DIARY FOR MARCH.

1. Fri... *St. Dovid.*
3. SUN.. *3rd Sunday in Lent.*
6. Wed.. Name of York changed to Toronto, 1834.
10. SUN.. *4th Sunday in Lent.*
13. Tues.. General Sess. and County Ct. sittings in York.
17. SUN.. *Passion Sunday. St. Patrick.*
21. Thur . *Benedict.*
24. SUN.. *Palm Sunday.*
25. Mon.. *Annunciation.*
29. Fri... *Good Friday.*
31. SUN.. *Easter Sunday.*

THE

Canada Law Journal.

MARCH, 1872.

Subscribers to the *Law Journal* will receive with the present number the Index to the last volume, and a Table of Cases, including not only those reported in full, but also those contained in the Digest of the English Law Reports.

The last feature, now introduced for the first time, will greatly facilitate a reference to the important cases contained in this Digest, which, embracing as it does all the English decisions of more than local interest, has, we are glad to learn, already proved of great service to many of our readers. The Table of Titles contained in this Digest, formerly printed separately, is this year included in the General Index, which, as it has been prepared with unusual care, will, we trust, be found more complete and useful than heretofore.

The proceedings of the Benchers of the Law Society during last Hilary Term, including an abstract of the Balance Sheet for 1871, are published in another place.

The *Goodhue Case* was re-heard before the Court of Appeal, on the 11th instant. Judgment will probably not be given before Sept. next. All the judges were present except the learned Chief Justice of Ontario. Mr. Christopher Robinson, Q.C., who led for the appellants, made a concise, but very masterly argument against the constitutionality of the Act which has given rise to the suits now under adjudication.

It is said that the following Barristers will shortly be gazetted as Queen's Counsel:—Dr. McMichael, Mr. C. S. Patterson, Mr. J. T. Anderson, Mr. Thomas Moss, and Mr. Samuel H. Blake, of Toronto; Hon. E. B. Wood, of Brantford; and Mr. Proudfoot, of Hamilton.

When speaking with reference to the case of *In re Dodge et al.*, *Insolvents*, decided in the Supreme Court of Nova Scotia, (see pp. 29, 51 *ante*) we omitted to refer to the recent case of *In re Chaffey*, 30 U.C.Q.B. 64 (and see a note of this case in 7 L. C. G. 7); Mr. Justice Wilson in delivering judgment saying, "They (the creditors holding a note made by the firm and endorsed by one of its members) must elect to prove upon one estate or the other. They cannot rank on both. And in our opinion, sec. 5, sub-sec. 7 of the Insolvent Act of 1864, directly favors and directly decides this question." We had intended to refer further to the Nova Scotia Case, but want of space forbids at present.

From statistics published in the English *Law Journal*, it appears the House of Lords heard 49 appeals during 1870, as against 26 heard in 1869. Of the 49, 20 were successful. During the session of 1870, 48 appeals were presented; of which 22 were from the Scotch Court of Session, 3 from Ireland, and, of English cases, 18 from Chancery, 4 from the Exchequer Chamber, and 2 from the Divorce Court. At present there are but 34 causes left in arrear.

Figures are given in the same periodical, which enables one to contrast the state of business before the Judicial Committee of the Privy Council with that before the Lords. 138 appeals were entered during 1870; at the close of the year 336 cases were left unheard, some of which were lodged ten years ago. 61 appeals were determined during the session, of which judgment was affirmed in 28, reversed in 28, and varied in four. It is to be hoped that the reconstruction of this Council and the appointment of salaried judges will lead to greater expedition and to the clearing away of all arrearages before many years elapse.

A decision of interest to dwellers in cities was recently pronounced by the New York Court of Appeals, in *Barker* v. *Savage*, with regard to the respective right of foot-passengers and vehicles at street-crossings. It was held that each has the right of passage in common and neither the right of precedence;

consequently that each is bound to accommodate the other, so that neither should vehicles be obstructed nor foot-passengers injured in crossing at such places.

Many legal squibs are let off against the Chicago practitioners, but they can afford to bear them all, consoled by this impartial testimony from the *Chicago Legal News*: "Men who are competent to manage any case, in any court where the law and equity systems of England prevail, work on from year to year, guiding the immense interests of their clients in this great city, with as little ostentation as has characterized the incredible increase of its commerce. To such men, public office offers few attractions. Its cares are too exacting, and its rewards too small. They find in their profession an ampler field, greater honors, richer rewards, and, with them, the peace and independence of private life."

Some of the Chicago lawyers are peculiarly happy in their advertisements. They manage incidentally to give the lie to current slanders about law and religion being divorced. The testamentary practitioners recommend themselves by their touching candour to all persons well-disposed, or of disposing mind. Here for instance is the ultimate part of a card that appears in the *Legal News*:

"Special attention given to Probate Matters.
"Wills drawn and construed.
"Estates settled.
"'*Set thine house in order: for thou shalt die, and not live.*'—2 King xx, 1.

This style of religious advertisement might be judiciously extended to other branches of the profession. Thus, counsel hungering for clients could extol their own perfections by the citation: "Who is he that will plead with me? for now, if I hold my tongue, I shall give up the ghost."—Job xiii, 19. And the Indiana lawyer could herald the salient features of his practice by a pardonable adaptation of Jerem. iii, 8, "Put her away, and give her a bill of divorce."

The name of Mr. Alexander Sampson, Toronto, was accidentally omitted from the list of those who passed the second intermediate examination in Hilary Term last.

LAW SOCIETY OF ONTARIO.

Hilary Term—1872.

The following is a *resumé* of the proceedings of Convocation, during last Term, published by order of the Benchers:—

Monday, 5th February.—The Hon. J. H. Gray, a member of the Bar of Nova Scotia, was called to the Bar.

Robert Wardrope, Esq., a member of the English Bar of Lincoln's Inn, was called to the Bar.

Tuesday, 6th February.—The Treasurer called attention to the vacancy in the Bench caused by the appointment of the Hon. Adam Crooks to the office of Attorney General of Ontario.

A meeting of Benchers ordered to be had for second Friday in this Term, for election of a Bencher in place of the Hon. Mr. Crooks.

Report of Examining Committee received.

Examining Committee for next Term to be Messrs. McMichael, Read, Blake, Crickmore and Burton.

Abstract of Balance Sheet laid on the table, and Auditors' report thereon.

Abstract of Balance Sheet for 1871.

	$	c.
Income—		
Certificate fees	10,664	70
Call fees	3,120	00
Admission fees	3,000	00
Attorney Examination fees	2,200	00
Term fees	1,096	00
Government Warrant (fuel and lights)	3,000	00
Reports, Sale of	277	20
Interest on Sterling Debentures	481	34
" Currency "	238	80
" Bank acconnt	260	45
Cash, per Solicitor	52	07
	$24,390	56
Expenditure—		
Reporters, Salaries of	7,000	00
Reports, Printing of	3,458	50
Salaries and Scholarships	3,530	00
Hall	5,238	38
Library and Office	844	38
Lands	504	50
Law expenses	192	10
Election expenses	140	00
	$20,907	86
Income less expenditure,	$ 3182	70
Outstanding Assets—		
Cash	61	75
Bank Deposit	15,346	57
Debentures, Currency	4,000	00
" Sterling	10,219	98
	$29,628	30

We have examined the accounts of which the above is an abstract, and compared the same with the vouchers, also the cash book, journal

and ledger and bank pass books, and find the same to be in all respects correct.

(Signed) Æmilius Irving, } *Auditors.*
" F. Osler, }

Toronto, 23 Jan. 1872.

Ordered, that the remuneration to the Auditors shall be fifty dollars per annum each.

Ordered, that thirty dollars per annum be paid to the publishers of the *Law Journal* for the publication of the *resumé* of the proceedings of Convocation.

Resolved, that the portion of the Report of Finance Committee of last Term affecting the Secretary and Sub-Treasurer do come into force immediately after the present Term. That Hugh Gwynne, Esq., shall continue to be nominally Secretary, Sub-Treasurer and Librarian of the Society, with a salary of two thousand dollars per annum, and the use of the rooms in the East Wing of Osgoode Hall now occupied by him. That from his salary shall be deducted a sum not exceeding one thousand dollars for the payment of a deputy. That Mr. Gwynne shall be paid at his present rate of income from his offices until the first day of July next, and that a deputy shall be appointed, whose duties shall commence immediately.

