DIARY FOR MAY.

2. Sun....Rogation Sunday.
4. Tues...Supreme Court sittings.
9. Sun. ..First Sunday after Ascension.
11. Tues...Court of Appeal sittings begin. County Court sittings for York begin. First Intermediate Examination.
12. Wed...Second Intermediate Examination.
13. Thur..Examination for Admission.
14. Fri....Examination for Call.
16. Sun. ..Whit Sunday.
17. Mon. ..Easter Term begins.
18. Tues. ..D. A. Macdonald, Lieutenant-Governor of Ontario, 1875.
21. Fri....Confederation of B. N. A. Provinces proclaimed, 1867.
22. Sat. ..Earl Dufferin, Governor-General, 1872.
23. Sun. ..Trinity Sunday.
24. Mon. ..Queen's Birthday, 1819.
30. Sun. ..First Sunday after Trinity. Proudfoot, V.C. appointed, 1874.

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Canada Law Journal.

Toronto, May, 1880.

It was stated at a late meeting of the Church Association in England, that no less than $60,000 had been spent in prosecuting the notorious Mr. Mackonochie. The outlay should have been less, or the results should have been greater.

We are glad to know that a second edition of "Leith's Blackstone" is being prepared by Mr. Leith, Q.C., to whom we were indebted for the first edition assisted by Mr. James F. Smith, Barrister-at-law. It could not be in better hands, and its appearance will be gladly welcomed.

The Court of Appeal in England have held that, in questions regarding the piracy of a trade-mark, the *colour* of the marks cannot be taken into account but that the plaintiff must prove his case from a comparison of the uncoloured (*i.e.* black and white) diagrams: *Methall* v. *Vining*, 28 W. R. 330.

Lord Justice James is adding to legal terminology. In *Ex parte Morier*, 28 W. R. 236, he refers to what we used to call in the Privy Council a "Bonamee Account,"—that is, an account put by one man in another's name, merely for his own convenience. The reference evidently is to the good turn, one good friend (*bon ami*) does to another.

What with "annual rests," "wilful default," and the like, V. C. Knight Bruce was led to describe the position of a mortgagee in possession, as "the most unfortunate with which he was acquainted." This was also the view of the author

of the quaint epitaph, said to be inscribed on a Connecticut tombstone:

"Shed not the tear for Simon Ruggle,
For life to him was a constant struggle;
He preferred the tomb and death's dark gate
To managing mortgaged real estate."

The appeals set down for hearing before the Supreme Court during the last three terms were provided by the different Provinces in the following proportions:—From Ontario, 25; from Quebec, 16; from the Maritime Provinces, 23. We are not in a position to say what proportions these numbers bear to the volume of litigation in each, nor to the number of cases sent by each to England, but taking Ontario as the mean, the number from Quebec seems small, and that from the Maritimes would appear to be large. We might suppose that a delicate compliment is thereby intended to the Chief Justice of the Court.

We are indebted to the *Solicitors' Journal* for a note of a very important ruling in criminal practice which took place at the Leeds Assizes, upon the question whether a prisoner could both speak himself and have his counsel also to speak for him. Mr. Justice Hawkins, after conferring with Mr. Justice Lush, held as follows:—"I think that though there are *dicta* of individual judges to be found in the books that a prisoner when defended by counsel is not at liberty to make a statement to the jury, I ought not to be bound to any such *dicta*, because there is no decision of any Court of criminal appeal on the point. As a general principle a prisoner may make his statement, and give his version of the transaction in respect of which he stands charged. I shall, therefore, though counsel appears for the defence, admit the statement of the prisoners." In this, case after the end of their counsel's address, the prisoners made their statement to the jury. The *Solicitors' Journal* suggests that the better course would have been to allow the statement to be made first, so as to enable the prisoner's counsel to comment on it: 24 Sol. J. 266.

We have heard of several cases in Ontario involving questions of testamentary capacity, in which it seems to us that the judges have been too severe in commenting on the evidence of solicitors and subscribing witnesses who are called to prove the invalidity of the will. Many of the witnesses in such cases are unlettered men, who have no notion that they are doing wrong in attesting the instrument, though they may not be satisfied that the testator understands what he is doing. In cases of this kind the evidence is nearly always very contradictory, and for the guidance of solicitors we cite from the *Solicitors' Journal* the ruling of Mr. Justice Hawkins in a case lately tried by him. He says, "that when there is a doubt of the capacity, the more prudent course is for the lawyer to prepare the will, making also a memorandum of the state in which he found the testator. Supposing, he adds, a man has a large estate to leave, and desires to make a will, a solicitor may come in and say 'I take it upon myself to determine that this man is not in a fit state to make a will.' It is a question whether it would not be a great deal better for him to prepare the will, at the same time making a note that the man was not in a fit state to make a will." 24 Sol. J. 321.

Apropos of the late rising of the Ontario Parliament, we find a letter written by Charles Dickens to Mr. Rawlinson, C. B., which embodies views that would have been considerably intensified if he had enjoyed the privilege of life in the

Dominion of Canada. As it bears on the opening of Parliament ceremonial by the Queen, and embodies some views of Parliament by the great novelist, it may both interest and amuse :—

"TAVISTOCK HOUSE, Jan. 25, 1854.

"MY DEAR SIR,—I assure you that we are all extremely sensible of your kind remembrance and much indebted to you for your invitation; but though reasonably loyal, we do not much care for such sights, and consequently feel that you ought to bestow the places you so obligingly offer us on some more deserving objects. The last ceremony of that kind I ever saw was the Queen's coronation, and I thought it looked poor in comparison with my usual country walk. As to Parliament, it does so little and talks so much, that the most interesting ceremony I know of, in connection with it, was performed (with very little state indeed) by one man, who just cleared it out, locked up the place, and put the keys in his pocket.

"Very faithfully yours,
"CHARLES DICKENS.

"Robert Rawlinson, Esq."

A Bill has lately been introduced into the English Parliament by the Lord Chancellor Cairns, providing for the scale of conveyancing charges to solicitors. It is left to the judge to make orders for regulating the remuneration by a rate of commission or percentage, having regard to all or any of six considerations: 1. The position of the party for whom the solicitor is concerned—whether as vendor or purchaser, lessor or lessee, &c. 2. The place, district, and circumstances at or in which the business, or part thereof is transacted. 3. The amount of the capital money, or of the rent to which the business relates. 4. The skill, labour, and responsibility involved therein on the part of the solicitor. 5. The number and importance of the documents prepared or perused, without regard to length; and, 6, the average or ordinary remuneration obtained by solicitors in like business at the passing of the Act. These considerations seem to exhaust all matters material to be known and weighed in order to formulate a scale of conveyancing charges, the necessity for which is just as great here as in England. There is, perhaps, one other local consideration, which so long as the Attorney-General remains supine, ought to be regarded in Ontario—that is the minimum for which the home-bred and self-taught conveyancer will undertake the like work, and the chances there are of the instrument framed by him effectuating the intention of the parties.

Mr. Morley's interesting life of Edmund Burke, in the "English Men of Letters," Series, has probably caused many to turn with fresh interest to the remains of that high-minded orator, philosopher, and statesman. Although Burke soon himself forsook the study of law for the more congenial sphere of political life, he has left evidence in one place, at least, of the admiration with which he regarded it. In his speech on American taxation occurs a passage, which in able hands might well be expanded into an instructive and interesting essay. Speaking of Mr. Grenville, he says:

"He was bred in a profession. He was bred to the law, which is, in my opinion, one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding, than all the other kinds of learning put together; but it is not apt, except in persons very happily born, to open and to liberalize the mind exactly in the same proportion."

It may easily be conceded that the study and practice of law, if pursued exclusively, would have a narrowing effect on the mind, tend to contract the sympathies, and encourage over-much that

spirit of system which Bacon in his "Novum Organum" (App. 45), points out as one of the standing snares of the human intellect. But on the other hand there is no study which has so many kindred studies to which it naturally leads, and which it illustrates, while in turn it is illustrated by them. History, especially Constitutional and Legal History,—Physiology, in connection with Medical Jurisprudence, and even Metaphysics, are all of them connected with and useful aids to the study of law. Pursued in connection with it, they immensely add to its interest, and may turn what would, otherwise perhaps, be an irksome profession, into an elevating and pleasing pursuit. We, therefore, cannot but wish well to those who are urging the re-establishment of the law school, provided the requisite funds are at hand. It should never be said, if it can be avoided, that a desire for aid to a higher intellectual life in the rising generation remained unsatisfied.

A correspondent remarks that the "Law Society has gone largely into the manufacture of new Barristers out of old Attorneys"; and suggests that it may be attributed to the N. P. What those mysterious letters may mean, we are unable, in our editorial capacity, to fathom, and Abbott's Legal Dictionary gives us no information on the subject; but we are not quite prepared to agree with our correspondent that the matter he refers to is altogether a "growing evil." It must be remembered that in this country the two professions are practically united, and this union must be taken with its almost necessary incidents. It is true that the standard of examinations for the Bar is somewhat higher than that for Attorneys, though, after all there is no great difference; but it is also true that the majority of those practising as barristers and attorneys, would, we think, be unable to give a very good account of the examination papers required for either one or the other, although they would, probably, from experience gained by practice, be more likely to conduct their client's business satisfactorily than would a newly fledged barrister. We are not prepared, of course, to say that every attorney should, as a consequence, and as a matter of course, be called to the Bar when he so desires it; but there is no good reason that we know of, why he should not be called if his character and attainments justify what may be termed promotion to the Bar. Every case must stand, necessarily, on its own merits, and we are not, at present, aware there has been any marked departure from what might be considered a wise discretion in the premises.

PRACTICE CONCERNING AWARDS.

Summary jurisdiction to set aside awards was first conferred upon the Courts by 9 & 10 Will. III. cap. 15 which enabled any of the parties to the arbitration to have the agreement to refer made a rule of Court. Under this statute, however, it was necessary for the parties "to insert such their agreement in their submission" (sec. 1). This provision was changed by the English Common Law Procedure Act of 1854 (sec. 17), which provided that the submission to arbitration might be made a rule of Court unless it contained words purporting that the parties intended that it should not be made a rule of Court. This was copied into our Common Law Procedure Act, and appears now in the Revised Statutes (cap. 50, sec. 201). The power to interfere summarily was supposed and until very

recently held only to apply, to cases of reference by consent of parties, and it was thought that where the reference was under the special power of an Act of Parliament (as in the case of expropriation of ands by railway companies) the statute of William did not apply, and that the only remedy was by filing a bill in Chancery to get rid of the award, if the circumstances justified that course: see per Richards, C. J. C. P. in *Widder v. Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. at p. 429. But by a recent decision of the Court of Appeal in England the provisions as to summary jurisdiction have been held applicable to railway references under the statute: *Rhodes* v. *The Airedale Commissioners*, L. R. 1 C. P. D. 402. It is said there that the appointment of an arbitrator is equivalent to a reference by consent. The Court of Appeal in this Province has declined to extend this authority to the case of an arbitration arising from one railway crossing another, because there by the terms of the Railway Act the arbitrators are to be nominated by one of the judges (R. S. Ont. cap. 165, s. 9, sub-s. 15). This decision, *The Great Western R. W. Co., and the Credit Valley R. W. Co.*, is not yet reported.

