DIARY FOR OCTOBER.

1. Wed... Master and Reg in Chancery. Clerks and Deputy Clerks Crown to make return of fees.
5. SUN.. *17th Sunday after Trinity.*
6. Mon... County Court Term begins.
10. Fri. .. Quebec Conference, 1864. Last day for Master and Reg. in Chancery, and Clerk and Deputy Clerk Crown to pay over fees to Provincial Treasurer.
11. Sat. .. County Court Term ends.
12. SUN.. *18th Sunday after Trinity.*
15. Wed... Law of England introduced into Upper Canada, 1792.
18. Sat. .. *St. Luke.*
19. SUN.. *19th Sunday after Trinity.*
21. Tues.. Battle of Trafalgar, 1805.
25. Sat. .. Charge of Balaklava, 1854.
26. SUN.. *20th Sunday after Trinity.*
28. Tues.. *SS. Simon and Jude.*
31. Fri. .. *All Hallow Eve.*

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THE

Canada Law Journal.

Toronto, October, 1873.

We publish in another place the judgment of Judge Boswell, of Cobourg, as to the legality of the assessment of Bank Stock; and, in a note to that case, we also refer to the decisions of other County Judges. So far as adjudicated cases go at present, they stand two to two. The majority of the County Judges at their recent meeting came to the conclusion that the assessments were illegal. We cannot say that as yet the matter has been so thoroughly discussed or so fully considered as to warrant any definite conclusion. It is possible that the subject may be adjudicated upon by one of the Superior Courts, should no preliminary objection bar the way.

The Judicial Committee of the Privy Council has been taking effectual steps to expedite the disposal of appeals depending before them. At present it is expected that all arrears will be cleared off before the end of the year, although some 195 cases are on the list to be heard, of which 19 are from different Provinces of the Dominion. With a view to the despatch of business an order has been promulgated providing that appeals are to be set down for hearing within a period not exceeding twelve months from the date of the arrival and registration of the transcript of appeal in England. Failing this, the Lords are to be at liberty to call upon the appellant to show cause why the appeal should not be dismissed for non-prosecution, and, if they shall so think fit, to recommend to Her Majesty the dismissal of any such appeal. No doubt, in case of a dismissal for non-prosecution, the appellant would be ordered to pay costs.

Editorial Items.

A paper was lately read before the Medico-Legal Society of New York, by Dr. Beard, in which he maintained that out of the fifty thousand physicians in the States, there were only one or two hundred whose opinion in difficult psychological cases would be of value in a court of justice. We fear that if accurate investigation were made, Ontario would not show more favourably in this matter. There is such rivalry in medical schools that the tendency is to multiply graduates, whose attainments are not at all in proportion to their numbers. We hope that the same infection is not about to extend to Universities which confer degrees in law. It is bad enough to have Q.C.'s flocking into court in such swarms that there is not room enough to receive them, but it will be more intolerable to have "Doctors of the Laws" thrust upon the profession, whose recommendation has been the capacity to run the gauntlet of a nominal examination.

It is a duty which we owe to the profession, as well as to ourselves, under the rules laid down for our guidance as journalists, to discountenance anything which can be looked upon as unprofessional or inconsistent with a nice sense of what is due to the honourable profession to which we belong. Our notice has been drawn to a circular, which calls the attention of practising attorneys at a distance to the fact, that the subscriber has been appointed Master and Deputy Registrar in Chancery, at a certain county town in Ontario, the name of which it is not necessary to mention. The circular then continues :—"Any Common Law Agency business entrusted to his care, will receive prompt attention." The person who thus seeks to bring himself to the attention of his brethren, should remember, in the first place, that he occupies a *quasi* judicial position, which is, by means of this circular, made to do duty in a way which is alike improper, unprofessional, and unfair to his fellow practitioners, who are obliged to depend upon their own merits for business, they being unable to present any attraction so glittering as that of Master and Deputy Registrar in Chancery. Were we inclined to joke on the subject, we might refer to the transparent logic which deduces the capacity of the advertiser for *Common Law* Agency business, from the bare fact of his being a local Judge in *Chancery.* But believing, as we do, that had our young friend thought twice on the subject, the circular would never have been written, we shall not pursue the subject further.

The case of *McLean* v. *McKay*, "an appeal from the Supreme Court of Judicature for the County of Halifax, in the Province of Nova Scotia, in the Dominion of Canada," has lately been decided by the Privy Council. The question was one upon the construction of an inartificially drawn clause in a deed of conveyance upon which the decree of the Judge in Equity, the Court of first instance, had been in the plaintiff's favour. The case was appealed to the Supreme Court, consisting of five judges, of whom the Judge in Equity was one. The Common Law judges were equally divided in opinion on the appeal, but the Equity Judge, having changed his first view of the case, turned the scale against his own decree. Sir Montague Smith, who delivered their Lordships' judgment, blandly regrets that the learned Judge in Equity should have found occasion to change the opinion to which he had originally come, for their Lordships] were of the opinion that his first judgment was right. A little further on we find his Lordship indulging in a little pleasantry as to some alleged local usage in the town of New Glasgow, where was situate the land in question. He observes "Soon after McLean pur-

chased the property he built upon it; but it is perhaps, not quite correct to say that he built upon it, because it appears to be the custom in that part of Nova Scotia to build houses and run them on the ground, and plant them there ready built." And finally at the conclusion of the judgment the Court lay down the rule that when a case comes before the Judicial Committee on appeal, their Lordships' will exercise their discretion in not regarding strictly the precise terms of the pleadings, and in deciding the case upon its merits. We are indebted for the report of the appeal to the *Weekly Reporter* (21 W. R., 798.)

JUDGES IN MANITOBA.

One of the inconveniences arising from a mixed nationality, when two languages are spoken and not mutually understood, is exemplified by an incident in a case recently heard before the Court of Queen's Bench, in Manitoba. It was apparently a simple action on a promissory note. The jury consisted, as is usually the case, of a jury composed partly of English and partly of French speaking inhabitants, and who were addressed by counsel in both languages.

Judge McKeagney, one of the two Puisne Judges, who was on the bench at the time, on the conclusion of the case, charged the jury in English, and being unacquainted with French himself, was compelled to direct the Prothonotary of the Court to translate his speech into that language for the benefit of those jurors who were unable to understand the English language. Against this mode of action counsel for defendant objected, on the ground that it was the express duty of a Manitoban Judge to explain his meaning to the jury in both languages *himself*, and not to call on a third party to do so for him.

The Act regulating the Courts in Manitoba provides (see p. 12 *ante*) that all judges appointed under it must be able to speak both languages. We are not prepared to say whether this is a wise, or even a necessary provision, though possibly it may be said to be for a time at least expedient; nor do we know why a gentleman was selected who has not the required accomplishment if indeed at the time of his appointment the law required it. But one thing may we think be said with truth, and that is, that it is a great pity that the field for the selection of judges for the Province of Manitoba, should be, by virtue of the act referred to, limited practically to the Province of Quebec. We certainly think, and we say so without reference to the many complaints made, rightly or wrongly, against the judiciary of the latter Province, that the selection should be made from the largest circle possible; and we might add our belief, that the better a judge is grounded in the old Common Law of England as modified by modern statutes the more useful he is likely to be, and more especially so when, in the natural order of things, this new Province of Manitoba must eventually be overrun by the Anglo-Saxon race.

NEW ONTARIO ELECTION ACT.

(Continued from page 249.)

We promised last month to speak of the more important sections of the Act. Our remarks must of necessity be brief.

The first section repeals so much of the third section of The Controverted Elections Act of 1871 (34 Vict. cap. 3, O.) as defines "corrupt practices," or "corrupt practice," and enacts that these expressions "shall mean bribery, treating, and undue influence, or any of such offences, as defined by this or any Act of Legislature, or recognized by the common law of the Parliament of England; also, any violation of the forty-sixth, sixty-first, or seventy-first section of the Election Law

of 1868; and any violation of the sixty-sixth section of such last mentioned Act during the times appointed for polling." By the Act of 1871 "corrupt practices," or "corrupt practice," were defined to mean, "bribery and undue influence, and illegal and prohibited acts in reference to elections—or any of such offences—as defined by the Act of the Legislature."

The new definition settles two questions which were left in doubt by the Act of 1871. The first of these was whether all prohibited acts—whether such as would in their nature unduly influence an election, or not—should be considered as corrupt practices, so as to render void the election of the candidate committing them, and subject him to the penalties mentioned in the Act. Or whether those acts should alone be considered "prohibited acts" within the meaning of the definition, which partook of the nature of bribery and undue influence in their tendency to prevent the election from being free. The other question was whether the Common Law of the Parliament of England —or, as it has been otherwise termed, the Common Law of England in reference to parliamentary elections—applied (as far as it related to corrupt practices) to elections to the Legislative Assembly of Ontario. In some of the recent election cases this latter question was indirectly decided in the affirmative, but opinions to the contrary were expressed by two of the most prominent counsel at the bar.

These two questions, which arose under the late Provincial Statute, did not arise in England, for there it was enacted that "corrupt practices," or "corrupt practice," should "mean" bribery, treating and undue influence, "or any of such offences as defined by Act of Parliament, or recognized by the common law of parliament:" Imp. Stat. 31 & 32 Vict. cap. 125, sec. 3.

The present definition also expressly includes, under the term "corrupt practice," the violation of certain sections of the election act of 1868 (32 Vict. cap. 21, O.); namely—section 46, relating to the personation of voters, section 61, as to treating meetings of electors, section 71, as to the hiring of conveyances, and section 66, which directs that taverns shall be closed, and that no spirituous or fermented liquors shall be sold or given upon the day of polling, provided, however, as to the violation of this last mentioned section, that to constitute such violation a corrupt practice it must occur during the hours appointed for polling.

It is probable that the offences, or most of them, pointed out by these sections thus specially referred to, would have been held to come within the meaning of the general expressions used in the definition, but still it cannot be denied that it is better to remove all cause for doubt, and that the definition, as it now stands, will convey a more accurate idea of the actual state of the law to unprofessional persons than it would have done had the special references been omitted.

The second section of the Act repeals the much discussed sixty-first section of the Act of 1868, and enacts in lieu thereof, that "No candidate for the representation of any electoral division shall, nor shall any other person, either provide or furnish drink, or other entertainment, at the expense of such candidate, or other person, to any meeting of electors assembled for the purpose of promoting such election, previous to or during such election, or pay, or promise or engage to pay for any such drink or other entertainment, except only that nothing herein contained shall extend to any entertainment furnished to any such meeting of electors, by or at the expense of any person or persons, at his, her, or their usual place of residence." This section, as it formerly stood, declared that no candidate "with intent to promote his

election," or any other person "with intent to promote the election of such candidate," should furnish entertainment; the section as it now stands omits all reference to the intention of the candidate or other person furnishing entertainment. The word "drink" has also been added, as many electors appear to have held the idea that drink was not included under the term "entertainment," which was the only expression used in the original Act.

Section 3 repeals section sixty-nine of the Election Act of 1868, and section forty-six of the Controverted Elections Act of 1871, and the following is enacted in lieu of the latter section: "45 (1). When it is found upon the report of a judge upon an election petition that any corrupt practice has been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, the election of such candidate, if he has been elected, shall be void. (2.) When it is found by the report of a judge upon an election petition that any corrupt practice has been committed by or with the actual knowledge or consent of any candidate at an election, in addition to his election, if he has been elected, being void, he shall, during the eight years next after his being so found guilty, be incapable of being elected to and of sitting in the Legislative Assembly, and of being registered as a voter, and of voting at any election, and of holding any office at the nomination of the Crown, or of the Lieutenant Governor in Ontario, or any Municipal office." This section is intended to remove any misapprehension as to the effect upon the seat of a candidate of corrupt practices committed by his agents without his knowledge or consent. It does not introduce any new principles, but merely states in a connected form those principles which have been already acted upon in this Province, and which have been in force in England from time immemorial.