Ordered, that the election of a deputy be proceeded with on first Saturday in this Term.

Friday, 9th February.—The Intermediate Examinations for the third and fourth years were held.

Saturday, 10th Feb.—Ordered, that $1,349 65 be paid to Mr. Rowsell for balance for publication of Reports for 1871. Mr. Rowsell paying $252 for 140 volumes sold.

Ordered, that J. H. Esten, Esq., be Deputy-Secretary, Librarian and Sub-Treasurer.

Mr. Moss introduced a rule as to subjects of examination—second and third readings for last Friday in this Term.

Mr. Moss gave notice for last Friday in this Term for an instruction to the Examiners.

Mr. Moss presented a petition on the subject of opening the Library in the evening, and gave notice of motion.

Friday, 16th February.—Mr. Treasurer presented a petition from Barristers of Chatham for election of R. S. Woods, Esq., as a Bencher.

Hon. E. B. Wood, of Brantford, was elected a Bencher in the room of the Hon. Adam Crooks, appointed to the office of Attorney General of Ontario.

Mr. Benson gave notice of motion for first Friday of next Term as to appointment of officers for the future,

The names of the gentleman called to the Bar and admitted as students are published officially as usual.

J. Hillyard Cameron.
Treasurer.

ARE TELEGRAMS PRIVILEGED?

We notice that this question arose before a select committee of the Ontario Parliament, appointed to investigate charges in connection with the election for the South Riding of Grey. An officer of the Montreal Telegraph Company was subpœnaed to produce certain despatches, and the following is a report of what occurred, taken from the columns of the Toronto *Globe* of the 22nd February last:

"The Select Committee on the charges against Mr. Blake, in reference to the late election in the township of Proton, for the South Riding of the county of Grey, met again yesterday morning. Present — Messrs. Rykert (Chairman), Prince, Galbraith and Pardee.

Mr. Lauder proceeded with his case by recalling Mr. H. P. Dwight, who said he begged to decline giving any information whatever in regard to the messages referred to in his subpœna. He thought it unnecessary to give his reasons; but, on being pressed, gave the same reason as he had at the previous sitting, viz., that the law prohibited his communicating the contents of telegrams.

The Chairman said the law only prohibited his communicating the contents of messages to any person other than a court of law, or a court of enquiry appointed by the Legislature. The law would not screen him in this case.

Witness said he had been advised that it would. He had been advised by counsel. He did not object to producing the telegram from Mr. Kerr to Mr. Oliver at the last session, because both the sender and the receiver consented to that production. He should decline to produce the register of messages, because he did not think it right that the affairs of all their customers should be exposed. He declined to say who had advised him in this matter. He had not seen Mr. Kerr since the last sitting. He had the sanction of the President of his Company for the course he was taking."

Subsequently, it appears, some of the telegrams were produced, with the consent of all parties interested, and thereafter the committee reported to the House. No action was taken, although it was discussed whether the House had power to enforce production, or to punish as for a contempt. The general understanding seemed to be, that colonial Parlia-

ments had no such power. With this we have no concern at present, though it does strike one as an absurd condition of affairs that this high chamber of Parliament is more powerless than the barrister who holds a Division Court in some backwoods village of Ontario, or the most illiterate magistrate who ever scrawled J.P. after his name.

We simply consider the legal question, whether privilege was properly claimed for the documents required. We take it that parties testifying before a select committee of the House are entitled to no greater privileges than persons testifying in ordinary courts of justice. They have the same immunity from arrest, *eundo*, *morando et redeundo*, as other witnesses: May's Parliamentary Prac. 147. They are also protected, by privilege, from the consequences, by way of threat or action, of any statements made by them in giving evidence. True it is that the Chamber in Ontario, equally with the House of Commons of England, has no inherent power to administer oaths to witnesses. By consequence neither has a committee of the local House. The English House of Commons has the inherent power of punishing, as for a breach of privilege, persons who give false evidence, who refuse to answer proper questions, and who decline for insufficient reasons to produce documents in their possession, custody or power, even when such misbehaviour occurs before a select committee: see May, pp. 405-6.

Assuming, then, that the officer of the Montreal Telegraph Company, who refused to produce the telegrams asked for, was entitled to the same protection as if he had been before any court of justice (which is indeed held in *Burnham* v. *Morrissey*, 14 Gray, 226), the question is, whether his plea of privilege was valid. It was clearly insufficient. No doubt all the acts of incorporation of these companies provide, in terms more or less explicit, against the disclosure by the company or its officers of the contents of any private message, under penalties more or less severe. The provision of our statute runs thus: "Any operator of a telegraph line, or any person employed by a telegraph company, divulging the contents of a private despatch, shall be guilty of a misdemeanor, and on conviction shall be liable to a fine not exceeding one hundred dollars, or to imprisonment for a period not exceeding three months, or both, in the discretion of the court before which the conviction is had:" Con. Stat. Can. c. 67, s. 16.

Mr. Justice Willes made short work of the objection in a case before him at Nisi Prius. A telegraph clerk having refused, under instructions from his superior officer, to produce private telegrams, or to answer questions concerning them, his Lordship said, "The only persons who can refuse to answer questions are attorneys, and of course counsel, who would stand on the same footing for a stronger reason. I do not enter into any question, whether another class is or is not privileged; I do not choose to introduce matter that is doubtful; but, with the exception, perhaps, of people in government offices as to matters of state, and counsel and attorneys, I do not know of any class that is privileged. It is quite clear that telegraph companies are not privileged." And then, addressing the witness, he proceeded: "If you did not produce those papers, everybody connected with the telegraph company, who could lay his hand on them, would be subject to be brought here, and to be punished for not producing them." The telegram was then read: *Ince's Case*, 20 Law Times, N. S. 421, May, 1869. Another case, to the same effect, of colonial authority, being the decision of the Chief Justice of Newfoundland, is to be found in 8 Jur. N. S. Part ii. p. 181. The Chief Justice, after referring to an analogous case of *Lee qui tam* v. *Birrell*, 3 Camp. 337, said: "I do not entertain a doubt that the communications or messages through the telegraph offices are not in law privileged communications; and that when the operators are compelled to attend a judicial proceeding, they are bound to disclose the contents of such messages; and that in so doing, they do not violate any oath of secrecy they have taken (that they will not *wilfully* divulge, &c.), or subject themselves to any prosecution under the statute." The rule is the same in the United States: *Henisler* v. *Freedman*, 2 Parsons, 274; as well as in the Province of Quebec: *Leslie* v. *Harvey*, 15 L. C. Jur. 9, where it was also held that such messages are not privileged. In truth, the wonder is that any one should ever have supposed that a disclosure of telegraphic messages by a witness in a court of justice, should expose him to a penalty under the statute for divulging the secrets of the office.

PROFESSIONAL ETIQUETTE.

The Tichborne case seems likely to be a *cause cèlèbre* in more ways than one.

Besides the importance of the stake, the romantic character of the claimant's story, and the immense time taken up by the trial, there was in the evidence adduced a succession of surprises, enough in themselves even without the startling and unexpected *denouement*, to render the case a memorable and notorious one.

We are sorry, however, to see that startling episodes were not confined to the evidence, but occurred even in the speeches of counsel. To us in Canada, with our colonial reverence for the Bench and Bar of the mother country, the Attorney-General's speech has been in many ways a surprise, and in some respects a most unpleasant one.

We can remember the amusement with which from a professional point of view we witnessed Mr. Pickwick's astonishment and horror when Mr. Serjeant Buzfuz, counsel for the plaintiff in *Bardell* v. *Pickwick*, presumed to tell the defendant's counsel, Mr. Serjeant Snubbin, that it was a fine morning: but had the leaders of the Bar in Mr. Pickwick's time been what at present they seem to be, he would scarcely, we think, have been startled by any such interchange of civilities between opposing counsel.

