DIARY FOR APRIL.

1. SUN..*Easter Sunday.*
2. Mon..County Court term begins. County Court sitt. (ex-York) for trials without Jury.
5. Thur..Canada discovered, 1499.
7. Sat....County Court term ends.
8. SUN..*Low Sunday.*
9. Mon..Surrender of Gen. Lee, 1865.
12. Thur..Bombardment of Fort Sumpter, 1861.
15. SUN..*2nd Sunday after Easter.* Pres. Lincoln assassinated, 1865.
18. Wed..First newspaper published in America, 1704.
22. SUN..*3rd Sunday after Easter.*
24. Tues..Earl Cathcart, Governor-General, 1846.
27. Fri....Royal Titles Bill passed. Queen created Empress, 1876.
29. SUN..*4th Sunday after Easter.*
30. Mon..Last day for Assessors to complete rolls.

CONTENTS.

THE

Canada Law Journal.

Toronto, April, 1877.

The Court of Appeals of Maryland has recently decided that the act of self-destruction cannot be judicially regarded as proof *per se* of insanity. It is but a fact, together with all the other facts in the case, from which the Court are to determine the testamentary capacity of the testator, not at the time of committing suicide, but at the time of the execution of the will: *McElwee* v. *Ferguson*, 16 Am. Law Reg. 97.

We notice the death of Thomas Lewin, in his 72nd year. As the author of "Lewin on Trusts," his name was very familiar, but, apart from law, he was an antiquarian and scholar of no mean repute. His "Treatise on the Life and Epistles of St. Paul," occupied his attention for forty years. Touching this book, a leading theological critic has classed it among the commentaries which he values most, and which he would advise the student to get at all cost.

Lord Coleridge has boldly denied in a letter to the Home Secretary the right of any member of the House of Commons to call upon him to answer to the House for his conduct as a Judge. This is an end probably of his offence against the anti-poachers, in having stated that "as the law protected the amusements of rich people, they must pay for its enforcement." We can understand and appreciate the idea that was probably passing through his Lordship's mind when he made this remark; it was nevertheless an unfortunate observation from one in his position.

The *Solicitor's Journal* notes the practice henceforth to be followed at the Rolls on motion to vary minutes. Sir George Jessel announced that the only question to be argued was, what was the actual order made: he would not allow the case to be re-argued. The only exceptions were when both parties consented to something being added to the minutes; or, as sometimes happened, when it could not be ascertained what order had been made. In the latter event, the case might be put on the paper to be argued again. This has long been the practice in the Court of Chancery in Ontario.

The *Law Times* again falls foul of the "authorized reports," and suggests the propriety of "something superior to the present sleepy supervision" of them. The writer says:

"In the current part of the Chancery Division reports we find a case of *Morgan* v. *Elford*. The report extends from p. 352 to p. 388—thirty-six pages! Nineteen of those pages are devoted to a judgment of Vice-Chancellor Malins setting out elaborately the evidence upon which he came to the conclusion that the defendant had been guilty of fraud. On this very evidence the Court of Appeal came to the conclusion that the defendant had done nothing inconsistent with the nicest sense of honour or with the most scrupulous integrity! The legal principle upon which the Vice-Chancellor founded his judgment was not noticed by the Court of Appeal, and this report, therefore, is a report of conflicting views on questions of fact, and is a gross imposition upon subscribers—as gross as the famous Consolidated Digest."

One result of the English Judicature Acts has been to increase enormously the amount of business in the Court of Chancery, so that the accumulation of work has occasioned what is commonly spoken of as "The block in the Chancery Division." The improvement in the procedure is credited with giving this additional impulse to litigation. Besides this, the mode of trial involving the reception of *viva voce* evidence before the Judge, considerably lengthens those parts of the case which require judicial interposition. This has also been noticed in Ontario, where the present practice of examining the parties both at law and in equity, has occasioned an unusual consumption of time in the trial and hearing of causes. It is said that the remedy to be applied in England, is an increase of judicial power, by the appointment of a new Judge to be attached to the Chancery Division.

We learn from the *Albany Law Journal* that New Jersey means to put an end to railway employee strikes, its legislature having passed a bill making it a misdemeanor for any locomotive engineer in furtherance of a strike to leave his engine at any other point than the schedule destination of the train, and also making it a misdemeanor for any railway employee, for the purpose of lending assistance to a strike, to refuse to aid in moving trains, or for any person to obstruct the operation of trains, or do other acts for a like purpose.

Mr. Blake's bill now before the House of Commons, provides that whosoever, being under a contract of service with a railway company carrying mails or passengers, wilfully and maliciously breaks any such contract, believing that the probable consequences will be to delay or prevent the running of trains, shall be subject to fine or imprisonment. The object aimed at is identical, and the necessity for some such provision is manifest.

In a case reported in the London *Times* of *Republic of Costa Rica* v. *Erlanger*, Malins, V.C., held, that a solicitor while engaged in the execution of his duty in the conduct of a cause, as a solicitor there-

in, is entitled to the protection of the Court as against the violence and abusive language of another solicitor. An order for the production of documents had been made, and it was directed that the documents should be inspected at the office of the defendant's solicitor. However, an order for security for costs was taken out, and before security was given, the plaintiff's solicitor wished to proceed with the inspection. This was objected to, and then a draft bond for security was prepared by the plaintiff's solicitor, and left for approval with the defendant's solicitor. Afterwards, the plaintiff's solicitor called at the office of the other solicitor for this draft of bond, when he was assaulted and called a scoundrel. The Vice-Chancellor held, that this was a contempt of Court, and required the offending solicitor to make an ample apology, and pay the costs of the application. But, upon appeal, this decision was reversed.

NEW LAW BOOKS.

The Revised Statutes of Ontario, which will be issued as soon as the incorporation of the Acts of the last session is completed, will doubtless be followed by an increase in the legal literature of the Province, and will certainly demand new editions of some of our standard works.

Mr. Leith, we understand, is likely to issue a new work on the law of Real Property, or a new edition of his Blackstone's Commentaries. At the request of the Chief Justice of Ontario, Mr. Frank Joseph, who is now assisting Mr. Christopher Robinson in the new Digest of Ontario Reports, has undertaken to edit new editions of Mr. Harrison's invaluable works, the Common Law Procedure Act, and the Municipal Manual. It is proposed to include in the former the Law Reform Act, the Administration of Justice Act and the Rules of Court, so as to include in one volume the practical procedure of the Common Law Courts. The Municipal Manual will be similar in character to the last edition, but will require to be thoroughly recast. It will be issued almost immediately after the issue of the Revised Statutes, the work being now in course of preparation from advance sheets of that compilation.

Mr. O'Brien is already at work on a new edition of his Division Court Manual, the first having been for some years out of print. This book will supply a want felt, not only by the officers of the Division Courts and those not of the long robe who are permitted to practice therein, but also by professional men whose services are now rendered more imperatively necessary by reason of the extended jurisdiction of these Courts. The growing importance of these inferior tribunals imperatively demands a work which will guide to a uniformity in procedure as well as decisions, and so increase the usefulness of these courts, to which a large portion of all classes of the community must continually resort.

We are also glad to be able to announce the issue of the tenth number of Messrs. Robinson & Joseph's Digest. It includes the titles of "Justice of the Peace" and "Landlord and Tenant," and brings the work down to the end of "Legacy."

PRINCIPLES OF JUDICIAL DECISION.

The Irish Lord Justice Christian has been lately overhauling a judgment of the Vice-Chancellor in a most *unchristian* style. The whole attack is a very brilliant piece of rhetoric, but entirely indefensible as a judicial deliverance. Some of his observations, however, are of general application, and not without meaning in many cases that have been decided in other Courts than those of Ireland. He said that there were two schools of

construction with which the Courts were familiar—namely, the very liberal and the very strict one, the spirit and the letter. Bentham alluded to the two-fold interpretation on the "double fountain principle," the effect of which was to make the Judge almost the master of every cause that came before him. Appended to the passage was a quotation from Homer, in the Greek, with Pope's translation of it, as follows:—

"Two urns by Jove's high throne have ever stood,
The source of evil one, and one of good;
From thence the cup of mortal life he fills,
Blessings to these, to those distributes ills."

In the present case, he went on to say, one might imagine the Vice-Chancellor seated on his small Olympus, with two urns before him, on one of which was inscribed 'laxness,' and on the other 'literalness,' and dipping his hand into the one and into the other, as he came to deal with different inquiries.

The well-known author, Mr. J. W. Smith, who is now a County Court Judge in England, has also been vexing his soul with the incongruities of judicial decision. He was moved to give vent and voice to his feelings, as he observed the manner in which the judgments of the High Court of Justice are week by week overruled by the Court of Appeal, and the Court of Appeal itself in turn overruled by a higher tribunal. His views were thus stated: "Equally eminent judges have been, and are governed by different systems or theories of judicial decision, leading to opposite results: the one mainly proceeding on technical refinements, the other on principles of natural justice, common sense, and public policy; the one deciding on general rules or principles, the other looking to the exceptive circumstances of each case as much as to general rules or principles. The adoption of the former system by some judges has led to endless uncertainty, frequent litigation, both original and appellate, incalculable expense and vexation, and the grossest injustice and contravention of public policy. And it has been the prolific source of a mass of refined trash and learned rubbish, which strains the brains, occupies the public time, and exhausts the bodily and mental powers of the judges to no purpose but to defeat moral right and sound expediency." What he proposes as the remedy would be of rather equivocal benefit. He suggests that a statute should be passed, providing that, subject to any plain enactment or plain agreement to the contrary, and subject to the established rules of law, where an exception to such rules is not called for by the circumstances, all cases in litigation, other than cases of construction, shall in the discretion and to the best of the judgment of the Judge deciding the same, be decided as far as may be, according to justice, moral right, and public policy.

Mr. Smith's proposed legislation recalls one of the most pungent of Lord Mansfield's sarcasms, as commemorated in the pages of Woolrych. Serjeant Sayer went the circuit for some Judge who was indisposed. Afterwards, he was imprudent enough to move, as counsel, to have a new trial of a cause heard before himself, for a misdirection by the Judge. Lord Mansfield said: "Brother Sayer, there is an Act of Parliament, which in such a matter as was before you, gave you discretion to act as you thought right." "No, my Lord," said the Serjeant, "I had no discretion." "You may be right, Brother," replied Lord Mansfield, "for I am afraid even an Act of Parliament could not give you discretion." As pointed out in some appropriate sentences of the admirable judgment of Mr. Justice Moss in *Re Stratford and Perth*, 38 U.C. Q.B. 157, "the discretion which the Court should exercise, is not one founded upon its

notions of what would accord with natural justice, or harmonize with the requirements of a perfect system of ethics in the particular case, but that sound judicial discretion, which acts upon well defined rules of general application. It will hardly suffice to say that this remedy [the application before the Court was for a *mandamus*] is to be granted or withheld *secundum discretionem boni viri*, unless appellate Judges are to be deemed gifted with superior goodness. I think that in this case, as suggested by Sir Joseph Jekyll, with reference to the jurisdiction of Chancery, we must go further and ask the question: *Vir bonus est quis?* And I see no objection to the answer given of old: *Qui consulta patrum, qui leges juraque servat.*"

The *Solicitors' Journal*, in a very good piece of burlesque, advocates the view that Mr. Smith's statute would require a supplementary clause to make it work properly, as follows: "All cases in litigation shall be decided in the following manner, that is to say:—There shall be furnished, for the use of each Court, one or more small discs of bronze; such discs shall be provided by Her Majesty's Mint, and shall bear on the one side the image of Her Most Gracious Majesty, and on the other side a sitting image or figure, representing Britannia. When a case shall be called, one of the said discs shall be placed before the Judge by the Registrar, and the said Judge, taking the same between his thumb and forefinger, shall thereupon direct that the said image of Her Majesty shall represent, for the purposes of the case, the arguments for the plaintiff, and the said image of Britannia the arguments for the defendant, and shall forthwith to the best of his ability, toss the said disc. If upon such tossing, the said disc shall so descend that the said image of Her Majesty shall remain uppermost, judgment shall be given in favour of the plaintiff; if otherwise, for the defendant."

