DIARY FOR NOVEMBER.

1. Mon...Harrison, C. J., died, 1878.
2. Tues...Primary Examinations.
3. Wed...Draper, C. J., died, 1877.
5. Fri....Sir J. Colborne, Lieutenant-Governor Upper Canada, 1838.
7. Sun...Twenty-fourth Sunday after Trinity.
9. Tues...First Intermediate Examination. Court of Appeal sittings begin.
10. Wed...Second Intermediate Examination.
11. Thur..Examination for Admission.
12. Fri....Examination for Call.
14. Sun...Twenty-fifth Sunday after Trinity.
15. Mon...Michaelmas Term begins.
16. Tues...Wilson, J. Q.B., sworn in, and Gwynne, J., sworn in C. P., 1868.
18. Thur..Hagarty, C. J., sworn in C. J. of Q. B. Wilson, J., sworn in C. J. of C. P., 1878.
21. Sun...Twenty-sixth Sunday after Trinity.
23. Tues...Scholarship Examinations begin.
24. Wed...Scholarship Examinations continued.
25. Thur..Scholarship Examinations conclude. Lord Lorne, Governor-General of Canada, 1878.
27. Sat. ..Cameron, J., sworn in Q. B., 1878.
28. Sun... Advent Sunday.
30. Tues...Moss, J., appointed C. J. of Appeal, 1877.

CONTENTS.

Canada Law Journal.

Toronto, November, 1880.

We understand that the Chief Justice of the Court of Appeal has been recommended to go to the South of France for the benefit of his health. That there should be a necessity for this is a source of grief to his numerous friends. We trust that he may soon return with health restored.

We are indebted both to Mr. E. Douglas Armour and to Mr. G. S. Holmested for excellent translations of Mr. Justice Fournier's judgment in the Great Seal case, one of which will be found in another place. The subject which had become rather "stale" from a newspaper point of view, has been revived by the recent appointment of Queen's Counsel and the discussion arising thereon.

We have before us the second edition of "Leith's Blackstone," edited by Mr. Leith, Q.C., and Mr. James F. Smith. We have not yet had an opportunity of examining it, but the reputation which the first edition so very properly obtained, has doubtless already commended it to all those amongst the profession who have any desire to be familiar with the law of real property, in Ontario.

The vacancy which has so long existed on the Bench in Manitoba, caused by the death of Judge McKeagney, has been filled by the appointment of Mr. James A Miller, Q.C., of St. Catharines. A good lawyer, and a man of shrewd common sense—he will fill the post well. Whilst we say this, we are bound also to say that there are many older men in the profession quite as qualified, who were more entitled to the preferment. It is said that it is well to have men as generals in the army who have still a good share of youthful vigour and dash, but the same reasons do not apply to judicial appointments. Vigour of mind of course is necessary, as also a fair share of bodily strength, but the wisdom of age and experience had also been considered worthy of consideration in such matters.

The epigrammatic utterances of Lord Justice Knight Bruce in *Burgess* v. *Burgess*, 3 De G. M. & G. 896, although still quotable as a piece of excellent humour are discredited as good law. That learned Judge said "All the Queen's subjects have the right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names and not the less so that they bear the same name as their fathers'." But the present Lord Justices lay down the law more uninterestingly in this way; 'Where a person uses his name in connection with a manufactured article, the result of which user is that his goods are represented to the public as the manufacture of another person of the same name, who has previously obtained a reputation for such goods, such person will be restrained from continuing such use, though the name may be his own."—*Thorley* v. *Massen*, 28 W. R. 966.

For excellent reading and for caustic observations on many venerable legal hallucinations we commend the judgment of Sir George Jessel in *Re Hallett's Estate*, 28 W. R. 733. The following may serve as samples to whet the appetite even two months after vacation. He is reversing a judgment of Mr. Justice Fry who relies on what is said by "Mr. Justice Willes in delivering the *considered* judgment of the Court of Common Pleas in *Scott* v. *Surman*, whereupon the Master of the Rolls interjects, "I do not understand that a judgment is any better for being held over a long time, for I think udgments are perhaps best if delivered when the facts are fresh in the judge's mind: but I do not say that they are better or worse." Again he lays down a valuable canon in the use of Chancery cases: "It must not be forgotten that the rules of the Courts of Equity are not like the rules of the common law, supposed to have been established from time immemorial. In many cases we can name the Chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence; and therefore, in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases."

QUEEN'S COUNSEL.

In April, 1876, the Ontario Government created, or assumed to create, some thirty-five Queen's Counsel. We then freely expressed strong disapproval of the list then prepared. There were on it many names not entitled to the position, and many not on it that should have been there; but surprise at the selection of certain individuals was swallowed up in amazement at the wholesale nature of the transaction. Some of the appointments just made by the Dominion Government have caused surprise in a different way.

The names that appear in the *Gazette* of the 16th ult., are as follows:—

Thomas M. Benson, Francis McKelcan, William R. Meredith, James Bethune, W. H. Scott, Martin O'Gara, Thomas Ferguson, B. B. Osler, James A. Miller, John A. Boyd, James F. Dennistoun, George A. Kirkpatrick, Alfred Hoskin, Richard T. Walkem, John O'Donohoe.

The Dominion Government was not, of course, bound to recommend for appointment all those whom the Lieut.-Governor of Ontario had assumed to create some four years ago; but it was natural that a selection should have been made from

the very full list of the year 1876. It is, however difficult to see upon what principle some of these names have been left out and others inserted.

It is an unpleasant and an ungrateful task, but we feel we cannot be true to our mission if we refrain from expressing what we believe, from careful enquiry, to be the voice of the profession on this subject. Of those in the country there is little to be said, except, *en passant*, to express surprise at the appearance of Mr. O'Gara, and the disappearance of such men as Edward Martin and others. As to the Toronto men the name of Mr. J. A. Boyd strikes every one as being in the right place. In fact, no one on the list, except perhaps, Mr. Bethune, by reason of seniority, is more entitled to the honour. But, when we admit this it, is difficult to see why the name of his senior partner, and senior at the Bar, Mr. J. K. Kerr, is omitted. When the latter was appointed in 1876, he was thought rather young, but that is more than four years ago, and he has had and still has a very extensive counsel business. Then again, if it is desired to have some of the younger members of the Chancery Bar on the list, why insert the name of Mr. Alfred Hoskin, and leave out that of Mr. Charles Moss. The former is certainly senior, but no one would pretend to say that as a counsel he occupies the position which Mr. Moss does. We are not, however, of the number who think that the distinction should in this country be entirely reserved for those who appear much in court in the conduct of important cases as senior Counsel. And so, if an additional qualification is to be imported, why give the distinction to a comparatively young solicitor, when there are numbers of much greater length of service in quite as large practice and of equally high standing.

The last name on the list suggests reflections of another character. No one can say that he has been very long at the Bar, or that he has an extensive counsel, or even solicitor's business, or has laid the profession under obligation in a literary way as have Mr. Leith and others, which we consider forms one claim for the honour. The appointment of those who are not entitled to the honour is a slap in the face to those who are.

We agree with a correspondent, one of the most eminent and highly respected Queen's Counsel in Ontario, who writes:—"the list is a conundrum *here*, as it was where I came from." As such, "we give it up," and conclude by quoting the further remark of our correspondent who says that, "The *Law Journal* should advocate abolishing the rank. No government can be trusted with it."

It will be seen from the following regulations as to rank and precedence in the *Gazette* in reference to the recent appointments that the Dominion Government do not assume to interfere with the right of the Provincial Government to give silk gowns should such right exist. They would, however, have rank only in the Provincial Courts. The question of precedence will have to be decided by the Courts when the question arises:

"Rank and precedence are conferred upon the above named gentlemen respectively from the date of their appointments in all Courts established or to be established under the authority of any Act of the Parliament of Canada, next after the following persons, namely:

"1. Those persons who, prior to the 1st day of July, 1867, received appointments as Her Majesty's Counsel learned in the law within any of the late Provinces of Canada, New Brunswick, Nova Scotia, Prince Edward Island or British Columbia.

"2. Those persons who, since the first day of July, 1867, were appointed Her Majesty's Counsel learned in the law under the Great Seal of the Dominion of Canada.

"Furthermore rank and precedence are conferred upon the gentlemen above named from the date of their appointments in all Courts in the Province of the Bar of which they are now re-

spectively or may hereafter respectively become members, next after the following persons, namely:

"1. Those members of such Bar who, prior to the 1st July, 1867, received appointments as Her Majesty's Counsel learned in the law.

"2. Those members of such Bar who, since the 1st July, 1867, were appointed as Her Majesty's Counsel learned in the law under the Great Seal of the Dominion of Canada.

"3. Those members of such Bar, if any, who may lawfully be entitled to rank in precedence over the respective gentlemen above appointed."

CONTRACTS WITH OFFICERS AND THEIR SUCCESSORS OF UNINCORPORATED COMPANIES.

Cases of difficulty on which the text-books throw little light sometimes occur in practice, where inartificial instruments are given to an unincorporated Company whereby money is secured and made payable to some officer of the company (generally the treasurer), and his "*successors* in office." The difficulty is, who is the proper person to sue in such cases, and it cannot be said that the law is either very clear or very uniform on the point. The better view seems to be that effect cannot be given to the instrument as it stands. The draftsman has attempted to provide for payment to official successors, which is in law constituting the officer a corporation sole, and this cannot be done by compact or agreement. Such attempts are made in order to vest the right of action in *one* person, and thus to get rid of the difficulty which would arise by reason of the multiplicity of plaintiffs, if all the shareholders were to sue.

An instructive case on this head of law is *Metcalf* v. *Bruin*, 12 East. 400, and at *Nisi Prius*, in 2 Camp. 422, which shews the practice, when the officers are still alive. There a bond was given to a number of persons jointly and severally as *trustees* of the Globe Insurance Company, to secure the faithful services of a clerk to that body, which was unincorporated. It was held that the survivors of the trustees named therein could sue for a breach committed at any time during the existence of the company, notwithstanding intermediate changes of the shareholders by death and otherwise. It was said that the instrument contemplated service to be performed to a succession of masters, who might from time to time constitute the company, and that the intervention of trustees removed the legal and technical difficulties attending such a contract made with, or a suit instituted by the company themselves as a natural body. In connection with this subject, the case of *Pigott* v. *Thompson*, 3 B. & P. 147, is in apparent conflict with the other authorities. There a person had agreed in writing to pay the rent of certain toll-gates to the "Treasurer of the Commissioners," who were by statute empowered to appoint a treasurer. The action was brought by the proper officer of the Commissioners, who was at the date of the contract, and of the commencement of the action, their treasurer. But all the judges agreed that the plaintiff had no cause of action. Alvanley, C. J. said, that the manifest intention of the agreement was that the defendant should pay the money to any person whom the Commissioners should choose to make their treasurer for the time being, but by law a debt is not so assignable. The promise, he said, did not amount to a promise to pay to the person who was the treasurer at that time, and if he had been removed from his office, the payment to him would not have availed the plaintiff. The case turned therefore on want of privity, as was explained by Lord Mansfield, in *Bourn* v. *Morris*, 2 Taunt. 381, where he said in reference to *Pigott* v. *Thompson*, "the promise was not made to the trea-

surer, though it was a promise to pay to the treasurer." The right of action was therefore vested in the Commissioners themselves, and not in their officers. So long as the particular officer with whom the contract is made remains alive, he may have the right to sue—but upon his death, what then? To borrow the words of Willis, J., in *Hybart* v. *Parker*, 4 C. B. N. S., 209, if the Court was to hold that the successor of such an officer could maintain the action, it would be trenching upon the prerogative of the Crown by making a new species of corporation—a corporation sole for the purpose of bringing actions. Similar observations were made by the same judge in *Gray* v. *Pearson*, L. R. 5 C. P. 568, and a general rule laid down as to such cases, that the proper person to bring an action is the person whose right has been violated. See also *Evans* v. *Hooper*, L. R. 1 Q. B. D. 45, where the Court of Appeal approved of this law. For this reason it was said by the Chief Justice in *Strange* v. *Lee*, 3 East, 495, that a bond to the persons then constituting a banking-house, and their successors, cannot be admitted, but it may be drawn so as to render the obligee answerable, not only to the present, but to all future partners in the house. And the same difficulty is adverted to by Lord Denman in *Graves* v. *Colby*, 9 A. & E., 356.

