DIARY FOR OCTOBER.

1. Mon ..County Court Term begins. County Court sitt. (ex York) for trials without jury.
4. Thur..Topmost stone University of Toronto laid, '53.
6. Sat....County Court Term ends.
7. SUN..19*th Sunday after Trinity.*
8. Mon ..Chicago destroyed by fire, 1871.
13. Sat....Battle of Queenston Heights-Brock killed, '12.
14. SUN..20*th Sunday after Trinity.*
21. SUN..21*st Sunday after Trinity.*
23. Tues..Lord Monck arrived at Quebec, 1861.
24. Wed ..Sir J. H. Craig, Governor-General, 1807.
25. Thur..Battle of Balaclava.
28. SUN..22*nd Sunday after Trinity.*

CONTENTS.

THE
Canada Law Journal.
Toronto, October, 1877.

The failing health of the Chief Justice of the Court of Appeal for Ontario has been a source of extreme regret to his numerous personal friends, as well as to profession who justly look upon the Hon. W. H. Draper as the most brilliant lawyer who ever adorned the Canadian Bench. His illness has been of a most painful character, but he has borne his sufferings, which we deeply grieve to fear that nought but death can end, with Christian fortitude, and with a power of endurance and self-control peculiarly his own. May a kind Providence "make all his bed in his sickness."

Her Majesty has been pleased to confer upon the Chief Justice of the Supreme Court of Canada the honor of Knighthood. If any one man more than another in this country, has raised himself to the highest position in the land by dint of his own unaided industry, integrity and ability, that man is Sir William Buell Richards. None will be found to say a word against so deserved an honor, and all will be pleased to know that the services of the Chief Justice have been appreciated. Although somewhat brusque in manner, his kind, large heart endeared him to all, whilst his solid learning, practical common sense, great breath of thought and force of character, long since marked him as a man eminently fitted for the high office he now fills. We trust he may long live to enjoy the honor conferred upon him.

Our correspondent, E. D. A., continues in this number to discuss some important points relating to the law of dower. His letters have been read with interest, and

we are glad to publish another. We expressed a hope some time since that some one might write a book on the law of dower. We think it might fall into worse hands than those of our industrious and intelligent correspondent.

The Chancellor recently took occasion to call attention to the fact that it was customary for the press to suppress in their reports the names of attorneys and solicitors against whom proceedings were instituted. He thought that the practice—though it arose from a kind and courteous motive—so far from being any benefit to the profession, had the effect of concealing from public disgrace the small number of the profession who were guilty of acting dishonorably, thereby identifying the comparatively large portion, who in discharging their duties had a due regard for the dignity of the profession with the objectionable minority. We concur in this view of the matter, subject however, to this proviso, that motions for rules nisi, or other preliminary motions, if published at all, should not give the name, but that when rules absolute and orders are made, the proceedings should be reported with all necessary particulars as in ordinary cases.

Lord Justice Christian is an Ishmaelite indeed. Lately he has been falling foul of the Council of Law Reporting in Ireland, and gave notice to the Bar that everything which would be thereafter attributed to him in the pages of the Irish reports, he, by anticipation, disowned and repudiated as spurious and unauthorized. This reminds one of the story told of the judicious Mr. Price, and the Court of Exchequer, at the time it was a close Court. When he began reporting there, one learned baron was heard to ask of a brother—"What does that fellow come here —taking down what we say—for?" In the long run it has been found advisable for the Judges and the "noble army of reporters" to work in harmony and not at cross-purposes. Moreover, the Lord Justice in writing to the *Times*, making strictures on the observations of the Law Lords who ventured to reverse one of his judgments, is shewing a sort of perverse pluck, much more to be deprecated than commended. It is certainly an unseemly and ill-advised course for the over-ruled Judge of an inferior tribunal to endeavour to set himself right by means of the newspapers. The professional public, to whom he appeals, can well guage the merits and demerits of occupants of the bench, without the necessity of judges descending into the arena of personal controversy.

RECENTS DECISIONS AND THE CURRENT REPORTS.

We venture to think that one point decided in *Hutchinson* v. *Beatty*, 40 U. C. R., 135, has hardly received sufficient consideration. There was a sale of timber by the locatee, and it was stipulated that ten years should be allowed for taking it off. The sale was in 1872, so that the limit of time for the removal had not been reached, and it was really not necessary to decide upon the effect of the time-limit. But the Court did so, and held apparently that the limitation was bad, as the statute did not provide for the forfeiture of the timber in default of removal within a given time. It was said to be impossible, in the absence of express legislation, to decide that the standing timber sold on free grant lands should be removed in one, two, three, or any other given number of years. But, surely, the true view is that the statute has nothing to do with this term of the bargain. The statute gives the right to sell the trees; the manner of sale and the quantity sold depend upon

the agreement between the parties. A sale of timber to be removed in ten years may mean a sale of so much of the timber as is removed within that time, and what is not so removed is to be considered as not sold.

The head note in *Haldan* v. *Beatty*, 40 U. C. R., 110, is scarcely perfect. It might, we think, be amended by a slight change, thus: The executor of one W., having paid money to defendant as a legatee under the will, and the will with the probate having been afterwards set aside by the Court of Chancery, the plaintiff, as administrator, was held entitled to recover the money from the legatee (or, *semble*, from the executor).

One objection to the conviction decided in *Regina* v. *Cavanagh*, 27 C. P. 537, is contrary to an earlier decision of the same Court, not cited in the later case. In *Regina* v. *Strachan*, 20 C.P., 182, it was held that in a conviction for selling liquor without a license, it was not necessary to state the name of the person to whom the liquor was sold. In *Regina* v. *Cavanagh*, the Court thought that the omission of the name would have been a fatal objection, but that it was remedied by certain statutes referred to. Upon examination of the cases it will be seen that the two holdings are irreconcileable.

It is rather dangerous for a reporter to state in a head note that a certain other case has been over-ruled, but we think the head-note of the report of *Wiley* v. *Smith*, 1 App. R., 179, should have mentioned that the cases of *Graham v. Smith*, 27 C. P., 1, and *Howell* v. *Alport*, 12 C. P., 375, were thereby over-ruled. Cases questioned or dissented from are properly mentioned by the English reporters: *a fortiori* should attention be called to cases that are extinguished as authorities.

In *Harris* v. *Smith*, 40 U. C. R., 52, the Chief Justice of Appeal adverts to the language of the plea as justly bringing it within the old rule, "the plea of every man shall be construed strongly against him that pleads to it, for every man is presumed to make the best of his own case." Of late very serious innovations have been made upon this canon of pleading both at common law and in equity. In *Workman* v. *The Royal Insurance Company*, 16 Gr., 190, it is said that when the Court sees from the whole of the allegations that the pleader must have meant his language in a sense not against him, it shall not be taken in a sense against him. Thus the ambiguity is removed by what is seen to be the scope and intent of the pleader. This is perhaps the case alluded to by the present Chancellor in *Grant* v. *Eddy*, 21 Gr., 573, where he repeats the same views. In this latter case Blake, V. C., lays down three rules of construction which clearly mark the great modification the old maxim of pleading has undergone since the abolition of special demurrers.

Very much akin to this is the gradual disintegration of the ancient cognate maxim as to construing a deed most strongly against the grantor. Upon this change, the Master of the Rolls has observed with his usual felicity in *Taylor* v. *The Corporation of St. Helens*, 25 W. R., 887, "I will take the liberty of making an observation as regards a maxim to be found in a great many text works, and I am afraid also in a great many judgments of ancient date, and that is that a grant, if there is any difficulty or obscurity as to its meaning, is to be read most strongly against the grantor. I do not see how, according to the new established rules of construction as now settled by the House of Lords, that maxim has any particular or special application at the present day. The rule is to find out the meaning of the instrument, using the ordinary and proper means of construction. If you find out its meaning you do not want the maxim, because you have already done so without any

such maxim. If, on the other hand, you cannot do so, then the instrument is void for uncertainty, and in that way you certainly construe it in favour of the grantor, because you annul the grant. Beyond that it appears to me it is impossible that the maxim can have any practical application."

Passing from details to generals, one crying evil of all the reports is their length. In nearly every number issued may be found cases which are either mere repetitions of former decisions, or lengthy findings on disputed facts, or collations of decided law, out of place in volumes which should embody only, but all, cases elucidating the development and progress of judicial decisions. When one of the Common Law reports was presented by the Parliamentary committee to the Duke of Wellington, his only remark is said to have been: "Too much of it,—too much of it,—a d—d deal too much of it." What with the increasing number of volumes from the different Courts and the increasing length of judgments in the individual cases, one is reminded of Professor de Morgan's whimsical objurgations on the German language as he enumerated the seven deadly sins of excess therein (1) too many volumes in the language; (2) too many sentences in a volume; (3) too many words in a sentence; (4) too many syllables in a word; (5) too many letters in a syllable; (6) too many strokes in a letter, and (7) too much black in a stroke. Let the reporters discharge their functions of condensation—excise, suppress, curtail — remembering that as brevity is to wit, so is succinctness to reporting.

MIND AND MUSCLE.

We are glad to notice the recent formation of a new company in the "Queen's Own Rifles" from among the Law Students in Toronto, hereafter to be known in that regiment as No. 7.

Volunteering is very popular just now. Perhaps this is somewhat due to the fact that the establishment of a standing army in Canada is becoming a debated question. Recent events in this Province, and events still more recent and startling in the United States, have given the proposition a tangible shape. It is not our province, however, to discuss the advisability of having a standing army in Canada; nor are we prepared, at present, to assert that the organization of this branch of the "Devil's own" will be a sufficient defence against any impertinence from even the limited army of our cousins to the south of us, but we are satisfied that they will charge the enemy abroad as bravely as they do their clients at home (and this speaks volumes for some of them). But, joking apart, perilous times may come, as they have before, to this Canada of ours, and then, as was seen years ago, we may also see future Chief Justices leading their companies to victory, or marching in the ranks as full privates, shoulder to shoulder with those whose profession is emblematic of force and violence. "There were giants in those days," but who knows but that the new corps may now, or hereafter, have on its roll men whose records will not be unworthy of the names of Robinson, Macaulay or McLean, and who may obtain discharges as honorable as did they. Student soldiers, whose graves are yet green, have shewn that they can fight as bravely and bleed as willingly for their country as did their forefathers. But in these days more is required than mere individual bravery or soldierly fortitude, war has become a great science, and even in its higher branches we can claim a representative from Osgoode Hall. A barrister and a Canadian volunteer has done honor to himself and to his country by his book on Cavalry, this work having been selected by the the Russian Government as the best of many at a competition open to the world,

perhaps, also, it is even more than a coincidence that the tactics employed by the German cavalry in their late war were identical with those urged by Col. Denison in a book on that subject just then previously published.

Volunteering, however, as well as many other out door pastimes has also its practical everyday aspect, one very important for lawyers and students to consider. No class of persons are at the same time so averse to, and so benefitted by, exercise. A walk down to the office, a rush to the Hall, and a walk home again, is what most of them call exercise. It never occurs to these unfortunates that a walk with the brain revolving some legal problem, or some knotty case, is practically useless as a life-giving exercise. We know how few have, or think they have, time for aught else, no wonder then that many a student finds himself on his "beam ends" before he has been studying for two years. Volunteering is, of course, not the only exercise attainable—many will prefer rowing, (and a member of the profession has done much to make this excellent recreation both popular and easy of attainment in Toronto) yachting, cricket, etc., and some few "knowing ones" make it part of their day's work to spend half an hour at the gymnasium, in the winter; but it cannot be denied that the drilling, the "manual" and the "bayonet" exercise, all call the muscles into play in a much needed way, while the effect of the companionship and sense of novelty, togethe with the excitement of rifle practice, is most beneficial to those who so sedulously subordinate their imagination to their reason.