Section 4 makes an addition to the oath to be taken by an assessor on returning his assessment roll. He was formerly required to make the general statement that he had assessed all persons correctly, but the present section requires him to state that he has not "entered the name of any person at too low a rate, in order to deprive such person of a vote, or at too high a rate, in order to give such person a vote, or for any other reason whatever."

Section 5 enacts that no person disqualified from voting by section two of the Election Act of 1868 shall act as the agent of a candidate, under the same penalty as if he had voted contrary to that section. That section disqualified certain persons holding official positions, specified therein, from voting, and imposed a penalty of two thousand dollars on any one violating its provisions.

The sixth section of the Act makes an addition to the oath which a person tendering his vote may be required to take, such addition being to the effect that he has not directly or indirectly paid or promised anything to any person, either to induce him to vote or to refrain from voting at the election. Formerly the person tendering his vote could only be required to swear that he had not received anything, but he was not obliged to make a statement as to whether he had given anything. It is to be hoped that the operation of this section will prove beneficial in tending to diminish bribery, for there are many persons, possessing a certain degree of respectability and great influence in election matters, who, although they would reject any bribe offered to themselves, yet can see no objection whatever to their own attempts to bribe others.

Sections 7-12 of the Act relate to the subject of election expenses and election accounts, and, as far as this Province is

concerned, introduce an entirely new system, although enactments to the same effect have been long in force in England. These sections follow, with a few unimportant alterations, the Imperial Statute 26 Victoria, cap. 29, which was founded on certain provisions of the Corrupt Practices Prevention Act of 1854 (Imp. stat. 17 & 18 Vict. cap. 102).

By section 7 candidates are required to appoint agents for payment of election expenses, whose names and addresses are to be given in writing to the returning officer on or before the day of nomination, and no payment (except in respect of the personal expenses of the candidate), and no advance, loan or deposit for the purposes of the election, is to be made by or on behalf of the candidate, either before, during or after the election, except through an agent so appointed. The returning officer is required, by section 8, to publish the names and addresses of the agents in a local paper, either on or before the nomination day, and is also, on that day, to announce the names and addresses from the hustings.

Section 10 requires that all bills and claims upon the candidate, in respect of the election, shall be sent to an agent for election expenses within one month from the day of the declaration of the election, otherwise the claim shall be barred; provided, however, that no claim is to be paid or allowed until approved of by the candidate.

The Act also makes provision for the case of the death of any person having a claim against the candidate; or for the death or incapacity to act of any agent.

Section 11 enacts that a detailed statement of all election expenses shall be made out and signed by the agent or agents within two months after the election, and shall be delivered, with all bills and vouchers, to the returning officer, who is required, within fourteen days, to insert an abstract of the statement in a local newspaper.

By section 12 the returning officer is required to preserve the bills and vouchers, and to permit them to be inspected by all voters wishing to examine them.

Sections 13-27 of the Act provide for the preliminary examination of parties to petitions, and others, and the production of documents. These sections introduce, in substance, the practice of the Court of Chancery relating to the examination of parties and production of documents; and they follow very closely the English Chancery Act of 1852: (Imp. stat. 15 & 16 Vict. cap. 86.) Section 13 enacts that any party to the petition may, at any time after the petition is at issue, be examined before an examiner by a party adverse in point of interest touching any matter raised by the petition, and the examination may be followed by a cross-examination and re-examination. A petition is to be deemed at issue as soon as the security to be given by the petitioner has been approved of. (See 34 Vict. cap. 3, s. 9, O.) Section 14 provides that when a seat has been claimed for a candidate, such candidate, although not a party to the petition, may be examined as if he were a petitioner.

Depositions taken under the provisions of the Act are to be committed to writing, and may be used upon the trial of the petition.

With reference to the production of documents, it is enacted by section 23 that any party to a petition may obtain, as of course, a rule requiring the adverse party to produce, within ten days, upon oath, all documents in his custody or power relating to the matter in question, and to deposit the same with the Clerk of the Court. And it is provided further, that when a party called upon to produce, wishes to avail himself of any privilege entitling him to withhold any document, he must state in his affidavit of production the grounds on which he

claims such privilege. The schedule to the Act contains a form of affidavit or production, which, *mutatis mutandis*, is the same as the form of affidavit on production set out in schedule G to the Consolidated General Orders of the Court of Chancery.

The next ten sections of the Act, 28 to 37, relate to the subject of scrutiny, or the separate examination into the validity of the individual votes polled, in order to ascertain which candidate has obtained a legal majority.

According to the system heretofore in force, a scrutiny has been conducted by the court in the same manner as the general charges in the petition. This process, as may be supposed, has proved very cumbersome; and the expense attendant upon it has been so great, as practically to render a lengthened scrutiny impossible. In England the taking of a scrutiny has not, as a rule, been attended with a correspondingly great expense. For there a species of judicial investigation is made annually before a functionary styled a Revising Barrister, in order to test the qualification of those persons who are entered upon the list of voters, or claim the right of being so entered. This process necessarily disposes of all those simpler cases, such as constitute the large majority upon the scrutiny lists in this Province, and the number of votes to be examined by such an expensive tribunal as the Court is therefore comparatively small.

Some persons have been in favour of introducing the English system here, but objection has been taken to it upon the ground of expense; as, in order to carry out the English system in such a way as to avoid unfairness and irregularity, it would be necessary to examine the voters' lists every year, and not merely when one of the ordinary general elections was anticipated. And further, that this annual examination of votes must take place in every constituency through the Province, although the probabilities always are that the majority of the returns will not be petitioned against. Under these circumstances it is contended, that although the English system may diminish the expense to the individuals proceeding under any particular election petition, yet the expense to the country at large would be too great to warrant its adoption.

Another objection has been urged against the introduction of the English system — though it may be doubted whether much weight should be attached to it—on the ground that the organization of political parties is not as perfect in this country as in England, and therefore the same pains would not be taken to cause a thorough examination of the voters' lists before the revising barrister, and consequently that the same accuracy in those lists would not be secured.

In framing the new Act, the Legislature appears to have considered it inadvisable to adopt the English system, and has sought to avoid the expense of that system by authorizing a judicial examination of the qualification of voters in those cases only where a petition has been filed, and also to remedy the evils of the system formerly in force here, by substituting an inexpensive mode of taking the scrutiny for the former expensive one by the Court.

By section 28 it is enacted that the judge, before whom the petition is to be heard, may appoint a time and place in every local municipality in the constituency, for entering into a scrutiny of those votes polled in that municipality, to which objection has been taken. By a subsequent section, it is provided that the scrutiny may be entered into before the judge himself, or he may appoint his registrar, or some other person, being a barrister and competent for the purpose, to act in his stead. It is further enacted that where the scrutiny is before a person

appointed by the judge to act in his stead, the evidence must be taken down in writing; and before the close of the scrutiny, all questions of law and fact are to be decided or reserved for the decision of the judge; a note in writing of such decision or reservation is to be made for the information of the judge; and the decision or reservation is to be publicly announced for the information of the public and the parties interested. When any party is dissatisfied with the decision of the person delegated by the judge to take the scrutiny, he may appeal to the judge against the decision; provided that the judge may on the trial before him refuse to consider any points not raised before his delegate; and in case he do consider the same, and allow the appeal on a ground not distinctly taken before the delegate, the judge may order the appellant, though successful, to pay the costs of and incidental to the appeal.

It is obvious that these new enactments must at all events diminish the expense and inconvenience entailed by the former system, which required all the witnesses on the scrutiny to attend—often at long distances from their places of residence—and during the trial of all the questions raised by the petition, the decision of some of which might render their attendance quite unnecessary.

The remaining sections of the statute relate to certain miscellaneous matters, among which, it may be observed that members of the Legislative Assembly are now authorized to act as counsel, agents or attorneys in election cases, their former disabilities having been removed.

It is sincerely to be hoped that these provisions, many of which have been found to work well in England, will help to diminish in a marked manner the evils of bribery, which are second only to the degrading influences of the falsehood and hypocrisy which is so generally the issue of political strife.

ACCIDENT INSURANCE.

The subject of accident insurance is discussed at some length in the last number of the *American Law Review*, and the few cases in point collected and commented upon. In his introductory remarks the writer says:—

"Accident insurance is of modern origin. The French in the seventeenth century appear to have conceived the idea; but the earliest English company was formed in London in 1848, and the first American company is only ten years old. The continental system of appraising organs at specified sums, and paying a fixed rate for a broken leg or a lost eye, has never found favor in America. Upwards of twenty-three accident companies have been organized here which have now passed away, like Mr. Oldbuck's ghost, who disappeared with a melodious twang and an unsavory odor. Their memory is not sweet to those who hold unsatisfied judgments against them. The Travellers' Insurance Company of Hartford, and its offshoot, the Railway Passengers' Assurance Company, remain almost alone, but occupy the field successfully and redeem this branch of insurance from the discredit which their defunct contemporaries brought upon it. The American system of accident insurance, and the rapid approximation toward sound science in law and practice which it exhibits, is chiefly due to this company. When first organized, it was intended chiefly to insure travellers, but it soon established a general accident insurance, and afterwards combined it with life insurance. No accident tables have yet been published, and the statistics as yet are insufficient to generalize with accuracy results like those of the life tables. It is, however, well settled that in general accident insurance hardly more than seven per cent of claims arise from accidents in travel by rail or water, while those growing out of horse or carriage injuries exceed in number those arising from all other causes combined.

The idea of American accident insurance was borrowed from England, but in adapting its principles to the customs and habits of this country, the conditions of society, the occupations of the people, and the risks of accident, it was found necessary to construct new tables of rates, new classifications of risks, and new methods of business. The result was the general failure of companies which sought to do business by mere imitation, instead of attempt-

ing the scientific construction of a sound system of insurance. The pioneer company is fairly entitled to the credit of developing this system, and proving that the principle of average can be skilfully generalized into a real protection against loss by accidental bodily injuries. It now is the largest and best arranged accident company in the world, having issued during the ten years of its existence over 250,000 general accident policies and paid more than $2,000,000 on over 17,000 claims; an average compensation for losses equal to about seven hundred dollars a day for every secular day the company has done business.

Probably most persons imagine that, in these days of frequent casualty on land and sea in public conveyances, accident insurance is designed for travellers chiefly. The reported cases, however, suggest the mistake of this supposition, and in fact accidents from travel are only a small part of the losses for which compensation is paid. Since the Travellers' Company is the most successful association, as well as the oldest, the discussion of the subject becomes of necessity, in its present form, little more than an examination of its policy and practice, although its defunct rivals have contributed something to the law of such insurance, and some of them have left in the reports decided indications not only why they failed but how well it is for the public that they died.

Accident insurance in this country began with the sale of "accident tickets" to travellers on railroads. They were of three classes: insuring the passenger, first, against accidents to the conveyance; second, against all sorts of accidents while travelling by public conveyance; third, against all accidents set forth in the contract, without reference to conveyance, mode of travel, or occupation. These tickets were sold at railroad stations. By common agreement, however, of all the American companies, this branch of insurance was at an early day given up to the Railway Passengers' Assurance Company, which was owned by all the companies, and is now under control of the Travellers' Insurance Company. These tickets cover only a specific journey, or a short period of time, and contain the same general provisions as the common policy.

