sunday after Trinity.*
16. Wed.. Wilson, J. Q. B., & Gwynne, J. C. P. 1868. Final [Exam. for Attorney.
17. Thur.. Final Examination for Call.
18. Fri.. Hagarty, C. J., sworn in C. J. of Q. B. Wilson, J. [sworn in C. J. of C. P. 1878. Final Exam.
19. Sat..
20. Sun.. *23rd Sunday after Trinity.*
21. Mon.. Michaelmas Term begins.
25. Fri.. Lord Lorne, Governor-General of Canada, 1878.
27. Sun.. *Advent Sunday.* Cameron, C. J., sworn in Q. B., [1878.
28. Mon.
30. Wed.. Moss. appointed C. J. of Appeal, 1877.

TORONTO, NOV. 1, 1881.

We have much pleasure in calling the special attention of our readers to an article in this issue, contributed by Mr. Alpheus Todd, C. M. G., the learned author of the well known works on Parliamentary Government in England and the Colonies, upon the subject of the proper constitutional method of dealing with complaints against the Judiciary. In addition to its intrinsic merit, the article will be read with especial interest in the light of recent events in Manitoba.

The *Law Journal* (Eng.) reproduces, in one of its latest numbers, an interesting and kindly letter recently written by Lord Justice Bramwell to the author of an article in the *Central Law Journal* of St. Louis, who sustained the view expressed by him in *Osborne* v. *Gillett*, 42 Law J. R., Exch. 53. In that case the learned Baron (as he was then) held that an action was maintainable by a father for negligence, whereby "the plaintiff's daughter and servant" was killed. Kelly, C. B., and Pigott, B., on the other hand, held that the maxim *actio personalis moritur cum persona* applied. A copy of the article was sent to the Lord Justice, who acknowledged it by the letter in question, in which he enclosed a photograph of himself in his judicial wig and robes. The letter was as follows, and well deserves to be placed on record :—

Dear Sir,—I am much obliged to you for the number of the *Central Law Journal.* I have read your article with great interest. I am glad to see that on your side of the Atlantic the law is dealt with on higher considerations than profit and loss. I am somewhat ashamed to think that you, for mere love of our science, have brought more research and learning to bear on the question you discuss, than I did when it was before me as a matter of duty. I am prone to decide cases on principle, and when I think I have got the right one (I hope it is not presumption), like the Caliph Omar, I think authorities wrong or needless. However, it is gratifying to be confirmed by them, as you confirm my opinion in *Osborne* v. *Gillett.* I am also very much gratified by the kind and flattering way in which you speak of me. Perhaps the reason you know me in America as well as you do, is the length of time I have been on the bench—twenty-five and a half years—longer than any one else now living by about four years ; so that I have had the time to be more chronicled than any one else, and I suppose I have made an average use of it. I can assure you I am very glad to have the good opinion of lawyers on your side of the water—none the less that they are young. I may, without vanity, say that all the "young ones" at our bar consider me their particular friend. I was in your city in 1853 only one night, during a long vacation ramble ; but for the twenty-five and a half years, and about forty-eight more, I would pay

the States another visit. Repeating the expression of pleasure at your communication,

Yours faithfully,

G. BRAMWELL.

COMPLAINTS AGAINST THE JUDICIARY.

Since confederation, several petitions have been presented to the Canadian House of Commons, against certain of the Judges, for alleged misconduct in office. These applications were received pursuant to section 99 of the British North America Act, which provides that "the judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons."

This provision, it need scarcely be said, is similar to the law of England which—ever since the accession of the House of Hanover—has made the judges independent of executive control, and subject to removal only upon an address from both Houses of Parliament.

From the proverbial integrity and uprightness which has distinguished the occupants of seats on the Bench in the Mother Country, it has rarely happened that there has been occasion to appeal to Parliament against a judicial functionary in the United Kingdom. But when such necessity has arisen, the proceedings instituted against the presumed offender have been noted for their gravity, deliberation and decorum. A few leading precedents have served to establish the mode of procedure in such cases, upon lines calculated to ensure the ends of justice, and likewise to uphold the dignity of Her Majesty's Courts.

In the British colonies, prior to the concession of parliamentary government, a remedy against judicial misconduct was provided by recourse to the provisions of an Imperial statute, passed in 1782, (22 Geo. III., c. 75) which declared that the incumbents of all patent offices in the colonies who "shall neglect the duty of such office, or otherwise misbehave therein" should be removable from the same by order of the Governor and Council; subject, however, to the right of appeal to the Crown in Council. Although this Act merely refers in general terms to officers holding commissions from the Crown, and not expressly to judges, it has been held by the judicial committee of the Privy Council to extend to all such functionaries; and it has been repeatedly invoked for the removal of colonial judges for misconduct in office.

Of late years, however, some have doubted whether this form of enquiry into judicial offences could be properly resorted to in colonies entrusted with full powers of local self-government; seeing that they possess means for the redress of such grievances similar to those which appertain to the Imperial Parliament.

This is undoubtedly an important question, which, in whatever way it may be decided, involves conclusions of special interest. It must be remembered that however extensive may be the powers granted to any colony, the Imperial Government has never relinquished the right of entertaining appeals from colonial courts of law. This is a prerogative of the Crown, hitherto maintained inviolate. Its continued existence affords to the colony the inestimable advantage of submitting, in the last resort, to able and experienced judges of the Privy Council, the solution of intricate legal questions. And on the part of the Crown, this is the golden link which joins all parts of the empire together, under the supremacy of the law; a union which it has been the pride of all loyal British subjects to perpetuate.

This fact has a material bearing upon the matter we are now considering: for it is not generally known that the Lords of the Privy Council have distinctly recorded their

conviction, that the grant of a parliamentary constitution to a colony, framed after the English pattern, does not militate against the exercise, by the local executive, of the powers they possess under the Act of 1782, for investigating complaints against the judiciary. These powers remain unimpaired, under every existing form of colonial constitution with the important security against a possibly unfair or illegal decision by the local tribunal, that the defendant can always appeal to the Crown in Council.

Trials before a Governor and Council have one great advantage over the parliamentary method of investigation, namely, that they are capable of speedy determination. Whereas, proceedings undertaken in a local legislature are unavoidably subjected to delay. For it is essential that they should be conducted with due formality and regard to constitutional precedent, such as is uniformly observed, in similar cases, by the Imperial Parliament. The omission of ample notices to all parties concerned, or the neglect of regulations framed for the purpose of ensuring a just and impartial decision, would necessarily invalidate the proceedings, and compel the Crown to refuse compliance with an address for the removal of a Judge.

On the first occasion of resort by the Imperial Parliament to this statutory method of dealing with an offending judge, the prosecution was compelled to be abandoned, after protracted enquiry, which extended over three sessions of Parliament, because it turned out that certain erroneous methods of procedure had been followed.* And in South Australia —a colony in complete possession of the rights of local self-government, upon an attempt, for the first time, in 1861, to obtain the removal of a judge by the constitutional method of a Parliamentary address, the question was found to be attended with similar and insuperable difficulties. Addresses were passed by the Colonial Parliament in 1861, and again in 1866, for the removal of Mr Justice Boothby, but neither of them proved effectual. The Imperial Government attached such vital importance to the principle of judicial independence that they felt it to be their duty to institute a special enquiry into the proceedings had in this case, before advising a compliance with the prayer of the address. For the Sovereign cannot be regarded as a passive agent in such transactions. In acceding to an address for the removal of a colonial judge the Crown is not performing a mere ministerial act, but assuming a grave responsibility. It has accordingly been held, upon such occasions, that the Crown is bound to ascertain the propriety of removal before decreeing that it shall take place.

