DIARY FOR SEPTEMBER.

2. Wed..Last day for notice of re-hearing.
6. SUN..13*th Sunday after Trinity.*
7. Mon..Recorder's Court sits.
8. Tues..Quarter Sessions and County Court sits in each County.
10. Thurs Re-hearing Term commences.
13. SUN..14*th Sunday after Trinity.*
20. SUN..15*th Sunday after Trinity.*
27. SUN..16*th Sunday after Trinity.*
29. Tues..*St. Michael.*
30. Wed..Appeals from Chancery Chambers.

The Local Courts'
AND
MUNICIPAL GAZETTE.

SEPTEMBER, 1868.

AMENDMENT TO THE DIVISION COURT LAW.

We are informed that the Attorney General has called upon the County Judges for suggestions in reference to amendments to the Division Court law. This gives clear indication of intended legislation, and under the right sanction, that of the Attorney General of the Province.

In all matters relating to the administration of Justice in England the law officers of the Crown assume the responsibility of measures introduced in the House of Commons, and the bill, if not actually prepared by them, has their approval and sanction, and is submitted under their auspices. So it has been with legislation in Canada, and from the course taken last session by the Premier, and the information he has called for, we doubt not the wholesome rule will be followed in the legislation of Ontario.

It is only those who are familiar with the administration of justice that can estimate the evils which spring from crude or party legislation, particularly in reference to the inferior courts—how extremely difficult it is in these courts, and by people that are not lawyers, that is to say, for suitors to get accustomed to any change in the laws, or to adapt their business transactions to it. And we are strongly of opinion that the sooner it is understood that legislation on such subjects is to be under the sanction of the Attorney General the better will it be for that portion of the business community, whose outstanding debts and claims must be collected by means of the Division Courts.

There is, of course, a natural desire with members of the legislature to have their names connected with statutes for the improvement of the law, but a little reflection will shew that it would be unwise and unsafe to relieve the law officers of the Crown of responsibility on this head. What we have said in reference to the small concerns of the Division Courts is *but a branch of the wise rule* which covers the whole ground of procedure in all the courts of civil jurisdiction, as to which legislation should not be undertaken on the individual responsibility of private members—unless indeed they have lost all confidence in the government for the time-being, and have become antagonistic to them. Upon this subject, the amendment of the Division Court law, there will be a peculiar fitness in the present Attorney General, Mr. Macdonald, dealing with it, for he materially assisted in developing the germ of the Division Courts into the present form and shape under which they have for many years worked so satisfactorily.

There is not in our judgment, and we have excellent means of collecting the opinions of those for whose benefit the courts were designed, any necessity whatever for organic changes in the present system; changes of a radical character we know have been proposed, plausible enough in theory, but which would destroy the value of the courts for debt collecting purposes, and would certainly meet no favor at the hands of those who are practically acquainted with the working of the Division Courts.

The amendments required are somewhat numerous, but almost wholly refer to matters of detail, and desirable, with a view to impart to the courts greater efficiency in securing the fruit of judgment recovered, the lessening of expenses, and facilitating remedies against officers who fail in prompt and proper discharge of the duties incumbent upon them. Much of this could be done by rules, but there are points that require legislation, *e. g.*, in reference to interpleaders — garnishment—testimony of witnesses out of the jurisdiction —the relaxation of the rule requiring strict personal service—giving a jurisdiction "by consent"—the just remuneration of officers, as well as legal practitioners in certain cases—the renewal of process, &c. &c.

No doubt the judges will all submit their views to the Attorney General, and it is to

be hoped with terseness and precision, seeing that there will be some thirty-five communications to be digested and considered.

As to the form of amendment we are strongly in favor of that introduced by the Hon. Mr. Baldwin, and since very generally followed in Canada, namely, by preserving the structure of the original act, and every clause of it, so far as possible, and repealing sections only where the alteration is so considerable that the interpolation of one or more words would not embody the amendments required. And in respect to new provisions, taking care that they are properly adapted to the system, and are so framed as to be of practical value to the suitors in the courts. We are speaking of the direct powers of the court. The powers of the Division Court and of the judges thereof, in aid, *e. g.*, under the Municipal and Amendment Act, must of course be dealt with and retained in these and such like acts. If the Attorney General should, as may be expected, after learning the views of the County Judges, prepare a measure of the kind we have spoken of, and if our professional brethren in the House of Assembly be disposed, as we think they should, to give him the cordial assistance he has a right to expect in passing such a measure, we shall have what the country requires, and what will be acceptable to the business community. But if there be any attempt to recast the whole—to throw "into pi," as the printers would say, and re-set—it will unsettle all the law we have in reference to Division Courts—will embarras suitors and lead to litigation and delays. Such a result would doubtless put some money into the pockets of lawyers, but we are quite sure no honorable man in our ranks would desire to see such an evil state of things—that courts which were and ought to be emphatically "the people's courts," should become valueless to the poor man and a trap to the unlearned.

THE WHALEN TRIAL.

This most engrossing case is so familiar to every one in the Dominion that it would be but a waste of time to refer to it at length. There are, however, some important and suggestive features in it which demand attention.

It is in the first place a proud thing to feel that the reliance of our people in the strength and majesty of the law is such, that they are content to leave to the even course of that law the punishment of a dastardly crime against it; and not only a crime against the law as such, but a crime revolting to the better instincts of our nature, and, from attendant circumstances, rousing a bitter feeling of indignation and horror, a feeling which would naturally find vent in a desire for speedy punishment or perhaps vengeanee on the perpetrator. But it was not thought necessary even to accelerate the sittings of the ordinary tribunals, much less to do what had a strong shew of necessity owing to the peculiarities of the case,—the appointment of a special commission for the trial of the offender. We have seen under somewhat similar circumstances in our nearl neighbourhood the bad policy and the evi effects, to use no harsher words, of allowing the passions of the hour, just and righteous enough within proper limits, to influence the due and orderly administration of the law.

It is of less importance (except for the effect produced in justifying the confidence of the public, and so sustaining the feeling we have alluded to) that the result has been to discover and legally fasten the crime upon the real criminal, for it can scarcely be questioned by any sane man, nor is it doubted by any person, that we have secured the perpetrator of the deed in the individual who has been found guilty and sentenced to suffer the extreme penalty of the law on the 10th day of December next. And in connection with this, we may remark, that one of the strongest features of the case against the prisoner, though one to which we have only seen a passing allusion, is, that no shadow of suspicion appears to have fallen upon any person other than the convicted prisoner. From first to last every circumstance has told against him, and against no one else, nor has there been any suggestion by the prisoner or any one else that any other person known or unknown might have committed the murder.

To those who consider that the guilt of the prisoner was proved on the trial beyond all reasonable doubt, it may seem a pity that there is still a possibility that he may yet go unpunished, for it cannot be denied that on a new trial there might and probably would be a difficulty in producing all the evidence that the Crown had at the last trial, and that it would give the unscrupulous friends of the prisoner an opportunity of manufacturing evidence difficult to rebut, or of buying up or making away with the witnesses on whose

evidence the verdict lately given was founded. We do not at present desire to discuss the probabilities of a new trial, the only possible ground for which is of course the ruling, that a prisoner must exhaust his peremptory challenges before he challenges for cause,—though we cannot but regret that, apparently in this single matter, the counsel for the Crown failed in that tact which, with this exception, he evinced in the conduct of the case throughout. The exigencies of the prosecution did not require a strict enforcement of the rule of law contended for by the Crown, if such rule there be, for even an indulgence to the prisoner in this matter would not, in all human probability, have affected the result, and no doubtful question would then have arisen.

But supposing the objection to be sustained, and the claims of justice delayed or defeated, though we may regret that in this particular case the example required for such evildoers may not be made for the prevention of similar crimes, we must not forget that the objection is intimately connected with one of the safeguards provided by that same law that overtook the criminal, for the protection of those who might be falsely accused.

The very strength and majesty of the law implies a tenderness to the accused which few would wish to see destroyed. The finite understanding of humanity renders it necessary that the law for one man should be the law for another, and that there should be no distinction of persons.

To those concerned in the conduct of this remarkable trial, whether we speak of the conduct of the judge on the bench, the patience and attention of the jury, or the unvarying fairness, good temper, tact and zealous devotion of the counsel on both sides, great praise is due. With respect to the counsel for the Crown, his able management of the case, with the one exception already alluded to, was only equalled by his fairness to the accused. As to those on the other side, we need not here speak of the conduct of Mr. Farrell, of whom the less said the better, particularly as he is not a member of our bar, nor amenable to, and possibly ignorant of, rules which are supposed to guide professional men, at least in this part of the Dominion.