The Legislature of Ontario have lately extended the summary jurisdiction of the Courts over awards still further. An appeal can now be had from awards in all cases of compulsory reference, and in all cases of voluntary reference, where it is agreed by the terms of the submission that there shall be an appeal. (See R. S. Ont. c. 50, ss. 192, 195, 197 and 205; *Walker* v. *The Beaver and Toronto Mutual Insurance Company*, 30 C. P. 211.) The first case of appeal from an award under this Section was *Re The Canada Southern Railway Co. and Norvall*, 41 U. C. R. 195, when Harrison. C.J., laid it down that it was not the duty of the Appellate Court to reverse the finding of the arbitrators on the weight of evidence merely, but that it was necessary to establish some misconduct, legal or otherwise, or the disregard of some legal principle. Inasmuch as the Statute giving the right of appeal indicates that the practice upon such appeal shall be the practice which obtain in appeals from the report of a Master in Chancery, it seems proper enough to hold that there should be no interference with the finding when there is evidence to support it,—as in the well-established rule by the Equity bench, in appeals from the Master. The rule laid down by Chief Justice Harrison has been approved and followed in very recent cases by Osler J., *Re The Hamilton and North-Western R. Co., and Boys*, 44 U. C. R. 626, and *Re Colquhoun and the Town of Berlin*, Ib. 631. In the former of these cases this learned Judge, whose authority on matters of practice is of great weight, intimates his view of the proper mode of appealing against the award in railway matters,—that it should be by rule *nisi* and upon reading the evidence taken by the arbitrators and by them transmitted to the Court.

It has been decided that there can be no rehearing by the full Court by way of appeal from the decision on an award given by a single judge: *Crain* v. *Trustees of Collegiate Institute of Ottawa*, 43 U. C. R. 498. The only remedy is a direct appeal to the Court of Appeal under the provisions of R. S. Ont. c. 38, sec. 18.

LAW SOCIETY.

HILARY TERM, 43RD VICTORIÆ.

The following is the *resumé* of the proceedings of the Benchers in Hilary Term, 1880, published by authority of Convocation:—

FEBRUARY 2nd, 1880.

The Report of the Examiners on the Ex-

amination of Candidates for Call was received and read, reporting that the following gentlemen had passed a satisfactory examination, namely:—

Messrs. G. M. Greene, A. V. McCleneghan, J. H. Long, P. A. Macdonald, M. J. Gorman, W. R. Hickey, W. L. Walsh, I. B. Rankin, W. Pattison, J. T. Parkes, L. Harstone, J. J. W. Stone, C. S. Rankin, H. Comfort, C. A. Kingstone, W. Mahaffy, G. W. Grote, M. S. Fraser, H. E. Morphy, and W. Lawrence.

The Report of the Examiners on the Examination of Candidates for admission as Attorneys was received and read, reporting that the following gentlemen had passed a satisfactory examination, namely:—

Messrs. G. M. Greene, A. V. McCleneghan, H. S. Lemon, T. W. Crothers, J. B. McLaren, M. J. Gorman, D. J. Downey, J. T. Parkes, C. A. Kingstone, A. C. Shaw, A. W. Gundry, D. McLean, J. H. Long, M. Fraser, H. D. Sinclair, F. Rogers, P. S. Ross, F. J. Brown, C. A. Myers, I. R. McColl, F. W. Harcourt, and H. B. Weller.

Ordered, That Messrs. McCleneghan, Gorman, McLean, Fraser, and McColl, do receive their certificates of fitness.

Ordered, That the cases of Messrs. Greene, Lemon, Crothers, McLaren, Parkes, Kingstone, Gundry, Long, Sinclair, Rogers, Ross, and Myers, be refered to the Committee on Legal Education, for report.

Ordered, That Mr. Downey receive his certificate on filing the proper certificate of service, signed by Mr. S. R. Clarke, and that Mr. Shaw receive his certificate on filing a proper petition.

Ordered, That Mr. H. B. Weller receive his certificate of fitness on filing the proper certificate of service, signed by Mr. C. A. Weller, and that the cases of Messrs. Harcourt and Brown be considered at the next meeting of Convocation.

The Report of the Examiners on the first Intermediate Examination was received and read.

Ordered, That the following gentlemen be allowed their first Intermediate Examination, namely :—

Messrs. W. Burgess, L. F. Heyd, E. T. English, H. F. Lee, I. W. Binkley, L. G. Drew, R. C. Hays, J. P. Fisher, F. A. Campbell, A. E. H. Creswicke, R. Tooth, D. I. Donahue, B. C. McCann, R. McLean, G. T. Ware, W. I. Shaw, A. H. Clarke, R. A. Porteous, G. T. Jelfs, I. B. Hands, J. C. T. Bown, J. G. Wallace, R. Patterson, W. Campbell, I. Canniff, I. I. A. Weir, I. R. Taylor, I. H. McCollum, H. S. Blackburn, E. A. Lancaster, J. W. Elliott, and A. McKenzie.

Ordered, That W. H. Hudson be allowed his first Intermediate Examination as a Student-at-Law.

The Report of the Examiners on the second Intermediate Examination was read.

Ordered, That the following gentlemen be allowed their second Intermediate Examination, namely :—

Messrs. E. Bodwell, T. D. Cumberland, E. R. Brown, C. Miller, E. A. Peck, R. S. Neville, J. Birnie, A. Craddock, R. Taylor, W. Steers, A. Dawson, D. F. McWatt, C. Campbell, J. A. McCarthy, I. B. Humphrey, E. G. Porter, J. V. May, W. A. Bishop, A. Stewart, W. B. Carroll.

The Report of the Legal Education Committee on the Primary Examination was received and read.

Ordered, That the following gentlemen be entered on the books as students, namely:—

GRADUATES OF UNIVERSITIES.

Peter L. Dorland, Lewis Charles Smith, Matthew M. Brown, Peter D. Crerar, Rufus Adam Coleman.

MATRICULANTS OF UNIVERSITIES.

Andrew Grant, James Macown, Francis R. Powell, John Tytler, Thomas Johnston.

JUNIOR STUDENTS.

R. V. Sinclair, H. Cowan, W. B. Raymond, W. A. Matheson, A. B. McBride, F. Hornsby, W. A. Perry, J. Denovan, M. J. J. Phelan, A. E. Overell, R. Smith, H. Morrison, J. McPherson, A. K. Goodman, J. A. McLean, T. J. F. Hilliard, R. Gunn, P. Simpson, J. Geale, A. E. Miller, John Greer, D. F. McMillan, C. A. Crawford, F. E. Cochrane, W. Pearce, A. Gillespie, G. A. Kidd.

Ordered, That the following gentlemen be entered on the books as Articled Clerks, namely :—

G. R. Vannorman, Jr., E. M. Yarwood, J. Highington.

Ordered, That Mr. Eddis be appointed Auditor of the Society for 1880.

The Report of the Legal Education Committee, on the cases of Messrs. F. E. Redick and George McLaurin, was read and adopted.

The Report of the same Committee, on the subject of the restoration of the Primary Examination for Easter and Trinity Terms, was received and read, and ordered for consideration at the next meeting of Convocation.

The Balance Sheet for 1879, was read by the Secretary.

Ordered, That it be referred to the Auditor.

The letter of Mr. Hutchison, with enclosures, as to the arrangement between the London Loan Company of Canada and its Solicitor, was read, and referred to the Committee on Discipline, to report whether the paper disclosed a *prima facie* case for action on the part of Convocation.

The Report of the Finance Committee was [received, read, and ordered for consideration at the next meeting of Convocation.

The question of the erection of Assize buildings on the Osgoode Hall grounds was adjourned to Saturday, the 7th inst.

Mr. Robertson moved that Mr. Maclennan be appointed a Committee to draw the attention of the Attorney-General to the defective character of the short-hand writers' notes of evidence furnished to the profession.

The Secretary presented a return, pursuant to Mr. Irving's motion, of the names of those who have paid and made default in payment of their annual fees.

The following gentlemen were then called to the Bar, namely :—Messrs. Greene, McCleneghan, Long, Macdonald, Gorman, Hickey, Walsh, Patterson, Parkes, Stone, C. S. Rankin, Comfort, Kingston, Mahaffy, Grote, Fraser, Morphy, and Lawrence.

Mr. Martin gave notice that when the report of the committee on Legal Education came up for consideration, on the 3rd inst., he would move that the rule allowing students of Universities to be admitted as Students-at-Law, or Articled Clerks on presentation of their certificates, be rescinded.

Mr. Leith gave notice that he would move to add such works on Natural Philosophy and Science as Convocation or the Legal Education Committee might approve of, in lieu of German, as a subject for examination in the Primary Examinations, or to add such works as an additional optional subject. The change proposed to come into force in Michaelmas Term next.

February 3rd, 1880.

The cases of Mr. Brown and Mr. Harcourt were considered.

Ordered, that they receive their certificates of fitness.

The papers of Mr. James Colden Dalrymple, an Attorney of more than ten years' standing, who applied for call to the Bar, were laid before Convocation,

Ordered, That Mr. Read, Mr. Leith, and Mr. Mackelcan be appointed a committee to examine and report in this case, under the rules for special cases.

The Legal Education Committee reported on the cases of Messrs. Myers, Greene, Lemon, Crothers, McLaren, Kingston, Long, Sinclair, and Ross,

Ordered, That they receive their certificates of fitness.

In the case of Mr. F. Rogers, his time not having expired, and not expiring during term, his petition could not be entertained.

Ordered, That Messrs. Gundry and Parkes receive their certificates of fitness.

The report of the Finance Committee relating to the grant to the Hamilton Law Association was received and read.

Ordered, That the Initiatory grant to the Hamilton Law Association, of $432, be paid.

Mr. Ferguson was unanimously elected a Bencher, in the place of Mr. Hodgins, resigned.

The report from the Solicitor to the Society referring to the cases of Attorneys and Solicitors in arrears with their annual fees, was presented, in accordance with Mr. Irving's motion of Michaelmas Term, last,

Ordered, That Mr. Ferguson be appointed a member of the Library and the Legal

Education Committees, in the place of Mr. Hodgins, resigned.

February 7th, 1880.

The report of the Legal Education Committee on the case of A. B. Ford, recommending that his petition be granted, was adopted.

A letter from Carswell & Co., in reference to the printing of the Reports, was read and referred to the Committee on Reporting for enquiry and report with suggestions for improvements in the system of reporting.

The petition of Messrs. Perdue and Rolph, the Chamber Reporters, and the report of the Committee on Reporting, were received and read.

Ordered that the salaries of the Chamber Reporters be fixed at $300 per annum each, to commence on the 1st instant.

The report of the special committee on the case of Mr. J. C. Dalrymple, was received and read.

Ordered, That Mr. Dalrymple be called to the Bar.

The report of the Committee on Discipline on the letter of Mr. Hutchinson was adopted.

The letter of Mr. Holmested, Registrar of the Court of Chancery, and the certificate of the taxing officer in reference to certain proceedings in the suit of *Austin* v. *Terry* were read.

Ordered, That the papers be referred to the Committee on Discipline for enquiry and report.

The report of the Finance Committee was taken up.

Eighth clause as to survey and plan of Osgoode Hall property.—Carried.

Eleventh clause as to prevention of theft of articles of clothing from the Hall, and the appointment of a hall porter was referred to the Library and Finance Committees to confer upon and report.

The estimates for 1880 were read by the Chairman of the Finance Committee, and considered.

Mr. Irving moved the adoption of the estimates of the Library Committee.—Carried.

The report of the Finance Committee as to the first year's grant to the Hamilton Association was considered and adopted.

Mr. Leith moved that the seventh edition of Arnot's Elements of Physics, by Bain & Taylor, and Somerville's Physical Geography, be substituted for the German works as subjects for examination in the primary examinations.—Carried.

The yearly balance sheet, with details of the amounts disbursed and received for 1879, as audited by the Auditor, were laid on the table.

Mr. Mackelcan moved that the statement in detail of receipts and expenditure for 1879 be printed, and furnished to each member of the Law Society, in accordance with the statute.

Mr. Crickmore moved the following rule, That a fee of one dollar be paid for each Certificate of Admission of a Student-at-Law, issued to such student, and a fee of two dollars for each Diploma of Barrister-at-Law, issued to such Barrister. Carried.

Mr. Crickmore presented the Report of the Committee on Legal Education on the subject of restoring the Primary Examination in Easter and Trinity Terms, and moved the following rule, That Primary Examinations for Students-at-Law be held in each Term during the year. Carried.