Thus, upon investigating the procedure upon the addresses against Judge Boothby, the Imperial Government became convinced that his trial had, in both instances, been improperly conducted; that the charges against him had not been formulated with the precision that would have been observed in the Imperial Parliament; that they were not adequately confirmed by evidence, and that the rights of the defendant to be heard had not been sufficiently respected. For these reasons,–and because Her Majesty's advisers were of opinion that the Crown was bound to secure to colonial judges protection against exaggeration and misunderstanding, from whatever source it might emanate—compliance with the address was refused. But to prevent further delay, or any failure of justice, the Secretary of State suggested that recourse should be had to the Imperial Statute of 1782, and proceedings instituted against the Judge before the Governor and Council.

The Executive Council of South Australia at first protested against this conclusion. They declared that it was an undue limitation of their constitutional rights. But the Imperial Government were firm, and finally succeeded in satisfying the local ministers of

* Case of Judge Fox: Todd, Parl. Govt. in England, vol 2, p. 731.

the wisdom of the course advised. Accordingly, sittings of the Executive Council, presided over by the Governor, were held for the purposes of this enquiry. It lasted eight days, and was conducted with decorum and impartiality. The charges against Judge Boothby were proved, and, pursuant to the provisions of the statute, his removal from the bench was ordered. The judge purposed to avail himself of the privilege of appealing to the Queen in Council, but before he could arrange to do so, his troubled career was terminated by death.

This case is instructive. It points to the need for the utmost care and circumspection in attempting to commence an enquiry into the conduct of a judge, whose tenure of office is beyond the reach of executive control. And it affords ample grounds for the belief that the ends of justice are more likely to be satisfied by a resort to the simple and expeditious remedy afforded by the Imperial Act of 1782, rather than by initiating trials—involving the delicate questions of judicial independence, and of the indefeasible rights of persons accused—before a popular assembly, liable to be influenced by party, and naturally impatient of delay, in the pressure of public business urgently claiming its attention. While, on the other hand, the credit of the Bench demands that accusations, which may prove to be utterly groundless, should not be permitted to remain undisposed of a moment longer than is absolutely necessary, lest the reputation and usefulness of the accused should be unwarrantably impaired.

Moreover,—in the event of a colonial Parliament insisting upon the exercise of its undoubted constitutional right of initiating proceedings against a judge within its own walls,—we learn from this case, that Her Majesty would still be advised that the trial must be reviewed by the highest legal tribunal in the Empire, before the consent of the Crown to the removal of a judge could be granted. This position is confirmed by a memorandum on Privy Council practice in the removal of colonial judges, presented to the Imperial Parliament in 1870, which states that "all the forms of suspension or removal which are in use lead by different roads to the same result, viz :—a hearing before the Privy Council."

In commending this subject to the thoughtful consideration of persons who are interested in a matter of such gravity and importance, I would in conclusion quote some further pertinent observations from the official memorandum above cited :—

"It is scarcely necessary to add that, in Colonies having Legislative Assemblies, those Assemblies cannot be deprived of their undoubted constitutional right to address the Crown for the removal of a judge; and the exercise of this right is altogether independent of the course which the Governor of the Colony may think fit to adopt. When the charges against a judicial officer originate with Assemblies, the form of address or petition is perhaps the most correct, though not the most convenient form of proceeding. When the action for removal originates with the Governor, he has the power to give effect to it in his own hands, subject to the control of the Home Authorities.

"The experience of the Lords of the Council," however, is "strongly *in favour* of proceedings by the Governor, subject to a review by the Secretary of State or the Privy Council in England, and they have invariably found, that in the cases in which proceedings have originated with the Local Assemblies, the delay, uncertainty, and expense have been greatly augmented.

"At the same time, when the misconduct charged is purely judicial, and therefore not properly amenable to the decision of the executive authority, acting on the advice of law officers or advisers of inferior rank, it would seem that the due maintenance of the independence of judges requires that judicial acts should only be brought into question before some tribunal of weight and wisdom enough to pronounce definitely upon them; and this function appertains with peculiar fitness to the Privy Council, which, as a Court of Appeal, has to review the decisions of all the Colonial Courts."

ALPHEUS TODD.

RECENT DECISIONS.

The first case in No. 1. of Vol. 5 of the Supreme Court Reports, now before us, is the *Ætna Life Insurance Co.* v. *Brodie*, being an appeal from the Court of Queen's Bench for Lower Canada. The action was on a policy of insurance, which the defendants desired to prove by parol evidence, had been issued, by mistake, for double the amount really intended. This they were allowed to do and obtained judgment. At p. 18 Ritchie, C. J., makes the broad statement that in case of an instrument signed in due course of business, "when from the nature of the transaction it is obvious a fair *quid pro quo* must have been contemplated, if the inadequacy of the consideration is so very gross indeed as to shock the conscience and understanding of any reasonable man, the Court I think, ought to infer, from that alone, mistake, inadvertence or fraud." There is also a noticeably broad statement of the law as to the admission of parol evidence in the judgment of Gwynne, J., (p. 33) where he says: "That there was a mistake in inserting the $2,000 in the policy and in the body of the application also, is a fact which the appellants may establish by any evidence they can adduce, parol or otherwise." But notwithstanding these expressions, it may be observed that there is nothing in the actual facts of this case which makes it conflict with the general rule as to the admission of parol evidence in the analogous case of the question of mortgage or no mortgage, which is deduced from all the Canadian and English cases, in some recent articles on that subject by the present writer, in a contemporary legal periodical. The rule as there arrived at is as follows: "In order to render parol evidence on the question of "mortgage or no mortgage" admissible in Courts of Justice, it is necessary first to show by something *which does not depend upon parol evidence*, that there is reason to believe the instrument, owing to some fraud, mistake, accident or surprise, other than a mistake in law, does not truly speak the agreement made,—or that subsequent dealings have taken place between the parties inconsistent with the fact of the deed being absolute, and causing a fraud to be committed on the mortgagor in case the parol evidence is excluded, and then parol evidence will be received to show what relief ought to be granted." In the case under review there was this extrinsic evidence other than parol evidence, *e. g.*, the memorandum in the margin of the application was for the alleged right amount, though in the body of the application and in the policy the alleged wrong amount was mentioned; and as counsel for the appellants urged,—that, supported as it was by parol evidence, by the premium paid, the published rates of the company, the contemporaneous entry made by the agent in this register of the correct amount, and other facts and circumstances, entitled the appellants to succeed.

The next case is *Welden* v. *Vaughan*, an appeal from the Supreme Court of New Brunswick. This was an action of assumpsit brought by a part-owner of a vessel against certain merchants in England. The plantiff alleged that while he had entire charge of the said vessel as ship's husband, the defendants, being his agents, refused to obey and follow his directions in regard to the vessel, and so broke their agreement. It appeared at the trial that plaintiff had sold a fourth share to E. V., brother of the defendants. The defendants alleged accord and satisfaction, and relied on a letter written by the plaintiff, in which he referred to the fact that the defendants complained of the "eternal bickerings," which they said were not their fault,—and then reiterating his complaints, closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for $4,200 in cash." The New Brunswick Court held that the expression "to end the matter" should

be construed as applying to the bickerings referred to, and that there had not been an accord and satisfaction. This decision was upheld by a majority of judges. At p. 42 Ritchie, C. J., "observes that in such cases the Court, unless satisfied, beyond a reasonable doubt that what is put forward as an accord and satisfaction was intended by both parties as such, and that there was an acceptance in satisfaction as an act of the will of party receiving, should not, by a doubtful construction, deprive a plaintiff of an unquestionable legal right which accord and satisfaction assumes he has."

The next case requiring notice here, is the *Mutual Fire Ins. Co.* v. *Frey*, in which it was held on appeal from our Court of Appeal, (1.) That a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O., c. 162, thus upholding the former decision of our Appeal Court (5. App. 87) in *Ballagh* v. *Loyal Mutual Ins. Co.* (2.) That the company under the policy (R. S. O., c. 161, sec. 56) were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought.