The policy grants a limited insurance. It insures either indemnity for injury by payment of a specified weekly allowance during the time the insured is disabled by the injury, or compensation for death by payment of a fixed sum if the insured dies in consequence of an accident. These two forms of insurance are issued separately or in a joint policy covering both indemnity and compensation. The policy now in use covers all "bodily injuries effected through *external, violent, and accidental means.*" Indemnity is limited to twenty-six weeks, and exception is expressly made against all forms of disease, drunkenness, duelling, suicide, self-inflicted injuries, and wilful exposure to unnecessary risk. Formerly the word "external" was not inserted, but now, in order to guard against frauds, the injury must be from some external means and produce a visible injury. Death must occur within ninety days from the happening of the accident to entitle the insured to compensation, and indemnity is not earned except it totally disables him from prosecuting any and every kind of business for the continuous period for which it is claimed. These are the peculiar provisions of an accident policy, which otherwise resembles an ordinary life policy, though in its effect and analogy accident insurance more closely resembles fire insurance than life insurance, and is truly a provision for indemnity except in cases of death, when it becomes a contract to pay a fixed sum of money upon the happening of death caused by accident. The form of the policy has been changed frequently in order to adapt it to new judicial decisions, and too little regard is had to the expediency of retaining the form of words which has been judicially construed, and thus expressing the rights of all parties by a contract which gradually becomes quite exact in its construction. Indeed the introduction of certain phrases from time to time shows the effect and marks the date of certain legal controversies, and makes a file of policies of successive years a condensed history of the law of this department of insurance.

What is an accident? The term, as used in policies, has been several times defined in the adjudicated cases. It is "any event which takes place without the foresight or expectation of the person acted upon or affected by the event." * The same definition is substantially adopted in Maryland.† It is "an unusual and unexpected result attending the performance of a usual and necessary act." It is "any unexpected event which happens as by chance, or which does not take place according to the usual course of things," ‡ It is something

* Withey, J. in *Ripley* v. *Railway Passengers' Assurance Co.*, U. S. Circuit Court for Western District of Michigan (1870); reported 2 Big. Cases, 738.

† *Prov. Life Ins. & Inv. Co.* v. *Martin*, 32 Maryland, 310.

‡ *North American Ins. Co.* v. *Burroughs*, 23 Legal Intell. 342; s. c. 69 Pa. St. 43.

which takes place without any intelligent or apparent cause, without design, and out of course.* "Some violence, casualty, or *vis major* is necessarily involved" in the term accident.† It means, in short, in the insurance policies, an injury which happens, by reason of some violence, casualty, or *vis major* to the assured, without his design or consent or voluntary co-operation. "Violent and accidental" are equivalent in meaning to "accidental violence,"‡ and every injury caused by accident, save those specially excepted by the policy, is covered by it.§ A full discussion of what an accident is, will be found in *Schneider* v. *Prov. Life. Ins. Co.*, 24 Wis. 28.

SELECTIONS.

FOSS AND HIS "BIOGRAPHIA JURIDICA."

(*Continued from p.* 256.)

Sir John Maynard, of whom much has been said, for and against, used to call the law 'ars bablativa,' and—

"Delighted so much in his profession that he always carried one of the Year Books in his coach for his diversion, saying that it was as good to him as a comedy. His passion for law ruled him to such a degree that he left a will purposely worded so as to cause litigation, in order that sundry questions, which had been 'moot points' in his lifetime, might be settled for the benefit of posterity. Judge Jeffreys is said to have availed himself of the serjeant's legal knowledge; but one day, when Maynard was arguing against judicial dictum, the coarse judge told him that 'he had grown so old as to forget his law.' ''Tis true, Sir George,' he retorted, 'I have forgotten more law than ever you knew.'"

Lord Thurlow used to say that Lord Mansfield was—

'A surprising man; ninety-nine times out of a hundred he was right in his opinions and decisions; and when once in a hundred times he was wrong, ninety-nine men out of a hundred would not discover it. He was a wonderful man.'

* *Mallory* v. *Travellers' Ins. Co.*, 47. N. Y. 52.

† Cockburn, C. J. in *Sinclair* v. *Maritime Passengers' Ass. Co.*, 3 El. & E. 478.

‡ *Riply* v. *Railway Passengeas' Assurance Co., ut supra.*

§ *Pro. Life Ins. & Inv. Co.* v. *Martin, ut supra.*

The law's delays were much more general in former times than at the present day, and little effort was made to fetch up arrears. During the chancellorship of Lord Eldon the business of the Court of Chancery progressed but slowly, notwithstanding that on the one hand the proverbial dilatoriness, hesitation, and dubitation, displayed by his lordship in decisions was more than counterbalanced by the expeditiousness of his colleague, Vice-Chancellor Sir John Leach, who was notorious for the swiftness with which he disposed of the business which came before him. A line might well have been drawn between the two extremes. The rapid disposal of cases by the latter, owing to his extraordinary confidence in himself, led to much inconvenience, and unnecessary and harassing litigation.

'He relied so little upon authorities, and listened so indifferently to any arguments that conflicted with his own opinion, sometimes not even condescending to give any reasons for his judgments, that his decisions were frequently appealed against, and not unfrequently overturned. In comparing his summary judgments with Lord Eldon's proverbial delays, the chancellor's court was designated the court of *Oyer sans terminer*, and Sir John's that of *Terminer sans oyer*.'

On the other hand Lord Eldon justified himself in his delays by his over-anxiety to do strict justice to the litigants, and acted on the principle that extreme care was necessary to come to a right decision, inasmuch as it prevented not only the annoyance and expense of appeal, but also future litigation in the same class of subjects. His judgments are certainly not only treated with the greatest respect, but regarded as of the highest authority, while those of his colleagues were often reversed on appeal or overruled. The following epigram wittily gives the contrast:—

"In Equity's high court there are
Two sad extremes, 'tis clear:
Excessive slowness strikes us there,
Excessive quickness here.

"Their source, 'twixt good and evil, brings
A difficulty nice;
The first from Eldon's *virtue* springs,
The latter from his *Vice*."

A contemporary of Lord Eldon's, Sir Thomas Harris, Master of the Rolls, was another tedious judge. Although possess-

ing great powers and ability his style was so heavy and his speeches so long and elaborate that he fatigued his hearers without interesting them. His predecessor, Sir William Grant, notwithstanding his great dispatch, left an arrear of more than five hundred causes, a large number, accounted for, it is said, by the fact that suitors set their causes down for Sir William because Sir Thomas should not hear them. The following is said of him:—

"To cause delay in Lincoln's Inn
Two diff'rent methods tend:
His lordship's judgments ne'er begin,
His honour's never end."

Most judges, from time immemorial, have possessed some peculiar trait of character to distinguish them from others. Of course a volume, giving merely an outline of a person's career, deals largely in the principal distinguishing features. Therefore, any peculiarity in the manners, actions, and capabilities of the subject of the memoir is eagerly taken advantage of, and with all sorts of personal allusions of this kind the volume abounds. Thus it is noted of Alan Chambre, that a little more than a century ago he revived an ancient custom which had long been discontinued, of first resorting to an Inn of Chancery and paying the customary dozen of claret on admission into the society of Staple Inn, where his arms are emblazoned on a window in the hall. From this Inn he removed to the Middle Temple and Gray's Inn where he was called. On his appointment as a Baron of the Exchequer a short Act of Parliament was passed authorising, for the first time, a serjeant to receive his degree in the vacation so that the vacant office might be immediately granted to him.

Justice Page was known by the sobriquet of the 'hanging judge,' though it is doubted whether he really deserved the stigma. It is said:—

"When Crowle, the punning barrister, was on circuit with Page, on some one asking him if the judge was *just behind*, he replied, 'I don't know, but I am sure he never was "*just*" *before*.' When old and decrepit, the judge perpetrated an unconscious joke on himself. As he was coming out of court one day, shuffling along, an acquaintance enquired after his health. 'My dear sir,' he answered, 'you see I keep *hanging on, hanging on*.'"

For cruelty Jeffrey was the greatest monster that ever sat on the bench. Mr. Justice Foster designated him 'The very worst judge that ever disgraced Westminster Hall.' Coke, although in other respects a profound lawyer, acted with great harshness and cruelty towards prisoners placed before him for trial, particularly if for offences against the State.

Sir Richard Adams owed his elevation to the Bench of the Exchequer in 1753 to the king's admiration of him in the character of Recorder of the City of London. Several persons being suggested George II. called out, 'I vill have none of dese; give me de man wid de dying speech,' meaning the Recorder whose duty it was to report convicts under sentence of death.

Chief Justice Markham acquired the title of the 'upright judge,' because he eschewed corrupt practices and was superseded for impartiality and conscience sake.

Justice Hutton was called by King Charles, although he declared the imposition of ship-money to be illegal, 'the honest judge.' On his appointment Lord Chancellor Bacon addressed him as follows:—

"'The king, being duly informed of your learning, integrity, discretion, experience, means, and reputation in your country, hath thought fit not to leave you these talents to be employed upon yourself only, but to call you to serve himself and his people.' Among the counsels he gave were 'that you should draw your learning from your books, not out of your brain;' 'that you should be a light to jurors to open their eyes, but not a guide to lead them by the noses;' 'that your speech be with gravity as one of the sages of the law, and not talkative, nor with impertinent flying out to show learning;' and particularly 'that your hands, and the hands of your hands, I mean those about you, be clean and uncorrupt from gifts, from meddling with titles and from serving of turns, be they of great ones or small ones.'"

It is noted that it was a pity his own precept was not followed by himself.

Lord Talbot was not only distinguished as a lawyer but for his humanity and kindness to the distressed. The following story is told of him:—

"After he had promised a valuable living to a friend of Sir Robert Walpole, the

curate of the late incumbent called upon him with a petition from the parishioners, testifying to his merits and his poverty, and entreating his lordship to use his influence with the new rector to continue him in the curacy. After some little conversation with him and finding that his stipend was only £50 a-year, his lordship kindly promised not only to comply with the request, but also to do what he could to get the salary raised. When the rector-expectant came to thank him for his promise, his lordship mentioned the curate's petition and begged it might be granted. 'I should be happy to oblige your lordship,' replied the clergyman, 'but I have promised my curacy to a particular friend.' 'Promised your curacy! what, sir, before the living is yours?' 'Yes, my lord.' 'Then, sir,' exclaimed the Chancellor with warmth, 'I will afford you an admirable opportunity of dismissing your friend, I will dispose of the living elsewhere;' and, without suffering a reply, dismissed him. On the curate's waiting upon him to know the result of his application, he told him that he was sorry to say that he could not get him the curacy; but on the poor man bowing and offering to retire, the chancellor stopped him and said, 'Though I cannot give you the curacy, I can give you the living, and yours it is; so you may write to your family and tell them that, although you applied only for the curacy, your merit and your modesty have obtained for you the living.'"

A story, not unlike the foregoing, is told of Lord Thurlow, who has been as much praised for his learning as abused for his irregularities. Having offended against the rules of his college and being called before the authorities to explain his conduct, he made an offensive reply respecting the dean, before whom he had frequently appeared for various offences:

"Having answered on one occasion with some disrespect, was sharply asked 'whether he knew he was talking to the dean.' Thurlow, of course, answered, 'Yes, Mr. Dean,' and ever after when they met addressed him as 'Mr. Dean,' and so frequently reiterated the title that the dean felt himself insulted by the banter. If this story be true, there is a graceful pendant to it, for on the impudent youth becoming chancellor he sent for his old enemy, and on his entering the room addressed him as usual, 'How d'ye do, Mr. Dean?' 'My lord,' replied the other sullenly, 'I am not now a dean, and do not deserve the title.' 'But you are a dean,' said his lordship, giving him a paper of nomination; 'and so convinced am I that you will do honour to the appointment that I am sorry any part of my conduct should have given offence to so good a man.'"

Giles Rooke, a Justice of the Common Pleas, though not considered a deeply-read lawyer, nor very highly respected on the bench, was, nevertheless, a mild and merciful judge. The following is told of him:—

"A poor girl, having from the pressure of extreme want committed a theft, was tried before him and reluctantly convicted; and that, while applauding the jury for giving the inevitable verdict, he declared that he so sympathised with them in their hesitation that he would sentence her to the smallest punishment allowed by the law. He accordingly fined her one shilling, adding, 'If she has not one in her possession, I will give her one for the purpose.'"

