DIARY FOR DECEMBER.

1. Tues..N.T.D., Q.B., P.D., C.P. Last d. for not trial Co. Ct. Clks. (exc. Co. Clks.) ret.resi't ratep'rs (Mun Act. s. 189.)
2. Wed..Open Day, Q.B. New Trial Day, C.P.
3. Thurs..Re-h. T. in Chy. begins. Open Day, Q.B. and C.P., Con. Stat. came into force, 1859.
4. Fri..N.T.D., Q.B. Open D., C.P. Last Day but one for cert.
5. Sat..Michaelmas Term ends. Last day to give notice for Call.

6. SUN..*2nd Sunday in Advent.*
8. Tues..Gen. Sess. and Co. Ct. sittings in each Co. begin. Last day for J.P.'s to ret. convictions to Clk. of Peace (32 V. Ont. c. 6. s. 9 (4); 32-33 V. c. 31, s. 76; 33 V. c. 27, s. 3.

13. SUN..*3rd Sunday in Advent.*
14. Mon..Prince Albert died, 1861. Collectors to return rolls, unless time extended. Councils may disfranchise for Municipal elections if taxes not paid by this date.
19. Sat..Last day to give notice of primary examination.

20. SUN..*4th Sunday in Advent.*
21. Mon..*St. Thomas.* Shortest day.
24. Thurs..Christmas Vacation in Chancery begins.
25. Fri..*Christmas Day.* First observed, 98.
26. Sot..Upper Canada erected into a Province, 1791.

27. SUN..*Sunday after Christmas. Innocents.*

28. Mon..Nomination of Mayor, Ald. Reeves, Dep. Reeves and Councillors (Mun. Act. ss. 102-105.)
31. Tues..Last day for Clerk of Peace to deposit Jurors' book in Crown office (C.S.U.C. c. 31, s. 29.)

CONTENTS.

THE

Canada Law Journal.

Toronto, December, 1874.

We are glad to see that the Government of Ontario seems favorably disposed to the appointment of short-hand reporters to take down evidence at trials before the judges. There is no reason why we should be behind the age in this matter. The example has already been set in the west wing of Osgoode Hall, and it is said to be a great convenience to the Bench and Bar.

We publish reports of two equity cases as to staying proceedings pending rehearing, as these cases often referred to, but have not hitherto been reported, we have been at some pains to give them to our readers. *Stovel* v. *Coles*, decided some two years ago by Mr. Taylor, will not be found elsewhere, *Campbell* v. *Edwards*, decided by the Chancellor in June last, will appear, we presume, in due course, in the "orthodox" reports.

BLUNDERS IN THE STATUTES.

The gentlemen engaged in consolidating the laws of Ontario will have plenty of opportunities for improving upon the performances of the Local Legislature of Ontario, which maintains the long-established reputation of parliaments for making extraordinary blunders. It was Lord Coke who said that all things were possible for parliament, except to turn a man into a woman, and *vice versa*. The last Ontario House have been occupying themselves in stamping out acts which had been extinguished some time before—wasting their strength — in slaying the dead. For instance they propose to re-

peal part of section 52 of the Error and Appeal Act (C. S. U. C., cap., 13), as will appear from the schedule A appended to 37 Vict., cap. 7, Ont. But the part they attempt to deal with had already been deleted by 32 Vict., c. 24, sec. 7, Ont. Again in 37 Vict., c. 24, sec. 4, certain words are added to C. S. U. C., c. 49, sec. 85, (the act relating to Joint Stock Road Companies). But it appears that this section 85 was repealed and a new section (containing different provisions) substituted by 35 Vict., cap. 33, s. 1. This jumble makes it rather difficult to know what the law is. However, it is well-known that the business of the Courts is to find out what the Legislature means.

CONCERNING VACATION.

Business men in England are falling foul of the long vacation there, and agitating for its abolition. In this it is not desirable that they should succeed. The best interests both of the bench and the bar demand that there should be a time for rest and recuperation for the members of the hard-worked and brain-racked profession of the law. It may be that the long vacation in England is too long and should be somewhat shortened, but it would be most injudicious to do away with it altogether.

In this country a temporary release from work is all the more necessary on account of the exhausting heat of summer. And indeed the seasons would seem to have somewhat changed since the limits of the vacation in this Province were first fixed. We have heard it suggested that instead of having it from the 1st of July to the 21st of August, it would be better if it were to run from the 15th of July to the 15th of September. Two months would be none too long, and such a two months as are indicated would it is said, embrace that part of the hot weather, which is hardest to be borne—that part namely in the beginning of September which now destroys all possible beneficial results of previous sojourns at sea-side and lake-side..

The large number of lawyers who have died from over-work, even under the present system, is quite enough to stay the hand of the most rigid reformer, before he sets about abolishing vacation. Among the many eminent names that might be mentioned we can recall those of Sir S. Romilly, Sir W. Follett, Sir John Rolt, Sir G. M. Giffard, Sir John Wickens and Mr. Justice Willes (one of the few judges who did not accept the honor of knighthood.) A prominent English periodical has aptly characterized the vacation as a period of relaxation not only necessary to the individual, but in the long run advantageous to the public.

ADVERTISEMENTS FOR TENDERS.

In these days of high rates in newspaper advertising, it pains the economic mind to see how wantonly architects and others throw away money by persisting in informing the contracting public that "*the lowest or any tender will not be necessarily accepted.*" These words are mere surplusage and do not avoid any liability supposed to be incurred by inviting tenders to be sent in. The point was expressly raised for decision in *Spencer* v. *Harding*, 39 L. J. C. P. N. S., 332, a case which arose out of a stock in trade that had been exposed for sale by tender. The time when all tenders would be received and opened was also stated. The plaintiff made a tender, which was alleged to be the highest, and brought an action because it was not accepted. The Court observed that there was no engagement in the advertisement to accept the highest bidder. There was nothing more than a public proclamation that the defendant desired to have

offers made for the stock, and so the action failed. We think we have observed this unnecessary clause about not accepting tenders in advertisements which have been settled under the supervision of Masters of the Court of Chancery. It would be well in this matter to observe the direction of the late Chancellor Vankoughnet, and shorten the advertisement as much as possible.

REAL PROPERTY LIMITATION.

The Legislature in England has taken a step in changing the period of statutory limitation in regard to land which should have long since been initiated in this country. Here, where the rapid growth of village, town and city, the sudden affluence of individuals, the simplicity of titles to real estate, and the frequent transfer of land as an article of commerce, work more radical and extensive changes in half-a-dozen years, than are to be found during a quarter of a century in what we speak of as "The Old Country," here, surely, rather than in England might we have expected to find the passage of an "Act for the *further* limitation of actions and suits relating to real property." Such, however, is the title of an Act passed in England in the last session of the Imperial Parliament, (37 and 38 Vict., cap. 57), although not to come into force till January, 1879.

One of the chief amendments of the law effected by this Statute is the allowance of a period of twelve years for making an entry or distress or bringing an action for the recovery of lands, instead of the present term of twenty years. In cases of disability, the period of ten years from the termination of such disability or death, is shortened to six years. It is further provided that the time limited for making entries, &c., shall in no case be extended by reason of absence beyond seas. As to this alteration we have anticipated English legislation, by the Act passed in 25th Vict., cap. 20, which enacted that no additional time should be given to absentees by reason of their absence from the jurisdiction. This Statute was commented on in *Low* v. *Morrison*, 14 Gr. 195, and Vankoughnet C. seemed to think that the change was rather too hastily introduced, as only one year was given to absentees within which to avail themselves of an existing disability. By the length of time given in England, before the Statute in question becomes operative, pains have been taken to modify as much as possible the effect of an *ex post facto* law.

Among the other provisions of the English Statute we may notice that the extreme period of limitation is to be thirty instead of forty years. Successive disabilities are provided for, but twelve and six years are respectively substituted for twenty and ten years in the previous Act.

Following this example we observe that the Attorney-General has introduced a bill this session to shorten the periods of limitation in Ontario. Every reasonable facility should be given for the sale and transfer of landed property in a new country like this, and no measure can have a more beneficial tendency to secure such a result than a proper curtailment of the present periods of statutory limitation.

No doubt considerations may be urged against the policy of this change. Persons holding wild lands for speculative purposes will probably object to an act which will cause them to give a little more attention to the utilization of their property. Persons whose maxim is *ne quieta marre* (*anglice* "let well alone"), will fail to see any sufficient reason for disturbing the time-honoured period of twenty years proscription. But twenty years now a days is well-nigh a life-time, and any one who allows another (say a squatter), to remain in undisturbed pos-

session for that length of time can hardly bring himself within the maxim as to the vigilant whom the law assists. There may be possible hardships in the operation of the law as to minors, yet if parents choose to die and leave their property uncared for, it should not be matter of surprise if the state is equally heedless. But, after all, the true remedy for the protection of infants is to provide for the appointment of a class of public functionaries who should have the supervision of intestate estates. It may be questioned (though perhaps we may be set down as heartless monsters for breathing such a thing) whether infants may not be classed as a "public nuisance," looking at the way their interests are protected to the detriment of public business.

FOX'S LIBEL ACT.

Though the act which declares the rule of law to be that on the trial of an indictment for libel, the jury may give a general verdict of guilty, or not guilty, upon the whole matter put in issue, and shall not be required by the judge to find the defendant guilty, merely on proof of the publication of the alleged libel, and of the sense ascribed to it by the indictment, was introduced by Mr. Fox, and is always known as "Fox's Libel Act," yet the merit of bringing about that measure is without doubt mainly due to two great lawyers, Lord Camden and Lord Erskine.

Lord Chancellor Camden was one of those admirable men in whose life, public or private, calumny itself could find no flaw. Although he was the son of a distinguished lawyer, Sir John Pratt, the successor of Lord Macclesfield as Chief Justice of the King's Bench, and was gifted with rare talents and industry, he passed so many years of his professional life in briefless obscurity, that at one time he seriously contemplated entering the Church. Happily for the profession, and for his own fame, he was dissuaded from this step, and induced once more to "ride the circuit" which he had travelled fruitlessly for eight or nine years. On this occasion a friendly stratagem procured him an opportunity for displaying his powers, which he used to such advantage that a respectable practice immediately flowed in upon him. He first attracted public attention in a prosecution for libel, *Rex* v. *Owen*, when he boldly asserted the then startling doctrine that, by the law of England, the judge had no right to direct the jury to confine their verdict to the question of publication, and to the correctness of the innuendos, leaving the bench to decide whether the matter itself was libellous.

This was in 1752, and for forty years, Pratt consistently and earnestly maintained the doctrine he had then, against the entire current of legal opinion, dared to assert. In 1792, after having enjoyed the highest honours of his profession, and gained for himself the reverence of the people as the guardian of their rights, and of the bar as a profound and upright judge, he had the satisfaction of conducting in its passage through the House of Lords, the bill which *declared* the law to be what he had always contended it was. This was the last public service he performed.

At this day the arguments so frequently used by Lord Camden seem to us unanswerable. "A man may kill another in his own defence, or under various circumstances, which render the killing no murder. How are these things to be explained?—by *the circumstances of the case*. What is the ruling principle?—the *intention* of the party. Who decides on the intention of the party? The judge? No! the jury. So the jury are allowed to judge of the intention upon an indictment for murder, and not upon an indictment for libel!! The jury might as well be deprived of the power of judging

of the facts of *publication*, for that likewise depends upon the *intention*. What is the oath of the jury? Well and truly to try the *issue joined*—which is the plea of *not guilty* to the whole charge." And yet Lord Mansfield never swerved from his opinion that the judge alone was concerned with the question, whether the writing complained of was libellous. He maintained this to be the law in every case, in his long career, where the question arose before him, and when Erskine united all his eloquence and logic in one impetuous stream against this dangerous doctrine, he put him aside, to use the advocate's own words, "as you do a child when it is lisping its prattle out of season." Lord Eldon too, stoutly maintained the same opinion, and begged the House of Commons, in the debate on Fox's Act, not to act with precipitation in unsettling a rule which had been regarded as law for a century. Thurlow, Kenyon, Buller, in truth all the lawyers of that day, great or little, concurred in holding obstinately that the jury had no business to meddle with the circumstances which make the publication criminal or innocent, and looked upon the Libel Act as a dangerous innovation, prophesying the usual doleful consequences to the constitution if it should become law. Amongst the whole profession Camden and Erskine were alone found to raise their voices against the prevailing opinion.

History furnishes us with an impressive scene in the debate in the House of Lords which decided the fate of Fox's Act. It was the last public question in which the venerable Camden was to take part. He was approaching four score years, and he rose to address the House slowly and painfully, leaning upon a staff for support. "I thought," he said, "I thought never to have troubled your Lordships more. The hand of age is upon me, and I have for some time felt myself unable to take an active part in your deliberations. On the present occasion, however, I consider myself as particularly, or rather as personally, bound to address you—and probably for the last time. My opinion on the subject has long been known; it is upon record: it lies upon your lordship's table: I shall retain it, and I trust I have yet strength to demonstrate that it is consonant to law and the constitution." We are told that his voice, which had been at first low and tremulous, grew firm and loud, and all his physical as well as his mental powers seemed animated and revived. He then stated, with his wonted precision, what the true question was, and he argued it with greater spirit than ever. Lord Thurlow, disappointed in his hope that the bill would be defeated, did his best to damage it in committee by a nullifying amendment. But Camden refused to allow any qualifications, whereupon the following dialogue ensued:

Lord Chancellor: "I trust the noble and learned Lord will agree to a clause being added to the bill, which he will see is indispensably necessary to do equal justice between the public and those prosecuted for libels. This clause will authorize the granting of a new trial, if the Court should be dissatisfied with a verdict given for the defendant."

