DIARY FOR MAY.

2. Wed ..English slave trade abolished, 1807.
5. Sat....Queen Victoria declared Empress of India,'76.
6. SUN..*Rogation Sunday.*
8. Tues..General Sessions and County Court sittings in York. Law Society Primary Examination.
11. Fri....Ascension day.
13. SUN..*1st Sunday after Ascension.* Hon. J. Crawford, Lieut.-Governor died, 1875.
14. Mon ..Law School Examination.
15. Tues..Law Society—1st intermediate examination.
16. Wed ..Law Society—2nd intermediate examination.
17. Thur..Law Lociety—Attorneys examination.
18. Fri....Hon. D. A. Macdonald, Lieut.-Governor of Ontario, 1875. Examination Call with honours examination for call to the Bar.
20. SUN..*Whit Sunday.*
21. Mon ..Easter term begins. Law Society Convocation meets.
22. Tues..Earl Dufferin, Gov.-General, 1872. Convocation meets.
24. Thur..Queen Victoria born, 1819.
26. Sat....Law Society Convocation meets. Annual election of Treasurer takes place.
27. SUN..*Trinity Sunday.*
30. Wed ..Abdul Aziz, Sultan of Turkey, dethroned, '76.

CONTENTS.

THE
Canada Law Journal.
Toronto, May, 1877.

We are told by the English *Law Journal* that the list of causes for the Easter Sittings in the Chancery Division is "one of the most appalling documents ever witnessed." It contains the names of 602 suits waiting to be heard. Of these the Master of the Rolls has 122, Vice-Chancellor Malins 189, Vice-Chancellor Bacon 90, and Vice-Chancellor Hall 201. We have complained occasionally of the "block" of business in our Courts, but there has never been anything to compare with this. The same journal implores that a new Judge may be appointed to the Chancery Division.

CONSTRUCTION OF THE ADMINISTRATION OF JUSTICE ACT.

The Court of Chancery has gone a very long way in giving such a strict and inflexible construction to some clauses of the Administration of Justice Act of 1873, as goes far to neutralize the value what we conceive to be of those clauses, and to countervail, as it seems to us, the intention of the Legislature. The main purpose of the first and eighth and kindred sections of the Act, was to enable each Court to work out full relief in respect of every matter properly presented for adjudication in the one suit. But it is nowhere apparent in the Act itself that this was intended to be extended to cases not falling within well-understood principles, and it is foreign to the spirit of the statute to hold that its permissive provisions should be petrified into a compulsory practice. It is a matter of consideration whether the Act was ever intended to accomplish such a result as is declared to be the law in *Demorest* v. *Helms*, 22

Gr. 433. That decision in effect completely transforms the character of an action of ejectment, and makes the judgment therein final as between the parties to it, not only in respect to the possession of the land at the time, but also in respect to the title to the land, which either party has, or might have, presented on the record. There are again other cases in which it has been held, that the plaintiff must of necessity bring in third parties, strangers to the suit, at the instance of a defendant; and others in which it is laid down, that when the plaintiff has proceeded in any Court to realize his debt or claim, he is bound under peril of demurrer, to prosecute in that Court all subsequent proceedings he may require to take, in order to enjoy the fruits of his judgment by way of equitable execution or the like. The Court of Appeal will very likely be called upon before long to pronounce upon the correctness of these principles of construction as applied to this Act, and we shall not be surprised if a series of cases on these points is found to be open to impeachment.

It seems contrary to principle to hold, as has been done in many cases in equity, where a defendant has a remedy over against another person, a stranger to the suit, and sets that up in his answer, that it is the duty of the plaintiff to amend his bill and bring that third person before the Court. The pleading in equity proceeds upon this, that one defendant is supposed not to know, or at all events not to be affected by, what is found in his co-defendant's answer. Whatever the rights as between co-defendants, why should the plaintiff be delayed or embarrassed by these questions? However the limit of cases decided in this direction, previous to the Administration of Justice Act, has been, where the rights over as between co-defendants arose out of contract, express or implied as in *Ford* v. *Proudfoot*, 9 Gr. 478. But since the Administration of Justice Act, this limit has been stretched to meet cases where the remedy over was based on a fraudulent or tortious act. This is surely an unexpected and an unwarrantable extension of the rule as to adding third parties.

The English Courts, in applying the analogous provisions of the Judicature Act, have laid down some valuable principles, which are pertinent to the proper construction of the Ontario Statute. In the *Swansea Shipping Co.* v. *Duncan*, 25 W. R. 233, (Feb. 1877), the Court of Appeal held that the object of the Act was to prevent the same controversy being tried twice over where there is any substantial question common as between the plaintiff and defendant in the action, and as between the defendant and a third person: in such a case the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question, once for all. In any such case, however, the Court will also consider whether this can be done without prejudicing or delaying the plaintiff.

In *Evans* v. *Buck*, 25 W. R. 392, the Master of the Rolls held that a person could not be added as a defendant to a counter-claim against whom relief was claimed in one only of two inconsistent alternatives. The decision was based on the well-known principle of pleading, that a bill cannot be filed praying for alternative relief founded on inconsistent allegations.

In *Norris* v. *Beazely*, 25 W. R. 320, Lord Coleridge makes a distinction, forgotten in some of the Ontario cases, that the object of the Act was not that complete justice might be done between the parties, but that all questions involved in the action might be effectually and completely adjudicated upon. There such a construction was given as that the plaintiff was held to be not obliged to add a

person against whom he did not wish to prosecute any claim, and whom the defendant wished to be added, merely for his own convenience. The Court said the principle should be strictly applied, for otherwise the Act might be used in a way exceedingly harassing to a plaintiff, who might be embarrassed and involved in suits in which he had no kind of interest.

The spirit of the Administration of Justice Act is to be found in the clause which declares that no proceeding, either in law or in equity, is to be defeated by any formal objection. The Court should not then be rigorous as to the manner in which relief is sought. If, after judgment recovered the *forum* is changed, that should not be a reason for refusing to entertain the suit, but it would be a reason for refusing to give more costs than would have been incurred by prosecuting the claim in the original *forum*. Following out this the Court has rightly concluded that there is no cast-iron rule as to allowing amendments. A discretion may be exercised to grant or refuse the amendment according to the circumstances of the case, as is pointed out in *Guggisberg* v. *Waterloo Insurance Company*, 24 Gr. 350.

LEGAL AND—OTHERWISE.

A subscriber has sent us a post card addressed to him, on the reverse of which is printed the following advertisement:

"—— ——"

"Solicitor, &c., &c.,
Box —, ——, Ont.
"Solicitor in Chancery and Surrogate Court,
"Attorney and Conveyancer.
"Farms bought and sold; Loans negotiated on
"all kinds of property.
"Marriage Settlements, Wills, Trusts and In-
"solvency made specialties. Houses and Lots
"rented and to rent, bought and sold. Stocks:
"Dominion and Banks. Funds: Currant and
"un-currant (*sic*) Debentures: Dominion and
"Municipal. Insurance on Life and against
"Fire. All dealt in a shade above central rates.
"Agent for Foreign Bequests and Claims in
"all parts of the world, especially the United
"Kingdom.
"Office, near the Post office, Town of ——,
"Province of Ontario.
"N.B.—Agent for Bunker's Deep Well and
"Force Pumps, &c."

This is positively too funny. We have seen all sorts of advertisements, professional, mercantile and "mixed," but if ever there was anything before that was so utterly irresistible, we should like to see it. We know some students who would delight, after reading Stephens, to draw a demurrer on the ground of multifariousness, but they would be of the nation that requires a crowbar to get a joke into their heads. It is really a pity to say a word more. It is like a labored explanation of a good bon mot, or first-class pun. To those, however, who have not given this matter the long and careful study that we have, we feel it our bounden duty to submit the result of that study and the careful analysis that accompanied it. A casual reader who had not read it more than half a dozen times, looking for the sweetest morsel, might imagine that "Funds" is a misprint for "Buns." We have from the first been struggling against the conviction that "Currant" was a Latin word (3d plural), helped on by the long-ago acquired knowledge that Funds *do* run like—we will say, the statute of limitations against unhappy creditors, or perhaps it would be better to cite in this connection the Insolvent Act, and here we notice that "Insolvency made a specialty," coupling it (in the singular) with Trusts (in the plural), the one following the other here as naturally as it does in every day life. One friend who helped in our analysis thinks that the word "Funds" has been misplaced, and that the words "Currant and un-currant" refers to the grocery department of the advertiser's business, and that "un-currant" means those dried fruits that are *not* currants. All our rumination, however, has thrown no light on one point, and that is as to who "all" are, whether clients, stocks or funds, and how they are "dealt

in." If he had said dealt *out*, then "funds" would apply, and applications would then, no doubt, be prompt and numerous. We regret, though, to hear of any dealings by a professional man in the *shade*, for how could they then bear the open scrutiny of day.

We would warn our readers not to run away with the idea that at first possessed us respecting the N.B., that it meant *near Boston*. Our mind, not unnaturally took this train of thought, glancing at the name following, and that the "deep well" advertised was dug by the same man who built the big hill (or the monument, which was it?) near the aforesaid city, quite overlooking in our gross materialism the subtle suggestion of this would-be benefactor of the legal race, about truth lying at the bottom of a well: a safe depository for secrets, etc: and, last of all, but by no means least, the means of *working* an unwilling or refractory client. An ordinary intellect fails to grasp the magnitude of the announcement, that this modest peddler of patent pumps is also the agent not only of "foreign bequests and claims" in the United Kingdom, but is also their agent in other foreign countries: to wit, the whole world. The "etc." at the end of this advertisement tells us that we have only been told of half the advertiser's business. Having done so well, "and we thank him much for that," let him also tell us

> 'Of shoes—and ships, and sealing wax—
> Of cabbages—and Kings—
> And why the sea is boiling hot—
> And whether pigs have wings,"

or even of *fat cattle*, for we are privately informed that the modest advertiser is not unknown in the place where the "lowing herd" change their owners and pass into the hands of those who make fat the lean kine.

Yes, let our funny friend write one more advertisement and we shall publish it free gratis as gladly as we do the one before us.

NOTES OF CASES

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

COURT OF APPEAL.

HARRIS v. SMITH ET AL.

From Q.B.] [Sept. 28, 1876.

Easement—Right of way—Severance of tenements—When the right will pass—"Appurtenances"—Pleading.

Declaration for breaking and entering the plaintiff's close, being a yard in the rear of a certain shop and premises, and throwing down a brick wall there.

Plea: that before the alleged trespass one J. D. was seized in fee of the said shop and premises, and of the said close: that the occupiers of the shop enjoyed as of right and without interruption a certain way on foot and with cattle from a public lane over said close to said shop and premises, and therefrom over said close to the lane: that afterwards J. D., by deed, dated 12th July, 1849, demised the shop and premises, *with all the appurtenances*, to L. & W. as trustees for a term of years, which it was agreed by the deed should be renewed, and which was afterwards renewed; and that the defendants became and are assignees of the term, and took possession of the shop and premises under the assignment: that after the demise to L. and W., the executors of J. D. demised to S. the said close, subject to said way, and the same afterwards became vested for a term in the plaintiff: that afterwards the defendants during their term, and in their own right, entered the close to use said way, and in using the same broke down part of said wall, which obstructed said way. On demurrer to this plea:

Held, by HARRISON, C.J., that the plea migh be read as alleging a defined way, necessary and convenient for the enjoyment of defendants' property before the lease from J. D., constructed across the plaintiffs' close, for the use and enjoyment of defendants' shop, and visible to all persons when the plaintiff acquired title: that so reading the plea, the way might be said

to be an "appurtenance" to defendants' premises, which passed from J. D. by the deed under which defendants claimed; and that the plea therefore was good.

On appeal this judgment was reversed, on the ground that the plea could not be read as alleging an apparent and continuous easement necessary for the proper enjoyment of defendants' premises, without which it would not pass under the deed.

Per Burton, J.—Upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law; easements not continuous or apparent, but used from time to time only, will not.

Per Patterson, J.—A right of way is not such a continuous easement as to pass by implication of law with a grant of the land; only a way of necessity will so pass. A way used by the owner of two tenements over one for access to the other, is not in law appurtenant to the dominant tenement, so as to pass with a grant of it under the word "appurtenances," unless the deed shows an intention to extend the meaning of that word, and to embrace the way, or the grant is of all ways "used and enjoyed," or words are used shewing an intention to include existing ways, in which case a defined existing way will pass.

Ritchie, for plaintiff.

Beaty, Q. C., for defendant.

Erratum.—In the note of *Gilleland* v. *Wadsworth* ante page 84, the names of counsel were omitted: they were, *Maclennan*, Q. C., for appellant; and *Boyd*, Q. C., and *W. Cassels* for respondent.

QUEEN'S BENCH.

Wood et al. v. Chambers.

[Sept. 26.

Guarantee—Construction.

Defendant's son, living at St. Catherines, applied to the plaintiffs, merchants in Hamilton, to supply him with goods, and on the 12th April they wrote to him that they would execute his order if he could get the endorsation of his father. On the 13th the son wrote to them to send the goods, and that he would get his father's endorsation if required. On the 17th the plaintiffs wrote proposing, in view of future business, and to save the trouble of getting an endorsement with each transaction, that the father should give a continuous guarantee. The son on the 19th wrote that he would get this, and urged them to send the goods at once, which they did on the same day, with a form of guarantee for the father to sign. On the 21st the son wrote to his father, who lived at Woodstock, "I am buying some goods" from the plaintiffs, and enclosed the guarantee for his signature. The father, not liking this form, wrote another, as follows: "Woodstock, 20th April, 1875. Gentlemen—In consideration of your supplying my son with what goods he may from time to time require of you this season, on your usual terms of credit, I do hereby guarantee the payment of the same." The defendant, as the Court inferred from the evidence, was not aware when he signed this that his son had already obtained any goods from the plaintiffs. After the guarantee, in May and June, further goods were purchased by the son.

