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DIARY FOR NOVEMBER.

1. Friday *All Saints.*
2. Sat. .. Articles, &c., to be left with Secretary Law Society.
3. SUN.. 20*th Sunday after Trinity.*
10 SUN.. 21*st Sunday after Trinity*
13. Wed.. Last day for service for County Court.
17. SUN.. 22*nd Sunday after Trinity.*
18. Mon.. Michaelmas Term commences.
22. Sat. .. Declare for County Court.
24. SUN.. 23*rd Sunday after Trinity.*
27. Wed.. Notices for Chancery re-hearing Term to be served Appeals from Chancery Chambers.
30. Sat. .. *St. Andrew.*

THE

Upper Canada Law Journal.

NOVEMBER, 1867.

THE MARRIAGE LAWS.—No. III.

The articles of capitulation, drawn up at the time of the cession of Canada, lie at the very root of the question we are now approaching. Upon them was based, and in view of them is to be construed, all the subsequent legislation of the Home and the Colonial Governments in regard to the religious privileges of the Roman Catholic clergy and population. It is laid down by Lord Mansfield in the famous case of *Campbell* v. *Hall*, Cowp. 204, "That the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning," p. 208.

Now among the articles of capitulation, relevant to the question in hand, demanded by De Ramsay, in command of the Town of Quebec, and acceded to by Admiral Saunders and General Townshend, on Sept. 18, 1759, is the following:—"That the exercise of the Catholic and Apostolic and Roman religion, shall be maintained, and that safeguards shall be granted to the houses of the clergy and to the monasteries, particularly to his Lordship the Bishop of Quebec, who, animated with zeal for religion and charity for the people of his diocese, desires to reside in it constantly, to exercise freely and with that decency which his character and the sacred offices of the Roman religion require his episcopal authority in the town of Quebec, whenever he shall think proper, until the possession of Canada shall be decided by a treaty between their most Christian and Britannic Majesties." Whereto the response was:—"The free exercise of the Roman religion is granted, likewise safeguards to all religious persons, as well as to the Bishop, who shall be at liberty to come and exercise, freely and with decency the functions of his office, whenever he shall think proper, until the possession of Canada shall have been decided between their Britannic and most Christian Majesties." Art. VI.

It will be observed that this article is to be regarded as merely provisional, and we find very important modifications in the terms granted, when the final articles of capitulation were concluded at Montreal, on September 8th, 1760, between Major-General Amherst and the Marquis de Vaudreuil, Governor of Canada. During the interval, Laval, Bishop of Quebec, had died—a fact which explains the provisions of some of these final articles, which we now proceed to cite, so far as necessary for our purpose:—

"The free exercise of the Catholic apostolic and Roman religion, shall subsist entire, in such manner that all the states and the people of the towns and countries, places and distant ports, shall continue to assemble in the churches and to frequent the sacraments, as heretofore, without being molested in any manner, directly or indirectly; these people shall be obliged by the English Government, to pay their priests the tithes and all the taxes they were used to pay under the Government of His most Christian Majesty.—*Granted as to the free exercise of their religion. The obligation of paying tithes to the priests will depend on the King's pleasure.*" Art. XXVII.

"The Chapter, Priests, Curates and Missionaries, shall continue with an entire liberty, their exercise and function of cures, in the parishes of the towns and countries.—*Granted.*" Art. XXVIII.

"The Grand Vicars, named by the Chapter to administer to the diocese during the vacancy of the Episcopal See, shall have liberty to dwell in the towns or country parishes, as they shall think proper. They shall at all times be free to visit the different parishes of the diocese, with the ordinary ceremonies, and exercise all the jurisdiction they exercised under the French Dominion. They shall enjoy the same rights in case of the death of the future Bishop, of which mention will be made in the following article. —*Granted, except what regards the following article.*" Art. XXIX.

"If by the Treaty of Peace, Canada should remain in the power of His Britannic Majesty, His most Christian Majesty shall continue to name the bishop of the colony, who shall always be of the Roman Communion, and under whose authority the people shall exercise the Roman religion.—*Refused.*" Art. XXX.

"The Bishop shall, in case of need, establish new parishes, and provide for the rebuilding of his cathedral and Episcopal palace, &c., and exercise all the jurisdiction which his predecessor exercised under the French Dominion, save that an oath of fidelity or a promise to do nothing contrary to His Britannic Majesty's service, may be required of him.—*This article is comprised under the foregoing (vus le précédent).*" Art. XXXI.

"The French and Canadians shall continue to be governed according to the custom of Paris, and the laws and usages established for this country, &c. &c.—*They become subjects of the King.*" Art. XLII.

By the Treaty of Paris (Feb. 10th, 1763) Canada was secured to the British Crown, and by article Four of that Treaty the following limited undertaking was entered into on the part of Geo. III.:—"His Britannic Majesty agrees to grant the liberty of the Catholic religion to the inhabitants of Canada: He will consequently give the most precise and most effectual orders that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Roman Catholic Church, *as far as the laws of Great Britain permit.*"

The Royal Proclamation of the 7th October, of the same year, contains nothing that particularly affects the question under discussion, and it was moreover revoked and annulled by the first legislative enactment relating to Canada, known as "The Quebec Act." This statute (14 Geo. III. cap. 83, 1774) entitled "An act for making more effectual provision for the government of the Province of Quebec, in North America," in its chief parts is to be found among the Imperial Enactments, collected at the beginning of the Consolidated Statutes of Canada, p. x. At present we refer specially to the 5th section which is of abiding significance, and may be regarded as the very charter which secures and defines the liberties of the Roman Catholic population of this country. It carries out precisely the above-cited provision of the Treaty of Paris, and extends in its scope beyond the concessions of the several articles of capitulation in recognizing and ascertaining the religious rights and privileges of priests and people. "And for the more perfect security and ease of the minds of the inhabitants of the said Province, it is hereby declared, that His Majesty's subjects, professing the religion of the Church of Rome, of and in the said Province of Quebec, may have, hold and enjoy, the free exercise of the religion of the Church of Rome, subject to the King's supremacy, declared and established by an act, made in the first year of the reign of Queen Elizabeth, over all the dominions and countries which then did, or thereafter should belong, to the Imperial Crown of this realm; and that the clergy of the said Church may hold, receive and enjoy their accustomed dues and rights, with respect to such persons only as shall profess the said religion," 14 Geo. III. cap. 83, sec. 5. By sec. 8, all the Canadian subjects, as to their property and possessions and civil rights were explicitly placed, or replaced, as some will have it, under the old French system of laws which obtained before the conquest, therein called the laws of Canada — which system was subject however to displacement when in conflict with their paramount duty of allegiance and subjection to the Crown and Parliament of Great Britain, and subject also to modification by the colonial authorities.

The next Imperial Act (31 Geo. III. cap. 31: 1791; Con. Stats. Can. p. xv.) provides for the separation of the Province of Quebec and the establishment thereout of the Provinces of Upper and Lower Canada, gives the two local legislatures thereby formed, the right to vary or repeal any existing laws, statutes and ordinances; and in sec. 35, specially preserves intact the privileges of the clergy of the Church of Rome, as provided for in the Quebec Act. In the words of Mr Pitt, the intention of the framers of this act was "to continue the laws then in force in Quebec—unless the assembly of each Province chose to alter them." In Lower Canada this was not done, but in Upper Canada, where the population was composed of English-speaking emigrants, settlers and natives, this right was exercised on the very earliest opportunity. By P. S. U. C. 32 Geo. III. cap. 1: 1792; the Upper

Canadian Parliament abolished the authority of the old "Laws of Canada," and declared that in all matters of controversy relative to property and civil rights, resort should be had to the English Laws, as the rule for the decision of the same. None of the ordinances saved by sec. 4 of this act, related to other than mercantile matters. Sec. 6 provides that "Nothing in this act shall vary or interfere with, or be construed to vary or interfere with any of the subsisting provisions respecting ecclesiastical rights or dues within this Province." See Con. Stats. U. C. cap. 9, preamble.

The list of those who passed the examination for call and admission, and for the law scholarships, during this Michaelmas Term, received too late for insertion in this number.

SELECTIONS.

TRIAL BY JURY.

(*Continued from page 261.*)

A word concerning trial by jury in the British colonies and dependencies. Some of them possess the system, others do not. Those which have it are, generally speaking, the most peaceful and flourishing, but the subject is too lengthy for more than a passing remark, on account of savage races of men being mixed up with the white inhabitants in questions concerning land, &c., as in New Zealand, the Cape of Good Hope, &c. The subject of trial by jury in foreign countries does not admit of detail on account of the limits prescribed to the essay. Neither does this branch of the question affect the arguments concerning the institution in Great Britain. The civil or Roman law, in fact, the institutes of Justinian, to this day, furnish the basis of legislation to continental Europe. In England, the protectorate of the common law has raised an impassable barrier to the invasive spirit of the civil or Roman law. Trial by jury, it is true, does exist in many European nations; but they have at the same time many other laws which take away from its value. In France, for example, the "*loi de suspect*" enables a man to be arrested, imprisoned, or transported, merely at the discretion of the authorities, if they *suspect* he may *intend* to commit any act, which they might not approve of. In Germany, Italy, the United States, &c., the violent agitation which led to the recent wars, produced many acts of lawlessness and oppression. It is useless, in a short essay like this, to allude to trials by jury in such countries. It is to be hoped that if peace continue, the inhabitants of these countries will seek to work out more carefully the principle of trial by jury, which is the "keystone of British liberty." It is true that in Great Britain and Ireland, when an Act of Parliament suspends the *Habeas Corpus* Act, persons can be detained in prison without being tried and convicted; but this measure is in force for a limited period only, and in the disturbed part of the kingdom mentioned in the Act of suspension. Moreover, the representatives of the people in the House of Commons would never sanction the suspension of the *Habeas Corpus* Act, were it not necessary for the safety of the realm. It may be as well to explain to the general reader, that *habeas corpus* is the name of a writ, by which every person who is imprisoned before trial, &c., may demand to be brought before some competent court, that he may be either convicted or liberated.