Earl Camden: "What! after a verdict of acquittal?"

Lord Chancellor: "Yes!"

Earl Camden: "*No, I thank you!*"

These were the last words Lord Camden ever uttered in public.

But great as was the influence of Camden's character and labours in securing the establishment of the law of libel on a rational basis, it is doubtful whether he would have lived to see the triumph of his opinions, had he not found a powerful ally in Erskine. Erskine's efforts were more splendid and striking, and being enacted on a more public stage, forced upon the mind of the people and of parliament the necessity for legislative

action. It was in the Dean of St. Asaph's case that Erskine first had occasion to contend for the principle, that it is the province of the jury, on an indictment for libel, as in other criminal cases, to bring in a verdict upon the whole matter in issue. Buller was the judge, whose pupil Erskine had been, and for whom he entertained a sincere feeling of reverence. This, however, did not prevent a fierce altercation between bench and bar, when the jury, eager to reward the eloquence of the advocate by a complete acquittal, brought in a verdict of guilty of publishing *only*. The last word Justice Buller refused to record, insisting that the jury did not understand their verdict.

Erskine: "The jury do understand their verdict."

Buller, J.: "Sir, I will not be interrupted."

Erskine: "I stand here as an advocate for a brother citizen, and I desire that the word "*only*" shall be recorded."

Buller, J.: "Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner."

Erskine: "YOUR LORDSHIP MAY PROCEED IN WHAT MANNER YOU THINK FIT; I KNOW MY DUTY AS WELL AS YOUR LORDSHIP KNOWS YOURS. I SHALL NOT ALTER MY CONDUCT."

A verdict of "guilty of publishing, but whether a libel or not, we do not find," having been at length brought in, Erskine afterwards moved for a new trial on the ground of misdirection. This he did with no hope of success, but to resist what he thought to be an illegal and unjustifiable precedent, and to call public attention to it. Fox often declared his argument on this occasion to be, in his opinion, the finest piece of reasoning in the English language, though the judges of the King's Bench were unmoved by it, and Lord Mansfield dismissed the whole question with a doggerel rhyme. The judgment was arrested on another ground, but the judges of England had, as far as lay in their power, placed the fatal doctrine that *libel or no libel* was a pure question of law, and one with which juries had no concern, beyond the reach of further danger. The result of the case was, however, far different to what it seemed likely to be. Instead of establishing a rule of law, which, like the rule in Shelley's case, would endure impregnable to all the assaults of reason, it caused so much alarm in the public mind that Fox's Act was called for, which forever subverted the doctrine by *declaring* the law to be the reverse of that doctrine. It fell to Erskine, who had made such a gallant and glorious struggle in the cause, to support the bill as Mr. Fox's seconder.

It will gratify equity lawyers to know that the clause in the act requiring the judge, according to his discretion, to give his opinion on the whole matter in issue, which has caused so much trouble, and in some cases has nullified the effect of the act, was the handiwork of Lord Eldon. "Mr. Fox's Act," says Lord Campbell, "only requires the judges to give their opinion on matters of law in libel cases as in other cases. But did any judge ever say, 'Gentlemen, I am of opinion that this is a wilful, malicious and atrocious murder!' For a considerable time after the Act passed against the unanimous opposition of the judges, they almost all spitefully followed this course. I myself heard one judge say, 'As the Legislature requires me to give my own opinion in the present case, I am of opinion that this is a diabolically atrocious libel.'"

In our own day judges are for the most part reconciled to the necessity of leaving the whole issue to the jury, and seldom attempt to diminish their privileges by such a direction as that just

mentioned. Seditious libels, to which Fox's Act was principally directed, are unknown to us, and no judge is likely to be led astray by an excessive reverence for royal prerogative or fear for the stability of government. Still prosecutions for libel at the instance of the Crown, though happily rare, have occurred amongst us. In such cases it behooves the judge to act circumspectly, lest the suspicion may be aroused that the baleful influence of party feeling has invaded even the bench, and that the spirit of the Act has been overridden by a specious adherence to the letter.

LAW SOCIETY.

Michaelmas Term, 1874.

There seems to have been a decided falling off this Term in the number of those who are sent forth as competent on behalf of their clients to "plead and be impleaded" in Her Majesty's Courts. The various examinations resulted as follows:

CALLS TO THE BAR.

Mr. Jas. H. Coyne, without an oral, having obtained over three-fourths the total number of marks, and Messrs. M. E. O'Brien, W. H. Watson, W. H. McFadden and N. F. Paterson, also without an oral, being already attorneys.

ATTORNEYS ADMITTED.

Mr. Jas. H. Coyne, (without an oral), and Messrs. W. H. McFadden, M. E. O'Brien, G. H. Watson, A. D. Cameron, James Pearson, W. D. Foss, H. E. Henderson, A. R. Creelman and H. W. Delaney.

INTERMEDIATE EXAMINATIONS.

First—Messrs. J. L. Whiting, F. B. Robertson, James Fullerton, J. R. Whiteside, H. East, F. D. Cowper and Walter Barwick, (without an oral.) Messrs. J. J. Manning, H. P. Milligan, H. Vivian, J. J. Wadsworth, J. W. Robinson, J. Lappan, A. H. Marsh, C. F. Smith, R. Gourlay, T. J. Decatur, F. H. Kennin, (after an oral examination.)

Second. — Messrs. John T. Wood, A. Monkman, C. J. Holman, M. Wilson, J. H. Scott, J. C. Haslett, A. C. Killam, R. G. Cox and C. C. Robinson, (without an oral.) Messrs. F. Going, E. J. Reynolds, A. Ogden, A. E. Smythe, James Leitch, S. C. Locke and Thomas Hodgkin.

SCHOLARSHIP EXAMINATIONS.

These examinations resulted as follows:

First Year—T. P. Galt, 263 marks.

Second—D. E. Thompson, 288 marks; James Fullerton, 263 marks; (the other students not classed being below the minimum.

Third—J. W. Gordon, 234 marks.

Maximum, 320, and minimum, 214, in first, second and third years.

Fourth—H. J. Scott, 350 marks. Maximum, 400; minimum, 300.

The examinations of Mr. Scott, for the fourth year (though only a "three year" man) and Mr. Thompson in the second year, were remarkably good, both obtaining a very high percentage, and this is also the first time for four years that the required standard in the fourth year has been reached.

SELECTIONS.

TESTAMENTARY POWERS OF SALE.

(*Continued from page* 308.)

In Massachusetts, at least, the law should be clear on this point, if decisions can make it so. It has been here held from the first that an executor's or administrator's function, as such, includes the performance of duties relating to the payment of legacies, whether directly or in trust, even if that trust extends over the lifetime of the legatee. The decisions, some of which go to a great length, and may be considered as modified by later authorities, nevertheless clearly show that an executor is bound to perform a testamentary trust, and, therefore, that he is *quoad hoc* a trustee; and it is a legitimate consequence of this that all powers

given him to carry out these trusts will as well survive to him under the name of trustee as of executor. Thus, in *Farewell* v. *Jacobs*,* where there was a direction in a will that the executor should give a reasonable support to the testator's father during his life, it was held that this was a legacy, and a duty to be discharged by the executor as such, and, therefore, by an administrator *cum testamento annexo*, and that an action lay against the latter in behalf of the legatee. The court, it is true, say, in the course of their opinion, "that the duties of an executor resulting from the nature of his office, and charged upon him as executor, devolve upon an administrator *cum testamento annexo*, where the authority is not necessarily connected with a personal trust or confidence reposed in him by the testator." But it is very noticeable that they should hold that the duty in this case was of that character,—that is, that the executor took as such, and not as a special trustee. In *Saunderson* v. *Stearnes*,† a similar state of facts existed; and upon the claim being made by the life annuitant under the will, that the *corpus* of the fund vested in her, because there was no one named as trustee to hold it during her life, the court say: "The supposed difficulty does not occur; for there is a trustee, if not named, yet arising by a plain implication from the words of the bequest, who is entitled to retain the legacy during the life of the plaintiff. The executor named in the will, or any person who may, by law, become entrusted with the execution of it, is the trustee of the legacy during the life of the plaintiff;" and a similar decision was made in *Ellis* v. *Essex Bridge Co.*‡ In the case of *Hall* v. *Cushing*,§ the action was brought on the executor's probate bond for not investing a legacy given by the will to children at majority, they, meanwhile, to receive the interest; and the defence was that he was not bound as executor, but as trustee, to invest, and that there was, therefore, no breach of his executor's bond. It was strenuously urged that his executorial character ended with the payment of debts and direct legacies and could not attach to special trusts; and that this trust to invest was not one which inured to him as executor, but as special trustee, indicating a confidence reposed in him by the testator; and that neither the duty nor trust could pass to an administrator *cum testamento annexo*. But the court held otherwise; and, as to the confidential trust alleged, said "that the direction to invest was intended for the security and productive value of the assets, and would be binding on any one intrusted with the execution of the will." This case, therefore, takes the one step farther in advance, that not merely will the court fasten upon the executor or administrator *cum testamento annexo* the character of a permanent trustee of trusts not relating to the immediate settlement of the estate, on the ground of enforcing the payment of a legacy, but that this will draw with it the right to the powers given by the testator for the purpose of carrying out such a payment, and the compulsory exercise thereof, wherever the court can see anything of the nature of a trust to have them employed. Indeed, the court had already, though somewhat indirectly, gone so far as to treat a power of sale of land as attaching to the executor as such, because the proceeds were to pay an annuity given by the will.* In *Dorr* v. *Wainwright*,† there was a general legacy for life, with a remainder over of certain personal estate. One executor, who, by the rule laid down in the preceding cases, was as such clearly trustee for the lives of two legatees, applied to the Probate Court to be relieved from his executorial bond, and to be allowed to give bond as trustee. It is to be remarked also, that a power of sale of realty, for the purpose of raising the money for these legacies, was given to the executor. The Probate Court refused to grant his petition, and this was affirmed by the Supreme Court on appeal, on the ground that his bond as executor held him to the discharge of this trust; Shaw, C. J., saying, "The ground upon which the decision in the present case proceeds is, that where the executor does not renounce the trust, but on the contrary, declares that he is ready and desirous to execute it, . . . it was competent and proper for the Court of Probate to decline granting a new commission to the executor, as trustee, and taking new bonds,

* 4 Mass. 634.
† 6 Mass. 37
‡ 2 Pick. 243.
§ 9 Pick. 396.

* *Prescott* v. *Pitts*, 9 Mass. 376.
† 13 Pick. 328.

when such commission would have given no new authority to the executor," which was the case therefore here. It seems to follow also that the executor as such could have executed the power of sale given, and that it would therefore have vested even in the administrator *cum testamento annexo*. The same character of trustee by implication was held to attach to the executor in the later cases of *Going* v. *Emery** and *Nash* v. *Cutler*.† In *Towne* v. *Ammidown* ‡ a money legacy was given to testator's granddaughter upon her marriage, otherwise she to receive only the interest during her life, and the principal to go to other parties at her decease. The executors, on settling their first account, were directed to retain this fund in their hands for the use of the granddaughter; but, subsequently becoming insolvent, the sureties, on their administration bond, were forced to pay this amount to the legatees. To a bill brought by the sureties for reimbursement, it was contended, in defence, that they had paid in their own wrong; not being bound to pay the amount of the fund, because the duty was upon the executors as trustees, and no longer *qua* executors, after they had retained it as a special fund by order of the Probate Court. But the court say, "This position is not tenable. They were bound to execute this trust *qua* executors. The manner in which this sum was noticed in their joint account as executors was intended, not to exempt them from further liability to account and pay over, but to show that it was a sum not then to be called for, but to be retained for the purposes of the will. . . . It was their duty as executors to perform this trust. . . . This point we now consider as settled by the authorities."§ The decison in *Newcomb* v. *Williams* ‖ is to the same effect. A. and B. were here appointed executors, and B. specially named as trustee of the residue for C. during his minority, with the duty meanwhile to keep the fund productively invested. B. declined this trust, but retained the fund, and subsequently became insolvent. Suit was brought upon A.'s bond, and prevailed, on the ground that, until A. separately qualified as trustee, the executors were charged with a general trust duty *qua* executors as to any fund in the nature of a legacy.