Held that the guarantee applied only to the goods purchased after it, not to those previously furnished.

McKelcan, Q.C., for plaintiff.

Osler for defendant.

Devlin v. Hamilton and Lake Erie Railway Company.

[Nov. 27.

R. W. Co.—Train passing along a street—Houses injuriously affected—Right to compensation.

A railway company was permitted by the corporation to run their track along Cherry street in the city of Hamilton, which was only thirty feet wide. The plaintiff, owning a brick cottage and frame house on the street, complained that the trains passing caused the houses to vibrate, and the plaster to fall off the walls, and alleged loss of tenants thereby; but the evidence as to any structural injury caused by the railway was contradictory, and the Court held that it was not sufficiently made out.

Held, affirming the judgment of Hagarty, C.J., that the plaintiff was not entitled to compensation under the Railway Act.

McMichael, Q.C., for appeal.

C. Robinson, Q.C., and *Walker*, contra.

Watson v. Charlton.

[Dec. 29.

Order to hold to bail—Sufficiency of affidavits—Rule nisi.

In order to support an order to hold defendant to bail, the plaintiff need not disclose in his affidavit the name of the persons on whose information he founds his belief that defendant is about to leave the province, where he files also other affidavits, stating facts which would justify such belief. In that case, it is the same as if the plaintiff had stated that these deponents

had informed him of the facts stated in their affidavits.

A rule *nisi* to set aside the order for such alleged insufficiency in the plaintiff's affidavit must point out the objection specifically.

H. Cameron, Q.C., for plaintiff.
Watson for defendant.

McBRIAN ET AL. v. WATER COMMISSIONERS OF THE CITY OF OTTAWA.

[Sept. 15

35 Vict., cap. 80, sec. 41—Construction of.

The 35 Vict. cap. 80, sec. 41, incorporating the defendants, as amended in 36 Vict. cap. 104, sec. 17, O., provides that "all work under the said companies shall be performed by contract, excepting the laying of the water pipes, and such other works as in the opinion of the engineer of the said companies can be more profitably performed by day work." *Held*, that the words "by contract" did not necessarily mean by contract under seal, so as to relieve the defendant from liability for work done upon an executed parol contract.

Osler for plaintiff.
S. Richards, Q.C., for defendant.

RUPERT ET AL. v. JOHNSTON, ET AL.

[Sept. 26.

Donatio mortis causa—Gift inter vivos—Delivery.

B., who died in 1874, had made a will in which there was a devise to the plaintiff, his illegitimate daughter; but this having given offence to his family he destroyed it and made another, and at the same time signed a promissory note, payable to the plaintiff, for $2,000. He placed this note in a pocket book, where it remained till after his death, but shortly before his death he shewed it to a witness, and said it was to be paid after his death, and then handed it with the pocket book to the witness, but afterwards took them back. He told this witness that he would talk more about it to her another time, and asked her to tell P., his legitimate daughter and his executrix, that he had shown the witness the note, which the witness did, and told the testator that she had done so. It was proved also that he said he had made provision for the plaintiff.

Held, that the plaintiff could not recover, for the note could not be claimed by her either as a *donatio mortis causa* or as a gift *inter vivos*, there having been no delivery of it by the testator.

Quære, whether such a note may, by manual delivery, be the subject of a gift.

Wallbridge, Q.C., for plaintiff.
Britton, Q.C., for defendant.

GEARING v. NORDHEIMER.

[Sept. 26.

Building agreement—Omission to sign specifications—Right to sue on quantum meruit.

The plaintiff agreed in writing, on the 19th February, to build a house for the defendant according to the plans and specifications of one R., with alterations made by I., for $25,000. Afterwards some alterations were agreed upon, and on the 30th April a contract was executed by plaintiff and defendant by which the plaintiff was to build the house for $26,596, and this contract recited that the plaintiff had agreed to do all the work required according to certain plans and specifications prepared by R., with certain suggestions and amendments made by I., and signed by the plaintiff, subject to the various stipulations and conditions mentioned in the contract. The plans were signed by the plaintiff, but not the specifications; but he finished the building according to the specifications prepared, and from time to time obtained certificates for payment from the architect for the work executed as under the contract, in accordance with its provisions, by which the money was to be paid on such certificates, no extra work was to be paid for without a written order, and in the event of any dispute the architect was to be the sole and final judge.

Held, that the plaintiff's omission to sign the specifications could not entitle him to set aside the contract as not complete, and to claim for the work done as upon a *quantum meruit*, without the architect's certificates.

C. Robinson, Q.C., for plaintiff.
H. Cameron, Q.C., for defendant.

CHAFFEY v. SCHOOLEY.

[Nov. 29.

Vessel—Unseaworthiness—General average.

The defendant's schooner was engaged to carry a cargo of timber from Spanish River to Chippawa. She left Spanish River with the timber on the 15th October, and anchored on that day at Bayfield Sound, leaking badly, where she remained till the 10th of November, and was then towed by a tug to Sarnia. There she got a steam pump, and with it on board was towed to the Welland canal, where she arrived on the 25th November, and being broken up the cargo

had to be unloaded. The defendant refused to give up the timber, unless, in addition to the freight, the plaintiff would pay his share for general average of (1) the expenses incurred for charges of the tug, $1200; (2) use of hawser, $50; (3) use of steam pump, $315; (4) telegrams, protest, adjustment, $25; (5) extra help discharging, $120.

Held, that if the vessel had been seaworthy the first, second and fifth items would not have been chargeable; and that the third might be; but

Held, also, that the evidence set out below shewed the vessel to have been unseaworthy at the commencement of and during the whole voyage, and that the expense was occasioned thereby; and that the defendant therefore had no claim.

Miller for plaintiff.
Delamere for defendant.

Sinclair v. Canadian Mutual Fire Insurance Company.

Mutual Insurance Co.—False statement as to title—Concealment of encumbrance—36 Vict. cap. 44, sec. 36, O.

The plaintiff, in his application for insurance with defendants, a mutual insurance company, answered "Yes" to the question, "Does the property to be insured belong exclusively to you?" and to the question, "If encumbered, state to what amount," he made no answer. The defendant's agent, who took the application, said the plaintiff told him there was a mortgage for $100 on the building, which he was about to have discharged, and that he, the agent, therefore thought it unnecessary to insert it in the application, and gave no notice of it to the company. The plaintiff said the agent filled up the application, which he signed without reading it, and that he told the agent of the mortgage, but did not say that he was going to remove it.

Held, that there was no false statement as to title; and that there was no concealment as to the encumbrance, for the omission to mention it was sufficiently explained; and that the defendants, after the issue of the policy on the application, and after the fire, could not take advantage of the omission as avoiding the policy under 36 Vict., cap. 44, sec. 36, O.

Quære, whether the "false statement" or "concealment" mentioned in that section must not be fraudulent, in order to avoid the policy.

Richards, Q.C., for plaintiff.
Duff for defendant.

Regina v. Nichol et al.

[August 31.

Summary conviction—Notice of appeal—33 Vict. 27 D.

It is not essential that the notice of appeal under 33 Vict. cap. 27 D., from a summary conviction, should be signed by the party appealing. A notice, therefore, "that we, the undersigned D. N. and C. N." of, &c., following the form given by the Act in other respects, but not signed, was held sufficient.

Lount, Q.C., for the prosecution.
McCarthy, Q.C., for Nichol.

Silverthorne v. Lowe.

[Oct. 17.

Covenant for title—Pleading.

A declaration on a covenant against encumbrances by defendant, his wife, or any one claiming under them, alleged as a breach that at the time of making said covenant a large sum was in arrear for taxes duly imposed, without shewing that they accrued while defendants owned the land or were caused by his acts. *Held*, bad.

J. K. Kerr, Q.C., for plaintiff.
McMichael, Q.C. for defendant.

Kerr et al. v. Stripp, et al.

[Dec. 29

Married woman—Liability of—35 Viet. cap. 16, O.

A married woman in August, 1874, gave a promissory note with her husband to the plaintiff, for money due by him, which they accepted on the representation, which was true, that she had separate estate, the only consideration being the forbearance of the husband's debt.

Held, that she was liable, under 35 Vict. cap 16, O.

Martin, Q.C., for plaintiff.
MacMahon, Q.C., for defendant.

Annie M. Hutchinson et al. v. Beatty.

Free grant territory—Sale of timber by locatee—31 Vict. cap. 8, 37 Vict. cap. 23, O.

Land within the free grant territory was located on the 12th of August, 1870. On the 2nd of April, 1872, the locatee sold to defendant all the pine and other timber thereon, stipulating that ten years should be allowed for taking it off, and defendant paid the purchase money in full. The patents for the lands issued in 1876, and the defendant afterwards cut timber, for which the patentees brought trespass.

Held, under 31 Vict. cap. 8, and the order in Council of 4th October, 1871, confirmed by 37 Vict. cap. 23, O., the locatee had a right to make the sale: that no limitation as to the time within which the timber should be removed could be implied from these statutes; and that the plaintiff therefore could not recover.

McCarthy, Q.C., for plaintiff.

Rose for defendant.

Fisken and Gordon v. Meehan.

[Jan. 2, 1877.

Promissory note—Accommodation maker and indorser—Relation of suretyship—Consideration.

Action on a note for $1500, dated 25th February, 1872, made by defendant payable to the order of S., and alleged to have been endorsed by S. to the plaintiffs.

It appeared that one M., on the 17th January, 1872, had given his bond to the assignee in insolvency of S. conditioned, if S. should fail to pay forty-three cents in the $ by the 10th July, to pay to the assignee $500, or so much as should be required to make up the deficiency. S. got the defendant to make this note for his accommodation, and got F. to endorse it afterwards, in order to give it to M. as security against his bond, which he did. M. having been sued on this bond, compelled F. to pay him the amount of the note, and F. and his partner then sued defendant as maker.

The learned Chief Justice of the Common Pleas, who tried the case without a jury, found that defendant, when he signed the note, understood from S. that F., one of the plaintiffs, would endorse as co-surety; and that defendant would be liable only for half the amount; but that F. knew nothing of this, but endorsed in the ordinary way, considering that defendant would be liable to him for the whole.

Held, Wilson, J., dissenting, that the relationship of co-sureties between F. and defendant was not established, so as to prevent the plaintiffs from recovering from defendant more than half the amount of the note.

Per Wilson, J.—F. and defendant each knew that the other was a surety for S., and that being so, there was the relation of suretyship between them for the common debtor.

Ianson v. *Paxton*, 23 C. P. 439, and its effect as a judgment of our Court of Appeal, commented upon.

Held, also, that M. held the note on a good consideration as between himself and the other parties thereto.

Ferguson, Q.C., for plaintiff.

Hodgins, Q.C., for defendant.

Abrahams v. Agricultural Mutual Assurance Association.

[Jan. 2.

Fire policy—Non-occupation of premises.

A fire policy, granted to the plaintiff on a dwelling house in a town, contained the following condition: "Unoccupied dwelling houses, with the exceptions undermentioned, are not insured by this association, nor shall it be answerable for any loss by fire which may happen to, in, or from any dwelling-house while left without an occupant or person actually residing therein. The temporary absence of a member or his family, however, none of the household effects being removed, is not to be construed into non-occupancy. And this condition is not construed to apply to the temporary non-occupation of small dwellings for the accommodation of hired help on a farm, the main dwelling on the same continuing to be occupied. But the main dwelling house must not be unoccupied for longer than forty-eight hours at any one time."

The plaintiff lived several miles from the house, which was leased to a monthly tenant, who had removed his goods within forty-eight hours before the fire, and no one had resided in the house for ten days before. The fire took place on the 10th September, and the tenant's month was up on the 24th. He was in arrear for rent, for which his goods had been distrained; but the plaintiff, who had a person ready to take possession, did not suppose that the tenant would leave before his month was up.

Held, that the exception as to forty-eight hours applied only to dwellings on a farm; that the condition which required an actual residence of the occupant was broken; and that the plaintiff could not recover.

Held, also, that a demand of the claim proper and proof of loss, without reference to this condition, could not be construed as a waiver of it:

Canada Landed Credit Co. v. *The Canada Agricultural Ins. Co.*, 17 Grant 418, departed from on this point.

No such waiver having been set up at the trial, which took place without a jury, *quære* as to the propriety of allowing it to be urged in term.

D. B. Read, Q.C., for plaintiff.

McMillan, for defendant.

SHANNON v. GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

[Jan. 2.

Insurance—Double Insurance—Same agent for both companies—Estoppel.

The plaintiff went to one Morris, who was local agent at Barrie for defendants, and for the Hastings Mutual Insurance Company. They went together to one M., who filled up two applications for insurance, which were signed by the plaintiff, one for insurance with defendants on his grist mill, and the other for insurance with the Hastings Company on fixed and moveable machinery in the mill. The agent, thinking the former insurance was on the building only, and the latter on the machinery only, did not inform defendants of the other insurance, and the application to defendants stated that there was no other insurance on the property.

Held, that there was a further insurance on part of the property insured by defendants; but

Held, also, WILSON, J., dissenting, that the defendants, under the circumstances, could not set it up to defeat the plaintiff's claim, defendants' agent having prepared the application with a full knowledge of the facts.

McCarthy, Q.C., and *Strathy*, for plaintiff.

J. H. Cameron, Q.C., for plaintiff.

NOTES OF RECENT DECISIONS.

QUEBEC.