Respecting the beneficial influence of trial by jury on the public, as a national institution—politically, socially, morally—the preceding part of our essay sufficiently explains the political branch of this subject. We shall now proceed to the consideration of the beneficial influence of the institution.

I. The beneficial influence of trial by jury on the judges must be evident to every person who has considered the subject in the spirit of a free-born Briton. It is an old proverb "that two heads are better than one." Solomon, the wise man, has written—not once but twice—that "in the multitude of counsellors there is safety." The strain upon the intellectual faculties of the judges if they were to unite the functions of judges and jurors, would be undesirable for many reasons. The value of the division of labour is acknowledged in most pursuits, and it is not improbable that if the minds of judges were continually overtaxed, they would not be able to follow all the facts of the multifarious causes brought before them with the same energy as jurymen, whose minds would be less fatigued. Then again, there is the responsibility. Twelve men who can share it between them, are less troubled by the weight of it than one or two men who have to bear it, especially in very perplexing cases—in which the life, or the character, or the fortune of a fellow-creature, depends upon the issue. In such cases, it is not unlikely that a judge of a severe disposition would be too severe, and that a judge of a mild disposition would be too lenient; thus justice would not be so well meted out. In a jury of twelve men it is to be supposed that there is a greater chance of obtaining men of various positions, which would serve to counteract the tendency to an excess of either undue severity or leniency. "In acting for the public," said a magistrate, "he regretted that the case could not be sent before a jury—for it was always more satisfactory to him to have the opinion of twelve men, than to take the responsibility of deciding himself."

To prove that in certain cases one man is not equal to twelve men to decide a cause—suppose a jury to consist of *one* man? Is it

to be imagined that the results would be as satisfactory to the public, as though the jury were to consist, as at present, of twelve men? Would the *one* juryman have in all cases the same clear views of the causes?—would he discriminate with the same accuracy?—would he decide with the same amount of judgment?—would he be able to sift the true from the false with the same nicety—since one mind, instead of twelve minds, would be engaged in weighing the evidence, and, in all probability, would not be competent to take so extended a view of the case, and unravel the complications that might exist? It is to be remembered that some cases are very intricate—not only from the result of circumstances, but from artfulness, or fraudulent designs. In a word, would the public have the same confidence in the soundness of the verdict of this one juryman, as in that of twelve jurymen? If you—I say to the reader—were a plaintiff or defendant in a cause, would you *prefer* your cause to be decided in this manner? If anyone would not prefer one juryman instead of twelve jurors, why should he prefer one judge to act alone, instead of twelve jurymen, with a judge to assist them and the case? The same argument will hold good respecting one or two, or more jurymen or judges, deciding causes, instead of the present number as established by law. It may be said that judges are more able and learned in the law than jurymen; and this leads us to the consideration of the question, whether one or more judges to decide trials would not be preferable to having any jury at all—in fact, to abolish the use of a jury, and allow the judges to adjudicate. It has been argued, judges are learned, and jurymen are often, comparatively, very ignorant, or, at all events, they are inferior to the judges in legal lore. It is preferable, some may say, to rely upon the decisions of men profoundly skilled in the law. Sir John Hawles, who was solicitor-general in the reign of William III., observes in a celebrated work of his:

"Though judges are more able than jurymen, yet jurymen are likely to be less corrupt than judges—especially in all cases where the powers of the prerogative and the rights of the people are in dispute. * * Less dangers will arise from the mistakes of jurymen than from the corruption of judges—besides improper verdicts will seldom occur; since juries will avail themselves of the abilities and learning of the judges, by consulting them on all points of law—and thus, to the advantage of information will be added that of impartiality. * * Had our wise and wary ancestors thought fit to depend so far upon the contingent honesty of judges, they needed not to have been so zealous to continue the usage of juries." "Although we live at present under a benign government," says a modern writer, "and our Crown lawyers—Liberal or Conservative—are pre-eminent for private and public integrity, yet Lord Brougham and Lord Lyndhurst, and other great statesmen, have warned us that it 'may not always be so." *Trial by Jury, the Birthright of the people of England*, p 81

The salutary effect of juries saving judges from the temptations and unpleasant positions which might occur to them if they were allowed to decide all cases without juries, could be proved in many ways. When judges were removable at the pleasure of the Crown, history records that many judges were not exempt from the human infirmity of preferring their own personal interests to those of justice and of the public. They feared to lose their places. It is far from satisfactory for a judge to decide, in times of great political excitement, in trials for political offences. In the trials of the Fenian conspirators, for instance, what a benefit it was to the judges to have a jury to decide upon the facts of the cases. Trial by jury serves, in a great measure, to protect the judges from the imputation of partiality, and in any case, does not require them to act contrary to the wishes or political bias of the government which appointed them. If they were to have the power to acquit, they might offend the government, or the class to which they socially belong; if they could convict, they might become odious to a large section of the people. It may be said that as a judge is not in the present removable, he has no inducement to act otherwise than with strict impartiality; but he may have sons and daughters, the sons to advance through interest in high quarters, and the daughters to marry in a certain class. There would be high-minded judges to despise all unworthy acts, but the cases of two of the king's justices, Empson and Dudley, together with the infamous conduct of Judge Jeffreys, are warnings not to expose even judges to unnecessary temptations. Some of the judges themselves have given a convincing practical proof of the superiority of trial by jury over that by judges only. "In 1620," relates a writer, "the conduct of Chief Justice Holt and his brethren in the Queen's Bench was called in question by Lady Bridgeman for an alleged illegal act in the course of a suit. These judges were summoned to appear before the House of Lords. They refused. Why? They denied the jurisdiction of the House of Lords, and insisted upon their undoubted rights as Englishmen to a trial by jury of their equals, in case they in anything were accused of having done wrong, and claimed the benefit of being tried according to *the well-known course of the common law.*"* If judges have thought it not prudent to be tried except by a jury, it is certain that other persons ought to think the same.

II. The effects of serving on a jury upon the class from which common jurymen are taken, must be very advantageous to the well-being of a nation.

We suspect that a free constitutional country could not continue to exist in the same state of freedom and order, if the practical education which serving on a jury confers,

* "Trial by Jury, the Birthright of the People of England," p. 106.

were withdrawn from so large a portion of its inhabitants. A juryman indirectly gains invaluable knowledge from the duties that he is obliged to perform. He acquires a knowledge of men, manners and things; he learns to make a due discrimination between right and wrong, between truth and falsehood, and is imperceptibly taught to recognise the difference which there is between arbitrary power, and liberty and order. Then again, the distinction which there is between liberty and license is forced upon his notice. On the one hand, he feels himself called upon to shield his fellow-countrymen from wrong and oppression, whether from the government or individuals; on the other hand, he equally sees himself called upon to prevent persons setting order and just dealing at defiance. Hence the juryman, with his mind thus disciplined, is better able to form sound opinions upon political and social matters, and to become a loyal, but free and order-loving member of the community. He instinctively respects the constitution and the laws of his country, because he is aware that he himself has often assisted to support the former and to administer the latter. He may be a reformer, but he has learnt from his past experience as a juryman, that to adopt the legal means is the only proper method of carrying out his views.

In criminal trials especially, the juryman is taught an instructive lesson which may well serve to make him a better man, in case he should need it. He sees the dire consequences of guilt in the miserable criminals brought before him, and a solemn warning is thus given to him, which he cannot reject, if he be a man of ordinary thoughtfulness, that "honesty is the best policy."

The intelligence and general knowledge of a juryman are greatly increased by the nature of the proceedings in a court of justice. The judges and the lawyers are well educated men. The pleadings of the lawyers, and the summing up of the judge in a trial, must certainly convey instruction and teach a lesson on the right use of words, likely to improve an ordinary juryman, and extend the narrower bounds of his thoughts and language.

III. The overwhelming disadvantage to suitors and prisoners, of having their cases tried by judges only, instead of tried by a jury, would be that both the facts of the case and the law would be in the same hands. The meaning of the famous legal maxim, "Fact for the jury, law for the judges," ought to be thoroughly understood by everybody. The office of the judge is to explain the law to the jury, and state his view of the case in his summing up, which must not contain his verdict; but since "all matter of law arises out of matter of fact," so till this point be settled by the jury there is no room for law.* After the verdict has been given by the jury, the judge carries the verdict into effect according to the law of the land, or in other words, pronounces the judgment which the law makes the consequence of the verdict.

The celebrated Blackstone gives the following reasons for the superiority of trial by jury over that by judges only :—

"If the administration by justice were entirely entrusted to the magistracy, a select body of men, and those generally chosen by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. * * In settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. * * * Trial by jury, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. It is therefore, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable constitution in all its rights; to restore it to its ancient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to *amend* it wherever it is defective; and, above all, to guard with the most jealous circumspection against the introduction of new and and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty."

If this opinion, given by so eminent a man, does not convince the reader of the value of trial by jury, nothing else can. It may be added, that if a person is not satisfied with the decision of a jury of men whom he can challenge or object to within a reasonable limit before trial, he will not be contented with any legal process that human wisdom can devise. He can move for a new trial (in civil cases), and, if there be sufficient grounds for the proceeding, a new trial will be granted him. In conclusion, I will merely give the words of Lord Camden, as quoted by Earl Russell in his essay on the British Constitution.

"The discretion of a judge is the law of a tyrant; it is always unknown; it differs in different men; it is casual, and depends upon constitution, temper, passion. In the best, it is oftentimes caprice; in the worst, it is every vice and folly to which human nature is liable."