The uncertainties of decision arising from the supremacy of one or other of the conflicting principles we have mentioned, seem inseparable from the system of English law as now administered. It is a part of the imperfection found in all mundane concerns, and need not be specially identified with the glorious uncertainty of the law. As pointed out by a recent author, rules of law only mean that the Courts have taken a particular view of a certain set of facts, and will do so again if similar facts arise. This process is inevitably subject to a two-fold danger: a strong Judge will be more likely to distinguish cases, he will look upon precedent as a guide, and not as a master. A Judge of a less independent spirit will dwell more upon resemblances, and will be more anxious to shelter himself under authority. The inclination of the one to adapt the law to the changing conditions of life, has the accompanying disadvantage of unsettling it,—while the other tends to make the law antiquated, though he leaves it certain.

The English *Law Journal* relates at length the sale of Serjeants' Inn, Chancery Lane, by auction. The 'Hall' is described as comprising a lofty dining-hall, having five richly stained glass windows, a coffee-room, a lofty chapel, having three richly stained glass windows, and robing-rooms for judges and serjeants. The property was stated to have a frontage to Chancery Lane of 130 ft., and, being in close proximity to the new Law Courts, offered unusual facilities for the erection of an institution or club-house, &c. After some spirited bidding the property was knocked down to Mr. Serjeant Cox for £57,100.

SELECTIONS.

THE FRANCONIA CASE.

Britannia does not rule the waves: *per* Cockburn, C. J., Kelley, C. B., Bramwell, B., Lush, J., Pollock, B., Field, J., and Sir R. Phillimore. Our readers, we trust, will entertain no feeling of alarm at the above rather sensational statement. The Channel Fleet is, we believe, still afloat; the "Thunderer" has not struck her flag to the Russian admiral; and to the best of our belief the Lords of the Admiralty will be able to give a most satisfactory account to Parliament of the state of the navy. Notwithstanding this, the first sentence of this article is strictly true. The law on the subject is laid down very clearly in the great case of *The Queen* v. *Keyn*, better known as the case of the "Franconia," which will be found reported at great length in the current number of *The Law Journal Reports* (46 L. J. M. C. 17). It seems to us to be a matter of congratulation to the whole country that a question, containing within it elements so calculated to provoke a hostile feeling between two independent powers, should have been decided in so peaceable a manner by a tribunal which must command universal respect. The facts of the case out of which the dispute arose were shortly as follows:—The "Franconia" was a German vessel carrying the German flag. She sailed from Hamburg, with the prisoner, who was a German, in command, and a German crew, but with a French pilot. She was carrying a mail from Hamburg to St. Thomas, in the West Indies, and put into Grimsby to take on board an English pilot, whose duty it was to conduct her down Channel as far as the South Sand Light, after which she would proceed to and touch at Havre, where she would land the English pilot and the French pilot, whose duty it was to conduct her from off Dungeness to Havre, and thence go to St. Thomas. When a mile and and nine-tenths of a mile S.S.E. from Dover Pier Head, and two and a half miles from Dover Beach, she came in collision with an English steamer, outward bound for Bombay. The "Franconia" was the overtaking vessel, and, according to the rule of the road at sea, was bound to give way. She, accordingly, was clearly in the wrong in the collision. After this event, however, the "Franconia," in defiance of all laws of humanity, as well as those of every civilized State, proceeded away from the scene of the accident, leaving the passengers and crew of the "Strathclyde" to their fate. The result was a lamentable loss of life, for which the prisoner was brought to trial at the Central Criminal Court, and found guilty of manslaughter.

The question as to the jurisdiction of this Court was reserved for the Court for Crown Cases Reserved, where it was twice argued—the second time before fourteen judges, one of whom (the late Mr. Justice Archibald) died during the period the case was before the Court. The question resolved itself into this, whether the accused, though he might be amenable to the law of his own country, was not capable of being tried and punished by the law of England? The counsel for the Crown met the challenge to the jurisdiction by the prisoner in the following way:—First, they contended that although the occurrence on which the charge was founded took place on the high seas—in this sense, that the place in which it happened was not within the body of a county—it occured within three miles of the English Coast; that by the law of nations the sea for a space of three miles from the coast is part of the territory of the county to which the coast belongs; that, consequently, the "Franconia," at the time the offence was committed, was in English waters, and those on board were, therefore, subject to English law. Second, that, although the negligence of which the accused was guilty occurred on board a foreign vessel, the death occasioned by such negligence took place on board a British vessel, and that as a British vessel is in point of law to be considered British territory, the offence having been consummated by the death of the deceased in a British ship, must be considered as having been committed in British territory. As to the point of a foreigner being responsible for a crime committed on the high seas on board a foreign ship by a foreigner, it was admitted that he was not answerable to English law. Story (Conflict of Laws, sec. 539) has laid down the law accurately on this subject as follows:—"No sovereignty can ex-

tend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exercise of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." The same principle was decided by Dr. Lushington in the "Zollverein," 1 Swabey Adm. Rep. 96. It was necessary for the Crown to establish that the jurisdiction of the Admiralty, now vested in the Central Criminal Court, would extend to such a case as the present. On this point the law is admirably summed up in a passage in the judgment of Chief Justice Cockburn—"Whatever of the sea lies within the body of a county is within the jurisdiction of the Common Law; whatever does not, belonged formerly to that of the Admiralty, and now belongs to the Courts to which the jurisdiction of the Admiral has been transferred by statute, while in the estuaries or mouths of great rivers below the bridges in the matter of murder and mayhem, the jurisdiction is concurrent. On the shore of the outer sea the body of the county extends so far as the land is uncovered by water. And so rigorous has been the line of demarcation between the two jurisdictions that, as regards the shore between high and low water-mark, the jurisdiction has been divided between the Admiralty and the Common Law according to the state of the tide. Such was the law in the time of Lord Coke, and such it is still."

The question now had to be decided as to how far the Admiralty jurisdiction extended. Several ancient writers contended that the King's sovereignty extended over a large tract of water. The most extravagant of these assertions was that of Sir Leoline Jenkins, who seems to have supposed that the authority of the King of England extended beyond the four seas to the Atlantic and the Mediterranean. Such a contention at the present day is impracticable and absurd. No modern authority of any eminence has ventured to assert it, and the efforts of modern jurists have been directed to define the zone around the coast over which the English Courts can claim jurisdiction. The mind gets confused on reading the vast amount of somewhat barbarous latin in which the lawyers of Europe have endeavoured to define the difference between *mare liberum* and *mare clausum*. The general result would, however, seem to be that the three-mile zone, or the extent to which an ordinary cannon shot is supposed to reach, is the limit of the authority of the territorial dominion.

The decision of the question, if it be correct, is founded on the maxim of Bynkershoek—"*potestas finitur ubi finitur armorum vis.*" From this proposition Vattel draws the deduction that a vessel taken under the cannon of a neutral fortress is not a good prize. Bynkershoek's rule may, we think, be taken broadly as established; the question remains as to what is the nature of this sovereignty? Distinctions have been drawn by several writers on international law as to the distinction between *commorant* and *passing* ships, and in our opinion, such a line is most reasonably to be drawn. However, in the present case, no such question arose. The "Franconia" was, most unquestionably, merely a foreigner navigating English waters, and, as such, she was not, in the opinion of the learned Judges who formed the majority of the Court, liable to the laws of England.

The reasons for this judgment are scattered over about 80 pages of a closely printed report, but we think the *ratio decidendi* is perfectly given by the Lord Chief Justice, who declares that to sustain the indictment, the portion of sea in which the offence was committed must still be considered as part of the high seas, and as such under the jurisdiction of the admiral. But the admiral never had jurisdiction over foreign ships on the high seas. How, when exercising the functions of a British judge, can he, or those acting in substitution for him, assume a jurisdiction which heretofore he did not possess, unless authorized by State? The general result of the case was that by a majority of one—seven judges to six—the convic was quashed on this point of jurisdiction. Some of the dissentient judges based their judgment on what we take the liberty to term the hair-splitting distinction, that the death having taken place on board a British ship, the offence was within British jurisdiction. To this an adequate answer will be found in the judgment of Sir R. Phillimore, page 18:—"It appears

the prisoner had no intention to injure the 'Strathclyde,' or any person on board of her. He never left the deck of his own ship, nor did he send any missile from it to the other ship; neither in will or in deed can he be considered to have been on board the British vessel. He can no more be considered by intendment of law to have been on board the British vessel than he would have been if his bad navigation had caused the 'Strathclyde' to impale herself upon the 'Fraconia,' and so to sink." We have given the above necessarily short sketch of this important case; we decline to say we agree with the majority, but certainly the main basis on which we might be disposed to differ, is the broad point of the jurisdiction within the three miles zone, not the point of the offence having been committed on an English ship, which, in our opinion, it certainly was not. As a treatise on international law, we advise our readers carefully to consider the report. It may make some demands on their time, but they will be amply repaid by the consideration of a most masterly series of essays, for such in truth are the judgments delivered on this highly difficult and interesting subject.—*Irish Law Times.*

THE NEW CHIEF JUSTICE OF IRELAND.

The appointment of the Right Hon. George Augustus Chichester May to the high office of Lord Chief Justice of Ireland is now *fait accompli*, and has received the cordial approval of the legal profession as well as of the general public. Mr. May, who is now in the 60th year of his age, was educated at Cambridge, where his academic career was highly distinguished. He was Bell's University scholar, and took a double first-class, having been third in the Classical Tripos, and also a Wrangler. He was called to the Irish Bar in Hilary Term, 1844, and was made a Queen's Counsel in 1858. Popular at the Bar, eminently judicial in his cast of mind, intellectual in culture, and gifted with great powers of application, the conscientious and upright lawyer who is now the Lord Chief Justice of Ireland well deserved that high promotion, and it would have indeed been difficult to make a selection more wise and fitting.—*Irish Law Times.*

NOTES OF CASES.

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

COURT OF APPEAL.

Wiley v. Smith.

From Q.B.] [Feb. 20.

Stoppage in transitu—Goods bonded in consignee's name.

The plaintiffs, merchants in New York, sold E. B. & Co. at Toronto, 250 barrels of currants on credit, and consigned the same to them in bonds. A bill of lading thereof was duly received by E. B. & Co., who paid the freight thereon, and gave their acceptances for the price of the said goods, as well as for the cartage and the American bonding charges. On the arrival of the goods, they were entered and bonded in the consignees' name, and placed in one of the Customs bonded warehouses, subject to the payment of the duties. E. B. & Co. sold and delivered 150 barrels of the said quantity, and the remaining 100 barrels were bonded under 31 Vict. cap. 6, subject to the duty, in a portion of E. B. & Co.'s warehouse. Before the acceptances matured, and while the goods remained in bond, E. B. & Co. became insolvent.