BREWSTER ET AL., *Appellants;* CHAPMAN ET AL. *Respondents.*

[20 L.C. Jur. 295.

Supreme Court—Right of Appeal.

Held, 1. That the right to appeal to the Supreme Court does not exist, in respect of any judgment rendered prior to the coming into force of the Act creating that Court.

2. That where a record has been remitted by the clerk to the Court below, in consequence of the proper certificate not being lodged within six months after the granting of an appeal to Her Majesty in Her Privy Council, that the appeal had been lodged in the Privy Council, this Court cannot order the Prothonotary of the Court below to return the record.

IN RE SIMMONS ET AL.

[20 L.C. Jur. 296.

Insolvent Act—Partnership.

Held, That the creditor of an insolvent cannot claim upon the partnership of which the insolvent was a member for the price of goods sold to the insolvent before his partnership, upon the ground that the partnership afterwards got the benefit of the purchase.

WOODWARD v. ALLAN ET AL.

[21 L.C. Jur. 17.

Carrier by water—Steamship—Loss of luggage.

Held, That a limitation of liability by a carrier put on a passenger's ticket, will not bind the passenger without proof of notice to him of such limitation, apart from the words on the ticket.

FULTON v. LEFEBVRE.

[21 L.C. Jur. 23.

Insolvent Act—Acquiescence.

Held, That a party who has for upwards of six months acquiesced in the proceedings taken against him under the provision of the Insolvent Act, 1875, cannot afterwards question the jurisdiction of the Court under said Act.

NEW BRUNSWICK.

THE QUEEN v. ARTHUR O'LEARY.

[3 Pugsley's Rep. 265.

Arrest under warrant issued by Justice of the Peace—Assault on officer—Summary conviction for assault—Prayer to proceed summarily—Necessity for—Presumption—Warrant of commitment.

A Justice of the Peace has no jurisdiction to try an assault summarily unless it is given him by Statute, and he must strictly pursue the authority given; and in order to give him jurisdiction under the Statute of Canada 32-33 Vict. cap. 20, sec. 43, it is necessary that the complainant should request him to proceed summarily; and this request should be made at the time of the complaint.

Where the proceedings did not show whether

such request was made or not, but it was proved that the complainant was present at the return of the summons and gave evidence against defendant, if any intendment could be made, it might be presumed complainant had made such request.

If a warrant of commitment, issued by a Justice of the Peace, is good on its face and the Magistrate had jurisdiction in the case, it is a justification to a constable to whom it is given to be executed, and a person resisting him is guilty of an assault; and where the warrant was based on a conviction for an unlawful assault, it is not necessary, in order to make the warrant legal and a justification to the constable, that it should be stated in the conviction and warrant that the complainant had requested the Magistrate to proceed summarily.

Quære. Whether a conviction by a Justice for an unlawful assault should show a request to proceed summarily.

A conviction for an unlawful assault may adjudge defendant to be imprisoned in the first instance, under sec. 43 of the 32-33 Vict., cap. 20.

It is not necessary, before a defendant, convicted of an assault, is imprisoned, that he should be served with a copy of the minute of conviction.

UNITED STATES REPORTS.

SUPREME COURT OF RHODE ISLAND.

MARY O'RORKE v. MARY SMITH.

Easement.

M. C. owning a tract of land bounded N. by a street, conveyed to D. the west portion, whereon was a well, reserving a right to use the well by the words "excepting a privilege to the well of water on said lot which I reserve for the use of my said homestead estate," this homestead estate being the remainder of the tract. Subsequently M. C. devised to J. in fee simple the land between the house and the lot conveyed to D., together with a tenement in the house, and to S. the rest of the homestead estate. For a long period, but not for the time required to gain an easement by prescription, all the occupants of the homestead estate had crossed the land between the homestead and D.'s lot on their way to the well. In trespass *quare clausum* brought by the grantees of J. against S., *held*, that the way across J.'s lot could not be claimed as a way of strict necessity. *Held*, further, that the way could not be implied from the circumstances of the case as one reasonably necessary.

Query. Whether the grant of a way existing *de facto* can be implied except in cases of strict necessity.

Semble, that the claimant of such grant must be required to show that without the way he will be subjected to an expense excessive and disproportioned to the value of his estate, or that his estate clearly depends for its appropriate enjoyment on the way, or that some conclusive indication of his grantor's intention exists in the circumstances of his estate.

[16 Am. Law Reg. 205.]

Exceptions to the Court of Common Pleas.

This was an action of trespass *quare clausum fregit*, to which the defendant pleaded in justification a right of way. The action was tried in the Court of Common Pleas to the court, and judgment rendered for the defendant. It came up to this court by bill of exceptions, the exceptions being accompanied by a statement of facts proved on the trial; in substance as follows:—

The plaintiff and the defendant were owners of adjoining lots fronting on Weeden street, in the former town of North Providence, now Pawtucket. The two lots were formerly part of a larger estate belonging to Michael Coyle. On the 11th May 1866, Coyle sold the part not covered by the two lots to P. G. Delaney. On the part so sold there was a well. In the deed to Delaney, Coyle reserved a right to use the well in the following words, viz.: "Excepting a privilege to the well of water on said lot, which I reserve for the use of my said homestead estate." The two lots now owned by the plaintiff and the defendant were embraced in what was then the "said homestead estate." Michael Coyle lived there after the sale till his death. He died after May 16th 1866, leaving a will bearing date of that day, which was approved November 5th 1866. In the will he devised the homestead estate to his wife for life, and, after her decease, to his son, John Coyle, and daughter, Mary Smith, the defendant, in fee simple, devising to John the tenement occupied by himself, with the lot of land westerly from the house, being the lot now owned by the plaintiff, and to Mary Smith the basement and attic tenements, with the share of land belonging to the same on the easterly side thereof, being the lot which she now owns. The widow of Michael Coyle died many years ago. The part of the homestead estate devised to John Coyle came to the plaintiff by mesne conveyances previous to June 17th 1872. The part devised to Mary Smith was in her possession June 17th 1872. The lot now owned by the plaintiff is nearest the land sold to Delaney. A path leading from the defendant's lot to the well crosses the plaintiff's lot. The tenants and occupiers of all portions of the homestead house had, for some years (but not twenty years), both

before and after the death of Michael Coyle, used the well, and the path to go to and from the well, when they saw fit. The plaintiff built a fence across the path on the line between his lot and the defendant's, and on the line between his lot and the Delaney lot. On the 17th June 1872, the defendant removed the lengths of fence stretching across the path, as being obstructions to her right of way along the path to and from the well, this removal being the trespass complained of.

The statement showed, in addition to the facts above stated, that both parties could go to the well in another way, by first passing directly from their own lots into Weeden street, then down Weeden street to the Delaney lot, and across the Delaney lot; but this was not the accustomed way—was more burdensome to the Delaney lot, and it was not known that the owners of the Delaney lot would consent to its use.

The opinion of the court was delivered by

DURFEE, C. J.—The plaintiff contends that Michael Coyle, being the absolute owner of the estate, had the right to dispose of the lot which he now owns unencumbered by the way; that Michael did so dispose of it when he devised it to John Coyle in fee simple, and that under John Coyle he holds it unencumbered.

The defendant contends that by force of the reservation in the deed to Delaney, the privilege of the well became appurtenant to the homestead estate and to every part of it, and consequently to the part which she now owns, and that inasmuch as she cannot use the privilege without the way, she is entitled to the way, either as a way of strict necessity, or as a way which, being reasonably necessary, may be implied from the circumstances.

1. We do not think that the defendant is entitled to the way as a way of strict necessity. Ordinarily, such a way is implied as incident to an express grant upon the presumption that when a man grants a thing he intends likewise to grant that without which the thing granted cannot be enjoyed. The privilege of the well has not been expressly granted or devised. If it passed to the defendant it passed to her as appurtenant to the estate which was devised to her, and that, too, without any mention, even in the most general way, of appurtenances. Now it will not be denied that Michael Coyle had the power to devise the estate without the privilege. He might have done so in express terms. Or, again, he might have expressly devised the intervening lot unencumbered by the way, in which case the privilege, if dependent on the way, would be extinguished by implication. The devise of the intervening lot in fee simple was *prima facie* equivalent to such a devise; for *prima facie* it gave the devisee as perfect an estate as the devisor himself had, and the devisor himself had an estate so unencumbered.

2. Is the plaintiff entitled to the way as a way which, being reasonably necessary, may be implied from the circumstances of the estate?

The law in regard to the creation of easements by implication where estates which have been united in a single ownership are severed by deed, will, or partition, is elaborately discussed in the third and last edition of Washburn on Easements and Servitudes, published in 1873. The cases there collected and collated are somewhat discordant, but they are very generally to the effect that where the easement or *quasi* easement is continuous, apparent, and reasonably necessary to the beneficial enjoyment of the estate for which it is claimed, a grant thereof will be implied. The rule applies especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and waterpipes or spouts, all these being continuous easements technically so called—that is to say, easements which are enjoyed without any active intervention of the party entitled to enjoy them. Ways are not in this sense continuous easements, but discontinuous or noncontinuous, being enjoyed only as they are travelled. This distinction, however, between ways and the other easements mentioned has not been uniformly regarded, and there are cases, especially in Pennsylvania, in which it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another will, upon a severance of the estate, pass as implied or constructive easements appurtenant to the part of the estate for the benefit of which they were established: *Kieffer* v. *Imhoff*, 26 Penna. St. 438; *McCarty* v. *Kitchenman*, 47 Id. 239; *Phillips* v. *Phillips*, 48 Id. 178; *Pennsylvania Railroad Co.* v. *Jones*, 50 Id. 417; *Cannon* v. *Boyd*, 73 Id. 179; *Thompson et al.* v. *Miner*, 30 Iowa 386; *Huttemeier* v. *Albro*, 2 Bosw. 546; affirmed, 18 N. Y. 48. But in New Jersey the doctrine was held to be inapplicable to ways: *Fetters* v. *Humphreys et al.*, 19 N. J. Eq. 471. And there are many English cases in which the application of the doctrine to ways has been denied: *Pheysey et ux.* v. *Vicary*, 16 M. & W. 484; *Whalley* v. *Thompson et al.*, 1 Bos. & Pul. 371; *Worthington* v. *Gimson*, 2 El. & E. 618;

Dodd v. *Burchell*, 1 H. & C. 113; *Polden* v. *Bastard*, 4 B. & S. 258, and affirmed, Law Rep. 1 Q. B. 156; *Thompson* v. *Waterlow*, Law Rep. 6 Eq. 36; *Langley et al.* v. *Hammond*, Law Rep. 3 Exch. 161; and see *Pearson* v. *Spencer*, 1 B. & S. 571, and affirmed, 3 B. & S. 761; *Daniel* v. *Anderson*, 31 L. J. N. S. 610. cited in Washburn on Easements, 3rd ed. 59.

In *Dodd* v. *Burchell*, 1 H. & C. 113, the owner of an estate had conveyed a part of it upon which there was a way which he claimed to be entitled to by implied reservation, upon the ground that there had been a continuous user of it for a number of years, and that without it the land could not be reasonably enjoyed. The Court of Exchequer decided against the claim. Chief Baron POLLOCK said: "There is a wide difference between that which is substantial, as a conduit or watercourse, and that which is of an incorporeal nature, as a right of way. In my opinion if we were to adopt the principle contended for, it would be a most dangerous innovation of modern times. The law seems to me particularly careful and anxious to avoid important rights to land being determined by parol evidence and the prejudices of a jury."

In *Worthington* v. *Gimson*, 2 El. & E. 618, Justice CROMPTON uses the following language: "It is said that this way passed as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say from the nature of a road whether the parties intended the right of using it to pass."

In *Polden* v. *Bastard*, 4 B. & S. 258, the owner of two adjoining estates devised them to different persons. There was on one of them a well and pump to which the tenant of the other was, when the will was made, and for some time before had been, in the habit of resorting for water, with the knowledge of the testatrix, using a foot-way from his dwelling house into the yard where the pump was. He had no supply of water on his own premises, but might have obtained it there by digging a well fifteen or twenty feet deep. The testatrix devised the premises "as now in the occupation" of the tenant. The devisee sold to the defendant, who claimed the right to use the pump. The claim was not sustained. ERLE, C. J., said: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The law recognises this distinction, and it is clear that upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass. The right to go to a well and take water is not a continuous easement, nor is it an easement of necessity."

We share the feeling expressed in these cases in regard to making rights in real estate dependent upon facts and circumstances which may be differently interpreted by different minds. If the grant of a way, existing previously *de facto*, can be implied from anything short of necessity, we think at any rate that the party claiming the way should be required either to show, as in *Pettingill* v. *Porter*, 8 Allen 1, that without the use of the way he will be subjected to what, considering the value of the granted estate, will be an excessive expense; or to show, as in *Thompson et al.* v. *Miner*, 30 Iowa 386, that there is a manifest and designed dependence of the granted estate upon the use of the way for its appropriate enjoyment, or to adduce some other indication equally conclusive; and see *Worthington* v. *Gimson*, 2 L. & E. 618; *Leonard* v. *Leonard*, 7 Allen 277, 283.