In *Brown* v. *Kelsy** a similar principle was applied. Here a money legacy was to be invested, and the income to go wholly to A. during her life, and on her death the principal to B. It was held a trust upon the executor, which he must assume, and that the principal could not be placed at once in the hands of A., though it was admitted that, after investment, the fund stood at the risk of the legatees. The trust duties of an executor seemed, therefore, something as tenaciously adhesive as was the fabled shirt of Nessus; and the decision in *Miller* v. *Congdon*,† that the mere mental determination, though actually made, of an executor to appropriate to himself, in the character of trustee, certain funds bequeathed in trust, but unaccompanied by any open and notorious act, would not discharge him as executor, falls well within the line of the cases already cited; and the case of *Dorr* v. *Wainwright* ‡ is expressly affirmed. It had, however, been admitted in some cases since *Dorr* v. *Wainwright*, that one holding this double character of executor and trustee might relieve himself of responsibility in the former capacity by any open and notorious act indicative of that intention. This was intimated in *Hall* v. *Cushing*; § and though the decision of *Dorr* v. *Wainwright* implies the contrary, yet the later doctrine was confirmed in *Newcomb* v. *Williams* ‖ and *Conkey* v. *Dickinson*. ¶ It was said, in the former case, that any "authoritative and notorious act" would have this effect, and this seems to have been already followed in the case of *Prior* v. *Talbot*.**

But even with this well recognized exception to the executor's liability, if he chooses to qualify as trustee, it still remains settled that as executor he is trustee for any testamentary purpose which the court construes as a legacy, taking the very extended meaning of that term, sanctioned by the decisions we have

* 16 Pick. 107, 113.
† 19 Pick. 67, 70.
‡ 20 Pick. 535.
§ *Hall* v. *Cushing*; *Dorr* v. *Wainwright*, *ante* pp. 679, 680.
‖ 9 Metc. 525.

* 2 Cush. 243.
† 14 Gray, 114.
‡ *Ante*, p. 680.
§ *Ante*, p. 679.
‖ 9 Metc. 525, 534.
¶ 13 Metc. 53.
** 10 Cush. 1.

mentioned. And it seems to make no difference whether he is called executor or trustee in connection with the particular trust imposed.* Thus, in *Prior* v. *Talbot*,† Isaac N. Prior was appointed executor and trustee by the will, which required "the said trustee" to sell and "to divide and set apart one-third of the proceeds arising from such sale, . . . and having safely and prudently invested the same in his own name, to hold the same in trust to pay the income to said Roxana [the testator's widow] during her life, and after her death to hold the same upon the trusts to be thus distributed," &c. It was held that, notwithstanding this language and the duty charged, he held the fund as executor, and was chargeable as such until he qualified as trustee. In *Dascomb* v. *Davis* ‡ the court would seem to imply that executors charged with the payment of similar legacies of personal property, and with the power and duty of managing the estate and effects "of the testator, and disposing of all his lands, &c., for the purposes before mentioned, at such time and in such manner as shall be most likely, in their judgment, to do exact justice to all my creditors, and to be for the greatest advantage of all concerned," had not merely a power, but an estate in possession; so that they could maintain an action of trespass *quare clausum* against an intruder, and which would, as an estate, of course, have passed to a single surviving executor. Whereas the same language in *Tainter* v. *Clark* was held to confer a mere discretionary power, to which this case stands therefore in direct opposition.

It seems, accordingly, to be clear, as we have already intimated, that if these trust duties attach to the executor as such, the powers coupled with them must equally attach so far as they are necessary to the discharge of these executorial duties, even if terms of special confidence or reliance in the trustee's discretion are found, and that this discretion is therefore exercisible by a single executor. It is true that in *Treadwell* v. *Cordis*,§ *Tainter* v. *Clark* is referred to with apparent approval; and it is said that the exercise of the power of sale in that case "was not necessary to the execution of the will, or to the complete settlement of the estate in accordance with it." But it is submitted that such was not the fact, and that we have shown that the exercise of the power in that case was indispensable to such a settlement, and that, at most, the trustee's discretion extended to the selection of the parcel which he should sell.

It is, however, admitted in *Treadwell* v. *Cordis* that testamentary trusts are binding on the executor as such; and if it were not clear from the cases already considered that powers of sale attach of necessity to the executorial office where the proceeds are to satisfy such a trust, we think it will be apparent from the cases that follow. In the very elaborately considered case of *Shelton* v. *Homer*,* the testator had given to his executors, "or those who should take upon themselves probate of the will," a power of sale. It was held that after two executors had qualified, and one subsequently resigned, the other could not execute the power. We shall have occason to notice this case further on, in connection with the distinction taken between a resigning and a non-accepting executor; but it is sufficient here to remark that the power in this case was a bare power, and so declared by the court, there being no purpose directed for the disposition of the proceeds; and that it was therefore not coupled with a trust.†

In the case of *Gibbs* v. *Marsh*,‡ a power of sale was given by name to the testatrix's brother Walter, who had previously been appointed trustee of certain real estate, under several special trusts; and it was further provided that he, or any successor of his nominated by him to the trusts, might sell and re-invest as the *cestuis quæ trust* should direct and advise, or, in default of such advice and direction, *as the trustee or trustees should think most for their interest.* The trustee died without nominating a successor; and the Probate Court appointed a new trustee, whose conveyance of the premises was here in issue. The state of facts certainly disclose as distinct a confidence reposed in the trustee's discretion as in the case of *Tainter* v. *Clark;* in addition to which the trustee there was an executor, and a sale imperative for payment of debts and

* *Newcomb* v. *Williams*, *ut sup.*
† *Ut sup.*
‡ 5 Metc. 535.
§ 5 Gray, 341, 359.

* 5 Metc. 462.
† *Denne* v. *Judge*, 9 East, 288.
‡ 2 Metc. 243.

legacies: and here, as it was contended, the appointee of the Court of Probate—under the statute of 1817, c. 190—could not succeed to such a discretion, so clearly limited to particular individuals; that to hold this would be to abridge the authority which every owner of property has, to select individuals to manage it, and would transfer it to persons unknown to him; that the power of sale was a naked authority, and rested on personal confidence; and that the testatrix reposed full confidence in her brother, not only in his management of the estate, but in his selection of a successor; that beyond this she extended no confidence, inasmuch as by distinct and precise words she limited the power of sale to her brother and his nominee. But the court held that as there was a trust of the proceeds, and the power was to effectuate this trust, its exercise was compulsory and not discretional, and that it could well pass to the probate appointee.

The case of *Whitney* v. *Whitney* * may be referred to, merely to show that an executor is the necessary trustee of testamentary trusts, and that a probate appointee succeeds thereto. There was there no power of sale to be exercised.

But in *Alley* v. *Lawrence*,† where a power of sale was given to executors, to whom the property had already been devised in trust to support the testatrix's children during their minority and that of the youngest of them, and then to divide it among them equally, it was held that the will gave the power of sale to them as executors, and that a deed executed by them simply as such was good. This case is therefore express to the point that such a power would survive; for as attached to the office of executor, or, in more intelligible language, because coupled with the trusts to which the executor succeeded, it could be well executed by any one on whom those trusts might fall, even an administrator *de bonis non*. The case of *Warden* v. *Richards* ‡ is even more strongly in point. The testator there appointed his brothers, by name, his executors, and authorized them "to take upon themselves the trust thereby created, &c., and, if necessary for the execution thereof, to sell any part or all my real estate." One brother declined the executorship. The case presented all the points of objection to the survivorship of the power which were deemed fatal in *Tainter* v. *Clark*. The power was given to two *nominatim*, as the testator's brothers, and by their judgment of the necessity of the sale, a clear discretion was vested in both. But the court held that, as the object of the sale was to pay debts and legacies, it was a power coupled with a trust, and could well be exercised by one executor. In view, therefore, of what trusts have been uniformly held to be legacies by the same court, this decision goes the full length for which we contend.

Nor do the latter decisions present any conflict with this case. In *Carson* v. *Carson*,* which might, in a hasty perusal, be thought to have an opposite tendency, the facts were, that executors, who were charged with payment of the income for life to the widow, and then the principal to her residuary legatee, and vested with a power of sale and investment, were sought to be held in trustee process for a debt due by the latter. The court, embarrassed by the language of the statute, by which all "debts, legacies, &c., due from or in the hands of the executor or administrator as such may be attached" by trustee process, while admitting that this trust attached to the executor, and unable to deny the long course of decisions uniformly holding such a gift a legacy, and the executor, as such, vested with its possession, nevertheless use language hardly warranted by the cases, saying, "This clearly contemplates a trust in the executors beyond the duty of paying the debts and distributing the assets in the ordinary way;" and again, "They [the executors] do not hold the property merely in their capacity as executors. If they did, their trust would be discharged, and their duty performed, when they had collected the personal estate, paid the debts, legacies and charges," &c. They then proceed to point out the inconvenience, or rather impossibility, both of the executors performing their trust, if a remote distributee's creditor could compel them to account to him immediately, and the equal impossibility of keeping the judgment of such a creditor alive and operative until the estate accrued to the

* 4 Gray, 236.
† 12 Gray, 373.
‡ 11 Gray, 277.

* 6 Allan, 397.

legatee in possession. It is really upon this ground that the case was decided, and the remarks of the court already quoted cannot be considered literally correct.

Indeed, the class of decisions in Massachusetts upon which we have been commenting are well founded upon English authorities, and on the principle there laid down that such a direction to distribute personalty, coupled with a power of sale of realty, makes an equitable conversion of such realty, out and out; giving the character of personalty thereto from the date of the will, and to the extent to which such distribution is to take place among the legatees; and that these become thereby *cestuis que trust*, with a right to insist on the exercise of the power.

Thus, in *Foone* v. *Blount*,* by the terms of the will, the executors were to pay certain specified legacies, and to this end were "appointed, constituted and empowered" to sell certain real estate. It was objected that this was a devise of lands, not a legacy, and that therefore the devisees, who were papists, could not take; but the court declared this to be a power not coupled with a trust in real estate, but in personalty, and operative from the testator's decease to convert the land out and out. Similar decisions had been made in equity in *Yates* v. *Compton*,† and *Att'y-Gen.* v. *Gleg*,‡ and a power to sell to pay an annuity was held a conversion out and out from the testator's decease; and the same principle has been fully recognized in other courts in this country;§ and that as the land became personalty, *e converso*, the power to deal with it attached to whoever should become charged with the executorial duty; to a single surviving or accepting executor, or even an administrator *cum testamento annexo*.

In *Treadwell* v. *Cordis*,‖ above referred to, the distinction is taken that, while under the Statute 21 Henry 8, c. 4, if one or more executors die, or do not accept the office, the survivor or remaining executors may well execute a power attached thereto, yet it is otherwise where they all accept and one thereafter resigns or renounces, because the power has vested in him, and his renunciation cannot divest him thereof; and ancient decisions to this effect are referred to,* and the same view has been adopted, in more than one modern case.† Indeed, in the case of *Conklin* v. *Egerton*, a very elaborate examination is made of the ancient law upon this point, and the testamentary duties of an executor are limited to dealing with personal property merely, while as to realty the executor acts not *qua* executor, but as trustee, whether he is a devisee of the land itself or only the donee of a power to sell it, because the will in this respect is a conveyance, not a testament. But, however well ascertained this distinction may have been at the early period of the common law, it is submitted that the course of decision in this state, already fully examined, by which the executor, as executor, stands charged with trust duties and powers properly attached thereto, has substantially overruled it. It would, indeed, be an anomaly for the same court to hold that the sureties on the executor's bond should be held responsible for the disposition of the proceeds of a power of sale conferred upon him even by the name of trustee, and yet that his approved resignation of the office of executor should not divest him of all title to deal with the land, when he had surrendered his power to act under the will from which alone it had proceeded. And as this distinction went on the ground that the resignation of his office by the executor did not relieve him of his character of grantee, it is hard to see how his refusal to accept that office from the Probate Court could have any other or greater effect. Indeed, under such a doctrine, nothing but a re-conveyance by him would be effectual to free him.

But if this distinction could be considered as having any foot-hold in this state, it has been definitely overruled by the late case of *Gould* v. *Mather*,‡ and the law placed on the ground for which we have been contending. The testator in this case, in the first clause of his will, appointed his wife and one Marshall respectively his executrix and executor; in

* Cowp. 464.
† 2 P. W. 308, 310-311.
‡ 1 Atk. 356.
§ *Meakings* v. *Cromwell*, 1 Seld. 136; *Rogert* v. *Hertell*, 4 Hill, 492; *Stagg* v. *Jackson*, 2 Barb. Ch. 86; *Boyd's Lessee* v. *Taylor*, 2 Dall. 223.
‖ 5 Gray, 341.

* 15 Hen. 7, 11.
† *Conklin* v. *Egerton*, 21 Wend. 430, and cases there cited; *Tainter* v. *Clark*, 13 Metc. 220.
‡ 104 Mass. 283.

the third clause charged "the said executrix and executor" with trusts during ten years to discharge such mortgages as they should deem expedient, to reserve such an amount as they might deem necessary for the support of the executrix, and during the same period, to reserve also such sums as in their judgment were necessary for the support of the testator's daughter and sons. In the fourth clause he directs that, "If it shall be deemed necessary or expedient to dispose of any of my real property for the benefit of the estate in the judgment of my executrix and executor, I hereby give them full power to do so, and invest the sums so received for the benefit" of the *cestuis que trust*.