The Court (Burton, Patterson, Moss, J.J.A., and Proudfoot, V.C.,) *held*, reversing the judgment of the Queen's Bench, that the *transitus* was at an end, and that the right of stoppage *in transitu* had ceased.

Foster and *J. B. Clarke* for the appellant.

O'Donohoe, with him *Meek*, for the respondent.

Appeal allowed.

Trumpour v. Taylor.

From Q.B.] [Feb. 20.

33 *Vict. cap. 7, sec. 6.*

Held, (Patterson, Moss, J.J.A., Galt, J., and Blake, V.C.,) that there is no appeal to the

Court of Appeal where a verdict is entered in the Court below, under 33 Vict. cap. 7, sec. 6, on a matter of discretion only.

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

J. K. Kerr, Q.C., with him *W. G. P. Cassels*, for the respondent.

Appeal dismissed.

RE MCCRAE.

From C.C. STORMONT.] [Feb. 27.

Insolvency—Deed of composition and discharge.

Where G. & M., creditors, on the application of the insolvent, refused to execute a deed of composition and discharge, but subsequently consented to do so upon being called upon by the assignee—who, as an inducement, gave his own note to cover costs, which they had incurred in endeavoring to recover the claim.

The Court (Burton, J.A.,) *held*, affirming the decision of Judge in insolvency that the deed was void, even although the action of the assignee was unauthorized by the insolvent.

Bethune, Q.C., for the appellant.

S. Richards, Q.C., for the respondent.

IN RE MCMILLAN AND THE JOSEPH HALL MANUFACTURING COMPANY.

From C.C. ONTARIO.] [March 6.

Insolvency deed of composition and discharge—Unliquidated damages.

M. brought an action on a breach of warranty of a reaping machine, but suspended proceedings on hearing of the insolvency of the defendant.

After the defendant had procured the confirmation of a deed of composition executed by the majority in number and value of the creditors, M. proceeded with the action and obtained a verdict upon which judgment was entered and execution issued. After the recovery of the judgment, the insolvents filed a supplementary list of creditors, and gave notice thereof to the plaintiff, and tendered the compositions provided by the deed of composition and discharge, which M. refused to accept.

The Court (Burton, J.A.,) *held*, reversing the decision of the Judge in insolvency, that the judgment was not affected by the deed of composition and discharge, and the order restraining the execution was therefore vacated.

Dunbar and *Thomson* for the appellants.

Osler for the respondent.

Appeal allowed.

MCLEAN V. DUN ET AL.

From Q.B.] [March 17.

Trade Protection Societies.

The defendants, who carried on the business of a Trade Protection Society, in consideration of a yearly subscription, undertook to procure and furnish the plaintiff, a merchant in Toronto, to the best of their ability, with information of the mercantile standing and credit of the plaintiff's customers among the merchants' traders and manufacturers throughout the United States and Canada, in the communities wherein they respectively resided, for the purpose of aiding the plaintiff in determining the propriety of giving credit. On the 14th June, 1875, the plaintiff sent his clerk to the defendants to ascertain the mercantile standing and credit of one W., residing and doing business in Toronto, who had applied to him to purchase goods on credit. The defendant's clerk read out of a book to the plaintiff's clerk that W. had stock to about $10,000, and $5,000 or $6,000 in his business, and claimed to be worth $7,000; that his character and habits were good; that he was doing a fair trade; and that his credit was good locally. The plaintiff, relying on this information and without making any further inquiries, about twelve days afterwards sold to W. goods to the value of $500 on credit. W. was really insolvent at the time the report was made, and on the 8th July following, absconded, without paying the plaintiff. The jury found that the defendants did not furnish the information to the best of their ability, and that the plaintiff did not act imprudently in not making inquiries, though living in the same place with W.

The Court (Burton, Patterson, J.J.A., and Blake, V.C.,—Hagarty, C.J.C.P., dissenting,) *held*, reversing the judgment of the Queen's Bench, that the defendants were not liable for the loss which the plaintiff had sustained by acting on the representation, it not being in writing and signed by them under C.S. U.C. 44, sec. 10.

Held, also, that the fact that the representation was made in pursuance of a contract did not prevent the application of the statute.

M. C. Cameron, Q.C., *C. Robinson*, Q.C., and *J. A. Boyd*, Q.C., for the appellant.

Bethune, Q.C., with him *Clarke*, for the respondent.

Appeal allowed.

CHANCERY.

Cockburn v. Eager.

Proudfoot, V.C.] [January 31.

Injunction at instance of defendants—Riparian rights—Trespasser.

In a suit brought to have boundaries declared, the defendants claimed the right to an injunction to restrain the plaintiff from retaining the use of a road along a portion of the shore of Muskoka Bay. It appeared that the road in question was of great public utility and benefit; that the defendants were not riparian proprietors, there being a road allowance laid out along the shore between their lands and the waters of the bay; that the defendants had built their mills, one partly in the waters of the bay and partly on the public highway, the other in the navigable waters of the bay.

Held, that the defendants were to be treated as plaintiffs, seeking relief by bill, and that being themselves trespassers (following *Giles* v. *Gambpell*, 19 Grant 226), they were not entitled to any relief against the plaintiff.

Süter v. Merchants' Bank.

Proudfoot, V. C.] [Feb. 21.

Manufacturer, advances to—Warehouseman's receipts—Insolvency—Unjust preference—Vagueness of agreement—Lien on receipts when issued.

In May, 1874, A., a manufacturer, open an account with a bank, representing himself as being in good circumstances, with a capital of $20,000 over all his liabilities, which was believed by C., the bank agent, who thought that he was doing a flourishing business. A. promised to keep C. always well supplied with collaterals for any accommodation afforded him. In December, 1875, A. applied to C. for assistance, and proposed that he should warehouse his goods as manufactured, and pledge the receipts of the warehouseman to the bank for advances to be made to him, which proposal was acceded to by C. Advances were accordingly made, for which receipts were deposited with C. on the 19th of January, 25th of January, 1st of February, and 7th of February. On the 26th of February, A., in compliance with a demand by some of his creditors, executed an assignment in insolvency.

On a bill filed to impeach these transactions as an unjust preference, the Court being satisfied that they all took place in good faith, and not in the contemplation of insolvency, *held* that the bank were entitled to hold their lien on such of the receipts as were so deposited more than thirty days before the assignment in insolvency; but, in respect of such of them as were deposited within the thirty days, the bank could not claim any lien or priority.

Held, also, that the same rule was applicable to promissory notes deposited with the bank as collateral security.

The promise, however, to keep C. well supplied with collaterals was of too vague and general a character to entitle the bank to retain any lien. But where advances were to be made on goods manufactured remaining unsold, (without specifying any quantity) and C. was to judge of the amount of the advance to be so made:

Held, that this agreement was not so vague or uncertain as to prevent the bank obtaining security for advances.

The Dominion Act, 34 Vict., cap. 5, sec. 47, enables a party making advances to a manufacturer to stipulate for obtaining a lien on warehouse receipts, to be subsequently granted to the manufacturer

It is incumbent on a party, seeking to impeach, as an unjust preference, a transaction between a debtor and his creditor occurring more than 30 days before insolvency, to prove that such transaction took place in contemplation of insolvency.

A. owned a barley mill which he was endeavoring to sell to one T., whose notes he was to accept in payment, and in December, 1875, he arranged with C. that these notes were to be handed over in security for all his own paper, then under discount. Subsequently, and on the 7th of February, 1876, the sale to T. having fallen through, he executed a memorandum in writing transferring to C. "as collateral security against paper discounted for me, my right, title and interest in a barley mill * * * keeping the privilege of disposing of the same and handing to you the promissory notes of the" purchaser.

Held, that this was not an unjust preference; that the bank having made advances on the faith of having the proceeds of the sale handed over, it was no extension of their security, on the sale falling through, to obtain an assignment of the mill itself.

Fuller v. Macklem.

Chancellor.] [March 16.

Construction of will.

A testator left legacies to his several nephews and nieces to be paid one year after his decease, and which he directed his trustees to keep invested during their minorities "in good and safe securities, drawing interest, for the benefit of the said legatees respectively, and to pay over or assign to them along with the principal moneys the accumulated interest or dividends as they severally attain their majority." In a subsequent part of his will, the testator directed that "whereas in my wisdom and discretion I have now seen fit to direct and declare that my nephew, S. M., shall not come into possession of his legacies or bequests until he has attained the age of twenty-three years, and being desirous that provision shall be made for his support and maintenance after he attains the age of twenty-one years, and until he arrives at the age of twenty-three years, I will and direct that my executors shall pay him, after he so attains the age of twenty-one years, and until he attains the age of twenty-three years, the annual interest, dividend and income of the sum of twenty-five thousand pounds which they are to invest and keep invested for that purpose."

Held, that S. M. was entitled to interest on his legacy from one year after the death of the testator until his coming of age.

Smith v. Rose.

Proudfoot, V. C.] [March 28.

Administration—Payments by administrator.

S. assigned to the defendant certain promissory notes for his sole and only use, except such as must be used in liquidation of all necessary expenses in connection with his board and funeral expenses, and by his will appointed the defendant his executor. In taking the accounts in an administration suit, one of the local masters refused to allow the defendant the expenses of taking out probate of the will, of advertising for creditors, of medicine and medical attendance for the testator, and of a grave stone, as having been sufficiently compensated for by the notes.

Held, on appeal, that he was entitled to be allowed the amounts in passing his accounts.

Fulton v. Fulton.

Proudfoot, V. C.] [March 28.

Mortmain Acts.

Where land is specifically devised, charged with a void bequest, the charge sinks for the benefit of the specific devisee; therefore where a testator devised his real estate, "consisting of * * * to A. F., eldest son of * * to exercise ownership over said lots during his natural life, he shall not sell or alienate any or either of them, but they shall remain an inheritance unincumbered to his legal heir, whether male or female, for all time to come. I bequeath to A. F., the aforementioned heir, the shop on the church property with all its goods and contents." As a charge upon this property he left $4000 to the English Church of Cornwall.

Held, that so far as this was charged on land, freehold or leasehold, the bequest was void; so far as charged on personalty it was valid and would be apportioned *pro rata* between the realty and personalty; that A. F. was entitled to hold the property subject only to such proportion of the legacy as was properly applicable to the personalty.

COMMON LAW CHAMBERS.

McRoberts v. Hamilton.

Mr. Dalton.] [January 26.

Sheriff's fees—Poundage—Satisfaction of judgment—Amount.

Held, that when, after seizure by a sheriff under an execution, the execution is settled between the parties by the taking of secured promissory notes from the defendant, the judgment is satisfied so as to entitle the sheriff to poundage under 27-28 Vict. cap. 28, although the execution remains in the sheriff's hands to be enforced if the notes should not be paid at maturity.

Mr. Marsh (Muloch and Campbell) for sheriff.

H. J. Scott, for plaintiff.

Marsh v. Donovan.

Mr. Dalton, Galt, J.] [February 6.

Trespass to lands—Description—Particulars.

An action was brought for trespass to lands, a count for trespass to goods and for trover, being also added.

Held, that the defendant was entitled to particulars as to the locality of the acts of trespass complained of.