The Report of the same Committee on the curriculum was taken up and considered, and Mr. Crickmore moved a rule in accordance therewith, which was carried.

Mr. Crooks gave notice that he would move for the reconsideration and passing of the following resolution, proposed during last Term, but which did not then carry, namely:—

Resolved, That this Society do apply to the Legislature for authority under which, and subject to such rules as the Society may adopt, the Society may permit any person who has obtained the degree of Bachelor of Laws in the University of Toronto, or other College possessing University powers in this Province, and after having passed such examination, and complied with such other conditions as the Society may prescribe, to be called to the Bar and admitted as an attorney after a period of four years'

study or service under articles, as the case may be, which period may have elapsed either before, or concurrently with, the passing of the examinations for such degree.

Mr. Meredith moved, That the Reports, including the back numbers of the current volume, at the time of formation, be supplied to each County Library Association formed under the Rule in that behalf. Carried.

Mr. Maclennan moved, That Mr. Ferguson be added to the Select Committee to consolidate the rules and regulations of the Society.

Friday, February 13th.

The papers of Mr. Jacobs, an attorney of ten years' standing, were laid before Convocation. Mr. Read moved, That a committee, composed of Mr. Leith, Mr. Ferguson, and the mover, be appointed to examine Mr. Jacobs. Carried.

The Report of the Library Committee was received, read and adopted.

Mr. Crooks moved the resolution, notice of which had been given on the 7th instant.

On a division the motion was lost.

The Report of the Committee on Discipline on the case of a member of the Bar which had been referred to them by Convocation, was received, read and adopted.

Mr. McCarthy moved, that the conduct of Mr. ———, a Law Student, as stated in the foregoing report, be referred to the Discipline Committee for consideration and investigation. Carried.

The Committee on Discipline, in accordance with the above motion, withdrew, for the purpose of carrying on the investigation ordered.

The special Committee appointed to examine Mr. Jacobs, reported that he had passed his examination satisfactorily.

Ordered, That he be called to the Bar.

The Committee on Discipline reported on the case of the Student-at-Law referred to them, and their report was adopted.

Mr. Jacobs was called to the Bar.

A second letter of the Registrar of the Court of Chancery was read and referred to the Committee on Discipline.

A petition from Mr. Mills on the subject of his fees was referred to the Finance Committee with power to act.

In the matter of the Law Student reported upon by the Committee on Discipline, as before stated, it was ordered, that the matter be referred to the same Committee to consider and report what punishment can, and ought, to be inflicted in the premises. The Committee to report next Term.

Convocation adjourned.

SELECTIONS.

PRESUMPTIONS IN CRIMINAL CASES.

The first enquiry before us, when entering on the discussion of presumptive proof, is that which relates to what is called "circumstantial" as distinguished from what is called "direct" evidence. Is there any "direct" evidence that is not "circumstantial"?

One of the simplest cases of what is called "direct" evidence, is that of a witness who testifies that he saw a particular person at a particular time. Let us note the several elements of incertitude in such a statement:

1. The *percipient powers of the witness may be defective.* We have heard lately a good deal about colour-blindness, and it is stated, on high scientific authority, that about eight per cent. of men are deficient in the capacity of distinguishing green from red. No man, it is urged, should be appointed to any position in which it is important to decide upon particular colours, *e.g.*, no man should be appointed sailing officer of a ship, or switch-tender on a rail road—without being first examined as to his capacity to distinguish colours. But is there not, with some persons, a want of capacity to distinguish faces? Is not this capacity, in other words, very unequally distributed? General Scott, it is said, used to be able to remember every soldier with whom he had any personal acquaintance; and of a great English politician, the first Duke of Wharton, it is stated, that on his annual electioneering campaign, which extended over three or four counties, he would not only remember the face of every voter whom he had previously met, but

knew when to ask whether the boy of one of them, born five years before, was yet in breeches, or whether the daughter of another, born a little earlier, was yet out of school. If there should be these variations in the capacity for distinguishing likenesses, and in individuating family incidents, it is not strange that this capacity should be in some persons all most absolutely suspended, and in others should become morbidly active. If so, we can understand how it is that we have so many extraordinary negations of identity, and so many equally extraordinary affirmations of identity. Two witnesses, one peculiarly dull in the exercise of this perception, the other peculiarly acute, are looking on at a riot, such as that led by Lord George Gordon, or that in Philadelphia in 1844, in which a series of Roman Catholic churches were burned. A man is seen figuring conspicuously in setting fire to a building. The flames cast a distracting light on his face, so as to exhibit it vividly, and yet at the same time in new and flickering expressions. The obtuse witness does not see in him a likeness to anybody. The witness gifted with an acute perception of likenesses, sees in him one, if not two, persons whom he had seen before.

"I cannot see the speaker, how with you?"
"Not see the speaker? Why I now see two."

Such was a supposed colloquy between Pitt and Dundas when, after a dinner in which each had taken too much port-wine, they entered the House of Commons. The excitement had produced contrary effects; the one could see nobody at all in the chair; the other saw two persons instead of one.

May we not, in view of what we call *face-blindness*, or, in other words, in view of the occasional abnormal distribution of the faculty of detecting likenesses, explain what is otherwise inexplicable both in history and in jurisprudence? "The popular belief at Rome," says Macaulay, "seems to have been that the event of the great day of Regillus was decided by supernatural agency. Castor and Pollux, it was said, had fought, armed and mounted, at the head of the legions of the commonwealth, and had afterwards carried the news of the victory with incredible speed to the city." * * "How the legend originated cannot now be ascertained; but we may easily imagine several ways in which it originated; nor is it all necessary to suppose, with Julius Frontinus, that two young men were dressed up by the dictator to personate the sons of Leda." St. James was in like manner seen charging at the head of more than one Spanish army, and Whalley, the regicide, appeared more than once as a supernatural ally among the Puritan soldiers, in their early conflicts with the Indians.

In the court room these abnormal conditions of the perceptive powers have been frequently illustrated. After the disappearance of Dr. Parkman, when public curiosity was greatly strained on the question whether he had been seen after the day on which it was alleged he had been murdered, several entirely honest witnesses were convinced that they had seen him in some of his old haunts at the time when, there is now no question, he was dead. Numerous have been the persons who, since the disappearance of Charlie Ross, have honestly declared that they recognised the lost child in places so remote from each other, and at times so close, that it is clear that some of them, at least, were mistaken. The same remarkable aberration of the perceptive powers was illustrated in the trials consequent on the Lord George Gordon riots, and on the Philadelphia riots in 1844, already noticed. In each of these cases the collisions were brought about by intense religious animosity. There was a conviction among certain classes of Protestants, and especially among those from the north of Ireland, that the Roman Catholics were about to rise to murder the foes of their Church, and that certain well-known and conspicuous Roman Catholics were to be foremost in the work of blood. There was a conviction among certain classes of the Roman Catholics that certain prominent Protestant leaders were engaged in preparing for a slaughter of Roman Catholics, and the destruction of Roman Catholic churches. When the leading rioters were tried, it is remarkable how ubiquitous these champions, on both sides, are sworn to have been, and yet at the same

time what vanishing properties they appear to have possessed. In the Philadelphia case, for instance, when the Protestant rioters were on trial, witnesses from the opposite ranks were found in abundance to testify to the activity of certain leading Protestant agitators in the fray; which participation was negatived by witnesses for the defence. The same condition of things was exhibited when the Roman Catholic Rioters were on trial; and it was noticed that one prominent and very obnoxious Roman Catholic alderman was sworn to have been conspicuous in so many distinct operations of mischief, that this very multiplicity of inconsistent employments gave strong corroboration to the testimony of his friends that during the whole of the riots he kept quietly at his home. The same observation may be made as to the English prosecutions of the Roman Catholics, under the auspices of Titus Oates. That Oates knowingly perjured himself there is no question. But there were other witnesses for the prosecution whom we cannot so readily dispose of, as they were persons whose honesty of purpose, whatever we may say of their susceptibility to excitement, was unquestioned and unquestionable. The only solution is that here proposed—weak capacity for the perception of identity, acted on by powerful distorting prejudices. The mental eye, never very accurate, is overstrained. It is feared, or hoped, or even believed, that a particular person will be in a particular place. Somebody else is converted into that particular person.

Are such transmutations or idealizations of appearances dependent upon public excitement, as in the cases just mentioned? It would be fortunate for public justice if they were, since in this way our distrust would be limited to cases which involve public excitement. But so far from this being the case, we find that the same deranging and transmutive influence is exercised, on many minds, by an intense personal longing. There are few impostors, striving to seize upon some vacant chair in a desolate household, that have not had at least some sort of temporary recognition of this class. We have before us a French trial, of which the basis was the disappearance of a young girl from a peasant's home. Two years afterwards, a girl, much resembling the lost child, made her appearance in the neighbourhood, and was greeted by some of the neighbours as the lost child re-appeared. The new-comer, not originally an impostor, but under the influence of one of those not unfrequent physical conditions in which self-deceit and epidemic delusion mingle, assumed the part thus assigned to her, and appeared in the bereaved home. The strangest part of the procedure was that she was welcomed by the family as really the person she claimed to be; and it was not until months had passed, and a series of counter recognitions sprang up from the family to which she really belonged, that the delusion was dispelled.

Lady Tichborne's recognition of the claimant as her lost son is a more familiar illustration of the same phenomenon. Her vision had been for years strained in one pursuit, that of the boy whom she reproached herself with having treated capriciously, and who had sought, in another continent, the home of quiet which he had been denied in his mother's house. She was prepared to receive in the vacant seat any one who had any plausible claim to it. She could not believe her child was dead. She was ready to seize upon any trifling indication that pointed out the claimant as her child. Certainly the claimant was very different from what her child would probably have been had he lived. But she eagerly desired that he should prove to be her child, and what she eagerly desired she believed. Of her honesty, there can be little doubt. There can be little doubt, also, that her perceptive powers had become so distracted by this morbid and passionate longing, and by this prolonged belief in his re-appearance, against all probability, that her recognition was a delusion.

There is also an instinctive tendency in many minds to see a person in a place with which he has usually been associated. The effect of this, in its most unshackled operation, we observe in dreams, in which we fill familiar scenes with persons whom we recollect as having in former times occupied them, no matter how long those persons may have been in the grave. Of

the operation of this delusion we have had several illustrations in forensic investigations, "Who did you see at the bank at the time?" is a question asked a witness on a prosecution against a bank clerk for embezzlement. "I saw A, B and C, at their respective posts." Now it turns out that A was not at the bank on the particular day, and the testimony of the witness is impeached on the ground, "*falsus in uno, falsus in omnibus.*" Yet the witness testified only what he really believed; and what is more, it is impossible for us to scan any long piece of testimony descriptive of a particular scene without finding in it one or more similar cases of filling in of details. In other words, when we recall an incident, we recall its usual conditions. In this way we can explain some of the conflicts as to identity. A, half awake, hears a noise like that of a burglar at an outside door. B, a suspected burglar, is known to be prowling about the neighbourhood, and on looking out of the window, amid shifting shadows, or perhaps in the person of a visitor haunting covertly, though not burglariously, the kitchen, A imagines he sees B. B's friends, however, are accustomed to see him in a particular alehouse at this hour, in which he is as much of an institution as the chair on which he sits. Some one of them looks in at the door at the usual hour, sees the group collected, and fills it up with its usual ingredients. Both A's testimony and that of the looker-in at the ale-house, turn out to be untrue. B was neither at the house of A, at the time, nor was he at the ale-house. Yet both witnesses testified only to what was an honest belief.