Nor is it necessary to discuss whether the senior counsel, who so ably and faithfully conducted the defence, was right or wrong in accepting a brief for the prisoner. Every lawyer knows that he would have been disgraced if he had refused to do so. For although his talents are supposed, from his position as Queen's Counsel, to be peculiarly at the service of the Crown, that, in itself, does not debar him from defending a prisoner; and it is not the practice in this country, as we believe it is in England, to obtain for a Queen's counsel a license for that purpose. His character as leader of the Bar of Ontario, and his knowledge of his responsibilities in that respect, preclude the thought that he would have hesitated for a moment in assuming even a much more odious position in the eyes of the public if his duty required him to fill it. It is only because some few persons, who, perhaps, ought to know better, appear to be ignorant of these matters, that it is worth while, even at this length, to refer to them.

There is much more difference of opinion as to the propriety of a member of the local Government accepting a retainer in a case of this kind, and under its peculiar circumstances—circumstances which may be said to have imparted to the crime a treasonable character, and made the trial somewhat of a state trial. The crime was, partly at least, aimed as a blow against the state by some one who would seem to have been in some way connected with, and perhaps the chosen agent of an organization avowedly desiring the overthrow of the power of our Sovereign. If the acceptance of office in a government is a tacit retainer in such a case as we have described, on the supposition that a distinction is to be drawn between such a case and an ordinary trial where the Queen is the nominal prosecutor, and if his duties as a sworn adviser of the Crown could, by any possibility, interfere with his duty to his client (and this really seems the principal difficulty), and if he could not take to the consideration of any point which might arise in the case, and come before him as a member of the Government, a mind perfectly free from bias, which few human beings could do, he might well have refused to act for the prisoner. If otherwise, the duty of the learned counsel, however anomalous his position might appear on the surface, was clear, and he acted properly in not refusing to defend a person (innocent by the law of England until proved guilty), who chose to call upon him to do his duty by him as a fearless advocate should. The question with Mr. Cameron, probably, was not—can I

find an excuse for refusing this brief—but, is there any conclusive argument or absolute reason why I should not accept it, for if not, I am *bound* by my barrister's oath to do so. Different men take different views of what their duty would be under a particular state of facts, and the view which Mr. Cameron took, and acted upon, though some may think it an extreme one, must be respected as the conscientious opinion of an honorable advocate, acting on his own view of the principles involved.

Anything that would have been grateful to the feelings of our late revered Chief Justice, Sir John Beverley Robinson, if he were alive, cannot but be of interest to those who cherish his memory. The thought arises from hearing of the success achieved by his youngest son, a lieutenant in the Rifle Brigade, in obtaining the appointment of Instructor of Military History at Sandhurst. The position, in itself an honorable and lucrative one, was purely the reward of merit, and his success is the more marked, as the competition was open to officers of the army in general.

We publish in other columns two interesting decisions by his Honor Judge Logie. The case of *Waugh* v. *Conway* may be said to conflict with the case of *Miron* v. *McCabe*, decided in Chambers by Mr. Justice Adam Wilson, 4 U. C. L. J., N. S., 74), though the learned judge of the County Court did not seem to consider it directly in point. There is much sound sense in the arguments he adduces, although other County Judges take his view of the law, or perhaps feel themselves bound by the judgment of the Superior Court Judge sitting in Chambers.

RECENT DECISIONS.

An application was lately made in England, in a case of *Beauman* v. *James*, on a bill filed for the specific performance of an agreement by the defendant to give a lease to the plaintiff. The plaintiff applied to the landlord's solicitors as to the renewal of his lease. The solicitors sent him a report by a surveyor, who recommended the granting a lease for fourteen years, at a given rent if certain repairs were done by the tenant. The tenant wrote back assenting to the repairs and rent, but asking for a term of twenty-one years. No final agreement was come to, but some months afterwards a negotiation having proceeded between the tenant and landlord without the intervention of the solicitors, the landlord wrote a letter promising the tenant a lease for fourteen years "at the rent and terms agreed upon," to which the tenant wrote back an unqualified acceptance. It was held, that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters; and that it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the Statute of Frauds.

It was lately held in England, in the case of *Betty* v. *Wilson*, that the specification of a patent may describe the process to be adopted so insufficiently as to invalidate the patent, and yet disclose enough to show that what is claimed by a subsequent patent is not new. Whether a specification contains a sufficient description can only be ascertained by experiment; and in making the experiment knowledge and means may be employed which have been acquired since the date of the patent. A prior publication will not invalidate a patent, unless it has imparted information so as to enable any one working upon it to reckon with confidence upon the result. In order to establish the prior public use of a patented article so as to invalidate the patent, it is not necessary to show that the article had been manufactured for sale. Where the subject of a patent in England is made in a foreign country, and applied to the purpose for which it was made, and under these circumstances is sent to this country for transmission to another foreign country, this is a sufficent user of the patent in England to constitute an infringement.

SELECTIONS.

BREACH OF PROMISE ACTIONS.

The *Daily News* owns there is a good deal to be said against actions for breach of promise of marriage. There is something very repulsive in the view of marriage as a matter of business instead of affection, and in appraising the value of the settlement to which affairs of the heart legitimately lead. Nor is it altogether fair that a man should not be allowed to alter his mind. He had better leave a woman in single blessedness than marry her to make her miserable. There is, however, another side to this question. The law is bound to take cognisance of any wilful injury inflicted by one person on another; and what injury is more wilful than that of engaging the affections of a woman, exciting her expectations and hopes, and then disappointing them? If the law took no cognisance of engagements to marry, then of course male relatives, fathers, brothers, and cousins, would have to do so, and the defaulting swain would be made to smart in his body instead of in his pocket. Young men cannot be too deeply impressed with the serious nature of the step they take in making a marriage engagement; and anything which would induce greater levity in such matters would be a danger to

the public morals. Necessity is a great teacher of tolerance. People who must live together soon make the best of it, and the Moravians, who marry by lot, make just as happy marriages as other people. On the whole, perhaps, our law on the subject is not open to very much animadversion. It makes an engagement what it ought to be, a serious affair. It takes the only cognisance it can take of the infraction of such an engagement, and, inflicting a pecuniary fine, does, not by way of solatium to the woman, but of punishment to the man. Such a law, equally with the absence of any law, is much open to abuse.

The *Pall-Mall Gazette*, in an article upon the subject, remarks:—"An action for breach of promise of marriage appears to be a less certain way of making money than it used to be. Mr. Baron Bramwell lately remarked, while dealing with one case of the kind, that when a man or a woman found out they could not agree it was better for them to break the engagement than to keep it. Perhaps the sum of human happiness would not be materially diminished if many persons now married had acted upon this conclusion. Juries, like judges, are becoming submissive to the argument that the sort of persons upon whom hardship is really inflicted by this breach of faith are not those who estimate their sufferings in pounds sterling. Yesterday an apparently hard case of this kind was tried at Leeds. The young lady, of course, had 'considerable personal attractions,' and the damages were laid at £5,000. The wedding-day was fixed, the friends were invited, and the whole party met at church—with the trifling exception of the bridegroom. He wrote two days afterwards expressing his regret that 'things had occurred differently' to the young lady's expectation, and hoped this explanation would meet with her approval. It did not. The action was brought, and the jury gave only a tenth part of the amount asked. If a case of this kind, where some cruelty appears to have been shown, is so treated, the chances of other spinsters finding a solace for wounded affection in a court of law are decidedly bad."—*Law Times.*

LIABILITY OF PURCHASERS AT AUCTIONS.

Another decision has been given which materially affects the interests of auctioneers. An action was brought in the Waltham Abbey County Court, before Mr. W. Gurdon, judge, by Mr. Chetwood, an auctioneer, to recover the sum of 5*l.* 2*s.* from Mr. Moore, under somewhat peculiar circumstances. The plaintiff is also a cattle salesman, and conducts a weekly sale of stock in the Waltham market. It appears that the defendant attended at one of these sales, and became the purchaser of ten lambs which were 'put up' and sold in pairs. The purchase-money amounted to 15*l.* 9*s.*, of which it was afterwards discovered, when he sent for the lambs, that the defendant paid only half. Whereupon the plaintiff refused to allow them to be removed without the whole of the money; and Mr. Moore's servant then paid 1*l.* as a further deposit, and left to see his master upon the subject. The defendant took no further notice of the matter. A few days afterwards the lambs were sent by the Auctioneer to Bishop's Stortford market, where they were sold for the sum of 9*l.* 15*s.*, and it was for the balance of the loss upon the sale and expenses incurred that he now sued the defendant. To a question from the judge the plaintiff stated that there were conditions of sale in existence, but that he did not read them every week. His Honor then ruled, that where a sale takes place under conditions, the purchaser is bound by those conditions; and if a provision is made in them for the sale of any lots not cleared, the auctioneer can claim the deficiency, if any, of the first purchaser; but in this case, as no conditions were produced, the purchaser was not liable. The defendant, however, by paying a deposit, had made himself liable for the amount of the purchase-money; but the plaintiff was bound to keep the lambs. If he had done so, although he might, if he thought proper, have allowed the animals to die for want of food, yet he could have recovered the purchase-money from the defendant; but as he had disposed of the lambs, he could not claim the balance. The judge, therefore, nonsuited the plaintiff; at the same time declining to make any order as to the 1*l.* which the defendant's servant paid as a deposit, intimating that Mr. Moore could take other steps for its recovery. The costs of defendant and one witness were allowed.—*Law Journal.*

NATURALISATION.