F. Osler, for plaintiff.

H. J. Scott, contra.

Erratum.—At p. 86 ante, under *Wood* v. *McAlpine* for "Galt, J." read "Proudfoot, V.C." And under *McArthur* v. *Smith*, for "From C. C. Wentworth," read "From C. C. Victoria."

CANADA REPORTS.

ONTARIO.

IN THE COUNTY COURT OF THE COUNTY OF ELGIN.

Between Daniel Hanvey, *Judgment creditor*, James Stanton, *Judgment debtor*, and The Corporation of the County of Elgin, *Garnishees*.

Attachment of debts—Practice—Motion by Judgment debtor to set aside order—Garnishing salary of Clerk of Peace.

Horton for the judgment creditor.

Defendant the judgment debtor in person.

The garnishees did not appear.

The facts of the case fully appear in the judgment of

Hughes, Co. J.—The judgment debtor is Clerk of the Peace and County Crown Attorney of the County of Elgin, remunerated by fees prescribed by law, for which he renders accounts for audit to a Board of three persons appointed for the purpose, one of whom is the County Judge, and the other two are nominees of the County Council, under stat. of Ontario 33 Vict. cap. 8, and Con. Stat. U.C. cap 121.

There are various statutes under which he is entitled to fees, such as the Jurors Act and others, whereby the amount is made payable from the county funds without reimbursement, in others certain specific fees are refunded to the county treasury by the Province; but in all, the amounts are considered to be primarily payable out of county funds, whether or not the county treasury is to be reimbursed, either partly or wholly out of the consolidated revenue fund of the Province; the Government paying nothing directly to the judgment debtor, either by way of fees or salary.

All accounts and demands of officers connected with the administration of Justice in the counties are to be preferred against the county subject to the approval of the Board to which I have alluded, 32 Vict. cap. 6, sec. 9; 33 Vict. cap. 8, sec. 1.

All orders or cheques of the Board (except for the payment of constables fees or services rendered during the sitting of the Courts) are to express the Act (if any), under which the expenditure is authorized (C.S. U.C. cap. 121, sec 3). It is to be inferred from the foregoing, and from what follows, although it is not expressly enacted, that all sums audited by the Board are to be paid by the treasurer out of county funds, on cheques or orders to be issued by them in favor of claimants.

It is enacted by the 5th section of C.S. U.C. cap. 121, that except for *debts actually due by a county*—the Board of Audit shall not give an order or cheque for the payment of any sum of money, unless it appers by the Treasurer's accounts that there are sufficient funds in his hands to meet the payment of such order. If any such order be made contrary to these provisions, the person or persons in whose favor such order has been made may recover the same against the Board of Audit, or such of the members as sanctioned such order in an action to be brought for that purpose, as for so much money had and received for the plaintiff's use and benefit. Then the Treasurer is without further order to pay the amount of the fees which are payable out of county funds when duly audited by the Board in an order prescribed and in preference to all other charges, unless otherwise provided by law, (after the expense of levying, collecting and managing the rates and taxes imposed on the county are paid), that is to say:

Firstly, All sums of money payable to the sheriff, coroner, gaoler, surgeon of the county gaol, or to any other officer or person for the support, care or safe keeping of the prisoners in the county gaol, or for the repairing and maintaining of the court-house or gaol.

Secondly, The accounts of public officers and officers of the Court of General Sessions of the Peace.

Thirdly, All sums of money payable for any other purpose whatever connected with the administration of justice within the county.

Fourthly, All other sums of money allowed by the Board in the order in which the same are passed.

The foregoing analysis is what practice and procedure under the statutes and legal decisions on the subject of defraying the expenses of the administration of justice seem to have brought about—but which a strict logical reading of the various Acts of Parliament might controvert. It is under this state of the law, and the facts which follow that the primary creditor insists that a debt is due by the garnishees to the primary debtors which is liable to attachment under the garnishee clauses of the C. L. P. Act. Without any previous examination of the judgment debtor before a Judge, the judgment creditor on the 16th December, 1876, upon affidavit setting forth the usual facts, and that the garnishees were indebted to the judgment debtor in $190.59, or thereabouts, as he was "informed and believed" (the affidavit does not explain upon what cause) obtained an order attaching "all debts due and accruing due from the garnishees to the judgment debtor, to answer the judgment due by the judgment debtor to the judgment creditor."

On the 10th January, 1877, the judgment debtor made application in Chambers upon affidavits of himself and the Treasurer of the county, setting forth some of the foregoing facts, and those which follow for a summons to set aside the foregoing attaching order: alleging that all moneys due to the judgment debtor at the then last audit, which was in October last, had been paid to the judgment debtor; that there had been no audit since October last; that there was no debt due or accruing due to the judgment debtor by the garnishees; that the order had been served upon the County Treasurer; and that such service caused serious inconvenience to the judgment debtor in his transactions with the Treasurer. Both these affidavits directly controvert the most material allegation upon which the attaching order was issued, for they both distinctly deny that there was a debt existing as due or accruing due from the Municipality to the judgment debtor at the time the attaching order was made:

1. To this summons the counsel for the judgment creditor presented as preliminary objections,—first that he should have been served with copies of the affidavits upon which the summons was granted.

2. That the application not being made by the garnishees, this is not a case in which the attaching order can be set aside on the ground of the non-existence of a debt due to the judgment debtor.

3. That the attaching order cannot be set aside at the instance of the garnishees, much less of the judgment debtor on a summary application.

4. That the judgment debtor has no *locus standi* in this matter, that if the existence of a legal debt be disputed it can only be tried by jury, under a writ, in the way provided for in 197th sec. of the C. L. P. Act, and not on a summary application to a Judge in Chambers or by the Court itself.

1. I may say, with reference to the first of these objections, supposing it were tenable under any circumstances, I know nothing whatever, either of a necessity for serving copies of the affidavits, or that it either was or was not done, so that objection falls to the ground for want of proof.

2. I am to decide whether or not the judgment debtor has a *locus standi* on an application like this; whether he had *a right* in fact and law to make it; for this is his application and is not that of the garnishees.

3. If I consider that the judgment debtor might legally or justly make this application, and assert a right in his own behalf, I am to decide whether or not the questions can be disposed of in a summary way—and if so, then whether or not there was a debt attachable under the C. L. P. Act, in the hands of the garnishees at the time the attaching order was made; it being conceded that the alleged debt consists exclusively of the statutory claim for fees payable to the judgment debtor by the garnishees for services rendered by him as Clerk of the Peace and County Crown Attorney in his public capacity as an officer appointed by the Crown, and not in any sense as the servant of the garnishees or by their employment or request.

4. In cases not expressly provided for by law, the practice and proceedings in the County Courts are to be regulated by and conform to that of the Superior Courts of Common Law, and this practice applies and extends to the County Courts. The Judges of the County Courts have power to issue summonses and make orders in all matters of practice in like manner and on like principles and grounds, and to the same extent as the Judges of the Superior Courts have power.

I do not think it necessary to go very largely into the consideration of this point, because I find that acting under analogous statutes concerning the attachment of debts under the C. L. P. Act, the Courts as well as the Judges in Chambers, both in England and this Province, have entertained summary applications to set

aside attaching orders; sometimes at the instance of judgment debtors and garnishees; in others at the instance of the solicitors claiming liens for costs of judgments against garnishees, and no question has been entertained subversive of the right of a Judge or of the Court to interfere summarily in cases, where no doubt, whatever was left as to the existence of a debt. *Ferguson* v. *Carman*, 26 U.C. Q.B. 26; *Bank of U.C.* v. *Wallace Adair*, garnishee, 2 Prac. Rep. 352; *Seymour* v. *Corporation of Brecon*, 5 H. & N. 961, are authoritative precedents for me; and there are numerous other cases on this point. See also *Robertson* v. *Grant*, 3 Chy. Ch. Rep. 331; *Wise* v. *Berkenshaw*, 2 L.T. N.S. 223; *Newman* v. *Rook*, 4 C.B. N.S. 439.

I am, therefore, satisfied in my own mind that there being no dispute about the facts in this case, I am properly called upon and fully justified in disposing of it upon this application, upon the merits.

The Judgment creditor only swore to a debt due the judgment debtor, upon his information and belief. The Judgment Debtor and the County Treasurer have positively sworn there is no such debt. The first case to which I will refer as decisive on the peculiar facts disclosed in this case, is a judgment of the Court of Q.B. of U.C., given at the very inception of our municipal institutions: *Asken* v. *The London District Council*, reported in 1 U. C. Q. B. (The learned Judge then referred at length to this case, also to *Jones* v. *Corporation of Carmarthen*, 8 M. & W. 605, and to *Geraghty* v. *Sharkey*, which was decided in the Court of Exchequer, in Ireland, reported in full in 30 L. T., 204.) In this case the application is that of the judgment debtor only, and not of the garnishees, and as he is interested in the fund aimed at by the attaching order, supposing there were fees due to him as a public officer, the claim for which was not audited or approved by the Board at the time the attaching order was issued, I think he has a right to be heard, for if a lien upon it is sought to be maintained illegally or unjustly, or irregularly by the judgment creditor, he has the right to be heard and have that lien removed *ex debito justitiæ*, by having the order creating the lien discharged, provided it be maintained that, without any doubt at all, there is no debt attachable, and that the garnishees are not liable under it; for the simple reason that every man has a right to the direction and control of his own affairs, and to retain the receipt and disposition of his own assets, fees, and emoluments to himself; provided such his right has not been curtailed or interfered with, or taken away by an Act of the Legislature, or his own act—such as is done in the case of persons making assignments of their estate and effects for the benefit of creditors, or under the insolvent law in the case of persons subject to its provisions, for he is the only person who can give or authorize a valid order for its payment or a discharge to the person who is legally obliged to pay him.

It has been usual to serve a copy of the attaching order on the judgment debtor. The judgment debtor in this case might very properly interpose objections, supposing the garnishees had been summoned before the court or a judge, to show cause why they should not pay the alleged debt to the judgment creditor, and insist that the claim, such as or whatever it is, is not attachable. It is not every debt, even due to a judgment debtor, that is attachable; the claim may be attended with circumstances which would prevent the judgment creditor from enforcing its immediate payment, and where such is the case it is not a debt of the nature contemplated by the act (see *Kennett* v. *Westminster Improvement Commissioners* 111, Ex. 349), if then he might do so in another proceeding, I do not see why he may not adopt one of his own, and show the same facts as reasons for setting the attaching order aside. There is no express provision in the C. L. P. Act on this subject, but on the authority of *Jackson* v. *Randall*, 24 C. P. 88, I think I have the right to set the order aside.

The Statute respecting the disposal of county funds for the administration of justice, regulating the order and conditions upon which claims on the county may be paid, presents an insuperable difficulty in the way of any claim upon the county such as this judgment debtor may have for fees being considered garnishable, for the payment cannot be enforced against the county as a matter of absolute right, much less can it be treated as a debt. The conditions interposing are: First, that the claim has not been audited and approved by the Board of Audit; next there must be money in the Treasury available for the purpose of paying it, because all sums and claims which are entitled to priority of payment must be first discharged. The Board of Audit must not, under a penalty, order or give cheques for the paying of such, unless funds are so available, and unless all these obstacles are removed—(and although it

may be somewhat extra judicial for me to notice the circumstance, but being the Chairman of the Board of Audit I do know there were no funds whatever in the County Treasurer's hands at the time the attaching order was made), there could be no sum payable to the judgment debtor, and no reason either in fact or law for saying the garnishees were in any respect or for any cause indebted to the judgment debtor. This being the case I do not see, on the contrary I am satisfied, that not only *before*, but even *after* an audit, there is nothing due to the Clerk of the Peace and County Attorney by the garnishees as for a debt—within the meaning of the garnishee clauses of the C. L. P. Act.