2. *There may be wilful perjury.* In some relationships, to certain classes of minds, perjury may be what Bacon called revenge, a sort of wild justice. Two years ago, the *London Quarterly Review*, a journal not among those distinguished for an advocacy of loose morals, when reviewing Lord Melbourne's life. and on commenting on Lord Melbourne's repeated assertions of Mrs. Norton's innocence of the criminal relations to him with which she was charged, told us that "according to the received code of honour when a lady's reputation is concerned," she is to be sworn out of difficulty by her paramour; and we are elsewhere told that it is as much a part of the profession of a man of gallantry to perjure himself in court in order to get rid of the consequences of a seduction, as it is to perjure himself to his victim in order that the seduction may be accomplished. And in the *Quarterly Review* such oaths are likened to that of "the loyal servant, who, in 1716, when twitted with having sworn falsely to save Stirling of Kerr's life, said he would rather trust his soul with God than his master's life with the Whigs." If we should judge from some of the recent English election cases, we might conclude that this preference still continues, and that the reluctance to trust a master's soul to Tories is as great as is the reluctance to trust a master's soul to Whigs. Bribery disqualifies; bribery is an indictible offence; bribery is shown to have been lavishly employed; but the agent who employs it is a Mr. Smith or a Mr. Jones, who never was heard of before or after the election, whom nobody on either side employed, and whom nobody on either side knew. And in our own inquiries into questions of bribery, the identity of the persons bribing is either clothed in the same mystery, or, when certain persons are identified as being concerned in the illegal act, these persons uniformly swear they know nothing about it. So generally is this the case that it is now recognised that no case of bribery can be proved, unless (1) by some one of the parties having some great pecuniary or political inducement to disgrace his associates; (2) by some innocent bystander fortuitously hearing part of the transaction; or (3) by extrinsic facts from which a case of guilt can be inferred. Nor is it in election transactions, or partisan strifes, or adulteries, alone, that there is this temptation to perjury. There is no imaginable attitude in which a witness can be placed in which he is not more or less tempted to testify to that which is false.

Are we, however—such is the natural inquiry which presents itself—to reject all testimony as tainted, and fall back upon a sort of legal agnosticism? By no means. The conclusion, indeed, is that there is no fact that can be demonstra-

ted, because there is no witness, the truth of whose statements is not dependent for credibility more or less upon his character, his capacity and opportunities for observation, his freedom from prejudice. In other words, to take up again the question of identity, which we have here selected as the simplest to which our attention can be turned, when a witness says, "I saw A at a particular place, at a particular time," this statement is circumstantial, because it depends upon the intelligence, fairness, and means of observation of the witness.

3. We have just been dwelling on what may be called the *subjective* factor in credibility. We now turn to the objective factor. *There may be two persons so apparently alike as to deceive an ordinary observer.* In the Tichborne prosecution, not only do we encounter a number of witnesses confident that the claimant was Roger Tichborne, but there was a mass of testimony to the effect that the claimant was a third person, not Arthur Orton, who he probably really was, but Castro, an Australian bushman, who was certainly neither Orton nor Tichborne. And though cases of close similarity among living persons are very rare, such is far from being the case with the dead. It is extraordinary how much confusion there is as to the identity of the remains of persons only recently deceased. Among the sad incidents of the morgue, not the least sad is the way in which, sometimes, several distinct relationships are set up for one corpse. Two or three women have been known to swear positively, and apparently honestly, that a particular body was that of a deceased husband. We are not without illustrations of the same confusion in our forensic history. In Udderzook's case,* one of the most striking in the records of disputed identity, the deceased was killed in reality, in order to perpetrate an insurance fraud, after having previously been killed by proxy, a dead body, dressed in his clothes, being slipped into a shop where he was working, and which was then set on fire. The false corpse was identified by several witnesses as being that of the living man, while the real corpse was afterwards denied by other witnesses to be his body after he was dead. Nor is this strange. In the period which immediately succeeds death,

> "Before decay's effacing fingers
> Have swept the cheek where beauty lingers,"

expressions previously unrecognized start out, while others previously recognized, recede.

We must remember, also, that in most cases of crime, persons whose identity is afterwards disputed rarely appear in broad daylight. The burglar can only commit burglary in the dark; and if he is seen at all it is under confusing shadows, or in the reflected light of a dark lantern. Disguises, also, are employed, which, in the late case of the Northampton bank robbery, leave the voice as the only means of detection. The assassin is ready, if he can, to adopt another dress, and to imitate another's gait and manner; and cases are reported in which the person assailed, believing that one with whom he was at enmity had perpetrated the offence, was clinched in the belief by the fact that the appearance of the supposed enemy was imitated by the real assailant. There may be, also, a mistake as to time, by means of which an *alibi*, true in everything but date, may be constructed. Of this we have an illustration in a recently-reported English trial. Two men were indicted for burglary on the night of Sunday, October 21st, 1878. Strong proof was adduced against them in the shape of the testimony of four separate witnesses, three of whom identified them as coming from the house in which the burglary was committed, and the other of whom believed that he saw them when a little further on their road. This case was met by the testimony of twelve witnesses, chiefly relatives and friends, who swore that during the whole evening in which the burglary was committed the defendants were in their own home, where they lived together, being brothers-in-law. The witnesses so produced went into a great mass of details, the whole testimony forming so consistent a narrative that the more minute and the more ramified became the cross-examination, the more unassailable did their statement become.

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* Reported in Whart. on Hom., app.

There was only one way of evading the effect. Their story could be pierced only at one point—at the time at which it touched the time of the burglary. All the incidents to which they referred might be true, and yet they might not have occurred on the evening of Sunday, October 21st. Though they must have occurred, judging from their internal coherence, on some other Sunday near that time. To test this, they were examined as to the state of the weather on October 21st. They united in swearing that it was rough, stormy and dark. An almanac was sent for, from which it appeared that the moon on that night was full. This was the only evidence at hand to sustain the hypothesis of a change of dates, and the defendants were acquitted. Yet it afterwards appeared that all the incidents on which the *alibi* was based had been transferred from the night of October 14th to that of October 21st. It was the night of Sunday, October 14th, that was rough, stormy and dark. There could have been no doubt that on that night the defendants were at their home, and were there seen by the twelve witnesses produced on the trial, and that it was then that the various things were seen and heard which were detailed by the witnesses with such harmonious minuteness as to defy cross-examination. But that the defendants should have been at home on Sunday, October 14th, was in no way inconsistent with their being out house-breaking on Sunday, October 21st.*

It may be said that here again is scepticism, with the difference that, while under the last head, the scepticism to which we were led was scepticism as the subject, *i. e.*, scepticism as to whether any witness is to be believed, now it is scepticism as to the object, *i. e.*, skepticism as to anything testified to really exists. The answer is that the only scepticism here invoked is the scepticism which is incident to whatever is credible, and without which nothing that is incredible, in the moral sense, can exist. It is not necessary here to appeal to Lessing's famous saying, "if absolute truth were offered to me on the one side, and probable truth on the other side, I should say, in all humility, give me the probable,"—for in this matter we have no choice. We cannot apprehend the absolute if we would. We can only, as to matters actual, as distinguished from matters ideal, reach approximate truth. We know, for instance, that a straight road is the shortest distance between two geographical centres, but this is a truth which, absolute as it is, cannot be illustrated in perfect exactness in any road over which we travel. When it is stated, for instance, that between Baltimore and Washington a particular road is straight, then we have a statement which may be approximately true, but which we know is, in some respects, false. Of the impossibility of perfect accuracy in human testimony, as to matters we might suppose to be the most susceptible to demonstration, we have a remarkable series of illustrations in a trial which took place in Massachusetts some few years ago, and in which the issue was whether a certain signature had been forged by tracing it over a signature that was genuine. On the one side, several of the most eminent microscopists in the land swore positively that under the ink they discovered pencil tracings. On the other side, about as many equally eminent microscopists swore just to the contrary. It became important, also, to determine whether the two signatures, comprising sixteen letters, coincided. A distinguished professor of mathematics, occupying the chief chair in his department in one of the chief universities of the land, swore that the probability that such a coincidence could be produced otherwise than by superimposition was 1 to 2,666,000,000,000,000,000,000. To rebut this testimony a series of signatures, taken at random from those of John Quincy Adams and other men of equally marked hand writing, were produced, in which it was sworn that there were numerous cases of entire coincidence. * We have to conclude, therefore, that from even the most exact and competent witnesses, and as to topics particularly capable of demonstration, absolute truth cannot be established on any question

See 17 Alb. L. J., p. 40.

* See 4 Am. L. J. 25.

touching practical life. High probabilities so high as leave us beyond reasonable doubt, but never absolute certainties, are the strongest proof that can be produced.

It follows, then, that of no conclusion can we obtain, in a court of justice, any evidence which does not consist of a series of circumstances. In other words, we infer certain conclusions from a series of facts. This series of facts may be apparently very simple, as where A says he saw B shoot C. Yet these apparently simple and "direct" cases, as they are called, are after all the most complex and most dependent on collateral circumstances for belief. Establish three or four of what are called extraneous facts: the finding of C's dead body, with wounds inflicted by a weapon shown to belong to B—the discovery of blood and of hair, identified with that of C, on B's clothes—the ferreting out of C's money, secreted in places over which B had exclusive control—the coincidence of B's feet with prints found on the soil near the spot of the killing—B's flight without explanation—and you have a strong case on which a conviction can rest. But limit your case to A's testimony that he saw B kill C, and you have to draw in a multitude of collateral facts before you can convict. Independently of the *corpus delicti,* which must be established, you have to make out the credibility of A. It is true that credibility is *prima facie* assumed until it is impugned on the opposite side. But, independently of such direct discredit, there is no witness that is produced as to whom multitudes of presumptions, based upon manner, self-consistency, objective probability, do not arise. On the testimony of a perfectly impersonal witness—if we could conceive such—of a witness who would give rise to no such presumptions, and invoke no circumstances, intrinsic or extrinsic, for his credit, no conviction could be had. Hence, that which is called the most direct testimony is often the most circumstantial. It rests upon the credibility of the witness and the credibility of the thing testified to, each of which may depend upon many complex conditions.

PRESUMPTIONS ARE INFERENCES FROM FACTS TO FACTS.

All evidence, therefore, we conclude, consists of reason and fact co-operating as co-ordinate factors. The fact is presented to us either by inspection, or by what we call judicial notice, or by our knowledge of every day life, such as is embraced by the term "notoriety," or by the descriptive narrative of witnesses. From these facts we draw certain conclusions. The mode by which we draw them is inductive, and the process we term *presumption.* In other words, a presumption is an inference of a fact from a fact. Of this we may take the following illustrations.

A man accused of crime hides himself and then absconds. From this fact of absconding we infer the fact of guilt. This is a presumption of fact, or an argument of a fact from a fact.

Stolen money is found on the defendant's person, and of this he gives no satisfactory explanation. Here, also, we infer the fact of guilt from the fact of unexplained possession of the stolen money.

"An enemy has done this." The cattle of a farmer are found one day injured so systematically and cruelly, that we can attribute the act only to the settled, malignant purpose of a cowardly enemy, A is such an enemy and we infer that he did the deed. The inference is far from being enough to convict if taken by itself; but it is valuable as one of a series of cumulative inferences. It consists of a presumption of fact—in other words, of an inference from the fact of cowardly hatred to the fact of guilt.

PRESUMPTIONS VARY IN FORCE WITH PROBABILITY.

Presumptions, therefore (limiting ourselves, of course, to presumptions of fact, and reserving the consideration of presumptions of law), vary in intensity in proportion to the probabilities they involve. We may illustrate this position by the presumptions, all of them (exclusive of those springing from his personal conduct) resting on extrinsic facts, on which Dr. Webster's conviction was based.