The Attorney-General seems to have made his client's cause his own in the strictest sense of the word, identifying himself with it so completely as altogether to ignore the fact that, upon every principle of law and reason, the matter, while *sub judice*, must be considered as undecided.

Assuming from the first that the claimant was an impostor, he did not hesitate to denounce him in the most unmeasured terms as the leading spirit of a vile and gigantic conspiracy; and although, from what has since transpired, the Attorney General does not seem to have been far astray in this, he certainly transgressed the bounds of professional etiquette, if not the social canons of ordinary English society, when he included by direct implication in his wholesale denunciation Mr. Serjeant Ballantine and Mr. Giffard, Q.C.

The portion of the Attorney-General's speech to which we refer is thus reported in the *Times* of February 9th:

"The Attorney-General, then resuming his speech, said he was aware that there was no limit to the possibility of facts, and there might be for all he could tell some triumphant explanation of the two facts which he had had to communicate that morning. He should have thought in any other case but the 'Tichborne case' that the fact of one of the attorneys and his son retiring from it, that the production of a letter written by the plaintiff beginning 'My dear and beloved sister,' addressed by the plaintiff to the sister of Arthur Orton, and signed with a forged address—because it was plain, as it had been read, that the writer never saw the person whom he proposed to introduce till long after he had left Australia—and with a forged date, because the writer had never seen Stephens at all until months after 1866: these facts, in any other than the Tichborne case would be thought conclusive as against the plaintiff; but in this case ordinary rules of action did not seem to apply. The day before, the speaker said he heard that his proof against Roger Tichborne ever having been at Melipilla was in favour of the plaintiff; that it might, indeed, be a slight suggestion in favour of the Orton case, but that as far so the Tichborne case was concerned it was entirely beside the case. Astonishment came upon astonishment day by day, for he had practised for some years in his profession: he had had some practice in cross-examination (a laugh), and although his powers might have been feeble in that respect, as the 'enlightened critic' suggested, yet he never met with a case like this, and he did not know that if he remained in practice for another 22 or 23 years he ever should again. His mind might be clouded by the strange mystery and obscurity in which this case was enveloped, but he should have thought that the demonstration from Roger Tichborne's handwriting that he had never been at Melipilla, or near the place, was some slight evidence that the plaintiff, who said he was there, was a rank, a gross, and an arrant impostor. But it was a mistake; it was a proof in favour of the claimant. (A laugh.) It might be that there was an answer to all these matters, but in any other cause the matters mentioned that morning would have put an end to the case. But this had not followed here. And those who conducted the plaintiff's case in the face of the arguments pressed upon them thus, and in the face of these demonstrations, must not complain if, by and by, it should be pointed out that although it was the duty, the great and sacred duty, of members of the profession to which he belonged to defend by all legitimate arguments any case which might be intrusted to them, and, although no man would stand up more indignantly than he should against the imputation which was sometimes ignorantly cast upon the Bar and

others in the profession of the law, that they should not defend persons whom they thought were guilty, or of whose guilt they had a suspicion—yet he would maintain that the duty of counsel in assisting in the prosecution of fraud was a very different thing indeed, and he would say that lawyers, whoever they might be, who, after demonstrations of the iniquity, the injustice and fraudulent character of a claim, lent themselves still to the prosecution of that claim, made themselves accomplices in the crime which they helped forward."

As the lamented Mark Tapley would have said, this is certainly "coming out remarkably strong," and it was scarcely to be expected that such insinuations would be borne in silence. Accordingly we find that later in the day Mr. Serjeant Ballantine said:

"I was not present when the Attorney-General made the observations which he thought proper to make this morning. Temper may not always be kept under control, and therefore I am not sorry that I was not present then, or I fear I might have made observations, which, not on account of their want of truth, but on account of their want of politeness, I might afterwards have regretted. * * * We were all of us perfectly well acquainted with that letter, and we had a mass of circumstances bearing upon it, and upon the case of Orton, which, when the proper time comes, will be submitted to the jury, and they will form their judgment as to whether it was possible for us to pursue any other course than the one we have adopted. The Attorney-General reminded your Lordship that he was Attorney-General, and no doubt he has been most worthily placed in that high office, but it gives him no right to impugn the honour of other members of the Bar, who have as exalted a view of their honour and character and of the strength of their principles as he can possibly have of his. I do hope, therefore, that your Lordship and the jury will protect us when we are out of court from the needless insinuations and sneers with which the Attorney-General has thought it proper to interlard his observations in the course of the enormously long speech he is delivering"

Mr. Giffard, who, it will be remembered himself came near being made Solicitor-General, was somewhat less temperate in his reply. He said:

"I claim to say a word, and I hope I shall say it temperately. What has fallen from the Attorney-General would produce the impression upon the mind of every one that it was an insinuation against the members of the Bar who were opposed to him. My learned friend has referred to his character as Attorney-General, but I venture to say that that position, which he occupies by accident, does not make him more than simply a member of the Bar, and I refuse to have my conduct judged by him."

We are sincerely glad, for the credit of the Bar, that the course which Sir John Coleridge chose to adopt, has incurred the almost unanimous disapproval of the profession; and that the foremost legal journals have administered to him a dignified and well-merited rebuke.

The *Law Times* says:

"It may fairly be expected that we should give expression to the general opinion in the profession with reference to the conflict, for such it must be called, between the Attorney-General and the counsel for the Tichborne claimant on Wednesday. The prevalent feeling and opinion is strongly opposed to the course pursued by the Attorney-General. The primary question is, Has any counsel a right to impugn the honour and integrity of counsel opposed to him on grounds such as those advanced by the Attorney-General? The learned gentleman concludes that a certain piece of evidence proves fraud, and that such evidence cannot be rebutted. He concludes further, that this conviction has also been brought home to the minds of his opponents, and he charges, them, as counsel, with being accessories in the fraud, unless they at once throw up their briefs. As interpreter, by his position, of the rules of etiquette governing the bar, Sir John Coleridge would undoubtedly be justified in expressing this view if his opinion were taken upon the point. But immediately that he constitutes himself the *censor morum* in a yet undecided cause, in which he is acting not as Attorney General, but simply as an advocate, and condemns his opponents as accessories in a fraud, unless they pursue a certain course, he frames a dangerous precedent—a precedent calculated to promote indecent displays of temper in our courts of law to the confusion of suitors and the detriment of the profession. We are not at all sure that he is right in drawing a distinction between the duties of counsel in defending a man whom he knows to be guilty, and in upholding a suit which, in his own mind, he believes to be dishonest. But to add that counsel in the latter case is to usurp the functions of the jury, and anticipate their verdict by throwing up the case, and that if he fails in this, he is a participator in the villany of his client, is to propound a principle most difficult of application, and which, if accepted, might lead to disastrous consequences.

We believe, therefore, that the protests of Serjeant Ballantine and Mr. Giffard have the cordial approval of the entire profession."

And so they should. To hold the contrary would bring deserved discredit upon the English Bar, and would open a very wide door to professional abuses of the gravest character. We trust this most unpleasant episode may, after all, be productive of good results, in establishing the rule that no counsel, however high his position, or how strong his conviction of the justice of his cause, may arrogate the right to impugn the motives or question the integrity of even the humblest of his professional brethren.

ACTS OF LAST SESSION.

We hasten to publish for the benefit of our subscribers the following Acts of last Session, in advance of their appearance in the usual course. From looking at the list, it will be seen that they are those most likely to be required for immediate reference. It seems extraordinary that the Legislature has never hit upon the idea of providing that all new laws (with an occasional exception when necessary) shall not come into force until a month or so after they are assented to.

An Act respecting the Law Society of Ontario.

Whereas, &c.: Her Majesty, &c, enacts:

1. The Benchers of the Law Society in convocation are authorized to appoint from time to time such persons, being members of the Law Society, of the degree of barrister-at-law, as they may think proper, to be editors and reporters of the decisions of the Superior Courts; who shall hold office at the pleasure of the said Benchers, and shall be amenable to them in convocation for the correct and faithful discharge of their respective duties, according to such regulations as the said Benchers shall from time to time make in respect thereof.

