DIARY FOR MAY.

2. Sat. ..Articles, &c., to be left with Sec. Law Society.
10. SUN. ..*4th Sunday after Easter.*
13. Wed..Last day for service for County Court.
17. SUN. ..*5th Sunday after Easter.*
18. Mon..Easter Term begins.
21. Thurs. *Ascension Day.*
22. Frid..Paper Day Q.B. New Trial Day C.P.
23. Sat. ..Paper Day C.P. New Trial Day Q.B. Declare for County Court.
24. SUN. ..*Sunday after Ascension.* Queen's Birthday.
25. Mon..Paper Dy Q. B. New Trial Day C.P. Last day to set down for re-hearing.
26. Tues. .Paper Day C.P. New Trial Day Q.B.
27. Wed..Paper Day Q.B. New Trial Day C. P. Appeal from Chancery Cham. Last day for notice of re-hearing.
28. Thurs. Paper Day C.P.
29. Frid..New Trial Day Q.B.
30. Sat. ...Last day Court of Revision finally Assessment Roll.
31. SUN. ..*Whit Sunday.*

The Local Courts'
AND
MUNICIPAL GAZETTE.

MAY, 1868.

LORD BROUGHAM.

Recent despatches from England bring us news of the death of Henry Brougham, Baron Brougham and Vaux, in his ninetieth year, at his residence near Cannes, in France.

He was born in Edinburgh, on the 19th September, 1779, and was educated at the High School and University of Edinburgh, where he was laborious and successful. He became an advocate at the Scottish bar, in 1800, and about two years afterwards commenced his connection with the *Edinburgh Review*, to which he was for several years one of the most constant and eminent contributors. In 1807, he removed to London, and the year afterwards was called to the bar at Lincoln's Inn, where his great ablities and untiring energy made his success as certain and more brilliant than it could have been in the more limited sphere north of the Tweed.

Though his star was in the ascendant, both as a writer, an advocate, and as a outspoken, fearless statesman, the celeberity he acquired by his defence of Queen Caroline, brought him most prominently before the public, and made him for years one of the idols of the English nation. This masterly effort, and his speech on the Reform bill, were the oratorial efforts by which he was best known to fame, professionally and politically. He is, however, best known to those of the present day, as the greatest reformer, and particularly law reformer, of his day.

Those who are interested in the administration of the system of law and equity, combined in the English County Courts and in our Division Courts, will remember the attention he gave to this subject, in connection with other law reforms for the amelioration of the debtor and the security of the creditor.

Mr. Brougham was appointed Lord Chancellor during Lord Grey's administration, and though not attaining to the eminence on the bench that he did at the bar, his energy was the same, and his zeal as untiring as before.

His powers of work were almost superhuman. Such an intellect, combined with such physical endurance, and such a determined, dauntless spirit knew nothing of failure, until he had risen from an obscure position to the highest honours which his country could restore. He has left a name without which many pages of English history would be a blank, and his memory will ever remain as a beacon of encouragement to the industrious student, ambitious of success. Their motto should be what his proved to be, "Whatsoever thy hand findeth to do, do it with thy might."

JUDGMENT SUMMONS.

The following remarks, taken from one of the leading legal periodicals in England, may may give some useful hints to us, as to the best mode of enforcing the payment of judgments in the Division Courts against unwilling debtors.

The writer of the article alluded to (in the *Solicitor's Journal*) speaks thus:

Some of the county court judges have for years past acted upon a system of what they call "conditional committal" on the hearing of judgment summonses; that is, the judge enters into a sort of *quasi*-legal contract with the plaintiff, to the effect that the judge will commit if the plaintiff will promise not to take out the *ca. sa.* provided the defendant pays the amount due by such instalments as the judge considers are within the means of the defendant. Some judges, when asked to do this, decline on the ground that they have no power to commit conditionally. They have the power to suspend for any length of time the issue of the *ca. sa.*, or to set the committal aside on cause shown. How the two methods work will be best shown by an example of each from two of the metropolitan courts.

A plaintiff having satisfied the judge at one of these courts that the defendant has had the means

to pay since the judgment was obtained, an order of commital is made. The plaintiff then says he does not want to send defendant to prison, and asks the judge to add the condition that the warrant is not to issue if (say) £1 a month be paid. The judge says he has no power to make such a condition, but he can suspend the issue of the warrant for (say) six months, that is, for the time it would take to pay a debt of £6 by instalments of £1 a month. The plaintiff is thus placed in this unsatisfactory position: if he accepts an unconditional commitment he may issue his *ca. sa.* at once, or at any time within twelve months, but it must be for the whole amount, when in all probability the defendant is utterly unable to pay such a sum at one time, however long might be the patience of the plaintiff, and as the cash office will only accept the specific amount ordered by the Court, the defendant has no means of propitiating the plaintiff by paying instalments. Hence one of three things commonly happens: 1st. The defendant is arrested at once, and being unable to pay, serves his term in prison, and the plaintiff is worse off by the costs of the judgment summons and the *ca. sa.*, and he has to repeat the process, with the probability that the result will be the same. 2nd. He may have the issue of the *ca. sa* suspended six months, and at the end of that time he finds himself in exactly the same position as at first: the defendant goes to prison, and comes out without the slightest probability of ever being able to raise £6 at one time, 3rd. (And this is by far the most likely case of the three) long before the six months have expired the defendant has vanished, or, as high baliff will endorse on the *ca. sa.*, *non est inventus.*

Now take the court that makes conditional commitments, and let us suppose a similar case. The judge, being satisfied of the defendant's ability to pay the debt by instalments, says to the plaintiff—"I will commit the defendant to prison if you will agree not to take out the warrant if he pays £1 a month; you will be more likely to get your money in that way, and you don't want to send the man to prison." "Of course I don't," says the plaintiff, "I will agree to those terms." An attorney perhaps appears for the defendant, although that is very unusual in judgment summonses. The professional man knows that technically the judge has no power to make the condition part of the order of committal, and immediately puts the question to the judge, "Suppose, sir, the plaintiff *does* take out the warrant in spite of his agreement, for he is not legally bound by that?" "In that case," says the judge, "apply to me, and I will at once set the committal aside as having been obtained *contra bonas fides.*" Thus, by an ingenious fiction the *condition* of the committal has all the force of law without being technically legal, and the plaintiff almost certainly gets his money, as the cash office is ordered to take any instalments that the defendant may offer, and the plaintiff will perhaps in nine cases out of ten be content with even less than he bargained for.

The difference between the two systems is a matter of far greater importance than superficially appears; so much so indeed that collectors and tradesman, who go much to county courts, declare that they get quite thirty per cent, more under the conditional commitment system than they do under the unconditional and suspension system. And yet the conditional system is nothing more than applying to the *ca. sa.* the law and the universal practice of all the judges with regard to the *fi. fa.* When a judge, on an original hearing orders payment by instalments, he simply orders (not in words, for the law provides the condition) that the *fi. fa.* shall not issue if the instalments be duly paid. The judge ought to be entrusted with the discretionary power of dealing with both the *fi. fa.* and the *ca. sa.* in the same way, without having to resort to the transparent fiction we have referred to.

PREVENTION OF CRIME IN ENGLAND.

At the Meeting of Magistrates for the county of Middlesex, in November last, Mr. Serjeant Payne laid before them the following resolutions on Penal Servitude and the Prevention of Crime:

"1. That the great object of all classes of society should be the prevention of crime, and the consequent avoidance, as far as possible, of the necessity of punishment.

"2. That in the earlier periods of this kingdom, those who had committed offences were allowed to abjure and leave the realm, and were not to return without permission.

"3. That the difficulty which now exists in providing a penal settlement to which to transport criminals, renders it desirable that in cases not requiring capital or severe punishment, certain offenders, after repeated convictions, should be expelled the kingdom for such period as might be considered proper, without their being transported to a penal settlement—by which means great expense would be saved to the country in their maintenance either in the colonies or county prisons; and such a proceeding would be justifiable, inasmuch as foreign nations transport their criminals to England and other countries.

"4. That in order to check and prevent the commission of crime, which from recent investigations appears to exist to an extent hitherto unheard of, the magistrates of the several petty sessional divisions should meet once a week, or oftener if occasion requires it, and that such meetings should be open to any person desirous of communicating information of any offence committed or about to be committed; such information to be received confidentially by the magistrates, and by them communicated at their discretion to the police authorities, and to be authenticated by

the oath of the informant, not for publicity, but as a guarantee of good faith.

"5. That by this means it is hoped many cruel offences against the person which are now frequently and continuously committed by men against their masters and fellow workmen, might be prevented or detected; it being probable that many persons would be willing to communicate to the magistrates information which might even be the means of saving life when they would not be willing to go to a police station to be regarded as public accusers.

"6. That the laws against drunkenness should be more stringently enforced as a further mode of preventing crime, and every person in such a state of intoxication as might fairly lead to an apprehension that mischief might be the result, should be detained in custody by the police until such person became sober and was fit to be discharged with safety.—*English paper.*

SELECTION.