Even if a corporation sole, in the person of the treasurer and his successors could be thus constituted, still it would not give a right to the subsequent incumbent of the office to bring an action in the case supposed; because, if the personal contract were allowed to descend to such successor, the right to recover would remain in abeyance at the corporator's (*i.e.*, officer's) death, until his successor was appointed—and the right when once suspended would not revive. This is the principle laid down in Blackstone, and adopted by the Court as reasonable in *Howley* v. *Knight*, 14 Q. B., 240. It is there said that a bond given to a corporation sole, and his successors would enure as a bond to the corporators and executors. On the other hand, property given to a corporation aggregate does not go to executors, but is taken in succession. In the case of a corporation sole, the property would be in abeyance till the successor existed: the corporation aggregate always continues to be the identical grantee or purchaser: p. 253.

The result then is that in the construction of such instruments as we are considering, the words "successors in office" are to be rejected if in law the contract is such an one as will survive and pass to the executors of the obligee. Refer to the language of Coleridge, J., in *Howley* v. *Knight*, at p. 257. In *Dance* v. *Girdler*, 1 B. & P. N. R., 40, a bond was granted to twelve persons payable to them and their successors as governors of the society of musicians, conditioned to secure faithful performance of duties by their treasurer. The society was an unincorporated one when the bond was given. Mansfield, C. J., said: The bond is inaccurately drawn, being given to certain persons as governors of the society and their successors. The intention was no doubt that the bond should be payable to those who should succeed the obligees as governors. But this the law does not allow; and the bond can only be considered as given to the twelve obligees, and would ultimately have been payable to the representative of the last surviving obligee. The result in such a case then would be that which is so tersely expressed in Dicey's Book on Parties, p. 128: The right of action on a contract made with several persons, jointly, passes on the death of each to the survivors, and on the death of the last, to his representatives.

It would appear that the law is different in some parts of the United States, as it is there held a right of suit exists in the subsequent incumbent of the office, at all events where the engagement is for the benefit of some public or *quasi*-public body. See *Fisher* v. *Ellis*, 3 Pick., 325; *Kean* v. *Fisher*, 5 Serg. & Raw, 154, and *Commonwealth* v. *Sherman's Executors*, 6 Harris, 347.

CHIEF BARON KELLY.

The Right Hon. Sir Fitzroy Kelly, Chief Baron of the Exchequer, died in London, as our readers are aware, on the 18th Sept. He was born in 1796; was called to the bar in 1824 and made King's Counsel in 1835, and Chief Baron on the retirement of Sir Frederick Pollock in 1866. He was Solicitor-General under Sir Robert Peel, and Attorney-General in Lord Derby's Cabinet. An exchange thus relates the beginning of his circuit business in 1858.

"Mr. Kelly, on becoming a barrister, joined the old Home Circuit, now fused with the Norfolk into the South-Eastern, but left it because he found the work on this busy circuit was prolonged into the Vacation. As has been just said, he had an old-fashioned reverence for the long interlude to forensic battle which tradition has imposed upon lawyers and clients, and he changed to the Norfolk Circuit for the sake of his Vacation. The migration proved a very fortunate one. The assize was opened at Norwich. Mr. Kelly arrived at that city in the evening, and went to bed briefless. At one o'clock in the morning his clerk came to awake him with the news that an attorney wished to see him with a brief. It was for the defence of a publican and a bill-sticker, against whom a charge of libel was preferred. They had exhibited bills charging a certain clergyman with being a fit person to be made co-respondent in that Divorce Court which Sir Fitzroy Kelly was afterwards concerned in founding. The person libelled had engaged all the leading counsel on the circuit; and the attorney, wandering in town at his wits' end, had been recommended by a friend to try the new junior. On a point of practice Mr. Kelly threw the other side over for a time, but the cause came on at Thetford. Here the leader, who had been most feared, could not attend; and Mr. Kelly got the publican off scot free, while the bill-sticker escaped with a slight loss of money. Before he left the Court the attorneys for the other side threw to him over the table two retainers, and other briefs followed him at his lodgings. From that time till he left the circuit, owing to the stress of London work, his reputation on the Norfolk Circuit was unbounded."

Chief Baron Kelly was one of the oldest of the long lived men who have adorned the English Bench. The following extract from the English *Law Journal* contains several instructive points in connection with the career of the late Judge.

"The interesting and instructive career of the late Chief Baron may be said to have been incomplete in one respect, and too complete in another. He ought to have died a peer of Parliament; and he ought to have left the bench four years ago. Why these two events were not brought about has not been satisfactorily explained. The party to which the Chief Baron had rendered good service was in power. It is true that the Chief Baron had suffered pecuniary losses; but, having no son, his peerage would not have called for an endowment, and the Chief Baron himself was believed to wish the elevation. It can hardly be supposed that his party were guilty of the ingratitude of forgetting a man who had served them, but whose services were no longer valuable. Retired from the bench and a peer, the Chief Baron would have found vent, without reproach, for those political utterances which, breathed into the ear of the Lord Mayor from the bench of a Court of Justice, were justly said to be out of place. It can hardly be supposed that Lord Beaconsfield, who

possessed few more ardent admirers than the Chief Baron, thought that his presence in the House of Lords would, in any way, be embarrassing to his party. Yet, if a man who has filled, with applause, one of the four highest offices of the law, is not the man to be elevated to the peerage, it may well be asked who is. If the explanation is to be found, or partly found, in the collision between the Chief Baron and the Lord Chancellor for the time being on the question of the Privy Council, it may be said to be more an honour to the Chief Baron to have died without the peerage than if he had received it. Unless the judgment of legal history reverses the opinion of the day, the Chief Baron was in the right; and the resolution with which he maintained his opinion, in spite of the injury which he knew he was inflicting on his personal interests, is a proof of independence of spirit of more value to his reputation than a peerage would be. The mystery, equally great, why the Chief Baron was not allowed to retire, is only partly explicable as wrapt up with the question why he was not allowed a peerage. It may well have been that the Chief Baron did not feel inclined to listen to overtures for his retirement unless the offer of a peerage were a preliminary step. The maintenance of an aged judge on the bench, after the time has elapsed when he can readily perform his duties, is very bad judicial economy. This is especially the case when the judge is the president of the Court, it being an incident of his office that he should ordinarily sit with one or two colleagues. The receptive powers fade early; and a judge, who requires twice or three times as long to take in the facts of a case as when he was in full intellectual vigour, is accountable, when he sits with his colleagues, for the practical withdrawal from the public service of several judges. In such circumstances, a retirement on full pay would be a pecuniary economy to the country; and, if a necessary condition of such retirement is a peerage, it requires a strong reason for excluding from the House of Lords to justify a refusal to comply with the condition. These considerations are so obvious that the authorities who declined to be influenced by them can only be assumed not to be sufficiently alive to them. The moral to be drawn, from the fact that the late Chief Baron did not retire some years ago with a peerage, is that those who control our judicial system are either not sufficiently informed of what it is their business to know, or, as is more likely, are not sufficiently alive to the duty of interference.

Reflection turns upon the Chief Baron, now that he is dead, as representing the virtues and the failings of a past judicial age. There could hardly have been a better example of the stately dignity which is among the things of the past, equally with ruffles and walking-swords. It was often said that the Chief Baron was the only judge of his time who came out becomingly from the trying ordeal of walking up the nave of St. Paul's in his full robes and with his train-bearer behind him. His faults, too, were of the old-fashioned kind, in the sense that they were on the surface; and he was not corrupted by the tendency of the day for men to deceive themselves into thinking that they are serving high objects, when they are really serving themselves. It cannot be said that the Chief Baron held the opinion, which is now everywhere professed, that patronage is an absolute trust for the benefit of the public. Whether it is more dangerous for a public man to think that, in dispensing patronage, he may serve his friends so long as the public is not injured, or for him to be ready to express the most elevated principles on the subject, and yet not always to act as if the public interest were his sole and undivided object, may be open to controversy. But the new phase, as distinguished from the old, is to be recorded. The Chief Baron perhaps showed the old-fashioned character in his absence of cynicism. Although he was far from being credulous or easily deceived, he had none of the undue suspiciousness which is a bad modern development of character. He was not one of those men who earn a cheap reputation for acuteness by professing to smell gunpowder whenever anything is put under their noses. Another trait distinguishing him from his younger brethren was his grasp of general principle in pre-

ference to decided cases. The modern lawyer is too apt to run to his bookshelves for a case which has some resemblance to that in hand, although the resemblance is frequently immaterial. During the last few years some powerful intellects on the bench have directed themselves to the occupation of breaking down this unhealthy habit of the modern English lawyer; but still it is a vice of the day. During his later days, the Chief Baron seldom professed a previous acquaintance with any case that was cited to him less than forty years old. He would examine a case, when cited, by the light of the principle involved and use it as an illustration in his judgment; but his knowledge of law was founded on general rules, and was unconnected in his mind with an action which at such and such a date was brought by A. against B. and decided in a particular way, or with an obscure passage in Comyn's 'Digest.' The Chief Baron's application of law appeared to be instinctive, so deeply was he imbued with its elements. In his later days it was a common saying that, the difficulty of making him understand the facts once surmounted, the law might be left to take care of itself. It was also a frequent observation that, if the Chief Baron differed from his colleagues, the chances were that he would turn out right. His career as that of a successful lawyer is the history of a man who succeeded entirely by his own energy and his own talents. The necessity for the rising lawyer to add politics to his numerous pursuits brought him in contact with persons and events from which no credit was drawn—a fact which forms part of the history of most public men, whether lawyers or not. As a judge Chief Baron Kelly will not take rank among those who have made law or expounded it in a form which make them the highest authority on every subject touched, but he filled his high office worthily. His career and character deserve a study which is full of instruction."

SELECTIONS.