2. The said Benchers in convocation shall make regulations for the printing and publishing the said reports of the said decisions, and the distribution of the said reports and the price and mode of issuing thereof, and all such other regulations in respect thereto, as they may at any time consider necessary; and any profits arising from the said reports shall form part of the general funds of the Law Society.

3. The Benchers in convocation shall from time to time determine the salaries to be allowed to the said editors and reporters, and shall pay the same out of the general funds of the society.

4. The Benchers in convocation may make rules for the improvement of legal education, and may appoint readers and lecturers with salaries; and may impose fees and prescribe rules for the attendance of students and articled clerks at such readings or lectures, and for examinations thereon, as conditional to call to the bar, or admission as attorney; and may establish scholarships in connection therewith; and may for proficiency at examination, by rules to be established specially in that respect, diminish the number of years of studentship on the books of the society, or under articles of clerkship, but so as not to reduce the number of years for call to the bar or admission as attorney to less than three.

5. The Benchers in convocation may by regulation require that clerks hereafter articled shall pass a preliminary examination; and the term of service under articles to entitle each articled clerk to be admitted an attorney shall date only from the passing of such examination.

6. The fees payable by barristers, as term fees, and on call to the bar, and by attorneys on admission as attorneys, and by students and articled clerks on admission as such, and on examinations and attendance on lectures and readings shall be paid into the general funds of the Law Society, and shall be such as the Law Society shall by rule from time to time prescribe.

7. The Benchers of the Law Society shall, during Hilary term in each year, furnish to each member of the Law Society entitled to vote at the election of Benchers, a statement in detail of the revenue and expenditure of such Law Society, for the year ending the thirty-first day of December preceding each statement, the same to be first duly audited by auditors appointed by said Benchers to audit and report upon the finances of the said Law Society.

8. [Repeal of Con. Stat. U. C. Cap. 36, and Con. Stat. U. cap. 35, sec. 26; sub-secs 2, 3, and of inconsistent enactments.]

9. The Benchers of the Law Society in convocation are authorized to make such compensation as they may in their discretion think fit to any reporter, unless such reporter is appointed a reporter under this Act.

10. This Act shall come into force on the first day of Easter term next.

An Act to amend the "Law Reform Act of 1868."

Her Majesty, &c., enacts at follows:

1. Immediately after the word "jury" in the last line but one of sub-section 1 of section 18 of the Law Reform Act of 1868, there shall be inserted the following words, that is to say: "And in any action of ejectment the claimant or defendant may require the issue to be tried, and the damages, if any, to be assessed by a jury; and in that event the defendant shall file with his appearance, and the claimant

shall annex to his issue book, and on the day of service of the same file in the office from which the writ of summons issued, a notice in the words following: The claimant or the defendant (as the case may be) requires that the issue in this cause be tried, and the damages (if any) be assessed by a jury."

2. And the said sub-section shall be construed as if the said words had originally formed a part of the same.

An Act to amend the law respecting the issue of the Prerogative Writ of Mandamus.

Whereas, &c.:

1. In all cases in which the Court has jurisdiction to issue the Writ of Peremptory Mandamus, it shall be the duty of the judge, provided he be of opinion that the case is a proper one for the issue of the same, either in term time or in vacation, to make an order for the issue of the said writ under this Act from the Court in the first instance, and without a writ *nisi*, and the said writ, when issued, shall have the same force and effect as if it had been issued by rule of the Court.

2. The application for the said writ shall be made upon affidavit to a judge, who shall have authority to issue a summons calling upon any person who may, in his judgment, be affected by the writ if issued, to show cause why the same should not be issued.

3. Such summons may be served upon the person or party named therein, either personally or by substitution, as may be directed by the judge, in the same manner as a writ of summons.

4. The application may be made upon hearing by the parties, either in person or by counsel.

5. Affidavits may be filed in answer to the application, and in reply, according to the present practice on chamber applications.

6. Every deponent whose affidavit is so filed shall be liable to cross-examination and re-examination upon the same, in presence of counsel for, or after notice to all parties, either before the judge or before any officer of the said Court to be named by the judge, and the evidence shall be reduced to writing, returned into Court, and used on the hearing of the application.

7. Upon hearing the parties who appear, or their counsel, and after service of the said summons upon all proper persons as hereinbefore provided, the judge shall, if in his opinion it is a proper case for the issue of the said writ, order the issue of the same, and shall by his order direct what is to be done and performed by the person or party to whom the writ is directed, and the writ shall conform to the order; but if in his opinion the application should be refused, the said summons shall be discharged.

8. The judge shall have the same power in vacation to enforce obedience to the said writ by attachment, to be issued from the Court, as the Court has in term time to enforce obedience to a writ issued from the Court upon a rule thereof.

9. The costs of every application under this Act, and incidental thereto, shall be in the discretion of the judge who shall dispose of the application, and he shall make such order as to the same as to him shall seem just; and a writ of *fieri facias* may be issued from the Court to compel payment of the said costs without making the judge's order a rule of Court.

10. [Judges to make rule.]

11. No part of the jurisdiction hereby conferred upon the judges shall be exercised by the Clerk of the Crown sitting in Chambers; and nothing in this Act contained shall prevent any person from applying to the Court for the said writ according to the present practice.

12. Any order made by a judge under this Act shall be subject to appeal to the Court; and the judgment of the Court upon such shall be subject to a further appeal to the Court of Error and Appeal.

13. The affidavits upon which the application is made shall be entitled either in the Queen's Bench or in the Common Pleas, and all subsequent proceedings shall be entitled in the Court in which the affidavits on which the application is made were entitled; and the word "Court" in this Act shall in each such mean either the Court of Queen's Bench or the Court of Common Pleas, as the case may be.

14. The word "judge" in this Act shall mean a judge of either of the Superior Courts of law.

An Act to amend the Act of the Province of Ontario respecting Superior and County Courts, passed in the thirty-fourth year of Her Majesty's reign, and chaptered twelve, and to declare the true meaning of section sixteen of the said Act.

Whereas, &c.:

1. Section 3 of the said Act is hereby amended by inserting immediately after the word "commenced" in the third line of the said section the following words, "or to one of the judges of the Superior Courts of Law sitting at Chambers."

2. Section 5 of the said Act, chaptered 12, is hereby amended by adding to the said section the words following, "or to any suit wherein the attorney for the defendant, or in the case of two or more defendants, where the attorney for any one or more of them resides in a county or union of counties different from that in which the attorney for the plaintiff, or, if he prosecutes in person, in which the plaintiff resides."

3. Notwithstanding the provisions and enactments in the said section 16 of the said Act, chaptered 12, contained, the 7th section of the Act passed in the 33rd year of Her

Majesty's reign intitutled, "An Act to make further provisions for carrying out the Act intituled 'The Law Reform Act of 1868,' and to regulate proceedings on writs of error and certiorari" and chaptered 7, is in full force and virtue.

An Act to amend an Act passed in the thirty-second year of the reign of Her Majesty, and chaptered twenty-two, respecting County Courts.

Whereas, &c:

1. That section 3 of the said recited Act is hereby repealed, and the following shall be section 3 of the said Act:

(3.) After the passing of this Act no Junior Judge shall be appointed in or for any county or union of counties in Ontario, except in any county or union of counties where the population shall exceed forty thousand, as shall appear by the official census then last taken.

2. The Junior Judge of the County Court of any county or union of counties is hereby authorized to transact such business in Chambers, in the absence therefrom of the Senior Judge, as relates to matters over which the said Courts have jurisdiction, and as may, according to the course and practice thereof, be transacted by the Judges of the said Courts.

3. It shall be lawful for any Judge of a County Court, if requested so to do, and when the interests of justice seem to require it, to sit for a Judge of another County Court either at the sittings or in term, or to hear any case triable under the special or summary jurisdiction of such Judge, and the County Judge while so sitting, shall have all the powers and authority of the Judge of the County Court within whose county or union of counties he shall be so sitting.

An Act further to amend the Law relating to Property and Trusts.

Whereas, &c.:

1. In the construction of the will of any person who may die after the 31st March, 1872, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt, charged by way of mortgage on any part of his real estate.

2. In the construction of the said Act and of this Act, the word "mortgage" shall be deemed to extend to any lien for unpaid purchase money, or any charge, incumbrance or obligation of any nature whatever upon any lands or tenements of a testator or intestate.