ON THE UTILITY OF OATHS.

(By Edward Gardner, LL.B.)

The subject of oaths and declarations taken in various departments of the State has latterly attracted the attention of Parliament; and during the session 1865-66 a Commission was held to inquire what oaths, affirmations, and declarations are required to be taken or made by any of Her Majesty's subjects in the United Kingdom other than those taken or made by members of either House of Parliament, or by prelates or clergy of the Established Church, or by any person examined as a witness in a court of justice, and to report their opinion as to the dispensing with or retaining and altering such oaths, affirmations, and declarations. To the report made by the Commission, are appended 300 closely-printed pages of oaths and declarations taken by the holders of different offices on their appointment to them, and to these many others might be added which the Commissioners seem to have missed. Passing over the report itself, which appears to be fully concurred in by one only of the five Commissioners who sign it, we come to the dissent of Commissioners Lyveden, Bouverie, Lowe, Maxwell, and Milman, who seem to have brought their great intellects to the examination of a question in a truly philosophic spirit. They come to the conclusion that by far the greater number of the oaths into which they had examined, ought to be abolished, and the rest changed into some convenient and distinct form of declaration:—

"The imprecatory forms of oath in common use," they say, "appear open to very grave objections. Such oaths seem to assume that God's vengeance may be successfully invoked, and God's help declined or accepted by frail and fallible man, or made conditional on the truth of his assertions or the fulfilment of his promises—notions which seem inconsistent with the teachings of religion and of reason."

The limits of this article do not admit of detailing the arguments of these five dissentients. To those who would wish to pursue further the study of the subject opened up by the Commission, and who may not be inclined to adopt the views set forward in this paper, a careful perusal of the dissent referred to is earnestly recommended.

A glance at three hundred closely printed octavo pages of oaths and declarations taken by members of Her Majesty's household, officers of public departments, of courts of justice, by soldiers, sailors, and volunteers, by county, borough, and parochial officers, by recipients of the different orders of knighthood, by members of universities, colleges, and schools, of traders' guilds, of various incorporated societies; a glance at these is surely enough to set us thinking on the wholesale swearing that seems to be required in almost all the public relations of life; and to the catalogue are to be added several oaths and declarations that have been omitted, also those taken by members of both Houses of the Legislature, by the prelates and clergy of the Established Church, and by jurors and witnesses in courts of justice.

History tells us that oaths were taken in the earliest ages of which we have any records; and the compilers of legal history, wholesomely impressed by precedent, assert that, "however absurd or perverted by ignorance and superstition, an oath in every age has been found to supply the strongest hold on the consciences of men, either as a pledge of future conduct, or as a guarantee for the veracity of narration."* Under some of the deductions from and abuses of the civil law, of which the middle ages were fruitful, heathens, Jews, and other persons, whose opinions ex-cathedra fulminations then stigmatized infidel, were declared incompetent to be witnesses in courts of justice. The giving of evidence the old lawyers considered rather a right than a duty, and consequently incompetency was a fitting punishment on the holders of obnoxious opinion—a punishment in which frequently the innocent Christian was included, who, having a suit to maintain, happened to have only the evidence of rejected witnesses on which to rely. And Sir. Edward Coke, not free from the bigotry of his time, is found to declare that an infidel (*i.e.*, any one who was not a Christian) could not be a witness: "All infidels," he says, "are in law, perpetual enemies, for between them as with the devils, whose subjects they be, and the Christian there is perpetual hostility and can be no peace." About the year 1745, a better spirit seems to have dawned upon our tribunals, and in a celebrated case† then argued, it was decided that the words "so help you God" are the only material part of the oath, which any heathen who believes in a God might take as well as a Christian. Consequently, the kissing the Evangelists—with or without a cross on the cover—in England and Ireland; the uplifted hand in Scotland, the touching the Brahmin's

* Best Ev. § 56.
† *Omichund v. Barker.*

hand and foot in India, the placing the forehead on the Koran in Constantinople, and the breaking of a saucer in China, are all mere forms surrounding the great substance "so help you God." But our cousins on the other side of the Atlantic seem to be wandering away from what we may call the imprecatory sanction of the oath, for their books say that witnesses are not allowed to be questioned as to their religious belief—not because it tends to disgrace them, but because it would be a personal scrutiny into the state of their faith and conscience foreign to the spirit of free institutions, which oblige no man to avow his belief.* With them the curious anomaly could not have happened, which was made patent to the British public a few years since, in a case brought by a man called Maden, in an English County Court.† His only witness was his wife, who, on being examined on the *voir-dire*, stated that she did not believe in a God or in a future state of rewards and punishments. Her evidenee was rejected because she dared to speak the truth; had she lied and professed the necessary belief, her testimony must have been received. The Judge had no sympathy with the witness, but, assuming to be an authority in religion as well as law, he told her that she must take the consequences of her disbelief in the loss of her property, the subject matter of the suit.‡ Happily, Atheists are rare; were they however more numerous, the interests of justice must long since have demanded the admission of their evidence. Truth is what a court of justice desires; the exclusion of the honest infidel will not secure it, and the dishonest will not hesitate to profess the necessary qualifications for giving evidence.

Having taken this hasty glance at the history and nature of oaths, let us for convenience divide them into the same classes as those adopted by the five dissentient Commissioners whom I have already named. We have then:—

1. Oaths. to the breaking of which no penalties are attached by law, and

2. Oaths, to the breaking of which the law does attach a penalty.

1. Of the first class are (1.) oaths of allegiance, and (2.) oaths of fidelity in the discharge of duties.

(1.) As to the oaths of allegiance the dissentients with significant brevity state, that—

"In peaceful and prosperous times they are not needed; in times of difficulty and danger they are not observed. Contemporary history affords abundant proof of the inefficiency of political oaths, whether taken by the people to their rulers or by the rulers to the people."

It is the duty of all subjects to bear allegiance to their rulers, and the anomaly is a curious one, discoverable no doubt in all societies, of requiring a man to swear to perform that duty, which he not only ought to be presumed, but which the very fact of his being a subject compels him, to observe to his Sovereign. Somewhat similar is the peculiarity remarked by a surprised Frenchman of certain of our Irish brethren joining together and agreeing to be loyal; agreeing to be what they ought to be, agreeing to do their duty, and therefore considering themselves worthy of all praise, as faithful observers of political morality. Ordinary civilians are not called on to take the oath of allegiance, yet it behoves them to be equally as loyal as the soldiers who swear an oath, which even when they hear they hardly understand.

(2.) Then as to the oaths of fidelity in the discharge of public duties, they have never stopped the unworthy at the threshold, and the worthy did not require them to quicken their sense of duty. Such oaths seem to be in the nature of contracts, which might be entered into in a manner much more satisfactory than by embodying them in their present form. With a writer of the year 1834, quoted by the Commissioners, it is only common sense to hold that—

"No man should ever be called on to promise to do what he is bound by the duties of his office to perform, on the contrary, it should, in every way, be declared that every man has already promised to do his duty by the very act of accepting office." *

There are two motives, or, to use a perhaps more correct phrase, two sanctions for the observance of the class of oaths we are now considering, namely, the sanction of interest and the sanction of religion. Now, if an enlightened self interest does not impel to honesty in the discharge of a duty, it is very questionable whether the religious sanction will secure faithfulness in the office. The oath will not generate a conscience, and, where this is wanting, happiness here or hereafter ceases to persuade, and Hell offers no terrors. Even a tendency to superstition, which we too often shamelessly encourage, can have no place in one devoid of the moral sense. Worldly gain, present or prospective, is the sure reward of faithfulness. But, it may be said, a little wrong, scarcely possible of detection, may be done with advantage to the wrong-doer, and in such case self-interest inclines to the doing of it. The proposition may be questioned; but admitting the force contended for, the moral sense of right and wrong should be potent to resist the temptation, and, if it be not so, an oath cannot strengthen the weak conscience. As to the sanctity of the oath (a phrase which is scarcely intelligible) in what does it consist, since the practice is recognized of taking the oath as a matter of form, and disregarding its whole spirit? Oaths and declarations taken by officers of the army against the payment of money for commissions may be mentioned; these, however, common decency abolished some years ago, and the Report points out some other oaths which were, and are, taken not to be observed. Examined from whatever

* Greenleaf Ev. § 370.
† Rochdale Co. Ct., Feb. 1861.
‡ Her mother was the defendant; she had neglected the religious instruction of her daughter, and thus took advantage of her own wrong.

* J. Endell Tyler, "Oaths," p. 68.

point of view, an oath must be found not to possess in itself any sanction whatever for the due observance of the duty sworn to be faithfully performed.

2. Passing away from oaths of office we come prepared in some degree for an examination of judicial oaths, or that class of oaths to the breaking of which penalties are attached by law.* A witness is sworn in a Court of Justice to tell the whole truth; should he lie, a temporal punishment is imposed on his being found guilty of the offence, and further, say the clergy, he has earned punishment hereafter for having laid perjury to his soul. We shall not stop to examine the feeling of certainty or uncertainty as to this latter reward, that may be present to the mind of him who swears falsely; the question is not one of any importance to the object aimed at in this paper.