Lastly, we have the case of *Larue* v. *Deslauriers*. This case decides what Fournier J., calls "a very important question" as to the proper interpretation of sec. 48 of the Dominion Controverted Election Act of 1874. This section, after giving a right of appeal to the Supreme Court, and fixing the mode of giving notice of appeal, gives to the appellant the right of limiting his appeal in these words:—"In and by which notice the said party so appealing may, if he desires, limit the subject of the said appeal to any special and defined question or questions; and the appeal shall thereupon be heard and determined by the Supreme Court, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said Court ought to have been given by the Judge, whose decision is appealed from, * * * and the Registrar shall certify to the Speaker of the House of Commons the judgment and decision of the Court upon the several questions, as well of fact as of law, upon which the Judge appealed from might otherwise have determined and certified his decision in pursuance of the said Act, in the same manner as the said Judge should otherwise have done, etc." And the question which now came up for decision was whether, after a first appeal, in which the right of appeal has been limited to certain questions of law or of fact, a second appeal may be had on that part of the case which was withdrawn from the consideration of the Court in the first appeal? In other words, could this Court, under the existing law, at the time of the first appeal, send it back to the lower Court? Should it not rather have reported a final judgment to the Speaker? (See per Fournier, J., 106.

The majority of the court decided that the Supreme Court on the first appeal, could not, even if the appeal had not been limited to the question of jurisdiction, as it was, have given a decision on the merits, because no judgment on the merits had been given in the Court below, and that the order of the Court remitting the record to the proper officer of the Court *a quo* to be proceeded with according to law (for this was the order made on the first appeal), gave jurisdiction to the judge below to proceed with the case on the merits, which latter judgment was properly appealable under the said sec. 48 of Supreme Court Act.

It may be observed also that the opinion is expressed in some of the judgments, as per Ritchie, C. J., p. 102, per Taschereau, J., p. 124, that an Appellate Court in election cases ought not to reverse on mere matters of fact the findings of the Judge who has tried the petition, unless the Court is convinced beyond doubt that his conclusions are erroneous and the observations made to this effect in *Somerville* v. *Laflamme*, 2 S. C. 260, and

in the *Halton* case, 11 C. L. J. 273, to the same effect are approved of.

Passing to the English Law Reports for October, now received, we have before us Appeal Cases, vol. 6., p. 489 - 656; 17 Chancery Div., p. 721-844; 7 Queen's Bench Div. p., 397-484; and 6 Probate Div., p. 117-126.

Of the first of these a great part is occupied by the *Dysart Peerage Case*, which illustrates the following feature of Scotch Law, viz., that although that law accepts the continued cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry, yet in order to sustain that inference their cohabitation must be within the realm of Scotland. It may be well also to allude to a point of evidence which arose in the case. B. married C. *in facie ecclesia* in 1851, had issue, and died in 1872. In an attempt by A. to set up a previous irregular Scotch marriage, a witness gave evidence that B. told him repeatedly after 1851, that A. was his wife and not C. The Lords held, on principles common both to English and Scotch law, that such evidence was not admissible.

The remaining four cases are all appeals to the Privy Council, one from Natal, two from New South Wales, and one from Canada. The first-named is a fresh authority from the supposition that the Government revenue cannot be reached by a suit against a public officer in his official capacity, thus corroborating *Macbeath* v. *Haldimund*, 1 T. R., 180; *Gidley* v. *Lord Palmerston*, 3 Brod. & B. 285. Their Lordships felt it unnecessary to determine whether the Natal Court would have had jurisdiction if a petition of right had been presented, and the Crown had ordered that right should be done: but they observe *passim* that no practice of the Court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which it is constituted.

The two cases from New South Wales related to the provisions of the Act relating to the alienation of Crown lands in that colony. The second, however, *Turner* v. *Walsh* (p. 636), also decides, in accordance with former cases, that from long-continued user of a way by the public, whether land belongs to the Crown or to a private owner, dedication from the Crown or private owner, as the case may be, in the absence of anything to rebut the presumption, may and ought to be presumed; and their Lordships held that the same presumption from user should be made in the case of Crown lands in the colony of N. S. Wales, apart from the Crown Lands Alienation Act, though the nature of the user and the weight to be given to it vary in each particular case.

The Canadian appeal is *The Connecticu, Mutual Life Insurance Co.* v. *Moore* (p. 644) and is an appeal from the judgment of the Supreme Court, delivered Dec. 13, 1879, reversing a judgment of our own Court of Appeal (3 App. 230), affirming a rule made by the Court of Q. B. (41 U. C. R. 497). It may be remembered that in this case the defendants obtained a rule *nisi*, calling upon the plaintiff in an action upon a policy of life insurance to shew cause why a verdict obtained by her should not be set aside and a nonsuit or verdict entered for them pursuant to the Law Reform Act (R S. O., c. 50., secs. 264, 283), or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendant; and for misdirection in that the jury had not been directed on the evidence to find for the defendant. The Court of Queen's Bench (41 U. C. R. 497) ordered the verdict for the plaintiff to be set aside, *and verdict to be entered for the defendant*, while the Supreme Court eventually reversed this order and restored the verdict for the plaintiff, being of opinion that, under the Supreme Court Act, 38 Vict., c. 11., sec. 22, they had no power to direct a new trial on the ground of the verdict being against the weight of evidence.

The Privy Council have now held: (1) That although the Court of Queen's Bench would have had power to enter the verdict in accordance with what they deemed to be the true construction of the findings, coupled with other facts admitted or beyond controversy, they had no power to do what they did, *i.e.*, to set aside the verdict for the plaintiff, and direct one to be entered for the defendants in direct opposition to the finding of the jury on a material issue: (p. 653 654). (2) That under 38 Vict., c. 11, (C) the Supreme Court has power to make any order or to give any judgment which the Court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by sec. 22 in a case such as this, *in which the Court below did not exercise any discretion as to the question of a new trial*, and where the appeal from their judgment did not relate to that subject. But as remarked p. 655, this question ceases to be of any general importance, as the recent statute 43 Vict. c. 24 (C) enables the Supreme Court to exercise this very power. Referring, however, to R. S. O., c. 38., sec 18, subs. 3., their Lordships observe (p. 655) "that there is a section in the local Act, not precisely in the same terms, but to the same effect, limiting the jurisdiction of the Appellate Court of Ontario, with respect to which they take the same view, in accordance, as they understand, with the view of the Appellate Court of Ontario. (3) That, *although the Privy Council have the right, if they think fit, to order a new trial on any ground*, they would not exercise that power in this case, on the principle stated p. 656 that: "In order to be justified in granting a new trial, they must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury, in finding for the other party, have either wilfully disregarded the evidence or failed to understand and appreciate it." A further reference to this case will be found among our recent English practice cases.

In the October number of the Q. B. Div. most of the noticeable cases are on points of practice, and will be noted in our Recent English Practice cases. At p. 438, however, is a case on the subject of vendor and purchaser—*Johnson* v. *Raylton*, which proceeds on the principle that on the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, *an implied contract that the goods shall be those of the manufacturer's own make.* It is remarked by Cotton, L. J., (p. 444) that with the exception of two recent cases in the Court of Sessions there is not either in the decided cases, or in the text-books any authority on the question raised. He therefore decided the case as above, on the ground that a purchaser goes to a particular firm of manufacturers in reliance on his opinion as to the average excellence of the goods manufactured by them. Brett, L. J., agreed in this decision, holding (p. 454) that it is more "consonant with the ordinary simplicity of fair mercantile business, and more in accordance with legal principles to say that he who holds himself out to be a selling manufacturer of goods and does not hold himself out as being otherwise a dealer in such goods, does hold out to the proposing purchaser that what he (the manufacturer) offers to do on an order given to, or contract otherwise made with him for the supply of goods such as he professes to deal in, is that he will supply goods manufactured by him." The two Scotch decisions were the other way, and Bramwell, L. J., expresses concurrence with the majority of Scotch judges, and draws a distinction (p. 447) between (1) cases where a manufacturer's make is a peculiar make, where he has a brand known in the market, or even where he has a known name, where it can be supposed there is any *pretium*

affectionis; and (2) cases of articles of which one maker's make is as good as another's and which have no special repute, or name, or other distinction.