Nor must the security to life which a coroner's jury affords against foul-play and murder be forgotten. Every suspicious case of sudden or of violent death is inquired into. In countries where there are no investigations made in this manner the number of deaths by violence and poisoning is, with few exceptions,

* Chief Justice Vaughan—Bushell's case.

much greater than in those which make these inquiries by means of a coroner's jury.

In a country like Great Britain it takes a long time to induce the legislature to amend any time-honoured institution, even if it imperatively requires some judicious alterations to adapt it to the gradual changes which time has brought about in the condition of the community. The present method of summoning jurymen, is one that calls for amendment in some, if not in all localities. If the system of trial by jury is admirably adapted to secure the administration of justice, it must likewise be remembered that even a sound and beneficial system requires to be fairly and properly carried out. If it be not so, it will in time lead many persons to regard it with indifference, if not with dislike. We cannot do better than copy some of the remarks on this subject which appeared in an article, published in a daily newspaper: —

"It is no secret that the system of summoning juries is almost universally found to be objectionable. A tradesman may be taken from his business for a whole day, kept trying some trumpery small debt case in the Lord Mayor's Court, and then presented for his services with the handsome remuneration of eightpence sterling. He may be sent to the Common Law Courts, detained there for hours or days, and receive two shillings. If he happens to be on the special jury list, he certainly gets his guinea for the case he tries. But, as he is summoned only for that particular case, he must dance attendance in the court till it is called in turn, even though he have to wait for a week or longer. If he leaves, even for an hour, the trial may come on in the interval, and he himself fined for his absence. He may be chosen on a coroner's inquest, 'sit' on a body, and get nothing at all for his unpleasant task. As if to render the evil intolerable, the lists from which jurymen are selected, are made out with the most capricious irregularity. One man will be summoned twice or thrice every year; another will escape for ten years or even longer, although he has taken no steps to evade the duty. Now, there are a good many citizens who do not object to take their share of the work, but who grumble at being burdened with double labour, while their neighbours are never called on to perform the task. There are others who considered it such a nuisance that they think almost any means of escape lawful. Now, the wrong might be easily remedied, and its amendment is a mere question of detail. Let the lists be fairly made out and exhausted in rotation, and the willing class of jurymen will have their objections removed, while the reluctant or selfish will have no shadow of excuse for shirking the performance of a necessary duty. We simply take the institution as one which has in practice worked admirably, and proved an efficient bulwark against the encroachments of prerogative and power. Such being its worth, we are bound to see that nothing interferes with its successful working. Bad management, irregularity, and uncertainty have created a dislike to the system, when the fault really lies in the administration alone. The area of selection should be widened, and no room left for the operation of favouritism or neglect. If all citizens who are liable and qualified were to perform their proper share of so important a public duty, the labour would not press unduly on a small number, and there would be less temptation to shirk it."

It is also related that "judges on the bench, responding to complaints from indignant jurymen, have expressed their opinions very freely on their subject, and their views on the necessary reform point in the direction we have indicated." We admit at once that the judges are much more competent than we are to form sound opinions respecting the matter; but it occurs to us, that the principle of volunteering which has worked such wonders in raising a national force of volunteers to defend the nation, might be extended to the system of forming juries. As is well known, all men are not gifted alike, some can scarcely arrive at a correct opinion about their own affairs, much less concerning those of other people; others feel themselves almost physically and mentally incompetent satisfactorily to undertake the weighty task of passing a verdict upon disputes and crimes often of the most puzzling nature. There are, on the contrary, men who are clever at this kind of work, and who feel their own powers: very frequently they are not averse to undertake the duty. If an appeal were made to the inhabitants of every district for volunteer jurymen, it is not improbable that many would be found willing to come forward. If after this any deficiency in the requisite number of jurors were to occur, the lists of those liable to serve ought to be exhausted in rotation, and the required number made up. It would be probable, that by these means, a large proportion of willing jurymen who feel themselves mentally able to undertake the duty efficiently, would be secured with advantage to the interests of justice and to those of the community. At the same time, it is to be recommended that jurymen be better paid to recompense them for their loss of time, and divest them of the feeling, too prevalent among them, that they are shut up "in a box, whether they will or not, until they do 'well and truly try' some case or other possessing for them not the slightest earthly interest."

It is a strange anomaly in our laws, that one of the most important duties performed in a trial by jury is so inadequately remunerated. The judge is well paid, the lawyers are highly feed, but the jurors, who do so much, are scantily rewarded for their services. It is true that, a special juryman receives a guinea for the case he tries, but he has to be in attendance until the trial shall take place, and he may have to wait a considerable space of time. The number of judges and of the courts, above all in the metropolis, are insufficient, particularly for special jury cases, and many causes have to wait too long until their turns come. The number of the judges and of the courts that sit have not been augmented to meet the increase of population, and consequently of causes. No persons other than those who

have had to endure the hours and even days of weary, profitless waiting connected with a trial, can form a conception of the loss of time it may involve. We are of the opinion that jurymen ought to be properly paid. The payment of jurors is not a modern innovation. We read in Roberts' Southern Counties, that in 1485 (Richard III.), "there is evidence of payment to the jury for their expenses and labour, and for breakfast after they had delivered their verdict." There is a happy medium even in remunerating a jury; our opinion is, that jurymen ought to be paid for the time they really lose. With a stronger staff of judges, and additional courts to sit in, the waiting for the trials to come on in turn would be abridged, and so great a loss of time avoided.* We are not in favour of a uniform rule of payment to members of the same jury. Let each juryman be paid according to his station in life and calling, and in conformity to the scale of payment to witnesses in criminal cases—so much a day for a gentleman and a professional man—so much a day for a tradesman, &c., and so much a day for a mechanic, &c. This would save needless expense, meet the requirements of the case, and arrest the growing dislike of people, who may have pressing affairs of their own which demand their attention, to serve on juries. The time may come when the popular dislike to an ill-paid, forced service, may endanger the stability of the institution. The jury man of 1485, was paid "for his expenses and labour," why should not the juryman of 1866, &c., be paid a reasonable amount for his services.

In reference to the question, as to whether the age at which jurors can claim exemption should be made sixty-five instead of sixty, we hold that men of sixty-five, as they generally possess more experience in worldly matters, and are often in more easy circumstances than younger men, should be made to serve, provided they be properly paid and selected and allowed the requisite refreshments which their time of life demands. Judges are not disqualified at sixty, why should jurymen? but perhaps they ought to be exempted from serving on criminal juries, as the strain upon their nerves, likely to be weakened by age, might injure their health if the responsibility of deciding upon the life or death of a fellow-creature were to be incurred by their verdict. It is to be remembered that a judge does not decide such questions in a jury box.

As to whether unanimity should be required for a verdict, there is much to be said for and against it.† In Scotland, where an ordinary jury is composed of fifteen men, unanimity is not required; but it is to be recollected that in Scotland, trial by jury is not used in many cases in which it is employed in England. Whether from this or other causes, trial by jury is not generally so highly esteemed there as in England. In criminal trials, as the writer has seen, the effects of some of the jury being for a verdict of *not* guilty, and of others of the jury being for a verdict of guilty, has sometimes an unpleasant result. If the majority of a jury bring in a verdict of guilty, and a person is condemned to death, or some severe punishment, doubts are excited in the minds of some of the community, as to the guilt of the prisoner. "Some of the jury said he is not guilty, why are they not right, and the others who said he is guilty, wrong!" is the argument. In fact, the same individual is pronounced to be guilty and not guilty, by different members of the same tribunal. He cannot be both. Does not the dignity of the law suffer from this indecision in a court of justice. It is very difficult to get men to agree in a unanimous verdict, when the law allows some of them to shelter themselves from moral resposibility, and throw it upon others of a more determined frame of mind; it permits the timid to cast an undue burden upon the conscientious, when either an unpleasant or unpopular duty ought to be performed, in addition to which, if a prisoner is acquitted, and a minority of the jurors are for a verdict of guilty, a needless stigma will remain upon him, perhaps unjustly. Besides, in times of great popular excitement and agitation, the majority of a jury if they convict a popular person may be specially singled out for public execration, insult, probably persecution, because the minority of the jury thought the prisoner *not* guilty. Party spirit would seize hold of the opinion of the minority to justify an accusation against opponents. The good men among the jury thought him not guilty; the base, corrupt ones found him guilty Such are the arguments likely to be used. Now, if a jury of twelve men must agree either one way or the other, the whole jury is blamed or not, and there is no opportunity of proving the guilt or innocence of any one who has been tried, by citing a division of opinion among the jury. There is unanimity either one way or the other, and the public are spared the doubts and controversies which the other system is capable of giving rise to. We suspect that one of the reasons why our ancestors in England insisted upon unanimity,* was that it made it less easily for those in power, or others, to tamper with the jury. It is easier to find out and bribe seven men than twelve. If none of the drawbacks we have indicated have ever attended a verdict by majority in Scotland, it is to be considered that Scotland has a very small population, and some of the elements of discord are not very strong among them. Transport the scene into Ireland, and the results might be different. Neverthe-

* We had written our Essay and sent it in, before the Government announced that the number of the judges are to be increased. The number of suits which are constantly deferred on account of the lack of judges to hear them, are too numerous for any half-measures to be effective. Some of the judges have also to preside in criminal cases, which creates delays in civil actions; and many suitors are, as it were, forced to avail themselves of county courts to obtain more speedy justice; this militates against trial by jury.

† See next page.

* Debate between Lord Campbell and Lord Lyndhurst 1859. Hansard's Parliamentary Debates, vol. 150.

less, as a verdict by majority does, in its turn, possess its merits, we think it might be adopted in England; not as a matter of compulsion, but of *option*, in civil cases at first, to see how it work. If both sides were agreed, suitors might be allowed it.