Chief Justice Dyer also distinguished himself by his sympathy for the poor, and made himself the object of much indignation among the gentry at the Warwick Assizes in 1574, by the energy he displayed in supporting a poor widow against the oppression of a rich knight of the county, whose illegal proceedings were assisted by the bench of magistrates there.

"Thus he, with grace, the poore man's love did drawe,
And by sharpe meanes did keep the proude in awe."

Sir Francis Buller was equally celebrated among both females and males, but not with equal admiration. It is said of him:—

"While he is considered by the latter as one of the most learned of lawyers, he is stigmatised by the former as one of the most cruel of judges, since to him is attributed the obnoxious and ungentlemanly dictum that a husband may beat his wife, so that the stick with which he administers the castigation is not thicker than his thumb. It may perhaps restore him to the ladies' good graces to be told that, though the story was generally believed, and even made the subject of caricature,

yet, after searching investigation by the most able critics and antiquaries, no substantial evidence has been found that he ever expressed so ungallant an opinion."

The late Sir Lancelot Shadwell, when at the bar, submitted to a serious loss in a pecuniary sense by honourably confining himself to the Lord Chancellor's Court and not following the practice of taking briefs for other courts; not being able, to use his own expression:—

To induce himself to think that it is consistent with justice, much less with honour, to undertake to lead a cause, and either to forsake it altogether, or give it an imperfect, hasty, and divided attention—consequences that inevitably result from the attempt to conduct causes before two judges sitting at the same time in different places.

Sir Thomas More in his youth was impressed with strong religious feelings, but in time other attractions cured him of a good deal of his pious disposition. His son-in-law, Roper, thus simply relates his course of love:—

He resorted to the house of one Maister Colte, a gentleman of Essex, that had oft invited him thither, having three daughters, whose honest conversation and virtuous education provoked him there specially to set his affection. And albeit his mind most served him to the second daughter, for that he thought her the fairest and best favored, yet when he considered that it would be both great grief and some shame also to the eldest to see her youngest sister preferred before her in marriage, he then of a certain pity framed his fancy towards her, and soon after married her, never the more discontinuing his study of the law at Lincoln's Inn, but applying still the same until he was called to the bench, and had read there twice, which is as often as any judge of the law doth ordinarily read.

Many great and eminent lawyers have been distinguished for a retentive memory. Lord Eldon said of Chief Justice De Grey (Lord Walsingham), who was a most accomplished lawyer and of a most extraordinary power of memory:—

"I have seen him come into court with both hands wrapped up in flannel (from gout). He could not take a note and had no one to do so for him. I have known him try a cause which lasted nine or ten hours, and then from memory sum up all the evidence with the greatest correctness." *Twiss*, i. 113.

Sir William Grant too had a wonderful memory. The effect of a speech of his delivered in the House is thus described:—

"Quite a masterpiece of his peculiar and miraculous manner. Conceive an hour and a half of syllogisms strung together in the closest tissues, so artfully clear that you think every successive inference unavoidable; so rapid that you have no leisure to reflect where you have been brought from, or to see where you are to be carried; and so dry of ornament, or illustration, or reflection, that your attention is stretched—stretched—racked. All this is done without a single note."

Of the Bench generally so much is said of the learning and integrity of the judges that it would be invidious to point out one more than another. Considerable space is devoted to the account of the lives of some of our brightest luminaries, both ancient and modern. A little more than a century ago, in an interesting memoir of the celebrated Sir John Holt, we find the following:—

"After the succession of chief justices that disgraced the bench in the reigns of Charles and James since the death of Sir Matthew Hale, it is refreshing to recall a name which excites universal admiration, as possessed by one who was erudite in law, independent in character, and just and firm in his decisions. In him may be fixed the commencement of a new era of judicial purity and freedom, marked with that perfect exemption from extraneous influences which has, with few exceptions, ever since distinguished the bench, and which is now the undisputed glory of our judicature."

Of the judges who have died in harness during the present reign are Mr. Justice Talfourd, Mr. Baron Watson, and Mr. Justice Wightman, all from fits of apoplexy; the former in the middle of an effective address to the grand jury; Baron Watson after having just concluded his charge to the grand jury, and the latter while in the exercise of his duties at the assizes.

As showing the friendly terms on which the judges occasionally lived with each other, the following extract may serve to throw some light. Mr. Justice Williams in his will devised:—

"And, whereas it hath been heretofore agreed between my good and kind brother Warburton and myself that the survivor of us twayne should have the other's best scarlet robes, now I do will that my said good brother Warburton shall have the choice of either of my scarlet robes, and he to take that shall best like him, praying him that as he hath been a good and kind brother unto me so he will be a good and kind friend to my children."

A good deal is said about the Circuits and the Courts which cannot be here noted. Suffice it to say that in those days the Criminal and Common Law Courts were, in a sanitary point of view, much worse than they are at the present time, bad as some of them are. In 1750 the Black Sessions of the Old Bailey, at which an unusually large number of prisoners were arraigned, and a great concourse of persons assembled, no less than forty persons met with their death, among whom were Justice Abney, Baron Clarke, Sir Samuel Pennant, the Lord Mayor, Sir Daniel Lambert, and several of the counsel and jurymen. At the Summer Assizes at Bedford, at the trial of one Jenkes, "a scurvy, foul-mouthed bookseller," for scandalous words uttered against the Queen, every person in court was seized with such a malady, arising, it was believed, from the stench of the prisoners, that they all died within forty days to the number of three hundred. Among the victims were Chief Baron Bell, Serjeant Barham, and other lawyers and several gentlemen of the county.

In concluding our notice of this interesting volume, we give from the preface of the work a short account of the life of the author, who died while it was in the press :—

"Edward Foss, the eldest son of Edward Smith Foss and Anne, daughter of Dr. William Rose, of Chiswick, was born in Gough-square, Fleet-street, October 16, 1787. He was educated under Dr. Burney, at Greenwich, and in 1804 was articled to his father, who was a solicitor in Essex-street, Strand. In 1811 he became a partner, and on his father's death, in 1830, he succeeded to the whole business, which he carried on with a high reputation for ability and integrity. In 1827-8, when his friend Mr. Spottiswoode was one of the Sheriffs of London, he filled the office of Under-Sheriff. His professional work brought him into intercourse with most of the leading barristers of the day, so that, while he was able to turn to account his observation of the judges who then occupied the Bench, he could speak from nearer personal knowledge of many who, by later promotion, came to be included among the subjects of his biographical labors. In 1822 he became a member of the Inner Temple, with the intention of being called to the Bar ; but he afterwards relinquished this plan, and continued to practice in his original branch of the legal profession until 1840, when he retired from business. In 1844 he removed to Canterbury. The change was one which for most men would have involved no small risk ; for in too many cases it has been found that a withdrawal from a life of busy engagements to one of competence and leisure does not bring the happiness which had been expected ; and so it might have been with Mr. Foss. He had little taste for country occupations or amusements ; and although he took an active part in the public business of the neighborhood—among other things by acting as chairman of the Canterbury bench of magistrates, where his strong sense and his legal knowledge made his services very valuable—this was not enough to fill up his time. In his own words, he 'found that full employment was necessary to his own existence and happiness ;'* and he was fortunately able to provide himself with the means of such employment. He had always felt a strong love of literature ; he had already published some volumes, besides many contributions, both in prose and verse, to periodicals and newspapers ; and he had early formed a project of writing the lives of all the English Judges. Through many years of busy London life he had kept this project steadily in view, and had gradually accumulated large stores of materials for carrying it into effect. These he now set himself to arrange, to complete, and to employ in composition ; and the first two volumes of 'The Judges of England' were published in 1848.

"Although these volumes were at once noticed with high praise by some of the most esteemed critics, the general reception of them was not very encouraging. Lord Campbell, in his 'Lives of the

* Introduction to "Judges of England," p. xiii.

Chancellors,' had lately made the public familiar with a very different style of legal biography; and when readers came to take up Mr. Foss's account of the early judges with the expectation of finding it equally amusing with Lord Campbell's popular narratives, they could not but be disappointed. The Chancellors were commonly men who had played an important part in the history of their times: of the older judges the vast majority were utterly forgotten; as to many of them, it was necessary to enquire whether they ever existed at all, and, if so, whether they were judges or not; and perhaps nothing more could be ascertained, after all possible enquiry, than that their signatures were found attached to certain documents, and so prove them to have been in certain places at certain times. It was unfortunate for the author that the portion of his book which was first published should be that in which the names for the most part had nothing of attraction for the generality of readers, and were incapable of being invested with any other interest than that which arises from skilful investigation and scrupulous correctness.

"The two volumes, therefore, could not be regarded as at first very successful. But Mr. Foss knew that he was doing a good and substantial work; he felt that in it he had found a source of continual interest, the chief occupation of his life; and he determined to persevere even if the publication involved (as at one time it seemed not unlikely) a considerable pecuniary loss. The third and fourth volumes appeared in 1851; the fifth and sixth, in 1857; the last three in 1864.

"In the meantime the reputation of the book had been rising. The subject became more interesting as it advanced; the author's laborious research, his acuteness in enquiry, his sound and impartial judgment, were discerned and were warmly acknowledged, and long before the concluding volumes were published, the work had taken its place as one of historical authority. How valuable it is in this character may be in some degree understood from the continual references to it in D. Pauli's learned 'Geschichte von England;' nor was this by any means the only testimony which the author received of the appreciation which his work has found among German men of letters. In America also its reputation is well established; and resting, as that reputation does, on a foundation of solid merits, it is not likely to be disturbed.

"From the lives of judges, Mr. Foss was led on to the compilation of his 'Tabulæ Curiales;' and his last years were employed in the re-casting of his old materials with a view to the present publication.

"While engaged on these labours he removed to Addiscombe. The infirmities of age fell gently on him, and he retained to the last his powers of sight and hearing, with the full vigour of his mind. His death took place on July 27, 1870, and his remains are interred in the neighboring churchyard of Shirley. By those who knew him he will be remembered as a man of strong understanding, of thorough uprightness, and of a kind and generous heart.

"He was twice married. By his second marriage he has left six sons and three daughters. The eldest son, of whom, is Edward W. Foss, barrister of the Inner Temple.

"Mr. Foss was the author of several works, and contributed largely to the publications of the day."—*Law Magazine.*

LIABILITIES OF EXECUTORS.

The law relating to executors is not the only subject upon which the Court of the Rolls and the Vice-Chancellors have in recent years furnished conflicting, or perhaps we should say scarcely consistent, decisions. On this subject, however, we have now three cases which should be read carefully together—the case of *Coote* v. *Whittington*, before Sir Richard Mallins, on the 7th instant; *Rayner* v. *Koehler*, also decided by the Vice-Chancellor (27 L. T. Rep. N. S. 506; L. Rep. 14 Eq. 262); and *Cary* v. *Hills*, decided by Lord Romilly (L. Rep. 15 Eq. 79). To take the latter decision first—the head-note is "To a bill alleging that the defendant is executor, and had, before probate, possessed himself of the personal estate, and praying for general administration, a plea that the defendant is not executor is a complete answer." In *Rayner* v. *Koehler* the head-note is this, "A bill by a creditor to administer the estate of a testator alleged that the testator by his will gave to his wife, the defendant,

the use for her life of half his estate, and appointed her guardian of his children; that administration with the will annexed had been granted to the defendant, who was 'the only legal representative, and also heir of the undisposed of moveables and immoveables,' and that she had received and entered into possession of all the real and personal estate of the deceased. Plea, that if the defendant was not, or never had been, administratrix with will annexed, or legal representative of the deceased. Held, that if the defendant was not administratrix she was administratrix *de son tort*, and the bill could be sustained." In *Coote* v. *Whittington* the defendant was the widow of the intestate, and had not taken out administration, but had possessed herself of some of the estate. The case came from the County Court, where a preliminary objection was taken to the plaint, on the ground that a personal representative of the deceased was not a party to the suit, which was for administration, and before the Vice-Chancellor it was contended that a bill was not sustainable against an executor *de son tort* in the absence of the personal representatives of the decesed. From this doctrine the Vice-Chancellor expressed his emphatic dissent, and it is curious to observe the terms in which Lord Romilly and the Vice-Chancellor came to opposite conclusions. The former said: "You cannot administer the personal estate of a testator in Chancery unless you have his legal representative before the court; if you were able to do so you would work great injustice." The Vice-Chancellor expressed the opinion that it was of the highest importance to the administration of justice that an executor *de son tort* should be liable. At present the Vice-Chancellor has the best of the argument, as *Cary* v. *Hills* was decided by Lord Romilly without giving reasons or citing cases. The Vice-Chancellor is fortified by authority. "From the Statute of Elizabeth," he said, "down to the case before the Master of the Rolls, the doctrine of the court has been uniform, that where a person had possessed himself of the assets of a deceased person, and had not properly clothed himself with the office of executor or administrator, he was liable to be sued as administrator *de son tort*. The maxim was that a person could not take advantage of his own wrong. A man could not say he was not an executor when he had acted as such." If the equitable doctrine was otherwise, law would provide a remedy where none existed in equity, for at law an executor *de son tort* may be sued.—*Law Times*..