The Congress of the United States has passed a Bill nominally for the protection of its own naturalised subjects, but, in fact, dictating to other countries how they shall deal with their own citizens.

The alleigance of every man is due to the country of his birth. Of that allegiance he cannot divest himself, save in the manner prescribed by the laws of *his own* country. Manifestly no other country has a right to determine on what conditions the subjects of another State shall be released from their allegiance.

For instance, the Legislature of the Dominion would have no right to make a law declaring that a citizen of the United States by crossing the frontier into Canada shall be discharged from his allegiance to the United States. But they could, and it is all they could, enact that a stranger should become naturalised in Canada by residing there for a week or a day, that a residence under such a law should make the visitor a Canadian subject, but it would not unmake him a subject of the United States.

This is, however, the form which the new law has taken in America. It does not say in so many words that a British subject shall

cease to be such by complying with the conditions of naturalisation in the States, for even more than Yankee audacity would be required for such a clause. But it does the same thing in effect, for it says that, the law of his own country notwithstanding, any foreigner, becoming naturalised according to the law of America, is to enjoy all the priveleges of Americans by birth, and one of these privileges is that in his own native country that man is not to be amenable to the law from whose obligations he has not been discharged.

We may endeavour to disguise what it is inconvenient to acknowledge, but the truth is that this law is levelled at England, and is designed to assist the Fenian conspiracy. It recognises as American subjects many thousands of traitors whom the British law still recognises as British subjects, and it can scarcely fail to cause some dangerous complications. There can be no desire on the part of this country to keep the allegiance of the Fenians; England would willingly make a present of them to America, and would consent to the shortest possible residence in the States as the condition of being quit of them. But then many other consequences follow. If they choose to leave us, we must alter the terms on which they are to be allowed to return. With their allegiance, they must forfeit all right of succession to property, or to hold property—in short they must cease to be British subjects for all purposes. Moreover, we shall be compelled for our own security to place them under a very strict surveillance when they choose to pay a visit to Ireland, and the practice of the mixed jury must be abolished. Even America cannot dispute our right to prescribe our own terms for the admission of foreigners into our territories, and perhaps it will be found that those terms may make speedy naturalisation in the States by British subjects, not quite so desirable as it may have appeared. Mr. Reverdy Johnson should take for the first essay in his new office of minister in London an honourable settlement of this difficult question, before quarrels have grown out of the hasty Act of Congress.—*Law Times.*

DEBT COLLECTORS AND COUNTY COURT AGENTS.

Mr. F. J. Smith, Deputy-Judge of the Whitechapel County-Court, last week administered a sharp rebuke to those invaders of the Profession of whom such a swarm has been called into existencee by the County Courts. One of these agents, *Goodey* by name, had brought an action against a Mr. Owen for 2*l.* 12*s.* being 37*s.* for summons and hearing fees in a case of *Owen* v. *Thornton*, and 15*s.* for work and labour therein. It appeared from the evidence of the plaintiff's son that he had received no positive instruction from the defendant to take proceedings.

The deputy-judge said that the claim was an infringement not only of the County Courts Acts, but of the 6 & 7 Vict. c. 73. s. 35, which enacts that if any person sues out any process or commences any proceedings in any court of law or exuity, without being admitted an attorney or solicitor, he shall be incapable to maintain or prosecute any action or suit in any court of law or equity, for any fees, reward, or disbursement, &c., and and such offence is a contempt of court. Mr. Smith said that the various County Court Acts had been framed with a special view to protect the honest practitioner, who paid an annual tax for the prvileges of practising in the law courts. The public were equally interested in the strict enforcement of these rules, for it protected them against unqualified pretenders to professional knowledge, and secured to them competent advisers, who were officers of the court and under its control, who could be punished for any molpractice, and whose bills could be taxed. Debt collectors had sprung up everywhere since the establishments of the County Courts, but their practice was wholly illegal, and should not be encouraged. Thereupon Mr. Smith gave judgement for the defendant, and, on the authority of *Wilton* v. *Chambers*, 7 A. & E., ordered the plaint not and the I O U in the action of *Owen* v. *Thornton* to be handed to Mr. Owen, as "the agent" had no right to retain a security for an illegal demand.—*Exchange.*

The case of *Perry* v. *Taylor* has attracted general attention, both from the public and the legal profession. The defendant, the Rev. Dr. Taylor, is a minister of the Canada Presbyterian Church, who had married the son of the plaintiff, a lad of 16, to a widow, aged 49 The parties presented themselves before Dr. Taylor with a license, and the boy being asked his age by the clergyman, declared himself to be 22 years of age. This marriage was annulled by the Superior Court in a previous suit brought by the plaintiff for that purpose, the ground of nullity being the want of consent on the part of the parents of the minor. The action, *Perry* v. *Taylor*, was instituted for the recovery of damages for the illegal marriage. Mr. Justice Monk, on the 9th of July, after reviewing the facts appearing in evidence, expressed the opinion that the reverend gentleman should have done more than merely ask the age of the minor, the disparity of age and other circumstances being such as to awaken suspicion. He considered that a want of proper care had been manifested by the defendant, and on this ground he condemned the defendant to pay $100 damages, and the costs of the action as brought.

This decision seems to have been pretty generally approved by the public, as far as we have observed. It is certainly desirable that clergymen should not be in any uncertainty as to their responsibility in respect to the parties whom they marry.—*L. C. Law Journal.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

BUILDING SOCIETY—FORFEITING SHARES.—Where after the death of a member of a Building Society his shares were permitted to run into arrear:

Held, that in the absence of a personal representative, the Society could not take any steps to forfeit the shares any more than they could have enforced their claim by action of debt as provided by the Statute. — *Glass* v. *Hope*, 14 Chan. Rep. 484.

COPYRIGHT.—A domiciled subject of the United States took up her temporary residence in Canada, while a book of which she was the authoress was being published in England by Messrs. S. L. & Co., the respondents. The appellants, Messrs. R. & Co., having subsequently printed and sold copies of the same work, a bill was filed against them to restrain the publication, to which defendants demurred:

Held (confirming the decision of the court below), overruling the demurrer, that under the 5 & 6 Vict. c. 45, an alien friend who first publishes in the United Kingdom a work, of which he is the author, if at the time of publication he is resident in the British dominions, even though such residence should be only temporary; and the fact that the temporary residence is in a colony with an independent legislature, under the laws of which he would not be entitled to copyright, does not prevent his acquiring this privilege.

Per the Lord Chancellor (Cairns) and Lord Westbury, Lords Cranworth and Chelmsford dissenting: The protection of copyright is given to every author who first published in the United Kingdom, wheresoever he may be resident, or of whatever state he may be the subject. *Jefferys* v. *Boosey*, commented on.—*Routledge et al.* v. *Low et al.* 18 L. T., N. S. 874.

LIFE ASSURANCE—INTEREST ON AMOUNT INSURED.—The assignee of a person upon whose life a policy of insurance has been effected is not entitled to claim interest on the amount of the policy until he is in a position to give to the assurers a full legal discharge upon payment of the claim.—*The Toronto Savings Bank* v. *The Canada Life Assurance Co.*, 14 Chan. Rep. 509.

MARRIED WOMAN'S ACT—SEPARATE ESTATE.—A married woman who was equitably entitled, as *cestui que trust*, to a life-estate in certain lands, joined with her husband in making a promissory note upon which judgment was recovered against them. Thereupon the plaintiff in the action filed a bill in this Court seeking to enforce his claim against the title of the wife.

Held, that the provisions of the Married Woman's Act had not the effect of increasing the interest of the wife so as to render her estate liable for this debt.—*Royal Canadian Bank* v. *Mitchell*, 14 Chan. Rep. 412.

MORTGAGE — REGISTRATION — RELEASE. — A mortgage at the date of its execution, the same having been registered, was ineffectual to pass the wife's estate, by reason of her not having been examined apart from her husband; and subsequently such mortgage was re-executed by the husband and wife, and the fact of the wife having been duly examined indorsed thereon, so that the deed was made effectual to pass her estate, but no registration took place.