3. Whereas by an error in the printed copy of the Act passed in the thirty-second year of Her Majesty Queen Victoria, intituled, "An Act to amend the law as to Wills," the word "not" is omitted in the beginning of the fourth line of the third section of the said Act, be it enacted that the said section be and the same is hereby amended so as to read as follows:

"3. Every will shall be revoked by the marriage of the testator except a will made in the exercise of a power of appointment, when the real or personal estate would not in default of such appointment pass to the testator's next of kin, under the Statute of Distribution."

And the said section so amended shall read as if incorporated in the said Act at the time of the passing of the same; but nothing in this Act shall apply to or affect any case now pending or heretofore adjudged by any court in this Province.

An Act to extend the rights of Property of Married Women.

Her Majesty, &c., enacts as follows:

1. After the passing of this Act, the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a feme sole.

2. All the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds and profits from any occupation or trade which she carries on separately from her husband or derived from any literary, artistic or scientific skill, and all investments of such wages, earnings, moneys, or property shall hereafter be free from the debts or dispositions of the husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent, as fully as if she were a feme sole; and no order for protection shall hereafter become necessary in respect of any of such earnings or acquisitions, and the possession, whether actual or constructive, of the husband, of any personal property of any married woman, shall not render the same liable for his debts.

3. A married woman in her own name, or that of a trustee for her, may insure for her sole benefit, or for the use or benefit of her children, her own life, or with his consent, the life of her husband for any definite period, or for the term of her or his natural life; and the amount payable under said insurance,

shall be receivable for the sole and separate use of such married women or her children as the case may be, free from the claims of the representatives of her husband, or of any of his creditors.

4. A policy of insurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or upon which he may at any time after effecting such insurance, notwithstanding a year may have elapsed, endorse thereon that the same shall be for the benefit of his wife, or of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the intent so expressed, and shall not so long as any object of the trust remains, be subject to the control of the husband or his creditors or form part of his estate, save and except for such amount as the same may be pledged to any person or persons prior to any endorsesation thereon for the benefit of his wife or children, or any of them, when the sum secured by the policy becomes payable: in the event of no executor or trustee having been appointed by the husband by will, a trnstee thereof may be appointed by the Court of Chancery upon the application of the wife, or in the event of her death, by the children or their guardian, and the receipt of such executor or trustee shall be a good discharge to the office in which such insurance is effected; Provided always, if it shall be proved that the policy of insurance was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

5. A y married woman may become a stockholder or member of any bank, insurance company, or any other incorporated company or association, as fully and effectually as if she were a feme sole, and may vote by proxy or otherwise, and enjoy the like rights, as other stockholders or members.

6. A married woman may make deposits of money in her own name in any savings or other bank, and withdraw the same by her own check, and any receipt or acquittance of such depositor shall be a sufficient legal discharge to any such bank.

7. Nothing hereinbefore contained in reference to moneys deposited, or investments by any married woman, shall as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any money so deposited or invested may be followed as if this Act had not passed.

8. A husband shall not by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued therefor, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continned unmarried; and a husband shall not be liable for any debts of his wife in respect of any employment or business in which she is engaged on her own behalf, or in respect of any of her own contracts.

9. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this or any other Act declared to be her separate property, and shall have in her own name the same remedies both civil and criminal against all persons whomsoever, for the protection and security of such wages, earnings, money and property, and of any chattels or other her separate property for her own use, as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman; and any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.

10. This Act shall not affect any pending suit or proceeding.

11. This Act may be known as the "Married Women's Property Act, 1872."

An Act to empower all persons to appear on behalf of others in the Division Courts in the Province of Ontario.

Her Majesty, &c., enacts as follows:

1. Any person may appear at the trial or hearing of a y cause, matter, or proceeding as agent and advocate for any party or parties to any such cause, matter or proceeding in the Division Courts in the Province of Ontario.

2. The Judge or other person lawfully holding any Division Court in the Province of Ontario may, whenever in his opinion justice would appear to require it, prevent any person from appearing at the trial or hearing of any cause, matter or proceeding in the said Court, as agent and advocate for any party or parties to any such cause, matter or proceeding.

We have kept the Division Court Act until the last, as it is such a tender morsel. It would scarcely be possible to find the anticipated abuse of an objectionable enactment more absurdly guarded against. Under what circumstances would "justice appear to require" a person to be "prevented" from appearing as an advocate or agent for another.

We have already published two other important Statutes: "An Act to make debts and choses in action assignable at law," and "An Act to declare the true construction of the Statute of 13th Elizabeth, chap. v., as to fraudulent deeds," &c. In addition to the

above measures we note that every person who carries on business under some name or designation other than his own, must register a declaration to that effect within six months after the passing of the Act.—That provision is made for the institution of suits against the Crown by petition of right and respecting procedure in Crown suits, &c.—An Act for the Prevention of Corrupt Practices at Municipal Elections.—That Committees of the Legislative Assembly may examine witnesses on oath.—That in the County of York the office of Clerk of the Peace and Crown Attorney may be held by different persons &c. There are no less than three Acts affecting Registrars, which, however, are not of immediate interest to the practising lawyer. We should have supposed it would have been more convenient, and a "better job" to have inserted all these provisions in one Act.

We shall probably have occasion to allude further to some of the Acts of this Session at a future time.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

JORDAN v. AMBLER.

Arbitration—Reference back—Costs.

[Prac. Court, Mich. Term, 1871.

GALT, J.—When a rule is asked for to refer a case back to an arbitrator to allow him to certify to prevent defendant deducting costs, the arbitrator evidently intending that each party should pay his own costs, the rule will be made absolute without costs. The costs of taking the award again before the arbitrator to be borne by the applicant.

BAIN v. McKAY.

Particulars of Fraud.

[Chambers, Oct. 27, 1871.]

MR. DALTON.—Particulars will be ordered of the fraud charged in a plea to a declaration alleging the breach of an agreement.

WILLIAM McLEAN, *Primary Creditor*, MURDOCH McLEOD, *Primary Debtor*, AND DANIEL McLEOD, *Garnishee*.

Division Courts — Garnishee proceedings — Discretion of Judge—Jurisdiction.

[Chambers, November 18, 1871.]

A garnishee in a Division Court suit not appearing on summons judgment was given against him. After a lapse of more than fourteen days he applied for leave to set aside this judgment and come in to defend. Meritorious grounds for relief being shown, the judge made an order as asked.

HAGARTY, C. J., C.P.—The judge had jurisdiction to make such an order, although the fourteen days within which new trials should be asked for had elapsed.

A judge of a Division Court has in garnishment proceedings large discretion to prevent injustice, nor is he to be tied down to rigid rules as to procedure and forms in cases where the subject matter of the suit and the suit itself is within his jurisdiction.

CAMERON v. MILLOY.

C. L. P. Act, sec. 227—Twenty days' notice of trial.

[Chambers, Dec. 22, 1871.]

MR. DALTON—The provision as to twenty days' notice by the defendant to the plaintiff to bring on a case for trial does not apply when the case has once been tried.

BAIN v. McKAY.

Pleading—Declaration in trover.

[Chambers, Dec. 27, 1871.]

MR. DALTON.—It is incorrect in a declaration in trover to allege that the defendant converted to his own use or wrongfully deprived the plaintiff, &c. [Which is the form used in Bullen & Leake's Precedents.]

HARPER v SMITH.

Change of venue.

[Chambers, March 12, 1872.]

MR DALTON.—When the place where the cause of action arose and the place of residence of the defendant and of his witnesses concur, a change of venue will be ordered to such County although the plaintiff's witnesses reside where the venue is laid.

ENGLISH REPORTS.

COURT OF EXCHEQUER.

JONES v. BRASSEY AND BALLARD.

Nolle prosequi—Entry of as to part of plaintiff's claim—Judgment by nil dicit as to residue—Second action for balance of claim—Plea of "judgment recovered"—Effect of nolle prosequi in support of such plea—No bar to second action.