An order must therefore be made for setting aside the attaching order, and the summons of the judgment debtor made absolute; but as it is for the relief of the judgment debtor, and not at the instance of the garnishees, it must be without costs.

QUEBEC REPORTS.

COURT OF REVIEW.

LIVINGSTONE v. THE GRAND TRUNK RAILWAY.

Railway Co.—Continuous Journey.

Held, That a passenger travelling with a railway ticket, from Montreal to Toronto, marked—"Good only for continuous trip within two days from date,"—and who leaves the train in which he starts at Kingston, where he remains several days, cannot afterwards avail himself of the ticket in payment of a trip on another train from Kingston to Toronto.

[January 31, 1876.—22 L.C. Jur. 15.]

This was a motion by plaintiff for a new trial, and a counter motion by defendant for judgment on the verdict.

MONDELET, J.—This was a trial before a special jury. The action was for the recovery of damages which the plaintiff alleged that he had sustained by being ejected from the Grand Trunk cars for not having the required ticket. The jury were of opinion that the plaintiff had no claim against the company, and this finding was in accordance with the instructions of the learned judge who presided at the trial. Two motions were now made, one for judgment on the verdict of the jury, and the other for a new trial. The facts were very simple. The plaintiff bought a ticket to go to Toronto, but when he got as far as Kingston he stopped over there. The ticket which he had purchased bore the inscription, "Good only for a continuous trip, within two days from date." A few days after the plaintiff alighted at Kingston he wished to pursue his journey, and took the train. At a short distance from Kingston he was asked for his ticket, and he produced the old ticket. The conductor told him that that ticket would not do, and the plaintiff having been first politely requested to leave the car, and having refused to do so, was ejected. It was for this ejection that he now claimed damages. The question was, whether this ticket constituted a contract between the plaintiff and the Grand Trunk. The conditions on it were that the journey had to be a continuous one, and had to be accomplished in two days. The question was, whether these conditions formed a contract or not. At the hearing His Honor had an impression that the plaintiff's pretension might be well founded, but he had come to the conclusion that the demand could not be sustained. Livingstone must have been aware of the conditions. Being a person of some education he ought to have read what was on his ticket. Even if a man could not read it was his duty to inquire what was on the ticket. If this ticket was not spent after two days when would it be spent? His Honor refered to the case of *Cunningham* v. *G. T. R. W. Co.*, 11 L. C. J. 107, a case more favorable to the plaintiff than this one, in which the Court of Appeals dismissed the action against the company.

JOHNSON, J.—The plaintiff brought an action for damages against a railway company for having been illegally ejected from their carriages on the occasion of his journey between Kingston and Toronto on the 10th of March last. The defendants pleaded that they were justified in what they did, and are not liable.

The facts are few and simple. The plaintiff being asked for his fare by the conductor, produced a ticket and refused any other payment, and was in consequence put off the train, without any unnecessary force being used. The sole question, therefore, was whether the ticket presented entitled the plaintiff then and there to be conveyed as a passenger in the defendants' carriages. The ticket is in these words:—"Grand Trunk Railway. Good only for continuous trip within two days from date. Montreal, West to Toronto. First-class." In one margin is stamped the date, namely, "6 March, '75," and in the other is printed the number 5,186. The Judge charged the jury, first, "that the meaning of the word continuous" was not, necessarily, (as had been contended by the plaintiff's counsel) the mere literal one of continuity of mechanical motion, which was a thing practically impossible throughout so long

a journey; but was to be taken in a reasonable and practical sense, and might, for instance, be taken to mean, if the jury should be of that opinion, that there was to be such a continuous relation between the passengers and the train as was usual in railway travel in the case of through passengers; and, secondly, as regarded the knowledge of the plaintiff of the terms of his ticket, that if, by exercising the ordinary care and intelligence of passengers in his situation, he could, in the opinion of the jury have known what was printed on the face of the ticket, then there would be a contract between the parties according to those terms. The jury found unanimously that he had suffered no damages under the circumstances, and found specifically every fact alleged by the defendants in their plea: that the plaintiff bought the ticket on the 6th of March for a continuous trip, valid for two days from date; that he left Montreal in the train that evening, using this ticket; that he did not go on continuously to Toronto, but broke the journey by disembarking at Kingston, where he spent some days, and then reimbarked there on the 10th, using the same ticket, and refusing to pay otherwise, upon which the train was stopped, and the plaintiff was put out at the next station, without any unnecessary force. We are now asked to set aside this verdict for misdirection as to law, and for being contrary to evidence.

This case is not distinguishable in principle from *Cunningham* v. *The Grand Trunk Railway*, 11 L. C. J. p. 107, where the Court of Queen's Bench, composed of Judges Aylwin, Meredith, Drummond and Mondelet, unanimously held that a person purchasing from a Railway Company a ticket, stated on its face to be good only for a specified term, enters into a special contract, which is at an end as soon as such term has expired. It is hardly necessary to observe that the present case is not to be confounded with the class of cases where a common law liability is attempted to be avoided by conditions unknown to the other party. It was not put upon any such ground by the learned counsel who argued this motion. If it could be doubtful in a common-sense view of the matter, whether a person in the situation of this plaintiff, a highly intelligent commercial agent, would give his money without looking at what he got for it, there were circumstances proved in this case from which the jury was well warranted in believing that he had a very special reason for looking at it. It is proved in the case that this is a regulation designed to protect the corporation against fraud, which, it was also proved, could be very easily practised if the rule did not exist; and though a common carrier cannot divest himself of his common law responsibilities unless by a special contract, and therefore his own act alone must be insufficient to relieve him of such duties, yet he may and he must in many respects regulate the mode in which he is to perform those duties. See 46 vol. N. H. Rep., 213, where the judgment of the Supreme Court is given in the case of *Johnson* v. *Concord R. R.*

Plaintiff's motion rejected and defendant's motion granted.

UNITED STATES REPORTS.

COMMON PLEAS, PHILADELPHIA.

LOWRY ET AL. V. PLITT ET AL.

Control of body after death.

After the proper interment of a body the control over it rests with the next of kin who is living. It cannot be transmitted or transferred.

Where there were several next of kin in the same degree and they differed in their wishes as to the disposition of the remains, a bill by the majority to enjoin the others from interfering with the removal of the remains to another place, was dismissed.

When a body has been properly buried in a vault, with the consent of all concerned; *quære* whether even the next of kin can remove it against the will of the vault-owner though the latter be a stranger.

This was a motion for an injunction heard on bill and answer. The complainants were the three sons of Henrietta Lowry, and the two executors of a deceased son, Lowry Donaldson Lowry; the respondents were Sophia W. Plitt, Elizabeth S. Edwards, and the Laurel Hill Cemetery Company. The bill set forth that Mrs. Henrietta Lowry died January 12th, 1866, at a house in Philadelphia, which had been purchased and furnished for her by her son, Lowry Donaldson Lowry, who was then residing at Lima, Peru; that at the time of the decease of Mrs. Lowry neither she nor any of her children had any place of family sepulture, and her remains were interred, without objection from any of her children present at her death, in a lot in Laurel Hill Cemetery belonging to her sister, Sophia W. Plitt; that, in 1869, Lowry D. Lowry returned to Philadelphia, and died there in 1871, leaving a will, wherein he bequeathed $5000, to be appropriated to building a vault in Laurel Hill Cemetery, in which he directed to be placed the remains of his mother, and of any of his brothers and sisters who had died,

or might thereafter die—also his own remains and those of his immediate family; that the vault had been completed, but that respondents refused permission to the executors of Lowry D. Lowry to enter Mrs. Plitt's lot for the purpose of removing Mrs. Lowry's remains to her son's vault. The bill prayed an injunction, forbidding respondents from hindering the removal. The answer of Mrs. Plitt and Elizabeth S. Edwards admitted the main facts set forth in the bill, but averred that Mrs. Lowry left a daughter surviving, viz., the respondent, Elizabeth S. Edwards; that the father, mother, four sisters, and a son of Henrietta Lowry were, previous to and at the time of her death, buried in the lot at Laurel Hill belonging to Mrs. Plitt, and which the latter had purchased with the concurrence of Mrs. Lowry for a family burial lot; that Mrs. Lowry, before her death, repeatedly expressed a desire to be buried in that lot, and on her death-bed gave express directions to that effect. Respondents denied the right of complainants to remove the remains, and declared that such removal would do great violence to their feelings.

Before the argument one of the three sons of Mrs. Lowry, complainants in this bill, died, and another one withdrew from the cause and opposed the removal.

The opinion of the court was delivered by

FINLETTER, J.—The controversy is about the right to disinter and remove, after appropriate obsequies, which were considered by all interested as final.

In *Wynkoop* v. *Wynkoop*, 6 Wright 293, it is clearly and broadly decided that, after interment, all control over the remains is with the next of kin. The reasoning which transfers this right from the widow is not satisfactory, because it does not seem to be based upon principle or reason; and is repugnant to the best feelings of our nature.

Such a right must necessarily be in the next of living kin. It is only the living who can give the protection, or be burdened with the duty of protection from which the right springs. It is only the living whose feelings can be outraged by any unlawful disturbance of the dead. From this it follows that it is a right which cannot be transmitted or transferred. It is, moreover, one in which all of the next of kin have an equal interest. The plaintiff, therefore, derives no authority over the remains of his mother from his brother's will; and in himself he has no better claim than his sister or brother. He is then without that clear, exclusive title, which alone is enforced by injunction.

When it is considered that the removal of the remains of Mrs. Lowry, involves an invasion of the rights of Mrs. Plitt, it is not clear that, even if all the next of kin had joined in these proceedings, we could have granted the relief prayed for. The law regards with favor "the repose of the dead." When they are inurned in the places selected by them, it must be something more than sentiment or abstract right which will induce us to enforce the claim of the next of kin, by the invasion of the burial-place of another. In such a case it may well be questioned whether the right of the next of kin exists at all.

This doctrine is more than foreshadowed by Chief Justice Read, in *Wynkoop* v. *Wynkoop*, when he says: "Besides, the fact that her son is deposited in her burial place, in consecrated ground, and that he was buried with the ceremonies of the church, and with the honors of war, is sufficient to justify us in refusing permission to a removal under the circumstances."

Mrs. Lowry was buried where she desired to be; with the acquiescence of all her children. Those of them who survive are divided upon the question of removal. She is with her father, mother, sisters, and her first born. Upon the granite which marks their resting place her name is graven with theirs; and beneath it their ashes have commingled. It is fitting they should remain undisturbed.

The bill is dismissed.

(Note by Editor of *American Law Register*.)

We present this case to our readers, although not a decision of a court of last resort, as one of a class of cases not often met with in the reports. As said by Mr. Justice READ, in regard to cases of this kind, "it is of rare occurrence that any dispute arises after the burial, or that any case has been submitted to a court for its decision."

It is not necessary to trace the growth of ecclesiastical jurisdiction in these matters in England, as the rules of law there have never been adopted in this country, and possess but little more than an historical interest for us. BLACKSTONE shows clearly the state of the law in his day when the ecclesiastical jurisdiction in these matters had become fully settled.