A word to those who would evade their duties as jurors. If you, we say to them, dislike to serve on a jury to settle the affairs of your fellow countrymen, you should bear in mind that other people are liable to be called upon to settle your affairs. You cannot say how soon. You might be ill-treated, robbed, run over, injured in some railway or other accident; any one of you might meet with some suspicious death, or die suddenly. Juries would be required to mete out justice in your respective cases. How mean of you to require that of others in public matters which you will not, if you can help it, perform for them. If you are deaf to this appeal, it is almost useless to mention it to you as one of the duties which you have to perform as members of a great nation. We may add, that if the nature of the duties should make you reluctant, it requires no learning to perform the functions of a juror. "It requires no more than a coolness in thinking, and a mind above being carried away by prejudices or feelings. The juror is to remember that it is the jury which is the judge as to the *facts* of the case, not the judge who sits on the bench. It is the duty of a juror to be totally regardless of every consideration but that of strict justice. He should make up his mind to do *what is right*. He is neither to regard the rank in life, nor the wealth of any suitor or prisoner. In a court of justice all men, under these circumstances, sink to an equality. A juror, after he has formed his conscientious opinion, ought not to allow himself to be coerced, or flattered, or persuaded by the talk of others, into a different opinion. He is invested with a solemn trust, and this trust he must preserve with scrupulous care, as consonant with the dearest interests of society."—*Chambers.*

Respecting what classes of men, not now eligible to serve as jurors, should be admitted to serve, it may be observed that great caution is required to prevent men, who have no property, deciding questions which relate to disputes about property, claims, debts, damages, &c. It is simply because having no property of their own to manage, they are not versed in any details concerning such matters.

It may be said "Who talks of destroying jury trial? It may be answered that the tendency of county and of some other courts is to gradually bring it more and more into disuse. We are of the opinion that the legal profession would greatly increase their business, if trial by jury in civil cases was rendered a cheaper and a more expeditious process. How to explain this would be matter enough for a separate essay.

The remarkable union of a learned judge and an independent, impartial jury to decide a cause, has taken away all real grounds for any sneers at them as an ignorant tribunal. Such a tribunal, which has withstood the storms of centuries, is not the issue of the prudence of this or that council or senate, which perfected it in a day or in a year; but it is the production of the various experiences and appliances of the wisest thing in the inferior world, to wit, time, which, as it discovers day by day new inconveniences, so it successfully applies new remedies; "so that (continues Sir Matthew Hale) it is a great adventure to go about to alter it; without very great necessity, and under the utmost demand of safety imaginable."*

THE UNANIMITY OF JURIES.†

Dear Sir,—Observing in the papers that you have proposed in the Convention to abolish the unanimity of juries as a requisite for a verdict in civil cases, I beg leave to address to you a few remarks on a subject which has occupied my mind for many years, and which I consider of vital importance to our whole administration of justice. Long ago I gave (in my Civil Liberty and Self-Government) some of the reasons which induced me to disagree with those jurists and statesmen who consider unanimity a necessary, and even a sacred element of our honoured jury-trial. Further observation and study have not only confirmed me in my opinion but have greatly strengthened my conviction that the unanimity principle ought to be given up, if the jury-trial is to remain in harmony with the altered circumstances which result from the progress and general change of things. Murmurs against the jury-trial have occasionally been heard among the lawyers, and it is by no means certain that without some change like that which I am going to propose, the trial by jury, one of the abutements on which the arch of civil liberty rests, can be prevented from giving way in the course of time.

The present constitution of our state permits litigants to waive the jury, in civil cases, if they freely agree to do so. This would indicate that the adoption of verdicts by a majority of the jurors, in civil cases, would not meet with insuperable difficulty; but it seems to me even more important and more consonant with sound reasoning to abandon the unanimity principle in penal cases. The administration of justice is a sacred cause in all cases, and the decision concerning property and rights and, frequently, the whole career of a man or the fate of an orphan, is, indeed, sufficiently important not to adopt the majority principle in jury-trials, if it implies any lack of protection, or if there is an element of insecurity in it; and if there is not, then there are many reasons, as we shall see, why it ought to be adopted in criminal cases as well as in civil.

* Prize Essay for Law Amendment Society, by George Overend, Esq.—Eds. L. J.

† A letter from Dr. Francis Lieber, to a member of the New York Constitutional Convention revised with additions by the author.—Eds. L. J.

At the beginning of my "Reflections," I stated the different causes of the failure of justice in the present time. Circumstances obliged me to write that pamphlet in great haste, in which I forgot to enumerate among these causes the non-agreement of jurors. It would be a useful piece of information, and an important addition to the statistics of the times, if the Convention could ascertain, through our able statistician, the percentage of failures of trials resulting from the non-agreement of jurors in civil, in criminal, and especially in capital cases. This failure of agreement has begun to show itself in England likewise since the coarse means of forcing the jury to agree, by the strange logic of hunger, cold, and darkness, has been given up.

In Scotland no unanimity of the jury is required in penal trials; nor in France, Italy, Germany, nor in any country whatever, except England and the United States; and in the English law it has only come to be gradually established in the course of legal changes, and by no means according to a principle clearly established from the beginning. The unanimity principle has led to strange results. Not only were jurors formerly forced by physicial means to agree in a moral and intellectual point of view, but in the earlier times it happened that a verdict was taken from eleven jurors, if they agreed, and "the refractory juror" was committed to prison! (Guide to English juries, 1682. I take the quotation from Forsyth, History of Trial by Jury, 1855.)

Under Henry II. it was established that twelve jurors should agree in order to determine a question, but the "afforcement" of the jury meant that as long as twelve jurors did not agree, others were added to the panel, until twelve out of this number, no matter how large, should agree one way or the other. This was changed occasionally. Under Edward III. it was "decided" that the verdict of less than twelve was a nullity. At present, in England, a verdict from less than twelve is sometimes taken by consent of both parties. There is nothing, either in the logic of the subject, or the strict conception of right, or in the historic development of the rule, that demands the unanimity of twelve men, and the only twelve men set apart to try a cause or case.

At first the jurors were the judges themselves, but in the course of time the jury, as judges of the fact, came to be separated from the bench as judges of the law, in the gradual developement of our *accusatorial* trial, as contradistinguished from the *inquisitorial* trial. It was a fortunate separation, which in no other country has been so clearly perfected. The English trial by jury is one of the great acquisitions in the developement of our race, but everything belonging to this species of trial as it exists at present, is by no means perfect: nor does the trial by jury form the only exception to the rule that all institutions needs must change or be modified in the course of time if they are intended to last and outlive centuries, or if they shall not become hindrances and causes of ailments instead of living portions of a healthy organism.

The French and German rule, and, I believe, the Italian also, is, that if seven jurors are against five, the judges retire, and if the bench decides with the five against the seven, the verdict is on the side of the five. If eight jurors agree against four, it is a verdict, in capital as well as in common criminal cases. There is no civil jury in France, Germany, Italy, Belgium, or any country on the continent of Europe.

This seems to me artificial and not in harmony with our conception of the judge, who stands between the parties, especially so when the State, the Crown, or the People, is one of the two parties; nor in harmony with the important idea (although we Americans have unfortunately given it up in many cases) that the judges of the fact and those of the law must be distinctly separated. The judge, in the French trial, takes part in the trying, frequently offensively so. He is the chief interogator; he intimates, and not unfrequently insinuates. This would be wholly repugnant to our conceptions and feelings, and, may the judge for ever keep with the American and the English people his independent, high position *between* and *above* the parties!

On the other hand, what is unanimity worth when it is enforced; or when the jury is "out" any length of time, which proves that the formal unanimity, the outward agreement, is merely *accomodative* unanimity, if I may make a word? Such a verdict is not an intrinsically truthful one; the unanimity is a real "afforcement" or artificial. Again, the unanimity principle puts it in the power of any refractory juror, possibly sympathizing more with crime than with society and right, to defeat the ends of justice by "holding out." Every one remembers cases of the plainest and of well-proved atrocity going unpunished because of one or two jurors resisting the others, either from positively wicked motives or some mawkish reasons, which ought to have prevented them from going into the jury-box altogether.

I ask, then, why not adopt this rule: *Each jury shall consist of twelve jurors, the agreement of two-thirds of whom shall be sufficient for a verdict, in all cases, both civil and penal, except in capital cases, when three-fourths must agree to make a verdict valid. But the foreman, in rendering the verdict, shall state how many jurors have agreed.*

I have never heard, nor seen in print, any objection to the passage above alluded to, in which I have suggested the abandoning of unanimity, other than this that people, the criminal included, would not be satisfied with a verdict, if they knew that some jurors did not agree. As to the criminal, let us leave him alone. I can assure all persons who have investigated this subject less than I have, that

there are very few convicts satisfied with their verdict.

The worst among them will acknowledge that they have committed crimes indeed, but not the one for which they are sentenced, or they will insist upon the falsehood of a great deal of the testimony on which they are convicted, or the illegality of the verdict.

The objection to the non-unanimity principle is not founded on any physcologic ground. How much stronger is the fact that all of us have to abide by the decision of the majority in the most delicate cases, when Supreme Courts decide constitutional questions, and we do not only know that there has been no unanimity in the court, but when we actually receive the *opinions* of the minority, and their whole arguments, which always seem the better ones to many, sometimes to a majority of the people! Ought we to abolish, then, the publication of the fact that a majority of the judges only and not the totality of them agreed with the decision? By no means. Daniel Webster said in my presence that the study of the Protests in the House of Lords (having been published in a separate volume) was to him the most instructive reading on constitutional law and history. May we not say something similar concerning many opinions of the minority of our supreme benches?