LORD WESTBURY.

It is with much regret that we have to record the death of Lord Westbury. Although he had arrived at the ripe age of seventy-three years, and had for exactly half a century been in the law and of the law, his talents can at this moment be as ill-spared to the country as at any part of his long and useful career. His experience and authority would have been of great value in carrying the administration of the law over the transition period of 1874 and in starting the work of the new Court of Appeal; while in the single matter of the European Arbitration, his death will cause much obstruction of business, and may give rise to more than one difficulty. The profession also takes a just pride in the ex-Lord Chancellors. They are the mighty and venerable oaks of the legal *academus.* The position is surrounded with so much of honour, of respect, and of power in law and politics; they so completely represent the ideal and the actual height to whtch professional success under the constitution can carry the barrister of fortune, that the fall of one of them appears to be a loss to every disciple of the law. Not the less does this feeling affect us, when we reflect that the old is passing away, that all things are becoming new, and that ex-Lord Chancellors are no longer to occupy the same position which they have hitherto enjoyed and adorned, but are to be put back to work in the Court of Appeal, as though they had risen directly from the ranks, and had never sat on the Woolsack or had been custodians of the Great Seal.

The epithet 'clever' has been so much perverted from its proper sense that we scarcely like to apply it in eulogy. But the word exactly represents what Lord Westbury was. To matriculate at the age of fourteen years, to win a scholarship at college at the age of fifteen, and to obtain a first class in the classical and a second class in the mathematical schools at the age of eighteen, are peculiarly the

feats of a clever lad and a clever man. His was no case of drudgery working up to ability; of experience supplying the want of talent; of luck and 'backing' substituted for genius. He had as keen and bright an intellect as nature ever bestowed on man. Logical force, exquisite precision, abnormal memory, apt language—these were among the gifts or qualities which lifted Richard Bethell to the leadership of the bar, and gave Lord Westbury eminence as a judge. He was, as might be expected from the possession of such powers as these, a man of marvellous independence of thought and of judgment. He was the reverse of a slave to precedent. His judgments, indeed, are remarkable for their omission of reference to decided cases. In them broad principles and doctrines are asserted, and legal heresies are denounced in language bold, novel, and uncompromising. His arguments at the bar were the forerunners of his judgments on the bench. Had he held the Lord Chancellorship as long as Lord Eldon did, and been as thoroughly unchecked by other judges, he would have worked the law into new grooves, and changed much of the substance of our jurisprudence. From such results the law has been saved by the authority of other judges, and perhaps to the advantage of the law. But, as it is, Lord Westbury has left the impress of his almost revolutionary genius on the jurisprudence of the country, and has taught lawyers the rare art of thinking and judging for themselves.

In Parliament, in earlier days, both in the House of Commons and in the House of Lords, the oratory of Sir R. Bethell and of Lord Westbury could make itself felt. Unfortunately, the possession of unrivalled powers of sarcasm, capable of being expressed in tones of voice and with a manner by no means calculated to alleviate its bitterness, tempted him into assaults which his victims were not likely to forget or to forgive. But during the last five or six years of his life Lord Westbury was rather a popular character in the House of Lords. Age had softened his disposition, and his speeches always contained a fund of wit and humour, while his conversational powers were an unfailing source of amusement and entertainment in the intervals of business. His sincere regard and friendship for Lord Cairns also drew him from anything like strong partisanship in the House of Lords, and he seemed to strive rather to act the judge than the advocate in the political questions before the House.

To Lord Westbury is due the credit of some of the most important Acts of Parliament of modern times. The greatest marvel in accurate and ingenious legislation—we mean the Succession Duty Act—owed its passage through the House of Commons to the acute and precise explanations of the bill which he, as Solicitor-General, gave in aid of the Chancellor of the Exchequer. He also had the care of the Probate and Divorce Acts, and of the Fraudulent Trustees Act of 1857. His Bankruptcy Act of 1861 can hardly be reckoned a success; but the working of the measure was ruined by the false policy of erasing from the bill the clauses constituting a Chief Judge in Bankruptcy, contrary to the earnest advice of Sir R. Bethell. His warnings proved true, and in 1869 Parliament assented at last to what he had proposed eight years previously; and, although much injury has arisen from the persistent blunder of the Government in not appropriating a judge to the Court of Bankruptcy, yet the injury would have been far greater if no judge at all had been appointed.

We cannot close our criticism on the career of Lord Westbury without recalling his ardent and honourable exertions in establishing some system of education and examination for the bar. To his initiative is due the present activity of the Inns of Court, which bears a very marked contrast to the absolute inertia which prevailed before he interested himself in the question.—*Law Journal.*

Another Wisconsin man has fallen a martyr to the law which allows a woman to procure a policy of insurance on her husband's life. The companies remark, that under the present mixed condition of chemical expert testimony, it would be throwing good money after bad to dispute the claim, although they know where she bought the strychnine.

Of the present United States Senate it is stated that out of the 74 members, 46 are lawyers.

CANADA REPORTS.

ONTARIO.

ASSESSMENT CASES.

In the matter of the Appeals from the Court of Revision of the Town of Cobourg.

Assessment of Bank Stock.

Bank Stock is not personal property liable to assessment within the meaning of 32 Vict., cap. 36, sec. 4.

[Cobourg, July 10, 1873,—*Boswell, Co. J.*]

Appeals from the Court of Revision of the Town of Cobourg to His Honor the County Judge, who delivered the following judgment :—

Boswell, Co. J.—After as much consideration as the time permits, and not without very grave doubts, I have arrived at the conclusion that the Provincial Legislature, in the definition of personal property contained in the fourth section of the Assessment Act, (32 Vict: cap. 36) did not intend to include bank stock. At the time of the passing of that Act bank issues were liable to a duty, under the Act Con. Stat. Can., cap. 21, and the Provincial Legislature seem to have considered this a sufficient reason for exempting bank stock from assessment. The clause expressly exempting it (sec. 9, sub sec. 16) may be considered as enacted for the purpose of making their intention clear and as explanatory of the reason for exempting it. In the event of the removal of the tax on the issues, it may be assumed that the Provincial Legislature, before making the stock subject to assessment, might reasonably desire to consider all the stipulations and conditions attached to its removal.

The language of the section, although it seems on a casual reading to be most comprehensive, admits, I think, of the construction I give to it. Shares in incorporated companies are particularly specified, but not dividends from those shares, and dividends from bank stock expressly mentioned, while the clause is altogether silent as to bank stock itself. Both in this section and in the exempting clause this species of property is defined as "stock," while property in other incorporated companies is called "shares." This, at least, shows that a distinction pervaded the mind of the framer of the Act. Then, if the stock be liable to assessment, both dividends and stock would be liable, and it is quite clear that the legislature did not intend to tax both. So important an item of property as bank stock would surely have been specified if it had been intended that it should be included as personal property liable to assessment as soon as the tax on issues was removed, and without further legislation.

Should the section defining personal property not admit of the construction I have put on it, and its language be held to comprehend bank stock, then it would be necessary to consider the questions, raised by the learned counsel for the appellants, whether the Act imposing the tax has been so entirely repealed as to deprive the stock of the benefit of the exemption contemplated in the Assessment Act.

The exempting clause protects the stock from assessment "so long as there is a special tax on bank issues." The Dominion Act (34 Vict: cap. 5, sec. 15) "exempts every bank to which that Act applies from the tax now imposed, * * * to which other banks," the same section goes on to express, "will continue liable." Section 73 of the same Act enacts that "this Act shall not apply to any now existing bank not mentioned in the schedule," contemplating clearly that other banks were in existence which would be still liable to the tax. Then the repealing section of the Act (sec. 76) is altogether silent respecting the Act imposing the tax. It cannot therefore be said that there is no longer "a special tax on bank issues," and if we were confined to strict grammatical construction, without being at liberty to consider the intention of the legislature, it must be admitted that the language of the exempting clause would still protect the banks in question from assessment, because a special tax on bank issues is in fact still continued by the Dominion Act.

I do not deem this fact conclusive, and I doubt whether I should have adopted the construction contended for, had it been necessary to decide this point. I am not prepared, on the other hand, to say that the argument is fallacious. The language in the exemption clause of the Assessment Act may have been framed with a view to protect from assessment the stock of banks coming within the meaning of sec. 5 of the Act, Con. Stat. Canada, cap. 21. By this section, which imposed the duty on bank issues, banks complying with the Act respecting banks and freedom of banking (Con. Stat. Can., cap. 55), are, upon certain conditions, expressly relieved from the tax on issues. Whether any banks availed themselves of that section or not this court is not at present advised, but I am strongly of opinion that the stock of a bank in operation under that section, and consequently paying no duty on its issues, would have been

held to be free from assessment. The section was intended to favour those banks which adopted the system there proposed, and the restrictions imposed by the section were considered a burthen equal to the tax and in lieu of it. The Provincial Legislature, it may be well argued, could never have intended such gross injustice as to make the stock subject to an assessment, which would have had the effect of taxing these banks which the Act intended to favour far beyond the banks which were in express terms freed from assessment in consequence of the duty to which they were already subject. If this view be correct, and to me it seems very reasonable, then the further question arises whether there may not be an equivalent for the tax in the enactments of the Dominion Act, which relieves the banks specially enumerated from the tax upon their issues. If the tax be remitted only upon a condition of some restriction equal to and intended to be in place of the tax, the reason for exemption would be still applicable.

This reasoning at least raises a claim for an interpretation against the assessment if there be a doubt, and a doubt will, I think, be entertained by every one who gives consideration to the subject. I am clearly of opinion, therefore, that the stock should not be assessed until the Provincial Legislature has been afforded the opportunity of considering the effect of the *Dominion* Act exempting the issues from taxation.

I should have desired, before coming to a decision in this matter, to have taken much longer time for consideration, had it been possible, but the assessment rolls must be finally settled by the fifteenth of this month and further delay might prevent the necessary amendments of the rolls in conformity to the opinion I have so far formed.

The matter is of less importance, as the decision will, in all probability, be of no importance after the current year, as the legislature, before another period for assessment comes round will, I have no doubt, have passed an Act explanatory of their views.

To have assessed the parties who have appealed would, to some extent, have been exceptional, In the municipality of Cobourg, for instance, where a very large amount of stock is held by a private savings bank and other parties, the Court of Revision have determined that the stock is exempt from taxation. No appeal has been made from that decision. I have, however, endeavoured not to permit this fact to influence my opinion, but to arrive at a conclusion founded only on the language of the Act and what I conceive to have been the intention of the legislature.