A leading topic of discussion in the London legal and lay newspapers, at the present time, is the cost of litigation. A correspondent of the *Times* attributes the great cost of litigation to the law of evidence, and the necessity of calling and keeping in attendance a crowd of witnesses. He says:—"In former days causes were tried and witnesses examined on much stricter lines than they are now. Of late years cross-examination 'to the credit of a witness' has become an insidious cause of the protraction of trials. It has always been a rule in England not to admit secondary evidence of any fact if primary evidence can be obtained. The attendance of witnesses and the preparation of briefs for counsel and the fees of the latter are all regulated by these exigencies of the law of evidence. There appear to be two remedies for this evil: (1) A return to the old system of winnowing out each case by a process of pleading and extracting out one or two precise questions of fact which will constitute the issues to be tried, and to confine the evidence strictly to those questions; or (2) relax the law of evidence and to permit the judges and juries to consider documents and other matters of evidence, although not constituting primary evidence; and to modify the practice of the courts so as to allow of trials being postponed for such further evidence on controverted points as the judge may think necessary. The first alternative remedy would no doubt be a retrograde movement, although probably an improvement on the present state of things. I believe that the second remedy is the only one that could be successfully applied." He recommends the adoption of the French system upon the latter point. Much more conclusive is the reason assigned by another writer, who says: "Another great reason for the increase of costs nowadays is to be found in the division of the legal profession into the two branches of counsel and solicitors. Looked at by the light of reason alone, there is no logical argument whatever in support of that division. What can be more absurd than compelling a suitor to filter his case through the brains of one man into the ears of another? Even if a solicitor of talent and honesty wishes to act personally for his clients in those courts where he has equal audience he can only do so

at a loss; for the authorized scales of costs are so arranged as to discourage this attempt at independence. Such a solicitor can get but a wretched fee for his own work, while if he employs counsel, he can pay him well, and also run up a neat little bill for himself. We doubt not but that a time will come when, all this old-world nonsense being swept away, the lawyer will be one man complete in himself, and not, as at present, two people chained together by an absurd custom, and compelled, for their own profit, to make as much as they can out of their unhappy clients.—*Albany Law Journal.*

In *Shepard* v. *Wright*, New York Supreme Court, June, 1880, it was held by Von Vorst, J., that a judgment recovered in Canada against a person residing in this State, without the service of process in Canada or appearance by the defendant, will not support an action in this State, although the defendant may have been a citizen of Canada, and although a copy of the bill of complaint was served on the defendant in this State, which according to the laws of Canada gave the court of that country jurisdiction to render judgment there. The court observed "But the learned counsel for the plaintiff urges that the service upon the defendant at Chautauqua county of a copy of the bill of complaint, under the laws of Canada, gave the court jurisdiction of the person of the defendant. I cannot agree with him in such contention. No sovereignty can extend its powers beyond its own territorial limits to subject either person or property to its judicial decision. Every exercise of authority of this sort, beyond this limit is a nullity. Story on Conflict of the Laws, § 539. The jurisdiction of State courts is limited by State lines. *Ewer* v. *Coffin*, 1 Cush. 23. This last case states that 'upon principle it is difficult to see how an order of a court, served upon a party out of the State in which it is issued, can have any greater effect than knowledge brought home to the party in any other way.' A citizen of one State or country cannot be compelled to go into another State or country to litigate a civil action by means of process served in his own State or country. And a judgment obtained upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognised beyond the State in which the action originated. Freeman on Judgments, §§ 564, 567. In *Holmes* v. *Holmes*, 4 Lans. 392, it is held that in order that the court have jurisdiction of the person of the defendant, it is necessary that the defendant be served with the process of the court, or voluntarily appear in the action, and 'that such service of process can only be made within the territorial jurisdiction of the court.' *Dunn* v. *Dunn*, 4 Paige, 423; *Ex parte Green* v. *Onondaga Com. Pleas*, 10 Wend. 592; *Fogler* v. *Columbia Ins. Co.*, 99 Mass. 267." "The comity due to the courts of other countries is urged as a ground for a recovery here upon this judgment. The courts of this State do recognise foreign judgments as binding here, when the record shows that the courts rendering a judgment had jurisdiction of the subject and of the person of the defendant, and give full credit to such judgments by refusing to retry the matters when once determined in an action where the foreign courts had acquired such jurisdiction. We go no further with respect to judgments of a sister State." The same doctrine was held by the Supreme Court of Michigan, on a very careful and extended examination, in *McEwan* v. *Zimmer*, 38 Mich. 765; S. C., 31 Am. Rep. 332.—*Albany Law Journal.*

In *Armstrong* v. *Kleinhans*, Louisville Chancery Court, 1 Ky. L. Rep. 112, the plaintiff carried on the clothing business at 150 West Market street, Louisville, in a leased building with an observatory, which was called the "Tower Palace," and advertised his business under that name by signs and publications. Subsequently he removed to West Jefferson street, to a building with no tower or observatory, and continued the designation "Tower Palace." After his removal the owner of the first premises himself carried on the carpet business there under, under the name of "Tower Palace Carpet Store." Later he rented the premises to defendants, who carried on the clothing business, under the designation, "Tower Palace." The

plaintiff filed a bill to restrain defendants from the use of that designation, but the bill was dismissed. The Court said: "Plaintiffs insist that the house is not a palace nor the observatory a tower. But while this is true, we are compelled to speak with entire accuracy, and although the plaintiff has proved by an architect that the 'tower' is not a tower, but has been called a 'chicken-coop,' yet I think it is too much to expect of men that in naming a conspicuous building they shall not be allowed to use the language of compliment. And it seems to me that a fine house may be called a palace, and that the ornament on a high building like this may be called a 'tower;' and that 'tower-palace' is not in the language of compliment a too exaggerated name for this particular structure. The newspaper, in describing the plaintiff's opening, called particular attention to this tower, setting forth its command of all the territory adjacent to Louisville. It is to be observed that the sign on the tower was simply 'Tower Palace,' and not Tower Palace Clothing House, and it is further proved that the iron slab at the front door has the words 'Tower Palace' cast in it. I think this name was suggested and adopted as appropriate to this particular building, and was given to the building itself, and that it does not matter who first called it 'Tower Palace.' What is true of the name of an article must be equally true of the name of a building. It would be unjust to its owner to limit him as to his tenants, or to prevent him from taking a proper advantage of its notoriety. No new tenant has any right to deceive the public into thinking the building is still occupied by a former tenant. But in so far as the public are deceived by the fact that the name of the building continues to be used, such misleading cannot be avoided, any more than a belief that the first firm that manufactured 'Paraffine Oil' or 'Essence of Anchovies' will continue to exclusively supply the market with these articles. To make this even plainer, suppose a house built of red granite called by its first tenant Red-Granite House, or of brown stone so named Brown-Stone Palace, could such a tenant move away his business and sign to a brick house or a frame house and prevent all other tenants from calling the houses by their appropriate names? I am not willing to put this case solely on the ground that the name 'Tower Palace' was appropriate or descriptive of this building. I am inclined to think that whatever name had been given must adhere to it." See "Antiquarian Book-Store" case, *Choynski* v. *Cohen*, 39 Cal. 501; 2 Am. Rep. 476; "No. 10 South Water street" case, *Glen & Hall Manufacturing Co.* v. *Hall*, 61 N. Y. 226; 19 Am. Rep. 278.—*Albany Law Journal.*

NOTES OF CASES

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

COURT OF APPEAL CHAMBERS.

Moss, C. J.] [Sept. 25.

Grant v. Van Norman.

County Court appeal—Jurisdiction—Chamber order.

Holman moved for leave to set down this case by way of appeal to the Court of Appeal from the County Court of the County of Brant, notwithstanding that the time for damages, as limited by Rule 40 of the General Orders of the Court of Appeal, had expired. The appeal was sought to be had from an order made in Chambers by the Judge of the County Court, discharging a summons to set aside an attaching order previously made by himself, it being objected that no appeal lay from an order such as has been made in this case.

Counsel for appellant cited the judgment of Proudfoot, V.C., in *Van Norman* v. *Grant*, 27 Grant, 500, and R. S. O. c. 50, s. 200, as authority to show that the matter was appealable.

Aylesworth, in opposition to the application, pointed out that nothing said by the learned Vice-Chancellor in *Van Norman* v. *Grant* went the length of holding that an appeal to the Court of Appeal could be entertained, and that a reference to section 200 of the C. L. P. Act at once showed that it had no application whatever to a case like the present, but had reference solely to

matters of award. The origin of the section, 40 V. c. 7, schedule A. (84), placed the question perfectly beyond doubt, and *Re Freeman, Cragie v. Proudfoot*, 2 E. & A. Rep. 109, was entirely in point as showing that no right of appeal existed.

Moss, C. J., refused the application, holding that the matter was not appealable, and that section 200 of the Revised Statutes, c. 50, in no way whatever affected the question.

QUEEN'S BENCH.

VACATION COURT.

KNOTT v. THE HAMILTON & FLAMBORO' ROAD COMPANY.

Galt, J.] [Sept. 28.

Road Co.'s Act (R. S. O. ch. 152)—Roads completed and tolls established—Extensions—Right to collect tolls.

The provisions of the "General Road Co.'s Act" (R. S. O. ch. 152), respecting the extension of roads, apply to roads which have been constructed and completed, and tolls established thereon.

In this case the extensions were new constructions within the City of Hamilton, and measured separately were less than two miles, though the distance of the original road and the extension together much exceeded two miles. *Held*, that the defendants were entitled to exact toll therefor.

No toll-gate had been maintained for nearly nine years on the portions of the road within the City of Hamilton. *Held*, that defendants could, nevertheless, under sec. 89 of the Revised Statute, erect and maintain a toll-gate thereon, and exact toll from the travelling public.

McKelcan, Q.C., for plaintiff.

Robinson, Q.C., *contra*.

COMMON PLEAS.

VACATION COURT.

[October 8, 1880.

NAGLE v. TIMMINS.

Insolvency—Maliciously suing out demand for assignment—Damages—Pleading.

Held, by GALT, J., that an action will lie by a debtor to recover damages against a creditor who has falsely and maliciously made a demand for an assignment under the 4th sec. of the Insolvent Act of 1875, and amending Acts, and that the penalty for so doing is not confined to the question of costs under sec. 5 of the Act.

To such an action, the defendants pleaded a plea which, after setting out a variety of dealings between the parties, showing that from time to time the plaintiff failed to meet his engagements with the defendant, concluded that the plaintiff being indebted to the defendant in the sum of $1,400, and being unable to pay the same or to meet his engagements, &c., the defendant *bona fide* believing the plaintiff to be insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and having reasonable and probable cause for so believing, and without malice, made a demand on the plaintiff, &c.

Held, plea good.

Bethune, Q.C., for the plaintiff.

Robinson, Q.C., for the defendant.

MCCARTHY v. ARBUCKLE.

Arbitration—Master's certificate—Time to move against—Appeal.

In this case, on the parties being brought before the Court, in accordance with the judgment of the court, as reported in 31 C. P. 48, and being made parties to the action, it was objected that the application to refer back the Master's report was too late, not having been made until after the lapse of two terms from the making thereof.

Held, by GALT, J., that this was not a reference within 9 & 10 Wm. III. ch. 15, but that it came within the 210th section of R. S. O. ch. 50, as being a report or a certificate made under a compulsory reference, and under the 209th sec. of the Act, should have been moved against within the first six days of the term following the making thereof.

Held also, that even if looked upon as an appeal from the Master's report, the evidence did not justify the interference of the court.

Snelling, for the plaintiff.

Hall, for the defendant.

CHANCERY.

Rogers v. Lowthian.

Proudfoot, V.C.] [Sept. 10.

Will, construction of—Life interest.