By the adoption of the rule which I have proposed, the great principle that no man's life, liberty, or property shall be jeoparded twice by trials in the courts of justice, would become a reality. At least, the contrary would become a rare exception. Why do all our constitutions lay down the principle that no one shall be tried twice for the same offence? Because it is one of the means by which despotic governments harass a citizen under disfavor, to try him over and over again; and because civil liberty demands that a man shall not be put twice to the vexation, expense, and anxiety for the same imputed offence. Now, the law says, if the jury finds no verdict it is no trial, and the indicted person may be tried over again. In reality, however, it is tantamount to repeated trial, when a person undergoes the trial, less only the verdict, and when he remains unprotected against most of the evils and dangers against which the Bill of Rights or Constitution intended to secure him This point, namely, the making of the noble principle in our constitution a reality and positive actuality, seems to me a most important motive why we should adopt the measure which I respectfully, but very urgently, recommend to the Convention. So long as we retain the unanimity principle, so long shall we necessarily have what virtually are repeated trials for the same offence.

In legislation, in politics, in all organizations, the unanimity principle savors of barbarism, or indicates at least a lack of development. The United States of the Netherlands could pass no law of importance, except by the unanimous consent of the States General. A single voice in the ancient Polish Diet could veto a measure. Does not perhaps something of this sort apply to our jury unanimity?

Whether it be so or not, I for one am convinced that we ought to adopt the other rule in order to give to our verdicts the character of perfect truthfulness, and to prevent the frequent failures of finding a verdict at all.—*American Law Register.*

UPPER CANADA REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

McGuffin v. Cline.

Setting aside order for arrest made by County Court Judge—Grounds for interference—Waiver—Order for too great an amount.

There is a broad distinction, on an application to set aside an order for an arrest, between an order based on affidavits deficient in statutable requirements and those containing statements from which different conclusions might fairly be drawn by different judges.

In a case coming under the latter head, a Judge in Chambers declined to set aside an order for arrest by a County Court Judge of competent authority, preferring to leave it to the full Court.

But as the order was granted for a sum greater than that warranted by the allegation in the affidavit, the amount for which defendant was held to bail was directed to be reduced to the correct sum, without setting aside the order.

The defendant does not, by putting in special bail, waive objections not of a technical nature.

(Chambers, September 13, 1867.)

On the 25th June, 1867, the defendant was arrested on a capias *ad respondendum* for $700. The writ was obtained on an order of the County Judge of Halton, made the same day, founded on an affidavit of plaintiff, setting forth a suit and a reference to arbitration, and an award by the arbitrator directing that defendant should pay plaintiff $500, and that defendant was justly indebted to plaintiff in that sum, and also in $80, or thereabouts, for costs of reference and award, also directed to be paid to him by the award.

The affidavit proceeded to state the grounds on which plaintiff sought to shew that the defendant was about to leave the country, &c.

Defendant was arrested on the same day, on the writ for $700

On 2nd July, a summons was obtained in Chambers, with stay of proceedings, to set aside the judge's order and the arrest, &c., on the grounds that the affidavit was insufficient; that the reasons assigned for plaintiff's belief were insufficient, untrue, and unfounded, &c.; that no copy of the award was served, or demand made; that the order was for $700, though only $580 sworn to, and because defendant was not about to quit Canada, &c.; or why the amount for which defendant is held to bail should not be reduced to $500.

On 4th July, the defendant's attorney in Milton, in ignorance of the issuing of the summons and stay of proceedings, put in special bail for defendant.

Many affidavits were filed on the hearing, on either side.

Ferguson shewed cause.
J. B Read contra.

Hagarty. J.—I at once say that I should not have ordered defendant's arrest on such an affidavit as seems to have satisfied the County Judge. But I have several times had occasion to express my difficulty in assuming the right to review the exercise of the judge's discretion in a matter clearly within his jurisdiction.

There are certain facts stated to support plaintiff's assertion that defendant is about to abscond. They do not satisfy my mind; but they seem to have satisfied his mind. The legislature gave him full power to form an opinion, and to act thereon. I expressed this doubt in *Allman et ux.* v. *Kensel*, 3 Pr. R 110. The present Chief Justice Draper, says in *Terry* v. *Comstock*, 6 U. C. L. J. 235, that if pressed to overrule such a decision, he would refer the matter to the full court. In the same volume similar doubts are expressed by Richards, C J., in *Swift* v. *Jones*, *Ib* 63, and again in *Palmer* v. *Rogers*, *Ib.* 188, and *Runciman* v. *Armstrong*, 2 U. C. L. J., N. S., 165.

In *Howland* v. *Roe*, within the last twelve or eighteen months, I had occasion to consider and review some of the cases on this subject, but the written judgment which I delivered was mislaid in Chambers. I there arrived at the conclusion that when a judge's order had been obtained on affidavits clearly omitting certain material statutable requirements (under the absconding debtors' act), another judge could properly set it aside.

The order made was moved against in term, but without success, 25 U. C Q B. 467. In *Demill* v. *Easterbrook*, 10 U. C. L. J. 246, Mr. Justice A. Wilson seemed to consider that one judge might review the conclusions arrived at by a brother judge, but he did not set aside the order.

I draw a broad distinction between the case of an order based on affidavits clearly deficient in certain statutable requirements, and those which state facts from which differently constituted minds may in good faith draw different conclusions I think I should wait the positive judgment of a Court in Banc before taking on myself to set aside a judge's order merely because the statements on which it was granted failed to bring my mind to the same conclusion as that of my fellow judge.

But the order before me seems open to the objection that it is granted for a sum far greater than is warranted by the allegation. The affidavits only pretend to charge a debt of $580, and the $80 being for costs, ought not to have formed part of the sum for which defendant was held to bail. I cannot understand on what idea the order issued, or the writ was marked for $700. It is certainly wrong for the excess above $500.

The earlier cases would seem to warrant a literal setting aside of the arrest on such an objection But in *Cunliffe* v. *Maltass*, 7 C. B. 701, the Court points out the difference under the new law, that "the arrest now takes place, not by force of the affidavit stating the amount of the debt, but for such amount as the judge in his discretion may think fit; such discretion, of course, to be exercised, not arbitrarily, but according to the practice of the Court." There the judge ordered that a *capias* should issue for £1050, the sum alleged in the affidavit to be due for principal on certain bills of exchange set out, and defendant was arrested therefor. It was found that as to one of the bills, a good cause of action was not stated in the affidavit. Defendant applied to the same judge (Patteson) to be discharged from custody, not to set aside the order. The judge refused so to do, but made an order reducing the amount for which defendant should be held to bail to £550, thinking that amount to be clearly due.

The Court, after full argument, refused to set aside either order, Wilde, C. J. saying, "that the judge had authority to make the order to the extent of £550 is conceded; the real objection is that he erroneously exercised his discretion by ordering the *capias* to issue for £1050. We, therefore, cannot set aside the order altogether. It was admitted on argument that the authorities show that the circumstance of a defendant being arrested for too large an amount affords no ground for his discharge, if the affidavit warrants the arrest to a certain extent." All the previous cases are reviewed in this judgment.

It is also sought to be shewn by affidavits of the defendant and others, that as a matter of fact he did not intend to leave the country. This is met by affidavits on the plaintiff's part, which shew that others besides the plaintiff believe that such was defendant's real intention.

I do not feel warranted in acting on this part of the application, on the conflicting evidence.

It is objected by the plaintiff that defendant has waived objections to the arrest by putting in special bail It seems from the law laid down in 1 Arch. 796 & 2 Lush Pr. 706, that this would only cure a technical objection, and not substantial defects. It is pointed out that the powers given by the statute to a court or judge to interfere is at "any time after the arrest." This is noticed in *Bowers et al.* v *Flower*, 3 Pr. R. 68, and by Coleridge, J., in *Walker* v *Lumb*, 9 Dowl. 131 The objection here is certainly more than technical.*

Cameron et al v. Murphy.

Ejectment—Letting in landlord to defend.

One Casselman, claiming under a Sheriff's sale, recovered possession by ejectment of the land in dispute against defendant, who had been his tenant at will since the purchase at sheriff's sale; and, on 20th July, 1866, turned him out of possession, but the premises were left vacant. On the 29th March, 1866, plaintiff commenced an ejectment against defendant, and on 8th June, 1867, was put in possession under a writ in this suit. Casselman then applied to set aside this judgment, and be let in to defend as landlord, but

Held, that he must be left to his ordinary remedy by ejectment.

[Chambers, September 13, 1867.]

This was an action of ejectment commenced on 29th March, 1866. Interlocutory judgment for default of appearance was signed 7th March last. A writ of possession was issued and plaintiffs were put in possession on 8th June last.

On 14th Aug., 1867, one Casselman applied to set aside this judgment, and to be allowed to defend the action as landlord of defendant Murphy. He swore that Murphy gave him no notice of this

* The case was subsequently compromised by the parties.—Rep.

action and that he did not know of it till the second week of July last; that he purchased Murphy's interest in the land some years ago, at sheriff's sale, and that Murphy then became his tenant at will, and was in possession as such about five years. He then brought ejectment, and on 20th July, 1866, was put in possession by the sheriff, and Murphy removed, but as he had no use for the land, he left the possession vacant. Nearly a year after, the plaintiffs were put in possession in the suit they had brought against Murphy, commenced a few days after Casselman's suit.

It appeared that when Casselman sued out process, on 23rd March, 1866, he did not claim title as Murphy's landlord, but, according to the the notice on the writ, as purchaser under the sheriff's sale on the judgment against Murphy.

It appeared from the affidavits that when plaintiffs' writ was served on Murphy, he had previously been served with ejectment process at Casselman's suit whereby title was claimed not on any relation of landlord and tenant, but on a wholly different ground. Casselman then recovered judgment, and ejected Murphy in July, 1866, and left the land vacant, and so it remained for eleven months. During all that time, Casselman was neither personally or by tenant in actual possession, and if the plaintiff or a stranger had entered on the vacant land, he would have been driven to his ejectment. Murphy had apparently not been heard of since his removal from the land in 1866.