Here, in the first place, the power was given *nominatim*. The word "said" does not, it is true, occur before executrix and executor; but to infer thence that this meant to refer to the office and not to the individuals already named, would be to assert that the testator meant there should be a succession of one male and one female in that office. It is clear the word "said" is omitted by inadvertence. In the second place, the power was given expressly in confidence and relying on the judgment of these two. In the third place, the duties which the power was to facilitate the execution of were trust duties, and only testamentary in the sense that they were contained in the will.

Both the executor and executrix qualified; the former subsequently resigned, and the latter alone executed the power of sale. It was objected that the power was a bare power, was discretionary, and could only be executed by both. But the court sustained the sale, and held that the trust underlying the power, and connected with duties charged on the executor by the will, attached to the office, were coupled with a trust, and would have survived to one executor on the decease of the other. "The power of sale in question," says Ames, J., "it is true, may not be, in the strict sense of the word indispensable to the final distribution of the estate; but it is manifestly subservient and auxiliary to the execution of the trusts which he has seen fit to connect with the administration of the will. It is certainly appropriate to and in entire harmony with the mode of administration which he has pointed out, and the functions which he has thought proper to connect with the office of executor. It is part of the executorship," &c. The learned judge then remarks upon the distinction between resignation and non-acceptance. "The rule [of survivorship] seems to be the same also if one of the executors had refused to accept the trust. . . . It is difficult to see why a vacancy occasioned by the resignation of one of two, which is simply a refusal to be concerned with the trust thereafter, can stand on any different ground. The power seems not to be a mere naked authority, but is coupled with the trust of administration as one of its incidents, and its exercise is a matter of duty, and not of mere arbitrary discretion, whenever the necessity for its exercise shall arise."

A similar decision had been reached in the recent and almost parallel case of *Chandler* v. *Rider*,* the only point of difference between the two being that the distinction last considered was not in issue in this case, as the power was exercised by a surviving, and not a continuing, executor. But the power was as discretional, and the right to the proceeds seemed to be wholly dependent on the exercise of that discretion. Nevertheless, the court held that the power survived.

We consider, then, that it is well settled—in this Commonwealth at least—that all powers attached to testamentary trusts, which are not by express terms restricted to the donees, will attach to whoever occupies the position of executor, though he is but the single accepting, surviving, or continuing executor of several, even though expressly named; in a word, that the *nominatim* rule is entirely abrogated. And we think it follows, as a necessary consequence, that the same powers can be exercised by an administrator *cum testamento annexo*, and that the authority of *Tainter* v. *Clark* is seriously weakened, if not overruled. We are aware that in *Greenough* v. *Welles*† a different conclusion was reached; but we do not think that the doctrine, or rather *dictum*, put forward in that case can be maintained against later authorities already considered. The power in that case which was held to be personal, so as not to pass, was given to the executor to

* 102 Mass. 268.
† 10 Cush. 571.

enable him to invest the proceeds at interest for the benefit of the testator's daughters for life, the principal to be divided at their decease. This clearly differed in no respect from the power in *Gould* v. *Stratton;* on the contrary, its language is much more imperative, there being no expressed reference to the executor's discretion. It is also to be remarked that the point was quite unnecessary to the decision of the case, and that its discussion was waived by counsel. But, however this may be, the language of the subsequent decision, in *Blake* v. *Dexter*,* seems to establish clearly the doctrine for which we contend. "In general, where the trusts are necessarily connected with the official duties of the executor, and are obviously subservient to the due execution of the will, the powers and trusts vested in the executor *qua* executor, are held by necessary implication to devolve on the administrator *de bonis non, when not so expressed.*" The facts here were quite on all fours with those in *Greenough* v. *Welles*, and this decision must be regarded as plainly controlling the *dictum* in that case. There seems, therefore, to be no sound authority in this state to impeach the broad conclusion we have intimated to be the law, that such testamentary powers survive even to an administrator *cum testamento annexo.*—*American Law Review.*

CANADA REPORTS.

ONTARIO.

CHANCERY CHAMBERS.

STOVEL v. COLES.

Staying proceedings pending a re-hearing.

By analogy to the practice sanctioned by the Legislature with reference to staying proceedings pending Appeals to the Court of Error and Appeal, proceedings will be stayed pending re-hearings of decrees or orders of the Court of Chancery, upon security being given.

[April 29, 1872—*Mr. Taylor.*]

At the hearing of this cause, effect having been given to an objection that all proper parties were not before the Court, the cause was struck out, and the plaintiff directed to pay to the defendants the costs which they had incurred by the cause having been brought to a hearing. There were a number of defendants and several of them had issued execution to enforce the payment of their costs.

This motion was made by the plaintiff to obtain a stay of proceedings under these executions and under the order made by the Chancellor at the hearing, until that order could be re-heard. It further appeared that the plaintiff's solicitor had written to the solicitors for several of defendants who had issued executions, promising that the costs should be paid, and upon the strength of this promise, executions had been stayed for some days.

The plaintiff offered to pay the amount of the costs into Court.

Maclennan, Q. C. for the application. The Legislature has by Con. Stat. U. C. c. 13 § 16, established the principle that parties intending to appeal may obtain a stay of proceedings pending the appeal, upon giving security as a matter of right; and the Court of Chancery has made the principle applicable to re-hearings: *Weir* v. *Matheson* (Vankoughnet, C.); *Deedes* v. *Graham* (Re-hearing term, 1872). It is not necessary to show that if the costs are paid there is danger of their not being recovered, the Legislature does not entertain that question.

Evans, C. Moss, Arnoldi, Keefer and *Spragge* for the several defendants.

By the English authorities, of which *Gibbs* v. *Daniel*, 9 Jur. N. S. 632; 4 Giff. 41 is the leading case, the rule is established that no stay of proceedings will be granted but where circumstances make it expedient the Court may require a party entitled to receive a sum of money, or costs, to give security for repayment, if the decree should be reversed. This rule has been followed in this country in *Churcher* v. *Stanley*, 26th Oct, 1871, *Freehold B. S.* v. *Choate*, 13th Nov. 1871, and *Carradice* v. *Currie*, 5th Feb., 1872, (decisions of Mr. Taylor, unreported), and other cases; and before the Court will order security to be given it must be shown that there is danger that the costs can not be recovered if they are paid. Any right which the plaintiff had to be relieved from payment of these costs has been waived by the promise given by his solicitor that they should be paid. *Walker* v. *Niles* 3 Chy. Ch. 418, was also cited.

MR. TAYLOR, REFEREE IN CHAMBERS—It is not suggested that if the costs taxed under the Chancellor's order, are paid over by the plaintiff there will be any danger of her not recovering them in the event of the order being reversed on re-hearing. On the one hand it is contended that this must be shown before an order will be made staying proceedings; on the other side it is said this is not necessary.

* 12 Cush. 559, 569.

Several cases were cited in which I have recently held, following the English authorities, that this should be proved. In none of these, however, was my attention called to the provisions of the Error and Appeal Act, as to staying proceedings pending an appeal, nor was the case of *Weir* v. *Matheson*, decided by the late Chancellor, cited to me. In that case he held that, following the principle sanctioned by the Legislature in the Error and Appeal Act, and by analogy to the practice in case of appeals, proceedings should be stayed pending re-hearing, on security being given. The same course was, I find, adopted by the present Chancellor, in *Winters* v. *Kingston Permanent Building Society*, 1 Chy. Ch. 217. These cases show that a different practice should prevail in this country from that which prevails in England and which I erroneously followed in *Carradice* v. *Currie* and some other cases. I do not think that the letters written by the plaintiff's solicitor asking the parties to stay execution for a few days, should make any difference.

The order therefore will be that upon the plaintiff paying into Court a sufficient sum to cover the costs provided for by the Chancellor's order further proceedings for enforcing payment, of these be stayed until the re-hearing. The costs of this application will be costs in the cause.

Application granted.

CAMPBELL v. EDWARDS.

Staying proceedings pending re-hearing.

On motions to stay proceedings pending a re-hearing the Court will follow the practice laid down in the Error and Appeal Act, with reference to staying proceedings pending an appeal to the Court of Error and Appeal.

[June 15, 1874.—*Chancellor.*]

A decree had been made directing the defendant to pay to the plaintiff a large sum of money and costs. The defendant had set the case down for re-hearing and had given notice of re-hearing.

J. S. Ewart, for defendant, now moved to stay proceedings pending the re-hearing, offering to give the same security as would be required on an appeal to the Court of Error and Appeal.

He cited *Weir* v. *Matheson*, (unreported), decided by the late Chancellor Vankoughnet. *Winters* v. *Hamilton Permanent Building and Savings Society*, 1 Chy. Ch. 217, and *Stovel* v. *Coles*, (*supra.*)

W. G. P. Cassells. The English cases show that the Court, looking upon a decree as binding until reversed, will direct the money to be paid over to the party declared by the decree to be entitled to it, upon his giving security for re-payment in case of a reversal of the decree. This is the practice most proper to be followed in this country, where a high rate of interest can be obtained; for a party might retain and use, pending the rehearing, the money which the decree ordered him to pay, and as he would only, if compelled to restore it upon the decree being affirmed, have to pay interest at six per cent, he might actually make a profit, by obtaining a higher rate of interest for the use of the money in the meantime; parties would thus be encouraged to re-hear and prolong litigation. The cases in England of *Gibbs* v. *Daniel*, 4 Giff. 41, 9 Jur., N. S., 632; *Merry* v. *Nichol*, L. R. 8 Chy., 9 Jur., N. S., 632, have been followed here in *Walker* v. *Niles*, 3 Chy. Ch. 418, and the unreported cases of *Churcher* v. *Stanley*, (Mr. Taylor, 26th October, 1871); *Freehold Building Society* v. *Choate*, (Mr. Taylor, 13th November, 1871), and *Carradice* v. *Currie*, (Mr. Taylor, 5th February, 1872). In the case of appeals the Court has discretion, the letter of the Statute governing, but in the case of re-hearings it has a discretion which is unfettered by the statute.

Mr. Holmested, after taking time to consider, said that as the cases were conflicting and the practice therefore in an unsettled condition, he would direct the motion to be argued before a Judge.

The case was accordingly re-argued on the 15th June before the Chancellor.

Spragge, C. I am of opinion that a change was made by the Error and Appeal Act (Con. Stat., U. C., c. 13), in the practice, with reference to staying proceedings under a decree while it remains questioned. The Legislature has thought fit to introduce the principle in such cases that the decree is to be looked upon as not final until the Court of Appeal has decided whether it was right or wrong, and I do not think that this principle is to be confined to cases of appeals to the Court of Error and Appeal, but is also applicable to re-hearings, the Act being a legislative declaration of what the rights of parties shall be under such circumstances. If this were not the case the practice as to re-hearings would be anomalous. The defendant in this case, for instance, would have to pay over the money, but if upon re-hearing the decree were reversed, and then the plaintiff appealed, the defendant could not obtain payment from the plaintiff pending the appeal, in consequence of the Statute. It is

very true that the Court has in re-hearing cases a discretion, as it is not bound by the letter of the Statute, but still this is not a capricious but a judicial discretion, which the Court is bound to exercise in accordance with the principle established by the Error and Appeal Act.

An order was accordingly drawn up ordering that upon the defendant's giving security to the satisfaction of the Referee in Chambers for the due payment of the money and costs directed to be paid by the decree (in case the decree should be in part or in whole affirmed upon said re-hearing) proceedings under the decree be stayed pending the re-hearing. Further order that the costs of the application be costs in the cause.

IRISH REPORTS.

FARRAR v. CARROLL.

Practice—Administration—Misconduct of Executor—Costs—Writ of ne exeat regno.

An executor, who had drawn out of bank a sum of money, forming portion of the assets of the testator, wrote to a legatee of the testator, claiming 6 per cent. on his portion and that of the other legatees, and informed him that he was about to emigrate from the kingdom. A bill to administer assets was thereupon filed, and a writ of *ne exeat regno* was issued against him. In his answer the executor admitted being in possession of the assets, and gave a full account thereof.

Held, that the costs of the proceedings up to and including the answer must be paid by the executor, but that he was entitled to the subsequent costs.

[*Irish Law Times*, July 10, 1874.]

Bill to administer the personal estate of Patrick Byrne. The testator died 9th March, 1873, leaving assets to the amount of £563 12s. 8d. By his will he disposed of the greater portion of that sum in legacies, including, among others, the sum of £300 to his nephew, Thomas Farrar, the present plaintiff. The debts of the testator were of a trifling amount. On May 9th, 1873, the defendant, (the testator's executor,) wrote to the plaintiff the following letter:—"Dear Sir: In regard to the will affair of your uncle, I have gone through it with great trouble and cost. I have down every shilling to satisfy all parties. I had to pay the witnesses a pound a day, and also for the copies of the will. People thought there was nothing to do with the money only to throw it here and there, the whole cost on me. Now, again, for a memory also; I have agreed for a grand headstone by his request, which amounts to a sum of £89. I also must get 6 per cent. out of every one's portion. I intend to emigrate. In short, I would wish to settle it in honesty before I start. If all parties are not satisfied they must wait; I will pay them some time, if God spares me." The sum of £550, which had been lodged by the testator in the Bank of Ireland, was drawn out by the executor. An application was made to the Master of the Rolls in the matter of an administration summons for an order that a writ of *ne exeat regno* should issue against the defendant, but was refused on the ground that such an application should be made upon a bill of complaint. The present bill was then filed, the writ issued, and the defendant was arrested. In his answer, the defendant admitted the assets to the amount claimed.