No little credit is due to Capt. Bowes and Lieut. Hodgins, and others, for their energy in starting the corps. Something similar was attempted some years ago, but the scheme then fell through.

In connection with this matter we are glad to see that the Osgoode Hall athletic sports have been continued this year resulting in a very successful meeting.

LAW SOCIETY.

Trinity Term, 41 Vict.

The following is the *resumè* of the proceedings of the Benchers during this term, published by authority :—

Monday, August 27, 1877.

The minutes of last meeting were read.

The report of the examiners on the examination of candidates for Call was laid before Convocation and approved.

The gentlemen whose names appear in the usual list in this Journal, were ordered to be called, and on presenting themselves were called to the Bar.

A representation, dated 31st January, 1877, from A. Shaw, Esq., and others of Walkerton, to the Secretary, was read.

Ordered, that the Secretary reply to the same, as instructed by Convocation.

The several petitions of Richard Willis Jameson, and Isidore F. Hellmuth, setting forth that they had been called to the Bar by the Honorable Society of the Inner Temple, and praying that they might be called to the degree of Barrister-at-Law by this Society, were read.

Ordered, That they be called to the Bar.

The said Richard Willis Jameson, and Isidore F. Hellmuth, thereupon presented themselves and were called to the Bar accordingly.

The report of the examiners on the examinations of the candidates for admission as Attorney's, was received, read and approved.

The report of the Secretary upon the articles, affidavits, and certificates of service of the various candidates was received.

Ordered, That certificates of fitness be granted to D. B. McTavish, J. A. McGillivray, H. A. Marsh, P. C. McNee, L. K. Murton, D. McMillan, D. Steele,

T. W. Howard, E. McMillan, J. H. Hegler, J. W. Hector.

Also, that a certificate of fitness be granted to C. W. Peterson, after 2nd September, 1877, on his producing certificates and proof of his having completed his term of service. Also, that the several petitions for certificates of fitness of L. D. Teeple, W. S. Gordon, C. S. Wallis, J. McSweyn, C. McDonald, R. Shaw, J. Woodman, J. Crowther, and H. M. East, who have passed their final examinations for admission as Attorneys, be referred to the committee on Legal Education for consideration and report.

The report of the examiners on the Intermediate Examinations was laid before Convocation, read and approved.

The report of the Committee on Legal Education on the Primary Examinations was received and read.

The petition of Alexander McBeth Sutherland, was laid before Convocation with his degree of B. A. in the University of Toronto.

Ordered, That he be admitted as a Student-at-Law.

The petition of Mr. Albert Hamilton Backhouse was referred to the committee on Legal Education for consideration and report.

A letter dated 9th Jan., 1877, from Mr. Kenneth Goodman was read, stating that Mr. T. J. Wilson, who had paid his fees for his certificates on the 9th of December last, as stated by the Secretary, died on the 18th of the same month.

Ordered, that the sum of $20, amount of fees paid by Mr. Wilson, be returned to Mrs. Wilson on a statutory declaration being furnished to the Secretary establishing Mr. Wilson's death as having occurred at the date mentioned, and setting forth the name of his widow.

The resolution of Mr. Hodgins respecting a standing committee on discipline (read a first and second time during last term) was read a third time and passed.

Ordered, that Mr. McLennan, Mr. Hodgins, Mr. Benson, Mr. Hoskin, Dr. McMichael, Mr. Robertson and Mr. Osler, be the standing committee on discipline until Easter Term next.

Ordered, That Mr. McCarthy's notice of motion, to rescind the standing orders passed under 39 Vic., Cap. 31, and to substitute orders in place thereof, and Mr. Hodgins' notice of resolution relative to an Executive Committee of Convocation, do stand to first Monday of next Term.

Ordered, That Mr. Evans be paid the sum of one hundred dollars for his services as examiner for the present Term, and that he be appointed examiner for the next Term.

Tuesday, August 28.

The minutes of the proceedings of yesterday were read.

The balance sheet for the second quarter of 1877, was laid before Convocation.

The report of the committee on Legal Education, reporting the names of the several applicants for the position of Lecturer and Examiner, was read.

Ordered, That the Secretary do give notice by circular, of the intention to appoint a Lecturer and Examiner on Common and Commercial Law, and also a President of the Law School as required by Rule 104, for second Friday of present term.

The report of the committee on Legal Education on the several petitions referred to them yesterday was laid before Convocation, reporting in favor of certificates of fitness being granted to Messrs. Gordon, Wallis, McSweyn, Shaw, Crowther, and Teeple.

Ordered, that the report be adopted except as to the petition of Mr. McDonald, which is to stand for further consideration.

Ordered, that Mr. Alexander Leith be appointed Bencher in the place and stead

of Kenneth McKenzie, Esq., Q. C., resigned.

Moved by Mr. Martin, seconded by Mr. McCarthy, That Messrs. McCarthy, Crickmore, Bethune, Hector Cameron, Patton, Martin, McKelcan, and Maclennan, be a special committee to consider and report upon the resolution which was moved by Mr. Crickmore and seconded by Mr. Read at the meeting of Convocation held on the 25th Nov. last, and that the subject of the Law School, generally, be also referred to the same committee, and that said committee report on the first day of the next Term. Carried.

September 7.

In the absence of the Treasurer, Mr. Read was elected chairman.

The report of the Committee on Legal Education on the petition of H. M. East, was read and adopted.

Ordered, That Mr. East receive his certificate of fitness.

The petition of Mr. Richard Willis Jameson, was referred to the Legal Education Committee.

The petitions of Messrs. McNab and McCutcheon, asking that they might be exempted from paying arrears of Term fees, were refused.

Mr. Kirkpatrick's certificate was ordered to be issued to him without fine.

Mr. R. W. Adams' certificates for 1876 and 1877 were ordered to be issued without fine.

The report of the Legal Education Committee on Mr. McDonald's case was adopted.

The report of the committee on discipline, in the respective cases of two barristers, was read and adopted, and the barristers named were called upon to make explanations.

Ordered, That all letters referring to annual certificates be referred to the Finance Committee.

The Treasurer took the chair.

Moved by Mr. Hodgins, seconded by Mr. Robertson, and resolved, that the appointment of Lecturer and Examiner and of President of the Law School, be postponed until the first Tuesday of next Term.

Ordered, That the names of Mr. Leith and Mr. Hodgins, be added to the committee appointed on 28th August last to consider and report upon the resolution therein mentioned, and the subject of the Law School generally.

SELECTIONS.

EASEMENTS AND APPURTENANCES.

The easement clause in a deed, although a mere common form, is a most important part of the conveyance, the omission of which any good conveyancer would regard as a careless mistake. By omitting the easement clause in an original grant or lease, it would be held that, in the absence of special circumstances, the easements and appurtenances would not pass. But in conveyances other than original grants or leases, if the easements and appurtenances were conveyed expressly in the original grants or leases, and reference were made to such original grants in the subsidiary ones, the easements will pass by implication. In the case of *Renwick* v. *Daly*, 11 Ir. L. T. R. 96, decided by the Court of Common Pleas in Ireland last Trinity Term, J. M. demised for a term of years to P. T. certain premises, together with *inter alia* "the right to use the walls on the north side of the said plot for building purposes." Subsequently, P. T. sub-demised to the defendant these same premises along with others, describing them as "the plot or piece of ground on the north side thereof, lately purchased by the said P. T.," setting them out by metes and bounds: "To have and hold the said demised premises with the rights, members, and appurtenances thereunto belonging or in any wise appertaining." The granting party of the lease did not expressly mention the right to use the wall, nor did it mention the easements and appurtenances. In an action of trespass *q. c. fr.*, brought by the assignee of J. M., the landlord, to try the right of the defendant to use

the wall for building purposes, the Court held that the right to use the wall for that purpose passed under the above sub-lease, irrespective of the habendum; that the plot of ground originally leased by J. M. to P. T. was specifically stamped and impressed with the right to use the wall in controversey, and that what was conveyed to the defendant was the plot of ground so stamped and impressed.

But it frequently happens, especially in cases of tenancies from year to year, that lands are let without any writing whatever. What then becomes of the easements? It appears that in Great Britain and Ireland, notwithstanding some conflict of authorities, those easements which are usually enjoyed with, and are essential to the convenient occupation of lands, will pass by a parol demise when, at the time of the demise, the easements existed and were in use. The principle upon which this rule proceeds is that, when a person grants a house or land, he impliedly grants everything that is indispensable for the full enjoyment of the subject-matter of such grant. This principle has been exemplified in several cases which, though not cases of parol demises, are similiar to them. In the familiar case of *Pyer* v. *Carter*, 1 H. & N. 916, the owner of two adjoining houses sold and conveyed one of them to a purchaser, and it was held that the house so sold was entitled to the benefit, and was subject to the burden, of all existing drains communicating with the other house, although there was no express grant or reservation for that purpose. In *Ewart* v. *Cochrane*, 4 Macqueen 122, the respondents, who were the owners of a tan-yard, were held to be entitled to use a conduit leading to a cesspool on the appellant's property, without an express grant of such right. Lord Campbell, L.C., in giving judgment, said:—"I consider the law of Scotland, as well as the law of England, to be that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant, if there are the usual words in the conveyance. I do not know whether the usual words are essentially necessary, but where there are the usual words I cannot doubt that that is the law." He afterwards added—"When I say it was necessary I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant." And in *Watts* v. *Kelson*, L. R. 6 Ch. 166, it was decided that if the owner of a house and land makes a formed road over the land for the apparent use of the house, and then conveys the house separately from the land with the ordinary general words, a right of way over the road will pass. The above principle was recently extended to the case of a parol demise by the Court of Common Pleas in Ireland in *Clancy* v. *Byrne*, 11 Ir. L. T. R. 94. The action was for disturbance of a right of way. It was proved at the trial that the plaintiff held two pieces of land under two landlords—one portion as tenant from year to year under G., and the other as tenant for lives or years under A. There was an accomodation pass from the plaintiff's house to the high road over part of the defendant's land. It was for some distance a well-defined carway as far as a certain kiln, and from the kiln to the defendant's house the way was undefined, but from his house to the high road it was a well-defined carway. In 1857 the plaintiff's father obtained a lease from A. for three lives or thirty-one years of adjoining land, called M., through which there was a way to the high road, and the distance from the plaintiff's house through these lands to the high road was shorter than the way in dispute, but portion of this way was over swampy ground, and was difficult to use. The defendant had been in possession for two years as tenant from year to year under G., prior to which time he was in possession as caretaker for G. of the lands. It was proved by the plaintiff that the user of the way with horses and carts had been enjoyed by the plaintiff, his father, and grand-father for over sixty years; and the jury found for the plaintiff, that he had used the way as of right. The Court refused to set aside the verdict, upon the ground that, if at the time the landlord let the farm this means of access to the high road existed, and if the landlord demised the farm with the appurtenances and the easements, the way would pass, and that, too, although

it was not strictly a legal way of necessity, but a way the use of which was essential to the convenient enjoyment of the farm. The evidence in the case was sufficient to show that it had been so demised.