Held, that the registration was sufficient under the Statute; but, that the examination of the wife upon the re-execution of the mortgage could not relate back to the first execution thereof, so as thereby to gain for it priority of an instrument which had been subsequently executed by the husband and wife, and duly registered.

The title acquired by a purchaser at Sheriff's sale of the husband's interest in his wife's lands, is sufficient for a release from the husband and wife to operate upon. — *Beattie* v. *Mutton*, 14 Chan. Rep. 686.

EJECTMENT—TITLE.—Evidence that plaintiff had been in possession of the land and had been intruded upon by defendant, *Held*, insufficient to entitle plaintiff to succeed in ejectment, it appearing that the fee was still in the Crown, the plaintiff being in possession as a free grant settler, but without patent or license of occupation.—*Henderson* v. *Morrison*, 18 Com. Pleas, 220.

PATENT—SETTING ASIDE.—A bill by a squatter to set aside a patent, on the ground of fraud or error must allege the custom of the Crown in favour of squatters, and such other facts as may shew his interest in obtaining the recission of the patent.

Possession of Crown lands by a person who entered upon an agreement with another, to clear and improve for the latter, on stipulated terms, is not such a possession as entitles the occupant to maintain a bill to set aside a patent to the latter, on grounds of fraud or error unconnected with his own interest.—*Cosgrove* v. *Corbett*, 14 Chan. Rep. 617.

RAILWAY COMPANY—NEGLIGENCE.—In an action against a railroad company for injury caused by an accident, evidence that the conductor was intemperate or otherwise incompetent is admissible to raise a presumption of negligence.

Admissions or declarations of the company, made subsequently to the accident, are not competent as part of the *res gestæ*.

The declarations of an officer of the company stand upon the same footing.

In an action for damages by a person injured by negligence, evidence of the number of plaintiff's family or of his habits and industry is not admissible unless special damage is averred.

It is no justification for the employment of an incompetent servant that competent ones were difficult to obtain.

Where a person injured by a railroad accident had accepted a ticket or pass describing him as "route agent, an employee of the Railroad Co.," this pass is competent evidence for the company, but it does not estop the plaintiff from showing that he was not, in fact, an employee of the company.

In an action for injury by negligence the damages should be compensation for the actual injury, and it is error to leave the measure and amount of damages, as well as the rules by which they are to be estimated, entirely to the jury.—*The Pennsylvania Railroad Co.* v. *Books* Am. L. Reg., 524.

2. A person receiving a printed notice on his ticket or check at the time of delivering his goods to a carrier is to be charged with actual knowledge of the contents of the printed notice.

Where such a notice stated that the carrier would not be responsible "for merchandise or jewelry contained in baggage, received upon baggage checks, nor for loss by fire, *nor for an amount exceeding* $100 *upon any article*, unless specially agreed for," &c., the words "any article" mean any *separate* article, not a trunk with its contents. The language bears that construction, and must be taken strictly against the carrier.

Therefore, a traveller who gave a single trunk to a carrier and received such a notice, was allowed to recover the value of separate articles in the trunk amounting to $700.

Baggage includes such articles as are usually carried by travellers. Books and even manuscripts may be baggage, according to the circumstances and the business of the traveller.

In this case a student going to college was allowed to recover the value of manuscripts which were necessary to the prosecution of his studies.—*Hopkins* v. *Westcott et al.*, 7 Am. Law Reg. N.S. 534.

3. It is negligence for a passenger in a railroad car to allow his arm to project out of the window, and if he receive injury from such position he cannot recover.

The railroad company is not bound to put bars across its windows to prevent passengers from putting their limbs out.—*Indianapolis and Cincinnati Railroad Co.* v. *Rutherford.*

TRESPASS—CERTIFICATE ON MARRIED WOMAN'S DEED.—The certificate on a married woman's deed was in these words, I, A., Judge of the * * do hereby certify that on this 13th day of January, 1849, at * in the said * * the within deed was duly executed in the presence of M., of * merchant, and D., of * * merchant, by the within named Margaret, wife of L., within named, and that the said Margaret, at the said time and place, being examined by me apart from her husband, did appear to give her consent, &c., &c.

Held, that as the Judge could not have certified that the deed was executed in the presence of the witnesses, who subscribed it, without being himself present, and as, when he certified to her consent to depart with her estate at the time of the execution of the deed, he was unquestionably certifying to a fact of which he had been a witness, and on the presumption that he knew the law and did his duty, the inference was that the certificate was executed in his presence, as required by 1 Wm. IV., ch. 3, and 2 Vic. ch. 6, under which it was given; but if the certificate was defective in form, effect must be given to it under C. S. U. C. ch. 35, sec. 13, as it had been made before 4th May, 1849.—*The Commercial Bank of Canada* v. *Smith et al.* 18 Com. Pleas, 214.

UNDUE INFLUENCE—FATHER AND SON.—In the case of a deed of gift from a father to a son, there is no presumption of undue influence in obtaining it.

Where a father made a deed of gift of all his property to his son and there was no evidence of undue influence on the part of the son, or of his having taken an unconscientious advantage of his father, and the Court was satisfied that the deed had been duly executed, the son was not required to prove that the father in making the deed was aware of its nature and consequences; and the deed was upheld —*Armstrong* v. *Armstrong*, 14 Chan. Rep. 528.

WILL—IMPERFECT ENUMERATION—A testator commenced his will by saying he disposed of the whole of his estate, and then gave $2000 to one person and $500 to another person; his estate in fact, being greatly in excess of these two amounts.

Held, [affirming the decree of VanKoughnet, C.] that as to such excess there was an intestacy; the rule as to cases of imperfect enumeration not

applying to cases where a sum of money is named in the will.—*McLennan* v. *Wishart—In re Nelson.* 14 U. C. Rep. 430.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

MUNICIPAL CORPORATION—DISQUALIFICATION OF TOWN COUNCILLOR.—At an election for four town councillors in a borough having no wards, five candidates were nominated, of whom one was mayor, and acted as returning officer at the election. Another of the candidates, who in the event proved to be in the minority, on the morning of the election caused printed copies of a notice that the mayor was disqualified for election, and that votes given for him would be thrown away, to be posted on the town hall and in other conspicuous places in the borough, and other copies to be distributed generally; but copies were not served on, nor was any verbal notice given to, the voters at the time of tendering their votes, and some votes had been recorded before the printed notice was made public as aforesaid: *Held*, that the mere knowledge on the part of voters in order to have that effect, must be not only of the fact constituting the disqualification, but also of the law that such fact does disqualify:—*Reg* v. *The Mayor, &c., of Tewkesbury*, 18 L. T. Rep. N. S. 851. Q.B.

STREET RAILWAY—INFORMATION—PARTIES.—An Act having been passed authorizing the construction of a street railway, confirming a covenant entered into for the purpose with the municipal corporation, and providing that the rails should be laid flush with the street, &c.; it was *held*,

(1.) That the rails must not only be flush when laid, but must be kept flush.

(2.) That to enforce the contract against the company, a suit by the municipal corporation, the other party to the contract, was necessary.

(3.) That an information by the Attorney-General to enforce the Statutory restrictions was proper; and that unless the parties concerned chose, by proper alterations and repairs, to comply with the requirements of the Statute, the Attorney-General was entitled to a decree for the removal of the rails as of a nuisance.—But,

(4.) That the municipal corporation was a necessary party to the information.—*The Attorney General* v. *The Toronto Street Railway Company*, 13 Chan. Rep.

TAX TITLES—QUIETING TITLES' ACT—PRACTICE UNDER.—The County Treasurer is not at liberty to become a purchaser at a tax sale.

Under the Act for Quieting Titles, where a contestant sets up a tax sale, which is found invalid, he is entitled to a lien for the taxes paid by his purchase money, with the proper per centage to which the owner would have been liable if no sale had taken place.—*In re Cameron.* 14 Chan. Rep. 612.

TAX SALES—FRAUD—RELIEF AGAINST FORFEITURE.—In case of a tax sale, if the owner, instead of paying the redemption money to the County Treasurer for the Sheriff's vendee, pays it to the latter personally, and he accepts it, the payment is, in equity, as effectual to save the property as payment to the Treasurer would have been.

So, if the Sheriff's vendee verbally agrees to accept payment personally at a distance from the County Town, in lieu of its being made to the Treasurer for him, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the Treasurer; refuse to receive it himself, and when it is too late to pay the Treasurer, and insist on holding the land as forfeited.

Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the Court, holding that the presumption in a case of doubt must be in favor of fair dealing and not of forfeiture, gave the owner relief.—*Cameron* v. *Barnhart*, 14 Chan. Rep. 661.