In the case at bar the legal grounds of the decision made in the court below are not explicitly stated, but only the decision itself, and the facts on which it was based. The question for us, as submitted to us in argument, is whether, the facts being as stated, the decision was right. We think it was not. It does not appear that the defendant's estate is dependent on the Delaney well for its water supply, nor that the defendant has not a well of her own, or could not make a well for herself at moderate cost. And in regard to the way, it does not appear to have been established in the lifetime of Michael Coyle so definitely as to show a *decision* on his part to subject the part of the estate now owned by the plaintiff to a *quasi* servitude in favor of the other part—as, for instance, he might have done by inclosing the way with a fence, which should connect it with the part now owned by the defendant. Indeed we do not see that the case at bar differs materially from *Polden* v. *Bastard*, 4 B. & S. 258, above cited; for, as we have seen, the privilege of the well not having been expressly devised, we cannot infer the way from the privilege, but must rather presume an extinguishment of the privilege unless the way may be otherwise im-

plied. If the facts are not such that the way may be otherwise implied, the *prima facie* right of the plaintiff to have his estate unencumbered by the way must prevail. We think the way cannot properly be implied from the facts which are stated. We therefore sustain the exceptions and grant the plaintiff a new trial.

Exceptions sustained.

(Note by Editor of *American Law Register*.)

After reading the above opinion one is impressed with the thought that there is much to be said in favor of the decision of the court below. It might well be argued that as the use of the well was reserved equally for the benefit of all portions of the "homestead estate" at the time of the sale to Delaney and the testator, during his ownership of both sections of land, having impressed upon the portion owned by the plaintiff a *quasi* servitude or easement, for real servitude or easement, of course, could not be, the land servient and dominant belonging to the same person, and that fact being presumably known to the devisees, the son and the daughter of the testator probably his heirs, the land would naturally pass to the devisees, with the respective portions charged and benefited, as they were in the testator's lifetime; unless something should appear in the devise, manifesting the intention of the testator to change the character of the enjoyment of the land; and that the devise in fee simple is not enough *per se* to manifest such intention since the enjoyment of an estate in fee simple is by no means inconsistent with its enjoyment subject to an easement, and as the will is to be taken as a whole and the intention of the testator collected therefrom (3 Burr. 1541, 1581; *Ruston* v. *Ruston*, 2 Dall. 244), if the devise to plaintiff's grantor "gave the devisee as perfect an estate as the devisor himself had and that was an estate so unencumbered;" so the devise to the defendant gave her "as perfect an estate as the devisor himself had" and that was an estate with the advantage of the use of the well annexed thereto and solemnly reserved to it, and that as to the use of the well, the way, long used by the testator, was necessary, as no presumption could be raised that the owner of the Delaney lot would permit a new and more burdensome way to be laid out upon his premises—as he certainly could not be compelled to—the way having been once located, the power of location was gone for ever, and in this case, the effect would be not merely to change the way but to create an additional and distinct one.

The English authorities seem to uphold the decision and to show a tendency to restrain ways by implication to those of strict necessity (though occasionally straining the word "necessity" and sometimes taking a more liberal view as to the character of the necessity), and by no means to favor the granting of ways by implication as original rights, or their revival after extinction by unity of possession, and, in view of the assumed non-continuous character of ways, not to apply to that species of easements the rule laid down in Gale on Easements 40. "Easements which are apparent and continuous are not merely those which *must* necessarily be seen, but those which *may* be seen or known on a careful inspection by a person ordinarily conversant with the subject."

In *Whalley* v. *Thompson*, 1 B. & P. 371 (1799), it was held that a way extinguished by unity of possession did not revive on severance. In *Plant* v. *James*, 5 B. & Ad. 794 (1833), Lord Denman said, "If the grantor wishes to revive or create such a right he must do it by express words or introduce the words therein used and enjoyed "in which case easements existing in point of fact though not existing in point of law would be transferred to a grantee."

In *Glave* v. *Harding*, 27 L. J. (N. S.) Exch. 286 (1858), Baron Bramwell appears to be disposed to apply a somewhat more liberal rule to ways and to grant that there might be such a thing as a continuous way. "It [a lease] did not grant the right in terms and the only way in which it could grant it was that the condition of the premises, at the time when the lease was granted, showed that it was intended that the right of way should be exercised on the principle I have adverted to, that by the devolution of the tenements a right of way to a particular door or gate would, as an apparent or continuous easement, pass to the owners and occupiers of both of them. But I think that the way in question is not a continuous and apparent easement within the principle of law * * * I found my opinion upon the condition of the premises at the time the lease was granted."

In most of the English cases, there were other outlets besides the one claimed as a way by implication and as reasonably necessary, and therefore they do not exactly cover the point of the principal case; indeed in *Pheysey* v. *Vicary*, 16 M. & W. 484, it was doubted by Alderson, B., whether a new trial should not be granted to try whether the way claimed were not necessary to the *convenient* occupation of the house, although there was another outlet from the premises. In *Dodd* v. *Burchell*, there was an additional way.

Necessity has in some cases been given a more liberal interpretation. In *Pyer* v. *Carter*, 1 H. & N. 972, it was said that by necessity should be understood the necessity at the time of conveyance and as matters then stood without alteration. This case which was not that of a way, has run the gauntlet of criticism and it is questionable how far it is authority beyond its own facts. In *Ewart* v. *Cochrane*, 8 Jur. 925 (1861), Lord Campbell said: "When two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for a comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant, if there be the usual words of conveyance."

Polden v. *Bastard*, 4 B. & S. 258, does not materially differ from the principal case, except perhaps in the particular, that in the English case, there was evidence that water could be obtained on the premises of the defendant by digging a well of a certain depth, but this distinction can be easily resolved to a mere question of the burden of proof, which Chief Justice Durfee thinks should rest upon the person claiming the easement.

In the United States, in Massachusetts, in the case of *Pettingill* v. *Porter*, 8 Allen 1 (1869), it was left to the jury to say whether there would be unreasonable labour and expense in constructing another way, and in the Supreme Court, Chapman, J., said: "The word 'necessity' cannot reasonably be held to be limited to physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labour or by any possibility."

In *Fetters* v. *Humphrey*, 3 C. E. Green (Ch.) 262 (1867), Zabriskie, Ch., remarked, "If until the time of severance of title there has been a way, or drain, or other matter in the nature of an easement, from one of the parcels through the other, established and kept up by the common owner of both, and necessary for the

beneficial enjoyment of the dominant parcel, then an easement is created by such sale, devise or partition. Discontinuous easements not constantly apparent are only continued or created when they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises."

In Pennsylvania, the doctrine, which seems based rather in legal refinement than on practical utility, that ways are not continuous easements, and that, therefore, the same rule as to visibility and permanency, is not to be applied to them as to other easements, is not regarded as law, and more liberality has been shown in sustaining ways than elsewhere. In *Kieffer* v. *Imhoff*, 2 Casey 438 (1856), the right to an alley-way through the servient in favor of the dominant portion of land, which two portions had formerly belonged to one proprietor and had been sold at sheriff's sale, with no mention of the right of way, was sustained, although it was not a way of necessity. Lewis, C. J., said, "It is obvious, therefore, that if the dominant and the servient tenements become the property of the same owner, the exercise of the right, which in other cases would be the subject of an easement, is during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure. The inferior right of easement is merged in the higher title of ownership: 2 Bing. 83; 9 Moore 166; 3 Bulst. 340. * * * Upon a subsequent severance of the estate by alienation of part of it, the alienee becomes entitled to all continuous and apparent easements which have been used by the owner, during the unity of the estate and without which the enjoyment of the several portions could not be fully had. * * * The owner may, undoubtedly, alter the quality of the several parts of his heritage, and if he does so and afterwards alien one part, it is but reasonable that the alterations thus made, if palpable and manifest and obviously permanent in their nature, shall go to the purchaser in the condition in which they were placed and with the qualities attached to them by the previous owner." The learned judge also approved of the rules of the civil law with reference to servitudes and cited Pardessus, *Traite des Servitudes*, § 288, which (as given in Gale, p. 50) is, "If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other and which was simple 'destination *du pue de famille*,' as long as the heritage belonged to the same owner, becomes a servitude as soon as they pass into the hands of different proprietors."

In *Phillips* v. *Phillips*, 12 Wright 186 (1864), Thompson, J., said: "In this, although we do not recognize a way of necessity, we see the reason for the creation of this private way (*i. e.*, that it was the only convenient way), why it was opened, kept open and used by the owner and his family until his death, and the same condition of things, as regards the surroundings continuing, we may presume that it must have been the intention of the owner that it should remain permanent, inasmuch as he made a final disposition by will of both the dominant and servient portions, without the slightest hint of a wish that their relations to each other should be changed." It will be noticed that the court gave a different face to the devise in fee from that given by the Rhode Island court, and as its opinion is derived from a consideration of the whole will, it would seem to be in better accord with the usually-received principles of interpretation.

Pennsylvania Railroad Co. v. *Jones*, 14 Wright 417 (1865), recognises and follows the foregoing case.

In *Overdeer* v. *Updegraff*, 19 P. F. Smith 119 (1871), which was the case of an alley-way, William, J., said: "But if there had been no express reservation of the right to the use of the alley in the conditions of sale, and in the deed delivered to the purchaser, the latter would have taken it subject to the servitude imposed upon it by the decedent for the use and benefit of the occupants of the adjoining lot. It was a continuous and apparent easement and the law is well settled that in such a case a purchaser, whether at private or judicial sale, takes the property subject to the easement."

In *Cannon* v. *Boyd*, 23 P. F. Smith 179 (1873), where an alley-way was claimed over a property which had been sold at sheriff's sale, on behalf of a property sold at the same sale, both properties having belonged to the same owner, Lynd, J., in the District Court, had charged: "The only question in this case is, what was the condition of these two properties at the time of the sheriff's sale? If the condition of the properties was such as to indicate that the occupants of property now owned by the plaintiff used the alley in question and had a right to do so, the verdict should be for the plaintiff." This was affirmed by the Supreme Court.

It will be seen by this short review of cases that there is a considerable conflict of authority, leading to no little uncertainty, but that on the whole it can hardly be said of ways by implication that they are favorites of the common law.

H. B., Jr.

DIGEST.

DIGEST OF THE ENGLISH LAW REPORTS

FOR AUGUST, SEPT., AND OCT., 1876.

From the American Law Review.

Action against Public Officer.—*See* Frivolous Suit.

Annuity.—*See* Residuary Legatee.

Arbitration Clause.—*See* Covenant.

Bailment.

1. Plaintiff left two parcels worth £60 with a servant of the defendant railway company, paid for their deposit without declaring their value, and received therefor a ticket headed "Luggage and cloak office," and bearing on its face, in plain type, a reference to conditions on the back. Among these conditions was one stating that the company would not be responsible for more than £5 value, unless the extra value was declared and paid for, and that "the company will not be responsible for loss of or injury to articles except left in the cloak room." Plaintiff knew there were conditions on the ticket, but did not know what they were. The parcels were left by the servant in an exposed place, instead of putting them in the "Luggage and cloak office," referred to on the ticket, and a thief made off with them. *Held*, that the plaintiff could not recover although the parcels were not put into the cloak-room, because the conditions on the ticket were binding, and the plaintiff must be held to have knowledge of them.—*Harris* v. *The Great Western Railway Co.*, 1. Q. B. D. 515.

2. Plaintiff left his bag, worth £24 12*s.*, at the cloak-room of defendant's station, and received a ticket therefor, on the face of which was the date and number of it, and the time of opening and closing the cloak-room, and the words "See Back." On the back it was stated that the company would be responsible only to the amount of £10. There was also a notice to this effect hung in the cloak-room in a conspicuous place. The jury found as a fact that the plaintiff did not read his ticket, and did not know of the condition on the back, and that, as a reasonably careful man, he was under no obligation to make himself aware of said condition. *Held*, that the company was liable for the value of his bag.—*Parker* v. *The South-eastern Railway Co.*, 1 C. P. D. 418.

BANKER.—*See* BILLS AND NOTES, 3.

BASE FEE.—*See* TENANT IN TAIL.

BILL OF LADING.

By a bill of lading, 306 packages of tea, shipped on board the *Medway* at London for Montreal, for the appellants, were "to be delivered from the ship's deck where the ship's responsibility shall cease at the port of Montreal . . . unto the Grand Trunk Railway, and by them to be forwarded thence to the station nearest Toronto, and at the aforesaid station delivered to" the appellants or their assigns. There was a list of exceptions to liability, and then the clause, "No damage that can be insured against will be paid for, nor will any claim whatever be admitted, unless made before the goods are removed." The ship arrived May 2d or 3d. The tea was unloaded and placed in shipping-sheds. From the shipping-sheds it was removed to the railway freight-sheds on the 6th, 9th, and 12th of May, and delivered at the appellant's warehouse in Toronto on the 13th, 16th, and 17th of May. The shippers were informed by the appellants of damage to the tea on the 30th of May. *Held*, that the clause, "Nor will any claim whatever be admitted unless made before the goods are removed," referred to the removal of the goods from the railway station rather than from the ship, and that not merely patent damage, but latent damage, that an examination at the station would have revealed, was meant. Appeal dismissed.—*Moore* v *Harris*, 1 App. Cas. 318.

BILLS AND NOTES.

1. 16 & 17 Vict. c. 59, § 19, provides, that, if a check is presented to a bank "which shall, when presented for payment, purport to be indorsed by the" payee, the bank shall not be liable by paying the same, &c. Plaintiffs did business in their own name, and also as "S. & Co., Agent, K." In payment for goods bought of the latter concern, defendants gave checks payable to "S. & Co. or order," to K., who indorsed the checks: "S. & Co., per K., Agent," got the money and misappropriated it. *Held*, that the defendants were not liable to the plaintiffs in any form. —*Charles* v. *Blackwell*, 1 C. P. D. 548.