It would appear that the Courts in America are somewhat less liberal in deciding what is necessary for the comfortable enjoyment of premises. In the case of *O'Rorke* v. *Smith*, the Supreme Court of Rhode Island laid down a some what stricter rule. M. C., the owner of a tract of land, conveyed the west portion to D., reserving to himself the use of a well thereupon for the benefit of the remaining part, which he called the homestead estate. M. C. devised to J. in fee the land between the house and the lot sold to D.,; and to S· the house and the rest of the homestead estate. For a considerable period, but not for long enough to gain an easement by prescription, the occupants of the house had crossed the land devised to J. to get to the well. The only other way for the parties residing in the house to go to the well was by going down the street in front of the house and accross D.'s land, but this was longer, and it was not known that D. would consent to it. In trespass *q. c. fr.* by the grantee of J. against S., it was held that the way across J.'s lot could not be claimed as a right of way of strict necessity, and that the right of way could not be implied from the circumstances of the case as one reasonably necessary. Durfee, C. J., in giving judgment, drew a distinction, supported by some English authorities, between continuous easements, such as air, light, &c., and non-continuous easements, such as rights of way ; and decided, with regard to the latter, that the party claiming the easements would be required to show, either that without the use of the way he would be subjected to what, considering the value of the granted estate, would be an excessive expense, or that there was a manifest and designed dependence of the granted estate upon the use of the way for its appropriate enjoyment, or to adduce some other indication equally conclusive. A similiar conclusion was come to by the Court of Appeal at Ontario,* Canada, in the case of *Harris* v. *Smith*, (*ante*,*infra*. 128) where the Court held that a shop and premises demised by a deed *with all the appurtenances* would not give the lessee a right of way over a neighbouring close, although both premises had originally belonged to the same landlord, and although the close had been demised subject to the right of way. The decision was grounded upon the same reasoning, namely, that a right of way is not such a continuous easement as to pass by implication of law with a grant of land ; only a way of necessity will so pass. The American and Canadian Courts thus considered that, in the absence of express words of grant conveying the easement, it is necessary to prove an absolute necessity—*i.e.*, no other mode of access to the object sought to be approached. It may be added that New Jersey, Louisiana, and Illinois are the only States of America which have adopted the English common law rule as to easements in light and air being capable of acquisition by use or prescription : see *Stein* v. *Hauck*, 4 Cent. L. J. 581. The tenant-farmers in Ireland may be thankful that the courts of law and equity at home are more liberal in their views on the doctrine of easements than the courts on the other side of the Atlantic.—*Irish Law Times.*

* This writer has followed the example of an Englishman in speaking of Ontario as if it were a city. They know many things at home, but are lamentably ignorant of geography. We would mention for their information that Ontario is the name of a country about twice as large as the United Kingdom.—Eds. L. J.

HOW TO GET MARRIED.

This is the question which at the present time is agitating the minds of millions of the fairest daughters of our land. Alas ! for these bright maidens, States now-a-days neither give bounties to men who marry young, nor impose heavy penalties upon all celibates, as the Grande Monarque was wont to do in Canada. 1 Parkman's Old Regimé, 225. This is a query apparently scarcely more soluble than the Oriental question in Europe or the Celestial question in America, yet we will endeavour to answer it, and if our efforts throw any single beam of light into minds darkened by the shades of uncertainty or doubt, we will feel that we have not dipped our pen in ink in vain.

Dear readers, do not expect to have in these lines receipts for philtres to bring back to your sides erring lovers, or draw

thither new admirers, nor mysterious secrets of occult sciences, by which chill December may win sunny May, *or vice-versa*; do not hope to read herein how bride or bridegroom, best-man or bridesmaids. should be attired on the momentous occasion when the bonds of wedlock are being fast riveted by priest or parson, justice or deacon; think not to be intertained by the "how" among the foreign nations in the dark places of the earth. Such lofty themes transcend our humble powers; we only propose to try and show how the two distinct entities are welded together into one person, in the eye of the law and to the satisfaction of the lawyers.

Start not as if pierced by some serpent's tooth, at the sight of these two words, "law" and "lawyers," for "the law is, after all, the most romantic of professions." Happily for its members it is not entirely composed of sheep-skins and dust and decided cases, "quiddets and quillets, cases and tenares," as the Prince of Denmark hath it. "Many are its paths of pleasantness, and writers of fiction, seeking where they can find what most will interest their readers, have oft-times turned to the law and invoked its invaluable assistance without compensation in compounding a plot or inventing a striking episode."

Take, for an example (which touches the point under consideration), a novel, which many of you have read during this very season, "What he cost her" (a truly novel subject, for most books might be truly said to be on what she cost him), by Mr. James Payne. The most exciting part of this highly creditable story is where the hero, Landon by name, is in the prisoner's docket to be tried for bigamy—he having deemed his first nuptials void, because his lady-love had married him under an assumed name, had taken to himself another partner for better or for worse. During the opening address of the counsel for the crown (for the trial took place in "merrie old England"), what puzzled Landon was, that the fact of his having been ignorant of the deception in the matter of the name (on which he counted for sympathy), was willingly conceded by the learned speaker; afterward he found that this was the chief point relied upon by his enemies. You, fair friend, did not see any great importance in the examination of Ella by Mr. Pawson, after she had explained that, owing to a quarrel with her father years before, she had taken and ever since been called by her mother's name. He asked:

"There was no material cause, then, why you should have deceived your husband?"

"None whatever," she replied.

"He did not, however, aid or abet you in the deception?"

"He? no!"

"I mean," continued Mr. P., "that you and your husband did not agree together before marriage to deceive the public by your assumption of this false name?"

"Most certainly we did not," answered the fair witness.

You doubtless found these questions and answers far from startling, in fact, monstrous; but the wicked hero, perched on the ragged edge of despair, noticed that they had a marked effect on the gentlemen in horse-hair wigs; he saw stuffs and silks look at each other significantly, and the Judge himself steal a glance at him over his spectacles—a look which seemed to chill him to the very marrow. Ella, too, felt that her replies had sealed the doom of her once dearly-beloved. And well-grounded was the fear of the culprit, the triumph of the accusers. Sufficient cause had the lawyers for the glances which said unmistakably, "he's a goner;" and very bad on the bench for that look which read "you rascal, fifteen years of penal service for you." For the law of the land at that time said that a marriage not lawfully celebrated, by reason of fraud having been practised by one party or the other, was valid in favor of the innocent victim, and that a marriage was perfectly good even when one of the parties had been married under a false name, providing the other was not cognizant of the deceit: *Kiny* v. *Wroxton*, 4 B. & A. 640. Hence, Ella having proved her husband ignorant of her real name, established the validity of the marriage, branded him as a bigamist, and severed the last hair that held the sword of Justice pendant over his head, consigning him to ignominy, disgrace and servitude. Having done all this, you remember she determines, woman-like, to rescue him ere the punishment, so richly deserved, overtakes him. She conspires with his counsel; produces a statement written by herself before her wedding, for Landon's perusal, explaining

all about the change of name, and on cross-examination, has an attack of *nommi-ricardo*, and will not swear that the wretch at the bar had not read the paper on their marriage eve. On this peg is hung the argument that both Eva and Landon had conspired to deceive the public, and had knowingly and wilfully intermarried without due publication of bans and proper license, and consequently the marriage was void. She was not Mrs. L., and Mr. L. had been free to wed when he met his second love.

Strange this may seem, but the law was good, provided the marriage took place after the fourth year of the reign of his majesty George the fourth. If the wedding had been before that time it would have been different, in the event of Langdon's ignorance, as Miss Mary Hodgkinson, who was married under the name of White, without any intention to mislead or without misleading any one interested, found to her cost, when her union was declared invalid: *Rex* v. *Tibshelf*, 1 B. & A. 195.

It may be a comfort to some in this world of trouble to know that the employment of a sham clergyman or forged license will not render the service inoperative when the innocent victim desires the noose to hold tight: *Dormer* v. *Williams*, 1 Curt. 870; *Lane* v. *Goodwin*, 4 Q. B. 961.

Nothwithstanding the widely-spread belief that matrimonial alliances are made in heaven (which, if true, must cause heaven to be anything but a place of rest, and almost require the presence in those realms of the blest of some individuals that one would think might as well be kept out), among all Anglo-Saxon communities marriage is but a civil contract —like an agreement to build a house or to make a bonnet; and the essence of it consists in the consent freely given by a man and a woman able at the time to agree. Force or coercion used towards either party will invalidate the affair: *Stevenson* v. *Stevenson*, 7 Phil. (Pa.) 386. It would be very unwise, therefore, for any youdg lady to make a dead set upon an eligible *parti*, and intimidate him into matrimony by threatening imprisonment and such like dire inflictions, for, though the lips of the timid and frightened male murmer assent to the all-important "wilt thou?" yet, neither mind nor heart consenting, Justice and Right will rescue the entrapped one, and put asunder those thus joined together: *Collins* v. *Collins*, 2 Brewst. (Penn.) 575. Mere unwillingness, some degree of reluctance, a show of masculine modesty, a refusal to take the hand of the bride, holding his peace (prehaps his last until he gains the quiet of the tomb), will not, however, enable the bashful swain to reconsider the matter after the justice or parson has performed the ceremony, even though the presence of the parents of the bride and a conservator of the peace in charge of the good man may have somewhat overawed him: *Jackson* v. *Winns*, 7 Wend. 47. And voluntarily taking up housekeeping, or going into board together, after the cause of intimidation has been removed, will have the effect of making perfectly good (so far as the law is concerned) a marriage at first invalid, brought about by fraud or force: *Hamstead* v. *Plaiston*, 49 N. H. 84.

And now let us approach the great question, will a marriage, entered into with the entire concurrence of those deeply interested, be valid and binding if all the rites and ceremonies, religious or otherwise, have been absent? This query touches the pockets of all marriageable and marrying "forked radishes with heads fantastically carved," whose business it is to fee—handsomely or otherwise, as the spirit or the circumstances may move them —the officiating priest or magistrate, Nay, more, it affects the pockets of all interested, for clothes, which Carlyle says give us individuality, distinction, social polity—which have made men and women of us—which are threatening to make clothes-screens or scare-crows of us—cost money especially at such times. On this important point doctors (of the law) differ rather widely. Some writers have said "yea" and others "nay" to the question; while courts and judges have said "ditto" and "do" to either response.

Long since, Parsons—ample authority in such matters, we must recognize in the name—said: "Marriage being essential to the peace and harmony, and to the virtues and improvement of civilized society (comfortable words, surely, to many a lonely heart) it has been, in all well-regulated governments, among the first attentions of civil magistrates to regulate marriage. Where the laws of any State

have prescribed no regulations for the celebration of matrimony, a mutual engagement to inter-marry by parties competent to make such a contract would, in a moral view, be a good marriage, and would inpugn no law of the State. But when the civil government has established regulations for the due celebration of marriage, it is the duty as well as the interest of all citizens to conform to such rules :" *Milford* v. *Worcester*, 7 Mass. 48. Another Parsons (think not, gentle reader, that the expression is ungrammatical) says: "That in all Christian communities of which we have any knowledge, and, as we suppose, in all civilized countries, certain ceremonies are prescribed for the celebration of marriage, either by express law or by a usage which has the force of law, and the question is, whether a mere consent of the parties, even with mutual promises, but without any use of or reference to any of these ceremonies, is sufficient to constitute a valid marriage :" 2 Parsons on Contracts, 75.

Whenever there is a ceremony, no particular form of words and no particular actions or deeds are necessary. A simple nod of the head or bob of a curtesy in response to the fatal query will be as efficacious and as binding upon the nodder or bobber as the most sonorous "I do," or simpering "yes," accompanied by Sir Charles Grandison bows and ritualistic genuflexions: *People* v. *Taylor*, 1 Metc. (N. P.)190.

A gentleman, hailing from Boston, whom we have before quoted, and who claims for himself great knowledge on this and kindred subjects, says he never knew of any case in which a mere agreement to marry, with no formality and no compliance with any law or usage regulating marriage, has actually been permitted to give both parties and their children all the rights and lay them under the obligations and liabilities, civil and criminal, of a legal union : 2 Parsons on Contracts, 79. His next sentence, however is an admission that some recent decisions of the courts seems to tend strongly in the direction which he disapproves. To some of these cases we will refer.