In an action to recover £133 8s. 10d. balance due for work and labour, &c., in which the particulars of the plaintiff's claim consisted of a series of items about ninety in number, the defendants pleading first (except as to £65 7s. 3d. parcel, &c.), never indebted; secondly (except as to the said parcel), payment; and they said nothing in bar of the plaintiff's claim to the £65 7s. 3d. The plaintiff thereupon entered a *nolle prosequi* in respect of so much of his claim as the defendant's pleas were pleaded to, viz., £68 1s. 7d., and signed judgment by *nil dicit* for £65 7s. 3d., and costs of suit, which the defendants paid. Thereupon the plaintiff immediately brought a second action, in the same form, to recover the £68 1s. 7d., in respect of which the *nolle prosequi* was entered in the previous action, to which the defendants pleaded, first, never indebted; secondly, payment before action; and thirdly, a special plea setting up the judgment recovered for £65 7s 3d. in the previous action, in bar of and as an answer to the second action.

The particulars of claim in the second action were identically the same as those in the first action, with the addition of a credit item for "£65 7s. 3d., amount of judgment recovered," leaving a balance of £68 1s. 7d., for which the second action was brought.

At the trial, before Bramwell, B., a verdict was, by direction of the learned judge, entered for the plaintiff, and a rule having been obtained pursuant to leave to set that verdict aside and enter it for the defendants, on the ground that they were entitled to it on the plea of judgment recovered, it was

Held, by the Court of Exchequer (Kelly, C.B. and Channell and *Pigott*, BB.) discharging the rule, that the plaintiff was entitled to the verdict. The *nolle prosequi* entered as to part of the plaintiff's claim, before final judgment in the first action, did not preclude him from bringing a second action for the balance of his claim, which was the subject of the *nolle prosequi*, and from recovering; and the plea of "judgment recovered" was not supported or proved by the *nolle prosequi*.

[24 L. T. Rep. N. S. 947.]

The plaintiff had brought an action on the 27th October, 1870, against the defendants in the ordinary form to recover £133 8s. 10d., balance due for work and labour done and performed by him as a contractor and otherwise at their request, and for materials provided and money due on accounts stated, &c., in which the particulars of his claim delivered consisted of a series of items eighty or ninety in number, amounting in the aggregate to the sum of £278 5s. 10d; with a credit given for £144 17s., money received on account, showing a balance, which the plaintiff claimed to be due to him, of £133 8s. 10d., for which sum he brought the above-mentioned action. To the declaration in that action the defendants pleaded: first, except as to the sum of £65 7s. 3d., parcel, &c., never indebted; secondly, except as to the said parcel, satisfaction and discharge of the plaintiff's claim by payment; and they said nothing in bar of the plaintiff's claim to the said sum of £65 7s. 3d.

The plaintiff then, on the 14th Nov., 1870, entered a *nolle prosequi* in respect of so much of the claim, as the defendants' pleas were pleaded to—viz., £68 1s. 7d., and signed judgment for £65 7s 3d. in the following form:—

"*Nolle prosequi* and judgment by *nil dicit*, dated 14th Nov., 1870.

"And hereupon the plaintiff says that he will not further prosecute his suit against the defendants, in respect of so much of the claim in the declaration mentioned as the defendants' pleas are pleaded to, and therefore, as to so much of the said claim, let the defendants be acquitted and go thereof without day, &c.; and, inasmuch as the defendants have said nothing in bar or preclusion of the action of the plaintiff in respect of the said sum of £65 7s. 3d., parcel of the money claimed, and in the said pleas excepted, the plaintiff remains therein undefended against the defendants, therefore it is considered that the plaintiff do recover against the defendants the said sum for £65 7s. 3d., and £7 7s. 6d. for his costs of suit."

The defendants satisfied the said judgment, and the plaintiff immediately thereupon, viz, on the 15th Nov., 1870, commenced the present action to recover the sum of £68 1s. 7d., in respect of which the *nolle prosequi* was entered in the previous action, as before mentioned, in which the declaration was in the same form as that in the previous action. To this declaration the defendants pleaded, first, never indebted; secondly, satisfaction and discharge by payment of the plaintiff's claim before action; and, thirdly, a special plea that the plaintiff, on the 26th Sept., 1870, in H. M.'s Court of Exchequer of Pleas at Westminster, impleaded the defendants, in an action for the recovery of the debts and moneys in the declaration above mentioned, and for, upon, and in respect of the contracts and causes of action in the said declaration above mentioned, and such proceedings were thereupon had in the said action that afterwards, and before the commencement of this suit, to wit on the 12th Nov., 1870, by the consideration and judgment of the said court, the plaintiff recovered, in the said action, the said debts and moneys in the said declaration above mentioned, to wit, £65 7s. 3d., and also £7 7s. 6d. for his costs and charges by him about his suit in that behalf expended, whereof the defendants were convicted; and by the record and proceedings thereof still remaining in the said court fully appears, which said judgment is in full force and unreversed.

By his replication, the plaintiff (1) suggested to the court the death of the above-named defendant Brassey; (2) joined issue on the defendants' first and second pleas; and (3) pleaded, by way of new assignment, to the third plea that he sued for money payable by the defendants to him for other causes of action than those in the said third plea mentioned, and in respect whereof the said judgment was recovered, as aforesaid.

To such new assignment to the third plea, the defendant Ballard pleaded, first, never indebted; secondly, satisfaction and discharge by payment before action; and upon those pleas to the plaintiff's new assignment issue was taken and joined.

The particulars of the plaintiff's claim in the present action, delivered under a master's order of the 5th Dec., 1870, consisted of precisely the same items and sums as those contained in the particulars delivered in the prior action, showing the before-mentioned balance of £133 8s. 10d., to which was now appended a credit item thus:

		133	8 10
Cr. 1870. Nov. 14.			
By amount of judgment recovered.	65	7	3
	£68	1	7

and it was for that balance of £68 1s. 7d. that the present second action was brought.

At the trial of the present action before Bramwell, B, at Westminster in Hilary term last, the record and particulars in the former action were put in and admitted. It was also admitted that, before the pleadings in the first action, all the items and the defendants' objections to them were discussed, and also that the defendants intended to suffer judgment for all that was due in respect of each item. Thereupon a verdict was, by the direction of the learned judge, entered for the plaintiff for £68 1s. 7d., subject to a reference. Referee to be agreed on by the parties, or to be named by the judge, with leave reserved to the defendants to move for a rule, calling on the plaintiff to show cause why the verdict found for the plaintiff should not be set aside, and a verdict entered for the defendants pursuant to leave, on the ground that the defendants were entitled to the verdict, on the plea of judgment recovered, the learned judge having erroneously directed it to be entered for the plaintiff on that plea.

A rule to that effect was accordingly moved for and obtained on the 17th Jan. last by *Powell*, Q.C., on behalf of the defendant Ballard, against which rule,