TRESPASS—LAND CONVEYED TO CORPORATION AS A MARKET—USER BY PUBLIC AS A HIGHWAY—INEFFECTUAL DEDICATION.—A block of land in the City of Hamilton, extending from John Street to Hughson Street, was conveyed to the Corporation for the purposes of a public market, a strip across the entire northerly side of which had been used for over twenty years as a passage way or sidewalk; but this strip was not separated from the rest of the block except by a kind of ditch, the earth from which mainly formed the sidewalk and raised it above the level of the rest of the block. This sidewalk had been recently narrowed and planked like the ordinary sidewalks of the city. A public market building had been erected on the southerly part of the block and used as such for about thirty years. The defendant and others, who owned the land adjoining to the sidewalk on the north, had erected buildings thereon fronting or facing on the sidewalk and nearest

block, which buildings were generally occupied as taverns, and to some of which there was no access except across the sidewalks. The city authorities, for some unexplained reasons, had recently erected a close board fence on the extreme northerly boundary of the sidewalk from street to street, thus effectually obstructing the doors and windows of said buildings, and cutting off all access to one or more of them. The defendant, being one of those injuriously affected by the board fence, cut it away, contending that he had a right to enter upon the sidewalk from any part of his land adjoining to it, as long, at any rate, as it was permitted to be used as a public way either for carriages or foot passengers, and in trespass for cutting away the fence he pleaded several pleas, alleging the *locus in quo* in some to be a carriage way and in othersa footway, relying on the public user for over twenty years:

Held, that the city authorities, being in the position of trustees, were incapable of dedicating any part of land to the purposes of a highway, or of diverting it in any respect from its original purpose of a public market, and therefore no such dedication could be presumed from any length of user they might permit or had permitted; and that, acting on behalf of the public, from the nature of their trust, they necessarily retained such a power of control as would justify the erection of the fence in question.—*The City of Hamilton* v. *Morrison*, 18 Com. Pleas, 228.

ONTARIO REPORTS.

PRACTICE COURT.

(Reported by HENRY O'BRIEN, Esq., *Barrister-at-law, Reporter to the Court.)*

IN RE SOULES V. MORTON.

Arbitration—Right of parties to go into case afresh before an umpire.

Where a case is referred to the award of two persons, and, in case of disagreement, to the decision of a third person, either as an umpire or as a third arbitrator, the parties have the right to insist that such third arbitrator or umpire shall have before him the evidence and witnesses produced before the two arbitrators, as well as the right to appear and state their case to such third arbitrator or umpire, before a binding award can be made.

[P. C., Easter Term, 1868.]

D. McMichael obtained, on behalf of Soules, a rule *nisi*, to set aside the award herein, on several grounds, one of which was that one of the arbitrators was not appointed until after evidence taken, and gave his award without having heard the parties or the evidence; also, that the arbitrator heard evidence on behalf of Morton, in the absence of Soules or any one on his behalf.

The submission was by deed dated the 17th April, 1868, and after reciting that disputes, &c., were pending between the parties, in reference to the annual sum of money to be paid to Mrs. Morton in lieu of dower, &c., and in order to settle the amount, &c., the parties agreed to refer the same to the award of two named arbitrators, and in the event of these two not being able to agree within two days from the date of the deed, then they could appoint a fit and proper person as third arbitrator by a memorandum to be endorsed on the deed, and the award of any two of them should be final and conclusive. The award was to be made in writing, on or before the 23rd April, with power to the arbitrators to extend the time, &c. On the 17th April the two arbitrators appointed the third arbitrator, and on the 23rd April the three arbitrators made the award now moved against, awarding an annual payment of $82 50, &c.

It appeared from Soules' affidavit that the two arbitrators proceeded with the arbitration on the 17th April: that both parties attended before them with their evidence, and were heard by the arbitrators, and although they had appointed the third arbitrator he was not present, nor did he hear the parties. The two arbitrators being unable to agree, they called in the third arbitrator, and the three arbitrators considered the matter among themselves and made their award, and did so without notifying Soules, and without his being heard by the third arbitrator, and he swore that if he had been allowed to place his case before the third arbitrator he would have convinced him that the annual amount was unusually large. Smith, one of the arbitrators, also made an affidavit stating that they named the third arbitrator to meet the event of the two not agreeing: that having considered the subject with his co-arbitrator they were unable to agree, and they then called in the third: that Soules and his evidence was not heard, nor was he offered an opportunity to be heard by the third arbitrator: that the son of Soules asked if they did not require his father, but he was told they did not, and Smith also swore that he was not aware that it was necessary or proper for the third arbitrator to hear Soules.

On the part of Mrs. Morton several affidavits were filed, going principally to show that the award was a reasonable one.

Harrison, Q C., shewed cause.
McMichael supported his rule.

MORRISON, J.—There is no dispute about the fact that the two named arbitrators first heard the parties; that being unable to agree upon the amount to be annually paid to Mrs. Morton they called in the third arbitrator, to whom, we may assume, they related the case made by the respective parties, and without the third arbitrator hearing the case except as stated; they conferred among themselves, and they then came to the conclusion of awarding as they did. It is to be regretted that the parties were not heard by the three arbitrators, as from the affidavits filed it is, I think, clear that the award is a fair and proper one, and if it were possible to uphold it I would do so, for it is just one of those cases in which the arbitrators, neighbours residing in the immediate vicinity of the land in question, could determine upon the statement of the parties alone, what was fair and reasonable, but on principle the award cannot be upheld. The third arbitrator was either intended to be an umpire or a third arbitrator. In either case the

parties had a right, personally or by counsel, to place their case before him, as well as the other two arbitrators. The award is a joint judicial act. The judgment of the three arbitrators was not the result of hearing the parties, for that of the third arbitrator was based on what the other two told him, in the absence of the applicant, and without his being notified that the third arbitrator was called in to deliberate on the subject. It is impossible to say what the parties would have done, or what course they might adopt to bring their case before the third arbitrator. If the case had been reheard they might have suggested a new view of the case, as said by Littledale, J., in *Salkeld* v. *Slater*, 12 A. & E. 767.

The general rule is, that an umpire to whom a case is referred by arbitrators must hear the evidence over again, and in the case cited Lord Denman says—"It is important to have it understood that the umpire, as well as the arbitrators, ought to hear and see the witnesses." And so in this case, the third arbitrator should have seen and heard the statement of the case from the parties themselves, or any witnesses they might produce. The parties are entitled to have their case, as made by themselves, put directly to the arbitrators, and are entitled to the benefit of the judgment of all three on the case, as made. Two of the arbitrators heard the case, apart from the third arbitrator, and the third heard it at second-hand and apart and in the absence of the parties, (as said by Coleridge, J., in *Plews* v. *Middleton*, 6 Q. B. 845)—"whereas it ought to have been considered by the arbitrators and umpire jointly, in presence of the parties." There is no imputation on the motives or conduct of the arbitrators; it is only the irregularity of the proceedings that invalidates the award; and the Court, in such a case, sends back an award to the same arbitrators, where there is no reason to believe that they are not to be trusted. I think that this is a case in which I ought to exercise that power, and that it should go back with an intimation that the third arbitrator should have an opportunity of hearing the parties and considering the evidence with the other two arbitrators.

CHANCERY.

In re Nelson.

Witness fees.

A public officer who has charge of documents for which he is responsible, and attends as a witness in his public capacity and in relation to matters connected with his office, will be allowed professional witness fees of $4 a day.

VanKoughnet, C.—Mr. Cayley, Registrar of the Surrogate Court, declined to produce the original will of the testator, unless he should be paid a larger fee than the 3s. 9d. given to ordinary witnesses. Looking at the responsibility with which a person in Mr. Cayley's position is charged, in keeping, searching for, and producing original documents, which it is of the greatest moment should be in proper custody: at the trouble and loss of time, in addition, which often occur in searching for and producing such documents: that Mr. Cayley is an officer and paid by fees, and that in the progress of a case he may be kept waiting in court for hours before he is called as a witness I think, $4 a day a reasonable allowance to him. I am told by the Clerk of the Crown that in a case of *Bennet* v. *Adams*, in 1859, Richards, C. J., ordered $4 to be taxed to a Clerk of Assize, who attended to give evidence, in that capacity, as a witness.

Houck v. Town of Whitby.

Purchase by Municipal Corporation.

The name of the seller or his agent must appear in a contract of purchase by a municipal corporation.

Where a municipal corporation contracted for the purchase of some land for a market site, and afterwards a by-law was passed with the sanction of the ratepayers, which recited the purchase but did not name the seller, and there was no other evidence under the corporate seal, and possession had not been taken, it was held that the contract could not be enforced by the vendor against the corporation.

[14 Chan. Rep., 71.]

Hearing at Whitby, at the Spring sittings, 1868.