Stripped of the legal sanction, this class of oaths is very similar to that we have been considering. It is every one's real interest to speak the truth,† and should any motive induce one to swerve from it the oath has no charm to prevent if conscience be dead to the sacred character of truth itself. If motive and conscience be acting in contrary directions the repetition of no formula can give power to the latter. A lie is a lie on the street or on 'Change, as much as in a Court of Justice, and why should its utterance be considered more heinous in the one place than the other? As great interests depend on the honest dealing of man with man as on speaking truly before a judge and jury. But if we exalt truth in the one case by investing it with a sort of specially made garment, of necessity its position in the other case is altered, and it becomes a less crime to tell your neighbour such a lie as may enrich you and impoverish him than to swear falsely to some insignificant fact in a Court of Justice. A lie, we are in effect told, is not so bad a thing in our every day contracts, but in a Court of Justice is something awfully wicked. Yet wherein does the difference consist? A lie has been told in the presence of God as deliberately in the one case as in the other. But truth has received in a Court of Justice a fictitious importance, and the tendency outside is not to stamp a lie with the severe condemnation which it merits. In the desire to secure veracity in our tribunals the interests of truth generally have been overlooked, they have been completely lost sight of, and society suffers in all its dealings in order that a result might ensue, which deeper investigation into the subject must prove to be not obtained. In ordinary dealings, and in ordinary conversation, we frequently find individuals not only pledging their honours, but willing to give their oaths as guarantees of the correctness of their assertions, and our common experience teaches us that when such guarantees are offered those individuals are lying most. A show of candour too frequently indicates its complete absence; and when we hear a man prefacing his statements with the phrase "to tell you the truth" as a sort of advance guard we may look out for being deceived in someway or other. Assuredly the injunction "swear not all" possesses more meaning than the heated controversies of sects have allowed us to perceive. A keen observation of human nature on the part of the Founder of Christianity, which is manifested again and again in other philosophic reflections, prompted these words; and the attempt of Paley* to show that they were inapplicable to judical oaths entirely fails principally because he misprehended their meaning. "Let your communications be yea and nay, for whatsoever is more than these cometh of evil," these words show the idea present to the mind of the speaker that the truth is deserved by the addition of an oath. Were truth sacred in the market place, its character would not, and could not, suffer when uttered in a Court of Justice. Rid truth in the latter case of its unwholesome surroundings, let it stand out in its own abstract greatness and importance, and we shall be sure of truth being spoken in the street, and consequently more sure than at present of securing it in our tribunals.

Supposing, however, the proposition incapable of proof that truth suffers by being considered something higher when uttered before a wig and gown than it is when spoken in other relations of life, still the taking of an oath can only be justified on grounds of expediency. It must be shown, first, that the religious sanction is of avail where simple and unaided conscience would be weak and insufficient, and, secondly, that our lives and properties are really protected by the notions which people are supposed to entertain upon being put through the oath formula. Parenthetically it may be observed that with the legal sanction we are not at present concerned; that in some shape must always be maintained. The history of the law of evidence would furnish us with curious information on this subject, but to one only of its chapters need reference now be made, namely, to that which tells of the times when men, so far mistrusting each other, feared to examine parties in a cause, or even any persons interested, however remotely, in the result; and when justice was but too often defeated from the absence of any one who could testify to the matter in dispute save the plaintiff or defendant, and neither could be a witness. "*Nemo in propriâ causâ testis esse debet*" we borrowed from the civil law. "If the rules of exclusion," says Taylor, "had been really founded, as they purported to be, on public experience, they would have furnished a most revolting picture of the ignorance and depravity of human nature." At the commencement of the present century,

* With this class the Commission was not concerned.

† It being more easy to tell the truth than a lie, some writers speak of a natural sanction for truth, meaning that it is more natural or easy to draw upon the memory, than the imagination.

"From the mouth of the most egregious liar," says Bentham, "truth must have issued at least one hundred times for once that wilful falsehood has taken its place." (Ev 82.)

* M. & P. Philosophy Bk. III, p. 11, c. 61.

Jeremy Bentham called attention to the absurdities of our system of evidence, and but 16 years have passed since complete justice in this respect has been done to that shrewdest of jurists. In 1833 interest ceased to be an objection to a witness; ten years later the person who had committed a crime was no longer excluded from the witness-box. In 1846 the English County Courts began to experiment on the evidence of plaintiffs and defendants and their wives, but it was not till 1851 that, the experiment having proved successful, Lord Brougham was able to induce Parliament to let in such evidence in almost all cases. Nor is the day now far distant when the mouth of a prisoner can any longer be kept closed. Yet, when Bentham's views began to be accepted, there were not wanting false prophets in abundance, who foretold the commital of the most dreadful perjuries.

Without entering into the various views as to what constitutes the essence of an oath, its supposed advantages cannot be more strongly stated than in the words of John Pitt Taylor. He says:—

"The wisdom of enforcing the rule, which requires witnesses to be sworn, cannot well be disputed; for although the ordinary definition of an oath—viz. 'a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth' may be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man to God; not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so, still it must be admitted that by thus laying hold of the conscience of the witness the law best ensures the utterance of truth." (§ 1247.)

Again we are brought back to conscience as the something which is to be laid hold of for securing truth; it is the witness' conscience which is to be affected, and hence the meaning of the question—"Do you believe that oath binding on your conscience." We have seen, however, that the moral faculty is not supplied with new strength by the administration of an oath. It is our common experience that the religious sanction of the oath does not deter a dishonest witness, though the legal penalties for perjury undoubtedly frequently do. It is but seldom, too, that the witness pays any heed to the officer of the court who performs the duty of swearing the witnesses; his mind is full of other thoughts, and if perchance he should give marked attention to the hurried words spoken by the officer, the jury receives his evidence with caution. A witness is never shaken by being reminded that he is on his oath, nor does the question—the resort of the "powerful feebles"—"by the virtue of your sacred oath do you swear so and so?" at all frighten him. Litigants frequently know, frequently imagine, that certain witnesses could, if they would, give certain evidence; they have been unable in conversation to get the desired admissions, but they seem to think that the swearing book has a magic spell. Despite the advice to the contrary of their lawyers, they have these persons placed in the witness-box, and the result is the usual one. A too frequently recurring illustration of this is in the examination of defendants to prove shop-debts due by them to the representatives of deceased traders, where the deceased was the only other person who could have given evidence.

That it is the regard for truth itself, uncloth-ed with mystic rites, which secures reliable evidence in our tribunals, receives additional corroboration by resort to negative proof. For instance, we are often informed that the Judges of courts established by the British rule in various countries over the earth are continually puzzled to discover in those localities, where mendacity is the normal condition of the people, the real facts of the cases they are called upon to decide. Before a class-fellow from the halls of this college,* now a Judge in India, the following case was presented:—The plaintiff, a money-lender, complained that he had agreed with the defendant to lend him 100 rupees, that he had given him 20 on account, and that the remaining 80 were to be given on his coming and executing the bond for repayment, but the defendant never returned to execute the bond, and he refused to pay back the 20 rupees advanced. The defendant replied that he had required a loan for a few days, that he had signed a bond to the plaintiff for 100 rupees, but only received 20 on account, the plaintiff saying that he would give him the remainder on the following day, but, in the meantime, defendant discovered he could do without the loan, so he repaid the plaintiff the 20 rupees lent, and got back his bond, which he produced. Each party set forward witness after witness in support of his case, the Judge adjourned again and again, and, at the time I heard the story, was unable to come to any decision. Olden times would have suggested "wager of law," some ordeal, or the "decisory oath," and the Judge under the civil law would have exercised his discretion, and administered the "suppletory oath."† But who shall say that truth would any the more have been discovered? It is not a little remarkable that the great foreign jurist Pothier, in speaking of these additional oaths, said:—

"I would advise the Judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath to prevent his demanding what is not due to him, or disreputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred, and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted."‡

* Queen's College, Belfast.

† The civil law permitted litigants to tender the "decisory oath," the one to the other, he who refused it lost his cause. It was the Judge's privilage in doubtful cases to administer the "suppletory oath" to either party.

‡ Obligations, by Evans, s. 831.