A man and a woman in New York State, were engaged to be married. The former entertained the notion that wedding ceremonies were vanities of vanities, empty show, vain delusions, unnecessary expenses, in fact he did not believe in them, and expressed the desire that his lady-love would fore-go the performance, especially as the marriage without them would, to his mind, be all sufficient. The fair one hesitated—the pomps and vanities of this wicked world and the flesh pots of Egypt had strong hold on her. But at last she gave way to his wishes, and named the day which was to see these twain made one flesh. On that eventful hour they went out riding together in a carriage, and while rolling smoothly along the gent produced a ring, and placing it upon the lady's finger, said: "This is your wedding ring; we are married." She received the circle of gold as the sign of wedlock. He then further remarked: "We are married; I will live with you and take care of you all the days of my life, as my wife." She made no objection to the pleasant programme thus sketched out for her future course, and together they drove to a house where he had previously engaged board for "himself and wife." There they lived together for over a month, he treating her and speaking to her and of her as his wife. Soon—sad to relate—a change came oe'r the spirit of their dreams. We seek not to lay blame at the door of either, but a divorce was sought for, and the Supreme Court of the State held and decided that this simple and uncommon marriage was perfectly valid: *Bissell* v. *Bissell*, 55 Barb. 325.

On the other hand, once upon a time in Scotland, after a family supper, at which, we may assume, toddy was not absent, one of the party, a jolly old batchelor, put a ring on the finger of a daughter of the house, a maiden bright and fair, saying to her, "Maggie, you are my wife before heaven; so help me, oh God!" The two kissed, the lady modestly exclaming, "Oh, Major!" The banqueters then drank the very good health of the happy couple, and forthwith bedded them according to an old Scotch custom. In course of time the question arose, was Maggie the wife of the Major? The Court of Sessions said she was, but the final court of appeal in the kingdom took the liberty of reversing that decision, and saying she was not, upon the ground that it appeared clear to them that no real marriage was then intended, and although the ultimate maturing of matrimony was hoped for and confidently anticipated by

poor Maggie and her friends: *Stewart* v. *Robertson*, 2 H. L. (Sc.) 494.

It seems pretty clear, however, that in the state of New York no religious form or ceremony of any kind, nor, in fact, any formality, except the agreement itself, is essential to the validity of a marriage. Any agreement made in the present tense between persons of the opposite sexes, capable of contracting, whereby they assume toward each other the marital relation, is actually a marriage. It need not be in writing, nor need any witness be present. And it may be proved as any other contract; and when proved to the satisfaction of a court of justice, it constitutes a lawful marriage: *Bissell* v. *Bissell, supra; Van Tuyl* v. *Van Tuyl*, 8 Abb. N. Y. Pr. (N. S.) 5. The service of both priest and magistrate may be dispensed with: *Wright* v. *Wright*, 48 How. Pr. 1. Out in Mississippi, too, it has been decided that to constitute a legal union nothing more is needed than that, in language which both of the contracting parties understand—be it English, Irish, or Dutch—or in words declaratory of their intention, they accept one another as man and wife, and if the words used do not, in their ordinary meaning or common use, "conclude matrimony," yet if the man and woman intend marriage, and their intent is sufficiently manifest, they become inseparably welded together until, as Samuel Smetes says, ill-cooked joints and ill-boiled potatoes, calling in the aid of a divorce court, put them asunder. Their consent to enter into the holy state may be expressed either in writing or orally: *Dickenson* v. *Brown*, 49 Miss. 357; *Rundle* v. *Pegram*, id. 751.

So, in Pennsylvania, in the present tense, (one sees now, what one prehaps never saw before, the advantage of the study of grammer) uttered for the purpose of effecting a matrimonial alliance, is all that is required. No particular form of solemnization before officials of either Church or State is needed: *Commonwealth* v. *Stamp*, 53 Penn. St. 132. The law among among the dwellers in Alabama is similiar, to all intents and purposes: *Campbell* v. *Gullatt*, 43. Ala. 57. In Michigan, too, if persons agree to take each other for husband and wife, for better, or worse, at once without any pomp or ceremony, or show, that may be pleasing to human nature, and from thenceforth live together, the Gordian knot is fairly tied, only death or some heartless divorcer can cut it: *Hutchins* v. *Kimmell*, 31 Mich. 127.

People who quote Latin, and know a little more of that classic tongue than "e pluribus unum," "excelsior," "sine qua non," "compos mentis," "et cætera," and agree in the correctness of the law, as stated in these last-mentioned cases, express the principle enunciated in them, with the aid of their little Latinity, as follows: Marriages made *per verba de presenti, vel per verba de futuro, cum copula*, are lawful. And this being interpreted means, that a marriage contract entered into by words signifying the intention of having a wedding then and there, and the couple immediately separating, and one entered into by words expressive of a determination to have a marriage some day or other, followed by the parties dwelling together in amity, are as valid and as binding as if made in the presence of the church.

It has, however, been expressly held in Maryland, that some religious ceremony must be added to the civil contract: *Denison* v. *Denison*, 35 Md. 361. On the Pacific coast the contract must be declared before a person duly authorized to take such declarations, and in the presence of a couple of witnessess: *Holmes* v. *Holmes*, Abb. U. S. 555. And a Massachusetts judge said that a marriage which was merely the effect of a mutual engagement between the parties, or solemnized by any one not legally empowered to do so, is not valid, nor is it entitled to the incidents of a marriage duly performed: *Milford* v. *Worcester*, 7 Mass. 48. In England no wedding is perfect unless made in the presence and with the intervention of a minister in holy orders, or other person authorized by statute; and so it is in Canada.

Whether there is a ceremony or not, intention being an all-important ingredient in this as in all contracts, it follows, notwithstanding novels and sensational stories to the contrary, that a marriage ceremony performed in jest does not make the pair husband and wife, even though a genuine J. P., who did not know whether he was tying the nuptial knot in joke or in earnest, officiated at the ceremony: *McClary* v. *Terry*, 21 N. J. Eq. 225.

Ladies, to whom appertain the privilege

of "naming the day," may choose any one of the seven for publicly assuming a new patronymic. Some question, it is true, as to whether a celebration of marriage on Sunday is a violation of law; but it is generally believed by lawyers that matrimony may be lawfully entered into on that sacred day. The reasons why are various; it is either because the frequency of the thing has in some measure protected it by usage, and the consequence of an opposite view would be disastrous, or because the contract of marriage is in the nature of a continuing contract, and may be regarded as made every succeeding day as long as the parties live together (2 Parsons on Contracts; or, and this applies chiefly to New York State, as civil contracts—and matrimony is such—made for a lawful purpose, and not tending to disturb the public peace and quiet, are valid and enforceable, although made on Sunday; so are marriages, unless it can be made out that they are contracts tending to disturb the public peace and quiet. Some marriages undoubedtly have that tendency, and so we would advise some ladies to be careful when they get married.—R. Vashon Rogers, Kingston.—*Albany Law Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported for the *Law Journal* by H. T. Beck, M.A. Student-at-Law.)

Bain v. McCarty.

Pleading.—Assignment.—Chose in action.

Where, in an action brought by the assignee of a *chose in action*, a plea that the assignment was made without consideration, *held* to be no defence.

[Sept. 5.—Mr. Dalton].

This was a motion to strike out a plea setting up as a defence to an action brought by the assignee of a *chose in action* that the assignment was made without valuable consideration.

Kennedy, for defendant, contended that the plea in effect merely raised the issue of beneficial ownership.

Mr. Shepley (Ferguson, Bain & Meyers) contended that that issue was raised by the plea of non-assignment.

Mr. Dalton thought that the plea should be struck out.

Order accordingly.

Snow v. Cole.

Writ.—Service.

If a writ of summons be served within the jurisdiction, it may be specially endorsed and final judgment may be entered against the defendant, although he is described in the writ as residing without the jurisdiction.

[Sept. 7.—Morrison, J.]

The facts of this case appear *ante*, *infra*, p. 223 on an application made before Mr. Dalton who set aside the judgment. From this decision the plaintiff appealed. The appeal was heard by Mr. Justice Morrison, who reversed Mr. Dalton's judgment, holding that upon the facts stated, the judgment had been regularly signed. It was however set aside on the merits, with the costs to the plaintiff.

Muir v. Kidd.

Ejectment.—Pleadings.

The A. J. Act has introduced into proceedings in ejectment "pleadings" within the meaning of the C. L. P. Act, which cannot consequently be filed during vacation.

[Sept. 8.—Mr. Dalton.]

This was a summons to set aside a replication and demurrer to an equitable defence, on the ground that they were filed during vacation.

Osler, for plaintiff, contended that the A. J. Act made provision for equitable defences and replications in ejectment. Previously there were no pleadings in ejectment. The act does not mention them as pleadings, but calls them statements, and the rules of pleading do not apply to them.

Mr. Shepley (Ferguson, Bain & Meyers) for defendant, contended that these statements since the A. J. Act had been treated as pleadings. The English Judicature Act substitutes statements of claim and statements of defence for the old Common Law Pleadings, and these statements are subject to the same rules as governed pleadings previously. The C. L. P. Act applies to all pleadings, and as soon as the law of ejectment was modified by the A.J. Act, so as to admit of pleadings, those pleadings must be regulated by the Procedure Act.

Mr. Dalton held that these statements under the A. J. Act. were pleadings within the purview of the C. L. P. Act.

Order accordingly.

DAVIS v. VANDECKER.

Costs.—Trespass.

Where the title to land is in issue upon the record, the plaintiff is entitled to full costs, although he has obtained a verdict of less than $8, and the judge at the trial has not certified for full costs.

[Sept. 11.—WILSON, J.]

This was a motion to review a taxation. The action was for trespass, the verdict being for the plaintiff for one shilling The judge at the trial had not certified for full costs. The plea of not possessed was on the record. Under these circumstances the Clerk of the Common Pleas refused to tax to the plaintiff any costs.

Mr. Read (Read & Keeler) for the defendant contended that 31 Vict. cap. 24, sec. 1, was express, and the certificate was necessary in order to enable the plaintiff to tax any costs.

Holman, for plaintiff, contended that the title to land was raised by the pleadings, and that, therefore, the plaintiff was entitled to full costs: *Williams* v. *Jones*, 15 W. R. 133 *Lake* v. *Briley*, 5 U.C. Q.B. 307; *Humberston* v. *Henderson*, 3 Prac. R. 40.

WILSON, J.—I think the plaintiff is entitled to full costs.

HUMPHRIES v. RAMSAY.

Security for costs- Insolvent—Action by.

Held, that under sec. 39, Insolvent Act of 1875, an insolvent is bound to give security for costs in an action for a personal wrong.

[October 3.—WILSON, J.]

This was an application for security for costs in an action by an insolvent for malicious prosecution.

S. M. Jarvis shewed cause. Sec. 39 of the Act of 1875 applies to causes of action which pass to the assignee. The whole section should be read together: *Smith* v. *Commercial Union Insurance Co.*, 33 U.C. Q.B. 529. This cause of action does not pass to the assignee; *White* v. *Elliott*, 30 U.C. Q.B. 253.

D. E. Thomson contra. The language of the section is imperative and applies to every action of what nature soever. If the insolvent were suing for a cause of action which passed to the assignee, he would be ordered to give security for costs irrespective of this provision: *Perkins* v. *Adcock*, 15 L. J. Ex. 7; *Elliott* v. *Kendrick*, 12 A. & E, 597; *Solomon* v. *Leek*, 9 Dowl. 361. *Smith* v. *Commercial Union* was decided on the English cases; sec. 42 of the Act of 1869 was not referred to. The only case in point is *Lee* v. *Moffatt*, 6 Prac. R. 284.