O'Brien, shewed cause.

Beaty, contra.

Hagarty, J.—I am of opinion, that on the facts thus briefly stated, it is impossible for me to allow Casselman to interfere now and defend the suit. To do so, it would be necessary to remove plaintiffs from the possession obtained by them in due course of law. The whole difficulty has apparently arisen from Casselman's own neglect in leaving the premises vacant for nearly a year, after he had ejected Murphy.

Were it necessary to enter further into the peculiar facts of the case, I might mention that notice of the pendency of this action against Murphy is positively sworn to, as given more than a year before judgment was signed, notwithstanding his denial thereof in his affidavit.

The only reason for allowing a landlord to appear and defend, is to prevent a recovery of a judgment and possession in an action orginally brought against his tenant. When the landlord is at the same moment seeking to eject the man he now alleges was his tenant, turns him out and takes possession himself, I hardly see why the privilege should be longer claimed. Had he chosen to continue in possession, could plaintiffs have removed him on a writ founded on a judgment against Murphy? By abandoning the premises for a year, he left it open to all the world to enter and take possession, and in such case I think as against these plaintiffs, equally as against a stranger, he must be left to his ordinary remedy by ejectment.

I think the summons must be discharged with costs.

Summons discharged with costs.

Kerr v. Waldie et al.

Ejectment against landlord and tenant—Application to strike out name of latter.

In an action against a landlord and his tenant, the latter being in actual possession, *held*, though with much doubt, that the name of the tenant might be struck out of the proceedings.

Doubts as to the propriety of the practice laid down in *D'Arcy* v. *White*, 26 U. C. Q. B. 570.

[Chambers, Sept. 21, 1867.]

This was a summons calling on the plaintiff to shew cause why the names of all the defendants, other than the defendant Waldie, should not be struck out.

It appeared from the papers filed that the defendant Waldie was landlady of the premises in dispute, and that the other defendants were her tenants. A consent was filed, signed by the latter to the effect that they consented to their names being struck out of the proceedings, and to the defendant Waldie defending the possession of the property in her own right as landlady, and asserting that they had no interest in the premises, except as tenants. The tenants were, and the landlady was not in actual possession of the premises.

James Paterson shewed cause. There is no authority for this application—sections 9 and 14 of the Ejectment Act, Con. Stats. U. C. cap. 27, do not apply to such a case as this. The usual application, and all that the statute contemplates, is to allow a landlord to come in and defend with a tenant, where the action is brought against the tenant alone. But the plaintiff must proceed against the person in possession. If he do not, how is he to obtain possession, even though he recover against the landlord. The only occasion in which a defendants name can be struck out, is where he is not in possession of the property and has no interest in it; and here the tenants are in actual possession and have a direct interest in the property.

J. A. Boyd, contra. As to the right of a landlord to come in to defend, see *Peebles* v. *Lottridge*, 19 U. C. Q. B. 628; and *Jones* v. *Scaton*, 26 U. C. Q. B. 166.

It is just and proper that the landlord alone should defend, for otherwise, in case of a verdict for plaintiff, even if the tenants allowed judgment to go by default, they would be liable for costs, *D'Arcy* v *White*, 24 U. C. Q. B. 570.

Adam Wilson, J.—I am not satisfied that it is a proper practice to strike out the name of the tenant of land, held by the tenant in actual occupation, merely because the landlord or some one else who is interested in the defence has been permitted to appear and defend the action.

The writ is to be directed to the *person in possession* by name, and to all persons entitled to defend the possession of the property claimed, and I do not see why the name of the person in possession should be struck out, so long as he is in possession.

Under the former practice, when the tenant did not appear, and the landlord was permitted to defend the action, a judgment was signed by the plaintiff against the casual ejector, to enable the plaintiff to recover the possession, in case he succeeded against the landlord; for without such a judgment, the plaintiff could not upon an execution against the landlord who was *not* in

possession, turn out the person who was in possession. This rule prevailed before the statute of Geo. II. See *Fairclaim* v. *Shamtitle*, 3 Bur. 1290

I see still some difficulty in enforcing the *habere facias* against some one who is not upon the land, or it may be even in the country, by turning off some body else, not appearing to have the least connection with the defendant. And I see no objection in turning off those actual occupants of the land by name, who were such occupants when the suit was commenced, and who were rightly made defendants.

Mr. Boyd has referred to two cases which sanction this practice, *Jones* v. *Seaton*, 26 U. C. Q. B. 166; and *Peebles* v. *Lettridge*, 19 U. C. Q. B. 628. And the case of *D'Arcy* v. *White*, 24 U. C. Q. B. 570, deciding that tenants whose names remain as defendants on the record, although judgment by default has been given against them for not appearing, are liable for the whole costs of the action occasioned by the defence of the person who has been admitted to defend, shows there must either be some serious deficiency in the law or some defect in the practice; and therefore, though with great distrust as to my power in such a case as the present, I will make the order as applied for.

The 14th section of the Ejectment act is just the converse of this case, and is, I think, opposed to the practice which has been referred to, a practice assuming to be sanctioned by the old law, when there was a special means of carrying it effectually through, but not at all provided for by the present mode of proceeding

Order to strike out names of tenants upon payment of costs of the application. Other costs against tenants to be costs in the cause against the landlady.

Reid et al. v. Drake.

Charging defendant in execution—Vacation not part of preceding Term for that purpose—County Judge declining to act—Right of defendant to a discharge on habeas corpus.

The vacation succeeding a Term is not to be considered for the purpose of charging a defendant in execution as a part of the preceding Term.

The same rule governs in this respect in County Courts as in the Superior Courts.

A Deputy Judge of a County Court declining, as he was the partner of the plaintiff's attorney, to entertain an application by defendant for a *supersedeas* on the ground that he had not been "charged in execution within the Term next after judgment" against him, the defendant was discharged from custody under a writ of *habeas corpus*.

[Chambers, September 28, 1867.]

Upon the application of the defendant, and upon reading his petition and affidavit, a copy of a writ of *capias ad respondendum* issued from the County Court of Grey, upon which defendant was arrested, and a certificate of the sheriff of the county of Bruce, by whom he was arrested, as to the cause of his detention, the defendant obtained a writ of *habeas corpus*.

It appeared from the petition of the defendant

1. That the defendant was, on the 28th February last, arrested under and by virtue of a writ of *capias* issued from the County Court of the county of Grey, at the suit of Calvin Pomeroy Reid and Charles Brown, and is still a prisoner in the close custody of the said sheriff under the said writ.

2. That the said Calvin Pomeroy Reid and Charles Brown, after said arrest, declared in their said action against the petitioner, and issue was joined therein on the 29th March last, and the same was tried at the County Court sittings, at the town of Owen Sound, about the 12th June last, and a verdict rendered for the said plaintiffs for the sum of one hundred and six dollars, or thereabouts.

3. That the petitioner should accordingly (as he is advised and believes) have been charged in execution in the said action by the plaintiffs during the July term thereafter, but they have failed so to do, and have not yet charged the petitioner in execution.

4. That the petitioner, about the beginning of the present month of August, in due form caused application to be made for a *supersedeas* in the said action to Samuel J. Lane, Esq., the acting Judge of the said county of Grey, in the absence of Henry McPherson, Esq., the judge of the said Court, but the said acting judge declined to receive the said application.

5. That the said acting judge is the partner of John J. Stephens, Esq, who is the plaintiffs' attorney, and, owing to his being so interested in the said suit (as the petitioner is informed), he declined to entertain the said application.

6. That the said judge, Henry McPherson, Esq, has for some time past been absent on a trip to Europe, and will not, as the petitioner is informed, return till some time in the month of December next.

7. That the petitioner was arrested in the said action on the alleged ground that he was about to quit Canada with intent to defraud the plaintiffs, which allegation was utterly unjust and unfounded, and the petitioner is not detained in custody for any other cause or matter whatsoever.

8. That since the petitioner's arrest he has duly executed a deed of assignment, for the benefit of his creditors, to the official assignee for the said county of Bruce, under and in accordance with the Insolvent Act of 1864.

9. That the petitioner is not worth the sum of twenty dollars over and above his necessary wearing apparel, and, under the provisions of the Indigent Debtors' Act, would be entitled to procure his discharge, but your petitioner verily believes that any application for his discharge in the said action would (for the reasons above mentioned) be declined by the said acting judge, and the petitioner is thus unable to procure relief from the said Court during the absence of the said Judge, Henry McPherson, Esq.

The petition then prayed that a writ of *habeas corpus* might issue, and that the defendant might be discharged from custody.

The first term after the sittings commenced on the first day of July last and ended on the sixth of that month, and the defendant has not yet been charged in execution.

This was not denied by the plaintiffs.

The defendant waived his right to be present upon the return of the writ of *habeas corpus*.

Upon the writ and return being filed,

Morphy, for the plaintiffs, showed cause, and contended that the whole of the vacation succeeding the July term was to be considered a part of that term, and that the plaintiffs had,

therefore, until the 5th day of October, inclusive, the last day of that vacation, within which to charge the defendant in execution, citing *Curry* v. *Turner*, 9 U. C. L. J. 211.

———, for defendant, cited *Brash* v. *Latta*, 5 U C. L. J. 226; *Torrance* v. *Halden*, 10 U. C. L. J. 332; and Har. C. L. P. A. 673.

Adam Wilson, J.—The question is whether the vacation is for the purpose of charging the defendant in execution to be considered a part of the preceding term? The terms are those seasons of the year which are set apart for the dispatch of business in the superior courts of common law? 3 Bl. Com. 275; Tidd's Prac. 9 Ed. 105; and these terms have certain days of commencement and of termination. The other seasons, not so set apart for the dispatch of business in the superior courts of law, cannot be within the terms.