Had it occurred to that great jurist, when he used these words, that oaths in general might be dispensed with altogether, the very same view he must have applied to the entire class, which he held with reference to the limited and extraordinary class then under his consideration. Perhaps, too, the earnest student of our great English jurist would discover that he questioned the utility of all oaths.*

The opinions, however, of great jurists need hardly be quoted for judges and juries who are supposed, next after the witness, to be impressed with the oath taken by him, throw aside altogether the consideration that the evidence has been sworn to; and in their decisions they are wholly guided by the credibility of the facts, which, in their eyes, receive no additional confirmation from the oath, nor does the oath, on the other side, lend to the opposing statements any strength whatever. And this seems to have been always the case, for we find one of our oldest law books in ordinary use, speaking of the "demeanor of a witness and his manner of giving evidence as oftentimes not less material than the testimony itself."†

Our lives and properties are not protected by the oath, nor does its imposition affect the conscience; on grounds of expediency therefore it fails to be serviceable. Moreover, we have seen that the interests of truth generally are prejudiced by the fictitious importance attached to an oath. On an examination of the question, then, both negatively and positively, the conclusion is forced upon us that public policy demands an alteration in the swearing laws. There is hardly a sin against society which is not referable to a disregard of truth; society may make laws to punish and deter, but the root of the evil remains untouched; we lop off branches and hope to preserve the dying tree; it is useless, the old story repeats itself. Let us follow however in the footsteps of an enlightened religion, and proclaim the securing of truth to be the great object of earthly laws. By truth we do not mean the metaphysical mirage often discoursed upon, but real, earnest, substantial truth, that we can lay hold of, and assure ourselves that this fact is real and that one indisputable, that this man's word is his bond and that man's honour unimpeachable.

Let it be our object to secure truth in all relations of life, and then will be attained the end of all laws—that men should live happily together.—*Law Magazine.*

* Bentham, Evidence, bk. 2, c. 6.
† Starkie, Ev. 547, 822, 4th ed.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

NEGLIGENCE — FILLING UP HOLE IN STREET— By an English act, the owner or occupier of land is empowered to break up so much of the pavement of any street as is between the main of the water works company and his premises, to effect a communication therewith, and such communication is to be made under the superintendence of an officer of the company.

Where an owner, acting under this power, opened a street to lay a service pipe, and carelessly filled up the hole, and the connexion with the main was at the same time effected by a water works company.

Held, that the owner, and not the company, was responsible for reinstating the street, and that the word "pavement" was not confined to foot pavement. — *Glover* v. *The East London Water Works Co.*, 16 W. R. 310.

PERJURY—MATERIALITY — EVIDENCE TENDING TO CORROBORATE THE WITNESSES' AVERMENT AS TO THE CARDINAL POINT AT TRIAL—CREDIT.—On the trial of S. for a robbery with violence, which the evidence went to show had been committed at 8.45 p.m., the prisoner was called as a witness for the defence, and was subsequently indicted for perjury in falsely stating on that trial, 1st, that on the day of the alleged robbery, S. came to a certain house at 8.30 p.m., and did not go out again that evening; 2ndly, that S. had lodged in that house for the two years last past; 3rdly, that during the whole of that time S. had never been absent frem the house for more than three nights together. Having been convicted of the perjury assigned upon the last two statements.

Held, that those allegations were material on the trial of S., as they tended to corroborate and induce the jury to give a readier belief to the other evidence of the prisoner upon the cardinal point at that trial.—*Reg.* v. *Thomas Tyson*, 16 W. R. 317.

MANSLAUGHTER—ACCELERATION OF DEATH BY ACTS OF DECEASED—CAUSA CAUSATI.—Deceased, immediately after being struck by the prisoner, had walked two miles to the police barrack, and ridden home a distance of four miles the next morning. The doctor stated that the reaction caused by this walking and riding accelerated the death of deceased; that but for such exertion deceased would have had a better chance of recovery; that deceased died of compression of

the brain; that the blow was alone sufficient to cause such compression, but that deceased was more likely to recover if he had not so walked or ridden.

Held, that the judge was right in directing the jury that if they believed the doctor's evidence they should find the prisoner guilty.—*Reg* v. *Flynn*, 16 W. R. 319.

FALSE PRETENCES. — Upon an indictment alleging that the prisoner obtained a coat by falsely pretending that a bill of parcels of a coat of the value of 14s. 6d., of which 4s. 6d. had been paid on account, was a bill of parcels of another coat of the value of 22s., which the prisoner had had made to measure, and that 10s. only was due, it was proved that the prisoner's wife had selected the 14s. 6d. coat for him at the prosecutor's shop, subject to its fitting on his calling to try it on, and had paid 4s. 6d. on account, for which she received a bill of parcels giving credit for that amount. On the prisoner's calling to try on the coat, it was found to be too small, and he was then measured for one which he ordered to be made to cost 22s.; and on the day named for trying on that coat he called, and the coat was fitted on by the prosecutor, who had not been present on the former occasion; and the case stated that the prisoner, on the coat being given to him, handed 10s. and the bill of parcels for the 14s. 6d. coat, saying there is 10s. to pay, which bill the prosecutor handed to his daughter to examine; and upon that the prisoner put the coat under his arm, and, after the bill of parcels referred to had been handed to him with a receipt, went away. The prosecutor stated that, believing the bill of parcels to be a genuine bill, and that it referred to the 22s. coat, he parted with that coat on payment of the 10s., which otherwise he should not have done.

Held, that there was evidence to go to the jury, and that the conviction was right.—*Reg.* v. *John Steels*, 16 W. R. 341.

FALSE PRETENCES.—An indictment alleged that the prisoner was in the employ of V. as a hewer of coals, and was entitled to 5d. for every tub filled by him, and that, by unlawfully placing a token upon a tub of coals, he falsely pretended that he had filled it, whereby he obtained 5d. The prisoner having been convicted,

Held, that, as there was evidence that the prisoner had acted the false pretence, the conviction was right.—*Reg.* v. *Thomas Hunter*, 16 W. R. 343.

FALSE PRETENCES —The prisoner was convicted upon an indictment charging him with obtaining money and goods by pretending that a piece of paper was a bank note then current and worth £5. It was proved that he fraudulently passed the paper as the bank note of an existing solvent firm, knowing that the bank had stopped payment forty years ago. The proceedings in bankruptcy were not produced, and a witness for the prosecution proved, in cross-examination, that he was employed by the bankruptcy commissioners to print certain indorsements in their presence, which appeared on the notes, and without which no holder could obtain a dividend.

Held, that the conviction was right.—*Reg* v. *Dovey*, 16 W. R. 344.

PERJURY—SWEARING AS TO HANDWRITING —In anaction of trover in a county court against the prisoner for steel, it appeared that the plaintiff was a man subject to fits, and was one day at the prisoner's beer-house so drunk as to have scarcely any recollection of what passed. On that day one C. was sent (by the plaintiff, as was alleged, to a railway station where the steel was lying, to order it to be delivered at the house of the prisoner's father, which was done, and the railway porter then brought the delivery-note to the beer-house, and (as C. stated on the trial) a pen was put into the plaintiff's hand, which was so tremulous that he was unable to write, and C, thereupon took the pen, and, by the plaintiff's direction, wrote his name, "A. Pinder," and the plaintiff agreed to sell the steel to the prisoner. The prisoner having subsequently sold the steel, the action was brought, the transaction above described being treated as a fraud on the plaintiff; and the prisoner being called for himself, swore repeatedly that the words "A. Pinder," on the note, were in the handwriting of the plaintiff.

Upon an indictment for perjury assigned upon that evidence,

Held, that the fraud set up by the plaintiff rendered the perjury assigned material to the issue, and that a conviction was right.—*Reg.* v. *Charles Naylor*, 16 W. R. 374.

LARCENY — STEALING FOWLS — EVIDENCE OF FOWLS HAVING BEEN STOLEN WHERE THE OWNER HAS MISSED NONE—IDENTITY.—Upon the trial of an indictment for stealing fowls the property of O, he was unable to say that any of his fowls were missing; but it was proved that the prisoner was met by a police constable at about one o'clock in the morning, going towards his own house and within 1200 yards from O.'s premises, when he threw down dead fowls, warm and bleeding, and ran towards his own house. His footsteps were visible in the snow from where he was met to the premises, and the knees of his cord trou-

sers were covered with the wet dung of fowls, and in O.'s fowl pen, under the roosts, marks of the knees of cord trousers were found, and, on the floor, fresh feathers as if from a fowl's neck; and on the following morning the doors of the fowl pen and of other buiidings, which had been closed on the previous night, were found open.

Held, that there was evidence to go to the jury, and that a conviction was right.—*Reg.* v. *Robert Mockford*, 16 W. R. 375.

DEBENTURE "PAYABLE TO BEARER"—ASSIGNMENT OF CHOSE IN ACTION.—The rule of equity, that assigments of choses in action are subject to the equities subsisting between the original parties to the contract, must yield to a contrary intention appearing from the contract itself.

Hence, where the promoters of a joint-stock company agreed that on the establishment of the company debentures should be issued to B. and D., payable to bearer, and the articles of association confirming this agreement, debentures payable to bearer were afterwards issued by the company to B. and D.

Held, that the assignees, by mere delivery of B. and D., took the full benefit of their contract, and could, under the winding-up of the company, prove for these debentures in their own names, thus disregarding any equities between the company and B. and D.

Such debentures not to be regarded as promissory notes.