2. The plaintiffs in New York purchased a draft of S. & Co. for £1,000 on S., P., & Co. in London, payable to the order of the plaintiffs. They indorsed it to W. & Co., of Bradford, England, and enclosed it in a letter to W. & Co. for transmission. The letter was placed in the "Letter Box" in the plaintiffs' office, where their letters for the post were usually put. It was stolen by one of their clerks whose duty it was to take the letters to the post-office, and in the course of a fortnight it was presented to defendants' bank, with a forged indorsement by W. & Co., to C. or order, and the blank indorsement of C., the bearer. Defendants received the draft, stamped it with their bank stamp, sent it to S., P., & Co., got the money on it, and turned the money over to the bearer. Evidence was offered at the trial to show that it was the general custom to send a letter of advice with a draft, or on the next steamer when a foreign remittance was made. This evidence was rejected. *Held*, that an action for money received to the plaintiffs' use would lie; that there was no evidence of negligence to estop the plaintiffs from setting up their title to the draft; and that the evidence in question was properly rejected.—*Arnold* v. *Cheque Bank. Same* v. *City Bank*, 1 C. P. D. 573.

3. A check drawn by the plaintiff on M. & Co., his bankers, payable to the order of P., and crossed "L. & C. Bank," was stolen from P., and his indorsement forged. It was then offered to defendant, who, after telegraphing to M. & Co, and receiving word that the check was good, took it in good faith and gave it to his bankers for presentation. Meantime P. learned his loss, wrote to plaintiffs about it, and asked for another check, which was sent him. Afterwards the first check was presented to M. & Co. by the L. and J. Bank, and was paid in spite of the crossing on its face. Subsequently the second check was presented to M. & Co., and paid. The jury found everybody concerned, except the defendant, had been guilty of negligence in the matter. *Held*, that the action could be maintained, as the defendant acquired no title to the check, and M. & Co. paid the first check without authority.—*Bobbett* v. *Pinkett*, 1 Ex. D. 368.

BOND BY SHIPMASTER.—*See* COLLISION, 2.

BROKER.

H. & Co., fruit brokers, gave the plaintiff a sold-note as follows: "We have this day sold to you, on account of James Morand & Co., 2,000 cases oranges," which they signed with their own name merely. In an action against the brokers for non-performance, *held*, that they intended to bind their principals, and that they were not liable as principals themselves.—*Gadd* v. *Houghton*, 1 Ex. D. 357.

See PRINCIPAL AND AGENT, 2.

CARRIER.—*See* COMMON CARRIER.

CHARTERPARTY.—*See* FREIGHT.

CHECK.—*See* BILLS AND NOTES, 1, 2, 3.

CLASS.

1. A testator left an aggregate fund to trustees to pay the income to his wife, and on her death to apply the income to the support

of "such child or children of mine then living, and of the issue of my child or children then deceased, . . . until my youngest surviving child shall have attained the age of twenty-one years." At that time, the trustees were to make certain sales of real estate, and to stand possessed of the whole fund in trust for "my child or children then living, and the issue then living of my child or children dying before that period," the shares of the children to be paid immediately, the shares of the other issue at marriage or the age of twenty-one. The youngest child became twenty-one in 1862. The widow died in 1874, and several of the children had died before her. *Held*, that the class to take was to be ascertained at the widow's death, and the personal representatives of a child dying before that time took nothing.—*In re Deighton's Settled Estates*, 2 Ch. D. 783.

2. A testator gave the residue of his estate to trustees in trust to pay the income to R. M. for his life, and at his death to pay the trust fund to his sister's female children "on their attaining the age of twenty-one years, or marrying with the consent of their parents." R. M. died in 1870, at which time the testator's sister was a widow with two daughters. In 1875, one daughter married with her mother's consent, and she and her husband petitioned for the transfer of a half of the residue of testator's estate. *Held*, that the "consent of parents" must mean, "parents or parent, if any," so that when the daughter married with her mother's consent she took a vested interest, and the class to take was to be fixed when an individual of it became absolutely entitled.—*Dawson* v. *Oliver-Massey*, 2 Ch. D. 753.

CLOAK-ROOM TICKET.—*See* BAILMENT 1, 2.

COLLATERAL COVENANT.—*See* COVENANT.

COLLISION.

1. An Inman steamer, going at ten and a half knots an hour, on a dark night, between Queenstown and Liverpool, overtook and ran down a bark having no light astern. The bark saw the steamer a quarter of an hour before the collision, but had not time enough to run up a light before they struck. The steamer did not see the bark. *Held*, that the steamer was liable, and that there was no contributory negligence on the part of the bark.—*The City of Brooklyn*, 1 P. D. 276.

2. A steamer, bound to a port for a perishable cargo of fruit, negligently ran into a sailing-vessel; and the master of the steamer, to avoid detention, and in good faith, gave a bond binding himself and his owners to pay the damage done. In an action against the vessel by the captain for wages and disbursements, including the amount of the penalty of the bond, *held* that the amount of the penalty must be held in court to abide the result of any claim preferred against the captain in respect of the bond.—*The Limerick*, 1 P. D. 292.

COMMON CARRIER.

The plaintiff shipped two horses on a steamer belonging to defendant, for transportation. There was no bill of lading. In a storm of more than usual violence, partly from the rolling of the ship in the heavy sea, and partly from struggling from fright, one of the horses was so injured that she died. The jury expressly found that there was no want of due care on the part of the defendant, either in taking proper measures beforehand for guarding against storms, or in the treatment of the horse at the time of the storm and afterwards. *Held*, that the defendant was not liable. "Act of God" defined by COCKBURN, C. J.—*Nugent* v. *Smith*, 1 C. P. D. 423; s. c. 1 C. P. D. 19; 10 Am. Law Rev.

CONDITION ON TICKET.—*See* BAILMENT, 1, 2.

CONSIDERATION.—*See* PRINCIPAL AND AGENT.

CONSPIRACY.—*See* FRIVOLOUS SUIT.

CONSTRUCTIVE TOTAL LOSS.—*See* MARINE INSURANCE, 2.

CONTINGENT INTEREST.—*See* MARRIAGE SETTLEMENT.

CONTRACT.

1. The defendants bought rice of the plaintiffs, to be shipped at Madras "during the months of March and or April, 1874, about 600 tons, per *Rajah*, of Cochin." The 600 tons filled 8,200 bags; of which 1,780 bags were shipped Feb. 23, 1,780 bags Feb. 24, 3,560 bags Feb. 28, and the remaining 1,080 bags on Feb. 28, with the exception of 50 bags, which were shipped March 3, on which day the bill of lading for the last 1,080 bags was signed. The defendants refused to accept the rice upon its arrival. Evidence was given that the rice shipped in February would be the spring crop, and equally good with rice shipped in March or April. *Held*, that the defendants were not bound to accept the rice.—*Shand* v. *Bowes*, 1 Q. B. D. 470.

2. The plaintiff contracted with the defendants to construct some dockworks. There was in the contract provision for a penalty of £100 a week in case the works were not completed on or before Aug. 31, 1873. The works were not completed on that date, and on Jan. 22, 1874, the defendants gave notice to the plaintiff to terminate the contract; and they at the same time seized the materials and implements of the plaintiff, under the following clause in the contract: "Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works to the satisfaction of the engineer, his contract shall, at the option of the company, be considered void, as far as relates to the works remaining to be done; and all sums of money due the contractors, together with all materials and implements in his possession, and all sums named as penalties for non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." There was a clause providing that if the works were not completed "within the period limited for that purpose," it should be lawful for the company

to assume control of and finish them, in which case the contractor should be paid only for the work he had done. *Held*, that the forfeiture of the sums of money, materials, and implements, as set forth in the above clause, could only be enforced before the expiration of the time limited for the completion of the contract.—*Walker* v. *The London & Northwestern Railway Co.*, 1 C. P. D. 518.

See PRINCIPAL AND AGENT, 1.

CONTRACT TO SELL.—*See* VENDOR'S LIEN.

CONTRIBUTORY NEGLIGENCE.—*See* COLLISION, 1

COVENANT.

Covenant by a lessee to keep only such a number of hares and rabbits as should not injure the crops, &c.; and in case he kept a greater number, he should pay a fair compensation for the damage, to be fixed, in case of disagreement, by two arbitrators. In an action for breach of the covenant to keep only such a number, *held* that the action could be maintained before an arbitration, the clause as to arbitration being a distinct and collateral covenant.—*Dawson et al.* v. *Lord Fitzgerald*, 1 Ex. D. 257.

CREDITOR WITH NOTICE.—*See* JOINT DEBTOR.

DAMAGE TO CARGO.—*See* BILL OF LADING.

DAMAGES, MEASURE OF.—*See* MEASURE OF DAMAGES.

DEAF MUTE.

A deaf mute was found guilty of felony, but the jury also found that the prisoner was not capable of understanding, and did not understand, the proceedings against him. *Held*, that the prisoner could not be convicted; and it was ordered that he be detained as of insane mind during the Queen's pleasure.—*The Queen* v. *Barry*, 1 Q. B. D. 447.

DEBT OF HONOUR.—*See* INFANT.

DELIVERY OF CARGO.—*See* BILL OF LADING.

DISCOVERY.—*See* PRODUCTION OF DOCUMENTS.

DISTRIBUTION.—*See* TRUST TO SELL.

DOCUMENTS, INSPECTION OF.—*See* INSPECTION OF DOCUMENTS.

ESTOPPEL.

A company, formed to build a railway, improperly went on when only one-fifth of the capital stock was taken. In a bill filed by a shareholder to avoid his contract to take shares, it appeared that, for a long time after the company was to his knowledge proceeding illegally, he continued to act with the other members of it, and did not protest against the improper and illegal acts. *Held*, that, though he might have originally had a ground of relief, he had lost it by acquiescence.—*Sharpley* v. *Louth & East Coast Railway Company*, 2 Ch. D. 663.

See BILLS AND NOTES, 2; VENDOR'S LIEN.

EQUITABLE OWNER.—*See* INSURANCE.

EVIDENCE.—*See* BILLS AND NOTES, 2.

FORCIBLE ENTRY.

L. was mortgagee in fee of premises, but did not take actual possession. T. and W. occupied the premises under the mortgagor, who had never been dispossessed. L. one day had a carpenter take off the lock of one of the doors, and he entered into possession. T. and W. entered by a window and expelled L. L. had them indicted for forcible entry. They were acquitted, and sued L. for malicious prosecution without reasonable and probable cause. *Held*, that the action could not be maintained. If L. got the legal possession for civil purposes, that was ground enough for an indictment against T. and W. for forcible entry.—*Lows* v. *Telford et al.*, 1 App. Cas. 414.

FOREIGN JUDGMENT.—*See* MARINE INSURANCE, 2.

FORFEITURE.—*See* CONTRACT, 2.

FORGED INDORSEMENT.—*See* BILLS AND NOTES, 2, 3.

FRAUDS, STATUTE OF.—*See* STATUTE OF FRAUDS.

FREIGHT.

Charterparty by the defendants to convey a cargo of railway iron from England to Taganrog, Sea of Azof, "or so near thereto as the ship could safely get," consigned to a Russian railway company. The ship arrived Dec. 17, at Kertch, a port thirty miles from Taganrog, where the captain, the plaintiff, found the sea blocked up with ice, and unnavigable till April. Against the orders of the charterers, who notified him that they would hold him responsible, he proceeded to unload the cargo; and, there being nobody to receive it, he put it in charge of the custom-house authorities there. The consignees claimed it; and, on their producing the bills of lading and charterparty, it was delivered to them against the captain's claim that it should be retained for freight. A receipt was given to the effect that the cargo was received "on the power of the charterparty and the bill of lading." *Held*, by MELLOR and QUAIN, J.J., that the captain was entitled to no freight; by COCKBURN, C. J., that he ought to have freight *pro rata*.—*Metcalfe* v. *The Britannia Ironworks Co.*, 1 Q. B. D. 613.

FRIVOLOUS SUIT.

The court will stay summarily as frivolous and vexatious an action brought for conspiring to make, and making, false statements about the plaintiff, if the defendants come in and show that they did all that they did as members of a military court of inquiry, and in the performance of their official duty.—*Dawkins* v. *Prince Edward of Saxe Weimar*. *Same* v. *Wynyard*. *Same* v. *Stephenson*, 1 Q. B. D. 499.

FUND IN COURT.—*See* MARRIAGE SETTLEMENT.

GOOD-WILL.—*See* MORTGAGOR AND MORTGAGEE.

INDORSEMENT OF CHECK.—*See* BILLS AND NOTES, 1, 2, 3.

Digest of the English Law Reports.

Infant.

B., being of full age, promised to pay, "as a debt of honour," a debt contracted when under age. Such a promise is not a "ratification of the contract made during infancy," as a "debt of honour" cannot be enforced at law.—*Maccord* v. *Osborne*, 1 C. P. D. 569.

Inspection of Documents.

Letters written and sent for the confidential and private information of the solicitor of a party in a future suit, and having reference to the subject-matter thereof, are not privileged. But if they are written in reply to the application of such solicitor, with a view to using the information so obtained in the suit, the case is otherwise.—*M'Corquodale* v. *Bell*, 1 C. P. D. 471.

Insufficient Assets.—*See* Residuary Legatee.

Insurance.