WILSON, J.—In *Smith* v. *Commercial Union* the Court did not notice the provision as to security for costs in the Insolvent Act of 1869, sec. 42. That provision is continued in the Act of 1875, sec. 39, and it is that, in allac - tions and suits of any "nature or kind whatsoever" brought by the insolvent before his discharge, he shall be required to give security for costs. If that provision had been before the Court in the case I have mentioned, it is not probable the decision would have been as it is. Since then, in the case of *Lee* v. *Moffatt*, *ante*, the Chancellor has decided, under the Act of 1875, that the insolvent must give security for costs in any suit he brings. I think that cannot have been what was meant by the Legislature, although they have enacted it because it. restrains the insolvent suing in cases in which the assignee has no interest. If the assignee employed the insolvent to help in winding up the estate, the insolvent could not sue for his wages unless he gave security for costs, which he might not be able to do. So if the insolvent had a cause of action purely personal—I mean one which did not pass to the assignee—against a municipal corporation, which would have to be sued for within three months, he might forfeit his claim if not able to give the security within the three months, which would benefit nobody but the corporation, which was a wrong doer. So he might be prevented from suing as an executor.

With every desire to assist the plaintiff, I find the enactment too plain and too strong to be got over. The security is to be *such* security as the Court shall direct; perhaps I can, under the circumstances, make it easier than it usually is. The order must go, costs to be costs in the cause.

Order accordingly.

CHANCERY CHAMBERS.

CARLEY v. CARLEY.

Alimony. — Witness Fees.— Counsel Fees.— Costs.— Solicitor, payment of costs by

[Sept. 17.—MR. STEPHENS.]

This was an application in an alimony suit for an order for payment of witness fees and counsel fees by the defendant to the plaintiff, in order to enable her to go to a hearing. There was not the usual provision for disbursements in the order for interim alimony.

H. Cassels, for defendant, asked that the motion be dismissed with costs, to be paid by

the plaintiff's solicitor, on the ground that similar applications had been made and dismissed.

Watson, for plaintiff.

THE REFEREE thought that he could not make the order, as the moneys asked for had not been actually paid; but that as no similar case had been reported he could not order the plaintiff's solicitor to pay the costs. Under the circumstances he thought that the motion should be dismissed with costs.

NOTES OF CASES.

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

COURT OF APPEAL.

RE ANDREWS.

From C. C. Leeds & Grenville.] [Aug. 31.

Insolvent Act, 1875—*Powers of assignee.*

Held, (Patterson, J. A.,) affirming the judgment of the County Court, that under sec. 39, nsolvent Act, 1875, an assignee represents the creditors for the purpose of setting aside a mortgage void for want of compliance with the Chattel Mortgage Act.

Bethune, Q.C., for the appellant.

Delamere for the respondent.

Appeal dismissed.

MCMARTIN V. HURLBURT ET AL.

From C. C. Northumberland & Durham.] [Sept. 15.

Exemption from seizure — Values — Division Court Bailiff — Notice of action—Jus tertii.

The defendants, Division Court bailiffs, were sued for selling a horse, of the value of $60, under an execution, which the plaintiff claimed was exempt from seizure. The horse was sold for $47.50. At the trial the plaintiff swore that the horse was worth $120, and the purchaser swore that he was worth $90.

Held, (Burton, Patterson, Moss, JJ.A., and Galt, J.,) that the value of the horse was to be determined by the whole evidence, and not by an exclusive reference to the price it brought at the sale.

Held, also, that the defendants were not entitled to a notice of action with the name and abode of the plaintiff endorsed thereon under C.S. U.C. cap. 126; a notice under sec. 193 of the Division Court Act, being sufficient.

At the time of the seizure the horse was included in a chattel mortgage given by the plaintiff to one Martin.

Held, that the defendants could not set up a *jus tertii*.

Armour, Q.C., for the appellant.

H. Cameron, Q.C., for the respondent.

Appeal allowed.

SHANNON V. THE HASTINGS MUTUAL FIRE INSURANCE CO.

From C. P.] [Sept. 15.

Insurance—Misdescription of premises—Survey made by agent—Further insurance.

One M., a previous owner of the property, at the request of the defendants' agent filled in an application for insurance, but on its being read over to the insured, he objected to the distances stated of the contiguous buildings. The agent, who had previously visited the premises, then undertook to go and measure the distances himself, and make the application correct before forwarding it. The insured thereupon signed the application, but the agent forwarded it to the head office without filling in the correct distances.

By one of the conditions of the policy, it was provided, that if an agent should fill up the application, he should be deemed to be the agent for that purpose of the insured, and not of the company, "but the company will be responsible for all surveys made by their agents personally."

The Court (Burton, J.A., Harrison, C.J., Moss, J.A., and Blake, V.C.,) affirming the judgment of the Common Pleas, *held*, that what the agent undertook to do was within the meaning of the proviso, and that the agent must be presumed to have made the survey so as to render the company liable.

It was proved that the plaintiff had mailed the company a notice properly addressed of a further insurance, and that they had not within two weeks thereafter notified the insured of their dissent.

Held, that the notice must be presumed to have reached the company, and that they must be deemed to have assented to it under 36 Vict. cap. 44, sec. 38, O.

The condition as to proof of loss required a certificate from the magistrate *most* contiguous to the place of fire.

Held, that the condition was null and void as being unreasonable.

Bethune, Q.C., with him *Dickson*, for the appellants.

McCarthy, Q.C., with him *Strathy*, for the respondent.

Appeal dismissed.

ROONEY v. LYON.

From Q.B.] [Sept. 15.

Insolvent Act, 1875—*Confirmation of discharge.*

Held, (Burton, Patterson, Moss, JJ.A., and Proudfoot, V.C.,) that an order confirming a deed of composition and discharge is final and conclusive as to all matters preliminary to its making, unless it has been reversed on appeal.

M. C. Cameron, Q.C., *Monkman* with him, for the appellant.

T. Ferguson, Q.C., for the respondent.

Appeal dismissed.

BROWN v. GREAT WESTERN RAILWAY CO.

From Q. B.] [Sept. 15.

Two lines crossing—Collision—Use of brakes—Negligence.

The defendants' railway crossed the Grand Trunk Railway on a level. The train on the defendants' line was approaching the crossing, and the air brakes for some reason failed to act. It was then too late to stop the train with the hand brakes or by reversing the engine, though every effort was made, and a collision occurred with a train on the other line, of which the plaintiff was a conductor, by which he was seriously injured.

It was shewn that these brakes were in common use on railways, and that the brakes in question had been twice examined and frequently used on that day, and found all right and effective.

Sec. 143 Con. Stat. C. cap. 66 enacts that "every locomotive or railway engine or train of cars on any railway shall, before it crosses the track of any other railway on a level, be stopped for at least the space of three minutes."

Held, (Hagarty, C.J. C.P., Patterson, J.A., and Galt, J.,) Moss, J.A., dissenting, that the defendants were guilty of negligence in not applying the air brakes at a sufficient distance to enable the train to be stopped by other means in case of these brakes giving way.

Held, also, that the statute imposed upon the defendants an absolute duty to stop for three minutes, and that their omission to do so rendered them liable for the injury sustained by the plaintiff.

M. C. Cameron, Q.C., for the appellants.

W. Rock, Q.C., for the respondent.

Appeal dismissed.

HOWELL v. MCFARLAND.

From C. C. Haldimand.] [Sept. 15.

Chose in action—Assignment of—35 Vict. cap. 12.

One of two partners assigned to the plaintiff a debt for goods sold to the defendant by a deed professing to transfer his partner's interest as well as his own. It appeared that he had a general power to transact the business of the firm, and that his partner afterwards ratified the sale.

Held, (Burton, Patterson, Moss, JJ.A., and Galt, J.,) that the plaintiff was entitled to recover under 35 Vict. cap. 12 as the assignment was within the scope of the partnership business, and covered by the agency of one partner for the other; and that even in the absence of authority, his partner's subsequent ratification was sufficient.

Held, also, that the fact that the contract was by deed did not deprive it of the effect of a simple contract.

Bethune, Q.C., for the appellant.

Robinson, Q.C., for the respondent.

Appeal allowed.

LA BANQUE NATIONALE v. SPARKS.

From C. P.] [Sept. 15.

Promissory note—Stamps—31 Vict. cap. 9, sec. 4, D.

On the 9th September, 1875, defendant endorsed a promissory note made by S. & C., bearing that date and payable to him four months after date at the plaintiffs' branch at Ottawa. On the same day C. deposited it with the plaintiffs, authorising them to fill it in for the amount of S. & C.'s then due paper, as also other paper falling due before the 22nd October. On the 21st October, the plaintiffs filled in the note for the amount due, and affixed stamps sufficient to cover double duty which were obliterated by writing across them the date on which they were so affixed, namely, 21st October.

Held, (Burton, Patterson, JJ.A., Harrison, C.J., and Moss, J.A.,) that the stamps were not properly cancelled; for if affixed as agents of the maker then, under sec. 4 of 31 Vict. cap. 9, D., the date of the obliteration must accord with that of the note; and if the plaintiffs acted as a subsequent holder, then under sec. 12, as substituted by 37 Vict. cap. 47, sec. 2, the initials or name as well as the date are required.

Snelling for the appellant.

M. C. Cameron, Q.C., for the respondents.

Appeal dismissed.

McDonald v. Georgian Bay Lumber Co.

From Chancery.] [Sept. 15.

Foreign bankruptcy—Assignment thereunder.

D., who was a naturalized British subject, possessed of a large quantity of lands in Canada, residing in the State of New York, was with his co-partners duly declared bankrupt by the Courts of that State on the 15th November, 1873, and on the 14th February following, a trustee of their estates was duly appointed, when the bankrupts executed a deed purporting to convey all their estate for the benefit of their creditors.

The Court (Burton, Patterson, Moss, JJ.A., and Blake, V.C.) *held*, reversing the judgment of the Court of Chancery, that the deed did not affect the bankrupt's lands in Canada, as there was no evidence that he intended them to pass when the deed was executed.

McCarthy, Q.C., for the appellant.

Crooks, Q.C., for the respondents.

Appeal allowed.

Kay v. Wilson et al.

From Chancery.] Sept. 15.

Mortgage—Statute of Limitations—Wild lands.

In 1835, D. sold certain wild lands to S., and a mortgage was executed by the purchaser for the consideration money. In 1838, S. sold and conveyed his equity of redemption to K. In 1842, D. filed a bill of foreclosure against S., on which a final decree of foreclosure was obtained in 1845; but to this suit, K., through some oversight, was not made a party. K. died in 1876, and the plaintiff, his heir at law, filed a bill to redeem in June of that year. The defendants claimed under conveyance from D. made after the foreclosure.

It was proved that D. had gone upon the land, after his title had become absolute at law in 1838 or 1840 to ascertain if there were any trespassers upon it: that he had asked one Hardy to look after the land, and offered to sell it to him: that he had sold it to one Steers in 1847 as absolute owner, and that the taxes had been paid by the defendants and those through whom they claim.

Held, (Burton, Patterson, Moss, JJ.A., and Proudfoot, V.C.) that there was sufficient evidence of possession having been taken more than 20 years before the bill was filed, and that the plaintiff's right was barred.

Boyd, Q.C., for the appellants.

Armour, Q.C., for the respondents.

Appeal dismissed.

Molson's Bank v. Macdonald.

From Q.B.] [Sept. 15.

Collateral mortgage—Right of action

The Bank held certain notes made by Mitchell Macdonald, the son of the defendant, who had indorsed them for his accommodation, and also certain other notes unsecured by any indorser Upon being pressed for payment of a portion of the notes, Mitchell Macdonald gave a mortgage to secure the whole, which purported to be made in consideration of $4,300, and was subject to a proviso to be void on payment of that sum with interest at 8 per cent., in one year from date, and then added, "the said sum being represented by certain promissory notes now under discount and held by the mortgagees, and any renewals or substitutions therefor that may hereafter be given for the same, all to be paid within one year."

Held, (Hagarty, C. J. C. P., and Burton Patterson and Moss, J. J. A.) affirming the judgment of the Queen's Bench, that the defendant was liable as the mortgage was merely collateral and did not suspend any right of action on the notes.

Dr. Spencer and *C. Moss* for the appellant.

C. Robinson, Q.C., for the respondent.

Appeal dismissed.

CHANCERY.