The next case of *Bradford* v. *Symondson*, (p. 456), is a curious one. The defendant, who had insured a cargo by a certain vessel, lost or not lost, for a certain voyage, believing such vessel to be overdue, effected a policy of re-insurance with the plaintiff on the same cargo and risk. Before the policy of re-insurance had been effected, however, the vessel and cargo had in fact arrived safely at the port of destination; but this was not known to either the plaintiff or defendant at the time the policy was effected; and all three judges held that the policy had attached, and that therefore the plaintiff was entitled to the premium at which it had been effected. Brett, L. J., with whom the other judges concurred, declares his opinion (p. 462), that the fact that the question of whether there was a loss or not, was determined before the making of the policy, is no objection to the policy. He points out that all the text-books support this view, and incidentally observes that "of all the great text authorities upon insurance law, Phillips is the one most to be considered."

The cases decided in the October number of the Chancery Division will be reviewed in our next number.

We are compelled from want of space, notwithstanding our fortnightly issue, to hold over much interesting matter, including some cases from the country, and a letter from a subscriber as to practice in County Courts in reference to the examination of parties.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Osler, J.] [Oct. 18.

REGINA V. WASHINGTON.

Conviction—Appeal—Jury—Further evidence —Irregularity.

A jury may be granted or refused by the Sessions, on appeal from a magistrate's conviction for violation of municipal by-law.

In this case the appellant offered evidence not before the magistrate. This was rejected by the Sessions, and the conviction amended and affirmed, as and for breach of municipal by-law.

Held, that there was the right to have the evidence taken, and having been denied it, the order of the Sessions was quashed.

Imprisonment, with hard labour, on non-payment of fine imposed, having been awarded with costs, payable to magistrate or prosecutor the sentence was held bad.

Bethune, Q. C., for conviction.

Murphy and *Fullerton*, contra.

Osler, J.] [Oct. 18.

MCEWAN V. MCLEOD.

Consent—Reference—Award — Contract—Measure of damages.

An award made under order of reference by consent may be appealed from.

Defendant's craft was, on 3rd Oct., hired by plaintiff for carriage of salt at so much per ton, the vessel to take in cargo and convey within reasonable time. Some days after defendant wired that the vessel could not go, and to know if a barge would answer. Plaintiff could at this time have got a vessel at the same rate, but waited for defendent's, which got freighted on 25th Nov. The master, however, apprehending bad weather, would not put out, and another vessel could not be got. Plaintiff then disposed of the salt, despatched part by railroad, settling with the consignee the difference

in price between salt he was obliged to buy and contract price. The charge by rail was greater in consequence of the change in mode of carriage. *Held*, that defendent was not entitled to look to plaintiff for damages which he might have recovered if he had chartered a vessel at $1 after the communication by telegraph ; but that plaintiff could recover difference in price paid consignee, both for freight and cartage.

Bethune, Q. C., and *Garrow* for appeal.
W. R. Mulock, contra.

Osler, J.] [Oct. 25.

ROBERTS V. CLIMIE.

Libel—Privilege—License Commissioners.

License Commissioners have no power to pass a resolution preventing the sale of liquor in any tavern, to any person addicted to drink, or the wife, etc., of such person.

C. Robinson, Q. C., for demurrer.
S. Ridout, contra.

Osler, J.] [Oct. 28.

MCKITRICK V. HOLLY.

Insolvent Act, 1875—Deed of composition—Validity.

A deed of composition providing for payment of partnership creditors only, without providing for separate creditors, is held defective.

Walsh, for plaintiff.
Scott, contra.

CHANCERY DIVISION.

Proudfoot, J.] [Oct. 12.

KILLINS V. KILLINS.

Administration suit—Imperfect account—Costs.

In a suit for administration, it appeared that the personal representative had kept very imperfect accounts of the estate, and that those brought into the Master's office had been made up partly from scattered entries and partly from memory.

Held, a sufficient justification for the institution of the suit, and that the plaintiff was entitled to the costs of the suit from the defendant up to the hearing, although no loss had occurred to the estate.

It was also shewn that the personal representative had invested the moneys of the estate in land out of the jurisdiction of the Court as well as on personal security, but no loss had been sustained, all having been repaid by the borrowers.

Held, that these facts did not constitute any ground for depriving her of the costs of suit subsequent to the decree.

W. Cassels, for plaintiff.
Moss, for defendants.

Proudfoot, J.] [Oct. 19.

BANK OF MONTREAL V. HAFFNER.

Demurrer—Mechanics' Lien Act—Mortgagee—Owner.

The plaintiff instituted proceedings to enforce a mechanic's lien, which had been duly registered, and the suit prosecuted. The plaintiff claimed to be entitled to priority in respect of such lien over the claim of a mortgagee—whose mortgage was prior to the contract under which the lien arose—for the amount by which the selling value of the premises had been increased by the work and materials placed thereon. The assignee of the mortgagee demurred on the ground that he was an owner of the land, within the meaning of the Act, and that proceedings had not been taken against him within the time specified by the Act.

Held, that he was not such an owner, not being a person upon whose request, or upon the credit of whom the work, &c., had been done.

Maclennan, Q.C., for plaintiff.
W. Cassels, for defendant.

Proudfoot, J.] [Oct. 19.

STEWART V. GESNER.

Will—Construction of—Mortmain—Mechanics lien.

A will contained this clause :—"I will and desire that the residue of my real and personal estate, being about the sum of $2,800, more or

less, shall be paid to the four Churches of England in the townships of Orford and Howard in four equal parts to each such churches as follows: To Trinity Church, Howard: St. John's Church, Morpeth; St. —— Church, Highgate, and the proposed new church at Clearville, and to be applied by my executors in the payment of any debt or debts upon each of such churches respectively; and in case of no debt, or their being a balance or residue after the payment of such debt or debts on each of such churches, respectively, then the residue, (if any) is to be paid by my executors to the churchwardens of such church, to be held by them in trust; and said money is to be invested by such churchwardens, and the interest arising therefrom is to be paid to the Incumbent of said church as a portion of his salary or stipend."

Upon a special case stated for the opinion of the Court it was shown that there was a large debt existing on the Morpeth Church for money borrowed on mortgage wherewith to pay off the building debts. The church at Clearville was not built at the time of the testator's death, but some debts were existing in respect of materials and work on the foundation:

Held, (1) that the mortgage debt on the Morpeth Church could not be considered as a building debt; but if it could be so considered the bequest to pay the same would be void, under the statutes of the Mortmain. (2) That as to the Clearville Church, which was in course of erection, the building debts would form a lien on the lands from the beginning of the work under the Mechanics' Lien Act, and the bequest to pay off those debts would therefore be void, unless the work was being performed in such a manner as excluded the creation of a lien on the land. (3) That the bequest for the benefit of the Incumbent would have been valid if the investment had been directed to be made upon realty; but as the trust might be carried out by investing on personalty the bequest was valid if as invested. (4) That the amount to which the Incumbent would be entitled was the residue after deducting the void bequests for debts.

W. Cassels, for plaintiffs.

J. Hoskin, Q.C., for defendants.

Atkinson, for the trustees.

Proudfoot, J.] [Oct. 19

HARDING V. CARDIFF.

Municipal Act — Award — Costs — Railway charters.

There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation. Upon a construction of sections 373 and 456 of the Municipal Act a municipal corporation has power to enter upon and take lands for the purposes permitted by the Act without first making compensation to the owner who is not entitled to insist upon payment as a condition precedent to the entry of the corporation.

Where a municipal corporation had so entered and a bill to set aside an award for improper conduct of the arbitrators and inadequacy of compensation failed upon these grounds, the Court (PROUDFOOT, J.) on dismissing the bill ordered the plaintiff to pay all costs the corporation having properly exercised their statutory rights.

Moss, Q. C., for plaintiff.

S. H. Blake, Q. C., for defendant.

CHAMBERS.

Proudfoot J.] [Oct. 12

FOSTER V. MORDEN.

Certificate of Master—Confirmation of G. O. 642.