He says: "Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried. The person, indeed, who has the freehold of the soil may bring an action against such as dig and disturb it * * *:" 2 Black. Com. 429. Coke says: "The burial of the *cadaver* is *nullius in bonis* and belongs to ecclesiastical cognisance; but as to the monument, action is given at the common law for the defacing thereof:" 3 Inst. 203.

These principles were enforced by the King's Bench in the case of *King* v. *Coleridge*, 2 B. & Ald. 806; 3 Phill. 337, n.; which arose upon proceedings begun by one Gilbert for a *madamus* to compel the churchwardens of the parish in which he lived to permit him to bury his wife in the parish graveyard in an *iron* coffin. The *mandamus* was refused, the court saying that the *right* of sepulture was a common-law right, but the *mode of burial* was of ecclesiastical cognisance alone. The case was then carried into the Consistory Court, before Sir William Scott, upon articles against the churchwardens for their refusal to permit the burial as demanded by Gilbert. The reasons urged by the wardens for their refusal were that the parish was a large one and had but three small burying-grounds, and if a coffin of imperishable material was used the grounds would soon become useless and it would be impossible for all the parishioners to find room for burial.

On behalf of Gilbert it was argued that ground once given to the interment of a body is appropriated for ever, and the insertion of any other body into that space at any time, however distant, is an unwarrantable intrusion. The judgment of the court was that the use of an iron coffin was not unlawful, but that it could only be allowed upon payment of a larger burial-fee. The court in reply to this latter argument said: "The legal doctrine certainly is that the common cemetery is not *res unius ætatis*, the exclusive property of one generation now departed, but is likewise the common property of the living and of generations yet unborn, and subject only to temporary appropriation. * * * Even a brick grave without the authority of the ecclesiastical magistrate is an aggression upon the common freehold interest, and carries the pretensions of the dead to an extent that violates the first rights of the living: "*Gilbert* v. *Buzzard*, 3 Phill. 335.

In *Reg.* v. *Twiss*, 10 B. & S. 298, it was held that ground consecrated for burial purposes cannot be applied to secular purposes, nor the bodies of the dead buried in it removed by the owners of the soil without the authority of an Act of Parliament.

In *Reg.* v. *Sharpe*, 7 Cox C. C. 214, where a son, from motives of filial affection and religious duty, removed the corpse of his mother from a family burial-place in a desecrated burial-ground, for the purpose of interring it with that of his family in a consecrated church-ground, it was held that the act constituted an indictable misdemeanor. Earle, J., said, in delivering the opinion of the court: "Our law does not recognise the right of any one child to the corpse of its parent, as claimed by the defendant. Our law recognises no property in a corpse, and the protection of the grave at common law, as contra-distinguished from ecclesiastical protection to consecrated ground, depends on this form of indictment, and there is no authority for saying that relationship can justify the taking of a corpse from the ground where it had been laid." s. c. Dears & B. 160.

Two controversial books on the subject of burials have lately appeared in England; one "The Burial Question," by Charles J. Burton, Chancellor of the Diocese of Carlisle; and the other, "On the Law relating to Burials," published anonymously.

The earliest case that we have found in America is a curious controversy which arose in Pennsylvania over the remains of Stephen Girard, a number of years after his death: *In re Stephen Girard*, 4 Am. Law J. 97: 5 Pa. L. J. Rep. 68. Girard directed in his will that his body should be buried in the ground of the Holy Trinity Catholic Church; this was done. The councils of the city of Philadelphia, which was the residuary legatee under his will, removed his remains from their first resting-place, by permission of the board of health and of the authorities of the church, and left them temporarily in the charge of an undertaker, in order to a subsequent removal to a sarcophagus built for them at Girard College, where, it appeared, they were to be buried with Masonic ceremonies. A bill was filed by some of Girard's relatives, praying for a special injunction to restrain this action and an order on the city authorities to restore the remains to their former resting-place. Judge King, in deciding the motion, said: "Where a person was buried in a common burying-ground, where the title did not pass, the law did not furnish a remedy in reference to a removal; but a chancellor would intervene to prevent the

desecration of the grave. If I had been applied to before the removal of the body, I would have interfered. But this is not the case here. The city claims as the residuary legatee and her motive was to indicate respect and honor for the memory of the man. If the executors chose to disclaim it they might have done so, if they were executors, but if they disclaimed, the relatives might be parties alone. In all these aspects a court of equity might interfere. But the body has been removed and the relatives had a knowledge of it. Even here the court can interfere; but ordering the body back to its former place would be deciding the case; we are not asked to do this now. It would be deciding the case before a hearing."

The court then ordered that the body be placed in the sarcophagus at Girard College, as the most convenient temporary abode, until its final resting-place should be determined at the final hearing.

In this case the English doctrine, as set forth by Blackstone, was cited by eminent counsel as the law in Pennsylvania; but, as it appears above, the court did not find it necessary to decide the point. A case arising soon after this in New York received very full consideration at the hands of Samuel B. Ruggles, in a report to the Supreme Court, as referee "in the matter of widening Beekman street," in the city of New York. In that case it appeared that the commissioners of estimates, &c., had paid into court the sum of $28,000, as damages for certain land taken in widening that street. The land taken belonged to the Brick Presbyterian Church, and contained "vaults for the burial of the dead in which various individuals claimed rights of interment, and the use thereof for the funeral of the dead." One Sherwood had been interred in this lot in 1801 and his remains had rested there quietly ever since. His descendants claimed that the expense of re-interring them in such suitable place as they might select, and of erecting the monument that had always stood over them, should be paid out of this fund. It did not appear that any burial-fee had ever been paid to the church for permitting the body to be buried there. The referee was of opinion that the use of this cemetery was a charitable as well as a religious use, a trust which a court of equity in the exercise of its undisputed equity powers might duly control and regulate; * * * that it was proper to retain from the fund a sum sufficient to cover the expense of re-interring the remains of Moses Sherwood in a separate ground in such reasonable locality "as his descendants might select." In his report, the referee drew "the following conclusions, as justly deducible from the fact that no ecclesiastical element exists in the jurisprudence" of New York.

"1. That neither a corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognisance, nor to sacerdotal power of any kind.

"2. That the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognise and protect.

"3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.

"4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.

"5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring their remains."

The Supreme Court, at a special term in 1856, confirmed this report in all respects and decreed accordingly; and also directed the church to reinter separately the remains found in any other of the graves whenever identified by the next of kin. See 4 Bradf. (Appendix) 502.

This case contains a very full exposition of the law of burial, and has been cited with approbation by the courts of other states.

In *Wynkoop* v. *Wynkoop*, 6 Wright 293, the case was this: Col. Wynkoop died in 1857, and was buried with military honors at Pottsville, in a lot belonging to his mother. Within a year his widow, who was also his administratrix, endeavored to remove his remains, but was refused permission by the owners of the cemetery and by her husband's next of kin. She thereupon filed a bill for an injunction restraining the defendants (the owners of the cemetery, the owner of the lot and her husband's next of kin) from interfering with the removal. The court, in dismissing the bill, *held*, that as administratrix the complainant's duty to bury terminated with the burial, and that as widow, "she would appear in that case to have no rights after the interment." The court further said, "that the fact that the body deposited in his mother's burial-place in consecrated ground, and that he was buried with the ceremonies of the church and the honors of war, was sufficient to justify a court of equity in refusing permission to a removal under the circumstances." This decision cannot be extended beyond the particular state of facts upon which it was based. It appears that the lot was owned by the mother of the deceased, and that he had been buried there

by his wife's consent. The court, therefore, only decided that a widow who consented to her husband's burial in a certain place, could not, against the wishes of his family, be allowed to remove his remains. It appears to leave undecided the question as to what voice a surviving husband or wife has in deciding where the deceased wife's or husband's remains shall be interred in the first place.

It has been decided that a husband has control over the remains of his wife: See the Ohio case, *infra*. It is reasonable that a widow, administering to her husband's estate, should, as against his heirs, choose his final resting-place, though this has never been decided. If she waives her right to administer, it would appear from the cases that the remains are under the control of the next of kin: See 4 Bradf. 503, *supra*. The reason given for depriving the widow of what would seem to be a natural right does not seem altogether satisfactory: it is that a widow may marry again and the custody of her husband's remains may thus pass into the hands of strangers. But in most cases burial-lots descend as real estate, and would commonly remain in the family of the husband, if originally his property. Arguments drawn from the civil law or even the English law would not avail in America, as the perpetuation of families, in the male branches, had in the early Roman system and has always had in England an importance which it does not possess in this country, and an essential part of this idea lay in the preservation in the line of the family of the tombs and monuments of the dead and of all the heirlooms and relics of the race.

It has been said that the expressed wishes of a testator as to the disposition of his remains will prevail over the wishes of his family: 4 Bradf. 503, *supra*.

Bogert v. *Indianapolis*, 13 Ind. 138, was an action by Indianapolis against Bogert, charging him with violation of a "cemetery ordinance." The court (per Perkins, J.) said *arguendo*: "We lay down the proposition, that the bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated. They cannot be permitted to create a nuisance by them. Hence a by-law might be reasonable where population was dense, requiring those buried to be sunk to a certain depth, or to be buried outside of where population was or was likely to become dense, and within a reasonable time after death, &c., but we doubt if the burial of the dead can, as a general proposition, be taken out of the hands of the relatives thereof, they being able and willing to bury the same."

A remarkable case that arose in Cleveland, Ohio, is reported (not very carefully) in Am. Law Times, July, 1871. The body of the plaintiff's wife was delivered to the defendants, who were physicians, for the purpose of dissecting its throat, in order, in the interest of science, to discover the cause of death. The defendants promised to perform the operation in the presence of the friends of the deceased, and to give the body a decent burial. By statements of the dangers of infection the defendants deterred the friends from attempting to see the remains at the medical college and held a pretended funeral on the day before the time appointed. It appeared afterwards that they had retained the body for general dissection and performed the funeral ceremonies over a coffin filled with rubbish. Upon a discovery of this fraud and upon threats of criminal prosecution the defendants sent the body in a rough box to the relatives of the deceased. The husband, who had been absent from home, upon his return brought suit for damages for laceration of feelings, expense of recovering the body, &c., and for the fraud. PRENTISS, J., in overruling a demurrer filed by defendants, said: "A corpse is not in itself so far property that it could be made an article of merchandise. A court would not enforce a contract for the sale of a dead human body. The same reasons which forbid the enforcing of such a contract, require that somebody shall have the right to the care and custody of a body for the purpose of securing it a decent burial. For this purpose the law gives a husband the custody of the dead body of his wife, a parent of a child and a child of a parent. The remedy (for infringing this right of custody) must be by civil action. * * * A body itself may not be property; but this right may be called perhaps a *quasi* property. At any rate it is a right which the law will enforce, and for an infringement of which an action will lie."