S. Blake, for the plaintiff.

Roaf, Q.C., for the defendants.

Mowat, V. C.—This is a bill for payment of the purchase money of certain land, which the plaintiff alleges that he sold and conveyed to the corporation of the town of Whitby for a market site.

There is no doubt that a contract was deliberately entered into to the effect alleged by the plaintiff; that in August, 1867, it duly received the sanction of the ratepayers in the manner required by the Statute; that, in pursuance of the contract, the plaintiff, on the 18th of November, 1867, in good faith, executed a conveyance, which was prepared by a Solicitor employed by the Council for this purpose; and that he left this conveyance with the Solicitor to be given up to the corporation on the purchase money being paid to certain incumbrancers on the property.

It seems that the ratepayers have, since August last, changed their minds in regard to the policy of the purchase, and do not wish to take the property. The plaintiff's bill was filed on the 27th of February, 1868, and the corporation resist the relief prayed. They allege, amongst other things, that the Solicitor had no authority under seal; that the authority he had, besides not being under seal, did not in terms authorize him to accept a conveyance, but only to prepare one; that the corporation had never become bound to the plaintiff, by any act under seal; and that they never accepted the conveyance, or authorized any one to accept it for them. It appears also, that they never entered into possession of the property. The objection which seems to me to be fatal to the plaintiff's case is the want of the corporate seal.

It was not contended on behalf of the plaintiff, that, in a case of this kind, the rule which requires a corporation to contract under seal was not as obligatory on this Court as on a Court of Law. I have looked at the cases cited, some of which were cases at Law, and some were cases in Equity, and I am clear that a seal was necessary to bind the corporation. Now, while several important resolutions of the Council were put in evidence, the only document in evidence to which the corporate seal was attached, is the by-law which was submitted to

the ratepayers. The insufficiency of this by-law to meet the requirements of the rule was urged on various grounds; but, apart from every other difficulty, the circumstance that the name of the seller does not appear in the by-law is fatal. That the mention of the seller (or his agent) is essential to make out a contract has been clearly settled. I refer to *Champion* v. *Plummer*, 5 Esp. 240; *Warner* v. *Willington*, 3 Drew. 523; and *Williams* v. *Lake*, 6 Jur. N.S. 45.

Though, therefore, if the plaintiff, had contracted with a private individual, or with an unincorporated company, what occurred would have entitled the plaintiff to the relief which he prays; yet, as the defendants are a corporate body, I am obliged to hold that as against them the contract was not binding; and that the plaintiff's bill must be dismissed. It is not a case for costs: *The Leominster Canal and Navigation Co.* v. *The Shrewsbury and Hertford Railway Co.* 3 K. & J. 674.

DIVISION COURTS.

(In the Fourth Division Court, County of Wentworth, before His Honor Judge LOGIE.)

WAUGH v. CONWAY.

Division Courts—Jurisdiction—Reduction of claim by payment.

An action on an unsettled account exceeding $200, which was reduced by *payment* to $100, *held*, not to be within the Division Court jurisdiction.

Miron v. *McCabe*, 4 Prac. R. 171, considered.

[Hamilton, 7th Sept. 1868.]

In this action the plaintiff claimed $104 17, gave credit for $3 50, and abandoned 67c., reducing the claim to $100.

The claim was for the amount of an account, one item being "balance of account due on building, $55 17;" the other items being for hay, wheat and lumber sold by plaintiff to defendant. There had been no settlement of the building account, and no admitted balance, on the contrary, every item of that account as well as the account in suit was disputed. The building account was produced, and consisted of a number of items for building materials, teaming and labour, exceeding $200, but reduced by payments to the balance claimed of $55 17. It became necessary, therefore, to prove all the items of the building account, as well as of the other; the two accounts amounting to about $300, when

Wardell for the defendant, contended that the court had no jurisdiction to try the case.

Durand for the plaintiff, cited *Miron* v. *McCabe*, 4 Pr. Rep. 171.

LOGIE, Co. J.—The 59th section of the Division Courts Act, contains a proviso, that no action shall be sustained for the balance of an unsettled account, where the unsettled account in the whole exceeds $200 Under that proviso I have always held that I had no jurisdiction to try an unliquidated account exceeding $200, though reduced by payment to a sum below $100; the intention of the Legislature apparently being to prevent these small debt courts from investigating large and important transactions. *Miron* v. *McCabe*, 4 Pr. Rep. 171, however, seems to be an authority for the position urged on behalf of the plaintiff, that this court has jurisdiction to try a disputed claim exceeding $200, where it has been reduced to $100 by payment. The point certainly was raised in that case, but it does not seem expressly decided in the judgment; on the other hand in *Higginbotham* v. *Moore*, 21 U. C. Q. B. 326, the court assume as a matter of course, that in such a case the Division Court has no jurisdiction. It was an action to recover the amount of an account and, as amended, the balance due upon two notes, the amount of the notes being reduced by *payment* to the balance claimed; and there the court held that the notes being settled or liquidated amounts, the proviso in the statute did not apply, the balance due on the notes and the account not exceeding the jurisdiction of the Division Court. Robinson, C. J., in giving judgment says:—"the plaintiff's claim as first delivered in stating an account of which the debit side exceeded £73, stated a case not within the jurisdiction of the court, according to the 59th section, although the balance claimed was only £25—that is if the whole account is to be taken as unsettled, notwithstanding there were among the items two notes, which in themselves were liquidated demands." I have known cases to be brought in the Division Courts for the balance of an unsettled acount exceeding $1000, but reduced by payment to $100; if the Court had jurisdiction in such a case, there would be this anomaly, that a case *could* be tried in a Division Court which would be above the jurisdiction of a higher court, the County Court. The intention of the Legislature to give jurisdiction to the Division Court in such a case as this, must be very clear and decisive of the point, more express than in *Miron* v. *McCabe*, before I would assume the jurisdiction claimed on behalf of the plaintiff.

GILBERT v. GILBERT EXECUTRIX &c. W. GILBERT.

Splitting cause of action.

Claims, such as promissory notes, which would each constitute a distinct cause of action if sued upon directly, become within the rule as to splitting of causes of action in Division Courts, when the nature of the action upon them is changed to an indirect action as for money paid by an endorser to the use of the maker.

[Hamilton, 7th Sept., 1868.]

At the June sittings of the Court, an action was brought to recover the amount of two promissory notes, made by the deceased Wm. Gilbert to other parties; the plaintiff claiming that he had signed the notes as security for Wm. Gilbert, and had to pay them. The claim was allowed to be amended, to one for money paid for the use of the defendant as administratrix, &c A set-off was put in and proved, and the plaintiff had judgment for a small balance. At the trial the plaintiff produced another note made in the same way, which he said he had paid, but did not give it in evidence. At the last sittings of the court, he brought another action for money paid on that note, and objection was made that he could not recover, on the ground that it was a splitting of a cause of action. For the plaintiff it was contended, that the three notes being all payable to different persons, formed different causes of action, and therefore the plaintiff was entitled to recover.

LOGIE, Co. J.—In *Wickham* v. *Lee*, 12 A. & E. N. S 526, Erle, J. says:—"It is not a splitting of actions to bring distinct plaints, where in a Superior Court there would have been two counts. I am not sure that the Court of Exchequer puts it so, but that is the true construction of the Act."

All the cases on the subject, illustrate the correctness of the rule laid down by Mr. Justice Erle, and I have always acted upon that rule in deciding upon what constitutes a splitting of a cause of action.

In this case the actions are not brought upon the notes directly, for then they would form distinct causes of action, but for money paid by the plaintiff for the use of the defendant in taking up the notes. In a Superior Court there would have been one count for money paid, under which the amounts of the three notes could have been recovered, making one cause of action though the notes were payable to different persons; as in *Grimsby* v. *Aykroyd*, 1 Ex. 479, where the orders were given to different persons, but were held to give only one cause of action. The plaintiff should have sued for the whole at once, and not having done so, he cannot now recover the amount claimed in this action.

ENGLISH REPORTS.

CROWN CASES RESERVED.

REG v. GLYDE.

Larceny—Finding lost property—Belief that owner will come forward.

Where a man found a sovereign on the highway, and, with a knowledge that he was doing wrong, at once determined to appropriate it, whether the owner came forward or not, and did so; but, also, at the time of finding, believed the sovereign to have been accidentally lost, and had no reason to suppose or believe that the owner would become known to him, it was

Held, on the authority of *R* v. *Thurborn*, 1 Den. 387, that he was not guilty of larceny.

[16 W. R. May 30, 1174.]

Case reserved by Cockburn, C. J.:

William Glyde was convicted before me at the last assizes for the county of Sussex on an indictment for larceny, in which he was charged with having stolen a sovereign, the property of Jane Austin.