D. became owner of a vessel in December, 1868, and the plaintiff equitable mortgagee. D. applied for insurance on the vessel in the defendant company in January, 1869, ordering the policy made in plaintiff's name, and sent to him. The policy, in the usual form, was made in the name of D., but sent to plaintiff. D. did not inform the defendant company that plaintiff was equitable mortgagee. In the policy, *inter alia*, was this: "This is to certify that Mr. D., as ship's-husband for the H., whereof is master at the present time D., has this day paid £17 10*s.* for insurance . . . on said vessel." In January, 1870, while the vessel was on a voyage, plaintiff took out a policy like the preceding, but in his own name as ship's-husband. In March, 1870, plaintiff, on application of the defendant company, paid the yearly assessment for losses, and received a receipt therefor as husband of the said vessel. In October, 1870, he paid another. In May, 1870, D. transferred the vessel to the plaintiff, who became registered owner. The defendant company had no notice of this. Later, D. put in a claim for the loss of an anchor. In November, 1870, the vessel was lost, and in December plaintiff put in a claim for the insurance. In January, on request of the company, D. attended a meeting of the directors to consider the claim. After his withdrawal they resolved that there was no claim. In April, 1871, another meeting was held, which came to a similar resolution; but D. was not notified, and the plaintiff had no notice of either meeting. Neither D. nor the plaintiff had signed, or been asked to sign, the articles. The company was a limited mutual insurance company. Every person insuring a ship in the company was a member, provided he signed the articles. The directors were to manage the affairs of, and act fully for, the company, with full power to settle disputes between members and the company; and no member could bring suit against the company, except as thus provided. If any member sold his ship, the new owner was to have no claim upon the company for loss. In case of loss, the directors were to summon the owner, master, or crew, as they saw fit, and make enquiry as to the loss. *Held*, reversing decision of the Queen's Bench, that the plaintiff could recover. (Archibald, J., and Pollock, B., dissenting.)—*Edwards* v. *The Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563.

Joint Debtor.

The defendants, R. and H., who were partners, had been in the habit of consigning goods through the plaintiffs to B. and S. for sale, the proceeds to be remitted by B. and S. to the plaintiffs. By an agreement in writing between plaintiffs and R. and H., these remittances were to be held to pay any advances made by plaintiffs on account of R. and H.; and the balance was to be sent to R. and H. The practice was for the defendants to draw on the plaintiffs, who accepted the drafts; and the defendants discounted their acceptances. In case the goods were not sold in season for the acceptances to be met, the defendants made a new draft, which the plaintiffs accepted. Thus the plaintiffs got new funds to meet the old acceptances, and the defendants got further time. This course continued for five years, at the end of which time R. and H. dissolved partnership. At that time there were goods in the hands of B. and S. for sale, and the plaintiffs had, on the security of them, accepted R. and H.'s drafts. H. went on with the business, and drew new drafts in the same manner, in the name of "R. and H., in liquidation." A year after the dissolution, H. informed plaintiffs that R. had withdrawn, and that he (H.) would go on with the business. Plaintiffs afterwards accepted R.'s drafts in the manner above described, by the discount of which they were saved cash advances. The action was brought partly for advances which had been renewed by "R. and H., in liquidation," partly for advances which had been renewed by H.'s draft alone, accepted by plaintiffs. *Held*, that the plaintiffs had a right to treat both H. and R. as principal debtors, and that R. was not discharged by the extension of time given H. in pursuance of the practice of the parties.—*Swire et al.* v. *Redman & Holt*, 1 Q. B. D. 536.

Laches.—*See* Estoppel.

Lease.

The *habendum* of a lease stated the term as 94¼ years, the *reddendum*, as 91¼. The counterpart of the lease signed by the lessee had 91¼ in both parts. *Held* that the *habendum* must control the *reddendum* in the lease itself, and that the counterpart must be made to follow the lease, and that the term was therefore 94¼ years.—*Burchell* v. *Clark*, 1 C. P. D. 602.

Liability of Master. *See* Collision, 2.

Liability of Ship-Owner.—*See* Bill of Lading.

Lien.—*See* Vendor's Lien.

Life Insurance.—*See* Amalgamation of Companies.

Limitations, Statute of.—*See* Statute of Limitations.

Malicious Prosecution.

The declaration set forth that the defendants falsely and maliciously wrote and published a certain notice, requiring the plaintiff, under the Insolvent Act of Canada, to make an assignment of his property for the benefit of his creditors, as certain promissory notes on which the plaintiff was liable to the defendants and others had long been overdue, and were unpaid. In another count, it was complained that the defendants maliciously, and without probable cause, had the plaintiff arrested, in a suit on certain promissory notes indorsed to the defendants by the plaintiff, on the ground that he was about to leave the country; when the court subsequently found that he was not about to leave the country, and ordered his discharge. The defendants replied to the first count, that the notice in question was true, and was not published, except to the plaintiff. To the last count they replied simply, that the note was long due, and that they had been informed, and believed, the plaintiff intended to leave. The court ruled, that, unless the defendants believed that they would lose their debt unless they had the defendant arrested, or if they acted with the idea of protecting other indorsers who might otherwise be liable to them, there would be evidence of want of reasonable cause for the arrest sufficient to justify damages. *Held*, error in the charge, and that the said notice was a legal proceeding, and *prima facie* privileged.—*Bank of British North America* v. *Strong*, 1 App. Cas. 307.

See Forcible Entry.

Marine Insurance.

1. The brig *Jessie*, from Falmouth, arrived at Mazagan, in Morocco, Dec. 27, 1874. Jan. 1, 1875, she was driven from her moorings in a gale, and lost her anchor. On the 9th, the captain wrote the plaintiff, who was owner, but said nothing about the loss of the anchor. The letter reached the plaintiff on the 24th, and, just a month later, the plaintiff, having had no further news of the vessel, had her insured in the defendant company, "lost or not lost." He said to the company's agent, "I do not know when she was ready to sail; I have not had the sailing letter yet." The usual time for loading at Mazagan was fifteen to twenty days, and for the voyage home, twenty-five to thirty, and the course of the post was irregular. After verdict for plaintiff, a motion to enter verdict for defendants, on the ground that the failure by the captain to mention the loss of the anchor constituted a material concealment, was refused. *Quære*, if a failure to communicate such a fact forms a defence, unless fraudulent.—*Stribley* v. *Imperial Marine Ins. Co.*, 1 Q. B. D. 507.

Marriage Settlement.

Where a husband, by a post-nuptial settlement, made a covenant to settle on his wife any property to which she was, or during the marriage should become, entitled, it was *held* that a fund in court, then contingent, and which came into possession after her death, was included.—*Agar* v. *George*, 2 Ch. D. 706.

Marshalling Assets.

Testator made several pecuniary legacies, and devised a specific real estate to one son, and the residuary real estate to another. There was not enough personalty to pay the debts beside the legacies. *Held*, that the pecuniary legacies must be exhausted in making up the deficiency before resorting to the real estate.—*Farquharson* v. *Floyer*, 3 Ch. D. 109.

Master and Servant.

1. The defendants employed the plaintiff with other workmen, and also a steam-engine, with an engineer, in sinking a shaft in their colliery. When the work was partly done they employed W., under a verbal contract, to finish it. W. was to employ and pay the plaintiff and the other workmen. The engine and engineer were under his control, but the engineer's wages were to be paid by the defendants. The plaintiff was injured through the negligence of the engineer. *Held*, that the defendants were not liable.—*Rourke* v. *The White Moss Colliery Co.*, 1 C. P. D. 556.

2. The S. Club, composed of persons interested in agriculture, made an agreement with the defendant company for the use of the company's hall for their annual shows. By this agreement the hall was, during the times of the shows, at the entire disposal of the club. The company was to provide accommodation for the stock and things exhibited, and provide and pay a sufficient body of men to do all the work about the show, and who should be under the exclusive control of the club. The company was to pay £1,000 to the club at each show, and be at liberty to charge and receive an admission fee of 1s. The club was to have entire and exclusive control of the show while it was in progress. The club contracted with one S. to see to admitting the stock, &c., at the gate, to its disposition, and to its delivery. He admitted and delivered on orders signed by the club, and was paid in the lump for the whole job. Plaintiff bought some sheep of an exhibitor at the show, and got an order to S. for their delivery. S. delivered him other sheep in place of his own. *Held*, that the defendant company was not liable.—*Goslin* v. *The Agricultural Hall Co.*, 1 C. P. D. 483.

3. Contract in writing, as follows: "I hereby accept the command of the ship C. C., on the following terms: Salary to be at and after the rate of £180 per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command; and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins ship." The captain was dismissed, not for misconduct, but without notice. *Held*, that the captain was

entitled to reasonable notice under this contract.—*Creen* v. *Wright*, 1 C. P. D. 591.

Measure of Damages.

The plaintiff, who was contractor for the construction of a tramway with a tramway company, contracted with defendants that they should lay with asphalt and maintain in good order for twelve months the said tramway. Within the twelve months, one H., driving over the road, was thrown out and hurt, in consequence of the defective condition of the asphalt. H. sued the tramway company, who gave notice to the plaintiff. Plaintiff gave notice to the defendants. They refused to settle; and plaintiff, by negotiation, finally settled by paying £110: £70 damages, and £40 H.'s costs. He sued for these sums, together with £18 costs of his own in getting the claim reduced. *Held*, that the defendants were only liable for the £70 damages.—*Fisher* v. *The Val de Travers Asphalte Co.*, 1 C. P. D. 511.

Mistake.

G. P. R., an undischarged bankrupt, ordered goods from a firm under his old firm name of "J. R. & Co., Mincing Lane, Plymouth." The firm sent them, thinking the order was from "R. Bros. & Co., Old Town St., Plymouth," with whom they had had dealings. G. P. R.'s trustee in bankruptcy seized and claimed the goods, and the sellers, learning the mistake, sued to recover them. *Held*, that no property in them had passed, and the trustee must restore them.—*In re Reed. Ex parte Barnett*, 3 Ch. D. 123.

Mortgagor and Mortgagee.

P., lessee of certain dock premises, and the machinery movable and immovable thereon, for twenty-one years, mortgaged the same to L. & Co. Afterwards a railway company gave notice to P. to buy the premises for the railway under the Lands Clauses Act. P. died; and L. & Co. took possession, and gave notice to the railway company that they wished the compensation settled by arbitration. The company, and the executors and mortgagees, concurred in the appointment of an umpire; and he made an award of a certain sum including £2,800 "in respect of trade profits which would have accrued if the premises had not been taken" by the railway company. The executors claimed this sum. *Held*, that it belonged to the mortgagees. *Pile* v. *Pile. Ex parte Lambton*, 3 Ch. D. 36.

Mutual Insurance.—*See* Insurance.

Negligence.—*See* Bills and Notes, 2, 3.

Negligence of Fellow-Servant.—*See* Master and Servant, 1.

Notice.—*See* Master and Servant, 3.

Partnership.—*See* Joint Debtor.

Patent.

Three referees were appointed under an act of Parliament to inquire into the impurities of the London gas, with right to require the gas companies to afford them facilities for their investigations. As a result of their examinations, one of the number thought he had discovered a method of securing greater purity in the gas. The impurities complained of came from certain compounds of sulphur. The defendant company had experimented on the matter, and had been using lime in the purifiers. This, with the contents of the purifiers, formed sulphide of calcium, with which the sulphur impurities combined. The carbonic acid of the gas impeded the action of the sulphide of calcium, and the result was, the gas came out too impure for use, and could not always be relied upon to come out with the same degree of purity. The gist of the plaintiff's change consisted in keeping more lime in the first set of purifiers. In this way the carbonic acid was more effectually removed, and the subsequent processes of removing the sulphur impurities by sulphide of lime were much more effective. The change was suggested to the defendant company by the referees, and the latter tried it, with success. The referees made their report, incorporating these suggestions and experiments; but the report was withheld from publication, to enable the plaintiff to get out a patent. *Held*, that the plaintiff's idea only amounted to a more thorough application of something in use before. *Quære*, whether a public official can patent the result of an official investigation.—*Patterson* v. *Gaslight & Coke Co.*, 2 Ch. D. 812.

Petition of Right.

English merchants authorized by the law of China to trade only with members of a Guild called the Cohong. War broke out between England and China, the Cohong was abolished, and the English merchants lost their only remedy, which was against the Cohong. A treaty was made between the countries, under which China paid to the British Government a certain sum on account of debts due from former members of the Cohong to said merchants. It was *held* that a petition of right would not lie by one of said British merchants to obtain payment of a sum of money alleged to be due from a former member of the Cohong.—*Rustomjee* v. *The Queen*, 1 Q. B. D. 487.

Power to Sell.—*See* Trust to Sell.

Principal and Agent.

1. Action for breach of the following undertaking: "I undertake to load the ship *Der Versuch*, twenty-nine keels, with Bebside coals, in ten colliery working days. On account of Bebside Colliery, W. S. Hoggett." Hoggett, the defendant, was a clerk of the colliery company, which had made a contract with B., W., & Co., to furnish them a certain amount of coal in the months of January, February, and March, "the turn to be mutually agreed upon." B., W., & Co. chartered the plaintiff's ship to convey the coal; and the plaintiff, objecting to the provision of the charterparty as to the matter of detention in loading "in turn," the above undertaking was procured, and the charter was completed. The undertaking purported to be with nobody in particular. The vessel was detained be-

yond ten days, and the claim was for demurrage. *Held*, that the jury properly found that the defendant was personally bound, though he did not know he was making the undertaking in reference to a pending charter, and that there was consideration therefor.—*Weidner* v. *Hoggett*, 1 C. P. D. 533.

2. A broker is not personally liable on a note signed by him, and running thus: "I have this day sold by your order and [redacted] your account, to my principals, five tons anthracene." *Southwell* v. *Bowditch*, 1 C. P. D. 374; s. c. 1 C. P. D. 100; 10 Am. Law Rev

See Bills and Notes, 1; Broker.

Privileged Communication.—*See* Inspection of Documents; Production of Documents.

Privity.—*See* Master and Servant, 2.

Production of Documents.

A banking company, having a controversy about an alleged fraudulent transfer of an account, at one of its branch offices, telegraphed to the manager of the branch office to write full particulars. In the suit that followed, the bank refused to produce the letter sent in answer to the telegram, claiming it to be privileged. *Held*, that it must be produced. *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644.

Proximate Result.—*See* Measure of Damages.