Quære. — Whether at law these debentures would not have been void.—*Re The Blakely Ordnance Company (Limited). Ex parte The New Zealand Banking Corporation (Limited.)* 16 W.R. 533.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

RAILWAY COMPANY—LIABILITY FOR ACTS OF THEIR SERVANTS.—The mere fact of the employment of a station master by a railway company is not even *prima facie* evidence of an authority from them to him to do that which the railway company itself had not authority to do.

Hence, if a station master, acting under an erroneous belief as to the state of facts, gives the plaintiff into custody, this will not render the railway company liable as for the act of their agent by inference, unless the company would have had power to do the act complained of, had the facts which the station master supposed to exist really existed.—*Poulton* v. *The London and South Western Railway Company*, 16 W. R. 309.

CONTRACT, CONSTRUCTION OF—NONJOINDER OF PLAINTIFFS. — An agreement for the sale of certain mines was made between the plaintiff, acting for himself, and also under a letter of attorney for and on behalf of A., B. & C., co-proprietors with him of the said mines, and carrying on business in co-partnership with him under the style of C. & Co., of the one part, and the defendants of the other part, whereby the plaintiff, acting for himself and co-partnars as aforesaid, thereinafter called the vendors, agreed to sell, and the defendants agreed to buy, the said mines.

Held, that the plaintiff could not sue alone for a breach of such agreement, but that A., B. & C. were parties to it, and must be joined as plaintiffs.—*Jung* v. *The Phosphate of Lime Company*, 16 W. R. 309.

BILL OF EXCHANGE—INTERNATIONAL LAW—CONTRACT—A bill of exchange was drawn and accepted in England, where it was also made payable, and was subsequently indorsed in France by a person resident and domiciled in that country to another person, also resident and domiciled there. The indorsement was made in accordance with the law of England, and not according to that of France.

Held, that the endorsement was good, as being in accordance with English law, and that it is not the nationality of the parties, but that of the contract, which must be regarded.

Held, also, that a contract made in England cannot, so far as the liability of the original parties to it, be varied by the law of any foreign nation through which the instrument constituting it passes. — *Lebel and another* v. *Tucker*, 16 W. R. 338.

PATENT—INFRINGEMENT OF.—Bottles of beer, covered with capsules of materials made by the plaintiff's process, were forwarded by a firm in Glasgow to their agents in England to be by them shipped abroad.

Held, that this was an infringement of the plaintiff's invention.

A patent for coating lead with tin by mechanical pressure, would be invalidated by evidence showing that lead coated with tin by mechanical pressure had, upon any occasion, been manufactured openly, not experimentally, but in the course of business, although none of the material might have been sold.

Although the publication of a mere notion of discovery, without any information of the means, will not invalidate the patent of a subsequent discoverer of those means, yet a specification may be bad as insufficiently describing the process sought to be appropriated, and still disclose

enough to invalidate a subsequent patent, by proving that what is thereby claimed is not wholly new.

In a suit by a patentee for infringement of his patent, the court may, under 21 & 22 Vic. c. 27, decree at the same time an injunction, an account, and an inquiry as to damages.

Damages may be awarded, though not specifically prayed for by the bill. (*Catton* v. *Wyld*, 32 Beav. 266.)—*Betts* v. *Neilson*, 16 W. R. 524.

CARRIER — NEGLIGENCE — EXTRAORDINARY DANGER.—A carrier of passengers is not bound to take precautions against an ordinary danger, to which his passengers are liable on a journey, and which they must be assumed to take upon themselves; but he is bound to take reasonable precaution against an extraordinary danger, which is known to him, and is not known to them. If a passenger sues him for injury resulting from such danger, the passenger must show a reasonable probability that the accident happened from the want of such precaution, and he must define the precaution with reasonable certainty. In such case a failure to adopt a usual precaution is evidence of negligence, though not conclusive. —*Daniel* v. *The Metropolitan Railway Company*, 16 W. R. 564.

ONTARIO REPORTS.

ELECTION CASES.

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

REG. EX REL. WALKER v. MITCHELL ET AL.

Municipal election—Name of candidate omitted from list—Effect on result of election.

In the list of candidates for the office of township councillors given to one returning officer, out of five for the township, previous to the election, the name of Alex. Henry, one of the candidates, and who had been duly nominated for the office of councillor, was accidentally omitted from, and was not placed upon the list of candidates until half-past one o'clock of the first day of the polling, whereby Henry certainly lost six votes and possibly more. The relator and one Stubbs having an equality of votes, the returning officer voted for Stubbs, who, with two other candidates, having a larger number of votes, were declared elected as the three councillors for the township. The relator and Alex. Henry protested against the election, contending that the whole result of the election had been affected injuriously to one or both of them by the omission of the name.

Upon an application to set aside the election it was

Held, that it is not every irregularity that will vitiate an election, and that in this case the question to be decided was not as to the mere abstract ground of the omission of the name, but only what effect it had had upon the final result of the election; and that, as it did not appear that the result would have been different if the name of Alex. Henry had been properly entered on the list, the election should not be set aside.

Quære as to the right of the returning officer to add the omitted name to the list of candidates.

[Common Law Chambers, March 5, 1868.]

This was a *quo warranto* summons respecting the office of councillor of the Township of Caledon.

The statement set forth that there were ten candidates nominated on the last Monday but one in December for the office of councillor to which three persons were to be elected, beside the reeve and deputy reeve, the names being Alexander Mitchell, George Atkinson, Samuel Stubbs, Justus Lemon, John Smith, Jacob Carrington, Nathaniel Patterson, Alex. Henry, Thomas Bell, and William Wilson Walker, the relator, and that a poll was demanded.

That the clerk should have provided the returning officers of the five electoral divisions into which the township is divided each with a certified list of such candidates; but the clerk did not provide the returning officer of No. 2 electoral division with such certified list, there being omitted from the list furnished to such returning officer the name of Alexander Henry, who had been duly proposed, and who was then and until the close of the election a candidate for the office of councillor of the township.

That the returning officer did not, nor did his poll clerk for No. 2 electoral division, enter in his poll book at the opening of the Poll, nor for several hours afterwards, the names of all the candidates, but omitted the name of Alexander Henry until a late hour of the day of election, whereby no vote was taken in his favour until about 2 o'clock in the afternoon, although there were electors present who would have voted for Alexander Henry if his name had not been improperly omitted as aforesaid; and whereby it became rumoured through the said division and other parts of the township that Alexander Henry was not a candidate, and in consequence many electors refrained from voting or voted for other candidates.

That the returning officer had no proper authority for entering the name of Alexander Henry upon the poll book in the afternoon of the 6th day of January.

That at the time of the declaration the relator, by reason of these and the other grounds mentioned in the statement, entered a written protest against the election of the three councillors returned as elected.

The affidavit of Wm. McBride, the returning officer for this division, stated the fact of the omission of Alex. Henry's name from the certified list of the candidates names furnished by the clerk of the township, and that his name was not entered as a candidate in the poll book till about half-past one in the afternoon of the following day, and not until a number of electors had tendered their votes for him, and whose votes were refused in consequence of his name not having been on the list furnished by the clerk.

That at least six electors tendered their votes for Alexander Henry, which votes were rejected, and there may have been many others present who did not go through that formality, before the returning officer put his name on the poll book and ten votes were taken for him after his name was entered; and the general impression among the electors present was, that in consequence of the omission there would be a new election if the one then being held was protested against.

Alexander Henry stated, after mentioning the circumstances in general above referred to, that in consequence of the omission he believes the

whole election for said office was disturbed, because he believes it was the general desire of the electors of the east side of the township that the councillors should be elected from different parts of the township, so that all localities would be represented in the council. That he resides in the east side of the township, and he believes he would have received a large vote in the said division which is situate on the east side of the township if his name had not been omitted.

That the impression that he was not a candidate had become too general when his name was put on the poll book to enable him to regain what he had lost by such omission in the former part of the day.

That on the day of the close of the election he protested against the whole election.

George Dodds, the township clerk, stated that he sent word to the returning officer to insert the name of Alexander Henry in the poll book as soon as he became aware of the omission.

Joseph Dodds stated that he has reason to believe from his knowledge of the township and otherwise, that if Henry's name had not been omitted from the poll book he would have been elected; and in consequence of such omission several of the electors voted for candidates for whom they would not have voted, and the whole complexion of the election was changed by such omission.

The relator stated that the clerk declared the poll for the different candidates as follows:

John Smith	19	votes.
Justus Lemon	136	"
Jacob Carrington	101	"
Nathaniel Paterson	147	"
Alexander Henry	145	"
Thomas Bell	104	"
Alexander Mitchell	192	"
George Atkinson	244	"
Samuel Stubbs	187	"
Wm. Wilson Walker	187	"

That the clerk, in consequence of the tie between Stubbs and the relator, voted for Stubbs, and declared Atkinson, Mitchell and Stubbs the three duly elected councillors.

That on the day of and before the declaration he protested against the election on the ground of Alexander Henry's name having been omitted from the poll book of one of the divisions, and in consequence the whole result of the election as he believes was changed, and on other grounds.