Pierce and Wife v. *Proprietors of Swan Point Cemetery and Almira T. Metcalf*, 10 R. I. 227, was the reverse of *Wynkoop* v. *Wynkoop*, *supra*. There the deceased, Metcalf, had died in 1856 and been buried in his own lot in Swan Point Cemetery, with the consent of his widow and in accordance with his own wishes. At his death this lot became the property of his only child, Mrs. Pierce. In 1869, against the consent of this daughter, and in violation of the by-laws of the defendant corporation, his re-

mains were removed by the widow, and placed in another lot in the same cemetery. His daughter filed a bill in equity to compel the restoration of the remains to their first resting place. The widow demurred to the bill for want of equity. The other defendant submitted to such order as the court might make in the case. The court, in overruling the demurrer, was of opinion that the remains should be restored to the place from which they had been taken. The view taken was that the person having charge of a body (in this case the corporation defendant) holds it as a sacred trust for the benefit of all who have an interest in it from family or friendship and that a court of equity will regulate this trust and change the custody if improperly managed. In this view, it was said, that it was not necessary to decide what might have been done had the child assented, or what the child might do of herself; and further that, although a body is not property, it may be considered a sort of *quasi* property to which certain persons may have rights, as they have duties, towards it arising out of common humanity. This case contains a very full discussion of the question.

The latest case we have found, except the principal case, is *Secor's Case*, 31 Leg. Int. 268. There it appeared that the widow of the deceased had decently interred her husband's remains, when his son, who averred that he had purchased a lot of ground pursuant to the instructions of his father (for a family burying-ground) insisted upon that being the proper place of interment. The Supreme Court for King's county, New York, upon motion of the widow, granted a perpetual injunction to restrain the son from removing the remains of his father. Pratt, J., in delivering judgment, said: "A proper respect for the dead, a regard for the tender sensibilities of the living, and the due preservation of the public health, require that a corpse should not be disinterred or transported from place to place, except under extreme circumstances of exigency." This ruling was sustained on appeal.

REVIEWS.

A Key to Equity Jurisprudence. Containing over eight hundred questions. Designed for the use of Law Students. By R. S. Guernsey, of the New York Bar. Diossy & Co., 86 Nassau St., New York.

This work is for the express purpose of aiding law students in the study and to clearly understand this great branch of the law as a system, and as founded upon logical and scientific principles. The idea is novel, but has the great advantage of making the value of the book depend mainly upon intelligent industry of the student.

Story's Equity Jurisprudence, upon which this analysis and questions and alphabetical index are founded, is referred to by the chapter and titles containing the subjects and answers to the questions used, and is for the purpose of requiring the student to make a note on the margin and space for that purpose, briefly stating the answer to each question, and showing where it can be found.

This edition of the work contains a blank page to each page of questions, and allows more extended notes of references, or answers and an analysis, to be made in the course of reading or actual practice, and thus it will serve as a general index of notes and references to authorities, leading decisions, statutory alterations, &c., making a useful and practical index legum, or Lawyer's Common-place Book on this branch of the law.

The arrangement is such that the chapters and questions comprise an outline and skeleton analysis of the entire system of Equity Jurisprudence, and the student may use any one or more standard works to fill up the subject.

Information for Assessors. Barrie, Wesley & King, publishers, 1877.

This is described as being "the substance of an address, and extracts from the pamphlet and papers on the duties of municipal officers, issued by their Honors, the judges of the County of Simcoe; with additions and references to recent enactments. Compiled by order of the County Council."

This pamphlet contains much useful information for assessors, all Acts bearing upon their duties, (including those of the session just over,) being referred to and commented on.

The "address" is one that His Honour Judge Gowan delivered at Barrie, in January last, before the County Council, at their request, to the assessors of the county. The "pamphlet" referred to was one entitled, "Suggestions to Municipal Officers," by Judge Ardagh, published a couple of years ago, which obtained a large circulation and proved of great assistance to assessors. The Voter's List Act, has of course superseded in a great measure the use of that pamphlet, but what is now of value has been retained by Mr. Banting in the manual before us. We can well believe also that the utterances of a judge so careful, learned and experienced as is the Senior County Judge (Judge Gowan) give the manual great additional value. We notice that many of the forms given in the Act referred to are apparently adopted from those prepared for the pamphlet published by Judge Ardagh.

The International Review, New York. A. S. Barnes & Co. Bi-monthly. $5.00 per annum.

We have before us the last three numbers of this now popular Review. In the style of its articles, it may be said to occupy a place between the old quarterlies and the best monthlies, such as dear old "Blackwood." Its writers comprise some of the best men in Europe and America, and its articles are not surpassed by those appearing in any of the standard Reviews. The article by Dr. Freeman on the "Origin of Parliamentary Representation in England," which we recently copied into this journal, is a fair average specimen of the matter contained in the "International," and its perusal will be sufficient to show that this average is very high. That the "International" embraces a very wide range of subjects is only what might be expected from the number of writers who contribute from time to time to its pages. This may easily be seen from the contents of the last number, March—April:

I.—The Administration of President Grant. An Independent Republican.

II.—Theory and Practice in Architecture. Jas. C. Bayles, of the Iron Age.

III.—Two Past Ages—Sonnet. Chas. (Tennyson) Turner, England.

IV.—German Comic Papers. Julius Duboc, Dresden.

V.—Two Norse Sagas. Prof. Hjalmar H. Boyeson, Cornell University.

VI.—Responsible Government. Prof. Van Buren Denslow, LL.D., Union Law College, Chicago.

VII.—The University of Upsala. Prof. Karl M. Thordén, Sweden.

VIII.—James Russell Lowell and Modern Literary Criticism. Ray Palmer, New York.

IX.—Contemporary Literature, Art, Science, and Events.

1. Recent English Books.
2. Art in Europe.
3. Scientific Progress.
4. Contemporary Events.

We strongly recommend those of our readers who desire a periodical supply of first-class literature at a nominal price to subscribe for this Review.

American Law Review. Boston: Little, Brown & Co.

Not the least interesting portion of this Quarterly is that which comes under the head of "Book Notices." Very generally containing able criticisms on law books, they are often amusing as well.

The reviewer, in writing of a little book called *Leading Cases done into English*, discourses pleasantly of the thought that came to him on reading the book, which is similar to that of Daniel Webster, who made the suggestion: "If the legislature will but put our writs into a poetical and musical form, it will certainly be the most harmonious thing they ever did." He thereupon put into verse a writ which he was then filling out in his little country-office. It ran as follows; viz:—

"All good sheriffs in the land,
We command,
That forthwith you arrest John Dyer,
Esquire,
If in your precinct you can find him,
And bind him."

The reviewer then unfolds his suggestion thus :—

"What the times demand, what the profession requires, is a poetical reporter of the decisions of the Supreme Court. Perhaps the suggestion will be made, that it would be much better to have, at least, one member of the Bench itself a poet ; and that the other members could do the necessary and useful work of making the decisions, while the poet could make them beautiful. We admit fully the truth of this suggestion ; but let us make haste slowly. We cannot spare, at present, the services of any of the worthy occupants of the Bench ; and we fear that they are too old to begin to poetize now. But we can easily have a poetical reporter now ; and when the next vacancy occurs upon the Bench, we can bring the requisite pressure to bear upon the appointing power, and secure our *desideratum*.

Let, then, the reporter begin at once to practice his new profession, and give us at least the rescripts, as they come down from the Supreme Court, aptly clothed in the robes of poetry. For instance, take the collected wisdom of the court in the matter of women's right to office, could it not be briefly expressed thus :—

'Woman ! thy mission is to please :
Not to be justice of the peace ;
Content with what the laws allow,—
A school-committee woman, thou !'

Opinion of Justices, 106 Mass. 604."

And again he urges that the reports are full of proper materials for reports :—

"Take the long struggle of fallen man and woman, upon the slippery sidewalks of the cities, to obtain reparation for their sufferings. The unsuccessful attempts might properly be put into some elegiac measure ; but when, after years of failure, there arose a new reformer, a second Luther, who discovered that ridges of snow were actionable defects for which towns were liable, who succeeded in finding the ridges and in obtaining a verdict for a fall thereon, would not the tale of his success be fitly expressed in light and flowing lyrics, not wholly unmindful, however, of the gravity of the event? We offer, modestly, the following example of how it might be done :—

'In Worcester, when the sun was low,
Trodden in ridges lay the snow ;
Across the walk he tried to go,
But fell, tho' walking carefully.

"Had Luther seen another sight,
Of sidewalk smooth with ice that night.
Without a ridge thereon, he might
Have suffered, without remedy.

"The court this plain distinction draw :
'When ice and snow, by natural law,
Are slippery found before your door,
You fall,—the town's not liable.

"'But when by man they're trodden down
In ridges, or an icy crown,
You, falling then, can sue the town,
And get your heavy damages.'

Luther v. *Worcester*, 97 Mass. 272."

The writer closes by a very "happy thought." We have thought it often on various occasions.

"We should have liked to lay before our readers a merry rhyme, suggested by the case of *Commonwealth* v. *Vermont R. R. Co.*, 108 Mass. 7, based upon the unexpected extinction of a popcorn boy, by the very railroad train in which he had for many years tortured the helpless passengers. We have done our duty in bringing the subject before the public. There are others equally tempting ; but we must stop somewhere."

We lay before our readers at p. 121 *post*, our contribution to legal lyrics.

CORRESPONDENCE.

County Judges as Benchers.

To the Editor of the Law Journal.

Sir,—It appears from a summary of the proceedings in Convocation in February last, that a resolution was passed, to procure an amendment of the Law, by providing that any member of Convocation who should hereafter be appointed a Judge of a County Court should thereby vacate his seat as a Bencher.

Is any such statutory provision required? According to the ancient usage and custom of the Benchers of the different Inns of Court in England, a County Court Judge has been always held ineligible and disqualified for holding a seat in Convocation, and this has also been the established usage here, there being no precedent of such an appointment.

Does not then a bencher by acceptance

of a County Judgeship virtually resign his seat?

When the late Sir James Macaulay became Treasurer of the Society, he—not being aware of the rule or custom—proposed the election of a certain County Judge. After a search for precedents and after considerable discussion, Sir James became satisfied of the disqualification and abandoned his motion.

An Ex-Bencher.

FLOTSAM AND JETSAM.

The Baltimore *Sun* says that on the occasion of the visit of Dom Pedro to the Supreme Court chamber in Washington, recently, he was conversing in an audible tone with the Brazilian minister, while Justice Miller was reading an opinion. The marshal of the court rapped and commanded silence, and Justice Miller, not knowing who the offender was, suspended his reading and remarked sternly: "We allow but one to talk here at a time." The emperor was quite discomfited, became silent at once, and as soon as he recovered his equanimity left.

It is stated in *Who's Who* for 1877 that the oldest judge in England is the Right Hon. Sir Fitzroy Kelly, Lord Chief Baron, aged 81; the youngest is Sir Nathaniel Lindley, of the Common Pleas Division, aged 49. The oldest judge in Ireland is Mr. Justice O'Brien, of the Court of Queen's Bench, aged 71; the youngest, the Right Hon. Christopher Palles, LL.D., Lord Chief Baron of the Court of Exchequer, aged 46. The oldest of the Scotch Lords of session is Robert Macfarlane, Lord Ormidale, aged 75; the youngest, Alexander Burns Shand, Lord Shand, aged 48.

A few years ago a man was on trial in Waynesboro', Tennessee, on a charge of murder. The evidence for the State was fatally defective, but the prosecuting attorney, an obstinate fellow, irritated by the conduct of defendant's counsel, insisted on argument. Court adjourned until next morning, meanwhile the attorney-general spent a good portion of the night in ransacking the books for "bloody cases," especially those in which the judges had indulged in a vast deal of rhetoric over the horrible nature of the crime of murder. These extracts he read to the jury next morning, quoting freely from the Old Testament as to the proper disposition to be made of the murderer, and closed in a perfect conflagration of adjectives in describing the "indescribable heinousness" of the crime. The court charged briefly, and the jury, after a few moments retirement, returned a verdict of "guilty in the first degree." Of course a new trial was at once granted. Defendant's counsel, however, was naturally curious to know how the jury *could* have found that verdict and asked one of the most intelligent members, "How on earth did you find that verdict? On what evidence did you base it?"