Some of these may be marshalled as follows:

1. The homicide was committed by someone at the time in Boston. Boston contained then, we may say by the way of rough estimate, 150,000 residents. A was resident in Boston that night. Therefore it is, on the face of things, 1 to 150,000 that A was concerned in the homicide. But there are many considerations which tend greatly to reduce the number of 150,000, the basis for inductions in this respect. We must take into account, in such cases, the antecedent probability of the conclusion. We must take into consideration, also, all conflicting probabilities. How many of the 150,000 residents of Boston were incapacitated at the time, by infancy, sickness, or other disability, from perpetrating the act? To how many others would the imputation of the act be morally and physically absurd.

2. The homicide was committed by some one with a motive. This, of course, is a proposition not universally true. Some homicides have undoubdtedly been motiveless. Sudden incursions of homicidal mania have, in certain very rare instances, swept down upon individuals abnormally constitutedin such a way as to make them the irrational instruments of a fierce destructive purpose. But these rare cases are generally distinguished by violent and uncontrollable scenic outbursts. No instance is on record in which they have been executed with the stealth and secrecy by which the killing of Dr. Parkman was marked. If, therefore, we have to assume that the murder of Dr. Parkman was committed by a person who had a motive to destroy him, we limit very much the ranks of those among whom the probable perpetrator is to be sought. Among motives we may mention the following:

Old grudge.—Who, likely to avenge it, bore an old grudge to the deceased?

Jealousy.—Of a man of Dr. Parkman's character and habits, is it probable that anyone could be instigated by this passion?

Expectation of plunder.—Is it likely that the dead man could have been entrapped into a place where he could readily have been killed by one of that desperate class by whom the docks and alleys of great seaports are infested?

Interest in getting the victim out of the way.—Was it the interest of anybody to remove him? Were there unprincipled heirs, whose access to fortune would be accelerated by his death? Had he debtors who would be relieved by his death?

Sudden passion.—Who is there among those with whom Dr. Parkman came in collision, who might have been stung into sudden passion by irritating conduct on his part; who would have been likely to let this passion wreak itself in a fatal blow; who would have had the skill afterwards to hide the body so as to evade immediate detection?

3. Supposing the homicide not to have been committed in a spot remote from Dr. Parkman's usual haunts, it must have been by a person capable of concealing its track, and of employing effective agencies by which the body of the deceased man could be removed from sight.

4. Consciousness of guilt is apt to betray itself, involuntarily, in attempts to evade justice; in feverish and restless interpositions in the action of the officers of justice who are seeking to ferret out the author of the crime; in tremour when charged with the offence; in efforts, not always cool or prudent, to throw suspicion upon others. It is true, as we will presently see, that conduct of this class is not an invariable associate of guilt. But when we notice a person engaged in a train of conclusive efforts to evade a charge of crime, and to throw the opprobrium elsewhere, we may say that he is probably concerned in the guilt whose imputation he makes such strenuous and unscrupulous efforts to repel.

5. Can we trace the property of the deceased into the hands of a suspected party? If so, and this possession is unexplained, this leads to the probability of the party charged being concerned in the homicide.

6. Are the remains of the dead man shown to have been at any time under the control of the accused? It is true, if so, they may have been placed there surreptitiously, without his knowledge, or brought there for the purpose of *post-mortem* experiment. But even making

these allowances, the fact, if established, is strongly inculpatory.

This brings us to the position that a conclusion, in all legal investigations, is based on a cumulation of probabilities. How these probabilities are to be marshalled is thus exhibited by one of the highest modern authorities in this line:

"The truth of a conclusion may be regarded as a compound event, depending upon the premises happening to be true; thus, to obtain the probability of the conclusion, we must multiply together the fractions expressing the probabilities of the premises. Thus, if the probability is $\frac{1}{2}$ that *A* is *B*, and also $\frac{1}{2}$ that *B* is *C*, the conclusion that *A* is *C*, on the ground of these premises, is $\frac{1}{2}\times\frac{1}{2}$, or $\frac{1}{4}$. Similarly if there be any number of premises requisite to the establishment of a conclusion and their probabilities by *m*, *n*, *p*, *q*, *r*, &c., the probability of the conclusion on the ground of these premises is $m\times n\times p\times q\times r\times$ . . . This product has but a small value, unless each of the qualities *m*, *n*, &c., be nearly unity.

"But it is particularly to be noticed that the probability thus calculated is not the whole probability of the conclusion, but that only which it derives from the premises in question. Whately's* remarks on this subject might mislead the reader into supposing that the calculation is completed by multiplying together the probabilities of the premises. But it has been fully explained by De Morgan† that we must take into account the antecedent probability of the conclusion; *A* may be *C* for other reasons besides its being *B*, and as he remarks, 'It is difficult, if not impossible, to produce a chain of argument of which the reasoner can rest the result on those arguments only.' We must also bear in mind that the failure of argument does not, except under special circumstances, disprove the truth of the conclusion it is intended to uphold, otherwise there are few truths which could survive the ill-considered arguments adduced in their favour. But as a rope does not necessarily break because one strand in it is weak, so a conclusion may depend upon an endless number of considerations besides those immediately in view. Even when we have no other information we must not consider a statement as devoid of all probability. The expression of complete doubt is a ratio of equality between the chances in favour of and against it, and this ratio is expressed in the probability $\frac{1}{2}$.

"Now if *A* and *C* are wholly unknown things, we have no reason to believe that *A* is *C* rather than *A* is not *C*. The antecedent probability is then $\frac{1}{2}$. If we also have the probabilities that *A* is *B* $\frac{1}{2}$, and that *B* is *C* $\frac{1}{2}$, we have no right to suppose that the probability of *A* being *C* is reduced by the argument in its favor. If the conclusion is true on its own grounds, the failure of the argument does not affect it; thus its total probability, added to the probability that this failing, the new argument in question established it. There is a probability $\frac{1}{2}$ that we shall not require the special argument; a probability $\frac{1}{2}$ that we shall, and probability $\frac{1}{4}$ that the argument does in that case establish it. Thus the complete result is $\frac{1}{2}+\frac{1}{2}\times\frac{1}{4}$, or $\frac{5}{8}$. In general language, if *a* be the probability found in a particular argument, and *c* the antecedent probability, then the general result is $I—(I—a\ (I—c)$, or $a+c—ac$.

"We may put it still more generally in this way: Let *a*, *b*, *c*, *d*, &c., be the probabilities of a conclusion founded on various arguments or considerations of any kind. It is only when all the arguments fail that our conclusion proves finally untrue; the probabilities of each failing are respectively $I—a$, $I—b$, $I—c$, *etc.*; the probability that they will all fail $(I—a)\ (I—b)\ (I—c)$ . . . ; therefore the probability that the conclusion will not fail is $I—(I—a)\ (I—b)\ (I—c)$ . . . etc. On this principle it follows that every argument in favour of a fact, however flimsy and slight, adds probability to it. When it is unknown whether an overdue vessel has foundered or not, every slight indication of a lost vessel will add some probability to the belief of its loss, and the disproof of any particular evidence will not disprove the event."—*Jevons' Principles of Logic*, I., 239.

* Elements of Logic, Book III., sections 11 and 18.
† Enciclopædia Metrop., art. Probabilities, p. 400.

PRESUMPTION OF INTENT.

Such being the general characteristics of presumptions of fact, I proceed to notice specially some of the most prominent among these presumptions, and the first that strikes the eye is the presumption, as it is called, of intent. The first criticism here to be made is that in setting up this presumption we pass from the sphere of inductive reasoning and enter upon that of deductive ; and, in so doing, depart from the true field of practical jurisprudence. The syllogism presented to us is as follows :

> "Whoever does an act, intended it :
> A did this act ;
> Therefore he intended it."

But the major premise, like all other universal and absolute statements involving human action, is untrue. Acts are so far from being always intended by those to whom they are imputable, that in a large number of cases they are unintended. Negligent offences are perhaps more numerous, and at the same time more varied, than intended offences. For one effect produced by us which corresponds to our intent, there may be a dozen which do not correspond. A telegraph operator may delay for half an hour forwarding a message. His intent, we may presume, is to get his dinner when it is ready. But this delay may produce a multitude of unintended injuries. It may discompose a whole system of railroad connections, so that in some remote spot, of which, perhaps, the operator may have never thought, a collision may occur. It may prevent innumerable appointments from being fulfilled ; it may cause innumerable injuries to persons or property on the wide system of roads it affects. The negligence, in fact, usually operates on a far wider surface than the wilful act, simply because the wilful act is usually insulated and intrusive, while the negligence is an omission in the performance of one of a long series of inter-dependent duties, of which, when one falls all fall. But between negligence and malice there is this fundamental distinction : the first is a lack of intent, arising from intellectual defect ; the second is a bad intent, arising from moral defect. It is of the essence of malicious offences that they are intended ; it is of the essence of negligent offences that they are not intended. Of the majority of cases in which one man invades the rights of another, we may safely say the injury, in the form it was perpetrated, was unintended. As to a majority of the cases covered, therefore, by the proposition before us, it is false.

We must also remember, in further illustration of the conclusion just stated, that there are few cases in which the object intended, even among what are called malicious crimes, is actually effected. A number of scholastic distinctions have been taken in this relation, and have been considered by me elsewhere. It is sufficient, at present, stripping them of their technical forms, to notice some of the more prominent.

1. An unintended object may fortuitously intervene between a blow aimed and the person intended to be hurt. A, for instance, shoots at B. After the pistol is aimed, and at the moment of its discharge, A's child suddenly darts in the way. The killing of A's child, so far from being intended by A, is of all things the most abhorrent to him.

2. B is struck by A when mistaken for C. Here A intends to strike B, but intends to strike him under a mistake of person. The intended object is hit, but the object is invested with wrong attributes, and is aimed at under the false belief that it possesses these attributes. A, for instance, as in Levett's case, shoots at a casual visitor, B, imagining B to be a burglar. Or A shoots at his child, B, imagining the child to be an enemy whom he designed to kill. Here there is no intention to kill B, as B really is, though there is an intention to kill some one whom B is supposed to be.

3. Or an act may be from a contingent intent. A shoots at B, knowing that B is in a place (*e. g.*, a railway carriage), in which other persons are sitting. A knows that he runs the risk, when shooting at such an object, of killing another person than the one at whom he aims. He kills C, sitting next to B. Undoubtedly he may be regarded as embracing C within the scope of his purpose. But, nevertheless he did not intend to kill C, and would

have avoided the contingency of so doing if he could have done so without abandoning his purpose of killing A.

4. The victim is not mistaken for another, nor killed fortuitously, nor killed incidentally to the attempted killing of another, but killed because he is falsely supposed to be an enemy, or falsely supposed to have property on him which can be readily appropriated by the assassin, or falsely supposed, as in there markable case of the murder of White by Crowninshield, to stand in the way of an inheritance.

(*To be continued.*)

NOTES OF CASES

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

COURT OF APPEAL.

From Q. B.] [March 27.

Sowden v. Standard.

Insurance Agent of Company acting for insured—Misdescription.

At the foot of an application for insurance on a block of five buildings, under one roof, there was above the signature of the applicant an agreement, declaration and warranty that if the agent of the Company filled up the application, he should in that case, be the agent of the applicant, and not that of the Company.

The plaintiff signed a printed form of application in blank, which he gave to the agent, telling him to examine the buildings and fill it up. This the agent did from an examination and diagram of the buildings which he had made on a previous occasion; and in answer to the question, "Is there any other fact or circumstance affecting the risk which it is necessary the Company should be made acquainted with ?" he answered, "No, it is a first-class building in every respect ; although one roof covers all, there is a solid brick fire wall between each store."

There was not, as a fact, such a wall, and the jury found that there was a misdescription and misstatement of a fact material to the risk.

Held, affirming the judgment of the Queen's Bench, that the plaintiff could not recover.

Robinson, Q.C., for the appellants.

Bethune, Q.C., for the respondents.

Appeal dismissed.

From Proudfoot, V.C.] [March 27.

Moffatt v. Board of Education of Carleton Place.

Specific performance—School Trustees—Change of school site.