W. O'Brien, Q. C., and another, for plaintiff, cited *Springett* v. *Dashwood*, 2 Giff. 521; *Kemp* v. *Burn*, 4 Giff. 348; *Hide* v. *Heywood*, 2 Atk. 125.

G. Foley for the defendant.

SULLIVAN, M. R.—The only question I have to determine is as to costs. The will was proved on 8th April; the defendant, on 13th April drew the money out of the Bank of Ireland, and lodged it at a private bank in his own name, where he could get it in a moment's notice. I have no doubt he was planning a most flagrant fraud. It is impossible to conceive a more dishonest letter than he wrote to the plaintiff. He now admits that the statement as to his intending to emigrate was a falsehood. The plaintiff made an effort to secure the assets, and sought a writ of *ne exeat regno* on a summons, which application I then had to refuse. The writ of *ne exeat regno* had, I have no doubt, the effect of securing the money. No matter how bad the conduct of the defendant was before, I think his answer put him straight. He admitted he had the assets, and gave a full account of them, and was not asked afterwards to give any further account of the assets. The rule as to costs is that the executor is entitled to his costs of suit if his own conduct be fair and honest, more particularly where the assets have suffered no diminution. But the executor who is only made honest by the process of the law must pay for his folly or fraud. I am perfectly clear that, having regard to the letter of 9th May, the defendant must pay the costs up to and including his answer, but he is entitled to costs from that period down to and including this appearance.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR FEBRUARY, MARCH AND APRIL, 1874.

From the American Law Review.

ACCOUNT.—*See* MORTGAGE, 1.

ACTION.—*See* COMPANY, 2, 3; EQUITY.

ADEMPTION.

1. A testator, reciting that £1440, or thereabouts, was due from his son, secured by bills or notes, released his son from payment of interest to the time of the testator's death. At the date of the will the son owed the testator about £1400, which was paid off before the date of a codicil, which contained no reference to the son's debt or interest thereon. At the date of the codicil the son owed his father £1291 for advances made subsequently to the will. *Held*, that said son must pay interest on the £1291.—*Sidney* v. *Sidney*, L. R. 17 Eq. 65.

2. A testator, by his will, gave the residue of his property equally between his children on their attaining twenty-one. He subsequently covenanted that he would, during his life or within six months after his death, settle a certain sum upon his daughter. This sum was not so settled at the testator's death. *Held*, upon all the circumstances of the case, that said daughter's share of the residue was *pro tanto* adeemed.—*Stevenson* v. *Masson*, L. R. 17 Eq. 78.

3. A railway company served a notice upon W. to treat for the purchase of certain leaseholds. The price was settled by surveyors appointed by the company and W., and was agreed to by W. Before this W. had bequeathed the leaseholds to A. The sale of the leaseholds was not completed until after W.'s death. *Held*, that said bequest was adeemed; but that A. was entitled to rents accruing between the death of W. and the completion of said sale.—*Watts* v. *Watts*, L. R. 17 Eq. 217.

ADULTERY.—*See* DIVORCE, 1, 2.

ADVERSE POSSESSION.—*See* TRESPASS, 1.

AGENCY.—*See* INSURANCE, 2; SET-OFF.

ALLOTMENT.—*See* COMPANY, 3.

ANNUITY.

A testator gave the residue of his estate, real and personal, to trustees for eleven years, upon trust to pay out of the rents and proceeds certain annuities. The testator then directed that the residue of said rents and proceeds should, during said term, be accumulated for the benefit of the person who should become entitled to the residue of his personal estate upon the expiration of said term; and after the determination of said term he devised his real estate, subject to the payment of said annuities, with powers of distress and entry for the recovery of the said annuities as if they had been secured by lease for years, to said trustees to the use of T. in strict settlement. *Held*, that said annuities were not a charge upon the *corpus*, but must be paid out of the income.—*Taylor* v. *Taylor*. *In re Taylor's Estate Act*, L. R. 17 Eq. 324.

See COVENANT.

APPOINTMENT.—*See* DEVISE, 2.

ASSIGNMENT.—*See* BANKRUPTCY.

ATTORNEY.—*See* TRUST.

AUCTION.

An auctioneer at a sale of horses sold a horse described in the catalogue as "steady to drive" and as to be sold subject to the conditions set forth therein. M. bought the horse at auction, and the auctioneer's clerk wrote in a sales ledger the name of M. and the price. Neither the catalogue nor conditions of sale were affixed to the sales ledger, nor were they referred to therein. *Held*, that there was not a sufficient memorandum in writing of a contract, within the Statute of Frauds, to bind M.—*Pierce* v. *Corf*, L. R. 9 Q. B. 210.

BAILMENT.

The plaintiff delivered a carriage to the defendant, a livery-stable keeper, who put it into a building which had been erected for the defendant by a competent builder, and which, so far as the defendant knew, was well built. The building was blown over and the carriage injured. The plaintiff offered evidence to show that the builder had negligently and unskilfully built the building; but the evidence was rejected by the judge, who ruled that the defendant's liability was that of an ordinary bailee for hire, and that he was only bound to use ordinary care in keeping the carriage, and that, if he had used ordinary care in having the building erected by employing a builder, he would be exempt from liability for an event caused by the careless or improper conduct of the builder of which the defendant had no notice. *Held*, that said ruling was correct.—*Searle* v. *Laverick*, L. R. 9 Q. B. 122.

BANK.—*See* LIEN.

BANKRUPTCY.

Two partners obtained an advance from A., and delivered to him a written agreement to assign to him on request their lease, stock, fixtures, and book-debts; provided that if the partners should repay said advance the agreement should be void; otherwise the premises were to be valued by valuers on each side, and any surplus repaid to the partners. Subsequently the partners became embarrassed, and thereupon, on request of A., assigned said lease, stock, &c., being all the partners' property, upon a valuation to A., who repaid to them a small surplus. Shortly afterwards the partners filed a petition in liquidation, stating their assets to be *nil*. *Held*, that said agreement was, after demand, a valid, equit-

able security upon the property of the partners; and that the subsequent assignment was valid, and was not invalidated by the Bankruptcy or Bills of Sale Acts.—*Ex parte Izard. In re Cook*, L. R. 9 Ch. 271.

See Covenant, 1.

Bequest.—*See* Ademption; Annuity; Devise; Illegitimate Children; Legacy; Settlement.

Bill of Lading.

1. The master of a vessel may properly sign bills of lading in favor of the shipper of goods, without production of the mate's receipt for the goods, if he is satisfied that the goods are on board the vessel, and has no notice that any one but the shipper claims any interest in them.—*Hathesing* v. *Laing*, L. R. 17 Eq. 92.

2. The omission of the words "or order or assigns" from a bill of lading will not give an indorsee constructive notice of an agreement between the shipper and consignee to realize proceeds from the goods shipped, and appropriate the same to a special purpose. An indorsee of such a bill of lading, who also has the goods delivered to him, obtains legal and equitable title to the same. It seems that such a bill of lading is not a negotiable instrument.—*Henderson* v. *The Comptoir d'Escompte de Paris*, L. R. 5 P. C. 253.

See Hypothecation.

Bill of Sales Act.—*See* Bankruptcy.

Bills and Notes.

1. The acceptor of a bill requested the holder to defer presentment for payment, agreeing to hold himself liable in every respect on account of said accepted bill, as if it had been regularly presented at due date. The holder did not present the bill for payment at maturity. *Held*, that the maker was discharged.—*Latham* v. *Chartered Bank of India*, L. R. 17 Eq. 205.

2. B. accepted a bill drawn by A. Before the bill became due A. represented to a bank which held the bill that B. would be willing to accept a renewed bill, and a new bill was accordingly drawn by A. on B., and discounted by the bank. At the same time A. drew a check on the bank, which the bank accepted, payable to B., and sent it to B. in a letter stating that he had drawn a second bill on B., and enclosed the check to retire the first bill. B. before the first bill became due, received and cashed the check, but refused to accept the second bill. *Held*, that B. had no right to cash the check, unless he accepted the second bill; also, that B. was not discharged from liability as acceptor of the first bill by the transactions between A. and the bank.—*Torrance* v. *Bank of British North America*, L. R. 5 P. C. 246.

See Mortgage, 2.

Broker.—*See* Evidence.

Buoy.—*See* Negligence, 2.

Cargo.—*See* Charter-party; Freight.

Charge.—*See* Annuity.

Charter-party.

By the terms of a charter-party a vessel was to load a full cargo and deliver the same at London, fire and other dangers of the sea excepted; "a lump sum freight of £5000 to be paid after entire discharge and right delivery of the cargo, in cash, two months after date of the ship's report inward at the custom house." A full cargo was loaded, but part was destroyed by fire on the voyage, and the remainder was delivered. *Held*, that the ship-owner was entitled to the whole of said £5000.—*Merchant Shipping Co.* v. *Armitage*, L. R. 9 Q. B. (Ex. Ch.) 99; s. c. L. R. 8. C. P. 469, n.

See Capture.

Check.—*See* Bills and Notes, 2.

Codicil.—*See* Ademption, 1; Will, 2.

Collision.

For a case of collision, see *Beal* v. *Marchais*, L. R. 5 P. C. 316.

See Negligence, 2.

Common Recovery.—*See* Devise, 1.

Company.

1. By the articles of a company, the qualification of a director was the holding of fifty shares. It was held that attending a meeting of the company as a director did not amount to a contract to take shares sufficient for qualification as director.—*Brown's Case*, L. R. 9 Ch. 102.

2. It seems that a director in a company who has signed the memorandum and articles of association, and has had shares appropriated to him, cannot set up, as a defence to an action against all the directors in consequence of false statements in a prospectus issued by them, that he took no part in preparing or issuing the prospectus.—*Peek* v. *Gurney*, L. R. 6 H. L. 377.

3. The appellant, not an original allottee, was the holder of shares in a company, and upon its being wound up, was placed upon the list of contributories, and paid a large sum upon the shares. He then filed a bill against the directors of the company, alleging misrepresentation and concealment of facts on the part of the directors in the prospectus they issued, and by which the appellant had been induced to purchase his shares, and he prayed indemnity from the directors. *Held*, that, as the prospectus was drawn up solely for the original allottees, the directors were not liable to the appellant.—*Peek* v. *Gurney*, L. R. 6 H. L. 377. *See* L. R. 2 H. L. 325; L. R. 13 Eq. 79.

Condition.—*See* Landlord and Tenant, 1.

Construction.—*See* Ademption; Annuity; Contract; Covenant; Criminal Law; Devise; Hypothecation; Illegitimate Children; Landlord and Tenant, 1; Legacy; Mortgage, 2; Package; Settlement.

Contingent Remainder.—*See* Devise, 1.

DIGEST OF ENGLISH LAW REPORTS.

CONTRACT.

1. It was agreed that the plaintiff should serve the defendant "for twelve months certain, after which time either party should be at liberty to terminate the agreement, by giving the other three months' notice in writing." *Held* (by BRAMWELL and PIGOTT, B.B.; KELLEY, C. B., dissenting), that at the end of the twelve months either party could end the agreement without notice.—*Langton* v. *Carleton*, L. R. 9 Ex. 57.

2. The plaintiff agreed to sell to the defendant "the house and premises he now occupies, known by the sign of the 'White Hart,' with stabling and garden;" and it was agreed that if either party should refuse to perform the agreement, such party should pay the other "£100 as damages." At the time of the agreement one S. held, under lease, a coach-house and harness room attached to the "White Hart." The defendant refused to complete the agreement, as possession of the coach-house could not be given by the plaintiff. *Held*, that, as the coach-house was not in the plaintiff's occupation, it was not included in the agreement; but that said £100 was a penalty, and that the plaintiff could only recover damages awarded by a jury. —*Magee* v. *Lavell*, L. R. 9 C. P. 107.

3. Action for dismissal from service in breach of alledged contract. The plaintiff had written to the defendant as follows: "Referring to my conversation with you, I now state my willingness to enter the service of your firm for one year, on trial, on the terms; viz., a list of the merchants to be regularly called on by me to be made and corrected as occasion requires. My salary for the year to be £120. If the terms herein specified are in accordance with your ideas, confirm them by return, and I will then enter on my duties on Monday morning next." The defendant answered: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall, therefore, expect you on Monday. I have made a list of customers, which we can consider together." *Held*, that the letters did not constitute a complete contract.—*Appleby* v. *Johnson*, L. R. 9 C. P. 158.