That Henry's election was injured in other parts of the township as well as in No. 2 division, and that the electors finding they could not vote for him voted very many of them for others for whom they would not have voted if the omission had not been made, and he believes if there had not been such an omission, he the deponent, who is also the relator, would have been elected to the said office.

Several affidavits were filed by the defendants, and amongst them two made by Samuel Stubbs and Alexander Mitchell.

Samuel Stubbs stated, that none of the persons, five in number, who are mentioned in the affidavits of the relator as persons who would have voted for Alexander Henry if his name had not been omitted, voted for the deponent Stubbs, who would not have done so had Henry's name been on the poll book from the first: that the omission did not increase the deponent's votes by a single vote; on the contrary, he would have had one more vote if Henry's name had been on the book.

Alexander Mitchell stated, that Walker had a vote from John White, whose name was not on the voter's list, and that the deputy returning officer for the said division also voted for Walker, and neither of them voted for Stubbs, and other persons voted for Walker who had not a sufficient property qualification: that only six votes were tendered for Henry before his name was put on the book, and ten votes given for him after it; and that deponent believes Henry would not have had more than from sixteen to eighteen votes if his name had been entered in the book from the first.

All of the defendants denied having had anything to do with the omission of Henry's name, and Henry's name was on the poll books for the other divisions of the township.

McMichael showed cause. Whether this proceeding be considered as taken against the defendants separately, or as impeaching the whole election, the relator must show that what he complains of has caused a different result than there would have been if there had been no irregularity. The relator does not show that the result would have been different from what it is. He cannot claim the benefit of those votes that were rejected for Henry. He cannot be allowed to say that some one else has got them who would not have got them if Henry had been voted for, and so the result of the election would have been different.

There are many instances where votes may be considered as abstracted from certain candidates, and yet they cannot claim the benefit of them, because they have not been effectually given.

If a disqualified person were a candidate all his votes may be lost, yet another candidate who is in the minority cannot defeat the whole election, or claim any benefit to himself on the assumption that if these votes had not been lost the result of the contest would have been different. So a candidate may, after receiving a certain number of votes, retire from the contest, yet the other candidates have nothing to do with his votes, nor are they allowed to consider how these votes would have influenced the position of the other candidates if they had not been thus thrown away.

So it might be reported wrongly that a candidate had retired, and votes might thus be given to others who would not have got them; yet another candidate, not even the one injured, could complain of this for the purpose of defeating the election.

Harrison, Q. C., supported the application. The statute is imperative that the clerk shall provide the returning officer with a certified list of the names of the candidates.

The present relator can complain of these proceedings in like manner as Henry might have done. The alteration of the poll book was an unauthorized proceeding, for it did not then correspond with the clerk's certified list: *In re Charles* v. *Lewis*, 2 U. C. Cham. Rep. 171; *In re Hartley*, 25 U. C Q. B. 12; *In re Coe*, 24 U. C. Q. B. 439; *In re Blaisdell* v. *Rochester*, 7 U. C.

L. J. 101; 29 & 30 Vic. c. 52, sec. 160, and subsections.

ADAM WILSON, J.—I do not think I am obliged to hold that every irregularity shall defeat an election. The present case shows that it would be a harsh application of the law if it were made as it is claimed.

The clerk of the township in making out five certified lists of the candidates names for the offices of councillors omitted one of the ten names from one of the lists, so that the list for division No. 2 did not contain the name of Alex. Henry as a candidate, though the other four lists contained all the names correctly.

The affidavits show that six votes in No. 2 division were thus lost to Henry, and none were lost to him, as appears in the other divisions that I can make out, though something of the kind is suggested.

These six votes would have made no difference in the result of the contest so far as he is concerned, for they would, if added on to the 145 votes, give him only 151, whereas there were other two persons, Stubbs and the relator, who had 187 votes, and, unless their standing can be impeached, the additional votes if allowed to Henry cannot at all serve him.

But Walker, the relator, argues that they might have served *him*, and as there was an equality between Stubbs and himself, he might have had some additional vote or Stubbs might have had some vote less, and so he would have been returned; but this is a speculative view of his case and rights, and the result might have been just the other way.

If the omission of one of the candidates names from the list out of ten candidates must necessarily defeat the whole election, independently of any effect which that omission had or could have had upon the results of the election, I do not see why the omission of a single voters name from the book delivered to the returning officer should not as an abstract proposition produce the like consequences.

I think this must be determined by what effect the omission of the name has had or might reasonably be considered to have had upon the final result of the election, and not on the mere abstract ground of an omission; and viewing the case in this manner I do not see that the omission complained of did produce, or can be presumed to have produced any material change in the voting, and certainly none in the persons who have been seated as the elected members.

When bad votes are given an election is not interfered with unless those votes, if struck out, would put the candidate for whom they were given in a minority: *Reg.* v. *Thwaites*, 1 E. & B. 704.

This is the rule in every case of parliamentary scrutiny, for the enquiry is, which member has the majority.

In the election of mayor where a councillor was excluded from voting, and his vote in consequence of an equality would have elected a different person, the election was set aside: *The Queen* v. *Coaks*, 3 E. & B. 249.

In *The Queen* v. *Mayor of Leeds*, 11 A. & E. 512, the list of the councillors elected containing the name of P. as one of the number, was published by the particular time named in the statute. After the expiry of this time, and on discovering a supposed error, the mayor and assessors published another list containing the name of R. instead of P. The court held that P. having made the necessary declarations was the councillor *de facto*, and that all that was done in correcting the list after the hour fixed by statute was void.

Voting papers not signed and not shewing the situation of the property for which the voter was rated on the burgess roll were held to be bad. The object of the statute being to prevent personation as much as possible: *Reg.* v. *Tart*, 5 Jur. N. S. 679.

In *Seale* v. *The Queen*, 8 E. & B. 22, the mayor and assessors at the revision of the burgess list erroneously treated the burgess list *de facto* made out for one of the parishes as a nullity, and made out a fresh list for that parish, and inserted in it the name of a person in the original parish list who proved his title to their satisfaction, and the name thus inserted was transferred to the burgess roll. It was held that such person, though qualified in all respects to be on the list acquired by the act of the mayor and assessors, no title to be a burgess The lists sent in were valid, and the mayor and assessors had no power to do anything else. than to act on the lists sent in, by inserting or expunging names on these lists to ignore the list sent in, and to substitute a fresh one was wholly illegal,—the plaintiff in error was charged with usurping the office of burgess.

Brumfitt, appellant v. *Bremner, respondent*, 9 C. B. N. S. 1, shews also a case of alteration of a list to cure a mistake by which a name was supposed to have been erased which was not erased, and the correction was maintained.

It is certain that Henry could not maintain an action against the returning officer for refusing to allow him to be voted for until his name was put in the poll book, because in such an action malice must be alleged and proved, and as the candidates name was not on the certified list of the clerk, malice could not be presumed against the returning officer: *Tozer* v. *Child*, 7 E. & B. 377.

The clerk on the day after the nomination is to post up in his office the names of the persons proposed for the respective offices. This I should think was directory only, and if he did it the second day after the nomination, an election had upon it would not be avoided.

The clerk is also to provide the returning officer of each division with a certified list of the names of such candidates, specifying the offices for which they are respectively candidates. No time is named when these certified lists are to be provided. No doubt it must be sometime before the polling day, for the clerk is also to provide the returning officer with a poll book, and he or his clerk shall enter therein in separate columns the names of the candidates proposed and seconded at the nomination; all of which must be done of course before the voting begins.

It may be presumed the returning officer is to take his information from the certified list of the clerk as to the persons who were the candidates that were proposed and seconded at the nomination. But the act does not say so. I should think the returning officer could not properly insert any name on the clerk's list of his own authority, or any name

in the poll book which was not in the certified list, but perhaps if he had no certified list at all he might insert the candidates names in his poll book notwithstanding the clerk's neglect; *Seale* v. *The Queen*, 8 E. & B. 22.

What the returning officer did in this case he may be presumed, from the affidavits, to have done with the clerk's assent, and I think the clerk could then have corrected his certified list.

While I think the election should not be avoided, I do not think the proceedings have been taken without just and reasonable cause for contesting the legality of the proceedings, and although I give judgment against the relator it must be without costs.

Summons discharged without costs.

COMMON LAW CHAMBERS.

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

IN RE TRUEMAN B. SMITH.

Extradition—Counterfeiting—Forgery.

A prisoner was arrested in Upper Canada for having committed in the United States "the crime of forgery, by forging, coining, &c,, spurious silver coin," &c.

Held, 1. That the offence as above charged does not constitute the crime of "forgery" within the meaning of the Extradition Treaty or Act.

2. That it certainly is not the crime of forgery under our law, and therefore the prisoner could not be extradited.

Definition of the term "forgery" considered.

[Chambers, March 3, 1868.]

This was an application by a prisoner to be discharged on a writ of *habeas corpus*, on the ground that the charge under which he was in custody was not within the Extradition Treaty or the Act of Canada giving it effect.