Appeals allowed.

(Note by the Editors C. L. J.)

The same point came before the learned judge of the County Court of Peterboro', who arrived at the same conclusion. He did not, however, give a written judgment.

His Honor Judge Wilson, of Norfolk, who holds that Bank Stock is liable to Assessment, has kindly sent us an extract from a paper he read before the County Judges at their recent meeting, in which he says:—

"I think the Appellants' contention that under Confederation Act Bank Stock cannot be assessed, is untenable, as this is not a question concerning 'Banking,' but 'Assessment.' As to the further contention, that sec. 4 of the Banking Act of 1870 virtually taxes the issues, I think it also untenable, as sec. 5 of that Act expressly exempts the issues from taxation; and, the other question is not whether sec. 4 operates prejudicially to holders of bank stock or not, but simply whether there is a special tax on these issues or not. It may be suggested that the abolition of the tax on the issues was intended by the Legislature as a *compensation* for the deprivation of the right to issue notes for less than four dollars, and any other burdens that the abolition of such tax might entail on the stockholders, and that therefore the holder of bank stock is virtually in no worse position than if the tax on the issues had been retained. However, whatever the intention of the Legislature or the effect of this enactment, all that we have to enquire into is, whether there is a special tax on these issues or not, and I think clearly there is not. As to the Appellants' last contention, I do not think that stock in banks, with head offices out of Ontario, can be said to be 'personal property,' owned *out* of this Province, where the owners of such stock reside *in* this Province."

It may not be out of place here to reproduce the opinion of two eminent counsel (Hon. J. H. Cameron, Q.C., and Hon. Edward Blake, Q.C.), on the question being submitted to them by the Assessment Commissioner of the City of Toronto, already published in the proceedings of the City Council. The opinion is as follows:

"First.—By the Assessment Act the shares of incorporated companies were liable to municipal taxation in the hands of the stockholders, but the stock of banks was exempt from such taxation so long as the issues of such banks were liable to the general tax existing when the Assessment Act was passed, and this exemption being exceptional and temporary, ceased as to those banks, the issue of which are no longer taxable under the Banking Act; and therefore, in our opinion, such bank stock is now liable to municipal taxation, but we consider that bank dividends should not also be taxed, although we do not say that they are not taxable.

"Secondly.—The stock of any such bank doing business and having offices or agencies in Ontario, and the stock of which may be transferred by law, within Ontario, although the head office may be without this Province, is taxable as the personal property of the person owning the same and resident in this Province.

"Thirdly.—The stock is taxable at the time when the other personal property is assessed."

ENGLISH REPORTS.

Odger v. Mortimer.

Libel—Fair comment on public men—Function of jury.

In actions for libel, it is only on the very strongest grounds that the court will set aside, as against evidence, a verdict for the defendant on the question of fair comment upon the conduct of public men.

The plaintiff, a well-known public character, in addressing meetings held to protest against a Bill recently introduced into Parliament, had burnt the Bill, and predicted much popular irritation in event of its being passed. Thereupon the defendant published of him (amongst other things) that he was a political cheap Jack, half booby and half humbug, and had defied the Government and threatened civil discord, and that he was only seeking by agitation to obtain a Government appointment:

Held, a question for the jury, whether this was fair comment or not, and a rule to set aside, as, against evidence, a verdict for the defendant refused.

[April 18, 1873,—28 L.T. N.S. 472.]

Action for libel against the publisher of the *Figaro* newspaper.

The declaration set out the alleged libel, of which the following are the principal passages:—"Odger victorious. Know all men by these presents, that Odger the cobbler rules the Government of England. . . . We do not like the cobbler, we abhor his principles, we regard him as an enemy of order, we hold him to be a demagogue of the lowest type, half booby and half humbug, a political cheap Jack, who would be a political sharper if he had brains enough. . . . He defied Parliament and the Government. . . . He threatened an unprecedented demonstration and civil discord. Odger is victorious. The Government have modified their Bill. . . . What may be Odger's next fancy it is impossible to guess. Perhaps he may assert the right of the Odgerites to refresh themselves in West-end pantries and wine-cellars, or he may demand the release of all convicts who are so nearly connected with that section of the people which Odger the cobbler commands." . . .

A second count charged the defendant with publishing in his newspaper the following words:—"I have any quantity of bottled-up abuse, treason, and riot. I will exchange the whole lot for any permanent appointment with 250*l.* per annum and upwards. George Odger."

The defendant pleaded, first, not guilty; secondly, that the alleged defamatory matters were true in substance and in fact; and, thirdly, that the alleged defamatory matters were "fair and *bonâ fide* comments upon the acts and proceedings of the Government, and the several matters and premises therein referred to, and the acts and conduct of the plaintiff in reference thereto and as a public character," and were published as such comments, and "without any malicious intent or motive whatever."

The action was tried before Brett, J. and a special jury, at the Guildhall Sittings in Hilary Term. The defendant was the publisher of the *Figaro* newspaper, and had admitted publication of the alleged libels. The plaintiff, and other persons on his behalf, gave evidence that he had given his political services without remuneration, and had never applied for any Government appointment. He admitted that he had publicly burnt the Parks Regulation Bill, and used words to the effect that if it passed, the people would meet (but not in the parks) to assert their right of public meeting, and that the Bill would produce much popular irritation if it should become law. The plaintiff had attended and spoken at various meetings, at which the nationalisation of the land and other kindred topics were discussed, both in Trafalgar-square and in the public parks, and was a well-known advocate of advanced democratic opinions. The chief object of the Parks Regulation Bill was to regulate the delivery of public addresses in the parks.

The jury having found a general verdict for the defendant,

Simon, Serjt., now moved to set the verdict aside, as being against the weight of evidence, arguing that the private honour and honesty of the plaintiff had been attacked in the alleged libels.

Bovill, C.J.—I am clearly of opinion that the questions in this case were questions for the jury, in whom the law has placed the power of deciding the question of libel or no libel. It is only in cases where the court can see that the jury are clearly wrong that the court should interfere. Mr. Odger complains that his honour and honesty have been attacked, and if we could see clearly that this has been done, we might interfere for his protection; but, as a matter of fact, we see nothing of the kind. The jury, in considering their verdict, would look at all the circumstances, and the circumstances point to this—that Mr. Odger is essentially a public man. This being so, editors of public newspapers may comment in the strongest possible way upon what he says and does in that character. As for the ridicule complained of, that is often the strongest weapon in the hands of a public writer, and if it be used fairly, the presumption of malice which would otherwise

arise is rebutted, and it becomes necessary to give proof of actual malice, or of some indirect motive, or of a wish to gratify private spite. Everything has been urged on behalf of Mr. Odger that could possibly be urged, but I see no ground whatever for disturbing the verdict of the jury.

Grove, J.—I am of the same opinion. If there be a ground of action with which the court should hesitate to interfere with a jury more than any other, that ground of action is libel. It is now the law that libel or no libel is for the jury, and the court should not interfere, unless the ground for interference be overwhelmingly strong. If mere ridicule of a public man were enough to support an action for libel, every public newspaper—especially every comic newspaper—would be perpetually subject to have an action brought against it. The fact is, that public men must put up with laughing, caricaturing, and sneering. Now the question here was this :—was the alleged libel really a malignant attack on Mr. Odger's private character, or was it a holding up of his principles to derision? This question has been put to and answered by a jury, and the court could never say that a second jury is bound to entertain it again. Unless every electioneering squib is to be made the subject of an action, I do not see how we can possibly interfere, the defendant being entitled to the verdict upon the finding of the jury that the plea of justification was proved.

Denman, J.—I am of the same opinion, on the ground that the court would be interfering in a very mischievous way with the functions of the jury by granting the rule. Generally speaking, the court can only say of a document, whether it can be a libel, and it is then for the jury to say whether it be so or not; for the jury are guardians of freedom of public comment as well as of private character. The plaintiff here is emphatically a public man, and as such is *primâ facie* the proper subject of public comment. It was for the jury to say whether the comment went beyond what was fair and right. If I had been on the jury, I might perhaps have entertained the question whether a verdict in the plaintiff's favour for a small amount would have been right; but, at the same time, I should have been quite disposed to listen to anything my fellow-jurymen might say on the other side. My judgment is founded on the assumption that the jury found their verdict upon the plea of not guilty.

Honyman, J.—I am of the same opinion, and only wish to say that I do not wish it in any way to be understood that a newspaper may make its public comments a vehicle for attack on private character. However, here we have a special jury of the City of London finding, after great deliberation (on what plea it is immaterial), a verdict for the defendant in an action for libel, and I think that we cannot interfere.

Rule refused.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Boynton v. Housler et al.

Where one having an interest in land is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, an attempted denial by the latter of the confidence, is such a fraud as will convert the purchaser into a trustee *ex maleficio*.

[May 17th, 1873.]

Error to the Common Pleas of Cameron County.

Mercur, J. The plaintiff claims to recover this land under the title acquired at a sheriff's sale, when it was sold as the property of the estate of Merrick Housler, deceased. The defendant, who is the widow of the said Housler, made defence to a portion of said land called "The Homestead," containing about eighteen acres. Prior to, and at the time of, the sheriff's sale, the defendant and her minor children were in the actual possession of the whole property. She had entered into a contract to purchase it from Aden Housler, who held a deed for it subject to the payment of the plaintiffs. While thus holding whatever interest passed to her under this contract, as well as her right of dower, she made the arrangement with Simpson, under which he purchased at sheriff's sale.

The evidence given by the defendants, which the jury found to be true, was substantially this, to wit: Prior to the sheriff's sale the defendant had agreed with Aden Housler to bid off the whole land, provided it was not run up higher than $1,200 or $1,250, which was the value of the property, and if he became the purchaser he was to deed "The Homestead" to her. Upon the day next preceding the sale Simpson, who was the plaintiff in the execution, was informed of this arrangement between Aden Housler and the defendant. He then said to them if they would not interfere or bid at the sale, and have it bid off as low as possible, that she should have the homestead; she should not get any

bidders, and he would get some one to bid it off; that would be better than for her to bid it off. The defendant and Aden agreed to this proposition. Relying upon it they did not interfere nor bid at the sale; nor did she get any other person to bid for her. Simpson bid it off for $110. The plaintiff bought of him with full knowledge of this arrangement.

Under these facts the court below held that a trust *ex maleficio* arose in favor of the defendant as to the homestead.

All the errors assigned are substantially to this conclusion.

Where a parol contract for the purchase of land has been carried on *mala fide*, there is a resulting trust implied by law, and equity will decree a conveyance according to the terms of the contract: *McCulloch* v. *Cowher*, 5 W. & S. 427. Equity will not permit one to hold a benefit which he has derived through the fraud even of another, and much less will it do so if he has acquired it by means of his own fraud: *Sheriff* v. *Neal*, 6 Watts, 540. In *Morey* v. *Herrick*, 6 Harris, 128, Justice Bell said, "it is equally well settled that if one be induced to confide in the promise of another, that he will hold in trust, or that he will so purchase for one or both, and is thus led to do what otherwise he would have forborne, or to forbear what he contemplated to do, in the acquisition of an estate, whereby the promissor becomes the holder of the legal title; an attempted denial of the confidence is such a fraud as will operate to convert the purchaser into a trustee *ex maleficio.*" Where one holding an article of agreement for one hundred and sixteen acres of land, upon which he had paid five dollars only, and was liable to be turned off, surrendered his title under a parol contract that ten acres thereof should be conveyed to him so soon as the person for whose benefit he gave up his title acquired a deed for the legal title, it was held to create a trust *ex maleficio* in his favor as to the ten acres: *Plumer & Crary* v. *Reed*, 2 Wright, 46. Nor does it make any difference that the title was acquired by Simpson through the judicial sale: *Beegle* v. *Wentz*, 5 P. F. Smith, 369, and cases there cited. This case of *Beegle* v. *Wentz* was one in which a debtor was induced to relinquish his claim to the $300 exemption, and consented that the whole of his land be sold, under an agreement that the plaintiff was to take a sheriff's deed for the same and make to the debtor a deed for the part agreed upon. It was held that if the debtor was induced to surrender his right on the false assurance that the part should be left to him, the plaintiff refusing, was a trustee *ex maleficio.* This was since the Act of April 22, 1856, and was held to be such a trust or confidence as was not affected by that Act. The same principle is affirmed in *Seichrist's Appeal*, 16 P. F. Smith, 237.