A testator bequeathed to his two daughters (both of whom were married and had children at the date of the will) the sum of $1,000 each, charged upon his realty, which he devised; the money to be invested in bank stock, and the interest accruing therefrom to be paid to them during their natural lives, and afterwards such sums to be equally divided amongst their heirs. By a codicil the testator directed that should his real estate be sold, the $2,000 might remain on mortgage, at interest, payable half yearly to the daughters, and when the mortgage should be paid his executors were to have full power to invest that sum in homesteads for his daughters, should they desire to do so. *Held*, that the daughters took a life estate, with remainders to their heirs as purchasers.

Williamson v. Ewing.

The Chancellor.] [Sept. 29.

Sale of business—Restraint of trade—Account—Pleading—Practice.

E., carrying on the trade or calling of a dealer in pictures and photographic business, sold out such business to W., and by the agreement covenanted "not to open or start a retail or photographic business of a similar character" in the City of Toronto for five years. By a subsequent agreement the first was modified, so as to allow E. to sell in any manner to persons residing out of Toronto, and to sell retail in Toronto on allowing W. a percentage on the prices realized. W. filed a bill alleging that E. had, prior to such second agreement, sold goods in contravention of it, and had subsequently sold to a large amount; and prayed an account and payment of his percentage. The Court being of opinion that such second agreement had been executed for a valuable consideration, granted the decree as asked, and directed the account to be taken by the Master, although the answer professed to state the actual amount of sales, and the case was heard on bill and answer.

Simpson v. Horne.

The Chancellor.] [Sept. 29.

Executors—Costs.

When an executor, by his misconduct in the management of an estate, causes a suit, and but for the circumstance of such having been brought the assets would have been dissipated, the Court will not, as a general rule, allow such executor his costs out of the estate, although no loss has been sustained; but where, in such a case, the widow of the testator filed a bill without calling upon the executor for an account, or affording him any opportunity of showing that his dealings were correct, the Court (Spragge, C.) refused the costs up to the hearing, reserving the subsequent costs till after the Master's report.

The Chancellor.] [Sept. 29.

Mealey v. Aikins.

Will, construction of—Lapsed legacy.

A testator bequeathed an amount of stocks to his brother John "to have and to hold to him, his heirs and assigns for ever." John predeceased the testator. *Held*, that the legacy lapsed, and that the next of kin of the legatee was not entitled.

COMMON LAW CHAMBERS.

Osler, J.] [Aug. 28.

Bank of Commerce v. Tasker.

Interpleader—Costs.

A sheriff having made a seizure of goods under a writ of execution placed in his hands, and a claimant to the goods having appeared, the execution creditor refused to allow the sheriff to withdraw. On the return of an interpleader summons obtained by the sheriff the execution creditor abandoned his claim.

Held, that the execution creditor might abandon at that stage of the proceedings without costs, and no order was made as to the costs of the sheriff.

Holman for the claimant.

Aylesworth for the execution creditor.

Proctor (W. Mulock) for the sheriff.

Cameron, J.] [Sept. 12.

HENDERSON v. HALL.

Alien defendant outside jurisdiction—Service—Amendment.

In an action against a defendant residing out of Ontario and not a British subject, a copy of the writ of summons itself instead of the notice of the writ required by section 50 of the C. L. P. Act had been served on the defendant.

Held, that no powers of amendment were given such as would enable service in one method to be substituted for service in another method, especially where the express language of the statute directed that the writ should not be served, but that a notice thereof should be. The copy and service of the writ were therefore set aside with costs.

Holman for plaintiff.

Aylesworth for defendant.

WATSON v. MCDONALD.

Osler, J.] [Sept. 13.

Commission—Viva voce examination.

Where a commission was issued to England to take evidence in a case involving many intricate questions of fact, the evidence was ordered to be taken on *viva voce* questions, instead of upon interrogatories.

Aylesworth, for plaintiff.

Ogden, for defendant.

HAY v. MCARTHUR.

Mr. Dalton, Q.C.] [Sept. 20.

Mortgagor and mortgagee — Ejectment — Chancery, concurrent suit in—Costs.

A mortgagee proceeded in ejectment against a mortgagor, and at the same time filed a bill in Chancery against him for a sale.

Held, that as the mortgagee could, since the Administration of Justice Act, R. S. O. c. 49, obtain in the Chancery suit all the remedies he could obtain in the ejectment suit, the latter should be stayed forever.

H. J. Scott, for defendant.

Aylesworth, for plaintiff.

EMMENS v. MIDDLEMISS.

Mr. Dalton, Q. C.] [Sept. 23.

Inspection of documents—Mortgage.

An action was brought upon the covenant contained in a chattel mortgage which covered goods in the United States and which was not registered in Ontario. An application for an inspection of the deed was made, and the plaintiff contended that a mortgagee could not be compelled to allow the inspection of his mortgage by the mortgagor while it remained unpaid, and that the clauses in the C. L. P. Act authorized inspection only in cases where a bill would lie in equity for a discovery prior to the passing of the Act.

Held, that there is jurisdiction, irrespective of the Act, to order inspection of any document sued upon.

J. B. Clarke, for plaintiff.

Aylesworth, for defendant.

CHANCERY CHAMBERS.

The Referee.]
Blake, V.C.]

WRIGHT v. WAY.

Supplemental answer—Time—Matter introduced by.

The bill alleged that defendants had given plaintiff certain promissory notes in part payment of the purchase money of a vessel, and had given a mortgage containing a covenant to pay the amount covered by the notes on the vessel as collateral security. The answer of the defendant Honey, filed in November, 1879, admitted, while that of the defendant Way denied this state of facts. On the 9th March, 1880, defendant Honey applied for leave to file a supplemental answer setting up that the notes were given for the plaintiff's accommodation; that there was an agreement that no liability in respect of them should ever be enforced by the plaintiff against the defendants, and denying that the mortgage was given as collateral security. The defendant Honey, by affidavit filed, explained that when he swore to his former answer he had forgotten the true

state of the facts, as they had occurred some years before, but he had remembered them after having a conversation in the beginning of February with his co-defendant.

The Referee refused the application. Blake, V.C., dismissed the appeal with costs, without prejudice to any application that might be made before the Chancellor at the hearing.

McPhillips, for defendant.

Hoyles, for plaintiff.

The Referee.]
Blake, V.C.]

Wright v. Way.

Service of papers.

This case was set down to be heard at Cobourg sittings on 6th April. Notice of examination and hearing was served on solicitors of defendant Honey on 22nd March, at a few minutes past four, who admitted service, but the same day discovering that the notice had been served within fourteen days of the hearing. They wrote to the plaintiff's solicitors repudiating their admission, and saying that they would move to set aside the notice.

The Referee refused to set aside the notice, with costs to be costs in the cause to the plaintiffs in any event.

Blake, V.C., dismissed the appeal of the defendant Honey with costs.

McPhillips, for defendant Honey.

Hoyles, for plaintiff.

Proudfoot, V.C.]

Draggon v. Draggon.

Draggon, Abel v. Draggon.

Administration—G. O. 638—*Who entitled to.*

D. died intestate and one of his creditors served notice of motion for an administration order under G.O. 638 on D.'s widow, the administratrix of estate. The widow then served notice of motion for a similar order upon the heirs of her husband, and filed affidavits alleging a deficiency of the personalty to pay debts that creditors were pressing, that some had taken proceedings to enforce payment of their claims, and also filed a consent of the adult heirs to an order being made in her favour.

The Master at Chatham granted an administration order to the widow.

On appeal, Proudfoot, V.C., upheld the Master's order and gave liberty to the creditor to add the costs of his application for administration to any claim he might establish against the estate.

Riordan, for creditor, appellant.

Hoyles, for administratrix, defendant.

Proudfoot, V. C.] [June 4.

Re John Thomas Smith.

Construction of will—What "capital" and what "profits"—Under bequest to A for life.

By his will, a testator, who at his death owned fifty-four shares of stock in the Consumers' Gas Company, bequeathed among other things as follows:—"I further bequeath to my dear wife, during the term of her natural life, the interest, dividends and profits, which shall or may arise from time to time from the stock or shares which I shall be the holder of or entitled to for my own use at the time of my decease, in the Consumers' Gas Company, of Toronto, The Dominion Bank, and the Ontario Bank, and the dividends, interest and profits, of the moneys or other securities into which the said several stocks may from time to time be changed or converted under the provisions of my will and codicil in that behalf; and I hereby direct my said executors and trustees to pay the said interest, dividends and profits, to my said dear wife Anne, during her natural life accordingly."

Two years after testator's death, the Gas Company issued new stock at par, and notified the executor that there had been allotted to him eighteen shares of said new stock of $50 each, being in proportion of one to every three of those standing in his name, and that any shares not accepted would be sold by public auction, for the benefit of the parties to whom the same were allotted; and the premium, if any, on the same, placed to their credit.

The executors not having funds to pay for the new stock the shares were sold, and produced a premium of $226.67.

Held, that the $226 67 was principal, and that the tenant for life was entitled only to the interest on it during her life.

NELSON v. DEFOE.

Proudfoot, V.C.] [June 5.

Writ of arrest—What necessary upon application for, in suit for specific performance.

A writ of arrest will not be granted against the purchaser in a suit for specific performance unless it be shown by affidavit that the vendor's lien is insufficient.

Seaton Gordon, for plaintiff.

MCKAY v. MCKAY.

Proudfoot, V.C.] [June 5.

Partition—Creditors—Certain costs of administration allowed.

An order for partition or sale was made under the recent G. O. 640, by the Master at London, for partition or sale of the estate of John McKay, deceased. In proceeding under that Order, the Master advertised for creditors, and among the claims sent in was one of Messrs. M. & M., solicitors, consisting of charges for obtaining letters of administration and for defending an action in the Court of Common Pleas v. the Administratrix. The plaintiff in that action is the present appellant, William McKay, a defendant in this suit, and entitled to a share of the estate. The Master allowed the claim. William McKay appealed, on the ground that the deceased was not, nor is his estate, indebted to M. & M. in any sum whatever, and they are not entitled to prove as creditors in this cause.

Appeal dismissed with costs.

Hoyles for the appellant.

R. Meredith for M. & M., the creditors.

SCOTT v. VOSBURG.

Proudfoot, V.C.] [June 5.

Timber on mortgaged property—Sale of, by third party—Proceeds to whom payable.

There were three mortgagees of a property. The first filed a bill for sale, the other two proving their claims in the suit in the Master's office, and the report appointed a day for redemption. No one redeemed, but a final order for sale was not taken, and because one Vosburg, who had purchased the equity of redemption, was negotiating as to Scott, the third mortgagee, becoming sole mortgagee of the property.

During the negotiations Vosburg cut and sold a large quantity of the timber on the land to G. & W. Scott then filed a bill praying *inter alia* payment by G. & W. of the price of the timber cut and sold them which had not yet been paid over.

On the reference, the Master in ordinary held, under *McLean* v. *Burton*, 24 Grant, 136, and *Brown* v. *Sage*, 11 Grant, 239, that G. & W. should pay the value of the timber sold them to the first mortgagee.

On appeal, PROUDFOOT, V.C., upheld the Master's judgment.

Roaf for plaintiff.

Dafoe for first mortgagee.

Eddis for defendant.

MACDONELL v. MCGILLIS.

Blake, V.C.] [June 8.

Jurisdiction of Master under G. O. 640—Question of title raised.

The jurisdiction created by G. O. 640 is intended to be exercised in simple cases only, where there is no dispute. Where questions are raised of title or the like a bill must be filed.