The charge or complaint was, that "Smith at the Town of Toledo, —— County, State of Iowa, on or about the 21st March, 1867, did commit the crime of forgery by forging, coining, counterfeiting, and making spurious silver coin of the stamp and imitation of the silver coin of the United States of America of the denomination of 5 and 10 cent pieces, with implements and materials which he produced for the purpose of carrying on the business of coining such spurious money."

Jas. Patterson showed cause for the Crown, referring to Con. Stat. Can. cap. 89; 2 *Bishops* Criminal Law, secs. 432, 434, 435 and 451; 5th Rep. Crim Law Com., A.D. 1840, p. 69; 3 Inst. 169 (*per* Lord Coke); 2 Bl. Com. 247; 2 East P. C 852; *Rex.* v. *Coogan*, 2 East P. C. 853; *Rex.* v. *Jones*, 1 Leach, 4th ed. 775, 785; *Reg.* v. *Anderson*, 20 U. C. Q. B. 124; *In re Windsor*, 6 New Rep. 96.

Curran, contra, for the prisoner. By Con. Stat. Can. cap. 89, the crime charged must be a crime by the law of the country where prisoner arrested, and this prisoner was arrested in Upper Canada (see also *Re Windsor*, 34 L. J. N. S. 163). As to the meaning of forgery, and that it does not cover cases of coining, see 4 Com. Dig. 406 *et seq.*, and Tomlin's Law Dict.

ADAM WILSON, J.—The Statute of Canada (cap. 89) applies to the crimes of murder, or assault to commit murder, piracy, arson, robbery, *forgery, or the utterance of forged paper*, committed within the jurisdiction of the United States (see also 24 Vic. c. 6); and the question is, whether the charge above stated as explained of forging and counterfeiting spurious silver coin, &c., constitutes the offence of forgery within the meaning of the treaty and statute?

I am of opinion it does not; it is unquestionably not forgery by our law here; nor from the evidence given can I assume it to be forgery according to the law of the State of Iowa, or of the United States of America, if that would make any difference. The statute declares that the offence charged must be such as would, according to the laws of this Province, justify the apprehension and committal for trial of the person accused, if the crime charged had been committed here; so that if not an offence of the character charged according to our law, the person is not to be apprehended, committed or delivered over to the foreign government; no comity shall prevail in such a case: *In re Windsor*, 6 New Rep. 96; 10 Cox. C. C. 118; 11 Jur. N S. 807.

Forgery is defined in 4 Bl. Com 247, to be "the fraudulent making or alteration of a writing to the prejudice of another man's right;" and this is substantially the definition accepted and approved of in *Reg.* v. *Smith*, 1 Dearsley & Bell, 566, in which counsel have arrayed the definitions of different authors of this offence, to which may be added, Bac. Abr. "Forgery."

Hawk. P. C., in Book 1, c. 70, sec. 1, it is described to be "an offence in falsely and fraudulently making or altering any matter of record or any other authentic matter of a public nature, as a parish register or any deed or will"

In *Reg.* v. *Closs*, 1 Dearsley & Bell, 460, Cockburn, C. J., said, "a forgery must be of some document or writing," and therefore putting an artists name on the corner of a picture in order to pass it off as an original picture by that artist was held not to be forgery.

There is no case where the making of false coin has been determined to be forgery, and it is not so by our statute.

Such an offence is here a misdemeanour for the first act and a felony for the second, but it is not the offence of forgery at all.

The decision of *Re Dubois, otherwise Coppin*, 12 Jur. N. S. 867, shews that this is the mode in which the treaty and statute are to be interpreted, and our own statute reciting the treaty is almost conclusive evidence that the "forgery" referred to is the offence of that name well understood in the United States and in this Province, and, to make it plainer, it relates also to "the utterance of forged paper."

The prisoner must be discharged.

Prisoner discharged.

IRISH REPORT,

BOWER V. GRIFFITH AND OTHERS.

Commissioners—Personal liability—Corporation by implication.

An Act of Parliament, appointing certain Town and Harbour Commissioners, enacted that the powers and authorities given by the Act might be exercised by a majority at a duly constituted meeting; and that all orders and proceedings of the majority should have the same effect as if done by all the Comissioners.

Held, (per Whiteside, C.J., and Fitzgerald and O'Brien, JJ., George, J., *dissentiente*), that this did not make absent or dissenting members personally liable upon contracts entered into by a majority.

Semble—(per Fitzgerald and O'Brien, JJ., George, J., *dissentiente*), the vesting of real and personal property by

statute in commissioners and their successors, makes them a corporation by implication.

Semble—(per Fitzgerald and O'Brien, JJ., George J., *dissentiente*), the opposing a bill in Parliament which contemplates a new system of municipal arrangements and taxation is not a proper application of the rates by Town Commissioners, where it is not included among the purposes enumerated in the Act.

[16 W. R. 540 ; Jan. 14, 15, 17, 1868.]

This was an action for work and labour. It was tried before the Lord Chief Justice at the Kildare Spring Assizes, when the following facts appeared. The plaintiff was a civil engineer. Defendants were seven of the Sligo Town and Harbour Commissioners. They, however, were sued personally, and not in the representative capacity as commissioners. The Act under which the defendants were appointed was the 43 Ge^{o}. 3, c. 60, of which, sec. 2 names twenty-four persons ; these persons "and their successors to be elected in manner herein mentioned" are declared to be the commissioners under the Act. Section 9 enacts that no act shall be good unless done at a proper meeting ; but all powers and authorities granted by the Act may be exercised by the major part who attend those meetings ; all orders and proceedings of the majority to have the same effect as if done by all the commissioners. By section 10, no order is to be revoked unless by a meeting of a greater number of commissioners than those who made it ; and at a special meeting fourteen days after. By section 11, actions are to be brought in the name of the clerk, or one of the commissioners. By section 20, contracts may be made for paving, lighting, &c., improving the port, &c., or any other matters or necessary things whatsoever, or for any purpose or purposes in execution of the Act." By section 23, contracts are to be signed by the commissioners. By section 28, property of lamps, pavements, &c., vests in commissioners and their successors. Section 29 makes a like provision as to old materials. Section 37 empowers them to purchase lands. By section 132 two separate funds were appoined: 1st. That arising from rates of houses, lands, &c., to be applied for purposes of paving, flagging, lighting, watching, &c., &c., &c., "and for carrying the several purposes of this act relating thereto into execution," and for paying and disbursing wages, &c., &c., "and for no other use, purpose, or intent, whatsoever." 2nd. The dues arising from the harbour; the purposes to which they are to be applied are similarly enumerated and like terms used.

It appeared that, at the close of 1866, certain bills affecting the Town of Sligo were before Parliament ; and the plaintiff, who had considerable experience in connection with bills before Parliament, was, in December, 1866, requested by the Secretary of the Commissioners to come to Sligo.

He accordingly proceeded to Sligo, and was present at two meetings of the sub-committee which had been appointed by the Commissioners. None of the defendants were present at either of these meetings. In consequence of a resolution passed at one of these meetings, and of a telegram received from the Commissioners' solicitor, the plaintiff proceeded to London for the purpose of opposing the bill on standing orders. The plaintiff admitted that he considered himself employed by the Commissioners as a body and not by individuals; and that he did not act in any way upon the faith or credit of the defendants personally. The defendants counsel admitted that the work was done, and that the charges were fair and reasonable. A resolution of the Commissioners was also put in, passed at a meeting at which some of the defendants were present, by which they disapproved of bills. By a subsequent resolution they resolved to oppose the bills, but a protest was entered against the application of the funds to such a purpose. The protest was signed by four of the defendants. The other three defendants were absent from this meeting. None of the defendants had ever personally authorised the plaintiff's employment.

The defendants' counsel asked for a nonsuit, which was refused.

Plaintiff's counsel called upon the learned Judge to tell the jury that if they believed the plaintiff's evidence they should find for him. This his Lordship also declined to do.

His Lordship told the jury that if they were satisfied that the plaintiff was employed by and acted upon the faith and credit of the Commissioners as a body, they should find for the defendants. The jury found for the defendants.

A conditional order for a new trial, on the ground of misdirection of the learned judge, having been obtained in Michaelmas Term,

S. Walker (*Palles*, Q. C., with him) now showed cause. The defendants are sued individually and not as Commissioners. There is no personal liability attachable to them. They protested against the making of the contract for which they were now sued, therefore no question of agency arises here. But independently of that the jury have found that the contract was made with the Commissioners as a body, and they are a corporation under the act. This contract was also *ultra vires*.