It was contended, however, that inasmuch as the agreement between the defendant and Simpson was that she and her agents and friends should not bid at the sale, it was contrary to public policy, and therefore void. In support of this principle the case of *Slingluff* v. *Eckel*, 12 Harris, 472, is cited. We assent to the correctness of the law there declared, as applied to the facts in that case. That was an agreement between two persons, neither of whom has any possession of or interest in the land. The court there said: "What we do agree is, that one bidder cannot legally buy off another with money or the promise of money."

The distinction in this case is, that the defendant had an interest in the land in reference to which the contract was made, and she was to retain a portion of that land. This is a distinction clearly taken and recognized in *Beegle* v. *Wentz*, and in *Seichrist's Appeal*, *supra*.

Judgment affirmed.

—*Legal Intelligencer.*

The Pennsylvania Railroad Co. v. Beale.

It is evidence of contributory negligence if a person does not stop and look out for a locomotive before driving across a railroad track.

[July 2nd, 1873.]

Error to the Court of Common Pleas of Juniata county.

Sharswood, J. The evidence showed a clear case of contributory negligence in the deceased. The crossing at which he met with the injury which resulted in his death, was a dangerous one, and as he was well acquainted with it, there was the greater reason that he should exercise the utmost care and caution, by stopping at the railroad before undertaking to pass over. It is very clear that if he had done so, but for a few minutes, the accident would not have happened. "The evidence," said the learned judge in his charge, "is uncontradicted, that there was a level piece of ground about ten feet wide, between the hill or bluff, and the first track or siding on the approach to the track from the valley upon which the deceased was travelling." It was his plain duty to have stopped at that place, and so the learned judge instructed the jury, but he qualified the instruction by adding, "if you find from the evidence that the approach of the train might have been

seen or heard from there." This, in fact, left the question of negligence to the jury, upon a point not material. Indeed, the duty of stopping is more manifest where an approaching train cannot be seen or heard, than where it can. If the view of a track is unobstructed, and no train is seen or heard approaching, it might, perhaps, be asked, why stop? In such a case there is no danger of collision, none takes place, and the sooner the traveller is across the track the better. But the fact of collision shows the necessity there was of stopping, and therefore, in every case of collision the rule must be an unbending one. If the traveller cannot see the track by looking out, whether from fog or other causes, he should get out, and if necessary, lead his horse and waggon. A prudent and careful man would always do this, at such a place. In the *Hanover Railway Co.* v. *Coyle*, 5 P. F. Smith, 396, the plaintiff, a peddlar, in the depth of winter, was driving inside of his covered waggon, with his head muffled up in a thick overcoat, and it appeared, that a traveller passing in the direction he was going, could not see up and down until within sixteen feet of the track. Yet these circumstances were not allowed to form any excuse for his negligence in omitting to stop. There never was a more important principle settled, than that the fact of the failure to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court: *North Pennsylvania Railroad Co.* v. *Heileman*, 13 Wright, 60. It was important, not so much to railway companies as to the travelling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives—of passengers on trains—and they will do so again, if travellers crossing railroads are not taught their simple duty, not to themselves only, but to others. The error of submitting the question to the jury, whether, if the deceased had stopped, he could have seen or heard the approaching train, runs through the entire charge and answers of the learned judge below. He should, upon the uncontradicted evidence, have directed a verdict for the defendants.

Judgment reversed.

—*Legal Intelligencer.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS

FOR JANUARY, FEBRUARY, MARCH, AND APRIL, 1873.

(*From the American Law Review.*)

Account.—*See* Bank, 1, 2; Husband and Wife.

Action.—*See* Injunction, 1; Damages, 5.

Advancement.

M. purchased a copyhold cottage in the name of his son, who was admitted tenant. M. shortly afterward gave the occupying tenant notice to quit, but allowed her to remain at an increased rent. M. received the rents, paid the quit-rent and costs of repairs, and treated the cottage as his own. On M.'s death it was testified that M. intended the cottage to be his son's after M.'s death. *Held*, that the cottage was not purchased as a gift to the son, but was taken in his name as trustee for his father.—*Stock* v. *McAvoy*, L. R. 15 Eq. 55.

See Cy-Pres.

Affidavit.

Affidavits on behalf of the plaintiff taken before a notary-public in America, at a place one hundred and twenty miles distant from residence of any British consul, were allowed to be filed by the clerk of records and writs, with the written consent of the defendant.—*Lyle* v. *Ellwood*, L. R. 15 Eq. 67.

Agency.—*See* Principal and Agent.

Annuity.—*See* Payment; Penalty.

Arbitration.

In a matter of general average the ship-owner and the owner of the cargo agreed to refer the question to the defendant, an average adjuster. *Held*, that the defendant was acting as a *quasi* arbitrator, and was not liable for want of skill or for want of care, or for negligence, if he acted honestly.—*Tharsis Sulphur Co.* v. *Loftus*, L. R. 8 C. P. 1.

Assault.

It was held that there might be an indecent assault upon boys, although they submitted to the act in ignorance of its nature, without actual or active dissent.—*Queen* v. *Lock*, L. R. 2 C. C. 10.

Assignment.—*See* Priority.

Auction.—*See* Order of Court; Vendor and Purchaser.

Award.—*See* Penalty.

DIGEST OF ENGLISH LAW REPORTS.

BANK.

1. The O. bank kept a loan account, a discount account, and a general account with the A. bank. The former bank was in the habit of borrowing from the latter, and depositing from time to time securities to meet these loans, which were entered to the loan account. The O. bank accordingly deposited three bills with the A. bank as security against certain drafts which it requested the A. bank to honor. *Held*, that the A. bank might hold the bills for the balance of the *general* account.—*In re European Bank. Agra Bank Claim*, L. R. 8 Ch. 41.

2. The plaintiff had a deposit on an account with the L. branch, and was indebted on another account at the B. branch of a bank. He drew against his account at the L. branch, but the bank set off his indebtedness at the B. branch. *Held*, that the bank was entitled to set off the indebtedness at the B. branch against the deposit at the L. branch.—*Garnett* v. *McKewan*, L. R. 8 Ex. 10.

See HUSBAND AND WIFE.

BANKRUPTCY.

1. In December, 1870, W. bought of C. ten hogsheads of whiskey in bond at a warehouse, subject to the order of C. On February 19, 1872, W. wrote to C. directing him to send a specified hogshead, and enclosing a check in payment of duty and warehouse and clearing charges. On February 26, 1872, C. filed a petition in bankruptcy, at which time said hogshead was still in the warehouse subject to C.'s order, but transferred to the credit of W. on the books of C. *Held*, that said hogshead was not within the "possession, order, or disposition of the bankrupt by the consent and permission of the owner" within the meaning of the Bankruptcy Act, as possession had been demanded with a *bonâ fide* intention of taking possession before the bankruptcy.—*Ex parte Ward. In re Couston*, L. R. 8 Ch. 144.

2. L., knowing that his bankruptcy was impending, drew all his balance at the banker's and deposited it, on January 7, 1871, with K., his accountant, to whom a considerable sum was owing. K. refused to accept the money unless L. authorized him to pay himself his debt. L. authorized K. accordingly, having in fact drawn said balance that it might not be attached by creditors. K. had made no demand that his debt should be paid subsequent to December 23, 1870. *Held*, that drawing said balance from the bank as aforesaid, was an act of bankruptcy, and said payment to K. a fraudulent preference.—*Ex parte Halliday. In re Liebert*, L. R. 8 Ch. 283.

3. H. sold three hundred and thirty tons of bleaching powder to E., to be delivered thirty tons per month. The November instalment was delivered, but not paid for. In December, the month in which the last instalment was due, E. called a meeting of his creditors, and declared himself insolvent. Thereupon H. wrote, "we refuse to deliver any more bleaching powder upon contract." E. became bankrupt, and the trustee claimed damages from H. for breach of contract. *Held*, that though E.'s insolvency did not put an end to the contract, H. was not bound to deliver any more powder until the price of both November and December instalments was paid; and that said letter did not constitute a breach of the contract.—*Ex parte Chalmers. In re Edwards*, L. R. 8 Ch. 289.

See BILLS AND NOTES; INDICTMENT; PRINCIPAL AND AGENT, 2; PRIORITY, 1.

BEQUEST.—*See* DEVISE; LEGACY.

BILL IN EQUITY.—*See* EXECUTORS AND ADMINISTRATORS, 1; INJUNCTION, 2.

BILL OF SALE.—*See* DESCRIPTION.

BILLS AND NOTES.

L. employed R. as his correspondent in London, and S. as his correspondent in Havannah. L. drew bills on R., who accepted them against a shipment to S., who sent bills to R. against R.'s acceptances. R. became insolvent and failed to pay his acceptances, and S. also became insolvent. *Held*, that the remittances from S. were specifically appropriated to meet said bills, and that they were not to be applied to the general account between R. and S.—*Ex parte Smart. In re Richardson*, L. R. 8 Ch. 220.

BOND.—*See* SURETY.

CARICATURE.—*See* COPYRIGHT.

CARRIER.—*See* BILL OF LADING; NEGLIGENCE.

CHAMPERTY.

Declaration that J. H., a brother of the defendant and a cousin of the plaintiff, died leaving a will disposing of his real and personal property. In consideration that the plaintiff would contest the will, and would obtain evidence and advance money for such purpose, the defendant promised the plaintiff to give him half of any personal or real property which the former should obtain by reason of contesting the will. *Held*, that such an agreement was champerty.—*Hutley* v. *Hutley*, L. R. 8 Q. B. 112.

CHARGE.—*See* PRIORITY.

CHARITY.—*See* PERPETUITY.

CHOSE IN ACTION.—*See* HUSBAND AND WIFE.

CHURCH.—*See* STREETS.

COLLISION.—*See* NEGLIGENCE.

CONDITION.—*See* CONTRACT, 2.

CONDITIONAL GIFT.—*See* PERPETUITY.

Digest of English Law Reports.

Contempt.

Inferior courts of record have no power at common law to punish for contempt out of court.—*Queen* v. *Lefroy*, L. R. 8 Q. B. 134.

Contract.

1. By agreement between C. and W., C. was to lease certain lots of land for ninety-nine years, at a certain rent to be apportioned as thereafter mentioned. W. was to build on plot P. twenty houses, on plot B. eight, on plot G. ten, and on plot Y. five houses. Separate leases of plot B. and of plot G. were to be made as soon as the houses on these lots respectively were covered in. W. assigned this agreement to the plaintiff, who completed the houses on plots B. and G. and then claimed leases of those plots. *Held*, that as the condition precedent to granting such leases had been performed, leases must be granted to the plaintiff of lots B. and G., although he refused to perform the remainder of the agreement.—*Wilkinson* v. *Clements*, L. R. 8 Ch. 96.

2. The defendants agreed with the plaintiffs to supply 6000 tons of coal to be delivered in equal monthly quantities during the period of twelve months, from the 1st July, 1871. During July the plaintiffs took only 158 tons, and the defendants thereupon declared the contract cancelled and refused to deliver any more coal. *Held*, that the plaintiffs' failure to remove the coal as agreed did not justify the defendants in cancelling the contract.—*Simpson* v. *Crippin*, L. R. 8 Q. B. 14.