The County Courts have, by ch. 15, sec. 13, of the Consolidated Statutes for U. C., "four terms in each year, to commence respectively on the first Monday in January, April, July and October, and end on the Saturday of the same week." This gives the extent and duration of the term—all other periods of the year must be out of term. The 18th section of the same act declares that in any case not expressly provided for by law, the practice and proceedings shall be regulated by, and shall conform to, the practice of the superior courts of common law.

There is no express provision in the County Courts for charging prisoners in execution, and therefore the practice and proceedings must be regulated by that of the Queen's Bench and Common Pleas; and the rule (Rule 99, T. T. 1856) which prevails in these courts, is that "The plaintiff shall cause the defendant to be charged in execution within the term next after trial or judgment."

That the vacation is not considered as part of the preceding term appears by the following cases:

In the case of a *non-pros.* for not declaring, which may be signed after the end of the term next after the appearance is entered, this term ends with the actual term time, and does not include the following vacation, 2 Wm.Bl. 1242; *Brandon* v. *Henry*, 3 B. & Al. 514; *Foster* v. *Pryme*, 8 M. & W. 664. In the case of a terms notice of the plaintiff's intention to proceed with the cause, the vacation forms no part of the term, *Milbourne* v. *Nixon*, 2 T. R. 40.

The former rule was, that the defendant should be charged in execution within two terms inclusive after trial or judgment, of which the term in or after which the trial was had should be reckoned as one. If a defendant surrendered in vacation after judgment, the vacation was reckoned as part of the previous term, and the defendant was supersedeable after the expiration of the following term, excluding the subsequent vacation. So that after trial or judgment the plaintiff had only to the end of the following term, within which to charge the defendant, *Smith* v. *Jefferys*, 6 T. R. 776; *Borer* v. *Baker*, 2 Dowl. 608; *Baxter* v. *Bailey*, 3 M. &. W. 415; *Thorn* v. *Leslie*, 8 A. & E. 195.

The rule by which the vacation was to be considered part of the previous term, was held to be done away with by the pleading rules which had the effect of an act of Parliament, and which declared that judgments should have no relation backward, and the plaintiff was held to be entitled to two full terms after the judgment had been signed, *Colbron* v. *Hall*, 5 Dowl 534. It was no doubt to meet the change unintentionally effected by the pleading rules, that the present rule was framed, which virtually restores the former one, by declaring that the defendant shall be charged in execution within the term next after trial or judgment.

I have no doubt then that the term next after the trial or judgment expires with the term time or the period in and for which the court sits, and that it does not include with it the following vacation. As the plaintiff has not conformed to this rule, the defendant is entitled to his *supersedeas*.

The other point is, whether the defendant is pursuing the proper course, by suing out a *habeas corpus* under the circumstances stated in his petition.

The deputy judge should, in my opinion, have granted the application. It is a serious matter to detain a person in custody illegally. I had some doubt whether the defendant had presented a sufficient case to justify my interference with the proceedings of the County Court. I am not altogether satisfied that such a case has been made, but on an occasion like the present, I feel I should give the advantage of the doubt to the prisoner.

I shall therefore order that he be discharged from custody in this cause.

INSOLVENCY CASE.

(Reported by Hugh McMahon, *Esq., Barrister at-Law.)*

Before Stephen J. Jones, Esq, Judge County Court, Brant.

In the matter of Wm Beare, an Insolvent.

Giving up part of stock to a creditor—Evidence of fraudulent preference—Discharge refused—Conditional discharge—Effect of insolvent not keeping proper books of account.

[Brantford, 9th September, 1867.]

The insolvent made a voluntary assignment to the official assignee of the county of Brant; and on his examination before His Honor the Judge of the County Court, on his application for discharge, it appeared that up to September, 1864, he had carried on business as a general merchant, at Widder station, in the county of Lambton, at which time he removed to Walsingham, in the county of Norfolk. He was then solvent. He owned a house and lot at Widder. The house was insured. The property was mortgaged to Kerr, McKenzie & Co., of London. At that time he was owing Kerr, McKenzie & Co. over $3,000. The buildings were, subsequent to Beare's removal from Widder, destroyed by fire, and Kerr, McKenzie & Co. got $900 for insurance, and sold the lot under the mortgage for $400 more.

In January, 1865, the insolvent being behind in his payments to Kerr, McKenzie & Co., they sent their book-keeper to the insolvent's place of business at Walsingham, and advised him to confine himself to groceries, taking away all his dry goods, which had been purchased from Kerr, McKenzie & Co. No account was kept by the

insolvent of the amount of goods delivered to Kerr, McKenzie & Co., they promising to send him an account. At the time Kerr, McKenzie & Co. got these dry goods, three or four other creditors had overdue accounts against insolvent. About this time Childs & Co. sued insolvent for a claim of $300, and the sheriff sold the stock, amounting to $800 or $900, to satisfy the executions in Child's case. Beare kept no books while at Walsingham, and kept no account of the cash. The daily sales were not large.

West Brothers' debt was contracted in August, 1863, on four months' credit, and were shipped to insolvent while at Widder, addressed to William Bruce, and taken from the railway station by insolvent, who paid the freight. Some letters were addressed to William Bruce. One was from a lawyer, and had reference to these goods, addresed to the William Bruce, which insolvent opened and returned to the post office.

The insolvent's liabilities for which he sought a discharge amounted to $1,529 20.

Fitch, for the insolvent, applied for an order for his discharge.

McMahon, contra. The discharge should be conditional, on payment of West Brothers' claim. The goods were got in 1863, addressed "William Bruce." Beare was then solvent, but concealed from West Brothers that he had these goods. They could then have collected their claim. The goods given to Kerr, McKenzie & Co. was a fraudulent preference. Insolvent said he thought he was satisfying the whole of their claim. He gave them more than half of his assets. After he gave Kerr, McKenzie & Co these goods, he owed several other creditors claims. His whole estate left only realized $400. *Re Lamb*, 3 L. J. N. S. 18. He did not keep books at Walsingham. *Ib.*

Fitch, in reply. The goods sent by mistake do not show any fraud, but a mistake on Beare's part, through the fault of West. As to fraudulent preference, see Insolvent Act, 1864, sec. 9, sub-sec. 6, and sec. 8, sub-sec. 4. He gave the goods back to the person from whom he purchased them.

Jones, Co. J.—I think the transaction of the insolvent with McKenzie & Co., in January, 1865, was a fraudulent preference, and as such would afford grounds under the act for the creditors of the insolvent to oppose his discharge; also the fact that he kept no account book of his cash receipts and payments, or other books of account suitable for his trade, while he carried on business in the county of Norfolk, where he was in business from September, 1864, up to the time he failed, in the spring of 1865, would entitle the creditors successfully to oppose his discharge. The importance of having such books of account is evident; for the insolvent swears he was solvent when he removed to the county of Norfolk, and it was while he was there, and while he kept no books, that he became insolvent; and there is therefore no way of tracing his transactions, to show how he became insolvent, because no record of his business transactions or of his cash receipts or payments has been kept. The Insolvent Act provides that the neglect in keeping such books after the passing of the act (30th June, 1864), shall be a sufficient ground for opposing the insolvent's discharge; and it was about three months after that date that he commenced business in Norfolk.

The turning over of all his dry goods to Kerr, McKenzie & Co., besides being, I think, a fraudulent preference under the act, was a transaction showing on the part of the insolvent a complete recklessness as to what he did, and a total disregard of the interests of his other creditors. The agent of Kerr, McKenzie & Co. came to the insolvent and stated, without any previous intimation, the steps they intended to take; that it would be for his interest to go out of the dry goods business, and deal only in groceries; to which he at once assented; and they then proceed to take, without any objection on his part, the whole of the dry goods stock, which was the bulk of the whole stock, and remove it to London. He did not even keep any account of the quantity or value of the goods they took: they promised, he said, to send him an account, which they never did.

This transfer of so large a portion of his goods, in my opinion, reduced Mr. Beare to a state of insolvency, and in two months thereafter he gave notice of insolvency; and the whole transaction showed such an utter disregard of the interests of his other creditors, as can only be reconciled, in my opinion, with the fact that he intended to give his creditors Kerr, McKenzie & Co. a fraudulent preference.

I also think that the circumstances under which West's debt was contracted are such, that if I had granted a discharge, it would only have been conditional on the insolvent's paying that debt. Although Mr. Beare was well aware that these goods were wrongfully addressed, and from the letters received at the post office to the same address, one of which he (Beare) opened, he must have known that West Brothers were not aware that he (Beare) had got these goods, yet he concealed that fact from them, and this at a time when, had they known that he got the goods, they could have obtained payment, for Beare was at that time quite solvent. Nor did he admit that he received these goods until afterwards, when they had otherwise ascertained the fact, and were suing him for the amount of their claim.

I think, from the above considerations, and from the observations of the court *In re Lamb* 3 U. C. L. J. N. S. 18, that it is my duty, in this case, to make an order refusing the discharge of the insolvent absolutely.

IRISH REPORTS.

CHANCERY.

In the Matter of the Estate of Michael Walsh and others, Owners.

David McBirnie, Petitioner.

Landed Estates Court (Ireland)—Jurisdiction—Amendment of conveyance—Mistake.

A conveyance of lands (in the absence of fraud) from the Landed Estates Court (Ireland) is unimpeachable and irrevocable, and the court has no jurisdiction by amendment or cancellation to rectify any error which may arise from the acts of the judge or the party having the carriage of the proceedings.

[Ch. Ap. (Ir.), 16 W. R. 1115.]

This was an appeal taken by Francis Wren from two orders of Judge Dobbs, dated the 23rd of November, 1866, and 30th of January, 1867, respectively. The petition of appeal stated that on the 5th of July, 1866, a certain estate, consisting of houses in Wexford-street, in the city of Dublin, was set up for sale in the Landed Estates Court, Ireland, in two lots.