Willis, for the plaintiff, now showed cause.—The question is whether, when a plaintiff has entered a *nolle prosequi*, as to part of a claim which he is seeking to recover by action, he can subsequently bring another action in respect of that part. Upon the pleadings here two courses were open to the plaintiff, to sign judgment for the £65 7s. 3d., but which, while the pleas were on the record undisposed of, would only be interlocutory; or, instead of joining issue on the two pleas, where the defendants say nothing as to the plaintiff's claim, the latter is entitled to enter a *nolle prosequi* on the pleas, and to sign final judgment. Unless that be so, a defendant, admitting a part to be due, might, by such pleadings, keep a plaintiff out of claim admittedly due. The pleas were pleaded on the 10th Nov.; the plaintiff did join issue, but entered a *nolle prosequi* as to the £68 1s. 7d., and judgment by *nil dicit* on the 14th Nov. as to the £65 7s. 3d. Whether or not the defendant got his costs of the pleas as to which the *nolle prosequi* was entered does not appear, but at all events by the 3 & 4 Will. 4 ch. 42, he was entitled to them. In Chitty's Archb. Pract., 12th edit., pp. 1214-15, it is said that, "Where a *nolle prosequi* is entered as to the whole declaration, the defendant is, and always was, entitled to costs in the same manner as upon a discontinuance. But where it was entered as to some of several counts, or part of a count, though the plaintiff was not entitled to costs as to those counts, or parts of counts, notwithstanding a verdict in his favour for the rest, yet he was not, before the 3 & 4 Will. 4, ch. 42, liable to pay the defendant his costs occasioned thereby; but by sec. 33 of that Act, it is enacted that 'where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf.'" The Act was clearly passed for the very purpose of giving costs to a defendant where the plaintiff abandons his claim. The plaintiff signed judgment for £65 7s 3d. only, and costs, which were paid, and then immediately afterwards he commenced this second action for the claim as to which the *nolle prosequi* was entered, to which the defendant pleaded, *inter alia*, a plea of judgment recovered, as to which the plaintiff new assigned that he sued for other causes than those for which judgment was recovered. [Channell, B.—It was stated just now that the question was, whether the effect of a *nolle prosequi* was the same as a plea of judgment recovered; but, on the pleadings, it would appear to be no such thing, but that there was here a new assignment. The replication to the plea of judgment recovered should have been *nul tiel record*. Kelly, C.B.—Why should not the plaintiff bring his second action for the balance?] Just so. In Bullen and Leake's Pleading, 3rd edit. p. 658, note (*b*), it is said, "It sometimes happens that a defendant who has no answer to the plaintiff's claim is not prepared to pay the amount of it into court, and that in order to avoid the costs of trying an issue fruitlessly, he suffers judgment by default as to this part, and pleads only to the residue. In such a case, if the plaintiff proceeds for the residue, no present advantage can be taken of the judgment by default, which will be interlocutory only; so that the defendant gains time and saves costs, and avoids providing any money. The plaintiff may sometimes find it advisable to defeat him in this, by entering a *nolle prosequi* to the part pleaded to (*for which he can afterwards bring an action*) and then take a final judgment at once for the residue." That is just what has been done by the plaintiff here

Powell, Q.C., and *J. O. Griffits*, for the defendant, *contra*, in support of their rule, submitted that the opinion expressed on this point in Bullen and Leake was wrong. The particulars delivered in the original action consisted of eighteen items of account, showing a balance due of £133 8s. 10d; then came the entry of *nolle prosequi* and judgment by *nil dicit* on the 14th Nov., and the plaintiff recovered £65 7s. 3d and his costs, and the defendant got no costs. Then, in the second action, the present one, to recover the balance of £68 1s. 7d., the particulars delivered are identically the same, word for word, and item for item, with those in the first action, superadding to them only a credit item for the £65 7s. 3d., the amount recovered under the judgment. The particulars in the two actions are identical, and there is nothing to show what items or particulars constitute this balance of £68 1s. 7d. [Pigott, B.—The particulars are the same, but the action is not for the same sum as that which was recovered in the first action.] Instead of entering a *nolle prosequi* the plaintiff's duty was to have gone on and met the defendant in his pleas, and so one action would have settled the whole matter: *Lord Bagot* v. *Williams*, 3 B. & C. 235. [Pigott, B., refers to the case *Cooper* v. *Tiffin*, 3 T. R. 511, cited in Tidd's Practice. Martin, B.—A nonsuit and a *nolle prosequi* are not in principle the same. On a trial a plaintiff must be present to hear the verdict, and if he is not, it cannot be given: that is a nonsuit. A *nolle prosequi* is an *abandonment* of the cause of action on the record.] It is contended that here judgment has been recovered for all the items claimed in the action. The question involved is one of fact. The pleadings are general—limited no doubt by the particulars. Suppose the first action had been for two items only, say of £20 each, and the particulars showed two items only; then a plea and payment into court of £30; or judgment by default as to £30—it is immaterial which—and a *nolle prosequi* as to £10, and the plaintiff had adopted similar proceedings to these here? Surely he could not bring a second action for that £10? [Pigott, B.—I agree that if the first action had been for £20 for a gold watch and £20 for a silver one, and the defendant had paid in £30, which had been taken in satisfaction, the plaintiff could not have brought a second action, having recovered the value of the two watches. But it is matter of evidence, what was *involved* in the former action?] No doubt in some instances a *nolle prosequi* may have the effect of a nonsuit, but not in others, and certainly not in this case. On the authority of *Bagot* v. *Williams* (*ubi sup.*), we contend that

it was not competent to the plaintiff to bring the second action.

Kelly, C B.—I am clearly of opinion that this rule must be discharged. Whether we consider this case as a claim made by the plaintiff and denied on the part of the defendant, and without any pleadings at all, upon the facts stated as in a special case, or whether we consider the point as raised upon the pleadings which was reserved at the trial, whether a second action can be brought after a *nolle prosequi* has been entered, under the existing circumstances—in either case it is clear that by law, and in fact upon the merits the plaintiff is entitled to the verdict. The plaintiff brings his action for £133, which it must be taken was due to him, of that sum £65 has been paid, leaving £68 remaining unpaid, and due, and for that latter sum the verdict has been found, and to it, beyond all question, if there were no pleadings, the plaintiff is entitled. But, supposing we proceed, notwithstanding the admission of the parties, to consider the question whether a *nolle prosequi*, entered under the circumstances of this case, is a bar to that claim of £68, how stands the case? Divested of all the legal technicalities and expressions it amounts simply to this: The plaintiff brought an action and delivered particulars for £278, admitting the payment of a certain portion of that sum, and leaving a balance due of £133. I dismiss the fractional parts. He claimed, therefore, £133 for work and labour, and to that the defendant pleaded, admitting £65 to be due, and for that amount judgment was suffered by default, and the £65 was paid. With regard to the residue, the defendant denied that he owed it; and, if the parties had proceeded to trial, the plaintiff, notwithstanding the pleas of never indebted, and payment, would no doubt have recovered the £68 also, the defendant being indebted in and never having paid that amount. But, instead of that, and it is immaterial from what cause, the plaintiff took the £65, for which the defendant suffered judgment by default, and taxed and obtained his costs; and with regard to the remaining £68 he entered a *nolle prosequi*. Upon that, the defendant (whether or not he availed himself of his legal rights I do not know), was undoubtedly entitled to tax his costs of the action, so far as regarded the portion of them relating to the £68, and to have judgment for, and to obtain payment of, such costs from the plaintiff. It is quite immaterial whether he did so or not, and if he has not done so it is his own fault. But, that action being thus at an end, there being judgment by default for £65, and a *nolle prosequi* as to the remaining £68, the plaintiff now brings a second action for £68. The question, and the only question, is, whether the *nolle prosequi* supports and proves the plea of judgment recovered? I think it does not. It is not a judgment recovered. There is, in one sense, a judgment recovered upon a *nolle prosequi*, entitling the defendant to his costs upon the plea, but it is not such a judgment as precludes the plaintiff, in point of law, from bringing another action for the £68. All the authorities are to that effect without any exception or qualification. The only exception existing to that rule of law is, where the *nolle prosequi* is entered *after final judgment* in the first action, and then it has no effect enabling the plaintiff to bring a second action. Where a *nolle prosequi* is entered *before* final judgment in the first action, there is nothing to prevent a plaintiff from bringing a further action. Here he has brought his action for this balance of £68 and the *nolle prosequi* does not preclude him from recovering it. But if it did, it is not a judgment recovered so as to support this plea; and, upon this ground, the plaintiff is clearly entitled to the verdict, and the defendant's rule must therefore be discharged.

(To be continued.)

REVIEWS.

Index to Precedents in Conveyancing, and to Common and Commercial Forms; arranged in Alphabetical Order; with Sub-Divisions of an Analytical Nature. By Walter Arthur Coppinger, Esq., of the Middle Temple, Barrister-at-Law. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1872.

Mr. Coppinger is not unknown to the profession. Some time since, he introduced himself into the company of legal authors as the author of the law of copyright in works of literature and art. His introduction was a respectable one, and his present compilation adds to his reputation as a laborious, painstaking, and accurate worker.

On the title page of his new work we find copied Dr. Johnson's appropriate aphorism, "Knowledge is of two kinds, we know a subject ourselves or we know where we can find information upon it." It is with the latter kind of knowledge that lawyers are principally concerned. Although every man is supposed to know the law, no man can with truth be said to know all the law; and the lawyer is fortunate who knows at all times "*where* to find the law."