It appeared that, on the evening of the 16th January last, the prosecutrix, being on her way home from Robertsbridge, where she had been to pay some bills, to her home at Brightling, and having some money loose in her hand, had occasion, owing to the dirty state of a part of the road, to hold up her dress, and in doing so let fall a sovereign. It being then dark, she did not stop to look for the sovereign, but on the following morning she started to go to the spot in the hope of finding the lost coin. In the meantime the prisoner, coming from Robertsbridge towards Brightling, in company with a man named Hilder and his son, and seeing, at the spot where the prosecutrix had dropped her sovereign, a sovereign lying in the road, picked it up and put it in his pocket, observing that it was a good sovereign and would just make his week up.

Proceeding onwards the men soon afterwards met the prosecutrix, then on her way to the spot where the sovereign had been dropped. According to her statement, on meeting the men, she addressed Hilder, whom she knew, and asked in the hearing of the prisoner, "if he had stumbled on a sovereign," stating that she had lost one and was going to look for it, to which inquiry Hilder answered in the negative. She was however, contradicted by Hilder, and his son, who were called as witnesses for the prosecution, as to any such conversation having taken place. But it was clear that the fact of the sovereign thus picked up by the prisoner being one which had been lost by the prosecutrix was speedily brought to the prisoner's knowledge. The fact of the prosecutrix having lost a sovereign and of the prisoner having found one having come to his master's ears—the master asked him if he had found a sovereign, to which he answered that he "was not bound to say." The master further asked if he had not heard that Mrs. Austin had lost one, to which the prisoner made the same reply. On the master asking whether it would not be more honest to give the sovereign up to her, he answered that "he could just manage to live without honesty."

Being asked by a police constable whether he remembered going up the Brightling road, and picking up a sovereign, he answered, "I do not know that I did." On the officer saying "I have been informed by witnesses that you did so, and if you did it did not belong to you—more particularly as you know to whom it belonged," the prisoner said he did not want to have anything more to say to the officer, and went into his house. On a subsequent occasion, however, he admitted to the same witness that he had picked up the sovereign.

The witness Hilder also stated that the prisoner afterwards came to him and asked him if he could say that he (prisoner) had picked up a sovereign, and on receiving an answer in the affirmative, said that if that was so he must go and see the prosecutrix, who had applied to him several times, about it.

In summing up to the jury on this state of facts, I told them that where property was cast away or abandoned, any one finding and taking it acquired a right to it, which would be good even as against the former owner, if the latter should be minded to resume it. But that when a thing was accidentally lost, the property was not divested but remained in the owner who had lost it, and that such owner might recover it in an action against the finder. As to how far larceny might be committed by a person finding a thing accidentally lost, it depended on how far the party finding believed that the thing found had been abandoned by its owner or not. That where the thing found was of no value, or of so small value that the finder was warranted in assuming that the owner had abandoned it, he would not be guilty of larceny in appropriating it; or if, not knowing or not having the means of discovering the owner, the finder, from the inferior value of the thing found, might fairly infer that that the owner would not take the trouble to come forward and assert his right, so that practically there would be an abandonment, and so believing appropriated the thing found as virtually abandoned by the owner, he would not be guilty of larceny. So, although the value of the article might render it impossible in the first instance to presume abandonment by the owner, yet if, from the fact of no owner coming forward within a sufficient time, the finder might reasonably infer that the owner had abandoned and given up the thing as lost, there would be no criminality in an appropriation of it by the latter.

On the other hand, I pointed out that there were things as to which it could not be supposed that they had been intentionally abandoned, or

the owner be supposed to have given up his property: thus, *e.g.*, a purse of gold, or a pocket-book containing bank notes, found in the road, could not possibly be supposed to have been intentionally placed there; or a diamond ornament, found outside the door of an assembly room, to have been intentionally dropped by the lady who had worn it, or a box or parcel left in a public conveyance or a hack cabriolet, to have been left with the intention of abandoning the property. That in all these cases as the property remained in the owner, and the presumption of abandonment was plainly negatived by the circumstances, a person finding such an article and appropriating it to himself with an intention of wronging the owner, if he knew who the owner was, or had the means of finding the owner—as where the name of and address of the owner were on the thing found—or had the means of ascertaining the owner, as in the case of a cabman who knew the house at which he had taken up or set down a person by whom an article must have been left in the carriage—would clearly be guilty of larceny. And even where the finder did not know the owner, if the nature of the thing found precluded the presumption of abandonment, and gave every reason to suppose that the owner would come forward and assert his claim, and the finder nevertheless determined to appropriate the chattel, and to keep it though he should afterwards become aware who the owner was, this too, if done with the intention of wrongfully depriving the unknown owner of property, which the finder knew still to belong to him, would be larceny, provided such intention was contemporaneous with the original taking of possession.

I told the jury that while, to constitute larceny in appropriating an article thus found, there must be a guilty intention of taking that which was known to belong to some one else, and which the party appropriating knew he had no right to treat as his own, this intention may be gathered from the value of the article and the other circumstances of the case, especially the conduct of the party accused, as to concealment or otherwise.

In this respect, I told them they might properly take into account the conduct of the prisoner Glyde in maintaining silence when he heard the question put by the prosecutrix to Hilder, if they believed that portion of her evidence; or, at all events, in refusing to say whether he had found a sovereign or not, and only acknowledging it when Hilder had told him he was prepared to speak to the fact.

As the result of this reasoning, I left it to the jury to say whether the prisoner, on finding the sovereign, believed it to have been accidentally lost, and nevertheless with a knowledge *that he was doing wrong*, at once determined to appropriate it to himself, and to keep it, notwithstanding it should afterwards become known to him who the owner was. I told the jury, if they were of that opinion, to find the prisoner guilty. But inasmuch as there was nothing to show that the prisoner, on appropriating the sovereign on finding it, had any reason to suppose that the owner would afterwards become known to him (or any belief that he would), I doubted whether an intention on his part of keeping it even if the owner should become known to him—he not believing that the latter event would come to pass—would amount to larceny. I therefore thought it right to take the opinion of this Court whether the conviction can be sustained on the facts I have stated.

The jury having found the prisoner guilty, I admitted him to bail, on his own recognizances to come up for judgment at the next assizes, if required so to do. Had I passed sentence at the time, I should have condemned him to imprisonment and hard labour for one calender month.

No counsel appeared for the prisoner.

Lumley Smith for the prosecution.—In *R.* v. *Moore*, 9 W. R. 276, 1 L. & C. 1, 30 L. J. M. C. 77, where a shopkeeper appropriated a note dropped in his shop, he was convicted, and that case differs from the present mainly in the fact that there the jury found specifically that when he picked up the note he believed the owner could be found. [BLACKBURN, J.—In that case, Wightman, J., referring to *R.* v. *Thorburn*, 18 L. J. M. C. 140, 1 Den. 387, asks if there is any case of a conviction being quashed where the three ingredients concur—first, that the prisoner intended to appropriate the property from the first; second, that he believed at the time he took it that the owner could be found; third, that he acquired the knowledge of who the owner was before the conversion. It, therefore, comes to this, whether a conviction can be supported where the first and third ingredient concur, but not the second.] *R.* v. *Preston*, 21 L. J. M. C. 41; *R* v. *Peters*, 1 C. & K. 245. [WILLES, J.—You are going back to the deluge.] [MARTIN, B.—How can you make a man's mind worse than it is here?] [COCKBURN, C. J.—This is not the case of a man finding a thing, and, without either supposing the owner will turn up, or believing he will not turn up, appropriating it; but where the finder appropriates, not supposing the owner will turn up, but from the first determining to appropriate the lost property whether he does or not.] The law upon the subject as laid down in *Thurburn's case, supra*, is unsatisfactory, as is pointed out in Russell on Crimes, vol. 2, p. 180, 4th ed., by Greaves. It is not to be supposed here that there was any abandonment, and, unless there was, this was larceny within the definition in Bracton, book 3, c. 32, f. 150.

COCKBURN, C. J.—We are of opinion that this is not larceny. The question seems to turn upon whether the finder of the lost property supposes at the time that it is abandoned by the owner. Where the lost property is such as it was in the present case, it may be doubtful whether the owner will come forward or not. Suppose a case where it is doubtful whether the owner will come forward, as where, having regard to the value of the property, it is to be supposed that a poor man would make search for it, but that a rich one would not, and a person finding it doubts whether the owner will come forward, but yet knows that the property is not abandoned, and resolves, nevertheless, even if he does so, to deny that he has it in his possession, and to appropriate it, and does convert it with that intention, that might be larceny. But the rule in *Thurburn's case* does not go to that length. Here there is nothing to show that the prisoner had reason to believe the true owner would come forward. I think, therefore, that it is not within

Thurburn's case. If the matter was one of greater magnitude, it might be worth while to reconsider that case.