4. A. and B. contracted as follows: "A. sells and B. buys all of the spars manufactured by M., say about 600 red-pine spars, averaging sixteen inches. The above spars will be out of the lot manufactured by J., the lengths of which according to his specification I am satisfied with." The J. lot contained 603 spars, of which 496 averaged sixteen inches. *Held*, that B. was bound to accept the 496 logs; the words, "say about" 600 spars, being words of expectation and estimate only, and not of warranty.—*McConnell* v. *Murphy*, L. R. 5 P. C. 203.

See BILLS AND NOTES, 2; COMPANY, 1; CORPORATION; LEASE; LIMITATIONS, STATUTES OF; MORTGAGE, 2; SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE. — *See* NEGLIGENCE.

CORPORATION.

The contract for the engagement of a clerk to the master of a workhouse by a board of guardians, must, in order to bind the guardians, be under seal.—*Austin* v. *Guardians of Bethnal Green*, L. R. 9 C. P. 91.

COSTS, BILL OF.—*See* PRIVILEGED COMMUNICATIONS.

COVENANT.

1. A covenant by a solvent trader to settle all future real and personal estate which he should at any time, during his intended coverture, be entitled to upon the trusts set forth in the settlement of the property be then owned, *held*, void as against creditors, who were entitled to shares acquired by said trader subsequent to said settlement, and which were standing in his name at the time of his bankruptcy.—*Ex parte Bolland. In re Clint*, L. R. 17 Eq. 115.

2. A husband covenanted in a deed of separation to pay an annuity to his wife during their joint lives, and so long as they should live separate and apart. Subsequently the husband obtained a divorce for the adultery of his wife. *Held*, that he was not released from his covenant to pay said annuity.—*Charlesworth* v. *Holt*, L. R. 9 Ex. 38.

3. A. sold a portion of his land to B. by deed, which declared that it was agreed that an adjoining piece of land belonging to A. should never be sold, but left for the common benefit of both parties and their successors. *Held*, that said clause amounted to an agreement that the piece of land should be left open in the state it was at the date of the deed; and that B.'s vendee might apply to a court of equity to obtain the removal of a building erected upon said land.—*McLean* v. *McKay*, 5 P. C. 327.

See LANDLORD AND TENANT, 2; LEGACY; SETTLEMENT, 1.

CRIMINAL LAW.

Certain Chinese coolies, headed by K. while in a French vessel on the high seas killed the master of the vessel and seized the vessel and run her ashore on the Chinese coast and escaped. Under an ordinance authorizing magistrates at Hong-Kong to arrest Chinese who, there is probable cause to believe, have committed "any crime or offence against the laws of China," K. was there arrested on a charge of murder. K. was released on *habeas corpus*, and again arrested on a charge of piracy. *Held*, that said ordinance covered crimes and offences against the laws of all nations, and not those peculiar to the laws of China; that K., in killing said master, was not guilty of murder within said ordinance; that piracy was not an offence against the law of China within said ordinance; and that if K. was punishable for piracy, it was only because that was a crime which *jure gentium* is justiciable everywhere. Also, that K. could not be released on *habeas*

corpus from the second arrest, on the ground that he was committed a second time for the same offence, contrary to 31 Car. 2, c 2, § 6. This section only applies when the second arrest is substantially for the same cause as the first, so that the return to the second writ of *habeas corpus* raises for the opinion of the court the same question with reference to the validity of the grounds of detention as the first.—*Attorney General for the Colony of Hong-Kong* v. *Kwok-a-Sing*, L. R. 5 P. C. 179.

Cruelty.—*See* Divorce, 1, 2.

Damages.—*See* Contract, 2; Legacy.

Demand.—*See* Landlord and Tenant, 1.

Demurrage.—*See* Freight.

Demurrer.—*See* Pleading.

Devise.

1. A testator devised a freehold estate to trustees and their heirs in trust to stand seized of the same during the life of A., and also, until the whole of the testator's debts were paid, upon trust to set and let the same, and apply the rents and the value of whatever timber may be considered at its best growth, in discharge of said debts; and after said debts were paid, upon further trusts to pay over the rents to A. during his life; and after A.'s death the testator gave said estate to the heirs of the body of A. After said debts were paid, said trustees conveyed said estate to A. for life; who subsequently suffered a common recovery, and then mortgaged the estate. After A.'s death his eldest son filed a bill against the mortgagee, alleging that under said devise A. was only equitable tenant for life; that the limitation to the heirs of the body of A. was a legal contingent remainder; that such remainder was intended to be supported by the legal estate in said trustees; that their conveyance to A. was a breach of trust, of which said mortgagee had notice; and praying that said mortgagee might be declared a trustee of the property for the plaintiff. *Held*, that said trustees took a legal fee by the the terms of the devise, and that consequently A. took an equitable estate tail, which was barred by the recovery.—*Collier* v. *Walters*, L. R. 17 Eq. 252. See 34 Beav. 426; L. R. 1 Ch. 81.

2. A testator gave all his property to his wife for her sole use and benefit, "in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at her decease, doing equal justice to each and all of them." *Held*, that the wife took an estate for life, with power of disposition among her children in her lifetime, or by deed or will, as she might think fit.—*Curnick* v. *Tucker*, L. R. 17 Eq. 320.

3. For a case where it was held that, from the tenor of a will, there was evidence of intention in the testator not to include leaseholds for years in a devise of lands, see *Prescott* v. *Barker*, L. R. 9 Ch. 175.

See Ademption; Annuity; Illegitmate Children; Legacy; Settlement, 2.

Director.—*See* Company, 2.

Discovery.—*See* Interrogatory, 1.

Disseisin.—*See* Trespass, 1.

Domicile.

Change of domicile.—See *Stevenson* v. *Masson*, L. R. 17 Eq. 78.

Easement.

The plaintiff was grantee of a right of way for a tow-path over land of M. M. built a road and bridge across the canal, obstructing the tow-path; and the plaintiff in consequence went around the bridge, and then back to the tow-path. M. subsequently sold the land adjoining the road and bridge to the defendants. The plaintiff used the substituted path around the bridge for many years, when the defendants erected a fence along the side of said street, preventing the plaintiff crossing the road. *Held*, that it was not necessary for the plaintiff to proceed against M. for the removal of the bridge; and that the defendants would be restrained from interfering with the plaintiff's substituted right of way around the bridge.—*Selby* v. *Nettlefold*, L. R. 9 Ch. 111.

See Trespass, 2.

Election. — *See* Privileged Communications, 2.

Entry.—*See* Landlord and Tenant, 1.

Equity.

S., who had effected two policies of insurance with an insurance company, brought actions upon the policies. An order of court was made that one action should be stayed until the other had been tried, the company agreeing to be bound by the result of that action if against them. S., however, was left at liberty to proceed with the other action, if judment should be against him. The company filed a bill in equity to have both the policies cancelled, as having been obtained by fraud. Judgment in said action at law was subsequently given for the company, on the ground that the policies were obtained by fraud. The court ordered the policies to be cancelled.—*London and Provincial Ins. Co.* v. *Seymour*, L. R. 17 Eq. 85.

See Covenant, 3; Specific Performance, 1.

Estate for Life.—*See* Devise, 2.

Evidence.

The plaintiff was to receive a commission if the defendant's house was leased by him. A. went to the plaintiff's office, and inquired what houses he had to let, and was given cards to view several houses, among which was the defendant's. The premium for the house as given to A. by the plaintiff was £2200. A few days later A. examined the house with the defendant, and the offer was accepted. The judge asked A., under objection by the defendant, whether he should have taken said house if he had not gone to the plaintiff's and obtained a card to the same, and A. replied that he thought not. *Held*, that there was evidence for the jury that A.

had taken said house through the plaintiff's intervention. It seems that said question was admissible.—*Mansell* v. *Clements*, L. R. 9 C. P. 139.

See Interrogatory, 2; Poor-rate; Will, 1.

Freight.

The defendant shipped upon the plaintiff's vessel petroleum, to be delivered at Havre, and to be taken out within twenty-four hours after arrival, or pay £10 per day demurrage. The authorities at Havre refused to permit the petroleum to be landed; and it was taken, by direction of the ship's broker, to Honfleur and Trouville, but permission to land was there also refused. The vessel then returned to Havre, and transhipped the petroleum into lighters hired by G., but, being obliged by the authorities to reship it, sailed back to London. *Held*, that the plaintiff was entitled to freight, back freight, and expenses, but not to demurrage and expenses incurred in ineffectual attempts to land the petroleum at Honfleur and Trouville.—*Cargo ex Argos*, L. R. 5 P. C. 134; s. c. L. R. 4 Ad. & Ec. 13; 8 Am. Law Rev. 99.

Husband and Wife.—*See* Covenant, 2.

Habeas Corpus.—*See* Criminal Law.

Hypothecation.

A., in Bombay, shipped cotton to B., in Liverpool, and drew a bill against the cotton for B.'s acceptance. A. insured the cotton, and then sold the draft to a bank, to which he gave the bill of lading with a letter of hypothecation, and the policy of insurance. The letter of hypothecation authorized the bank, in default of acceptance or payment of said bill, or on B.'s suspension during the currency of the bill, to sell the cotton, and apply the proceeds in payment of the bill; "the balance, if any to be placed against any other of A.'s bills which may at the time be in the hands of the said bank, or any liability of A. to the bank." B. accepted the bill, but, before its maturity, failed, and the bill was dishonored. The cotton was burnt at sea and became a total loss. The bank received the insurance money, which was more than the amount of the bill, and claimed the surplus toward satisfying other bills of A. held by the bank and unpaid. A. had assigned said insurance money to a creditor before it was paid to the bank. *Held*, that the bank was only entitled to said insurance money to the amount of said bill.—*Latham* v. *Chartered Bank of India*, L. R. 17 Eq. 205.

Idiot.—*See*—Rape.

Illegitimate Children.

A testator, who had gone through the ceremony of marriage with M., his deceased wife's sister, bequeathed half of his property to the two then living children of M., and all other the children he might have or be reputed to have by M. At the date of the will M. was *enceinte* with a third child, whom the testator sequently acknowledged as his child. *Held*, (Selborne, L. C., dissenting), that said third child was entitled to share with the other two children.—*Occleston* v. *Fullalove*, L. R. 9 Ch. 147.

Injunction.

1. Injunction refused to restrain an "Underwriter's Registry" association placing upon their registry, after the name of a vessel belonging to a member of the association which had ranked in the highest class, the words, "class suspended."—See *Clover* v. *Royden*, L. R. 17 Eq. 190.

2. An injunction was granted to restrain the defendant from allowing water pipes which he had laid, to remain in land belonging to the plaintiff but over which there was a highway.—*Goodson* v. *Richardson*, L. R. 9 Ch. 221.

See Easement; Equity; Specific Performance, 1; Trespass, 1.

Innkeeper.—*See* Bailment.

Insurance.

1. A policy of insurance upon the life of G. was assigned to trustees, to hold the proceeds for the benefit of C. for life, remainder upon such trusts as C. should appoint. The trustees had power to pay the premiums. C. subsequently, by deed to which G. was party appointed the policy and moneys to become due thereon to the plaintiffs to secure certain advances. The plaintiffs in consequence of said trustees and C. neglecting to pay the premiums, paid them themselves, and kept the policy alive. On the death of G. the trustees refused to pay any of the policy money to the plaintiffs. *Held*, that the plaintiffs were entitled to be repaid the amount they had paid in premiums with interest.—*Gill* v. *Downing*, L. R. 17 Eq. 316.

2. A. obtained a certificate of insurance on flour in his own name. The certificate stated that the insurance was to be subject to all the provisions contained in the policies of the insurance company. It was the custom of the company to issue to the holder of the certificate a policy running thus: "I, A. as well in my own name as for and in the name of every other person to whom the same doth, may, or shall appertain," do make insurance, &c.; and it was a condition of the policy that an action should be brought within one year after the loss. The above flour belonged to B., and was shipped by A., consigned to B. on board a vessel which was last seen afloat on the 22d of November, 1867, in the Gulf of St. Lawrence, where a few days later a violent storm raged. The vessel was found, bottom up, ashore, in May, 1868, when part of the flour was recovered and necessarily sold at an intermediate port, realizing about a quarter of the insured value. An action on the policy was brought by B. in March, 1869. *Held*, that B. was entitled to bring the action in his own name; and that the loss did not become total until it was sold at an intermediate port in consequence of the impossibility of carrying it to its destination,

and that therefore the action was brought in season.—*Browning* v. *Provincial Insurance Company of Canada*, L. R. 5 P. C. 263.

See Equity; Hypothecation.

Interest.—*See* Ademption, 1.

Interrogatories.

1. In an action by the rector of a parish against the patron of the living, for one-half of the rent of the churchyard and of the tithe rent-charge alleged to have been wrongfully received by the patron, the plaintiff was permitted to administer interrogatories as to the period for which the patron and his predecessors had received the rent and rent-charge, and as to the circumstances under which they had so received them.—*Towne* v. *Cocks*, L. R. 9 Ex. 45.

2. In an action for seduction of the plaintiff's daughter, interrogatories as to the defendant's pecuniary means cannot be administered to the defendant; but interrogatories as to whether the defendant had had sexual intercourse with the daughter, and had stated that he believed that she had not had such intercourse with any other man, are allowable.—*Hodsoll* v. *Taylor*, L. R. 9 Q. B. 79.