The Corporation of the Township of Wallace v. The Great Western Railway Co. and The Wellington Grey & Bruce Railway Co.

Chancellor.] [Sept. 12.

Agreement to erect and maintain station—Specific performance.

This was a suit to compel the defendants to maintain a regular way station at the village of Gowanstown, in pursuance of an agreement in that behalf entered into between the plaintiffs and the Wellington, Grey & Bruce Railway Co. on the 17th of May, 1872, whereby, as stated in the bill, in consideration of the sum of in debentures of the said municipality, the Wellington, Grey & Bruce Railway Co., "covenanted and agreed with the plaintiffs to erect, keep and maintain on the said extension a permanent freight and passage station at the said village of Gowanstown, such station to be built within a distance of six chains from the southwesterly angle of lot number 24, in the fifth concession of the plaintiffs municipality, provided no natural or engineering difficulties prevented its being placed within those limits, but if the chief engineer for the time being of the

Great Western Railway Co. should certify that any such difficulties intervened then within twelve and a half chains from the said angle of said lot."

It was proved that the principal inducement to the ratepayers and council for granting this bonus was the undertaking of the company to erect and maintain a permanent passage and freight station at the village of Gowanstown. The necessary buildings were accordingly erected and maintained for sometime by the Great Western Railway Co., who were lessees of the road, but the station was afterwards disused. The municipality thereupon filed a bill against both the railway companies for the purpose of compelling them to continue and use the station and buildings.

Spragge, C., before whom the cause was heard, thought that the Great Western Railway Co. was bound by the agreement between the plaintiffs and Wellington, Grey & Bruce Railway Co., and made a decree as against the Great Western Railway Co. with costs, and dismissed the bill as against the Wellington, Grey & Bruce Railway Co. with costs.

Goyean v. Great Western Railway Co.

Chancellor] [Sept. 12.

Railway terminus—Land conveyed on condition.

The plaintiff on the representations of parties interested in the location of the western terminus of the Great Western Railway, conveyed to the company a lot of land in the town of Windsor, without any money consideration being paid therefor, the deed reciting that the same was conveyed for the purpose and on the condition that the terminus should be placed there, and "the execution of which condition was the real consideration for this grant." The company did construct the necessary buildings for the purpose of the terminus, including passenger and freight stations, and continued to use them for several years, when they discontinued the use of the passenger station, and were about establishing it in another locality. On a bill filed to restrain the company from doing so,

The Court (Spragge, C.) *held*, that the company were bound to retain the terminus on the properties conveyed to them by the plaintiff and one Hall, or in default, the land conveyed by the plaintiff should revest in him; and ordered the company to pay the plaintiff his costs of suit: and, if plaintiff desired it, directed a reference to the Master at Sandwich to ascertain and report whether the condition had been performed.

Wilson v. McCarty.

Chancellor.] [Sept. 26.

Partnership—Interest on capital.

In this case, two partners, Wilson & McCarty, agreed each to furnish a certain amount of capital wherewith to carry on business together in partnership. In pursuance thereof, Wilson did bring in the amount stipulated, but McCarty never brought in any sum. In a proceeding afterwards to wind up the partnership estate, Wilson claimed to charge McCarty's representatives with interest on the amount agreed to be paid, which claim the Master at Barrie refused to accede to, and on appeal, this ruling of the Master was sustained.

Spragge, C., in dismissing the appeal on that ground, referred to the language of Lord Hatherley, when Vice-Chancellor, in the case of *Rishton* v. *Grissell*, L. R. 5 Eq. 326, "No interest is chargeable by one partner against a co-partner . . . The express point has been decided in this Court, that, unless there be an express stipulation or a particular course of practice shewn by the partnership books to the contrary, interest between partners is not allowed."

CORRESPONDENCE.

The Law of Dower.

To the Editor of the Law Journal:

I stated in my last letter some reasons why the inchoate right should be considered as within secs. 5 and 11 of the C. S. U. C. cap. 90; and here I propose to dwell for a short time upon the case of *Allen* v. *Edinburgh, L. A. Co.* 19 Gr. 248, where the point actually arose. The Court there held, that the wife's interest was not available for creditors, and an injunction restraining the sale of the right under execution was granted. The learned Chancellor seems to have decided the case solely upon the authority of *McAnnany* v. *Turnbull*, 10 Gr. 298. His Lordship argues that if the interest in that case were that of a wife, the question is already decided there, and that case must be followed. But the word "widow," which is therein used, points to the fact, that it is the consummate right to dower which

was the subject of discussion in that case. If so, then His Lordship says, "all the reasoning of the late Chancellor, by whom the judgment in that case was delivered, would apply *a fortiori* to this case." And he rests his decision on the grounds contained in the following expression of his opinion: "If I give effect to the argument for the defendants, I must hold, that what the learned counsel contends is a contingent interest in lands is made saleable by the statute; although the *same interest vested* is not made saleable. The judgment in *McAnnany* v. *Turnbull* proceeds upon this, that before dower assigned, a widow has nothing in the land. * * If that be so, it must be so *a fortiori* in the case of a wife whose right is inchoate." If the conclusion arrived at by the learned Chancellor be correct, it follows that this interest is neither a contingent, nor an executory, nor a future interest, nor a possibility coupled with an interest in land; or rather this must have been established before the conclusion above set forth could have been arrived at. If not one of those interests, what then is it? It is not a present estate, nor yet a vested interest. It is not a right of action, as we shall presently see; nor is it a right of entry; for she has none in respect of her dower until after the death of her husband and its assignment by the heir. How then shall we describe it except as coming within one of the terms used in the Act; for we have already seen that it is something more than a mere possibility? The result of the learned Chancellor's conclusion, not only militates against any contention for the presence of the element of contingency in the right, but also conflicts with a *dictum* of Mr. Justice Wilson's in *Miller* v. *Wiley*, who, though not deciding the point, thought that the wording of this Act, being so broad and general, might include this interest.

The conclusion arrived at by his Lordship rests *first* upon the assumption that the widow, as regards her right to dower, has, upon her husband's decease the same interest, *i. e.*, one containing the same inherent qualities, as that which she had prior thereto, but in a different form; and *secondly* upon the fact, though not expressed, yet implied, that an anomaly would be the result of a contrary decision. With regard to the first ground, considering that in this case, the very point at issue is the applicability of the statute, and looking at the concluding words of the quotation from *McAnnany* v. *Turnbull* in the judgment, we may, I think, conclude that the word "nothing" as used by the learned Chancellor bears the meaning expressed by the following paraphrase: "No such contingent or uncertain right or interest as may be reached by any of the phrases used in the statute." His Lordship's reasoning seems to be this: "Because, as was held in *MeAnnany* v. *Turnbull*, the consummate right has no such qualities annexed to it, or inherent in it as to bring it within any of the descriptive phrases, 'a *contingent*, an *executory*, or a *future interest*, or a *possibility coupled with an interest in land*,' it follows, *a fortiori*, that the inchoate right has none of these qualities; and because the consummate right, for lack of these qualities is excluded from the influence of the statute, therefore the inchoate right, for the same reason, is not affected by it." This proposition generalized, may be expressed as follows: That the qualities of those rights which are already vested, and depend for their full enjoyment only upon the exercise of the volition of the person entitled thereto, and those of rights which are as yet to vest, and whose enjoyment depends, not upon the exercise of the volition of the person to become entitled thereto, but upon the happening of an event entirely beyond his control, are of such like nature, that, if certain words

will not describe the former class, neither will those words describe the latter; or, if the one be not found to fall within the embrace of a certain phrase or number of phrases, neither will the other. A proposition which, it will be admitted, cannot be for a moment conceded.

Were the assumption correct, that the interest when consummate is the same as the interest inchoate, *i.e.* contains the same inherent qualities; and that upon the death of the husband, by the disappearance of the element of contingency, it simply appears in a more highly developed form, then the conclusion at which His Lordship arrives might have been conceded without argument. But if it can be shown that the inchoate right is not the same interest as the vested right, (though existing in the same person, yet at different times) but is of a totally different nature by reason of the element of contingency that may be shown to exist in it, then the reasons given in his Lordship's judgment will not be a sufficient warrant for the conclusion. For the judgment proceeds upon the assumption that these two rights are homogeneous.

With all due deference to a learned judge, the greatest respect for whose opinion I entertain in common with the whole profession, I venture to submit, that the most we can say is, that these two rights, the inchoate and consummate, are *different interests* in the *same person*, not the *same interest* in *different forms*. That the inchoate right is not the *same interest* as the consummate or vested right and has none of its properties, seems manifest. The very element of uncertainty or contingency, which, I contend, serves to bring the inchoate right within the statute, disappears upon its consummation, and a *new right* accrues to the widow, namely a right of action; or, as expressed by Wilson, J., "a right to have an estate in the land established for her;" and by Van Koughnet, C., "a right to procure something *i.e.* dower; neither of which rights she had before her husband's death. And further it is said in *McAnnany* v. *Turnbull*, "she cannot * * assert any description of right in it except by *action* to procure an assignment;" thus, by an exhaustive or exclusive process, describing it as nothing else than a mere *right of action*. Again, "the common law regards the title to dower for many purposes as a mere *right of action*:" Blake, C. in *Rose* v. *Simmerman*, 3 Gr. 600. These learned judges seem to have fully described the interest of the widow before assignment of dower in the words quoted. It is plain then that, before the husband's death, not having arrived at that period when she may "assert any description of right," since she has, as yet, neither "a right to have an estate established for her," nor "a right to procure dower," she cannot be said to have the *same* interest as that last above described. She has in reality little more than a right to wait for a contingency which may never happen—to wait for the probable arising of a right of action. But the husband's death having happened in her lifetime, she now emerges from her former state of uncertainty, and becomes clothed with a new interest, entirely devoid of any contingent ingredient, inasmuch as she has a right *presently* to maintain an action. Are these two interests the same in any respect, except in that of their ultimate object? The answer is suggested by the following passage from Story Eq. Jur. 12th Edn. by Perry, 1040 (*c.*):—She "has nothing but the contingency, which is a very different thing from the right immediately to recover and enjoy the property." But to this it will be answered, that it will not follow as a logical consequence that these two rights will be found to be of exactly the same nature in every respect, simply because they are both excluded from the purview of a certain clause in the statute;

that it may well be that they might both be excluded and still be totally different in nature from one another. Very true! But when they are both excluded for the *same reason*, or, when one is excluded simply because the other is (which amounts to the same thing), we must expect to find certain qualities or characteristics common to both of them. If the one be found to possess none of the qualities that the other does, or (which is sufficient for our present purpose) if those qualities mentioned by the statute be not common to both, they can no longer be governed by the same rules. If the inchoate right be found to possess certain qualities which the vested right does not possess, and of so different a nature as to bring it within another class of rights, then the reasons which will apply to the exclusion of the one will not apply fully to the exclusion of the other. At the least, its possession of those qualities which the vested right does *not* possess, calls for a reason why *they* should not bring the inchoate right within the reach of the statute, even though it be found that it bears a certain resemblance in other respects to the vested right, and might on the latter account be excluded; which reason is not given in his Lordship's judgment.

The real effect of the statute seems to be that, while it did not change the quality of that already existing, nor create any new interest in the wife, it provided a method of dealing with the already existing interest which was apparently not extended to the consummate right. If, then, it is not the same interest, but a totally different right, his Lordship's premises are faulty; and a conclusion founded upon false premises, though logically consequent thereupon, cannot but be erroneous.

With regard to the second ground, whether the avoidance of such an apparent anomaly in the law is, or is not, a desirable end, I do not propose to enquire. That other anomalies do exist, will not be disputed. One, in particular, is referred to, in his argument, by the learned counsel for the defendants in *Allen* v. *Edinburgh*. A lease for three years may be made by parol; but an assignment thereof must be in writing. Now, reasoning according to common sense views, we should no doubt arrive at the conclusion that where an estate in lands was allowed to be called into existence in such an informal way as by word of mouth, surely the subsequent dealings with it, which are of much less relative importance than its creation, might also be by word of mouth. This would probably be a just enough conclusion, and would save an anomaly, if the statute had not enacted otherwise.