3. The contract of a drunken man is voidable, not void. *Matthews* v. *Baxter*, L. R. 8 Ex. 133.

See Bankruptcy, 3; Covenant; Damages, 2-5; Interest; Letter; Negligence, 3; Partnership; Surety; Vendor and Purchaser.

Contribution.—*See* Devise, 1.

Conversion.—*See* Trover.

Copyright.

The defendant published an account of the life of Napoleon III. containing "the same story as told by popular caricaturists." The book contained, among many others, nine caricatures in a reduced form, taken, without consent, from woodcuts in *Punch*. *Held*, that a substantial part of *Punch* had been appropriated, and that there was an infringement of copyright.—*Bradbury* v. *Hotten*, L. R. 8 Ex. 1.

Costs.—*See* Ejectment.

Court.—*See* Jurisdiction.

Covenant.

1. The clerk of a brewery firm covenanted that during his service, or within two years thereafter, he would not sell or recommend on his own account, or for any other person, any Burton ale or ale brewed at Burton, or offered for sale as such, other than the ale brewed by said firm. *Held*, that the covenant was void. —*Allsopp* v. *Wheatcroft*, L. R. 25 Eq. 59.

2. The defendant covenanted not to carry on a public-house within half a mile of the plaintiff's premises. *Held*, that said half-mile must be measured in a straight line, not by the nearest available mode of access between the two houses.—*Mouflet* v. *Cole*, L. R. 8 Ex. (Ex. Ch.) 32 s. c. L. R. 7 Ex. 70; 7 Am. Law Rev. 687.

See Contract, 2.

Cy-pres.

Trustees had power to apply a portion of a fund towards "purchase of or effecting W.'s promotion in the army." Before the trustees had advanced the whole of such portion, purchasing commissions in the army was abolished by law. *Held*, that the remainder of said portion could not be applied for the advancement or benefit of W.—*In re Ward's Trusts*, L. R. 7 Ch. 727.

Damages.

1. Coal was taken by the defendant company from the colliery of another company without fraudulent intent. *Held*, that the defendant was liable for the market value of the coal at the pit's mouth, less the actual disbursements for severing and bringing it to the surface.—*In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46.

2. The plaintiff had a contract for furnishing a certain number of shoes at an exceptionally high price of 4*s*. per pair if delivered February 3. The plaintiff delivered the shoes to a railway Company, with notice that if they were not delivered on said day they would be thrown on the plaintiff's hands. Said company failed to deliver the shoes in time, and they were sold at 2*s*. 9*d*. per pair, the market price. *Held*, that, in absence of notice of said contract price, the plaintiff could not recover as damages the difference between the market price and said contract price.—*Horne* v. *Midland Railway Co.*, L. R. 8. C. P. (Ex. Ch.) 131; s. c. L. R. 7. C. P. 583; 7 Am. Law Rev. 471.

3. Declaration for breach of an agreement whereby, in consideration of L.'s paying £50 for good-will, £100 for painting, &c., and £75 annual rent, W. was to sell the trade fixtures and effects of an inn to L. "And by way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. the sum of $40 each; and either party failing to complete this agreement shall forfeit to the other his deposit money as and for liquidated damages." Demurrer and plea that L. had sued H. for said deposit in his hands "as and for liquidated damages in respect of the said breaches," and had recovered judgment. De-

murrer to plea. *Held*, that said deposit in the hands of H. was liquidated damages, and that L. could recover no further sum; but that the right of L. to sue W. being independent of any right to sue H. the plea was bad. Judgment for plaintiff on demurrer to plea, and for defendant on demurrer to declaration.—*Lea* v. *Whitaker*, L. R. 8 C. P. 70.

4. The defendants agreed by charter-party that their vessel should be at the Tyne and load 1300 tons of coal at a certain time, and broke their contract; and consequently the plaintiff was delayed and had to pay increased freight and a higher price for the coal. *Held*, that, in the absence of evidence that the plaintiff could get back the extra price for the coal on resale, the defendant was liable for such extra price as well as the increase of freight.—*Featherston* v. *Wilkinson*, L. R. 8 Ex. 122.

5. The defendant agreed to sell 3000 tons of coal to the plaintiffs, to be delivered during the months of May, June, July, and August. On May 31, the defendant wrote to the plaintiffs that he considered the contract cancelled, as coal had not been taken according to agreement, and on June 11 refused to deliver any coal. On July 3 the plaintiff brought this action. The price of coal had been and was still rising at the time of action begun. There was no evidence of the difference between the contract price and the price for which the plaintiffs could have obtained a similar contract at the day of the breach. *Held*, that the measure of damages, in the default of such evidence, was the sum of the differences between the contract and the market prices on the last day of each month respectively, although the action was brought before the periods of delivery had elapsed.—*Roper* v. *Johnson*, L. R. 8 C. P. 167.

See Negligence, 3; Penalty; Principal and Agent.

Death.—*See* Negligence.

Dedication.—*See* Way.

Deed.—*See* Mortgage.

Demurrage.—*See* Charter-parter, 1.

Descriptions.

A clerk in the accountants' department of a railway company described himself in a bill of sale as an "accountant." *Held*, an insufficient description.—*Larchin* v. *The North-western Deposit Bank*, L. R. 8 Ex. 80.

Deterioration.—*See* Vendor and Purchaser.

Depositor.—*See* Affidavit.

Devise.

1. A testator gave all his real and personal property to his executors, to be disposed of according to the direction in his will. He directed his executors to pay all his just debts, and then gave his personal estate to his brother, and made specific devises of part of his real estate. The personal estate was insufficient for payment of debts. *Held*, that said specifically devised real estate and the undevised real estate descending to the heir must contribute rateably.—*Stead* v. *Hardaker*, L. R. 15 Eq. 175.

2. The lessee of a piece of land assigned the term to the lessor by way of security for advances, and built four houses on the land. The lessor entered into possession as mortgagee, and died, having devised "my freehold houses" on said land. *Held*, that the mortgage debt did not pass by the devise.—*Bowen* v. *Barlow*, L. R. 8 Ch. 171.

See Payment.

Director.

The director of a company allowed shares to be allotted to his infant children. All the other shares in the company were allotted. The company was wound up, and calls were made upon the shareholders. *Held*, that it was a breach of duty in the director to allot shares to infants; that it was a fair inference that such shares would have been taken by some one other than the infants, as the remaining shares were taken; and that the director was liable, under Companies Act, 1862, § 165, for calls on the infants' shares.—*In re Crenver and Wheal Abraham United Mining Co. Ex parte Wilson*, L. R. 8 Ch. 45.

Distance.—*See* Covenant, 2.

Distress.

Articles of household furniture were deposited at a depository for furniture, to be warehoused at 30*s*. a year. *Held*, that said articles were privileged from distress, having been received in the course of trade, to be dealt with in accordance with such trade.—*Miles* v. *Furber*, L. R. 8 Q. B. 77.

Drunkenness.—*See* Contract, 3.

Easement.

The plaintiff had the right of having rainwater drop from the eaves of his building upon land of the defendant. *Held*, that the easement was not destroyed by raising the height of the eaves from the ground.—*Harvey* v. *Walters*, L. R. 8 C. P. 162.

Ejectment.

Ejectment was brought by T. for a certain estate, the parties defending being the trustees of an infant. T. was non-suited, and became liable for costs. A second action of ejectment was brought by T., in which the defendants were other trustees of other estate belonging to said infant. The question on which each action turned was the identity of T. *Held*, that, as the

plaintiff and the question of title were in each case the same, a stay of proceedings in the second action would be granted, until the costs of the first action were paid.—*Tichborne* v. *Mostyn*, L. R. 8 C. P. 29.

Election.—*See* Insurance, 1.

Entirety of Contract.—*See* Contract, 1.

(To be Continued.)

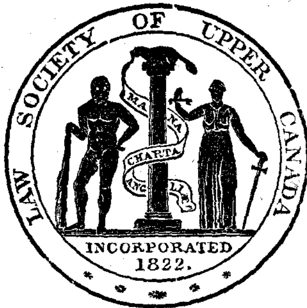
REVIEWS.

A Treatise on the Law of Injunctions, as administered in the Courts of the United States and England. By James L. High, Counsellor-at-Law. Chicago: Callaghan and Company, 1873.

In this work, the production of a western member of the United States bar, we have another valuable addition to the legal literature of the day, in the production of which American writers are taking an extensive and important part. Of course, so long as resort shall continue to be had to the laws of England in regard to property and civil rights in this Province, and the decisions in the English Courts continue to form the precedents and guides for decisions here, the works of American law writers will not occupy that position in the library shelves of our professional men which their intrinsic value merits. Yet, in many instances, these works supply examples of cases, the circumstances of which could not arise in England, but which may and are likely to arise with us. The circumstances of our country and the condition of our people resemble much more nearly those of the country and people across the border, than those of the mother country. And when, as often happens, questions arise here which have never arisen in England, and in regard to which English text books and reports furnish no information or precedent, we naturally turn to those repositories wherein are stored the results of American experience and American learning, and from them very frequently gain that information which the English law books are unable to supply. Mr. Dillon's very valuable work on Municipal Law, as well as the book now in review, are examples of our meaning.

In the work before us professional men will find, whenever occasion requires, a new and able assistant in the search for American precedents in reference to the law of injunctions. The author does not pretend, as he remarks in the preface, to state the law as it ought to be but as it is, and therefore "he has studiously refrained from the obtrusion of his own theories * * because in these days of multiplied book-making, the tendency among lawyers is to use text books merely as guide posts to direct them to the fountain head of our jurisprudence, namely the reports." Considering how difficult it usually is for men to refrain from the obtrusion of their own theories, whether good or bad, it is all the more creditable to our author to find that throughout he has adhered to his determination and modestly kept himself in the background. If judges and law administrators always exercised somewhat of the same self-control, and refrained occasionally from the "obtrusion of their own theories,"—remembering that it is their province to administer the law as it is and not as it ought to be—how much more steady and even would be the course of justice!

Mr. High does not, however, confine himself to the American authorities. In fact, the main merit which he claims for his production is that it supplies a work based upon the decisions of both England and America, and presenting the general principles governing courts of equity, both in England and America, in the administration of preventive relief. The reader will, therefore, find throughout the work a reference to English authority, though not so full and complete as that contained in the English treatises of Mr. Kerr and Mr. Joyce. But the work is rich in reference to American cases on injunctions, in the search for which the author has evidently exercised much patience and industry. The arrangement of the subjects seems judiciously made, and a copious table of cases cited, and a full index, complete a work which we trust will bring its author both profit and honor.



LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Easter Term, 36th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law. (The names are given as on the roll, and not in order of merit.)

No. 1257. Charles Victor Warmoll.
R. H. Caddy.
Hugh Matheson.
Harry Vincent.
James Reeve.
Michael Brennan.
Samuel Platt.
William Macdiarmid.
Robert Baldwin Carman.
C. R. W. Biggar.
George A. Mackenzie.
No. 1268. James Stafford Kirkpatrick.

Admitted and Called.

No. 1269. Henry J. Morgan.

And the following gentlemen received Certificates of fitness:

Charles R. W. Biggar.
J. B. McArthur.
Hugh Matheson.
Alexander Dunbar.
George A. Mackenzie.
Michael Brennan.
James Stafford Kirkpatrick.
D. G. Macdonell.
R. H. Dennistoun.
John McMillan.
C. Bogart.

And on Tuesday, the 20th May, the following gentlemen were admitted into the Society as Students of the Laws:

University Class.

Hamilton Cassels.
John W. Burnham.

Junior Class.

Rolland A. Macdonald.
Donald M. Christie.
G. Wallace Bain.
W. John Mulholland.
J. Clarke Eccles.
A. McD. Knight.
Franklin J. Brown.
Ethelwolf Scatcherd.
Hugh Stewart.
William Lawrence.
M. G. Cameron.

Articled Clerk.

Alfred Wright.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

J. HILLYARD CAMERON,
Treasurer.