Jus Gentium.—*See* Criminal Law.

Landlord and Tenant.

1. A part of a house was leased upon condition that, if the lessee should make default in payment of rent "within twenty-one days after the same shall become due, being demanded," it should be lawful for the lessor without further proceedings to re-enter. *Held*, that, to entitle the lessor to re-enter, he must demand rent *after* the expiration of said twenty-one days. The formalities of a common law demand need not be observed.—*Phillips* v. *Bridge*, L. R. 9 C. P. 48.

2. B. demised to the plaintiffs, by an instrument not under seal, "standings" for three lace-making machines. B. had previously mortgaged the building. The mortgagees, subsequently sold the premises to the defendant; but before the sale the plaintiffs attempted to renew their lease with the defendant, but failed so to do. *Held*, that the defendant was not bound by the demise from B. to the plaintiffs, as it was not by an instrument under seal, as required by Statute 32 Hen. 8, c. 34.—*Smith* v. *Eggington*, L. R. 9 C. P. 145.

Lease.

The plaintiff agreed to let, and the defendant to take, a dwelling-house for a term of seven years; upon terms (among others) that the defendant should, during the last year of the term, paint the house. The defendant occupied the house seven years, but neglected to paint the house at the end of the term. *Held*, that though said agreement was void as lease, yet that the defendant, by occupying for the whole seven years, bound himself to the performance of his agreement to paint.—*Martin* v. *Smith*, L. R. 9 Ex. 50.

See Evidence; Landlord and Tenant, 1; Legacy; Mines; Specific Performance, 2.

Legacy.

A testator bequeathed to the plaintiff "all and every sums of money which may be due to me at the time of my decease." *Held*, that damages recovered by the testator's executrix, for breach of covenant in a lease which took place in the testator's lifetime, passed under the bequest.—*Bide* v. *Harrison*, L. R. 17 Eq. 76.

See Ademption; Annuity; Devise; Illegitimate Children; Settlement, 2.

Letter.—*See* Contract, 3.

Libel.—*See* Privileged Communications, 2; Slander.

Lien.

The defendants, bankers, who were in the habit of making advances to L. on the security of deeds and documents deposited with them, were held to have no general lien upon a box deposited with them by L., of which L. alone held the keys, and to which he only had access.—*Leese* v. *Martin*, L. R. 17 Eq. 224.

See Trover.

Life-Estate.—*See* Devise, 2.

Limitations, Statute of.

A testator died in 1857, and his widow took possession of all the real and personal property, and paid interest upon a debt due from the testator to the plaintiff until February, 1864. In September, 1870, the will was proved, and under it the wife took an estate for life in the testator's property. *Held*, that the plaintiff's debt was barred by the Statute of Limitations.—*Boatwright* v. *Boatwright*, L. R. 17 Eq. 71.

Liquidated Damages.—*See* Contract, 2.

Loss.—*See* Insurance, 2.

Market Value.—*See* Poor-rate.

Master.—*See* Bill of Lading, 1.

Mate.—*See* Bill of Lading, 1.

Mines.

The Queen possesses the mines in the Isle of Man as of her own original title in the soil. It was held that the holder of a mining lease from the Queen was not liable to make compensation for the withdrawal, by percolation into his mine, of water which would have otherwise flowed into, or would have been retained in, *superjacent* land.—*Ballacorkish Silver, Lead, and Copper Mining Co.* v. *Harrison*, L. R. 5 P. C. 49.

See Trespass, 2.

Mortgage.

1. A mortgagee in possession, defendant to a bill for redemption, admitting the mortgage to be redeemable, cannot refuse to state the particulars of his accounts as mortgagee.—*Elmer* v. *Creasy*, L. R. 9 Ch. 69.

2. A. mortgaged a station and the stock upon it to B., to secure repayment of a certain sum with interest at a certain date, and to secure payment of any bill which the mortgagee might take, make, or endorse, by way of

renewal of the note secured by the mortgage. The bill was renewed from time to time by a bank which had discounted it; and the mortgagee paid the discounts on behalf of the mortgagor, and entered the discounts in the same account with other transactions with the mortgagor, debiting him with interest and commissions on the same. *Held*, that the sums advanced in payment of the discount on the renewed bills were covered by said mortgage, and were not an advance to said mortgagor on his personal security only.—*Fenton* v. *Blackwood*, L. R. 5 P. C. 167.

See Landlord and Tenant, 2; Priority.

Murder.—*See* Criminal Law.

Negligence.

1. A tug, towing a vessel in a thick fog, ran the vessel aground. The vessel had not requested the tug not to proceed. *Held*, that the vessel was guilty of contributory negligence, and that the tug was not liable for damages.—*Smith* v. *St. Lawrence Tow-boat Co.*, L. R. 5 P. C. 308.

2. The master of a vessel moored to a buoy which belonged to a private company. The mooring of ships to the bouy was sanctioned by the port authorities. The master also got an anchor in readiness for use in case of necessity. The shackle band of the bouy gave way in a gale, and the vessel drifted. The master endeavored to drop anchor, but its chain became accidentally entangled, and the anchor did not reach bottom until the vessel had collided with another vessel. *Held*, that under the circumstance the master was guilty of no negligence in mooring to the bouy.—*Doward* v. *Lindsay*. *The William Lindsay*, L. R. 5 P. C. 338.

3. The plaintiff, a season-ticket holder, and residing near a station, arrived at the station when it was dark; and hearing the opening and shutting of carriage doors, and seeing another person alight, stepped from his carriage which had overshot the platform, and fell and was injured. The train had made its final stoppage at the station when the plaintiff got out, and was not afterward backed into the station. *Held*, (the court having liberty to draw inferences of fact), that there was evidence of negligence on the part of the railway company, and no evidence of contributory negligence on the part of the plaintiff.—*Weller* v. *London, Brighton, & South Coast Railway Co.*, L. R. 9 C. P. 126.

4. The plaintiff was a passenger on the defendant s railway, travelling to B. On arrival at B. the name of the station was called out, and the train stopped, leaving the carriage in which was the plaintiff beyond the platform. The plaintiff attempted to alight; but the train, immediately after stopping as aforesaid, was backed to a proper position in the station, and the plaintiff was thrown down and injured. The plaintiff was familiar with the station. *Held*, that calling out the name of the station did not amount to an invitation to alight, and that there was no evidence of negligence on the part of the defendant to go to the jury.—*Lewis* v. *London, Chatham, & Dover Railway Co.*, L. R. 9 Q. B. 66.

See Trespass, 2.

Notice—*See* Bill of Lading, 2; Contract, 1; Priority.

Package.

Pictures were placed in a waggon open at the top. *Held*, that the pictures were contained in a package within 11 Geo. 4 and 1 Wm. 4, c. 68.—*Whaite* v. *Lancashire & Yorkshire Railway Co.*, L. R. 9 Ex. 67.

Partnership.—*See* Bankruptcy; Priority.

Parliamentary Election.—*See* Privileged Communications, 2.

Peril of the Seas.—*See* Charter-party.

Piracy.—*See* Criminal Law.

Pleading.

Declaration that the defendants maliciously and without reasonable cause caused the plaintiff's ship to be arrested for necessaries supplied by H., and to be detained until proceedings in the court were determined and the ship released. Demurrer. *Held*, (by Blackburn and Archibald, JJ.; Quain, J., dissenting), that by reasonable intendment the declaration must be taken to mean that the proceedings were determined in the plaintiff's favour, and that the declaration was good.—*Redway* v. *McAndrew*, L. R. 9 Q. B. 74.

See Set-off.

Poor-rate.

A railway company acquired a branch line upon terms which made the owners of the branch line become shareholders in said company. In consequence of competition the income from the branch line became very small. It was *held*, that, in assessing the poor-rate upon the branch line, the fact that three other railway companies with which the branch line connected would pay a high rent for the branch line if it were in the market, was to be taken into account in ascertaining the rent for which the branch line would reasonably rent.—*Queen* v. *London & North Western Railway Co.*, L. R. 9 Q. B. 134.

Practice.—*See* Interrogatory, 2; Will, 2.

Principal and Agent.—*See* Insurance, 2; Set-off.

Priority.

The tenants in common of certain land entered into partnership under the terms of which the land was to be partnership property; and the business was conducted on the land. One of the partners mortgaged his moiety of the land to secure a private debt. The mortgagee knew that the partnership was in occupation of said land. Said partner absconded, and the remaining partner was obliged to pay the firm debts, whereby a considerable sum became due him on the partnership accounts. *Held*, that said mortgagee had constructive notice of the title of the

partnership in said land, and that his claim must be postponed to that of the partner.—*Cavander* v. *Bulteel*, L. R. 9 Ch. 79.

Privileged Communications.

1. Confidential communications between a solicitor and client before and with no view to litigation are privileged. Bill of costs *held* to be privileged.—*Turton* v. *Barber*, L. R. 17 Eq. 329.

2. A and B. were candidates for Parliament. The chairman of a district committee formed to promote B.'s election, and B.'s election agent, wrote to A.'s election agent, stating that A. had been guilty of bribery. *Held*, that the communication was not privileged.—*Dickeson* v. *Hilliard*, L. R. 9 Ex. 79.

Probate.—*See* Will, 2.

Prospectus.—*See* Company, 2.

Proviso.—*See* Settlement, 2.

Railway.—*See* Negligence, 3, 4.

Rape.

An attempt to have connection with a girl who was to the prisoner's knowledge so idiotic as to be incapable of expressing assent or dissent, *held*, to be an attempt at rape.—*The Queen* v. *Barratt*, L. R. 2 C. C. 81.

Receipt.—*See* Bill of Lading, 1.

Recovery.—*See* Devise, 1.

Re-entry.—*See* Landlord and Tenant, 1.

Rent.—*See* Landlord and Tenant, 1.

Rent-charge.—*See* Interrogatory, 1.

Residuary Gift.—*See* Ademption, 2.

Right of Way.—*See* Way.

Sale.—*See* Auction; Evidence; Trover.

Seal.—*See* Corporation.

Security.—*See* Bankruptcy; Mortgage, 2.

Seduction.—*See* Interrogatory, 2.

Set-off.

Action for goods sold and delivered. Plea, that the goods were sold to the defendant by S., then being agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owners thereof, and that S. sold the goods in his own name and as his own goods with consent of plaintiffs; that the defendants did not know that S. was the plaintiffs' agent; and that before they did know that the plaintiffs owned said goods or that S. was their agent, S. became indebted to the defendants in an amount equal to the plaintiffs' claim. Replication that the defendants had the means of knowing that S. was only agent of the plaintiffs. *Held*, that the plea was good, and the replication no answer to it.—*Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38.

Settlement.

1. In a marriage settlement, a covenant to settle property acquired after the marriage is to be construed as applying only to property acquired during the coverture, although the usual words "during the intended coverture," were omitted from the settlement.—*In re Edwards. In re London, Brighton & South Coast Railways Act*, L. R. 9 Ch. 97.

2. A testator devised his P. estates in trust for C., the second son of A., provided that if C. should become entitled in possession to the S. estates, then said trusts in favour of C. were to cease. The S. estates had been settled upon A. in tail male. A., with his eldest son B., executed a disentailing deed of the S. estates, limiting a portion thereof to A. in fee, and the remainder to such uses as A. and B. should appoint. A. and B. accordingly appointed to A. for life, with power of creating a certain charge, remainder as B. and C. should appoint. A. created said charge. B. and C. appointed, subject to a life-estate in B., to the use of C.'s daughter for life, with remainders over until the entail in the P. estate should be barred; then to the use of C. for life, remainder to C.'s first and other sons in tail male. B. died, and subsequently A. died. *Held*, that as C. acquired the S. estates under a new title, and as said estates were destroyed in identity in point of quantity and value, said proviso did not take effect, and C. did not lose the P. estates.—*Meyrick* v. *Laws. Meyrick* v. *Mathias*, L. R. 9 Ch. 237.

See Annuity; Covenant, 1.

Shareholder.—*See* Company, 1, 3.

Slander.

Declaration that the defendant falsely said of the plaintiff, a stone-mason, "He was the ringleader of the nine-hours system," and "He has ruined the town by bringing about the nine-hours system, and he has stopped several good jobs from being carried out by being the ringleader of the system at L.," whereby the plaintiff was discharged from his position as mason in certain works. *Held*, that said words were not defamatory in themselves; and were not connected with the trade of the plaintiff, either by averment or by implication; and were therefore not actionable, even though followed by damage.—*Miller* v. *David*, L. R. 9 C. P. 118.

See Privileged Communications, 2.

Solicitor.—*See* Trust.

Specific Performance.

1. The defendant contracted to deliver to the plaintiff the whole of the get of coal raised from a colliery leased by the defendant, and not to be less in quantity than a specified amount. Subsequently the defendant contracted to sell the colliery to R. *Held*, that the court had no jurisdiction to grant an injunction restraining the defendant from selling the colliery. It seems that a court of equity will not restrain the breach of a contract which it cannot specifically perform.—*Fothergill* v. *Rowland*, L. R. 17 Eq. 132.