An apparent injustice exists with regard to the doctrine of notice, as affected by the Registry Act, sec. 67. A purchaser for value, without notice of a prior deed, may be defeated by notice of it between the time of getting his deed and registering it; a principle contrary to general policy of the Registry laws. It was noticed in *Millar* v. *Smith*, 23 C. P. at p. 58, by Gwynne, J., who said in reference to it, after adverting to the doctrine of notice in Equity:—"My moral conviction is, that" the introduction of the equitable doctrine of notice "was the intention of the Legislature, although the language literally does not express the equitable doctrine. I have come, however, to the conclusion, that as we have no means of judging of the intention of the Legislature, otherwise than by the language used, we must give effect to the clause *as it is expressed*."

Again, where, under C. S. U. C. cap. 84, a woman released or barred her right to dower by a conveyance to which her husband was *not* a party, an examination touching her consent was

made requisite. Though, when her husband *was* a party, she need not have been examined. When we consider that the object of the examination was to ascertain whether the husband had coerced his wife to join in the deed, which would be more likely to happen where he was also a party to the instrument than where he was not, it is difficult to see why it was so enacted. Thus, in one of two instances, imposing a precautionary measure, where there seems to be no reason for it; and in the other, omitting it, where the very state of facts exists, which furnished the reason for the law in the first place. See remarks of Robinson, C. J. in *Howard* v. *Wilson*, 9 U.C. Q.B. 450.

Other anomalies, not depending on the wording of the statutes, have existed; such as, that the wife of an idiot might be endowed; though the husband of one should not be tenant by the courtesy: Co. Litt. 31. See also Archbold's Blackstone, p. 129, n. 33, where it is laid down, that Courts of Equity, although not allowing the wife of a *cestui que trust* to be endowed of the trust, yet allowed courtesy of the trust; a seeming partial diversity, for which Lord Chancellor Talbot said he could see no reason; but which, as he found it settled, he did not feel himself at liberty to correct: 3 P. Wms. 234.

Whether an Act is expedient in its terms, or tends to create confusion or anomalies, is not, it will be admitted, our object in examining the state of the law; but rather the ascertainment of the law, as enacted. It is submitted that we are not called upon to say, whether the act in making the inchoate right an apparently higher interest in law, than the consummate right, produces an anomaly, nor, by showing that such an intention is apparently an absurd one, to say that *therefore* the Act is not to be so construed; nor, whether it was actually the intention of the Legislature, or unwittingly done, to include this contingent right in, and exclude the vested right from its provisions. If it be so enacted, I apprehend that to be sufficient.

That a possibility of succeeding for life to the third part of an estate, depending on the chance of the wife's surviving her husband, is a higher interest in law than the right of the widow immediately to have that estate set out, does at first seem too monstrous a proposition to be entertained. But, after all, this is not the exact deduction from the foregoing remarks. It is rather this, that, as already shown, the interest is not changed by the act, nor in any way exalted above the consummate right, except in so far as the statute has attached to it the incident of a capability of being dealt with in a way which it was apparently not thought fit to extend to the consummate right. But, even supposing the first enunciation to be correct, we must bear in mind that it does not depend for its proof upon the close and logical reasoning of learned judges and commentators; but is the offspring of a statute. Because the plain and manifest reading of a statute will produce an apparent anomaly in the law, we can hardly *solely thence* infer that such a meaning was not the intention of the Legislature; and that we must cast about for some other meaning, which will save the anomaly. There is little reason to doubt that the inchoate right is described by some one of the very broad expressions used in the 5th section of C. S. U. C. cap. 90. And if so, it is difficult to see why we should not, to use the words of Mr. Justice Gwynne, "give effect to the clause *as it is expressed.*"

If a reason for the provisions of the Act, founded on principles of moral philosophy or ethics, be sought for, we may find it in this, that, while the husband is alive, the wife is provided for. Supposing her right to dower, to be

the law the air of a science, who found it made available for creditors, no serious harm is done by its seizure. But, on the husband's death, having lost her supporter, cherisher and protector, assuming that her dower is all she has to look to for a maintenence (a state of affairs not infrequent), the creditors, not having availed themselves of their rights in the husband's lifetime, are precluded now from seizing her right, by assigning which, (as we shall hereafter see she may do) she may provide herself with funds in order to her support and maintainance in some degree at least. And this supposition is not at variance with the favouritism shown by the Courts to the widow in other cases even at the expense of creditors.

I shall attempt an examination of the second division of this part of the subject, namely, that relating to the consummate right, in my next letter.

E. D. A.

Toronto, Sept., 1877.

REVIEWS.

Commentaries on the Liberty of the Subject and the Laws of England relating to the Security of the person. By James Paterson, Esq., M.A., Barrister-at-Law, 2 vols. London, Macmillan & Co., 1877.

The immortal Blackstone said "that a competent knowledge of the laws of that society in which we live is the proper accomplishment of every gentleman and scholar."

Things are very different now from what they were in his day. He wrote to the scholar and the gentleman, for from the class to which they belonged was almost exclusively taken those who were concerned in the laws either as makers or expounders. Now, however, these positions are as open practically, as they then were theoretically, to the most humble in station of Her Majesty's subjects. The luminious and elegant essays of Blackstone have held sway in various forms and editions even to the present day, and nothing has so far, as a whole, approached them in excellence. He "first gave to a skeleton and clothed it with life." It may, however, be admitted without detracting from the fame of this great writer, that his arrangement was in many respects faulty.

Mr. Patterson whilst granting his due meed of praise to the great commentator, has not thought fit to use slavishly the model Blackstone constructed, but has, as we shall presently see, taken a line of his own quite novel and eminently in accordance with the instincts of the people to whom he writes.

Blackstone's commentaries were published in 1765, he having previously, in 1753 and subsequent years, delivered the same matter as lectures in the University of Oxford.

The giant strides made since that time in relation to the subjects of which he wrote, are well stated in the words of the writer whose book is now before us:

"During the century that has elapsed since Blackstone's work was published, hundreds of volumes of statutes, reports and disquisitions have been produced, modifying, reversing, or abandoning many false positions once thought unassailable. And during the same period all European nations have lived ages. Communities, princedoms, powers, and dominions have disappeared and reappeared under new names or new combinations. Organic changes have developed noiselessly in a night. All forms of government constitutions, systems of laws, have, more or less, been put on their trials and tested by the inexorable logic of first principles. Every timber of the vessel has felt the strain whatever, and wherever a fault existed, the fault has been seen and felt, and in not a few instances has been amended. The utilitarian has been abroad and has marked many a weak point in the armour instead of invoking the traditions of Greek or Roman ancient or mediaeval civilizations to help him has found a ruder questioning all sufficient, and a convenient touch stone in every market place and vestry. A friendly echo now follows this investigator everywhere. It can scarcely fail to be apparent that explanations of processes, methods and axioms which passed current with the learned a century ago, can scarcely now claim the plaudits of our wider and more critical audience. The legislature itself, which is the vigilant sentinel to guard against the advances of corruption and revolution, contains new representatives commissioned by multitudes who were then without the pale; powers and voices, not then dreamt of, now claim an undisputed hearing. New points of departure are suggested in many a settled routine, and still an interminable procession of amendments fills up the vista of the future. And though panting time toils after these in vain yet is the hope of higher and still higher and juster laws not one jot abated. Civilization may be incapable of definition, yet it plainly involves a consciousness that advance-

ment has already been made from worse to better, and that from each vantage ground gained it would be degrading and impious to retreat."

Mr. Patterson with the same end in view as his predecessor, has, as we have said, struck out a new path, peculiarly his own, and with especial reference to the liberty of the subject, which is in truth the ruling principle of the Anglo-Saxon race. In his preface he says:

"The author has attempted to take the reader over the same grounds [as that traversed by Blackstone] by a route altogether different, and always carrying the lamp of the liberty of the subject into every recess, examining each leading detail by the light it supplies, and trying, if possible, to mark at each turn where tradition ends and reason begins—'where freedom broadens slowly down from precedent to precedent.'"

The two volumes before us contain a general introduction to the subject of Law, discussing the current definitions and divisions under the general title "The liberty of the subject," and exhibiting that division of what he terms the substantive law, entituled the "Security of the Person," in complete detail, showing how the law guards personal freedom, and what have been the leading changes through which it has passed.

It will be seen from what we have said that the author does not, so far as he has gone discuss what Blackstone would call "The Rights of Things," except so far as they are incident to the security of the person and the liberty of the subject. We should think it quite possible that the author has in view hereafter to continue his illustrations of the great division of the law untouched in the two volumes before us. We trust he may. The great merit of the work before us gives promise that a new legal writer has appeared on the scene who will take his place as one of the best that England has produced.

We will now give an example, taken haphazard, of the style adopted by the author. He has been speaking of how far suicide is included in murder. He then continues:

"*Perplexity of the ancients as to suicide.*—The ancients were not unanimous in the view they took of the lawfulness of suicide. Plato thought it justifiable when one was overwhelmed by calamity or poverty*. Aristotle condemned it as an injury to the state.† The Gymnosophists, on reaching a certain age, or when threatened with disease, burnt themselves, after inviting their friends to a feast.‡ Cicero asserted the doctrine of Pythagoras, that it was unworthy to abandon one's post and leave life, without the order of Providence, yet praised the suicide of Cato, who resolved to die rather than look on the face of a tyrant.§ Virgil, Cæsar, Ovid, Seneca, Plotinus and Porphyry seemed to think suicide a shrinking from duty. But there was considerable vagueness in the view held. The Stoics generally viewed suicide as one of the ways of displaying their indifference to life and its troubles. The Stoical type of moral excellence, which was that aimed at by the educated classes of Rome, taught that death was not to be feared, and that rewards or punishments in the present or future life were not the true motives of virtue. Whatever views in the abstract may have been held, many distinguished ancients committed suicide.‖ But no writer on this subject has surpassed Marcus Antoninus, who says, "it becomes a man of wisdom neither to be inconsiderate, impetuous, or ostentatiously contemptuous about death, but to await the season of it as of one of the operations of nature."¶

The author then further discusses the subject under the headings: Influence of Christianity on Views of Suicide—Capital Punishment by way of Suicide—Gladiatorial Contests a kind of Suicide; and then proceeds with:

Suicide how [illegible] crime at common law.—It seems to have been a doctrine of our common law at an early date, that murder included suicide, and that the latter act was *ipso facto* a felony.** Hence forfeiture of goods and chattels was a legal consequence of the act, and as the suicide was his own executioner, the forfeiture accrued on the act, since conviction was rendered impossible. But though trial was super-

* Laws, lib. ix.

† Ethics, v.

‡ Q. Curt. b. viii. c. 9. The learned have remarked that there is nothing expressly stated in the law of Moses as to suicide, and that it has not generally been deemed to be included in the prohibitions of the sixth commandment.—*Michaelis Com.* § 272. But if the learned have so settled this point, it only shows the absurdity of interpreting divine laws in the way that courts of law would interpret most municipal laws; for the subject matter, the object and effect of the two kinds of laws differ *toto cœlo*.—See *ante*, p. 113.

§ De Senect. c. 20; Tuscul. i.; De Offic. b. i. c. 31.

‖ One Hegesius, mentioned by Cicero, was called the orator of death, from the persuasive manner in which he painted this final relief from care, and many voluntarily rushed to the tomb with enthusiasm.—*Tusc. Quæs.* lib. i.; 2 *Lecky, Hist. Mor.* Cocceius Nerva, a prosperous lawyer is said to have committed suicide owing to the sad state of public affairs in the republic.—*Tac. Ann.* b. vi. c. 29.