The Master certified that an application was made to him on notice of motion to disallow the accounts of the defendant filed under his order, as not sufficient in substance and form; that he heard the solicitors of the parties and examined the accounts, and found that they did not comply with his order on certain specified particulars.

The Referee before vacation set aside an order for attachment for non-production of accounts, because this certificate on which the attaching order was based had not been con

firmed by the lapse of a month from its making before such order issed. On appeal,

PROUDFOOT, J., *held*, that the certificate was written the language of G. O. 642—the result of a deliberate determination upon questions of fact, upon questions properly within the Master's cognizance—hence could not be acted on until confirmed. He thought that if this had been a certificate that no accounts at all had been filed it would not have required confirmation.

Appeal dismissed with costs.

Arnoldi, for appeal.

A. Hoskin, Q. C., contra.

Proudfoot, J.] [Oct. 19.

DAYER V. ROBERTSON.

Appeal—Enlargement of time for—Rule 462.

This appeal has been dismissed without costs, (see page 389), and the plaintiff (appellant) now appealed under Rule 462 for an extension of time for appealing.

PROUDFOOT, J.—In the case now before me there is no doubt that the plaintiff intended to appeal from the order of the Official Referee, but by the mistake of his solicitor thought the time was to be reckoned from the entering of the order, and not from the making of the decision (*Gibb* v. *Murphy*, 2 Chy. Cham.R.132) and every subsequent step has been promptly taken. I think it a case in which the plaintiff should have leave to appeal without intending to lay down any general rule that in every case the mistake of the solicitor will suffice to cure delay. The plaintiff to pay the costs of the motion.

McPhillips, for the motion.

Watson, contra.

Proudfoot, J.] [Oct. 26.

HARVEY V. G. W. R.

Parties—Joinder of defendants in cases of doubt—Rule 94.

The statement of claim set out that the plaintiff loaded some machinery upon a car of the G. T. R. Company, to be carried by that Company over their line to Toronto, to be there transferred to the G. W. R. Company for carriage to Dundas. That the G. T. R. Company received the machinery and for hire and reward undertook to carry it safely, securely, and with due care, etc., to Toronto, and there to deliver it to the G. W. R. Company for the plaintiff, to be carried to Dundas. That the G. W. R. Company received the machinery from the G. T. R. Company, and for hire and reward undertook to carry it safely, etc., to Dundas.

On the arrival of the machinery at Dundas, the plaintiff paid the agent of the G. W. R. Company the freight demanded under protest. as he claimed that more than the amount of freight was due him for injury done to the machinery during transit, through the negligence of one or other of the Companies. Each Company denied its liability, asserting that the injury occurred while the machinery was under the control of the other, or partly under the control of one and partly the other, but did not deny the fact of the injury.

McMichael, Q.C., for the appellant G. W. R.

W. Cassels, for the G. T. R.

Muir, for the plaintiff.

The Master in Chambers refused to strike out the G. W. R. Company as defendants.

On appeal,

PROUDFOOT, J.—The summons shows two contracts to have been entered into, one by the G. T. R. Company, and the other by the G. W. R. Company through the plaintiff would have had cause of action independent of any contract.

Rule 94 of the Judicature Act provides that in any action, whether on contract or otherwise, where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all the parties to the action.

This effects an entire change of the former rule at law, that where persons agreed severally, they could not be joined in an action but must each be sued separately, and the statute must receive a fair and reasonable construction so as to carry out the intention of the Legislature.

Here there is one single subject, the damage caused to the machinery. To entitle the plaintiff to recover, he must indeed prove more than that he must establish that it has been

caused by the neglect of one or other of the defendants or by both. But that is not part of the subject, which is the injury to the machinery.

The possibility of being able to establish this joint liability would seem, of itself, to justify the propriety of joining the defendants in the action.

But, independently of that, the language of the statute is wide enough to embrace just such a case as this, and the decisions that have been made on the English Act would in principal sanction *this* mode of procedure.

I agree entirely with the Master in the construction he has placed on the Act and dismiss the appeal with costs.

Boyd, C.] [Oct. 26.

BELL v. LAUDER.

Security for Costs—Further security.

The usual præcipe order for security for costs had been taken out by the defendant and duly complied with by the plaintiff. Replication was filed on 30th June last, and the cause brought on for examination and hearing before Ferguson J., at the Simcoe sittings in September, but was only partially heard, and adjourned until December next, owing to the judge being required to open the St. Catharines sittings. The defendant seeing that the costs far exceeded the $400 security given, applied for further security; the official referee refused the application. On appeal,

BOYD, C., thought upon all the circumstances of the case that it would not be just to interfere at this stage, by requiring further security. Appeal dismissed, costs in the cause to the plaintiff.

Plumb, for the appeal.

H. Cassels, contra.

Boyd, C.] [Oct. 26.

CRUS v. BOND.

Mortgage—Foreclosure—Principal—Election.

This case is reported at page 388 *ante*.

Eddis, for plaintiff, appealed from the judgment of the Master in Chambers.

Watson, contra.

The Court, (BOYD, C.,) in a judgment reviewing the question at some length, said, *inter alia:*

"The very question has been determined by Esten, V.C., in *Drummond* v. *Guickard*, in Feby., 1864, (Cham. Note Bk., p. 145), as mentioned in *Green* v. *Adams*, 2 Chan. Ch., 134. It does not become the Master or another judge sitting in Chambers, to overrule this decision made so many years ago, and acted on in many cases since. I do not see that any sufficient distinctions exist in this case to distinguish it from the case decided in 1864. The appeal is therefore allowed with costs."

(This judgment has been appealed to the Court of Appeal.)

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared from the various Reports by A. H. F. LEFROY, ESQ.)*

JOYCE v. METROPOLITAN BOARD OF WORKS.

Rule as to new trial against evidence where damages trifling.

Held, that it is the custom of the court not to grant a new trial on the ground that the verdict is against the weight of evidence where the damages do not exceed £20, except under peculiar circumstances, such as the trial of a right, or where the personal character of a person might be injured.

[June 24, Q. B. D.—44 L. T. 810.

It will be sufficient to quote such portions of the judgments as affect the above point of practice.

GROVE, J.—The damages were £15, and it is the custom, though not altogether invariable, that except under peculiar circumstances the court will not grant a new trial on the ground that the verdict is against the weight of evidence where the damages do not exceed £20,

* It is the purpose of the compiler of the above collection to give to the readers of this Journal a *complete* series of all the English decisions on pleading and practice which illustrate the present procedure of our Supreme Court of Judicature, reported subsequently to the annotated editions of the Judicature Act, that is to say, subsequently to June, 1881.

and I see nothing in this case to take it out of that general rule. No doubt there have been cases where the court has departed from it; and one is obvious, namely, where the action is to try a right. Another is where serious imputations are made upon the personal character of a party, and if the jury by giving small damages injure a man's character and the verdict is against the weight of evidence, no doubt the court will not adhere to the rule, but the court will not depart from the rule without very strong reasons, and I see none in this case.

LINDLEY, J.—The amount of damages found by the jury is so small that I should be extremely reluctant to grant a new trial on the ground that the verdict is against the weight of evidence.

STEPHEN J.—On the question of fact the jury have found the damage to be so small, and the judge not being dissatisfied with it, I think we ought not to grant a new trial on the ground that the verdict was against the weight of evidence.

SPARROW v. HILL.

Costs—Taxation—Claim exceeding amount recovered—Apportionment of costs—Special order.

[April 30. C. of A—44 L. T. 917.

This case, the hearing of which in the Court below will be found reported in our last number, came, on the above date, before the Court of Appeal, where it was held (reversing the decision of Grove and Lindley, JJ.) that the master's taxation was right.

Counsel for the plaintiff cited *Field* v. *G. N. Ry. Co.*, L. R. 3 Ex. Div. 261; *Mason* v. *Brentini*, L. R. 15 Ch. Div. 287.

Counsel for the defendant cited *Knight* v. *Purssell*, 41 L. T. N. S. 581, *Heighington* v. *Grant*, 1 Beav. 228; *Hardy* v. *Hull*, 17 Beav. 355; Seton on Decrees, p. 117.