MARTIN, B.—I agree; but, except for the authority, I should have said that this was larceny—where a man takes the property, resolving to appropriate it whether the owner came forward or not. I think, however, we ought not to overrule *Thurburn's case.*

WILLES, J.—I concur, and think that *Thurburn's case* is in point, and should govern this, and I have too much respect for the learned judge who delivered the judgment in that case to suppose that it was not well decided.

BRAMWELL, B., concurred.

BLACKBURN, J.—I should wish the law to be as my brother Martin would have it, but doubt whether the intervention of the Legislature would not be required to alter the law as it stands at present. Until reversed, the case is governed by Thurburn's.

Conviction quashed.

QUEEN'S BENCH.

READ v. GREAT EASTERN RAILWAY COMPANY.

Negligence—Action by executor—Lord Campbell's Act (9 & 10 Vict. c. 93)—Accord and satisfaction with deceased.

To an action by an executor under Lord Campbell's Act for negligence of the defendants, whereby the deceased lost his life, the defendants pleaded on accord and satisfaction with the deceased in his lifetime.

Held, on demurrer, a good plea.

(Com. Law, W. R., June 25, 1868.)

Declaration by the plaintiff, as widow and executor of D. Read, deceased, for negligence, by reason of which the deceased lost his life.

Plea.—That in the lifetime of D. Read the defendants paid to him and he accepted a sum of money in full satisfaction and discharge of all claims and causes of action he had against the defendants.

Demurrer and joinder in demurrer.

By 9 & 10 Vict. c. 93 (Lord Campbell's Act), s. 1, it is enacted that "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, if such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Codd in support of the plea.—This action is a new remedy, and not the same as that which accrued to the deceased; *Blake* v. *Midland Railway Company*, 18 Q. B. 93; *Pym* v. *Great Northern Railway Company*, in error, 11 W. R. 922, 32 L. J. Q. B. 377. [LUSH, J.—If the deceased had brought an action and recovered, could the executor subsequently recover?) I must go as far as that. Accordingly, satisfaction with deceased is no bar to the fresh cause of action in the representatives, and the language of the Act seems to show that on death a new right springs up.

Philbrick, contra.—The plea is in respect of all claims for and in respect of all causes of action. There are no words in the statute giving the new right; all they give is an extended right of action to the executor in consequence of the death and the damage therefrom, for which the deceased himself could not recover. The assessment of damages on a different principle in the two actions does not show any right to bring both. There is no new cause of action arising from the original wrong. The words "persons who would have been liable if death had not ensued" point to a continuing liability.

Codd in reply.—This case fits in with every word of the section.

BLACKBURN, J.—I think this plea is good. Before Lord Campbell's Act the maxim "*actio personalis moritur cum persona*" applied to such a case, and the preamble to that Act points to the cases in which the wrong-doer escaped from liability. But here, taking the plea to be true, the Act would not have enabled the party injured to maintain an action because he had accepted an accord and satisfaction. In the second section the principle upon which the jury may give damages, and the persons to whom they are to go, are new; but there is not otherwise a new cause of action. It would be straining the statute to hold that after the injured party has recovered the executor may recover also.

LUSH, J.—The structure of the 1st section shows that it was not the object of the statute to make the wrong-doer pay twice over, but only to give to the executor a right to sue where there was a cause of action existing at the time of death, which was prevented from taking effect by the maxim *actio personalis moritur cum persona.* It is true that the measure of damages is different, and in that sense the action is new, but not otherwise.

Judgment for defendant.

BAZELEY v. FORDER.

Liability of husband for neccessaries supplied to child on order of wife.

[Q. B. July 3rd, 1868.]

In this case it appeared that the plaintiff by order of the defendant's wife supplied clothes for the defendant's child. The wife was living separate from the defendant, and the child, who was under seven years of age, was residing with her against the defendant's will, the Master of the Rolls having, in exercise of the powers conferred by 2 & 3 Vict. c. 54, made an order that the infant should be in her custody. There was some evidence that the defendant's wife had been driven from him by his misconduct. The wife had some separate property, which the jury found was inadequate for her support according to the husband's degree. The question now arose whether the defendant was liable for the price of the articles supplied to the defendant's child.

H. Lloyd for the plaintiff.

Keane and *B. Campbell* for the defendant.

The Court, after taking time to consider, now delivered judgment: Blackburn J., Mellor J., and Lush, J. thinking that the defendant was liable, on the ground that, while the infant was lawfully in the wife's custody, the cost of providing for it was part of the reasonable expenses for which she was entitled to pledge her husband's credit; Cockburn, C. J. dissenting, and holding that the Legislature had made no pro-

vision for the support of the infant while it was in the custody of her mother, and had never intended to create a new liabiliy in the father for necessaries supplied to his children.

CORRESPONDENCE.

The Statute of Limitation as applied to Division Court Process.

To the Editors of the Local Courts' Gazette.

Messrs Editors,—You would oblige me and many of your readers by giving your opinion on a question relating to the application of the Statute of Limitations to Division Court suits under certain circumstances. The question is one that has arisen recently in Recorder Duggan's Court in Toronto and has doubtless arisen in many other Courts. It is this:—A has a claim against B, due in 1861. He sues it in 1862, but the summons is not served. He takes out another summons in 1863 and tries to serve it, but cannot do so. B leaves Canada in 1863, and goes to the United States—but returns in 1867. A then goes to the clerk and continues his efforts to serve him, taking out another summons, in the same suit, and gets B served for trial in 1867. Now you will perceive that there is a hiatus or gap of say four years, when A did nothing in the suit because B was in foreign parts. It would have been useless for him to have done so until B's return.

The question is, can A avail himself of his summonses issued in 1862 and in 1863 to stop —or to defeat a plea of the Statute of Limitations, pleaded in 1867, by B to A's claim? In Toronto the Division Courts are held twenty-four times in the year, and in other places they are held, sometimes monthly, sometimes every two months. Again is there any reason why the old doctrine of continuances, that is, a constant issue of process, the one linked into the other down to the last summons issued, and reaching back to the first summons issued before the claim was barred by the Statute, should be applied to Division Court suits? My opinion is that it should not. Suppose summonses were issued in this way in Toronto from Court to Court, for four years on a claim of $100. We would have ninety-six summonses issued to connect that of 1863 with that of 1867: or, if the Court were held six times in a year we would have 24 summonses. In the first case the costs could not be less than $200—in the last over $50. My idea is that if the plaintiff makes use of reasonable efforts to serve the defendant—sues him—enters his suit, but fails to serve him—that is a commencement of the suit, which if pursued within six years ought to stop the effect of the Statute.

The old doctrine of continuances applied to Courts of Record I think does not apply to Courts not of Record.

Then, process issued from term to term—now it issues every six months. Continuances are abolished in Canada in Courts of Record, but the summons should no doubt in Courts of Record be issued and reissued or continued regularly every six months. I cannot see any necessity for this in Division Courts, where the action is once honestly commenced, and not abandoned, but only left in abeyance because the defendant has left the country, provided it is acted on within six years. What is your opinion Messrs. Editors?

The late Judge Harrison, I know, acted on the view I have taken.

"Scarboro."

Toronto, 12th Sept. 1868.

[We shall endeavour to discuss the subject of this letter next number. The view taken by our correspondent seems a reasonable one. —Eds. L. C. G.]

A Master's Right to order a Servant to go to Bed.—A singular case came before the County Court judge at Guildford (Mr. Stonor.) *Wheatly* v. *White*, was a claim of 16*s*. 8*d*. in lieu of notice. The defendant is the landlord of the Talbot Inn at Ripely. The plaintiff said she was in the service of the defendant, who had dismissed her without giving her any notice. The cause of her dismissal was that the defendant came down into the kitchen one night and told her to go to bed at a quarter to 10 o'clock. She refused to do so, as they never went to bed till half-past 10. On the following morning he threatened to kick her out of the house if she did not go. The Judge.—I think your master was quite justified in dismissing you. When your master told you to go to bed it was your duty to do so, and as you did not obey his reasonable commands, he was quite justified in dismissing you. I shall find a verdict for defendant.—*Law Times.*

One of the best "legal" puns on record is unanimously tributed by the gossipers of Westminster Hall to Lord Chelmsford. As Sir Frederick Thesiger he was engaged in the conduct of a cause, and objected to the irregularity of a learnd serjeant who in examining his witnesses repeatedly put leading questions. "I have a right, maintained the serjeant, doggedly, "to *deal* with my witnesses as I please. "To that I offer no objection," retorted Sir Frederick; "you may *deal* as you like, but you shan't *lead*."—*Jeafferson.*