"Oh!" said the juryman, "thar wa'nt nothing in the *evidence* that *teched* him; but you see, Squire, *the law was so d—d strong.*"

In the life, letters and table talk of the painter Haydon, recently published, there is the following curious notice of a contempt of court case: "April 5th, 1832—Dined with Major Campbell, a man who greatly distinguished himself in the Peninsular war. He ran away with a ward in chancery. Lord Eldon, before whom he was brought said, 'it was a shame that men of low family should thus entrap ladies of birth; 'my lord,' retorted Campbell 'my family are ancient and opulent, and were neither coal-heavers, nor coal-heaver's, nephews' in allusion to the chancellor's origin. Eldon committed him on the spot to prison for *thirteen years* for contempt, and refused to accept an apology. On Brougham's accession, Campbell petitioned, and by a special order he was discharged. When Eldon committed him to prison, his wife, who was only a girl of fifteen, went to her mother in Scotland. They allowed him on his word to see her to Gravesend. She cried incessantly, and died soon after from a broken heart. * * * He was at the storming of Ciudad Rodrigo, Burgos, Badajoz, and St. Sebastian. As early remembrances of his campaigns, his loves, his vices, his triumphs, and his disgraces crowded his imagination, his face, heated by wine, shone out, his eye seemed black with fire, his mouth got long with revengeful feelings. He looked like a spirit escaped from Hades wandering till his destiny was over."

On the occasion of his retirement from the chair of Real Property in the Law School of Hartford University, (a posi-

tion which he has long and honorably filled), Prof. Washburn took occasion to give his class a few words of friendly counsel. Among the many subjects that he touched upon in the course of his remarks was one which has given most of the debating societies in the country a good deal of trouble, viz: "Is a lawyer justified in defending a client whom he believes to be guilty?" Upon this point the learned gentleman says:

"I wish to say a few words upon a matter which troubles sensitive minds, both inside and out of the profession, and that is, how far a lawyer can honestly and honorably engage in the defense of a person charged with a crime, where he has reason to suppose his client is guilty. To my mind there are no two sides to the question, provided the lawyer deals fairly with what properly comes before the court. He has no right to tell the jury he believes his client innocent, if he does not. But he not only has a right, it is his duty, to see that the defendant has fair play, and if the proof of his guilt fails, or the witnesses against are prejudiced or perjured, he is bound to give his client the benefit of its exposure, and if he thereby escapes, justice may fail in that particular case, but the great and holy cause of justice will be advanced by it. Such trials are not mere battles between the Common-wealth and the prisoner at the bar. They are but incidents in the working of that system, upon the purity and integrity of which, men hold their lives, their property, and everything they account dear, in security. Men believe these to be safe because they hold them by the same law which watches over and guards the rights and persons of their fellow-citizens from the humblest to the highest. But let it be ever understood that if a man, because he is poor and friendless, under a charge of crime, can be seized and dragged before a court, and because there is a popular clamour against him no man can be found to see that he is fairly dealt by and fairly convicted if found guilty, his conviction and punishment would do more to weaken public confidence in the administration of the law than the escape of a score of of men suspected of crime. No; the lawyer who in such a case consents to take the defense of such a man, and conducts it in good faith, instead of doing a dishonest or dishonorable act, is a benefactor to the community who cry out against him."

"WHO IS MY NEIGHBOUR?"

A poetical friend from the ancient capitol sends to us the following parody suggested to a "First Intermediate," on reading Smith on Neighbouring Proprietors. It is so good that we do not apologise for its insertion in these days of legal poeticisms:

Thy neighbour? It is he whom thou
Of all men hatest most;
Who's ever anxious for a row,
Nor lets a chance be lost.

Thy neighbour? It is he whose cows
Grow fat upon *your* grass,
Whose hornéd cattle calmly browse
"With sweet unconscious grace,"

In *your* potato patch, and feed
With no felonious bent,
But *bona fide*—clearly freed
From aught of ill intent.

Thy neighbour? It is he who digs
A well that draineth yours,
Lets loose his sod-uprooting pigs,
And floods you with his sewers.

He, who to malice much prepense,
To wilful inj'ry prone,
Refuses to put up his fence
Or keep his fowls at home.

Thy neighbour? Who from purest spite,
At half-past nineteen years,
Obstructs your almost "ancient light"—
Gives vict'ry to your fears,

When hope had almost won the day;
Then makes unkindest sport,
And aggravates you by the way,
He insult adds to tort.

Who opes a window on your yard,
Your privacy invades,
And guards it with a light he's had
For over two decades.

Thy neighbour? Ask me not again,
But ere this day be run,
Go! mix among your fellow men,
And seek him—with your gun.

J. B. M.

Kingston.

CROSSING THE RUBICON.

This being the season of law examinations, we deem it not inappropriate to re-print from the Edinburgh *Law Magazine*, the following lines, written by one who had passed his final examination :

Despite of a little fear lurking,
I have pulled through my final Exam.;
So adieu for a short time to working,
And farewell forever to cram.
I shall put on my gown—not unheeded ;
Some, seniors, shall wish me good luck,
Will tell me of men who've succeeded—
Not a word about those who have stuck.

In this breathing space, just for a moment
I brood, and I muse, and inquire,
What my fortune is—well or ill omened ?
What my portion is—lower or higher ?
Come, tell me, thou ancient *haruspex*,
Are we classed with the fortunate few ?
Shall sunshine or shade rest on us specks
Of cloud in the infinite blue ?

Shall the barque of my fortunes, a "clean ship"
Return to the port whence it came ?
May I ever aspire to the Deanship,
And to leaving a notable name ?
Shall I come to be Lord Justice-General,
Or only be Lord Justice-Clerk ?
Comes a sinister whisper, " New men are all
Inclined to shoot over the mark."

Shall I rank with the forcible-feebles,
Or shall I come out as a star ?
Shall I try salmon fishers in Peebles,
Preferring that much to the bar ?
Shall I, waft on the wild wind, be borne away
To regions forlorn and remote ?
To Lerwick, Lochmaddy, or Stornoway,
Where life is not worth half a groat ?

After years shall I willingly take a
Decent banishment out in Ceylon,
Judge coolies and blacks in Jamaica,
Or elsewhere in some tropical zone ?
On the Gold Coast, o'er niggers and Krooman,
Shall it be my sad fortune to reign ?
Nota bene, some good men and true men
Such little jobs did not disdain.

Or tied to the helm of some journal,
Shall I drudge through the sultry July,
And feel it not easy to spurn all
Temptations to have a "good shy ? "
Let the high Fates our fortunes determine—
Yet what matters their smile or their frown ?
Some hearts have been sad 'neath the ermine
That were merry beneath the stuff gown.

I own, like the rest of mankind, most
Legal folks rather favor the first ;
So with watchword of " Deuce take the hindmost ! "
Let us go at our work with a burst.
Nay ; nay ! with an honest endeavor,
With a spirit that's gallant and true,
Let us strive and be thankful—whatever
The Fates bring to me and to you.

American Funeral Oratory.—The *London Law Times* has had frequent articles commenting severely upon speeches made by members of the American Bar upon funeral occasions, and not without reason. The *Law Times* says :

" We have more than once given our readers some examples of funeral oratory in America on the occasion of the deaths of lawyers of reputation. Judge Lynd, of the Pennsylvanian Court of Common Pleas, died recently, whereupon the Bar had a meeting. Judge Lynd, judging from the speeches, has never had an equal in virtue, integrity, industry, and ability. " No man," we are told, " is necessary to the public ; " but, nevertheless, the loss of Judge Lynd is " irreparable." There would appear to be some mysterious process in Philadelphia for detecting corrupt judges, for one speaker says that Judge Lynd passed through life without reproach. " There was no smell of fire upon his garments." Judge Ludlow was particularly brilliant, thus describing the decease of the late Judge : " The pale horse and his rider ranged through the world at all times, but as the hours of this fatal day rolled into the flood of time with savage fury, on every moment of each he wrote ' Death's Own ! ' " Judge Briggs was less happy, and positively found a flaw in his deceased brother. " As a speaker," he says, " he was not so successful. He gave conclusions, but without his reasons, thus leaving his hearers to work up to them as best they might " This is rather severe. The Hon. Charles Gibbons also forgot the solemnity of the occasion, for he made a fierce attack on " that beggarly system of economy that is practised in this country, that refuses to public servants a decent compensation for public services." The climax of misery, however, was reached by Judge Ludlow, who sent his hearers away with this pleasant interrogatory, " friends and brothers, who will fall next ? "

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 40th Victoria.

During this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

Albert Clements Killam.
Thomas Hodgkin.
Cornelius J. O'Neil.
Francis Beverley Robertson.
Henry Ernest Henderson.
Hamilton Cassels.
Francis Love.
William Wyld.
Thomas Caswell.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

George Edminson.
Frederick W. Colquhoun.
Edward O'Connor.
John Bergin.

The following gentlemen received Certificates of Fitness:

J. H. Madden.
H. Cassels.
J. W. Gordon.
J. Dowdall.
C. J. O'Neil.
T. M. Carthew.
T. J. Decatur.
T. D. Cowper.
A. W. Kinsman.
C. McK. Morrison.
C. Gordon.
F. S. O'Connor.
G. S. Hallen.

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

Graduates.

Charles Augustus Kingston.
John Henry Long.
James J. Craig.
William Fletcher.
Leonard Harstone.
Patrick Anderson Macdonald.

Junior Class.

Benjamin Franklin Justin.
John F. Quinlan.
John Williams.
Joseph William MacDowell.
Phillip Henry Drayton.
Thomas A. Gorham.
James R. Brown.
George J. Sherry.
Hector McKay.
D. Henderson.
Alexander Carpenter Brazelev.
John Bertram Humphries.
Lauren G. Drew.
Herman Joseph Eberts.
Solomon George McGill.
David Johnson Lynch.
Thomas Henry Loscombe.
John Vashon May.
George Moir.
J. H. Macallum.
Hugo Schliefer.
David Robertson.
Angus McB. McKay.
Charles Rankin Gould.
William James Cooper.
Edward Stewart Tisdale.
Francis Melville Wakefield.
Alexander Stewart.
Thomas Miller White.
John Arthur Mowat.
Henry Bogart Dean.
George Robert Knight.
Humphrey Albert L. White.
John Wood.
George Benjamin Douglas.
Alexander Humphrey Macadams.
Hugh Boulton Morphy.
William Henry Brouse.
George J. Gibb.
Frederick E. Redick.
William Masson.
Edward Guss Porter.
Thomas Robert Foy.
Henry Albert Rowe.
Thomas H. Stinson.
Stewart Masson.
Francis Evans Curtis.
William Steers.
Robert Taylor.
Henry M. East.
Armour William Ford.

Wm. Martin McDermott.
Charles W. Phillips.
Wellington Smaill.
John Clyde Grant.
George Merrick Sinclair.
George Walker Marsh.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Sexsmith.
John Baldwin Hand.
James Barrie.
George Frederick Jelfs.

Articled Clerks.

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.
J. A. Lougheed.

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

That a graduate in the Faculty of Arts in any University in Her Majesty's 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.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.