BRAMWELL, L. J. said that he interpreted the order made by the Court to mean that the plaintiff was to get the general costs of the cause, but not the costs incurred in attempting to recover that which he failed to recover: and that the defendant was to get such costs as he incurred in consequence of the unfounded claims of the plaintiff; and that if there were costs incurred by the defendant which were applicable to the successful as well as to the unsuccessful claims, the master might say that those would have been incurred if the plaintiff's claim had been limited to the amount for which he was successful and disallow them. And he thought the master had taken that view.

COTTON, L. J., also agreed that this was the effect of the order made, which was all that had to be considered; and that the order in *Knight* v. *Purssell*, ubi sup. was entirely different.

BRETT, L. J. gave judgment as follows:—

It seems to me that the undisclosed foundation of Mr. Graham's argument was that all the Courts have become Courts of Chancery since the Jud. Acts; and he has read us a lot of cases, forms, and text-books, to show us that there were only two forms of dealing with costs in the Court of Chancery. It seems to me that that undisclosed foundation fails. There were different modes of proceeding in the Courts of Chancery and Common Law, and the costs were dealt with in a different way, and they must be dealt with in a different way still. As regards the costs of an action upon the common law side of the High Court, it is the practice to deal with them very much in the same way as in an old common law action. Be that as it may, authorities cannot help us to construe the order in this particular case. The action here is brought in respect of one cause of action, consisting of three items; the defence is one defence. I agree that it is proper according to the common law view to say that there is only one issue. Upon that the plaintiff succeeded; but he failed as to two of the items, the three items being distinct. This order that we are called upon to interpret is a new form, *sui generis*, standing by itself. But it is an order made in an action upon a builder's account, which was and is still a common law action. The order was made for the purpose of obviating the difficulty that there was only one issue, and directs the costs to be taxed as if there were three issues in the action. If it does mean that, the mode of taxing is perfectly well understood. The plaintiff has succeeded in establishing his cause of action, but has failed in certain issues; he is, therefore, entitled to the costs of the cause, but not to the costs that he incurred solely in respect of the issues on which he has failed; and the defendant is entitled to the costs that he incurred solely in respect of the issuss on which the plaintiff has failed. . . . I think that

the Master was right in his construction of this order; and, as I have said, it is not one of the two Chancery forms of order, but a new order that we are called upon to interpret.

HART V. HART.

Imp. J. A. sec. 24, *subs.* 5.—*O. J.A. sec.* 16, *ss.* 6.

Separation Deed—Interference with pending action—Agreement to refer to arbitration—Jurisdiction.

Where in an arrangement for a compromise and the execution of a deed of separation, entered into between the parties, during the trial of a divorce suit, it was agreed, amongst other things, that the petition and answer should be dismissed, and also that "in case of difference in working out these terms, matter to be referred to Mr. W. and Dr. D."

Held (1) There was nothing in above section of the J. A. to prevent the Court granting specific performance; (2) the clause as to reference to arbitrators did not oust the jurisdiction of the Court.

[June 23-24, Ch. D.—45 L. T. 13.

There were several questions involved in this case, and the judgment of Kay, J., is of great length. Only a note of those portions of it that concern the above points can be here given.

The action was for specific performance under the circumstances mentioned in the above head note.

The first objection raised was that the Court had no power to interfere with the action of the Divorce Court. Kay, J., referred to *Besant* v. *Wood*, L. R. 12 Ch. D. 630, pointing out that the section of the J. A. refers to restraining a term "pending action," and he overruled the objection (1) because it was doubtful whether after the agreement in question, which contained the term "petition and answer dismissed," there was any pending action in the Divorce Court at all, (2) because, whether there was any pending action or no, he was not asked for an injunction to restrain it; (3) because there is nothing in the spirit of the above section of the J. A. to make him hold that because the agreement contained that one term, that an action, which at the time the agreement was come to was pending in the Divorce Court, shall be dismissed; the Court is absolutely by that prevented from directing specific performance of the whole agreement or any part of it.

The second objection raised was that the Court should refuse specific performance, because of the stipulation in the agreement, relating to reference in case dispute to certain arbitrators. As to this Kay, J., observed that in the case of this agreement one essential part of it had been to some extent performed, in that the litigation which was in progress had been compromised and put an end to—and, therefore, on the principle acted on in *Milnes* v. *Gery*, 14 Ves. 403, the Court ought to do its utmost to carry out that agreement by a decree for specific performance: and that he had to consider whether there was in the objection raised, such a formidable difficulty as the Court after all cannot get over and must give way to. He then considered at length the case of *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419, and the cases on which that proceeded, and other cases, and said:—

"All these cases seem to me to proceed on one and the same principle—a very simple and intelligible principle—that, when the agreement on the face of it is incomplete until something else has been done, whether by further agreement between the parties or by the decision of an arbitrator, this Court is powerless, because, there is no complete agreement to enforce. Applying that rule to this case, I find here an agreement which is quite, on the face of it, complete. The arbitrators are not to complete it; they are not to supplement any defect in it. That is not the purpose for which they are appointed, but it is merely that, in case of difference in working out these terms, the matter is to be referred to them. . . . In this case the deed is not to be such a deed as Mr. W. and Dr. D. approve, but a deed containing usual covenants, and the agreement is quite perfect and complete in itself without the clause of arbitration; the clause of arbitration is only added as a subsidiary clause in case a difference shall arise, which, as I have said, I cannot and ought not to contemplate as a thing that must inevitably happen. But whether it happens or not I do not think that the case comes within *Tillett* v. *Charing Cross Bridge Co.* or any other of the cases cited on this point, and I do not know of any authority for refusing to grant specific performance of an agreement like this, because of the addition of that clause, that in case of difference, that difference is to be de-

cided by two named persons; and least of all do I hold that the Court is bound to hold its hand on that ground in a case where, as here, there has been part performance of what I consider to be one of the most important stipulations in this agreement."

[NOTE : *Imp. J. A. sec. 24, subs. 5. and Ont. J. A., sec. 16, subs. 6, are identical.*]

REG. V. HOLL AND OTHERS.

Parliamentary elections—Mandamus.

[June 1. 2 Q. B. D.—45 L. T. 69.

Where commissioners appointed, under Imp. 15-16 Vict. c. 57, to inquire into corrupt practices alleged to have taken place at elections, refuse to give a certificate of indemity, under Imp. 26-27 Vict. c. 29. sec. 7., to a witness examined by them in connection with such corrupt practices on the ground of his answers being unsatisfactory, the court will not grant a writ of mandamus to them to do that which *prima facie* they rightly and properly refused to do.

[NOTE:—*R. S. O. c.* 11., *sec* 53, *is an enactment very similar to Imp.* 26-27 *Vict., c. 29., sec.* 7.]

RE X. Y. Z.

R. S. O. c. 40., *sec.* 58—*Lunacy—Order for examination by visitors—Place where enquiry by jury held.*

[April 13, and May 7. C. of A.—45 L. T. 97.

In this case a petition in lunacy had been presented and answered, and the solicitors of the petitioner desired an examination of the alleged lunatic, X. Y. Z., by two medical men, to be held at the place where he resided in the country. The solicitors of X. Y. Z., however, declined this, but offered to allow the examination in London in the presence of a shorthand writer, and of another medical man on behalf of X. Y. Z.

The court ordered that two of the Lord Chancellor's visitors should examine X. Y. Z. and report, and that all persons should be restrained from interfering with their visits.

After the visitors had reported, the Court made the usual order for an inquiry before a jury; and that the enquiry should be held at or as near as convenient to the place where X. Y. Z. resided.

On May 7th counsel for X. Y. Z. applied to have this altered, and the inquiry directed to be held in London. It appeared there was a great difference of opinion between the petitioner and his wife, who was the sister of X. Y. Z., as to the propriety of the proceedings in lunacy, and that they all lived in the same house in the country.