Blain, for plaintiff.

Hoskin, Q.C., for infants.

Cattanach, for adult defendants.

Proudfoot, V.C.] [Oct. 13.

PHERRILL v. FORBES.

Service of bill by publication—G. O. 100, 436 and 645—Decree—Practice.

Motion for a direction to the Registrar to issue a decree on præcipe.

The bill had been served by publication, the notice being in the form Schedule C to G. O. 100. The time to answer having expired, plaintiff applied for præcipe decree, verifying his claim by affidavit.

Registrar refused to issue decree because the special endorsement provided by Sche-

dule G to G. O. 436 had not been incorporated in the notice published.

It was contended that order 646 was intended to dispense with the long notice, as it provided that plaintiff must produce an affidavit verifying his claim, which was not done in ordinary cases, where defendant was served in person.

Held, that Registrar's course was correct, and that as defendant had no knowledge of the amount claimed by the plaintiff from the notice served, the case must be set down for hearin *ro confesso*.

W. Fitzgerald for plaintiff.

Proudfoot, V.C.] [Oct. 13.

Cleghorn v. Wilson.

Injunction—Dismissal of bill—Effect of.

A motion to continue an injunction was returnable to-day. A countermand of the notice of motion and a copy of an order dismissing the bill had been served by plaintiff on defendant; but, nevertheless, counsel for defendant appeared and moved for an order to dissolve the injunction.

The learned Vice-Chancellor thought that when the bill fell all proceedings under it fell also; but leave was given to renew the motion if on further consideration counsel desired to do so.

Hoyles for defendant.

Proudfoot, V.C.]

Re Romanes v. Smith.

Rev. Stat. Ont. ch. 109, *s.* 3—*Estate.*

A testator devised lands to his executors "To hold the same in trust for the use and benefit of my son William during his lifetime, and after the death of my son William, in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs, the children of my said son William taking equal shares, and the child or children of any deceased child of my said son to take their parent's share in equal proportion."

Held, that William took an estate for life, and the legal estate in remainder vested in the trustees for the benefit of his heirs.

Black for purchaser.

Moss for vendor.

CANADA REPORTS.

SUPREME COURT REPORT.

Lenoir v. Ritchie.

Great Seal case—Appointment of Queen's Counsel.

The following is a translation of the judgment of Fournier, J. pronounced in the French language, viz.:—

Fournier, J. — The respondent J. N. Ritchie, a barrister of the Nova Scotian bar, was appointed a Queen's Counsel by letters patent, under the Great Seal of Canada, on the 26th of December, 1872.

On the 7th of May, 1874, the Legislature of Nova Scotia passed two Acts, chapters 20 and 21—the first, authorizing the Lieutenant-Governor to appoint Queen's Counsel for that Province—the second, giving him power to regulate the order of precedence between them.

On the 27th of May, 1876, the appellants and several other members of the Nova Scotian bar were appointed Queen's Counsel, by virtue of letters patent, giving them rank and precedence over the respondent. The prothonotary of the Supreme Court of Nova Scotia, having thought he ought to conform to these letters patent, in preparing the roll of barristers, assigned to the appellants and others, a precedence over the respondent, which none of them had had before. The latter having obtained from the Court on the 3rd of January, 1877, a rule to restore and maintain him in the order of precedence which he had since the 26th of December, 1872, the date of his letters patent.

It is from the judgment making this rule absolute, that the present appeal is brought.

The principal questions raised in this cause are: First, whether the judgment rendered upon this rule on the 26th of March, 1877, is susceptible of appeal to this Court; second, whether chapters 20 and 21, of 37 Vict., of the Statutes of Nova Scotia, are beyond the jurisdiction of the Legislature; third, whether these Acts can have a retrospective effect, affecting the position of Queen's Counsel appointed by letters patent, issued under the Great Seal of

Canada, before the passing of the two Statutes in question.

One other question, to which considerable importance has been attached—that of the validity of the Great Seal with which the letters patent of the 7th of May, 1876, were sealed—having been settled, pending the suit, by two Acts, one of the Federal Parliament, and the other of the Legislature of Nova Scotia, need not now be discussed. I shall content myself with saying that I share the opinion expressed on this subject by the Chief Justice, Sir William Young.

After having had much doubt on the question, whether there is a right of appeal from a judgment rendered in a proceeding commenced as this has been by a motion for a rule *nisi*, I have come to the conclusion that this Court has jurisdiction in such a case, where the judgment which it shall give, whether it be to affirm or reverse the judgment appealed from, is one that may be put in execution.

In effect the 17th section, defining the appellate jurisdiction of this Court, has not declared that the appellant's exercise of that right shall depend upon the mode of procedure adopted in the Court of first instance, to enforce his rights. The word "case," employed in that section is not synonymous with "cause," it has a wider signification, and is applicable to all the procedures by means of which one arrives at a judgment upon his rights, in a Court of superior jurisdiction.

In order to give the same right of appeal in all the Provinces, it was necessary to employ an expression of as wide a signification as that. If that right had been given according to the nature of the mode of procedure, or action, the result would have been, that in certain cases, by reason of the difference of the systems of procedure existing in the different Provinces of the Dominion, a judgment upon the same question would be liable to appeal in one Province and not in another. It is without doubt to avoid a like inconvenience and to give, saving certain restrictions, the right of appeal in the general manner which the 17th section of the Supreme Court Act declares, in using this very vague expression, that there is an appeal in cases where the following conditions are found, namely:—First, that the judgment which one wishes to appeal is a final judgment of the highest Court of last resort; secondly, in the case where the judgment is one of a Superior Court exercising a jurisdiction in the first instance, or by way of appeal, but in which the decision would be final. In order that there may be an appeal, it suffices that one or other of these conditions are found, whatever otherwise may be the manner of proceeding which may perchance be employed to arrive at a judgment. The meaning of the word "case" employed in our Act, is at least as wide as that of the word "suit," which is found in the 25th section of the Supreme Court Act of the United States, and of which Marshall, C. J., has given the following definition:—"The term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a Court of Justice, by which an individual pursues that remedy in a Court of Justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a Court of Justice, the proceedings by which the decision of the Court is sought is a suit" (*Weston* v. *City Council of Charleston*, 2 Peters, 464).

And Story on the Constitution of the United States, vol. 2, No. 1125, p. 485. "What is a suit? We understand it to be the prosecution, or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of Justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' The instruments whereby this remedy is obtained, are a diversity of suits, and actions, which are defined by the Mirror to be the 'lawful demand of one's right;' or as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio, quod alicui debetur.*"

Now the judgment in question in this cause being final, at least upon the present procedure, and rendered by a Superior Court (the Supreme Court of Nova Scotia)

deciding in the last resort—this judgment is found in this respect to fulfil the conditions rendered necessary by the Statute that there may be an appeal. In two cases the proceedings having been commenced, as in the present case, by motion, this Court has already decided that there is a right of appeal—these are the cases of *Wallace* v. *Bossom*, 2 C. S. C. R., 488, and *Wilkins* v. *Geddes*, 3 C. S. C. R., 208.

Therefore for these reasons I should be disposed to consider the judgment as susceptible of appeal, if, in addition to these, there are found two other conditions that I consider essential to give jurisdiction ; that is, first, that the judgment has not been rendered in the exercise of a discretionary power which the courts exercise for the conduct of business and the maintenance of order during their sittings ; and second, that the judgment rendered was susceptible of being put in execution.

To ascertain whether these two conditions exist in the present cause, it is necessary to recall the terms of the motion which was the foundation of the judgment : What is, according to the motion, the object of contestation—*the matter of record?* It is the demand of precedence which the respondent makes in these terms : "That it be ordered that the rank and precedence granted to the said Joseph Norman Ritchie by said letters patent of 26th December, A.D. 1872, be confirmed, and that he have rank and precedence in this Court over all Queen's Counsel appointed in and for the Province of Nova Scotia since the 26th December, A.D. 1872." That is the demand ; then follow the reasons, given in its support. It reduces itself then exclusively to the question of precedence over the Queen's Counsel appointed since the 26th December, 1872, in and for the Province of Nova Scotia, although the reasons invoked to give effect to this contention attack the validity of the two statutes by virtue of which these appointments have been made. But it is not these propositions of law which constitute the demand. Even though the judgment upon this motion may be a recognition of the right of the respondent to precedence over the appellants, it would not in the least disturb the existence of the letters patent conferring on them the distinction of Queen's Counsel. In effect we cannot probably declare them void except by means of a *scire facias*, or perhaps a *quo warranto* ; in any case, one cannot attain that end, except by a procedure specifically demanding the annulment of the letters patent. Every procedure of that kind would necessarily be long, and would necessarily be a proceeding instituted by the Crown. The better mode of putting an end, at least temporarily, to a conflict which might manifest itself before the Court, and to avoid the disagreeable consequences of it, would be, without doubt, to address oneself to the summary jurisdiction of the Court concerning the conduct of business, the maintenance of good order, and the discipline to be observed during the sittings of the tribunal. It is that which has been done, in adopting the procedure which has been followed in this case. But in the exercise of that power, the decisions of the Superior Court are without appeal : they escape all revision save that of the Judicial Committee of Her Majesty's Privy Council wherever either fine or imprisonment has been awarded. I think for that reason that the appeal ought not to be entertained.

Another reason which induces me to to think that, in the present case, there ought not to be an appeal is, that the judgment of this Court, which should reverse that of the Superior Court of Nova Scotia, would be incapable of being executed.

It is a general principle by which this Court is bound as well as all other tribunals, that a Court has not jurisdiction in any case where the judgment which it might give would not be susceptible of execution. In order that a judgment may be executable, it is necessary that the Court have powers to put the demandant in possession of that which is the object of his demand, or in default, to accord to him a pecuniary indemnity, or, that it have power to pronounce a condemnation of imprisonment against the recalcitrant party.

In order to see the difficulty, not to say the impossibility, of executing the judgment of the Court, supposing that it re-

verses the judgment of the Court of first instance, and that it awards to the appellants the right of precedence which they claim over the respondent, let me ask, What would happen in such case? How and against whom would they execute the judgment? Would they be able to issue a writ addressed to Sir William Young, the Chief Justice of the Superior Court, to enjoin him to recognise the precedence of the appellant? And if he refused, would there be issued against him an order for contempt of court? Judgments are executed against the parties and not against the judges. Would the appellants have the least means of forcing the respondent to desist from his precedence or to compel him to refuse to reply to the question which might be addressed to him by the Chief Justice, notwithstanding our judgment? Certainly not; the judgment would in this case be nothing but an expression of opinion which would remain a dead letter.

If I may not presume that an inferior Court will refuse to execute the judgments of this Court in ordinary cases because they may be contrary to their own,—I may not be wrong in thinking that in a case like this when it acts in the exercise of a discretionary power, which is not subject to our control, it would think itself justified in not conforming to it, in order to preserve intact its prerogatives and discretionary power. In the case supposed, we shall be exposed to seeing the Supreme Court of Nova Scotia, notwithstanding our contrary opinion, maintaining its own decision. Nothing of that kind could have happened, if instead of addressing the disciplinary jurisdiction of the Court, the validity of the letters patent had been attacked by *scire facias*. In that case the judgment would be executed as all others, and there would not be any possible conflict between the two Courts. I should be induced by these reasons to declare that this Court has not jurisdiction, and that it ought to abstain from judgment. But as I am under the impression that I am alone in entertaining this opinion, I shall briefly give the reasons of my decision upon the merits of the question submitted.