¶ M. Anton. b. ix. c. 3. The ancients record with what indifference the indians of their time ascended a funeral pile and burnt themselves to death, it being, as they represented, an eastern custom. Calanus did so in presence of the whole army of Alexander the Great. And a venerable Brahmin in an embassy from Porus to Augustus did the same thing at Athens.—2 *Maurice, Ind. Ant.* 107. The Siamese, indeed, considered it a laudable act of piety.—3 *Univ. Mod. Hist.* 336. In India, so eager were men to join in drawing the car of Juggernaut, and so confident if they could only pull a rope, they would go to heaven, that in their excitement they fell beneath the wheels, not unwillingly.—*Clarke, Ten Relig.* 134.

** 1 Hale, P. C. 412.

seded, an inquisition by the coroner was held on the body. And yet this doctrine, that murder included suicide, tends to inconsistencies, and cannot be logically acted on.* It is self-evident, however, that life is not a species of property, and that the law could never vindicate suicide on the plea, that one is thereby only destroying at pleasure what is one's own. It is in every view a wrongful act, or at least one without legal excuse. Hence when one person asks another to kill him, the law views it as nothing less than a murder, for one had no right to give such a command, and the other ought to have known the same, and ought not to have acted upon it. In such an event he that is killed is deemed no suicide, but the killer is deemed a murderer.†

Again, two persons sometimes agree to kill each other and one may in the result be killed and the other not. In this event it may become necessary to ascertain in what position they stand, for it may often be difficult to decide whether one who is killed under such circumstances commits suicide, or is murdered by his confederate. This question will mainly turn on whether the person killed by his own order and contrivance contributed in a material degree to his own death, or whether the material part was contributed by his partner.‡ Each is considered the murderer of the other, and if the purpose is only partly executed, this is the footing on which the mutual guilt is judged.§

The same subject is then concluded by elaborating upon the ancient punishment of suicide, its punishment in England, and other legal consequences flowing therefrom.

This work is full of deep philosophical reasonings and historical research, whilst at the same time the details, fully introduced to illustrate the subject treated of, are so accurately laid down as to make the book one of great value as a text book for the practising lawyers. It is a work peculiar to itself, shewing the author to be a man of deep thought, great industry and power of arrangement. It is a book which like some others of a cognate nature,—such for example as Todd's Parliamentary Government,—should be plentifully used in the seminaries of learning, not merely for their intrinsic merit and as means of instruction, but for the free, brave, manly thoughts that pervade them, and marking them as fit exponents of that law open to all and favouring none, and teachers of that spirit of liberty without license, which we claim to be the heritages of our race.

We look upon this book as one of the greatest additions of the day to the library of legal literature, and we most heartily recommend our readers to lose no time in supplying themselves with it. The lessons it conveys cannot but be most beneficial to all classes.

As regards the volumes themselves, that which comes from Macmillan's press cannot be very inferior, but we would suggest that a second edition should give the matter in a little less cramped form. The size is convenient, but neither is the paper as good as it might be, nor is there enough of it.

* R. v. Burgess, 1 L. & C. 258.
† 1 Hawk. P. C. c. 27, § 6; R. v. Russell, Ry. & M. 356.
‡ 1 Hawk. P. C. c. 27, § 6; Keilw. 136; Moor, 754.
§ R. v. Alison, 8 C. & P. 418; R. v. Dyson, R. & Ry. 523.

BOOKS RECEIVED.

Forensic Medicine and Toxicology. By Woodman & Tidy. Philadelphia: Lindsay & Blakiston. Toronto: Copp, Clark & Co. 1877.

Void Judicial Sales. By A. C. Freeman. St. Louis: Central Law Journal Office. 1877.

Elements of the Laws of the United States, etc. By Thos. L. Smith. Philadelphia: J. B. Lippincott & Co. 1878.

Catalogue of Law Books. R. Carswell: Toronto. 1877.

FLOTSAM AND JETSAM.

An exchange says: "The phrase 'privily and apart' is a corruption of the old English, 'privils and apert,' '*Apert*' is an obsolete word from the Latin, *aperio*, to open, and which meant then 'openly, publicly.' 'Privily and apert,' meant then 'privately and publicly. The phrase is twice used in this sense by Chaucer in his 'Wife of Bath's Tale.' At present it seems to be a redundant expression for private." The phrase as now understood may seem redundant, but as corrected it would be nonsense. It is used in describing the private examination of witnesses, or of a wife when executing a conveyance. An acknowledgement by a wife taken on a private examination, "*apert*" (openly or publicly,) from her husband, would hardly satisfy the statute, neither would it satisfy the rule upon which the statute is founded.

Flotsam and Jetsam.

Here is a singular bequest by a French man; it may truly be styled 'a new way to pay old debts.' Vaugeas, the famous French grammarian, was in the receipt of several pensions, but so prodigal was he in his liberalities, that he not only always remained poor, but was rarely out of debt, and finally acquired among his intimates the *sobriquet* of *Le Hibou* from his compulsory assumption of the habits of that bird, and only venturing into the streets at night. His will contains much that is original, but the following is an especially characteristic clause. After disposing of all the little he possessed to meet the claims of his creditors, he adds: 'Still, as it may be found that even after the sale of my library and effects, these funds will not suffice to pay my debts, the only means I can think of to meet them is that my body should be sold to the surgeons on the best terms that can be obtained, and the product applied, as far as it will go, towards the liquidation of any sums it may be found I still owe; I have been of very little service to society while I lived, I shall be glad if I can thus become of any use after I am dead.' Whether the creditors accepted this well-intentioned bequest in part satisfaction of their claims is not recorded. I should have been pleased to have found that it was 'declined with thanks,' so that the poor *savant's* body might have gone in peace, instead of pieces, to its last resting-place.

In the case of *Ex parte Heminway* v. *Stevens*, 2 Lowell's Decisions, 496, the question arose as to what are the rights of the tenant of premises in respect to fixtures put in the leased premises by him, and it was held that the right of the tenant to remove such fixture is not lost by non-payment of rent and notice to quit, but only by quitting. If the landlord has prevented the removal by an attachment of the fixtures, the right is not then lost, even by leaving the premises. It was also held that a parol renewal of a lease renews whatever rights the tenant had to remove the fixtures. See, as sustaining the doctrine permitting removal, notwithstanding non-payment of rent, *Slossfield* v. *Mayor of Portsmouth*, 4 C. B. (N. S.) 120, though the point, as a general one, was not decided in that case. See, however, *Whipley* v. *Dewey*, 8 Cal. 36, and *Weeton* v. *Woodstock*, 7 M & W. 14. As to parol occupancies from year to year, or from month to month by the same tenant, it has been held that they make up, when past, but one tenancy: *Birch* v. *Wright*, 1 T. R. 380; *Rex* v. *Herstmonceaux*, 7 B. & C. 551. And the successor of a tenant, in the absence of evidence of a new and different contract with him, succeeds to the duties and rights of his predecessor. And a mere holding over of a tenancy from year to year does not affect the tenant's privilege to remove fixtures put in during during the term of his previous lease in writing, and so long as he holds under a fair claim of right, as tenant, he preserves his privilege. See *Penton* v. *Robart*, 2 East, 88; *Roffery* v. *Henderson*, 17 C. B. 574; *Heap* v. *Barton*, 12 id. 274; *Marshall* v. *Lloyd*, 2 M. & W. 450. It has been held, however, that when one accepts a written lease of the same premises, with the buildings, etc., from his landlord on the expiration of the former tenancy, he impliedly admits that the fixtures, of which he accepts a demise, belong to the landlord: *Loughran* v. *Ross*, 45 N. Y. 792; 6 Am. Rep. 173; see also *Shepard* v. *Spaulding*, 4 Metc. 416.—*Albany Law Journal.*

The knowledge of law prevailing among the English lower classes is illusterated by the folowing story: Not long ago an officer of the London school board was crossing Covent Garden market at a late hour, when he found a little fellow making his bed for the night in a fruit basket. "Would you not like to go to school and be well cared for?" asked the official. "No," replied the urchin. "But do you know that I am one of the people who are authorised to take up little boys whom I find as I find you, and take them to school?" "I know you are, old chap, if you find them in the streets, but this here is not a street. It is private property, and if you interferes with my liberty, the Duke of Bedford will be down upon you. I knows the hact as well as you."—*Ex.*

The following is an extract from the will of John Hylett Stow, proved in 1781: "I hereby direct my executors to lay out five guineas in the purchase of a picture of the viper biting the benevolent hand of the person who saved him from perishing in the snow, if the same can be bought for the money; and that they do, in memory of me, present it to ———, Esq., a King's counsel, whereby he may have frequent opportunities of contemplating on it, and by a comparison between that and his own virtue, be able to form a certain judgment which is best and most profitable, a grateful remembrance of past friendship and almost parental regard, or ingratitude and insolence. This I direct to be presented to him in lieu of a legacy of three thousand pounds I had by a former will, now revoked and burnt, left him." — *Newcastle Chronicle.*

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Trinity Term, 41st Victoria.

DURING this Term, the following gentlemen were called to the Bar:—

James Vernal Teetzel.
Lyman Davis Teeple.
Alfred H. T. Marsh.
Thomas Gibbs Blackstock.
Duncan Byron McTavish.
J. Wilmot Gordon.
Erastus Blair Stone.
James Henry Madden.
John Crerar.
J. Alexander McGillivray.
Wm. Seton Gordon.
Frederick Montye Morson.
Charles Wesley Peterson.
Henry Auber Mackelcan.
Edward H. Tiffany.
T. Mercer Morton.
Charles Stephen Jones.
Elias Talbot Malone.
David Steele.
Philip Sanford Martin.
John Secord.
J. Melbourne Kilbourne.

The following gentlemen, members of the English Bar, were admitted and called.

Richard Willis Jameson.
Isidore F. Hellmuth.

The following gentlemen received Certificates of Fitness:

Duncan B. McTavish.
J. Alexander McGillivray.
Alfred H. Marsh.
Lyman Davis Teeple.
Charles Wesley Peterson.
Peter Clark McNee.
Wm. Seton Gordon.
Charles Stayner Wallis.
Luther Kendal Murton.
John McSweyn.
Daniel Spencer McMillan.
David Steele.
Robert Shaw.
Thomas William Howard.
E. D. McMillan.
John Hind Hegler.
James Crowther, Jr.
John William Hector.
Henry Mortimer East.

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

Graduates:

Walter Taylor Briggs, B.A., Trinity College.
Richardd Wornall Wilson, B.A., Victoria College.
George Beavers, B.A., Victoria College.
Edward Addison Emmett Bowes, B.A., University of Toronto.
Edward Betley Brown, B.A., University of Toronto.
Jacob Edward Lees, B.A., University of Toronto.
William Nesbitt Ponton, B.A., University of Toronto.
Paulus Æmilius Irving, B.A., Trinity College.
Alexander McBeth Sutherland, B.A., University of Toronto.

Matriculants:

Ernest Edward Kitson, University of Toronto.
James Martin Ashton, Albert College.
David Barker Stevenson Crothers, Albert College.

Junior Class:

Charles Oliver.
Arthur Virgil Lee.
Wm. Frederick Williams.
Charles Joseph Leonard.
Walter Allan Geddes.
Collin Gregor O'Brien.
Augustine Foy.
John Christie.
William Bannerman.
Patrick Sarsfield Carroll.
Alexander Armstrong Hughson.
Robert McGhee Flood.
Wm. Evans Scott.
Frank Howard King.
J. Johnston Anderson Weir.
Loftus Edwin Dancey.
Samuel E. T. English.
Edward Arthur Lancaster.
Robert Alexander Porteous.
Francis Patrick Ford.
J. Rymal Taylor.
George Taylor Ware.
Robert George Barrett.

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

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317. Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musaeus, Stumme Liebe Schiller. Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

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

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.