Counsel against the motion cited *ex parte Smith*, 1 Sw. 6 ; *ex parte Southcot*, 2 Ves. sen 402 ; *ex parte Baker*, 19 Ves. 340.

All three judges agreed that the inquiry should take place in London.

BAGGALLY, L. J.—I think the inquiry ought to take place in London. I do not accept the reason that the expense of holding it in the country will be greater. I put it upon the ground of the very strong family feeling existing in the matter, which, one may very fairly expect, extends to the neighbourhood in which the alleged lunatic lives.

JAMES, L. J.—A jury *de corpore comitatus* is the worst possible jury in a case where there is local feeling.

[NOTE.—*It seems also from some expressions of Cotton, L. J., that in the case of threatened interference by third parties, the Court will, on notice to them, order them not to interfere with the examination of the alleged lunatic by medical men selected by the petitioner and approved by the Court.*]

RE KNAPMAN ; KNAPMAN V. WREFORD.

Costs—Probate action and administration action against executrix—Set off of costs by executrix —Incumbrances and assignments.

[C. of A., May 19—45 L. T. 102

Here a testator left £2,000 to be equally divided among certain legatees, and the residuary estate to his executrix absolutely. Certain of the legatees afterwards commenced an action in the Probate Division against the executrix to set aside probate of the will, some of the plaintiffs being married women suing without their husbands; but the executrix obtained judgment with costs. After this some of the same plaintiffs, with other of the legatees commenced an action in the Chancery Division to administer the estate, the husbands of the married women now being joined as plaintiffs, and the executrix

being defendant. The latter then paid the £2,000 into Court. Afterwards on Aug. 1, 1879, the Probate Division ordered the plaintiffs in the Probate action to pay the taxed costs thereof to the executrix, who thereupon obtained a charging order in the administration action against the share in the fund in Court of one party only, not being one of the married women. All the shares in question had been assigned or incumbered before the judgment in the probate action.

On June 26, 1880, an application for the division and payment out of the money in Court was made to Hall, V. C. (43 L. T. N. S. 25) who held, and his decision was now confirmed by the Court of Appeal, that the costs of the probate action were expenses of administration caused by the acts and conduct of the legatees, and proper to be deducted from the legacies themselves, and to be considered a charge upon them as against assignees, incumbrances, and husbands taking in right of their wives, that the executrix had not by payment in of the specific fund resigned any claim she might have against it for expenses of administration, and that she was entitled in priority to all parties claiming, to set off against each share therein, and to be paid the proportionate share of the taxed costs of the probate action.

CONNECTICUT MUTUAL LIFE INSURANCE CO. v. MOORE.

Rule to set aside verdict—Misdirection—New trial—R. S. O. c. 38, s. 18, subs. 3—Privy Council.

[July 5, 6, 7, Privy Cl.—L. R. 6 App. 644.

This case is more fully alluded to in the article on Recent Decisions in the present number. It may be well to note here, however, that it supports the following propositions:—

(1.) It is not in the power of a Court on the return of a rule *nisi* to enter a verdict in direct opposition to the finding of the jury upon a material issue.

(2.) R. S. O. c. 38, sec. 18, subs. 3,—as to there being no appeal to the Court of Appeal in cases where a new trial is granted or refused upon matter of discretion only, applies only where an appeal is brought from a judgment of the Court below in which they have exercised a discretion.

(3.) The Privy Council have the right, if they think fit to order a new trial on any ground, but that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it.

[NOTE.—*The portion of the judgment, p.* 655, *relating to R. S. O. c.* 38, *sec.* 18., *subs.* 3 *is only an obiter dictum, but is pronounced on the analogy of a point actually decided in the case, viz., the effect of the similar sec.* 22 *of the Supreme Court Act,* 38 *Vict. c.* 11, *C. as it stood before the passing of the recent* 43 *Vict. C.* 24. *c.*]

FUTCHER V. FUTCHER.

Imp. O. 19. *r.* 23—*Ont. O.* 15., *r.* 17 (*No.* 141)

Pleading—Allegation of contract—Statute of Frauds—Demurrer.

A statement of claim which alleges an agreement in relation to a matter which comes under the Statute of Frauds, but is silent as to whether it is evidenced by writing or not, is not open to demurrer, though one specifically relying on the statute.

[July 27, 28 Ch. D —19 W. R., 884.

The above head-note sufficiently shows the point in question.

Counsel for demurrer argued that though the defence of the Statute of Frauds cannot be raised by a general demurrer: *Catling* v. *King*, L. R. 5 Ch. D. 660, *Shardlow* v. *Cotterill*, W. N. 1881, p. 2; it can be raised by a demurrer specifically relying on the statute. *Wood* v. *Midleley*, 2 W. R. 301; *Barkworth* v. *Young*, 5 W. R. 156; *Vale of Neath Colliery Co.*, v. *Furness*, 24 W. R. 631.

FRY, J. referred to *Clarke* v. *Callow*, 46 L. J. Q. B. 53; Stephen's Principles of pleading, 7th Ed., p. 140, and disposed of the question thus:—" Before the Jud. Act there was a diversity in the practice at law and in equity. At law it was unnecessary to allege writing in a case which required writing under the Statute of Frauds. That conclusion was arrived at by the courts on the principle stated in 1 Saand

276, note 2. . . . . Quite a different practice prevailed in equity. The court required a plaintiff, who relied on an agreement which came within the statute, to allege writing satisfying the statute. The principle is expressed by V. C. Kindersley in *Barkworth* v. *Young*, (ubi sup.) From the difference in the requirements as to allegation between law and chancery there followed a difference as to the power of the statute by demurrer. As the plaintiff was required to state writing in chancery, if he did not do so his bill was demurrable. As he was not so required to state by declaration at law, the absence of the statement could not be taken advantage of by demurrer. Thus matters stood before the Jud. Act. Imp. O. 19., r. 23 provides :—[His Lordship read the rule.] That rule, I think, implies that the allegation of a contract simply throws on the defendant the burden of alleging the Statute of Frauds. The result of that rule is twofold. It abolished the old rule in chancery that writing must be alleged, and it abolished the old rule of law, according to which the point might be raised at the trial, even if no notice had been given of the intention to do so. Therefore it leaves it open to allege a mere contract, and requires the defendant, if he intends to raise the point, to do so by his pleadings."

Demurrer over-ruled with costs.

[NOTE :—*Imp. O.* 19, *r.* 23., *and Ont. O.* 15., *r.* 17, *are identical.*]

WE regret to record the death of Mr. W. M. Ross, Clerk of the Process, on the 28th ult. Mr. Alex. Macdonell has been appointed temporarliy to the position. It has been said that the Government propose abolishing the office. There certainly seems no necessity for it.

REVIEWS.

A MANUAL OF PRACTICE OF THE HIGH COURT OF JUSTICE FOR ONTARIO, under the Judicature Act, 1881, with the additional rules of the Supreme Court of Judicature for Ontario, passed since the 21st of August, 1881, and the Rules of the High Court of Justice ; by George Smith Holmsted, Registrar of the Chancery Division. Toronto: Rowsell and Hutchison, 1881.

We are happy to say that the anticipations expressed in the last issue of this journal, with regard to the above work, have been abundantly fulfilled by a perusal of it. The author concisely and modestly states the object of his Manual in his preface in the following words : "To those who have neither the time, nor inclination, to make an analytical study of the Act and Rules, with a view to informing themselves of their precise bearing upon the different stages of an action, it is thought the following pages (in spite of whatever defects may be found therein), may be some service, as the author has endeavoured to focus the several portions of the Act and Rules applicable to each particular step of the proceedings, and thereby save the practitioner the labour of an independent search, at each time he wishes to take a step in a cause."

The fact is, however, the Manual supplies a clearly needed help to the mastery of the new procedure, which no mere study of the Acts and Rules would render unnecessary, and which could not be afforded by the excellent works of Mr. Maclennan and Messrs. Taylor & Ewart These latter are, in fact, manifestly framed upon a different plan, and intended to supply other requirements. To write a Manual which can be, without effort, read through consecutively so as to give a general bird's-eye view of the whole field of the practice of the High Court, is no light undertaking, and we can honestly say Mr. Holmsted has succeeded in it ; at the same time his book is sufficiently full in its matter, and in its citations of Rules and cases, to make it of great use for reference on any particular point that may arise in practice.