After Confederation, difficulties arose in the Provinces of Ontario and Nova Scotia, on the subject of the power of the Lieutenant-Governor to appoint Queen's Counsel. This question affecting the Royal prerogative was for this reason referred by the Privy Council of Canada, to the Secretary of State for the Colonies, in order to obtain the opinion of the law officers of the Crown. The memorandum of the Privy Council, signed by Sir John Macdonald, after having cited paragraph 14 of section 92 relative to the organization of the Courts, contains the following declaration :—"Under this power, the undersigned is of the opinion that the legislature of a Province, being charged with the administration of justice and the organization of the Courts, may, by statute, provide for the general conduct of business before those Courts; and may make such provision with respect to the Bar, the management of criminal prosecutions by counsel, the selection of those counsel, and the right of preaudience, as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the Royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation."

To this part of the memorandum, the Colonial Secretary, Lord Kimberly, made the following reply, which may be found in his despatch of the 1st February, 1872 :—"I am further advised that the Legislature of a Province can confer by Statute on its Lieutenant-Governor, the power of appointing Queen's Counsel; and with respect to precedence or pre-audience in the courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor-General and Lieutenant-Governor, as above explained."

The Chief Justice, Sir William Young, in the reasons of his judgment in this cause, speaking of the effect of that correspondence upon the two Acts in question, expresses himself thus : "Among the grounds taken

in the rule, it is urged that the 20th and 21st chapters of the Provincial Acts of 1874 are *ultra vires*, and the appointments therein invalid and of no effect. But the Crown, through its Secretary of State, having authorized such enactments, and the Acts having gone into operation, this contention is quite untenable."

The decision of this case not requiring it, I shall not examine the question whether the reply of Lord Kimberley, making known the opinion of the law officers, should be considered as importing at the same time a sufficient consent on the part of Her Majesty to authorize the legislation which followed it. Suffice it to say, that I recognise the wisdom of the rule which presumes in favour of the legality of legislative Acts, and which compels the tribunals to examine the question of their validity only in those cases where the solution of the question submitted to the Court imperiously requires it. The present cause does not present one of those cases, and the rule to which I have referred ought here to receive its application. The question to be decided here, is not so much whether the Acts in question are *ultra vires*, but rather whether one of them, chapter 21, can have a retroactive effect, affecting the letters patent of the 26th December 1872 granted to the respondent. It is, in consequence, quite useless to occupy oneself with the constitutionality of these two Acts, and one could not do it in the present case without violating the rule above mentioned. For this reason, I shall abstain from pronouncing on the validity of the Acts which are attacked, limiting my observations to the question of retroactivity raised as to chapter 21. The second section of the chapter is in these terms: "Members of the bar from time to time appointed after the 1st day of July, 1867, to be Her Majesty's Counsel for the Province, and members of the bar to whom from time to time, patents of precedence are granted, shall severally have such precedence in such courts as may be assigned to them by letters patent, which may be issued by the Lieutenant-Governor under the Great Seal of the Province." The appellants pretend that the terms of this section give an absolute power to the Provincial Government to assign to Queen's Counsel, who shall be appointed by virtue of that Act, rank and precedence over those previously appointed by Her Majesty or Her representative. This interpretation is certainly erroneous. The section is worded in terms which are designed to give effect to laws for the future only. It does not contain even one of those expressions ordinarily employed to give them a retroactive effect. To admit the retroactivity of this law, would be a violation of the following general rule of interpretation: "It is a general rule that all Statutes are to be considered to operate in future, unless from the language a retrospective effect be clearly intended." It would be useless to cite authorities here for this principle. It is enough to say, that I rely on the numerous authorities cited in the case of *The Queen* v. *Taylor*, 1 S. C. R., 65, decided by this Court, upon the retroactive effect sought to be given to a section of the Act which constitutes this Court.

Relying on these authorities, I am of opinion that the section of chapter 21 above cited, has no retroactive effect; that the letters patent giving rank and precedence to the appellants ought not to have any more effect than the Act itself, nor to affect in any manner the position of the respondent. I am, in consequence, of opinion, that the appeal ought to be dismissed with costs.

COUNTY COURT OF THE COUNTY OF ELGIN.

In the matter of W. E. Roche, Insolvent.

Insolvency—Contestation.

An infant son claiming to prove a debt for money lent against the estate of the insolvent, his father, disallowed, on account of the doubtful character of the evidence in support of the claim, and that no books were shewn as proving credits given to the son for the alleged loans, and that subsequent payments alleged to have been made on account of the supposed debt were not charged by the Insolvent to the son, or credited by the son to the father.

[St. Thomas, Oct. 5.

The claimant set up a claim against the estate as for money lent. He had been a

school-teacher, and alleged that moneys received by him in that capacity had been either sent by letter or were handed to his father. None of the letters were produced, nor were there any letters proven setting forth acknowledgments of the receipt of such by the insolvent. The insolvent kept books shewing receipts of moneys from various persons in the course of his business as a merchant and miller, but none as received from the claimant. It was alleged that $300 at one time was paid in one sum to the insolvent by the claimant, when claimant asked for a note, but which the insolvent refused to give, stating that if the claimant could not trust his own father he might lend his money to some one else. The only evidence in support of the claim was that of the claimant and of his father and mother, who all swore to the loan of the moneys, and the same were advanced in different sums at various times, and that the insolvent was to pay the claimant ten per cent. interest for the use of the moneys. The other facts of the case appear in the judgment. The claim was contested by a creditor on behalf of the estate.

Hughes, Co. J.—After the best consideration I can give to this case, I am unable to say that I am quite satisfied of the *bona fides* of this claim for the following amongst other reasons, viz.:

1. I have carefully looked over the books of the insolvent, and find various entries in them of cash received during the course of his business as a merchant and a miller, and I can find none which corroborate the evidence given in support of this claim; so that without an entry of a dollar, crediting his son with money alleged to have been loaned to him, the insolvent comes here to support the claimant's allegation, although there are various entries of cash received from many other persons, which appear to be duly credited, but none received from him.

2. The claim is sought to be substantiated by bringing before me some loose leaves detached from an old diary of the insolvent and an old pass-book, which it is alleged were found tossing about the house of the insolvent by his younger son just before the evidence was taken by me in this matter, and I may say, with reference to them, that they bear a very dubious and unsatisfactory appearance, as presenting evidence of the *bona fides* of the claim set up by this young man against the estate of his father.

3. The son was and is still a minor, and it does not seem to me probable, that if he *lent* his father money, and the father had refused to give him a note or memorandum acknowledging his indebtedness, and agreeing to pay ten per cent. interest for its use, that he would have taken an old diary of his father's—as he said he did, and contented himself with the entries which now appear; and afterwards have left the book (such as it is) to be tossed about his father's house; in other words, it is too much to expect me to believe it, and I must simply say I do not believe that any one, with the sense and intelligence this young man appears to possess, and the shrewdness and care most young lads exercise about their first personal earnings, would leave the evidence of such a disposal of money as alleged here, to go out of his hands, into the custody or within the reach of his debtor, even although his own father were (as it is alleged here was the case) that debtor, and more especially as he had had the shrewdness to ask for a promissory note and acknowledgment of the debt and been refused it.

4. I think the evidence brought in corroboration is not of that satisfactory and conclusive kind that I can entirely depend on it; more than this, it is a matter for grave suspicion, that not one of the letters sent as alleged, enclosing moneys, from the claimant to his father, or the father's alleged acknowledging receipt of such, was produced.

5. It is quite as extraordinary, if the insolvent paid his son, as it is alleged he did, early in 1879, $33, and in the end of that year $30 more, when the claimant went to Kingston to matriculate, that no entry should appear to show it in the insolvent's books. And it is quite as extraordinary that, in none of the leaves of the old diary produced, or in the pass book, do there appear to be credits given for the sums so received from the father, and the old diary, it is alleged, contains the foundation entries for those which appear in the other scrap of a book which I have *called* a pass book, and which presents quite as doubtful an appearance as the diary.

6. Again, I find entries in that old Diary under date of "Monday, April 7, 1876," "Lent," the letters "W. E. R." written over some other word or initials, which it is alleged were the letters "Pa." (*for papa*)—"$24.00"—"Paid Mrs. McPherson for board up to date, $6.00." "Received from the Trustee, $30, in part payment of my Salary S. S. No. 19, Gainsborough;" and on the next page are written in pencil, under the date of March 10, the words, "*Recd. from*," and all the rest of the entries for two pages, which had been made in pencil, are rubbed out, apparently with India rubber. I must say I cannot rely upon such a book, or upon such evidence, in a contestation between a minor son, and this contestant, acting on behalf of his father's creditors. Were the case one set up by this same son against the executors or adminis-

trators of his father after his death, it would, and ought to be, treated (were the evidence of the indebtedness like that presented in this case) with the gravest suspicion; any court would require the most conclusive proof of the correctness of the claim before it would be allowed, and I think the same must be done here as between him and the assignee of his father's estate.

7. A reference was made to McKenzie, the contestant, as capable of corroborating the father's statement—and it is said that he was in co-partnership with the insolvent in the grain business, and knew the insolvent was getting the money from his son, and that the insolvent got the $300 in one sum from the claimant, which helped to pay off a note in the Bank; yet McKenzie was not called to prove that, but when he *was* called and examined *on his own behalf*, he did not corroborate that statement, except that he says, one morning about the time of the holidays of 1878, the insolvent came into the mill and said that his son had come home, and "*handed him some money*"—and thinks he mentioned the amount—probably it might have been $300, and said he thought it was "*pretty well for a boy*;" that the Insolvent said his son had "*handed him the money*;" that he knew nothing of any entry being made in any books about such a transaction; and that if the $300, claimed as got from the claimant to pay off a note that the firm owed, was really received by the firm, it was entirely unknown to him; but there might have been notes paid off that he, the contestant, knew nothing of, whatever; that the insolvent did all the business, and the notes were given as partnership notes—they were the insolvent's notes, and the contestant endorsed them.

8. I think, on the whole evidence, I should not be justified in allowing this claim, as I am inclined to think the insolvent sent out his son (a minor), to earn money, and he took his earnings into his own possession, and that is what he meant when he told the Contestant that his son had "*handed*" him the money, and that it was "*pretty well for a boy;*" for if he had been *borrowing* money from his son at ten per cent. interest, there is no doubt, in my mind, that words conveying a different meaning would have been made use of than those which the contestant says were made use of on that occasion.

I therefore decide that the claimant is not entitled to be collocated on the dividend sheet of the estate for any part of his alleged claim, and I order him to pay the costs of this contestation.

REVIEW.

The Law and Practice as to Probate, Administration and Guardianship in the Surrogate Courts in Common Form and Contentious Business, including all the Statutes, Rules and Orders to the present time, with a collection of Forms. By Alfred Howell, Barrister-at-Law. Toronto: Carswell & Co., 1880.

Since the abolition in 1858 of the Court of Probate for Upper Canada, to which there was an appeal from the various Surrogate Courts, there has been no central Court of Probate in this Province, all jurisdiction and authority, voluntary and contentious, in relation to matters and causes testamentary, and in relation to the granting or revoking of probate of wills and letters of administration being exercised in the several Surrogate Courts. The appellate jurisdiction which was then transferred to the Court of Chancery was afterwards, and is at present, vested in the Court of Appeal.