Held, affirming the judgment of Proudfoot, V.C., that a contract for the purchase of land for the purpose of changing the site for a school by the Board of Education was *intra vires*, although the Council had passed no by-law authorising the purchase, nor had the Governor in Council approved of the change—and the plaintiff was therefore enabled to call for specific performance of the agreement for purchase.

Hodgins, Q.C., for the appellant.

Bethune, Q.C., for the respondent.

Appeal dismissed.

From Proudfoot, V.C.] [March 27.

Cannon v. Corn Exchange.

Incorporated Society—Expulsion of member— 35 Vic., c. 45, s.

Held, affirming the judgment of Proudfoot, V.C., that the plaintiff was illegally expelled by the defendants.

Per Burton and Patterson J.J., on the ground that there had been no refusal to arbitrate.

Per Galt, J., the plaintiff was expelled contrary to by-law 3, as no meeting was called in compliance therewith to consider his expulsion.

Robinson, Q.C., and *Ferguson*, Q.C. for the appellants.

McMichael. Q.C., and *Boyd*, Q.C., for the respondents.

Appeal dismissed.

From Proudfoot, V.C.] [March 27.

ATTORNEY-GENERAL v. O'REILLY.

Escheat—Jurisdiction.

Held, affirming the judgment of Proudfoot, V.C., that the law of escheats applies to land in this Province; that the escheat belongs to this Province, and not to the Dominion; that no inquisition of office is necessary, and that the Court of Chancery is entitled to entertain a suit by the Attorney-General to enforce the escheat.

W. Macdougall for the appellants.

J. D. Edgar and *Cartwright* for the respondents.

Appeal dismissed.

From C. C. Stormont, &c.] [March 27.

RE BARRETT.

Insolvent Act, 1875—Power of Assignee to avoid chattel mortgage.

Held, BURTON, J.A., dissenting, affirming the judgment of the County Court, that an assignee in insolvency represents the creditors for the purpose of avoiding a chattel mortgage for non compliance with the Chattel Mortgage Act.

Bethune, Q.C., for the appellants.

J. J. Foy for the respondents.

Appeal dismissed.

From C. C. Waterloo.] [March 27.

MOORE v. KAY.

Landlord and Tenant—Action for refusal to admit—Statute of frauds.

The plaintiff brought an action against the defendant for damages for refusal to admit him into possession of land, which the plaintiff alleged the defendant had verbally agreed to give him a lease of the premises for sixteen months.

Held, affirming the judgment of the County Court, that the evidence failed to show an actual letting, but that even if such had been proved, the plaintiff must fail—under the fourth section of the Statute of Frauds, as like action was brought in respect of an agreement for interest in land.

Appeal dismissed.

From C. C. Grey.] [March 27.

AGAR v. STOKES.

Landlord and Tenant—Cesser of term.

The defendant leased to the plaintiff a mill and ten acres of adjoining land for five years, at the rent of $500 for the first year, and $550 for each of the four succeeding years, payable half yearly, in advance. The lease contained the usual clauses, and concluded with the following clause:—"And should the mill be rendered incapable by any fire or tempest, then the portion of the rent for the unexpired portion of the term paid for in advance, to be refunded by Stokes to Agar." To an action brought by the plaintiff to recover the portion of the term paid in advance, the mill having been destroyed by fire, the defendant pleaded by way of set off, money payable for rent due for the half year succeeding that in which the mill was destroyed.

Held, BURTON, J. A., dissenting, reversing the decision of the County Court, that the effect of the accident which rendered the mill incapable put an end to the term.

Appeal allowed.

From Blake, V. C.] [March 29.

SILVERTHORN v. HUNTER.

Liability of paid valuator for deficiency.

Held, dismissing the appeal, that no case was made to induce the Court to depart from its well understood rule, not to reverse the finding of the Judge of first instance.

Held, also, that a paid valuator is not liable for gross negligence in making a valuation unless it was false, to his knowledge, or fraudulently made.

Ferguson, Q. C., for the appellant.

Boyd, Q. C., for the respondent.

Appeal dismissed.

COMMON LAW CHAMBERS.

Armour, J.] [March

ZARITZ v. MANN.

Division Court.—Service.—Prohibition.

In a Division Court suit, defendant was served one day too late for the ensuing sit-

tings, and did not attend. The Division Court Judge ruled that the defendant by entering a dispute note had shown that he knew when the trial would come on, and that he should therefore have attended. He accordingly gave judgment for the plaintiff with costs.

Held, that the defendant was entitled to full notice of the trial, and that a prohibition should issue.

J. F. Smith for plaintiff.
Ellis for defendant.

Osler, J.] [March.

GOLDING V. MACKIE.

Ca. Sa.—Render by bail—Supersedeas—Discharge—Reg. Gen. H. T., 26 Geo. III.

The defendant was arrested under a *ca. sa.* and afterwards admitted to bail. Judgment was signed against him in the vacation between two terms, and he was surrendered by his bail in the vacation following.

Held, on an application for a *supersedeas* under *Reg. Gen. H. T. 26, Geo. III.*, that the render related back to the preceding term, and that the latter should count as one of the two terms within which the plaintiff should charge the defendant in execution.

J. B. Clarke for plaintiff.
G. D. Dickson for defendant.

Mr. Dalton, Q.C.] [April 24.

SHELLY V. HUSSEY.

Examination—Trial—Verdict.

The plaintiff obtained an order to examine the defendant, and served the same upon him, with an appointment for the examination, on the commission day for the assizes at which the case was to be tried. The case was disposed of on the day on which the appointment was returnable, a formal verdict being entered for the plaintiff, subject to a reference.

Held, that the effect of the verdict was to render the order to examine, and the appointment nugatory, and that the defence could not be struck out on the ground that the defendant refused to attend.

Aylsworth for plaintiff.
Holman for defendant.

CHANCERY CHAMBERS.

The Referee.] [Feb. 2.
Blake, V.C.] [March 18.

CARMICHAEL V. FERRIS.

Land to be sold under decree—Tender for compensation.

Where land was advertised for sale under a decree and the purchaser, the owner of the adjoining lot, who had also been in possession by his son, of the advertised premises, tendered for them, knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek an abatement after the purchase was completed, and a subsequent encumbrancer offered to give the same price for them as the purchaser,

Held, by Mr. STEPHENS, Referee, that the petitioner should be put to his election either to take the land without abatement of the purchase money, or let it go to the subsequent encumbrancer.

Affirmed on appeal by BLAKE, V.C.

F. E. Hodgins for purchaser.
Armour for subsequent encumbrancer.
Plumb for infants.
Hoyles for plaintiff.

Spragge, C.] [March 10.

RAMSAY V. MCDONALD.

Conduct of Sale.

The plaintiff having the conduct of the sale of property under decree, applied for leave to bid at the sale.

The Referee refused the application, and on appeal, SPRAGGE, C., affirmed the Referee's judgment.

MASTER'S OFFICE.

The Master.] [January.

BLOOMFIELD V. BROOKS.

Default of co-executor—Domicile.

J. B., Sr., and S.D., of Montreal had been executors of C. B., who died in Montreal about 1844 ; S. D. proved the will in Onta-

rio. The plaintiffs, two infants were solely entitled under this will. J. B., Sr., died in Montreal, in 1869, T. B. and J. B., Jr., were his executors, and both proved the will in Ontario; but T. B. alone acted as executor, J. B., Jr., having given him a power of attorney to act for him in all matters relating to the estate. The plaintiffs and T. and B. and J. B., Jr., were each entitled to one-third share under the will of J. B., Sr. Suit was brought for the administration of both estates and a receiver appointed.

In taking the accounts before the Master, S. D.'s attendance was dispensed with, as it appeared that none of the assets of C. B's estate in Ontario had come to his hands.

The Master found T. B. and J. B., Jr., who did not appear or file any accounts, indebted to the estates in about $51,000. In default of evidence to shew that any of the assets come to their hands formed part of C. B.'s estate, the Master further found that the whole formed part of J. B., Sr.'s estate. The decree on F. D. ordered the executors to distinguish the assets of each estate, and notified them that in default the whole would be taken to belong to the estate of J. B., Sr. T. B. having died, the suit was revived.

J. B., Jr., applied to the Court for leave to open and retake the accounts on the ground that he had been kept in ignorance of the proceedings by his executors. Leave was given him to surcharge and falsify.

J. B., Jr., now distinguished the assets of the estates and sought to be relieved from liability as to the estate of C. B. on the ground that he was not executor of that estate. As to the J. B., Sr., estate he also sought to be relieved in several respects. The Master's judgment is upon these points.

Held, that T. B., and J. B., Jr., did not by proving the will of J. B., Sr., become executors of C. B., as J. B. Sr. was not the sole or surviving executor of C. B.

Held, that J. B., Jr., is liable for the moneys of J. B., Sr.'s estate come to the hands of Thomas, whether before or after the proving of the will, or before or after the power of attorney. * * *

Held, that the writ of attachment or registration issued in Quebec did not affect the assets in Ontario.

Held, that as the Ontario Bank shares, though subscribed for at Montreal, and at one time registered there, were transferred to Bowmanville during the testator's life, and appeared on the stock register there only, they are Ontario assets.

Foster for John Brooke.

Langton for plaintiffs.

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH, AND APRIL, 1879.

(*Continued from p* 83.)

Lien.

1. F., a ship-owner, employed S. & Co. to get insurance effected on his ship; and, to F.'s knowledge, S. & Co. employed B. for this purpose. This had been the usual course of business, and B. always retained the policies until the premiums and brokerage had been paid. A settlement was had between F. and S. & Co. monthly, and F.'s acceptances at one month taken for the balance. F. did not know the particulars of the arrangement between B. and S. & Co. On a loss occurring, F. demanded of S. & Co. a policy which had been retained by F. because the charges were not paid. S. & Co. not being able to produce the policy, F. brought detinue against B. for it. *Held*, that B. had a lien on it for his charges, as against F.—*Fisher* v. *Smith*, 4 App. Cas. 1.

2. E. mortgaged his property to his solicitors, who acted professionally for E., and prepared the mortgage to themselves, and they retained it. E. had previously given a first mortgage on the property, and he afterwards gave a third and fourth. The first mortgagee held the title-deeds. In an action against E., and the first, third, and fourth mortgagees, the solicitors claimed a lien on the mortgage-deeds and documents in their possession for the costs, charges and expenses incurred by them as the solicitors of E. *Held*, that there was no lien. "Reasonableness is the foundation of all the legal doctrine of lien." (per Thesiger, L. J.)—*Sheffield* v. *Eden*, 10 Ch. D. 291.

Limitations, Statute of.

Defendant owed plaintiffs a large debt incurred in 1865, and in answer to a demand wrote them in May, 1874, as follows: "Believe me that I never lose out of my sight my obligations towards you, and that I shall be glad as soon as my position becomes somewhat better to begin again and continue my instalments." It appeared that, in 1874, defendant's position was bettered by £14, but was no better in any other year. In Septem-

ber, 1876, he wrote again as follows: "Since the present year, I find mpself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living." It did not appear that the "general commercial crisis" had, in fact, "given way." *Held*, that the claim was not saved by these letters from being barred.—*Meyerhoff* v. *Froehlich*, 4 C. P. D. 63; s. c. 3 C. P. D. 333; 13 Am. Law Rev. 301.

See TRUST, 1.

MALICE.—See INJUNCTION.

MARINE INSURANCE.—See INSURANCE.

MARKET.—See SALE, 1.

MARRIAGE.—See JURISDICTION.

MARRIAGE SETTLEMENT.—See Trust, 2.

MARRIED WOMEN.—See HUSBAND AND WIFE.

MISDESCRIPTION.