Public Official.—*See* Patent.

Ratification of Contract.—*See* Infant.

Realty and Personalty.—*See* Marshalling Assets.

Residuary Legatee.

A testatrix gave life annuities, and ordered funds invested to pay them. She then gave the residue of her estate, "including the fund set apart to answer the said annuities, . . . when and so soon as such annuities shall respectively cease," to J. The estate paid only 5*s.* in the pound, and the court ordered sums apportioned to each annuity to be invested and the income duly paid. One of the annuitants died, and J. claimed the fund out of which this annuitant had received his annuity. *Held*, that all the annuities must be paid in full before J. could take any thing as residuary legatee. *In re Tootal's Estate. Hankin* v. *Kilburn*, 2 Ch. D. 628.

Right, Petition of.—*See* Petition of Right.

Sale.—*See* Vendor's Lien.

Salvage.

The steamer M, from Sumatra to Jedda, with 550 pilgrims, was wrecked on the Parkin Rock, in the Red Sea, two or three days' voyage from Jedda. The steamer T. came up, and her captain refused to rescue and carry to Jedda the pilgrims for less than £4,000, the whole amount of the passage-money from Sumatra to Jedda. The captain of the M. at last agreed to give this amount. *Held*, that the bargain was inequitable, and must be set aside. £1,800 was awarded.—*The Medina*, 1 P. D. 272.

Sheriff.

A sheriff seized goods under a *fi. fa.*, and the execution creditor afterwards lost his claim under the execution by accepting a composition from the execution debtor. He gave no instructions to the sheriff how to proceed, and the sheriff sold the goods for his fees and expenses. *Held*, that the execution debtor could maintain trover or trespass against the sheriff in respect of the goods so sold.—*Sneary* v. *Abdy*, 1 Ex. D. 299.

Slander.

In an action to impeach a testator's signature to a will to which the plaintiff was an attesting witness, the defendant testified as an expert that he thought the signature was forged. The jury found in favor of the will, and the presiding judge animadverted severely upon the hardihood of the expert. These strictures were published next day in the *Times*. Afterwards defendant was called in an action for forgery, and testified that the alleged forgeries were genuine signatures. The counsel in cross-examination, referred to the witness' testimony in the previous case, the remarks of the judge, and the item in the *Times*, and sat down. Thereupon the witness began an "explanation" of the previous case, and, in spite of the efforts of the judge to stop him, said: "I believe that will to be a rank forgery, and I shall believe so to the day of my death." The jury found, on special questions put them by the judge, that the witness spoke these words not in good faith as a witness, nor in answer to any question, but for his own purposes, and maliciously. *Held*, that the words were privileged.—*Seaman* v. *Netherclift*, 1 C. P. D 540.

Sold Note.—*See* Broker.

Statute.

A man may be convicted and fined for "riding a horse furiously so as to endanger the lives of passengers, under the following statute: "If any person, *riding* any horse or beast, or *driving* any sort of carriage, shall *ride* or *drive* the same furiously so as to endanger the life of any passenger, every person so offending and being convicted of such offence shall forfeit a sum not exceeding £10 in case such *driver* shall not be the owner of such waggon, cart or other carriage, [and in case the offender be the owner of such waggon, cart, or other carriage,] then any sum not exceeding £10."—*Williams* v. *Evans*, 1 Ex. D. 277.

Statute of Frauds.

The following note by W.'s solicitor to A.'s solicitor is not such as to meet the requirements of the Statute of Frauds, although a verbal agreement was made, as there stated: "W. has been with us to-day, and stated that he had arranged with your client A. for the sale to the latter of the Lion Inn for £950. We therefore send herewith draft contract for

perusal and approval.—*Smith* v. *Webster*, 3 Ch. D. 49.

Statute of Limitations.

A writ was issued in the Common Pleas for a claim not then barred, but it was never served. After the claim was barred, but within six months of the date of the writ, the time allowed by the Procedure Act for the writ to remain in force, a bill in Chancery was brought for the same claim. *Held*, that the writ would have saved the claim in the Common Pleas, but was of no effect against the statute in proceedings in equity. *Manby* v. *Manby*, 3 Ch. D. 101.

Sub-contractor.—*See* Master and Servant, 2.

Tenant in Tail.

G. R. had an estate tail expectant on the death without issue of C. R., a lunatic. C. R. died without issue, and G. R. had converted his estate tail into a base fee, and died leaving a widow and children. The land was sold and the fund paid into court. G. R.'s widow and children petitioned to have the fund paid out to them. *Held*, that they must first produce a proper deed enlarging the base fee. *In re Reynolds*, 3 Ch. D. 61.

Ticket.—*See* Bailment, 1, 2.

Time for Completion of Contract.—*See* Contract, 2.

Transfer of Shares.—*See* Contributory 1, 2.

Trust to Sell.

A testator left his property, including a newspaper, to his son W., and two others, trustees in trust, among other things, "to carry on, or cause to be carried on, under their inspection and control, during the life of my said wife," the newspaper. He directed a reserve fund of one-fourth part of the profits of the newspaper to be set apart each year to aid in carrying it on, and then directed the trustees to divide the remaining three-fourths of the profits of the paper, and his other property, into six parts, and to pay one part to each of his five children named, and one to his wife; and in case a child died without issue before the death of the wife, his share to go to the surviving children. Then followed: "In case any of my children shall survive my wife, and die before he shall have received his share of my trust estate, without leaving issue, I give such share equally amongst my surviving children." Then came this: "And from and after the decease of my wife (or during her life if she and the majority of my children and my trustees shall think it proper and expedient so to do), at the sole discretion of my trustees, or trustee, to sell and absolutely dispose of all my real and personal estates, and my trade or profession [the newspaper], and the good-will thereof, and to divide the proceeds thereof amongst my wife and children and their issue, if the division be made in the lifetime of my wife, but if the division be made after her death, amongst my children and their issue." Then followed a provision, that, in case it was decided to sell the paper under the foregoing provisions, the eldest son should have the privilege of taking it at £500 under the market value. *Held*, that the will created an absolute trust to sell at the death of the wife, and a trust to sell in the discretion of the trustees as to the time and manner thereof, during her life; and that at the wife's death the surviving children took equal vested shares in the newspaper and the residue of the property.—*Minors* v. *Battison*, 1 App. Cas. 428.

Ultra Vires.—*See* Debentures.

Vendor's Lien.

Dec. 31, 1873, the defendants sold to B. & Co. one hundred tons zinc, out of a gross lot lying on the wharf, and at the same time made two "undertakings," as follows: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons zinc off your contract of this date." Jan. 7, 1874, the plaintiffs bought of B. & Co. fifty tons zinc, and paid for it. Jan. 14, B. & Co. failed, having given the defendants a bill for the zinc, which was dishonored; and the defendants refused to deliver the zinc to the plaintiffs. *Held*, that the assumed undertaking to deliver did not estop the defendants from setting up against the plaintiffs their right as unpaid vendors to stop the goods.—*Farmeloe* v. *Bain*, 1 C. P. D. 445.

Vested Interest.—*See* Class, 1; Trust to Sell.

Wages and Disbursements.—*See* Collision, 2.

Waiver.

In bankruptcy proceedings against the holder of a lease, the lessors sent the trustee in bankruptcy a notice to disclaim the lease within twenty-eight days, as the Bankruptcy Act provided. Some letters followed; and the day before the twenty-eight days were up the lessors wrote, "We should be glad to have a reply to our letter of the 24th ult., as to whether you intend to retain the lease, at your earliest convenience." The letter of the 24th ult. contained the notice to disclaim. *Held*, that the right to a disclaimer within the twenty-eight days was waived by the lessors.—*Ex parte Moore. In re Stokoe*, 2 Ch. D. 802.

Warehouseman.—*See* Bailment, 1, 2.

Will.—*See* Class, 1, 2; Residuary Legatee; Trust to Sell.

Witness.—*See* Slander.

Words.

"*Act of God.*"—*See* Common Carrier.

"*For your Account.*"—*See* Principal and Agent, 2.

"*On Account of.*"—*See* Broker.

"*Receive*," "*Divide.*"—*See* Trust to Sell.

"*Rider*," "*Driver.*"—*See* Statute.

CORRESPONDENCE.

County Judges as Benchers.

To the Editor of the Law Journal:

Sir,—In your April number an ex-Bencher says, "According to the ancient usage and custom of the Benchers of the different Inns of Court in England, a County Judge has been always held ineligible and disqualified for holding a seat in Convocation," etc.

A reference to the English Law List for 1875, (the latest in Osgoode Hall Library), shows, among the Benchers of Lincoln's Inn, two County Judges; among those of the Inner Temple, four; and among those of Gray's Inn, one.

Q. C.

REVIEWS.

Blackwood's Edinburgh Magazine for April, 1877, republished by the Leonard Scott Publishing Co., 41 Barclay Street, New York.

The following are the contents:

The French Army in 1877.

A Woman-Hater.—Part XI.

Crete.

Pauline.—Part III.: In the Hebrides.

Harriet Martineau.

A Railway Journey.

Translations from Heine, by Theodore Martin.

The Political Situation.

Some papers on the state of the French army having been published in *Blackwood's Magazine* during the year 1875, their author thinks it would be an advantage to France to note the change in her military position since that time. He admits that "France cannot attack Germany," but "if invaded she can now, most certainly defend herself."

The description of Crete, if rather long, is interesting. One object of the article is apparently to show the British lion a place that is just the right size and shape to make a rest for one of his paws.

The review and criticism of the Autobiography of Harriet Martineau is very unfavorable. The writer thinks she has been much overrated, finds it "difficult to understand on what her great reputation was founded;" and adds, "it will not be increased by her Autobiography, where that good sense which is her strongest point shows less than ever before." Blackwood has never been a friend of this author and what is said must be taken *cum grano salis*.

The light and airy articles are up to the mark, and the whole concludes with the usual discussion of the Eastern Question.

The periodicals reprinted by this company are as follows: *The London Quarterly, Edinburgh, Westminster*, and *British Quarterly Reviews*, and *Blackwood's Magazine*. Further particulars are given in the advertising columns.

A Treatise on the Law of Insurance. By S. R. Clarke of Osgoode Hall, Barrister-at-Law, Toronto. R. Carswell, 1877.

This is a re-publication of a work no insurance, published a few years ago. The present volume contains a supplement which gives a full note of all the decisions in the Dominion roported to March, 1877. We have already alluded to this book, and therefore need only call attention to the additional of the supplement.

The Law of the Road; or, Wrongs and Rights of a Traveler. By R. Vashion Rogers, Jr., Barister, etc. San Francisco, Sumner Whitney & Co.; New York, Hurd & Houghton; Cambridge, The Riverside Press.

This is a new edition of a work, the first edition of which we noticed at some length. Most of the matter contained in it, originally appeared in a series of articles in these pages. We are glad to have been at the birth of such a creditable and successful production. We cannot de-

scribe it better than by giving an extract taken haphazard from its pages. The hero and his friend have just left the house to start for an afternoon walk.

"Scarce had our feet touched the sidewalk when, with the exclamation, 'Get out you rascallion!' Jones executed a *pas seul*, and then lay sprawling on the ground; and the small boy—whose sled as it slid swiftly down the board walk my friend had vainly endeavored to avoid—glided merrily on. As I whisked the snow off, Jones in wrathful accents consigned the juvenile to a place beyond the possible limits of frost, and exclaimed:

"'I'll sue the city for allowing the road to be in such a beastly state. Corporations are bound to keep the street in a proper condition, so that the lives and bones of passers-by will not be endangered.'

"'True,' I replied, 'but the accident was not wholly caused by the slipperiness of the pavement; the unlawful and careless act of the boy in coasting had something to do with your overthrow; and in the exactly similar case of Mrs. Shepherd it was decided that the city was not liable.' *

"'I tell you all towns and cities must keep their highways and streets in repair, so that they are without obstructions or structural defects which may endanger the safety of travellers, and are sufficiently level and smooth, and guarded by railings when necessary, to enable people, by the exercise of ordinary care, to move about with safety and convenience.' †

"'You repeated that sentence very well and with great emphasis. It is quite correct in a general way that highways, streets and sidewalks should at all times be safe and convenient, but then regard must be had to the locality and intended uses ‡ Towns are liable only for injuries caused by defects and obstructions for which they might be indicted. ‖ They do not insure the safety of all using sidewalks in the depths of our northern winters;§ and it has been expressly decided that the mere existence of a little ice on the walk is no evidence of actionable negligence: ¶ the slipperiness of the ice, if the walk is properly constructed and free from accumulations of snow, will not give those who fall a right to sue a city with success.** One must go gingerly and with due care on such occasions.'††

"'All very fine,' said Jones, 'but when my friend Clapp, in walking along the streets of the city of Providence, at night, fell on some ice and broke his thigh, he recovered damages.'

"'Yes, I remember; but then there was a ridge of ice and snow, hard trodden, in the centre of the sidewalk, which was considered such an obstacle as the city should have removed.* And'—

"Ere I had completed my sentence the hour of my doom had struck, and I was as white as ever miller was; an avalanche of snow slid off a roof and thundered down on my devoted head. Jones with a smirk asked me if I was going to sue for damages. Sadly, as I twisted my head slowly round and nodded first to right and then to left, to see if the vetebræ were all in working order, I replied:—

"'Ah, no! I cannot do so with success.† It's a case of *damnum absque injuria*."

"'Ho! ho!' laughed my companion; 'strong language; but no wonder.'