The Surrogate Courts' Act, 1858, by which the former Court of Probate for Upper Canada was abolished, and its powers and duties transferred to the Surrogate Courts (now thirty-eight in number), follows in part the English Court of Probate Act, 1857. By this Act the ecclesiastical jurisdiction (which had existed for eight centuries, and of which it was said by a writer in the English *Law Magazine*, 1857-8, "It was when the three Courts were not, when Chancery was unborn, and when an English jury was a feeble, heartless mob") in such matters was done away with, and the jurisdiction vested in Her Majesty, to be exercised by the Court of Probate.

As remarked in the preface of the present treatise—although many works have been written in England relating to the matters covered by the statute, there have been none specially adapted to the law and practice in the Province; and the business of the Surrogate Courts, except in ordinary common form matters, had, to some extent, become a "mysterious art"—as in England before the Probate Act, when the business

there was confined to certain select practitioners of Doctors Commons. In fact, the Registrars have, during the twenty-two years which have elapsed since the Act was passed, become the repositories of knowledge in these matters; and have constantly been resorted to, not only for guidance in matters properly belonging to their official duties, but for advice upon difficult questions of Probate law. One object of Sir Richard Bethell's measure abolishing the ecclesiastical jurisdiction, and establishing the Court of Probate, is said to have been to simplify the procedure, and throw the practice open to the profession generally; and rules were made under that Act for carrying its provisions into effect both in contentious and non-contentious business. Although rules were made under our own Surrogate Courts' Act for carrying out its provisions as to common form business, the practice in contentious business, as well as in some matters of non-contentious business, was left by the statute to be governed by the practice of the English Court of Probate, as it stood in December, 1859, and through that by the practice of the former Prerogative Court, which had to be ascertained from various English works and from the English reports.

The setting forth of this practice, as applicable in our own courts, but hitherto unwritten and not provided for by Rules or Forms, is the principal feature of the treatise now under review.

In the presentation of his task, Mr. Howell seems to have spared no pains in collecting his materials, which he has succeeded in presenting to his readers in a form admirably arranged, and the work so far as we have been able to examine it, is reliable and of much practical value. He gives first a short introduction. Part I. contains the Surrogate Courts' Act, the Act respecting guardians of infants, with notes and references. Part II. relates to common form business, and gives the Rules, Orders and Forms. Part III. treats of the appointment of personal representatives, their compensation, probate of will, administration, limited grants, and grants generally, with matters of practice relating thereto. Part IV. discusses contentious business, and the whole concludes with an appendix giving various rules, tables of costs, statutes, some useful, practical directions, forms, &c.

Mr. Howell's labours cannot but be of great service to his brethren as well as to officers in the courts, and we trust that he may reap some fruit from his labours in a field of literature which, so far, has not been of a very lucrative character.

CORRESPONDENCE.

Transcripts to C. C.

To the Editor of The Law Journal.

Dear Sir,—In *Burgess* v. *Tully*, 24 C. P. 549, a serious defect in the law was pointed out by the Court, and several Sessions of the Provincial Legislature have been since held, but the defect is not remedied.

It was there held that a Division Court execution must be issued from the Division Court in which the judgment was obtained before a transcript could issue to the County Court under sec. 165. When the defendant lives in another division it is usually a farce to issue an execution in the division in which judgment was got, and it may happen that a defendant living in another division may have goods to satisfy the judgment, and yet be saddled with the costs of a transcript to the County Court, and executions against goods and lands and sheriff's fees.

Such a case has just come under my notice in which a defendant has had to pay not only the costs of transcript and executions, but costs of a chancery suit to get equitable execution against his lands.

This matter is surely not beneath the Legislature to remedy.

Yours truly,

Barrister.

October 22nd, 1880.

Leith's Blackstone.

To the Editor of The Law Journal.

Dear Sir,—As you are doubtless aware there has been a new edition of Leith's Blackstone published, differing very materially

from the old edition which has been for a long time a prescribed text-book by our examiners, for instance in the old edition the "descent of real property at Common Law, under Stat. 4 Wm. IV. cap. 1, and under Stat. 14 & 15 Vict. cap. 6, occupied a very considerable space, whereas in the new edition it is not treated of in any way, and again the new edition devotes a large space to Constitutional Law, which is not to be found in the old edition at all. Now your correspondent would be obliged to know if it will be required of students going up for examination hereafter to be familiar with both editions. An answer through your valuable columns would be thankfully received.

Yours,
Student.

Pembroke, Ont., 22nd Dec., 1880.

[We are told that after next Term the new edition will be put on the Curriculum. —Eds. L. J.]

Witness fees in Division Courts.

To the Editor of the Law Journal.

Sir,—It has been decided by a County Judge that not more than 75 cents per day can be allowed to professional witnesses in Division Court suits, because the Division Court Rule 147 gives no discretion to increase the fee except where the witness attends on a Superior Court subpœna. Some County Judges give professional fees in Division Court suits. What is the law or the general practice on this point?

Yours,
V.

[We believe the practice is as laid down in the first part of the above letter. One County Judge, of large experience, makes an exception in favour of Provincial Land Surveyors, who are entitled to professional fees, under the authority of the Land Surveyors' Act. R.S.O., cap. 146, sec. 25.—Ed. L. J.]

FLOTSAM AND JETSAM.

The following amusing account of the administration of justice-of-the-peace-law in the North-West we find in a volume written by Miss Fitzgibbon, just published by Rose-Belford Publishing Co., Toronto, entitled "A Trip to Manitoba:"

The winter of 1878 was mild and open, more so than had been known in the North-West for thirty years. The snow had vanished almost completely from the portages, and water covered the ice on many of the lakes. When, at Christmas, the staff accepted Mrs. C.'s invitation to spend the day at Iver, the question was whether they would come with dogs or canoes. Neither, however, were practicable, and they had to walk—some of them eighteen miles. We amused ourselves icing the cake, inventing devices, with the aid of scraps of telegraph wire, as supports for the upper decorations, decorating the house with cedar and balsam wreaths, and providing as good a dinner as it was possible to obtain in the woods. With the exception of having nothing for our guests to drink, we succeeded tolerably well. Being within the limits of prohibitory laws, it was necessary to ask the Lieutenant-Governor of Manitoba for an especial "permit" to have wine sent out; and we were answered that "if the men had to do without whisky, the gentlemen might do without wine." So we had to content ourselves with half-a-glass of sherry each, the remains of some smuggled out with our luggage in the spring.

We soon had proof that the men rebelled against the prohibitory law. The presence of whisky being suspected in a neighbouring camp, a constable who had been but recently appointed, and was anxious to show his zeal, never rested until he had discovered the smuggler and brought him to justice; the clause that the informer was entitled to half the fine of fifty dollars not diminishing his ardour.

To a lawyer the proceedings would have been amusing, for all parties concerned were novices in their respective *rôles*. The justice of the peace, with a great idea of his own importance, the majesty of the law, and the necessity for carrying it out to the letter, had obtained several manuals for the guidance of county justices of the peace and stipendiary magistrates, over the technicalities of which he spent many a sleepless hour. No sooner had he mastered the drift of one act, than the next repealed so many of its clauses that the poor man became helplessly bewildered. Handcuffs there were none, neither was there a lock-up, and the constable spent his time in keeping guard over the prisoner, being paid two dollars a day for the service. The latter was fed and housed,

Flotsam and Jetsam.

and, not having been overburdened with work or wages for some time, did not object to the incarceration.

Ultimately he was tried, found guilty, and fined fifty dollars or a month in jail. Many arguments arose between magistrate and constable, as the latter, having served in the United States, and there learned a smattering of Yankee law, was resolved to make his voice heard in the case. The inability of the prisoner to pay the fine of course made it necessary to fall back upon the alternative—thirty days in jail, which was a hundred and odd miles off. There was no conveyance to take him thither; and no roads even if there had been; and the man refused to walk.

"If I had the money I'd pay the fifty and have done with it," he said; "but, not having it, I can't do it. If I am to go to gaol, all right, take me; but whoever heard of a man walking there of his own accord?" And he whittled away at the stick in his hand, feeling that he was master of the situation. Being remanded until the next day, to keep up some semblance of proper procedure, he went away quite contentedly, only to return the next day and the next to repeat the same farce. At last both magistrate and constable began to look rather tired, while the prisoner, on the contrary, was quite at his ease. The wire was down between us and Winnipeg, and no advice could be obtained. So at last the constable, agreeing to forfeit his share of the fine, and the magistrate to take a time-bill on the contractor for the next section of the railway for the remaining twenty-five dollars, they let the man go.

Law is very like a sieve; it is easy to see through it, but one must be considerably reduced before he get through.—*Exchange.*

A newly appointed Irish court crier being ordered to clear the court-room, yelled out: "Now thin, all ye blackguards that isn't lawyers must lave the court."

In a case in Connecticut, last month, the judge ruled that certain evidence was inadmissible. The attorney took strong exceptions to the ruling, and insisted that the offered evidence was admissible. "I know, your honour," said he warmly, "that it is proper evidence. Here I have been practising at the bar for forty years, and now I want to know if I am a fool?" "That," quietly replied the court, "is a question of fact, and not of law, and so I won't pass upon it, but will let the jury decide."

A prisoner was arraigned for some offence against the criminal laws of the State, who stated he was unable to have a lawyer The court told him to select one of a number of young lawyers present to represent him. He contemptuously surveyed the group of legal tyros, and remarked that he preferred to plead guilty at once than be embarrassed with such counsel. This provoked a ripple of laughter from the bystanders, at the expense of the ignored lawyers. The court gave the prisoner the full term. Thereupon, the lawyers laughed, and "honours were easy."

In Lynchburg, Va., a distinguished member of the bar, appealing to the court for the discharge of his client, wound up with the statement that if the court sent him on further trial, a stain would be left on his character which could not be washed off by all the waters of the blue ocean and all the soap which could be manufactured from the "ponderous carcase of the Commonwealth's attorney." To this the ponderous attorney replied, that while he "deemed it foreign to the case at bar, he desired to advise the court, if they thought it advisable to boil his body into soap, they should look to the opposite counsel for the concentrated lye out of which to make it."

A Nautical Divorce.—A correspondent writes from Yokahama: "One of those curiosities of procedure which crop up at times in the most unheard of way, came under my notice recently and may interest you. It is that of a husband and wife on board the *Bullion*, one of our American ships in the course of her voyage from New York to Japan, pronounced by her worthy captain, arrayed for the time with the authority of the chancellor. The record of the proceeding, as entered by the captain upon the 'log' of the ship, is as follows: 'Feb. 6, at 7 p.m., lat. 40° 30' S., long. 158° 32' E., Charles Brown, cook, and Harriet Brown, stewardess, separated as man and wife, with their own free will and accord, dividing their clothes and signed clear of each other forever as man and wife, each taking separate rooms.'"