Battersby, Q. C., and *Ball*, Q. C. (*F. L. Dames* with them) in support of the rule. The fact that the person sued dissented from the expenditure of the money does not alter their liability. This case must be decided exactly as if the entire twenty-four Commissioners were sued. The law is that you may sue any number of individuals of an aggregate body, and if the contract has been made in conjunction with others they may plead that as a plea in abatement ; *Lefroy* v. *Gore*, 1 Jones & Latouche, 571. 1. The whole body are personally liable, and can be sued jointly for an act legally done and *ultra vires*. This part of the case is governed by *Horsley* v. *Bell*, 1 Bro. Ch. C. 100 n., and Ambler's Rep. 770. There it was held that Commissioners of Navigation, under an Act of Parliament, were personally liable for orders signed by them, and that the plaintiff's remedy was not only *in rem* against the rates. This case is confirmed by *Eaton* v. *Bell*, 5 B. & Ald. 34. And this Act of Parliament, under which the Sligo Commissioners derive their authority, pointedly omits the protection from personal liability to be found in all analogous Acts, and while there is a provision that the Commissioners may sue by their clerk, there is nothing authorising them to be sued. The case of *Colquhoun* v *Nolan*, 13 Ir. Law, 248, was an extension of *Horsley* v. *Bell* to Ireland. It was there decided that Lighting and Paving Commissioners of Cashel under the 9 Geo. IV. c. 82, and 3 & 4 Vict c. 108, were not a corporation, and were liable personally. This

act is very similar in its terms, but not so favorable to a contrary view. The hardship of holding that the rates only are liable would be much greater on persons who contract with the Commissioners than any inconvenience which may result to the Commissioners if they are made personally responsible. How can we touch the rates? A mandamus to the Commissioners to levy a rate will not give us the money. It may be there are sufficient funds without a fresh rate, and then a mandamus cannot go. The act of 10 Vict. c. 16. was passed to alter the law as laid down by *Horsley* v. *Bell*, but it only applies to acts where it is incorporated. And see Chitty on Cont. 257; *Bogg* v. *Pearse*, 10 C. B. 534. 2. The absence or dissent of the defendants made no difference. The 9th section of the act makes the majority binding on the minority: *Todd* v. *Emly*, 8 M. & W. 505, decided that a majority may bind personally a committee of a club, although the minority disapprove. [FITZGERALD, J.—That is a question of personal agency.] The act gives the majority a personal agency from the minority: *Doubleday* v. *Muskett*, 7 Bing. 110; *Fox* v. *Clifton*, 6 Bing. 776. 3. The act of opposing the bill was *intra vires*, *Reg.* v. *Town Council of Dublin*, 7 Ir. Jur. N. S. 317; *Bright* v. *North*, 2 Phillips, 216; *Cole* v. *Green*, 6 M. & G. 872. A public body has an implied right to take steps to preserve its existence. The proposed bill here would have abolished the present body and increased taxation.

Palles, Q. C., in reply.—The Commissioners are a corporation. It is not necessary to have express words to create a corporation: 10 Coke 30a. The words "successors," which occur in this act generally create a corporation by implication: *Conservators of River Tone* v. *Ash*, 10 B. & C. 349. They are also empowered to take lands as a corporation. There can be no personal liability here. From the constitution of this body the individuals composing it are constantly changing. On a change of this kind the duty of performing it may be cast on one class of persons, *i. e.*, the individuals who made the contract, and the power of performing it in another class, those actually in office. The remedy is against the rates, not a personal liability: *Reg* v *Norfolk (Sewer) Commissioners*, 15 Q. B. 549; *Bolton* v. *Guardians of Mallow*, 8 Ir. C. L. App. 9. But this act is clearly *ultra vires*. The 132nd section distinctly sets out the purposes for which the rates are liable, and they are to be liable for "no other purpose." The plaintiff can make no one liable except the persons who employed him.

To be continued.

ENGLISH REPORT.

PROBATE.

HALL v. HALL.

As regards the procuring the execution of a will, mere moral pressure, if it materially control the free exercise of volition on the part of the testator, amounts to undue influence, and a wife is no exception to this rule.

[16 W. R. 544, March 4, 1868.]

This was a trial before the court and a special jury. The plaintiff, Ann Hall, propounded the will of her late husband John Hall, and the defendant William Hall, the brother of the testator, pleaded "undue influence" on the part of the plaintiff.

The will gave everything to the wife. The property was between £15,000 and £20,000. The plaintiff had no children by the testator or by any other husband. The testator had at his death between twenty and thirty brothers, sisters, nephews and nieces, in comparatively straightened circumstances. He was on good terms with his relations. Several thousand pounds had come to the testator through the plaintiff.

The material evidence in support of the plea was that given by the attorney who drew the will, and the said attorney's wife. The attorney swore that at the time he drew the will he did so to produce peace between the plaintiff and the testator, and the witness felt then that the will would be set aside on the ground of undue influence if the circumstances came to be sifted. The evidence of the attorney and his wife also went to show the excitement of manner of the plaintiff in connection with the subject of the will; her abuse of the testator on the same subject; expressions of fear of the testator that his life was in danger if he did not make a will, leaving everything to her, and that he had determined to do so in consequence of the annoyance and pressure she was putting on him, as one instance of which the testator had mentioned the plaintiff's remaining out of bed all night because he would not make such a will as she desired.

The jury found against the will, and the Court pronounced accordingly, and condemned the unsuccessful plaintiff in costs.

The case is reported for the purpose of giving his Lordship's direction to the jury as to what constitutes undue influence.

Sir J. P. WILDE.—To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections, ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so asserted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist; moral command asserted and yielded for the sake of peace and quiet, or to escape from distress of mind or social discomfort; these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven, and his will must be the offspring of his volition, and not that of another's.

CORRESPONDENCE.

The Insolvent Law of 1864—*Assignees.*

TO THE EDITORS OF THE CANADA LAW JOURNAL.

SIRS,—I have read with much interest the communication of your correspondent "SCARBORO'," on pages 47 and 48 of Vol. IV. N. S.,

and although his statements with regard to assignees in insolvency may be startling, I know, within my own experience, of similar cases, and that he has not at all over-stated or over-colored his case, and that they are true. For instance, in this county a trader largely indebted as a produce dealer absconded from the Province about five years ago, and took with him some thousands of dollars wherewith to commence business in the United States; but finding the people there more acute than himself, he soon became penniless; in this forlorn condition he returned to his former home (a comfortable brick cottage, nice orchard and garden, outbuildings, &c., all of which he had, before leaving Canada, conveniently placed in the keeping of an accommodating brother-in-law); he then went through the form of making an assignment of his estate and effects (?) to one of the assignees in insolvency appointed by a neighbouring board of trade, and struck a bargain with him to put him through for a named sum! The assignee instead of acting under the 10th section of the act, by calling a meeting of the creditors for the public examination of the insolvent, or having him and other persons examined before the judge as he, acting in the interest of the creditors generally, might and ought to have done for the purpose of ascertaining what his assets really were and what had become of the money wherewith he absconded, &c., set to work and solicited, in the interest of the insolvent himself, a release from the requisite number of his creditors, some of whom were told (also in the interest of the insolvent) that it was true "the man had committed a wrong in leaving the country as he had done, and so forth, but there was no use in keeping the poor man under; he was back now and would probably do better for the future," &c. And so the thing was procured through the importunities of the insolvent, aided by the disinterested recommendation of the assignee; the weight of whose position was lent to the procuring of that which under ordinary circumstances could not have been obtained, and which the assignee by all his might and main ought in the interests of truth and honesty, if not in that of the creditors, to have opposed. The result was that the requisite creditors signed the discharge, the notice of its deposit with the clerk of the County Court of the application for its confirmation was given by the assignee, and when the insolvent appeared his petition for confirmation came up for hearing, all the papers and notices, &c., were found to be the work of the assignee, who had been the paid retainer of the insolvent, instead of the representative of the creditors; no one appeared to oppose the confirmation of the discharge, or to have the insolvent examined under the 3rd sub-section of the 10th section, the assignee did not do so at all events, and if he had acted in a way which comported with his duty in the matter he would have been there to oppose the confirmation of the discharge. Some of the creditors thought it would be useless to attempt to oppose it with the assignee doing all he could to promote it, and so the discharge was confirmed by the judge, and now the insolvent is enjoying the same property that he occupied before he absconded from the Province. It is a singular feature in the character of most of the assignees appointed by the Board of Trade to which I have before alluded, that, up to a very recent date, they were themselves insolvent in circumstances, or, to speak more plainly, they were nearly all insolvent debtors—persons who have not succeeded with their own affairs set to manage the broken down or disordered affairs of other insolvent people; and the assignee whose acts I have hereinbefore particularly alluded to was himself one of the number.

I observe your correspondent, SCARBORO', speaks of the assignee's certificate as a prerequisite to a proper discharge of an insolvent by the judge. I should be very thankful if he would mention, for the information of your readers in general, and myself in particular, under what section of the Insolvent Acts of 1864 or 1865 he finds or infers it to be an essential, as I apprehend the authorities he refers to are applicable to the English Bankrupt or Insolvency Acts only.

Had I not already made this communication too long I should give my views upon some of the defects of the insolvency acts alluded to by "SCARBORO."

Yours respectfully,

Union, May 1, 1868. UNION.

[We shall be glad to have the views of our correspondent on the matters he alludes to.—EDS. L. J.]