Joseph Wood, a farmer, lived on a farm called "Lache Hall Farm," near Chester. but within the County of the City of Chester. He was christened Joseph merely, but had assumed the name of Joseph Albert, and took the lease of his farm, and did his business in that name, and was known to his creditors by it. In 1876, he gave a mortgage or bill of sale to one H. as trustee for his wife for money advanced on his growing crops. He signed it "Joseph Wood," and was described in it as "Joseph Wood, of Lache Hall Farm, in the County of Chester, farmer," and the farm was described as in the occupation of "Joseph Wood," and situate in the "County of Chester." The affidavit of execution made by the witness repeated the same expressions. The document was duly registered under the Bills of Sale Act, 1854, exactly as it was written. That act requires a "description of the residence and occupation of the person making or giving the same." In 1878, wood was adjudged bankrupt, being described as "Joseph Wood, commonly called Joseph Albert Wood, Chester, farmer." There was no farmer of the same name in the County of Chester. *Held*, that the registration was not invalid for misdescription.—*Ex parte M'-Hattie*. *In re Wood*, 10 Ch. D. 398.

MORTGAGE.

1. A mortgagor who receives the rents and profits may maintain an injunction in his own own name to save the property from injury. It is not necessary to join in the mortgage.—*Fairclough* v. *Marshall*, 4 Ex. D. 37.

2. In 1865, the S. company, limited, mortgaged its works to its bankers, to secure its current account for an amount not exceeding £50,000. There was a covenant to surrender the works, which were copyhold; but no surrender was ever made. There was an attornment clause, by which the company became tenants from year to year of the mortgagees, at a yearly rent of £5,000, which was a fair rent, with right in the mortgagees to enter and expel the mortgagors at will. July 17, 1870, two years' rent was due, and the bankers sent an attorney to distrain, and he put two men, employed in the works, in charge as keepers. They remained in charge till October 6. July 18, the company asked the bankers to postpone the sale, and they did not proceed. July 19, a petition for winding up was made, and July 28, an order was granted, and a liquidator appointed. In November, the property was sold without prejudice, and realized less than the bankers' claim. *Held*, that the bankers were entitled to their sum as landlords under the distress, by virtue of the attornment clause. *Ex parte Williams* (7 Ch. D. 138) distinguished. —*In re Stockton Iron Furnace Company*, 10 Ch. D. 335.

3. F., by a writing, assigned his goods therein described, to a company "as their own proper chattels and effects," in consideration of a loan. If he paid the loan, the deed was to become void. If he became, *inter alia*, "embarrassed in his affairs," the company could at once take possession, and "until default be made in payment," he could "hold, make use of, and possess the said goods, chattles, and effects," without interference. The document was duly registered. The company heard subsequently that F. was embarrassed in his circumstances, as was the case, and put in a keeper without demanding payment, and before any payment was due. In subsequent bankruptcy proceedings against F., *held*, that company was entitled to the proceeds of the goods.—*Ex parte National Guardian Assurance Company*. *In re Francis*, 10 Ch. D. 408.

4. L., a merchant, was in the habit of strengthening his account at the bankers, by depositing securities from time to time. In 1876, his debit balance was £62,000, and on that day he deposited the title-deeds of his property at C., with a memorandum reciting that it was in consideration of £15,000, and that it was agreed that the security was "to cover any moneys due from time to time from" him to them with interest. He received the £15,000 at different times as he wanted it, and from time to time received back other securities previously deposited, as he partially paid off the previous advances. He also made further deposits of securities from time to time, including title-deeds of freehold and other real estate; but no other memorandum was given. On his death, *held* that the aggregate sum due the bank at his death was chargeable ratably on all the securities in the bank's hands at that time. *Lipscomb* v. *Lipscomb* (L. R. 7 Eq. 501) and *De Rechefore* v. *Dawes* (L. R. 12 Eq. 540) criticised.—*Leonino* v. *Leonino*, 10 Ch. D. 460.

5. W. had an execution in his house, and to discharge it, got £150 from C., with part of which he paid the execution. W. gave C. a receipt "for the absolute sale" of the furniture attached, and at the same time, a document was signed by W. and C., by which W. "hired" of C. the said furniture for two months for £170. If the £170 was not duly paid, or if during the time W. became bankrupt or the property became in any way liable to seizure, or W. should remove it from the house, C. was to have authority to take the goods at once. If C., took the goods and sold them, he

should pay over to W. any balance received above the £170 and costs, and, if less than that sum was received, W. should be liable for the balance. When W. paid the £170 and costs, the property was to become his. *Held*, that the two writings constituted a mortgage, and were void against creditors as not being registered under the Bills of Sale Act (17 & 18 Vict. c. 36, §§ 1, 2, 7).—*Ex parte Odell. In re Walden*, 10 Ch. D. 76.

See Lien, 2; Sale. 3, 4.

Name.—See Misdescription.

Negligence.—See Partnership.

Obliteration.—See Wills, 3.

Parties.—See Mortgage, 1.

Partnership.

1. Two women, V. C. and M. W., became partners in business in London, in 1875, under the firm name of C. & W. In 1877, V. C. married one L. In 1878, the partnership was dissolved, and it was ordered by the court that "the said partnership business, and the leasehold premises, trade, fixtures, stock in trade, good-will, and business be forthwith sold as a going concern," to the partner who should bid the highest. M.W. was the purchaser, and she afterwards carried on the business under the old style. The deed of assignment contained the clause, "including the right to represent that the business as recently carried on by C. & W. is now being carried on by the said M. W." L. and his wife lived in Paris, and did business there under the firm name of C. & Co. *Held*, that M. W. could not be enjoined from using the old firm name; and per James, L. J., that the assignment conveyed the right to its use.—*Levy* v. *Walker*, 10 Ch. D. 436.

Patent.—See Judgment.

Payment.—See Surety.

Pleading and Practice. — See Action; Judgment; Mortgage, 1; Trust, 1.

Policy.—See Lien, 1.

Principle and Surety.—See Surety.

Promise.—See Limitations, Statute of.

Proviso.—See Mortgage, 3.

Realty and Personality.—See Conversion; Will, 6.

Receipt.—See Sale, 4.

Resignation.—See Misdescription; Mortgage, 5; Sale, 3.

Religious Education.—See Husband and Wife.

Remoteness.—See Will, 2.

Res Adjudicata.—See Judgment.

Residence, Right to Name.—See Injunction.

Residuary Legatee.—See Legacy.

Recovation.—See Will.

Right of Way.

By a public Act, a corporation was empowered to build a pier according to plans. It was alleged that, if the pier was built in the manner provided by the act, a certain public right of way would be thereby rendered unavailable for use. *Held*, that, if that were the case, the Act must be held to have extinguished the right of way by implication, though no reference was made to the matter in the Act.—*Corporation of Yarmouth* v. *Simmons*, 10 Ch. D. 518.

Riparian Rights.—See Watercourse.

Sale.

1. A man brought pigs into market, and sold them with all faults and expressly without warranty. They turned out to have typhoid fever, and died on the purchaser's hands, and infected his other pigs. The acts of the seller amounted to a breach of the statute prohibiting such sale in market of infected animals, and inflicting a penalty. *Held*, that the existence of the statute did not raise an implied representation that the pigs were sound, and the purchaser had no remedy.—*Ward* v. *Hobbs*, 4 App. Cas. 13; s. c. 2 Q. B. D. 331; 3 Q. B. D. 150; 12 Am. Law Rev. 104, 738.

2. One W. obtained some sheep of the defendant, under colour of a purchase, but in fact by false pretences. The plaintiff bought them of W. *bona fide*, and in regular course, but not in market overt. October 25, W. was arrested on a warrant procured by the defendant, for obtaining goods under false pretences, and November 7 following, he was convicted under 24 & 25 Vict. c. 96. That Act provides that, in case of obtaining goods by false pretences, where a person is "indicted on behalf of the owner of the property, and convicted, . . . the property shall be restored to the owner." Meanwhile, on November 7, the defendant found the sheep, and went and took them into possession. *Held*, that the statutes did not affect the question between these parties, and the defendant was liable for conversion. The reason of the rule giving preference to the innocent purchaser, as laid down in *Root* v. *French* (13 Wend. 570), preferred by Cockburn, C. J., to the English reason as given in "Benjamin on Sales."—*Moyce* v. *Newington*, 4. Q. B. D. 32.

3. Where household goods are sold, and a receipt given for the purchase-money, and a detailed inventory of the goods is attached and made part of the receipt, and the seller remains in possession, the sale is void as against creditors. unless the document is registered under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36). *Allsopp* v. *Day* (7 H. & N. 457), and *Byerley* v. *Prevost* (L. R. 6 C. P. 144), discussed. See *Woodgate* v. *Godfrey* (4 Ex. D. 59).—*Ex parte Cooper. In re Baum*, 10 Ch. D. 313.

4. The household goods of W., a judgment debtor, were seized under a *fi. fa.*, and sold by by the sheriff to the father-in-law of W., who took a receipt therefor containing an inventory of the goods. The same day the purchaser let

the house where the goods were, together with the goods, to W. at a yearly rent, and W. remained in possession. *Held*, that the receipt did not require registration under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36, §§ 1, 7). The receipt was only evidence of payment, and not in the nature of a bill of sale.—*Woodgate* v. *Godfrey*, 4 Ex. D. 59.

See MORTGAGE, 5.

SETTLEMENT.—See TRUST, 2.

SLANDER.—See LIBEL.

SOLICITOR.—See LIEN, 2.

STATUTE.—See CORPORATION; RIGHT OF WAY; SALE, 1.

STATUTE OF LIMITATIONS.—See LIMITATIONS, STATUTE OF.

SURETY.

Action by a bank on the following guaranty, signed by the defendant: "You having this day, at my request, placed the sum of £2,000 to the credit of C.'s account with you, in the event of his promissory notes and interest, or any of them representing that amonnt, not being paid at the due dates, I hereby undertake, upon demand, to secure payment of the same upon the Adelphi Theatre," &c. Ten notes of £200 each were given, payable at inintervls of a week. C. had a general account and also a special account at the bank. The £2,000 was credited to the general account. Two sums of £200 each were expressly debited to the general account. Subsequently, enough deposits were made to cover the whole loan; but the bank did not enter them to the general account, but honoured C.'s checks against them. When the notes became due, the bank claimed the mortgage, on the ground that the notes were all unpaid. *Held*, that the bank was bound to have applied the deposits to payment of the guaranteed notes, and the surety was not bound.—*Kinnaird* v. *Webster*, 10 Ch. D. 139.

TORT.—See ACTION.

TRADE NAME.—See PARTNERSHIP, 1.

TRUST.

1. P., by will, in 1779, gave his estate to his son R. and the heirs of his body in tail male, "upon special trust and confidence" in his said son, that, in case of failure of issue, he "would not do nor suffer any act in law or otherwise to obstruct or prevent" the limitations and provisions of the will. R. suffered a recovery of the estates as soon as he came into possession. R. died in 1808, without issue. *Held*, that the will did not create a trust, and that R. had power to bar the entail. The defence of the Statutes of Limitations may be raised on a demurrer which states a different specific objection to the statement, and adds the words "and on other grounds sufficient in law to sustain the demurrer." But the Statute of Frauds must be specifically pleaded.—*Dawkins* v. *Penrhyn*, 4 App. Cas. 31.

2. A marriage settlement empowerd the trustees to use the income for the husband, wife and children, as they in their "uncontrolled and irresponsible discretion" should think proper. The husband was a drunkard and lived apart from the wife, and the trustees paid all the income to him, except the board of the only child at school. The income was £300 a year above the child's board, and the wife was destitute. *Held*, that although the court did not approve of the course of the trustees, it could not interfere.—*Tobor* v. *Brooks*, 10 Ch. D. 278.

VENDOR AND PURCHASER.—See SALE, 1, 2.

WARRANT.—See EXTRADITION.

WATERCOURSE.

"The right to the water flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial water-course constructed on his neighbour's land, do not rest on the same principle. In the former case, each successive riparian proprietor is, *prima facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some legal origin."—*Rameshur Pershal Narain Singh* v. *Koonj Behari Pàttuk*, 4 App. Cas. 121.