When the lamented Judge Manniere was on the circuit bench, a German from one of the interior towns of the county who had just been elected as justice of the peace, but had never tried a case, came into his court to witness a trial, so that he might know to proceed when he should be called upon to administer justice. It so happened that he was present during the last day of the celebrated Hopp's murder trial, and heard Judge Manniere sentencing Hopps to be hung. About ten days after this his first case came on for trial. It was upon a note of hand, and amounted to $12.25. Addressing himself to the defendant Hans, he said, "Stand up! What has the prisoner to say why the sentence of the court should

not be pronounced upon him?" The poor defendant, frightened by the solemn manner of the justice, said he had nothing to say. "Then," said the justice, "it is the sentence of the court that you pay to the plaintiff, John Dedrich, the sum of $12.25 and $2.30 costs, and may God Almighty have mercy on your soul."

A Non-plussed Judge.—An Irishman sold his farm and bought another in the same neighbourhood, and, in moving, he took the manure from his old farm to enrich his new one, and the purchaser sued him for so doing.

Upon the trial, the judge instructed the jury that, according to the law, "*manure is a part of the real estate*," and that they must, therefore, give a verdict in favour of the plaintiff for the value of the manure.

This so exasperated Pat, that he jumped up and addressed the court in an excited manner, as follows: "Do you say, judge, that manure is a part of the real estate?"

"Certainly," replied the judge, "as much as the soil."

"Now, judge, is not a cow personal property?"

"Yes," said the judge.

"And is not hay personal property?" "Yes."

"Well, now, thin, judge, will you please explain to the jury how one piece of personal property can go through another piece of personal property and come out real estate?"

J. York Sawyer was one of the early circuit judges of Illinois. He weighed about two hundred and fifty pounds, had a squint eye, was from one of the Eastern States, and prided himself upon his learning and dignity. When Springfield was a small village, he was holding court there in a log house, and had for his jail a log stable. In passing sentence upon a man for horse stealing, he said, "If such things are allowed, we could keep no horses in our stables, no cattle in our yards, no hogs in our pens, no chickens on our roosts," etc., etc.

A tall, lean, lank rail-splitter, who was standing in the crowd of sturdy pioneers, who had gathered in the log court-house to hear the sentence of the court pronounced upon the horse thief cried out at the top of his voice: "Hit him again, old gimlet-eye, he's got no friends here, we'll stand by you."

The judge feeling that his dignity had been offended, exclaimed: "Who said that? who said that?"

The rail-splitter, raising himself head and shoulders above the crowd, said: "This old hoss said it, sire."

Judge Sawyer said: "Mr. Sheriff, take that old hoss, and put him in the stable."

The sheriff obeyed the judge's order, and the poor rail-splitter had to remain in the log jail over night, because he dared, in a rough and honest way, break in and applaud the action of the judge in a matter in which the settlers were very much interested.

This question of the cost of litigation arises collaterally on the consideration of the claim of Mr. Doutre, Q. C., upon the Dominion Government, for services as counsel before the Fisheries Commission, which services he values at $50 a day, the aggregate being some $20,000, we believe. The Canada *Legal News* informs us that "Mr. Doutre deposed that in the test case of *Angers* v. *Queen Ins. Co.* he received $500 in fees, although he spent but two days in court. In another case, in which he obtained a $12,000 verdict he was three days in court, and received $1,800 in fees besides the taxed costs. In the case of *Grant* v. *Beaudry*, known as the Orange trial, he was paid $10 per hour. Mr. F. X. Archambault, of Montreal stated, that in the case of *Wilson* v. *Citizens' Ins. Co.* the amount claimed in the suit was $2,000, but he received $1,000 as a retainer, besides other fees. In the case of *Rolland* v. *Citizens Ins. Co.*, his retainer was $2,000. In three *capias* cases which were presented as one, and which lasted about a month, he received $2,800 altogether. In the criminal case of a woman charged with stealing silks, he received a retainer of $1,500. This client was merely admitted to bail. To defend a criminal case, which would not occupy more than two days, he had received $2,000." These amounts seem large, no doubt, but they are by no means unprecedented in this country. There are a number of counsel in the city of New York who command $250 dollars a day. There would seem to be no reason why a British lawyer should not be paid as much as a British physician, both standing equal in their respective professions; and a British jury recently gave Dr. Phillips a verdict of £16,000 damages for two years's loss of business.—*Albany Law Journal.*

SHYSTERS AND PETTIFOGGERS.

Chief Justice Ryan, of Wisconsin, in his address to the graduating class of the University of Wisconsin, June 22, 1880, thus speaks:—

"Behold the pettifogger, the blackleg of the law! He is, as his name imports, a stirrer-up of small litigation; a wet-nurse of trifling grievances and quarrels. He sometimes emerges from professional obscurity, and is charged with business which is disreputable only through his own tortuous devices. For the vermin can't forego his instincts, even among his betters. He is generally

found, however, and he always begins, in the lowest professional grade. Indeed, he is the troglodyte of the law. He has great cunning. He mistakes it for intelligence. He is a fellow of infinite pretence. He pushes himself everywhere, and is self-important wherever he goes; you will often find him in legislative bodies, in political conventions, in boards of supervisors, in common councils. He is sometimes there for specific villainy; sometimes on general principles of corruption, waiting on Providence for any fraudulent job. He is always there for evil. The temper of his mind, the habits of his life, make him essentially mischievious. In all places he is always dishonest. When he cannot cheat for gain, he cheats for love. He haunts low places, and herds with the ignorant. It is his kindly office to get them by the ears, and to feed his vanity and his pocket from the quarrels he incites and foments. He is in everybody's way, and pries into everybody's business. He meddles in all things, and is indefatigable in mischief. He is just lawyer enough to be mischievious. He is a living example of Pope's truth, 'that a little learning is a dangerous thing.' Among his ignorant companions he is infallible in all things. Sometimes he is reserved and sly, with knowing look, which gains credit for wisdom and character, for thinking all he does not utter. Generally he is loquacious, demonstrative of his small eloquence. Then his tongue is too big for his mouth, and his mouth too loose for truth. By his own account, he is full of law and overflowing. Among his credulous dupes he cannot keep it down. He knows all things; nothing is new to him; nothing surprises him; nothing puzzles him. But it is in the law that his omniscience shows best. His talk is of law incessantly. He has a chronic flux of law among his followers. He prates law mercilessly to every one except lawyers. He discourses of his practice and his success to the janitor of his office and the charwoman who washes his windows. He revels in demonstrative absurdity, and boasts of all he never did. He is the guide, philosopher and friend of vicious ignorance. He is the oracle of dulness.

"'And still the wonder grows,
That one small head can carry all he knows.'

"He hangs much around justices' courts. There he is the leader of the bar. But he finds his way into courts of record. In them he is a plague to the bar and an offence to the bench. He is flippant, plausible, captious, insolent. He is full of sharp practice, chicane, surprise, and trick. He is the privateer of the court; plundering on all hands on private account. He is ready to sell his client or himself. He is equal to all things, above nothing and below nothing. He is ready to be the coroner of the county or the Chief-Justice of the United States. He would be a bore if he were not too dangerous for that harmless function. He is a nuisance to the bar, and an evil to society. He is a fraud upon the profession and the public—a lawyer among clowns and a clown among lawyers.

"There is a variety of these animals, known by the classic name of Shyster. He has forced the word into at least one dictionary, and I may use it without offence. This is still a lower specimen: the pettifogger pettifogged upon; a troglodyte who penetrates depths of still deeper darkness. He has all the common vices of the family, and some special vices of his own. This creature frequents common courts and there delights in criminal practice. He is the familiar of bailiffs and jailors, and has a sort of undefined partnership with them in thieves and ruffians and prostitutes. These he defends or betrays, according to the exigencies of his relations with their captors or prosecutors. He has confidential relations with those who dwell in the debatable land between industry and crime. He is the friend of pimps and fences. He has intimacies among the vicious men and women. He is the standing counsel of dens and houses of ill-fame. He knows all about the criminals in custody, and has extensive acquaintance among them at large. He is conversant with their habits of life, and calls them familiarly by their Christian names. He prowls around the purlieus of jails and penitentiaries, seeking clients, inventing defences, organizing perjury, tampering with turnkeys, and tolling prisoners. He levies blackmail on all hands His effrontery is beyond all shame. He thinks all lawyers are as he, but not so smart. He believes in the integrity of no man; in the virtue of no woman. He loves vice better than virtue. He enjoys darkness better than light. His habits of life lead him by the dark lanes and dark ways of the world. He is the confidant of guilt. He is the Attorney-General of crime."

Law Society of Upper Canada.

OSGOODE HALL,

TRINITY TERM, 44TH VICTORIÆ.

During this Term, the following gentlemen were called to the Degree of Barrister-at-law.

FREDERICK WRIGHT.
EDWARD MORGAN.
WILLIAM HENRY BEATTY.
JOHN CANAVAN.
EDWARD MAHON.
ALEXANDER HENRY LEITH.
JOHN JOSEPH BLAKE.
CHARLES EDWARD HEWSON.
WILLIAM HODGINS BIGGAR.
WILLIAM HENRY POPE CLEMENT.
SKEFFINGTON CONNOR ELLIOTT.
PATRICK MCPHILLIPS.
WILLIAM BRUCE ELLISON.
JOHN STANLEY HOUGH.
MICHAEL ANDREW MCHUGH.
WILLIAM GEORGE EAKINS.
JAMES ROLAND BROWN.
RICHARD WORNALL WILSON.
JAMES EDWARD LEES.
JOSHUA ADAMS.
ROBERT SINCLAIR GURD.

(The names are placed in the order in which the Candidates entered the Society, and not in the order of merit.)

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates.

EDWARD LOCKYER CURRY.
WILLIAM ARMSTRONG STRATTON.
GEORGE SMITH.
ALEXANDER SUTHERLAND.
JOSEPH BURR TYRRELL.
WILLIAM JOYNT JAMES.
THOMAS HENRY GILMOUR.
THOMAS VINCENT BADGELEY.
HARRY LAWRENCE INGLES.
JAMES BURDETT.
GEORGE ROBSON COLDWELL.
HARCOURT JOHN BULL.
ISAAC NORTON MARSHALL.
WELLINGTON JEFFERS PECK.
ALVIN JOSHUA MOORE.
WILLIAM ARTHUR DOWLER.

Matriculants.

GEORGE HAMILTON JARVIS.
EDMUND JAMES BRISTOL.
W. K. MCDOUGALL.
ALFRED HENRY COLEMAN.
ARCHIBALD MCKELLAR.
STEPHEN O'BRIEN.
HARRY EARL BURDETT.
JOHN ANDREW FORIN.

Junior Class.

HORACE FALCONER TELL.
RICHARD J. DOWDALL.
DANIEL S. KENDALL.
GEORGE FREDERICK BELL.
ANGUS CLAUDE MCDONELL.
OLIPH LEIGH SPENCER.
SANDFORD DENNIS BIGGAR.
HARRY ANSON FAIRCHILD.
GEORGE CRAIG.
JAMES ARMSTRONG.
ARCHIBALD MCFADYEN.
WILLIAM ALFRED JOSEPH GORDON MCDONALD.
CHARLES MAIN BYGRAVE LAWRENCE.
COOTE NESBITT SHANLEY.
A. C. STEELE.
GUERET WALL.

And the following gentlemen passed the Preliminary Examinations for Articled Clerks :—

DAVID DUNCAN.
PETER YOUNG.
MATTHEW WILKINS.

By order of Convocation, the option to take German for the Primary Examination contained in the former Curriculum is continued up to and inclusive of next Michaelmas Term.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

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

All other candidates for admission as articled clerks or students-at-law shall give six weeks'