This book has more similarity to Indermaur's Manual of Practice than to any work we know of, and this, indeed, seems to some extent to have suggested its arrangement. It first deals with

the ordinary steps in a cause from its commencement to execution, and then takes up the various incidental proceedings in actions, *e. g.*, Disclosure of Parties, Security for Costs, Discovery and Production of Documents, Amendments, etc. Anxious as a critic naturally is to criticise, it is hard to find anything in the arrangement to submit to this invidious process, unless it be the very small point that the matter relating to "Allowance of Service of Writ, when served out of the Jurisdiction," is placed under the heading "Proceedings in Default of Appearance," instead of under that of Service of Writ of Summons.

Some the features of the book which Mr. Holmsted has evidently taken pains to note are—(1) the points in which the old and new practice differ; (2) the points in which the English practice under the Judicature Acts differs from our own; (3) the points on which, owing to the Judicature Act having made no provision, the old practice may be held to continue; (4) the points in which our rules at present are ambiguous or defective; (5) which the forms appended to our Act cause embarrassment by their imperfect accordance with the rules to which they are intended to conform. When we add that Mr. Holmsted has not hesitated to give the reader the benefit of his research and experience to suggest solutions of the difficulties which present themselves, we feel that it is unnecessary to say any more in commendation of his book.

It was our original intention to cite some examples of what we have here stated, and to lay before our readers some of Mr. Holmsted's criticisms and suggestions. It would, however, take up space to little purpose, as we are confident the Manual will be widely, if not universally studied by the profession. One pregnant suggestion, however, to which we would call attention, arises out of the consideration of section 12 of the Act, which provides that, in default of special provision, the practice and procedure is to be the same as that which would have been in use in "*the respective existing Courts*, if the Act had not been passed." This section is taken from section 22 of Imp. Act of 1873, and is natural enough in England, since there the Chancery Division still retains exclusive jurisdiction over the various classes of actions, which, under the previous practice, were more particularly within the category of Chancery causes. But our Act abolishes all distinction, and gives to each Court the jurisdiction formerly possessed by all the others. Mr. Holmsted observes, with apparent justice, that it is to be regretted now that the several Divisions of the High Court have co-ordinate jurisdiction in all actions, that some way could not have been found of completely assimilating the practice in all the Divisions, and suggests that this might have been done by providing that in matters of practice not specially provided for, the practice of the former Courts of Law should prevail, and where there was no practice on the point in the Courts of Law, the former practice in Chancery should be the law, or *vice versa.*

Mr. Holmsted has not overburdened his Manual by citing cases, but seems to have taken much trouble to choose those most necessary to be remembered. We should expressly pick out as useful the remarks on pp. 28-29, as to what property is "separate estate," so as to entitle a married woman plaintiff to sue in respect of it without a next friend; and those on pp. 155-1588 in which he tabulates in a convenient form the cases which show what debts are attachable, and what debts are not attachable. This is not to be found in either of the annotated editions of the Act, Messrs. Taylor and Ewart merely mentioning some of the cases, but not setting out their results in the convenient method adopted by Mr. Holmsted. As to the separate property of married women, Mr. Holmsted points out that, since the decision in *Furness* v. *Mitchell*, 3 App. R. 510, and the Declaratory Act, 40 Vict. c. 7. sched. A. (R. S. O. c. 125, sec. 4, ad ex.), the authority of *Boustead* v. *Whitmore*, 22 Gr. 222, for the proposition that the *jus disponendi* is conferred by R. S. O. c. 125, sec. 4, cannot but be considered as very seriously shaken; and he arrives at the conclusion that it is only property *expressly settled* to her separate use, which comes within R. S. O. c. 125, sec. 7, relating to the wages and personal earnings of a married woman, and any acquisitions therefrom, etc., which is the "separate estate" of a married woman, so as to entitle her to sue without a next friend.

In conclusion, we can cordially recommend

the Manual to our readers as a useful, well-written work.

A MANUAL OF THE PRACTICE OF THE SUPREME COURT OF JUDICATURE IN THE QUEEN'S BENCH AND CHANCERY DIVISIONS. Second Edition, by John Indermaur, Solicitor. London: Stevens & Haynes, London, 1881.

The books written and edited by Mr. Indermaur, "The Student's Friend," are legion. The one before us like the others is "intended chiefly for the use of Students." The subject is one that is now of interest to our legal juveniles as well as those in England; and the manual before us gives a comprehensive sketch of the system of practice now common to both countries. Of course in this country we have books appropriate to our procedure which will with the current decision give the student all the reading he is likely to find time for in this branch of his studies; but a reference to Mr. Indermaur's manual will often set him on the right track or solve a difficulty arising from a want of knowledge of some elementary principle not alluded to in books intended solely for practitioners.

A COMPENDIUM OF THE LAW RELATING TO EXECUTORS AND ADMINISTRATORS, by W. Gregory Walker, B.A. London: Stevens & Haynes, Law Publishers, Bell Yard, London, 1880.

The idea of this book is well conceived and well carried out. It is exactly what its name indicates. As the author remarks, the learned volumes of the late Mr. Justice Williams almost exhaust the subject, and will long remain the authoritative exposition of this branch of the law. They are, however, very expensive, and their very bulk makes them useless for many of the purposes for which this compendium supplies. Mr. Walker, in the work before us, has confined himself to the integral parts of the main subject, omitting those incidental to it; confining himself to matters practical, and leaving out those of antiquarian or historical interest. The practice connected with this branch of the law is barely touched upon, nor would it have been appropriate in a book of this nature to have enlarged upon a matter which must be more fully and accurately discussed in works devoted to it.

The task which Mr. Walker set for himself to do has, we think, been well and faithfully done, evincing a thorough knowledge of the subject, and evincing a mind capable of grasping the salient points of this much adjudicated branch of law. We strongly recommend Mr. Walker's book to the profession in this country. It supplies a felt want, and will doubtless command a ready sale. Like all the works published by the leading house of Stevens & Haynes, the one before us is a master-piece of typographical art.

FLOTSAM AND JETSAM.

AN Illinois citizen brought his daughter's young man before a justice for violently ejecting him from his own parlour one Sunday evening. After hearing the other side, the justice said: "It appears that this young fellow was courting the plaintiff's gal, in plaintiff's parlour; that plaintiff intruded, and was put out by defendant. Courting is a public necessity, and must not be interrupted. Therefore, the law of Illinois will hold that a parent has no legal right in a room where courting is afoot. Defendant is discharged, and plaintiff must pay costs."—*Virginia Law Journal.*

ENGLISH JUDGES.—Recent deaths of judges suggest some reflections upon the thorough change which, a few years have produced upon the bench. Within twelve years every judge on the common-law side has died, retired, or been promoted. To take the Queen's Bench, Lord Chief Justice Cockburn and Justices Shee and Quain have died; Justice Blackburn has become Lord Blackburn, Justice Lush has become a lord justice. Sir John Mellor has retired, and Sir James Hannen has gone to the Divorce Court; in the Exchequer, the Chief Baron, Barons Channell, Piggot, and Cleasby, have died; Baron Bramwell has become a lord justice; in the Common Pleas, Chief Justice Erle retired, and Chief Justice Bovill died, and Justices Willes, Keating, Honyman, and Archibald died; Justice Brett has become a lord justice, Justice Byles has retired, and Justice Montague Smith has been promoted to the Privy Council.

On the equity side, death and retirement have produced the like effect. Lord Chelmsford, Lord Chancellor, Lords Justices Turner, Knight-Bruce, Rolt, Giffard, James, and Thesiger died; Lord Romilly died; Vice Chancellors Stuart, Kindersley, and Malin retired; and Vice Chancellor Wickens died. *Law Times.*