WILL.

1. Testatrix gave a sum in trust for her brother C. for life, remainder to C.'s wife E. for life, remainder to "all and every the children of the said" C. "living at the death of the survivor of them, the said" C., and E. his wife, and the issue of such of them as shall be dead. C. had three children by a first wife, she had also two by E. before he married her, and one afterwards. Evidence was offered that testatrix had promised C. to make the bequest to all the children, if he would marry E.; that she had always treated the children alike as her nephews and nieces; and that, in preparing her will, she gave directions that they should be treated alike, and she supposed the will to be to that effect. One legitimate daughter was married to B., a brother of a member of the firm of solicitors who drew the will. *Held*, that extrinsic evidence could not be admitted, and the legitimate children only could take. *Dorin* v. *Dorin*, (L. R. 7 H. L. 568), and *Laker* v. *Hordern* (1 Ch. D. 644), discussed.—*Ellis* v. *Houstoun*, 10 Ch. D. 236.

2. F., by will, gave all his property to those children of his two daughters who should attain twenty-five. At F.'s death, one daughter had two infant children; the other, three children, one of whom had attained twenty-five. *Held*, a gift to such of the children as a class, living at the death of F. as should attain twenty-five. If there had been no children of the two daughters living at the death, the gift would have been void for remoteness.—*Picken* v. *Matthews*, 10 Ch. D. 264.

3. E., by will made in 1826, gave certain freehold lands to his mother, "to hold unto her, . . . her heirs and assigns for ever." The will was properly attested, the interlineation of two words being mentioned. When the will was produced, the words "her heirs and assigns for ever" were found erased by a line struck through them in ink. *Held*, a valid obliteration under the Statute of Frauds (29 Car. II. c. 3, § 6), and the mother took a life-estate only.—*Swinton* v. *Bailey*, 4 App. Cas. 70; s. c. 1 Ex. D. 110; 10 Am. Law Rev. 713.

4. "Executorship expenses" means the same as "testamentary expenses" in a will.—*Sharp* v. *Lush*, 10 Ch. D. 468.

5. H., by will dated in 1820, gave, in one clause, a leasehold and three freehold houses to his daughter S. for life, without impeachment of waste; remainder to the first and other sons of S. successively in tail male, and, in default of such issue, to the daughters of S. successively in tail, and, "in case of default of issue" of S., "to the right heirs of the said S. for ever." S. married, became a widow, and died without having had any children. *Held*, that she took an absolute title in the leaseholds.—*Herrick* v. *Franklin*, (L. R. 6 Eq. 593) considered.—*Comfort* v. *Brown*, 10 Ch. D. 146.

6. B., by will dated 1818 and not attested so as to carry real estate, gave the "rest of my property" in trust to his brother's children for life, "and on the decease of either of them, his or her share of the principal to go to his or her lawful heir or heirs." *Held*, that "heirs" must be taken literally. *Mounsey* v. *Blamire* (4 Russ. 384), disallowed.—*Smith* v. *Butcher*, 10 Ch. D. 113.

7. C., by will, gave one-fourth of her residue in trust for each of her three sons, and the remaining one-fourth to her grand-daughters, with a declaration of forfeiture in case of bankruptcy or insolvency of a beneficiary, and a disposition over. C. died in 1875, and the will was dated in 1874. W., a son, was adjudged a bankrupt in 1873. C. was a creditor, and proved. In 1875, after C.'s death, W.'s creditors accepted a proposal for composition, but it was not carried out. In 1876, a decree for the administration of the trusts under C.'s will was made. In 1878, a composition betwen W. and his creditors was made, and the bankruptcy was ordered to be annulled, *Held*, that there was no forfeiture.—*Ancona* v. *Waddell*, 10 Ch. D. 157.

See Conversion; Legacy.

Words.

"*Children.*"—See Will, 1.

"*Clause.*"—See Will, 3.

"*Default of Issue.*"—See Will, 5.

"*Lawful Heirs.*"—See Will, 6.

"*Right Heirs.*"—See Will, 5.

"*Uncontrolled and Irresponsible Discretion*,"—See Trust, 2.

CORRESPONDENCE.

Unlicensed Conveyancers.

To the Editor of the Law Journal.

Sir,—Your warm advocacy of the rights of the County practitioners deserves and no doubt receives their warmest gratitude. It is to be hoped that next session a Bill will be passed to prevent the unseemly contest between licensed and unlicensed conveyancers.

The proportion the latter bear to the former in the country districts is as five to one—in other words in every village where you find a professional man, you will on the average find five "jackals" to rob him of his practice, a practice to which he is entitled by the certificates which he has obtained and by the responsibility he incurs.

In the country more than one half of the legal business is necessarily conveyancing, and the only answer so far to the cry of poor professional men for protection is something like this, "You are undoubtedly entitled to protection, but the profession is so unpopular *now*;" or, it is right but "inexpedient." We are in a bad way in this country if *Right* and *Justice* have to give way to expediency and to the cry of ignorance. I cannot help thinking that if the matter were properly laid before Mr. Mowat by the Benchers, that he would remedy this great and growing evil.

Yours &c.,

A Sufferer.

[It is hard to say what the result would be of an appeal to Mr. Mowat on this subject. It is not perhaps worth discussing as it is not likely to be made. We had hoped that an Attorney-General having so large a majority might have thought proper to have brought in some equitable measure of relief, especially as he has personally, we believe, an earnest desire to advance the interests of his profession. We despair of the Benchers taking the initiative, as they ought to. Country practitioners will have to combine and agree on some concerted plan of action, before they die of inanition. The difficulty is that the Benchers are not

in truth a *representative* body, although elected by the very men who now, with great reason, complain of the evil alluded to. They are composed mainly of eminent counsel or practitioners with large business in the prinicipal cities, who do not feel, and seem unable to comprehend, or are too busy to think about the difficulties of their brethren who are struggling for existence against overwhelming odds in the numerous small towns and villages in the Province. There should be a representation in Convocation of men who are conversant with the practical crying wants of the great mass of the profession, and have sufficient fellow-feeling to do something to remedy the gross injustice to which so many country practitioners are now subjected.—Eds. L. J.

Unlicensed Conveyancers—Deputy Clerk of Crown at Barrie.

To the Editor of the Law Journal.

Sir,—In several of the later numbers of your excellent journal, I have been pleased to notice parties laying before you and the public generally complaints with reference to *soi-disant* "conveyancers." They show that the places from which they come have not half the grievances to complain of that we professional men in this Town of Barrie have. There are not only five or six of these pettifoggers here, but there are as a matter of fact nearly as many as twenty, and one of these, our wealthy postmaster, does so much business of that description that he has to employ a staff of clerks, and I am told that he does as much conveyancing as any five firms in the County. His success in this line induces him to come forth even more boldly, and now he appears as mortgagee's agent in proceeding under power of sale. But, sir, this is not all. Even our Deputy Clerk of the Crown draws deeds, mortgages, *wills* and *chattel mortgages*, and searches appearances, signs judgments, enters records, &c., &c., for outside offices, and thus destroys our agency business. The fact of the matter is this state of things should be prohibited by legislative enactment. The Registrars are not allowed to draw deeds or mortgages. Then why should Deputy Clerks, who have the custody of wills, chattel mortgages, and other records, be permitted to do business with reference to them outside of their legitimate sphere? Mr. Mowat, with all his reform cannot do better than look to these matters before bothering his head with that immense overhauling called "The Judicature Act of 1880."

Yours obediently,

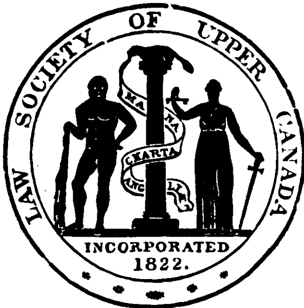
Barrie, April 15, 1880. S. H.

[We have already called the attention of the Attorney-General to this matter. We trust he will take some action. The present state of things is most objectionable.—Eds. L. J.]

FLOTSAM AND JETSAM.

The Tichborne Claimant.—On the application of Mr. E. Kimber, solicitor for the "Claimant," the Attorney-General has granted his fiat for a writ of error in the matter of the late trial of Arthur Orton for perjury. The grounds of error alleged are that the two separate sentences of seven years' penal servitude passed upon the claimant were substantially for one and the same offence. On the argument of the case, should the appeal be successful, the Claimant would be entitled to his liberty at the expiration of the first term of seven years.

Tit for Tat.—A medical practitioner, urgently wanted patients, and not understanding the difference between attracting and disgusting, circulates through the city postal cards addressed to any gentleman of sufficient eminence to draw his attention, on which he offers his services to cure them of fits, falling sickness, epilepsy, and all the ills, too disagreeable to mention, that flesh is heir to; closing with the agreeable assurance that he will treat them in perfect confidence. Imagine his disgust on receiving from a witty lawyer this response, also spread on a post card: "Dear Sir,—I offer you my services to defend you on your trial for murder, arson, robbery, larceny, malpractice, criminal abortion, indecent assault, body-snatching, and obscene communications. I can secure, if not your acquittal, at least the mitigation of punishment, every time. N. B.—This postal card is strictly confidential."—*Albany Law Journal.*



Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 43RD VICTORIÆ.

During this Term, the following gentlemen were called to the Bar, (the names are not in the order of merit, but in the order in which they stand on the Roll of the Society) :--

GEORGE WHITFIELD GROTE.
WILLIAM COSBY MAHAFFY.
P. A. MACDONALD.
WILLIAM LAWRENCE.
WILLIAM LEIGH WALSH.
JOHN J. W. STONE.
COLIN SCOTT RANKIN.
HORACE COMFORT.
ALEXANDER V. MCCLENEGHAN.
MARTIN SCOTT FRASER.
WILLIAM PATTISON.
WM. REUBEN HICKEY.
GEORGE MONK GREEN.
JAMES THOMAS PARKES.
MICHAEL J. GORMAN.
HARRY EDMUND MORPHY.
CHARLES AUGUSTUS KINGSTON.
JOHN HY. LONG.

Special Cases.

JAMES C. DALRYMPLE.
JOHN JACOBS.

The following gentlemen have been entered on the books of the Society as Students-at-Law and Articled Clerks .--

Graduates.

PETER L. DORLAND.
LEWIS CHARLES SMITH.
MATTHEW M. BROWN.
PETER D. CRERAR.
RUFUS ADAM COLEMAN.

Matriculants.

ANDREW GRANT.
JAMES MACOUN.
FRANCIS R. POWELL.
JOHN TYTLER.
THOMAS JOHNSTON.

Primary Class.

ROBERT VICTOR SINCLAIR.
HECTOR COWAN.
WILLIAM BEARDSLEY RAYMOND.
WILLIAM ALBERT MATHESON.
ARTHUR B. MCBRIDE.
FRANK HORNSBY.
WILLIAM AUSTIN PERRY.
JOSHUA DENOVAN.
M. J. J. PHELAN.
ARTHUR EDWARD OVERELL.
ROBERT SMITH.
HUGH MORRISON.
JOHN MCPHERSON.
AMBROSE KENNETH GOODMAN.
J. A. MCLEAN.
THOMAS IRWIN FOSTER HILLIARD.
RANALD GUNN.
PHILIP HENRY SIMPSON.
JOHN GEAEE.
EDWARD A. MILLER.
JOHN GREER.
DANIEL FISKE MCMILLAN.
CHARLES ADELBERT CRAWFORD.
FREDERICK ERNEST COCHRANE.
WILLIAM PEARCE.
ANDREW GILLESPIE.
G. A. KIDD.

Articled Clerks.

G. R. VANNORMAN.
E. M. YARWOOD.
J. HEIGHINGTON.

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' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

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

Students-at-Law.

CLASSICS.

1880 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.