What we understand by the law is a huge collection of statutes and decided cases, year by year assuming more gigantic proportions. With its increase in dimensions the necessity increases for such works as the one now before us. The idea is by no means a novel one. We have before us at present "A General Index to the Precedents in Civil and Crimina Pleading, applicable to the present practice in every ancient and modern collection, including also the precedents in the Books of Reports, from the earliest period to Easter Term, 3 Geo. IV. By Charles Petersdorff, Esq., of the Inner Temple. London: S. Brooke, Paternoster Row, 1822." Old as it is, we have

found it of service even in these modern days. Mr. Coppinger's work appears to be framed on the same plan. What Mr. Petersdorff did in 1822, and did well, in civil and criminal pleading, Mr. Coppinger has done and done well, in 1872, in conveyancing, common and commercial forms. Both gentlemen endeavoured to combine the analytical with the alphabetical order of arrangement. Mr. Coppinger, of the two, has, we think, in this respect, been the more successful. It may be urged against Mr. Coppinger, as it was urged against Mr. Petersdorff, that the value of his compilation would have been enhanced by a diligent examination of the precedents referred to, and that the index should have been confined to those of acknowledged correctness. But "acknowledged correctness" is an indefinite term. That which one man may think correct another may think incorrect, and that which no man may think correct may yet be useful to a man of fair learning, good judgment, and ordinary caution.

In Mr. C ppinger's index reference is made to 10,000 precedents, and yet the whole work is only 570 pages. We cannot better declare in what manner the author has performed his work, and his reasons for so doing, than by the use of his words. "Not only precedents of a modern character have been indexed, but such precedents in the earlier collections as may with slight alteration be adapted to the exigencies of existing circumstances. It has not been deemed advisable to exclude forms framed under acts of parliament which may have since been rejected, nor those which are virtually the effect of causes no longer necessitating a peculiar form, if such form may prove possibly of assistance either as a precedent or connection with other matters, or as a guide in construing an assurance or instrument under the altered state of the law. * * * For similar reasons a precedent has not been rejected on account of its verboseness or unnecessary length. Many a precedent, in its entirety now obsolete, may prove useful and suggestive as a guide in the preparation of a deed more suited to the style and phraseology of modern times, and the learning and precision of our earlier draftsmen may be resuscitated, if for this purpose alone, with advantage."

An index such as this is more permanent in structure than ordinary law books, and its value is less injured by the lapse of time than ordinary text books. But its value will be less diminished if its possessor will take the trouble to have his volume interleaved, and note new precedents as they come forth from the "womb of time."

The mechanical execution of the work is in Messrs. Stevens & Haynes best style, which is saying a good deal. The perspicuity of an author, however, is sometimes blunted by the blunders of his printer; but here both author and printer appear to have worked in the same spirit, and that is to make the work a success. We hope they have done so, for their efforts deserve it.

The Canadian Monthly and National Review. Adam Stevenson & Co., Toronto. Nos. 1 and 2. (Price $3 00 per annum.)

So many attempts to establish a periodical in this country which should be a vehicle for the development of English literature in Canada have resulted in failure, that every fresh attempt is regarded with some misgiving. Inasmuch, however, as Confederation has opened a wider field, both as a market and a source of supply, and as every year increases that field and adds to its fertility, we may hope that the effort now made will be attended with happier results.

Typographically, the new magazine is a credit to this country, and especially to Toronto, where the business of publication seems to be largely established. Nor do the contents of the first two numbers belie the neat, plain, yet attractive exterior. Sufficiently solid, without being heavy, they are like a well baked home-made loaf, sustaining, yet easy of digestion. Variety prevails; but, thank the conductor, *no sensationalism*. May they ever avoid that rock on which so much of our periodical literature is wrecked, and rendered useless for everything but mischief!

To get at the best part of these numbers we must begin at the end, where the "Book Reviews" are to be found. The critique in the February number upon Mr. Freeman's historical essay is very interesting, and that upon Longfellow's "Divine Tragedy" is a gem, which even the warmest admirer of Mr. Longfellow cannot fail to appreciate, even if they are forced to the conclusion that for once he has made a mistake. *Query.*—Could not a nicer phrase than this be hit upon? Surely "Book Re-

views" is not such English as so great a master of the language as we fancy we discover working here would undertake to defend. It smacks too much of that modern style which regards adjectives and substantives as possessing a difference without a distinction.

The magazine is not to be made altogether non-political except in a party sense; and here the Editors are probably right, for otherwise the publication would be deprived of a subject without which its professed character of a national work would be practically negatived. Nevertheless, to treat of such subjects in a judicious way so as to hit the happy mean of instruction, without "raising the dander" of either Grits or Tories, will be no easy task. The article upon "The Recent Struggle in the Parliament of Ontario" is very good, and comes within the rule that no party politics are to be discussed. The paper upon the Census of 1871 is full of suggestions of great value. And, in conn ction with this article, we are reminded that we have received a pamphlet published by Mr. J. C. Taché, controverting some of the views advanced by Mr. Harvey, and, perhaps, in some instances successfully. Mr. Taché says, correctly enough, that "the rate of increase of one period, in a young country yet undergoing the process of colonization and traversed by migratory currents, is no criterion whatever of the rate of increase of the next period. The population of Upper Canada was 465,357 in 1841 (end of that year), as ascertained by the census of that year; it was 952,004 in 1851 (end of the year); and 1,396,091 in 1861 (end of 1860), showing a total increase of 104 per cent. for one decenniad, and 46,000 for the period next following. But as the second period was made, in reality, only of nine years, the correct statement is to say that the annual increase was at the rate of 7.42 during the first, and 4.34 during the second period. This example shows the fallacy of calculations based on a mere regular geometrical progression." Again, when speaking of the supposed inaccuracy of the census, he alludes to the special re-numeration of St. Marys, which gave the population of that place as 3,178, taking nine months after the taking of the census, which gave the number as 3,120. It is, however a matter of notoriety that general disatisfaction exists on the subject of the last census.

We are glad that military matters, so essentially a part and parcel of this Canada of ours, are not overlooked, and so far that department has been well supplied by the pen of Lt.-Col. Denison.

We understand that the proprietors are determined that the want of immediate financial success sahll not deter them from giving the enterprise a fair trial. That it will succeed we have no doubt, and that it includes among its contributors one so well known and so highly appreciated in the literary world as Mr. Goldwin Smith cannot but tend largely to that success.

The leading articles contained in the January number are, "The Washington Treaty," by Chas. Lindsey, Esq.; "Anne Hathaway—a Dialogue," by Dr. Wilson, of University College; "The Cavalry Charges at Sedan," by Lt.-Col. G. T. Denison, jun.; "Man's Place in Nature," by Prof. Nicholson, of University College; an article on the curiosities of Canadian Literature, by Dr. Anderson, of Quebec; the initial chapters of an admirably written story entitled "Marguerite Knecler, Artist and Woman," by Miss Murray, of Wolfe Island; a Sketch of an Historical Night in the Old Canadian Parliament, by S. T. Watson, Esq.; two original poems—"Marching Out," and "January;" and a translation by Goldwin Smith, M.A., of the Opening of the Second Book of Lucretius, together with Tennyson's recent poem, "The Last Tournament."

The contents of the February number are—"The Canadian Census of 1871," by Arthur Harvey, Esq., of Toronto; a thoughtful article on Early Christian Art and Symbolism, by the Rev. W. H. Withrow, M.A., of Niagara; "Modern Dress" by Mrs. C. R. Corson; "A North American Zollverein," by Chas. Lind sey, Esq.; a description of "A Night of Terror in the Backwoods," by Mrs. Muchall, (not quite equal in style and tone to the other matter), and a capital article on the Recent Struggle in the Ontario Legislature, by a "By-stander." Marguerite Knecler is continued in a style equal to its commencement, and the poetical contributions include "Marching In," "February," "The Bachelor's Wife," "One Woman's Valentine." The selections are excellent, embracing a biographical sketch of Henry Cavendish, a study of Hibernicisms in Philosophy, by the Duke of Argyle, and a critique upon Helps as an Essayist, by the Rev. Charles Kingsley.