2. A. agreed in writing to lease a wine-cellar from B. for twenty years from a certain future date. As inducement to the agreement, B. had promised to make the cellar

dry. A. entered into possession, and remained there two years, but, finding that the cellar had not been made dry, complained of the dampness to B., and paid his rent under protest. B. brought a bill for specific performance of said agreement by the execution of lease in accordance therewith. *Held*, that A. had not precluded himself from setting up in answer to the bill non-performance of the agreement to keep dry. Bill dismissed.—*Lamare* v. *Dixon*, L. R. 6 H. L. 414.

Stable-keeper.—*See* Bailment.

Statute.—*See* Bankruptcy; Criminal Law; Landlord and Tenant, 2; Package.

Statute of Frauds.—*See* Auction.

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

Taxes.—*See* Poor-rate.

Tenant in Common.—*See* Priority.

Tithe.—*See* Interrogatory, 1.

Total Loss.—*See* Insurance, 2.

Trespass.

1. H. brought ejectment against S., who set up adverse possession for twenty years, and H. was nonsuited. He then went to the land in question and cut down a tree, and threatened to cut down more. *Held*, that cutting down the tree was not evidence of possession, but only a trespass, and H. was enjoined from cutting down any more trees. *Stanford* v. *Hurlstone*, L. R. 9 Ch. 116.

2. In the defendant's land were hollows caused by the subsidence of the ground over spots which had been worked out in mining operations. Heavy rains caused water to overflow from a watercourse running over the land into the hollows, thence into the defendant's mines, and thence into the plaintiff's mines. The defendant diverted the watercourse, and thereby lessened its liability to overflow. The defendant had not been guilty of negligence in working his mines; and he offered evidence to show that he had taken all reasonable precautions to guard against emergencies. The judge excluded the evidence, and directed a verdict for the plaintiff. *Held*, that said evidence should have been admitted; and that the opinion of the jury should be taken as to whether what was done by the defendant was done in the ordinary, reasonable, and proper mode of working the mine. New trial ordered.—*Smith* v. *Fletcher*, L. R. 9 Ex. (Ex. Ch.) 64; s. c. L. R. 7 Ex. 305; 7 Am. Law Rev. 300.

See Injunction, 2.

Trover.

The purchaser of goods which remain in the vendor's possession, and subject to his lien for the purchase-money, cannot maintain trover against a third party for their conversion.—*Lord* v. *Price*, L. R. 9 Ex. 54.

Trust.

A., a trustee, appointed B. a trustee of half of the trust-fund against the terms of the trust. A.'s solicitor advised against said appointment, but drew a deed of transfer from A. and a deed of indemnity from B.; and he also introduced A. to a broker, for the purpose of enabling him to sell a portion of the trust-fund for payment of costs. B.'s solicitor examined and approved the deed appointing B. trustee, but warned B.'s wife, who was a *cestui que trust*, of the consequences which might follow a change in the trust. B. subsequently misapplied the trust-fund held by him. *Held*, that the solicitors of A. and B. were not liable for the misapplication of said trust-fund by B.—*Barnes* v. *Addy*, L. R. 9 Ch. 244.

See Devise, 2.

Tug.—*See* Negligence, 1.

Value.—*See* Poor-rate.

Vendor and Purchaser.—*See* Covenant, 3.

Water.—*See* Mines.

Way.

A railway company took land for the railway under statutory powers, and, in accordance with their contract with the owner of the land, built level crossings connecting the portions of the land separated by the railway. Said land was, at the time of the contract, subject to a statutory provision against being built upon. This prohibition was subsequently removed, and the land was built upon. The company objected to the occupants of the houses crossing their line at said crossings. *Held*, that the right to use said crossing was not restricted to purposes for which the land adjoining the railway was used at the time of said contract, and that said occupants might use said crossings, but so as not to obstruct the proper working of the railway.—*United Land Co.* v. *Great Eastern Railway Co.*, L. R. 17 Eq. 158.

Will.

1. Declarations of a testator that he had destroyed his will were admitted, not as evidence of such destruction, but as evidence of intention, from which, when united with other circumstances, destruction may be inferred.—*Keen* v. *Keen*, L. R. 3. P. & D. 105.

2. The court allowed, with consent of all parties, proof of a will, reserving power to the executor to prove certain codicils not in the country, upon his filing an undertaking to prove such codicils as soon as they, or an exemplification thereof, should come to his hands.—*In re Goods of Roberts*, L. R. 3 P. & D. 110.

See Ademption; Annuity; Devise; Illegitimate Children; Legacy; Limitations, Statute of; Settlement, 2.

Witness.—*See* Interrogatories, 2.

Words.

"*Crime or Offence.*"—*See* Criminal Law.

"*Lands.*"—*See* Devise, 3.

"*Or Order or Assign.*"—*See* Bill of Lading, 2.

"*Say about.*"—*See* Contract, 4.

CORRESPONDENCE.

To the Editor of the Canada Law Journal.

Gentlemen—A point has arisen here in a County Court case upon which I should be glad to know your view.

Sect. 220 of the C. L. P. Act is to the effect that a party dissatisfied with the decision of the Judge at *Nisi Prius* respecting the allowance of any amendment may apply *to the Court*, from which the record issued, for a new trial, &c. Under this section can a party apply *in Chambers* to strike out a plea added at the trial by leave of the Judge, or should the motion be made in Term?

The plea in question was a plea of rescission and was pleaded to the whole declaration, the declaration containing a special count and counts for money paid and on accounts stated. I objected that a plea of rescission could not be pleaded to the common counts as under the latter the plaintiff must prove an executed contract, and an executed contract could not be rescinded. Of course a plea of release or accord and satisfaction could be pleaded, but, as I conceive, not a plea of rescission. The Judge ruled against me and allowed the plea to be pleaded to the whole declaration, and I moved in Term to strike out the plea, so far as pleaded, to the common counts, but was told that the application must be made in Chambers.

I have not been able to find any decision on the point; but looking at the different language of this section from the other sections of the Act, for instance, the section authorizing applications to strike out embarrassing pleadings to be made to a Judge in Chambers, I think the application to strike out a plea, added at the trial, should be made to the Court. The latter section, as I understand it, applies only to pleadings in the ordinary course of the action. The two questions above mentioned appear to me of sufficient general interest to deserve an opinion from you. I do not ask you to discuss them for my assistance, as the case in which they arose is disposed of on other grounds.

Yours truly,

J. R.

REVIEWS.

A Manual of Costs, with Forms of Bills prepared from the new Tariffs. By J. S. Ewart, of Osgoode Hall, Barrister-at-law. Toronto: Rowsell & Hutchison, 1874.

It is rather late in the day to review this most useful little book, for we apprehend that long before this appears, every practitioner who has occasion to prepare a bill of costs, has supplied himself with a copy. It is, therefore, more to keep a record of our "native productions" than to give any information to our readers, that we now speak of Mr. Ewart's manual.

The compiler includes in his labours the tariffs of all the Courts and a variety of miscellaneous costs and fees, and their name is legion; in fact, were it not for the list in the table of contents, substantiated by reference to the pages of the book there indicated, one might well doubt there being such a number (no less than seventeen) in existence.

These miscellaneous tariffs comprise Part V. The first four parts are divided thus: Part I—Costs of proceedings in the Common Law Courts, alphabetically arranged; Part II—Forms of Bills in Common Law Courts; Part III—Costs of proceedings, alphabetically arranged, in Court of Chancery; Part IV—Forms of Chancery Bills.

A practical experience of some months is the best test of this book, and prophecy on our part is now out of place. That experience has shown that it is a reliable and compendious guide to practitioners, and it exhibits much care and industry on the part of the compiler.

Speaking of the new tariffs induces us to turn to a relic in the way of tariffs which a friend sent us the other day.

It is a tariff of the Court of King's Bench, dated in Easter Term, 3rd, Geo. IV, and is signed by Wm. Campbell, J., and D. Boulton, J. It would seem to have been sent by post to "Arch'd McLean, Esq., Cornwall," and bears an endorsement which is apparently in the bold and clear handwriting of that fine old man. The judges of the present day who settled the last tariff will be glad to know that they have not gone to any undue length in their recent small increase, when reminded that at a time when money had a buying capacity of about four times greater than at present, the items in the tariff were much the same as at present, for example: Instructions, were £1.0.0; attendances, 2s. 6d. each, when special, 5s.; special affidavits, 5s. per folio, etc.

Sheriffs under the new traiffs come out much better than lawyers—for example: Sheriffs now receive $1.05 for a certificate of search for fi. fa. One would have thought that the former fee was ample for the work and responsibility, when it is remembered that a search is a thing of hourly occurrence in a Sheriff's office. But they, like Registrars, are blessed with a capacity of combining for their own interests with which lawyers are not gifted. The latter are not only deficient in this respect, but permit depredators and trespassers in the shape of unlicensed "land agents," and "conveyancers" (falsely so called) to take the bread out of their mouths. In England this is not so, and the time has come for a change in this country.

FLOTSAM AND JETSAM.

Theatrical Justice.—A new book relating to the earlier days of San Francisco recalls, in the following sensational style, an example of the oratory of the late "Harry Byrne," the California lawyer, whom Miss Matilda Heron, the actress, is said to have married many years ago: Mr. Byrne rose in the court-room amid deep silence, and proceeded to close for the prosecution. Pale as the white wall around him, with long and flowing black locks, his eye burning and glowing like a blazing coal, he tore the veil of sophistry, woven around the subject by his adversaries, and laid the bald and awful facts before the jury. Now rising to awful denunciation, he seemed a Nemesis to the cowering criminal before him, now he turned his voice to low persuasion as he sought to mould the jury to his wishes. But as he paused, after a tremendous effort, his eye persuaded him that unless he called to his aid some new and startling line of action the verdict would be against him. At the time an old eccentric man was bailiff of the court. One of his peculiarities was to sleep through the arguments of counsel, and naught could arouse him save the command of the court, and the voice of the District-Attorney directing him to do some official act, but at these well-known sounds he would start from his seat with an alacrity remarkable for one of his years. Turning to the man (who was enjoying his usual nap) Byrne, to whom this idiosyncrasy was well known, pointed his finger at the peaceful countenance, and then eulogized his faithful attention to his duties. "But," said he, "he has in this case left one duty unperformed." Then, with a voice that thrilled through men's hearts and made the rafters ring; "Mr. Bailiff, call William Adams." The old man sprang from his seat, and hurrying across the court-room to the entrance beyond, called in a weird, thick manner, the dead man's name. "William Adams, William Adams, William Adams, come into court." The criminal shivered in his seat, men's blood flowed coldly, and the silence was as death. Justice seemed crying to heaven for retribution; the faces of jurors grew white and blue, and each man glued his eye upon the door as if he expected the apparition to answer the summons. "Gentlemen," continued Byrne, "that witness can never come. The one who can relate to you the circumstances of this tragedy lies in his cold and silent grave. No bailiff's voice can arouse him from his eternal sleep; naught save the clarion blast of the Archangel's trump can pierce the adamantine walls of his resting-place. He has been deafened forever by him who now stands arraigned at this bar. Base, brutal, bloody man; upon you hangs this awful responsibility. Your hands have dabbled in his blood, and as the instrument of outraged society, I demand your conviction." Genius triumphed. Justice was vindicated, and the prisoner expiated his offence on the scaffold.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Trinity Term, 38th Victoria.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law, (the names are given in the order in which the Candidates entered the Society, and not in the order of merit):

Angus M. Macdonald.
Frederick St. John.
John Ross.
Donald Greenfield McDonell.
David Hill Watt.
James Parkes.
Thomas B. Browning.
John Rice McLaurin (admitted and called.)
John Wright, under special Act " "

And the following gentlemen obtained Certificates of Fitness:

John Bruce.
James Parkes.
David Hill Watt.
Richard Dulmage.
John Ross.
George B. Philip.
Frederick St. John.
Thomas B. Browning.
George R. Howard.

And on Tuesday, the 25th of August, the following gentlemen were admitted into the Society as Students-at-Law:

University Class.

Charles Wesley Peterson.
John English.
George William Hewitt.
Duncan McTavish.
Donald Malcolm McIntyre.
Thomas Gibbs Blackstock.
William E. Hodgins.
Frederick Pimlott Betts.
Alfred Henry Marsh.

Junior Class.

Alexander Jackson.
Henry P. Sheppard.
Horace Comfort.
Bayard E. Sparham.
Archibald A. McNabb.
William Swayzie.
Albert O. Jeffery.
William F. Morphy.
Hamilton Ingersoll.
Albert John McGregor.
Robert D. Story.
Denis J. Downey.
Alfred Carss.
Alexander V. McClenaghan.
Charles E. Freeman.
John Hodgins.
Frederick Murphy.
George W. Hatton
Martin Scott Fraser.
Frederick W. A. G. Haultain.
William Pattison.
Roderick A. Matheson.
Charles E. S. Radcliff.

Articled Clerks.

Peter J. M. Anderson.
John H. Scougall.

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 Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's 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 shall pass a satisfactory examination upon the following subjects: namely, (Latin) Horace, Odes, Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic: Euclid, Books 1. 2, and 3, Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

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

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

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

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

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