"'If the owner of the house had left the ice and snow there for an unusual and unreasonable time after he knew of its presence and might have removed it, he probably would have been liable to me,‡ or, if that old awning had fallen on me,‖ or if that lamp hanging over Sol's Arms' door had lighted on my crown, producing an extra bump, for the edification of Fowler and Wells and the savants of that ilk, I might have got something in the first case out of the city; in the other from the landlord.§ Or if one of those barrels had rolled out of that warehouse, and, thumping against your legs, had brought you down, you might have sued the merchant.'¶

"'Look at that poor old woman; she will come to grief most assuredly.'

"Before us toddled an aged granny, assisting her septuagenarian extremities with an antique looking umbrella, of no color known to this life. It was of a 'flabby habit of waist, and seemed to be in need of stays, looking as if it had served the old dame for long years as a cupboard at home, as a carpet-bag abroad.'

"'So feeble a person should not be out in such slippery weather unattended;** people should exercise common prudence. One who has poor sight should take greater care in walking the streets than one in full enjoyment of her faculties.'††

"'I fancy the least obstacle or hole would upset her,' said Tom.

"'And if she did stumble over a small impediment she could not sue the city for damages. So the court held where a man fell over the hinge of a trap-door projecting a couple of inches above the sidewalk in a village.‡‡ But the degree of repair in which the walks must be kept depends considerably upon the locality; one may reasonably expect better pavements in a city than in a village; and so in Boston where an iron box four inches square, set in a sidewalk by a gas company, had a rim projected an inch above the level, the city was held responsible for injuries caused by it.'‖‖

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* *Shepherd et ux* v. *Chelsea*, 4 Allen 13; *Hutchinson* v. *Concord*, 41 Vt. 271; *Ray* v. *Manchester*, 46 N. H. 59.

† *Hixon* v. *Lowell*, 13 Gray 49; *Barber* v. *Roxbury*, 11 Allen 320; *Hewison* v. *New Haven*, 34 Conn. 142.

‡ *City of Providence* v. *Clapp*, 17 How. 168.

‖ *Merrill* v. *Hampden*, 26 Me. 234.

§ *Ringland* v. *Toronto*, 23 C. P. Ont. 93.

¶ Ibid.

** *Stanton* v. *Springfield*, 12 Allen 566; *Hutchins* v. *Boston*, Ib. 571 n.

†† *Wilson* v. *Charlestown*, 8 Allen 137.

* *City of Providence* v. *Clapp*, 17 How. 168; *Church* v. *Cherryfield*, 33 Me. 460.

† *Hixon* v. *Lowell*, 13 Gray 59.

‡ *Shipley* v. *Fifty Associates*, 101 Mass 251; *S. C.* 106 Mass. 194.

‖ *Drake* v. *Lowell*, 13 Met. 292.

§ *Tarry* v. *Ashton*, L. R., 1 Q. B. D. 314.

¶ *Byrne* v. *Boadle*, 2 H. & C. 722; *Randleson* v. *Murray*, 8 Ad. & E. 109.

** *Davenport* v. *Ruckman*, 37 N. Y. 568.

†† *Winn* v. *Lowell*, 1 Allen 180.

‡‡ *Ray* v. *Patrolia*, 24 C. P. Ont. 73.

‖‖ *Loan* v. *Boston*, 106 Mass. 450; *Bacon* v. *Boston*, 3 Cush. 174.

"'If she did meet with an accident and was held entitled to damages, what would she get in hard cash?' asked Jones.

"'Tis impossible to say. It would depend upon so many things. In one case where an old man of seventy, who was very feeble, fell at night into an opening for a drain in the sidewalk, which was covered with boards laid at right angles with the others and projecting some two inches, over which he stumbled, the jury gave $4,000 damages; but the court held that excessive, as the old man was insolvent and incapable of much labor.'*

"'That was a large sum for injuries.'

"'But the old fellow died. We go in here,' I added.

"'You may, I will not,' replied Jones, as he leant against the railing of a bridge over a little stream.

"'Well do not stand there; if the board gives way and lets you down, you will have no remedy against the city; for it is not bound to keep up railings strong enough for idlers to lounge against, or children to play upon.† Look out, there is another sled!' As I rang the door bell I heard Jones mutter: —

"'Those boys ought to be indicted for obstructing the sidewalk in such a way.'

"'True for you,' I mentally ejaculated, 'I remember that one of those bewitched and besaddled wheelbarrow concerns, yclept velocipedes, was held to be an indictible obstruction.'‡

Judge Redfield, no mean authority, says of Mr. Rogers' book: "The book is as interesting as a novel, and more instructive in the law than most books addressed particularly to that object." Speaking of it in general terms, both as to the subject, its treatment and appearance, it may not be inappropriate to describe it in a Pickwickian manner as the "neatest, gwacefullest, pwettiest thing that ever wan upon wheels."

* *Hutton* v. *Windsor*, 34 Q. B. Ont. 487.

† *Stickney* v. *Salem*, 3 Allen 374; *Gregory* v. *Adams*, 14 Gray 242.

‡ *Reg* v. *Plummer*, 30 Q. B. Ont. 41.

FLOTSAM AND JETSAM.

A physician reproaching a lawyer with what Mr. Bentham would, perhaps, have called the "uncognoscibility" of legal nomenclature, said: "Now, for example, I never could comprehend what you lawyers mean by *docking an entail.*" "My dear doctor," replied the lawyer, "I don't wonder at it; but I will explain; it is what your profession never consent to—*suffering a recovery.*"

THROWING AN EGG AT A JUDGE.

[From *Punch.*]

ON FINDING THE FRAGMENTS OF AN EGG UPON THE CHAIR OF VICE-CHANCELLOR MALINS.

Hens sit, and judges sit—'tis fair to match 'em,
Since one has lately given much pains to Hatcham,
And laid a yoke (some say) on our theology;
But this egg surely had its nest mistaken.
Eggs in the Rolls would scarcely need apology,
And every one has heard of Eggs and Bacon.
How then account for this misplaced ovation?
Why thus:—Our memory may have its failings,
But we account for it by this quotation,
"Ab ovo usque ad (Flacco pace) Mal-ins."

The London *Times*, in speaking of the attack on the Vice-Chancellor with an egg, says: Such a scene is happily of very rare occurrence. The old law reports, however, give a few cases of the kind, which seem to have been punished with extreme severity. In "Dyer's Reports" (reprinted 1688, for assaulting a witness in court a man was condemned to imprisonment for life, to forfeit his goods, and to have his right hand amputated at the "Standard in Cheape." A case more directly in point is reported in the quaint Norman French of the law courts as follows: "Richardson ch. Just. de C. Banc al Assizes at Salisbury in summer 1631 fuit assault per prisoner la condemne pur felony que puis son condemnation ject un brickbat a le dit Justice que narrowly mist, and pur ce immediately fuit indictment drawn per Noy envers le prisoner and son dexter manus ampute and fix al gibbet sur que luy mesme immediatement hange in presence de Court." The Noy herein mentioned was the Attorney-General. Another case reported in the same book (page 188 b, marginal note) records the fact that for striking Sir Thomas Reynolds with a stick Sir William Waller was fined £1,000 and ordered to be imprisoned during the Royal pleasure.

Circumstantial Evidence.—Mr. Jules de Gastyne, in the Parisian journal *Le Nain Jaune*, gives a very remarkable story of circumstantial evidence in a Spanish criminal case, the names of the actors in which are unfortunately suppressed. According to the chronicler, a quarrel arose between two gentlemen at a Madrid theatre, apropos of a pinch of snuff offered by one to the other, and causing the latter to sneeze in

the donor's face. Words passed, ending in a challenge. One of them left and went to buy a pair of pistols, and then hurried to say farewell to a lady friend before making his way to the selected battle ground. While doing so a sneak thief penetrated to the room and was about to make away with the gentleman's overcoat, which hung against the wall. At that precise moment the woman opened the door, perceived the robber and gave the alarm, whereupon the robber, with one of the pistols in question, fired upon her, and she fell fatally wounded. The firearm, recently discharged and still smoking, was found opposite her. No one had seen the thief enter or go out, though the shot had been heard. The gunsmith who had sold the pistols fully identified them, and said that the purchaser had asked him to load them carefully on buying them, and it was only after the greatest difficulty that the unfortunate victim of circumstantial evidence was enabled, if not exactly to prove his innocence, at least to cause sufficient doubt in the minds of the jury to justify a verdict of what the Scotch would call "not proven."

Working on their Feelings.—An old fellow, who gave his name as Charles H. Slosson, was called up in Judge Wright's court on the charge of drunkenness. He was a remarkably seedy-looking specimen, arrayed in a dirty check shirt and a pair of loose, baggy trousers, which were prevented from falling off by a leather strap knotted about his waist. He was shivering and trembling from the effects of a debauch, and hardly had the strength to stand upright. When the judge asked him if he had anything to say, he rose up in a sort of disjointed way and demanded a jury-trial, which was granted, and when his turn came he advanced and began:—"Gentlemen of the jury, I stand here to-day less a defender of my own personal debasement than an example of human depravity, which, like a beacon light, should warn you from the rugged rocks of intemperance. A man in my condition is like a rude signpost I once saw in Tennessee, which pointed up a road over which the green grass was beginning to wave. On the sign was the inscription 'Small-pox,' and the index finger of a hand pointing westward. If any of you in travelling along a highway saw such a sign as that, you would pause upon the brink of deadly danger, and turn backward (sensation). In me you behold such a sign; and if by looking upon me any one of you can be turned back from destruction, I shall think that God in his infinite mercy has allowed me to fill a sphere of usefulness which shall enable me to bear with fortitude the imputation constantly hurled upon me by my own conscience, that I have lived in vain. Gentlemen of the jury, as you peruse the pages of the poets you will see how they have deified the wine-cup. They have wreathed it with the flowers of fancy, surrounded it with the halo of song, and peopled its bloody depths with the creatures of their own bright imaginations, until one might almost believe it to be the well-spring of human happiness, when bitter experience tells us in very different language that it is the fountain-head of misery, the abode of the demon that destroys our very lives. There is something which comes up in the fumes of the cup that fools call inspiration, but it is a cunning reptile, which, crawling up from the dregs of the grape, enters the window of the brain, and steals away, like a thief in the night, with our reason fast in its embrace. There is a hand in the wine-cup which, at any moment, may put forth its felon grip upon your throats and strangle you as a strong man might a babe. Gentlemen of the jury, I have not long to stay. Two mighty miners are delving on this lode — Time and Death. They are daily at their posts, working together side by side as one eternal shift, clearing away the rubbish of waste cork and pushing along the ledge. Before long I shall be gathered into the vast laboratory of Death, a piece of useless porphyry, to be cast into the waste dumps of hell." Here he pulled from his pocket a red handkerchief and began to sob. The old miners and the jury, moved by his forcible simile, broke forth into a simultaneous sob, in which the court, spectators, and prosecuting attorney joined. The jury were obliged to find him guilty, but recommended him to the mercy of the court. He was accordingly fined five dollars, which the jury paid on the spot, and the old man slid out of the door with the remark, "I knew I'd ketch 'em. Blast my buttons, didn't I work up the briny, though, didn't I!" A subsequent investigation led to the discovery that the bummer was an ex-actor from 'Frisco.—*Virginia City Chronicle.*

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 40th Victoria.

During this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

Albert Clements Killam.
Thomas Hodgkin.
Cornelius J. O'Neil.
Francis Beverley Robertson.
Henry Ernest Henderson.
Hamilton Cassels.
Francis Love.
William Wyld.
Thomas Caswell.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

George Edminson.
Frederick W. Colquhoun.
Edward O'Connor.
John Bergin.

The following gentlemen received Certificates of Fitness:

J. H. Madden.
H. Cassels.
J. W. Gordon.
J. Dowdall.
C. J. O'Neil.
T. M. Carthew.
T. J. Decatur.
T. D. Cowper.
A. W. Kinsman.
C. McK. Morrison.
C. Gordon.
F. S. O'Connor.
G. S. Hallen.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

Charles Augustus Kingston.
John Henry Long.
James J. Craig.
William Fletcher.
Leonard Harstone.
Patrick Anderson Macdonald.

Junior Class.

Benjamin Franklin Justin.
John F. Quinlan.
John Williams.
Joseph William MacDowell.
Phillip Henry Drayton.
Thomas A. Gorham.
James R. Brown.
George J. Sherry.
Hector McKay.
D. Henderson.
Alexander Carpenter Beazeley.
John Bertram Humphries.
Lauren G. Drew.
Herman Joseph Eberts.
Solomon George McGill.
David Johnson Lynch.
Thomas Henry Loscombe.
John Vashon May.
George Moir.
J. H. Macallum.
Hugo Schliefer.
David Robertson.
Angus McB. McKay.
Charles Rankin Gould.
William James Cooper.
Edward Stewart Tisdale.
Francis Melville Wakefield.
Alexander Stewart.
Thomas Miller White.
John Arthur Mowat.
Henry Bogart Dean.
George Robert Knight.
Humphrey Albert L. White.
John Wood.
George Benjamin Douglas.
Alexander Humphrey Macadams
Hugh Boulton Morphy.
William Henry Brouse.
George J. Gibb.
Frederick E. Redick.
William Masson.
Edward Guss Porter.
Thomas Robert Foy.
Henry Albert Rowe.
Thomas H. Stinson.
Stewart Masson.
Francis Evans Curtis.
William Steers.
Robert Taylor.
Henry M. East.
Armour William Ford.

Wm. Martin McDermott.
Charles W. Phillips.
Wellington Smaill.
John Clyde Grant.
George Merrick Sinclair.
George Walker Marsh.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Sexsmith.
John Baldwin Hand.
James Barrie.
George Frederick Jelfs.

Articled Clerks.

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.
J. A. Loughead.

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

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

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317, Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musaeus, Stumme Liebe Schiller. Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

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

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

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.