The following is a copy of the advertisement:

"Rental and particulars of houses and premises situate in Wexford-street, formerly Kevin's-port, and Protestant-row.

"Nos. 8, 9, 10, and 11, in Wexford-street, and No. 1, Protestant-row, held under three several leases from the corporation of Dublin, dated respectively the 30th of April, 1808, for the term of ninety-nine years from the date of said leases"

To be sold by auction in two lots, as in annexed rental, at the *Landed Estates Court*, Dublin, on Thursday, 5th July, 1866."

"Lot No. 1.

"The houses in this lot are held under lease of the Corporation of Dublin, dated 30th April, 1808:—

Denomination.	Tenant's Name.	Yearly Rent.	Observations.
		£ s d.	
City of Dublin. The dwelling-house and premises formerly Kevin's Port, No. 11	Philip Redmund	69 2 6	Lease dated 25th May, 1812, for 94 years, from 26th March, 1812, at yearly rent of £73 10s., of the then currency.
The dwelling-house and premises, 1, Protestant Row	Philip Redmund	10 0 0	Lease dated 5th July, 1813, for 91 years, at the yearly rent of £20 then currency. An annual rent of £10 in lieu of £20 has been received for some years back.
		79 2 6	
	Deduct head rent	27 2 9	
		51 19 9	

"Note.—This lot is held under lease 30th April, 1808, from the Lord Mayor . . . . of the City of Dublin to W. Bond . . . . for 99 years, from 25th March then last, at the yearly rent of £27 15s. . . . . The premises are described as that lot . . . . containing in front 20 feet 8 inches, and in the rear to Mrs. Gartside's holding, 16 feet 9 inches, in depth on the south side, adjoining Protestant Row, 76 feet 10 inches; and on the north adjoining another building of W. Bond, 78 feet."

"Lot No. 2.

"The houses and premises in this lot are held under two several leases from the Corporation of Dublin, dated respectively 30th April, 1808, for 99 years from the date of said leases:—

Denomination.	Tenant's Name.	Yearly Rent.	Observations.
		£ s. d.	
City of Dublin. The dwelling-house and premises in Wexford-St., formerly Kevin's Port, No. 8	Mary M'Gee	16 0 0	Tenant from year to year.
The two several dwelling houses and premises in Wexford St., formerly Kevin's Port, Nos. 9 & 10	Mary M'Gee	60 0 0	Lease of 1st February, 1839, for 65 years.
		76 0 0	
	Deduct head rent, &c.	39 2 10	
	Net rental of lot No. 2	36 17 2	

"Note.—This lot is held under two leases, dated respectively 30th April, 1808, from the Lord Mayor . . . . to W. Bond, ... for 99 years from 25th March then last . . . . The premises demised by the first lease are described as 'That lot or parcel of ground on the east side of Kevin's Port, containing in front to Kevin's Port 20 feet 8 inches; in the rear to Mrs. Gartside's holding, 16 feet 9 inches; in depth from front to rear on the north adjoining John Rogers' holding, 82 feet; and on the south adjoining another holding of William Bond's, 80 feet.' The premises, demised by the other lease, are described as 'That lot or parcel of ground on the east side of Kevin's Port, containing in front to Kevin's Port 20 feet 8 inches; in the rear to

Mrs. Gartside's holding, 16 feet 9 inches; in depth from front to rear on the south adjoining another holding of W. Bond's, 78 feet; and on the north side, 80 feet.'"

This description was followed by a plan of the premises in conformity therewith.

Lot No. 1 was purchased by Philip Redmund, the tenant thereof, and lot No. 2 by the appellant, who paid the sum of £290 therefor, and received a conveyance executed under the hand and seal of Judge Dobbs, in which conveyance the metes and bounds were those above given. The appellant now submitted that the interest of the owners in the entirety of the premises expressed therein to be held under the two several leases from the Corporation of Dublin to William Bond in the said year 1808, which were stated by the rental to constitute lot No. 2, were conveyed absolutely to him, subject to the payment of the two several rents, and to the performance of the condition, covenants, and agreements on the lessees' part in the said leases contained, and also subject to the tenancies and sub-lease therein mentioned, and to no other right, title, charge, or incumbrance whatever. This conveyance was duly registered in the proper office for registering deeds in Dublin on the 9th of August, 1866.

The petition of appeal then stated that the petitioner was not personally acquainted with those premises, except that he had been in one of the shops fronting Wexford-street shortly previous to the sale, and that he was induced to become the purchaser of lot 2 entirely from the description thereof given in said rental, and that he was led to believe, and did believe, that he had purchased the entire of the premises comprised in said lot No. 2, as set forth on the said rental. However, the appellant, in the month of November, 1866, discovered that a portion of the premises which he had so purchased, being the rear portion of the premises contained in and demised by the said two several indentures of lease, was in the occupation of Philip Redmund, who refused to give possession thereof, on an allegation that such portion was really included in lot No. 1 in said rental (which had been purchased by Redmund), and that it had been in error conveyed to petitioner, who, so Redmund alleged, never intended to purchase, and in fact had not purchased the same.

Redmund afterwards moved in the Landed Estates Court that the conveyance should be rectified, and that appellant should re-convey to Redmund the disputed portion of the premises; and by an order of the said Court made by Judge Dobbs on the 23rd November, 1866, the appellant was directed within one week after the service thereof to re-convey to the purchaser of lot No. 1 the said portion of the premises so conveyed to him as aforesaid, and in the event of his declining to execute such conveyance, then it was ordered that the said conveyance to the appellant should be recalled and cancelled, and that the same should be brought into the said Court, and lodged with the examiner of the Judge for such purpose.

It was not alleged that there had been any fraud in relation to the purchase, or any error or mistake on the face of the conveyance; on the contrary, all parties to the said motion admitted that the premises conveyed to the petitioner were the premises which were demised by the said two indentures of lease, and none others.

To the above petition of appeal David McBirnie, at whose petition the several premises in the Landed Estates Court were sold, answered that the premises of which said Francis Wren became the purchaser were stated in the rental to consist of two denominations, viz., No. 8, Wexford-street, and Nos. 9 and 10 in the same street, all of which were in the possession of a Mrs M'Gee as tenant to the owner under a lease for 65 years, at a rent of £60, and that the net annual rental of No. 2 was stated in said rental to be £36: that in the conveyance of the said lot No. 2 the measurements in the said leases of 1808 were inserted by mistake; that such measurements included a plot of ground or yard at the rear of said two denominations, but that said plot was not intended to be sold, and was in fact not sold to said Francis Wren as purchaser of said lot No. 2; that the premises sold to Francis Wren consisted of Nos. 8, 9 and 10, Wexford-street, and nothing more; and that said yard never formed part of said premises, but has always formed part of the premises No. 1, Protestant-row, and were included and demised by a certain lease of the 5th of July, 1813, which lease is mentioned only in the column of observations in lot No. 1, and is stated in column No. 2 of said lot No. 1 to be in the tenancy of Philip Redmund thereunder: that Francis Wren shortly after he obtained his conveyance claimed said yard or plot of ground, when Philip Redmund, who had purchased lot No. 1, claimed compensation, alleging that said yard was comprised in said lot No. 1, and sold to him: that on the hearing of the application to the Landed Estates Court a verified map of said premises was used; that Francis Wren did not then venture to swear that he had purchased said yard, or that he even believed he had done so; and that the said yard and the rest of lot No. 1 had been occupied together as one house since 1843; and finally, that Philip Redmund was not only tenant of lot No. 1 aforesaid, but was also tenant of this portion of lot No. 2, under a lease of 1819, for a long term of years, and yet it was now sought to have the whole of lot 2 conveyed discharged of this lease to said Francis Wren, the appellant, when the lease of said yard was actually in being.

The conveyance which Judge Dobbs had made in manner above-mentioned granted "unto the said Francis Wren the said respective lots of ground and premises expressed to be demised by said two several indentures of lease situate respectively in the parish of St. Peter, and city of Dublin, with the appurtenances," subject to the tenancies therein mentioned.

Pilkington, Q.C., and *Tottenham*, were heard in support of the appeal.—After the conveyance the Judge had no power either to recall or to cancel it; neither had he power to order the purchaser to convey the yard at the rear of his premises to any other party. The 61st section of 21 & 22 Vic. cap. 73, makes the conveyance executed by the Judge of the Landed Estates Court conclusive against all persons whatsoever. Thereby the then purchaser's title was after the execution and delivery of the conveyance indefeasible, and the lands so conveyed were discharged of all tenancies and encumbrances, save

those which appeared on the face of the conveyance. The 85th section of the Act makes the conveyance for all purposes conclusive evidence that every act which ought to have been done previous to the execution of the conveyance has been done *Errington* v. *Rorke*, 7 H L. C. 630; *Power's estate*, 10 H. L. C. 645; *Dublin and Kingstown Railway Company* v. *Bradford*, 7 Ir. C L. 57; *Roe* v. *Lidwell*, 9 Ir. C. L. 184; *Purcell's estate*, 3 Ir. Jur. C. S. 102 n.; *Bodkin's estate*, 3 Ir. Jur. O. S. 101. A court of equity, had this sale taken place therein, could not reform the conveyance, had it been made by vendor to purchaser: *Bennett* v. *Hamill*, 2 Sch. & Lef. 566.

Flanagan, *Q.C.*, and *Henry Loughnan*, for the respondent McBirnie, in support of the order of judge Dobbs Wren never purchased, nor meant to purchase, this yard in question. He purchased the premises Nos. 8, 9, and 10 Wexford-street, producing £36 17s. 2d., and no more. This yard did not contribute to pay that rent, inasmuch as it was attached to lot No. 1. The Landed Estates Court is a court of equity, it is constituted, as such by the 37th section of 21 & 22 Vict. c. 72: "The said Landed Estates Court, Ireland, shall be a Court of Record, and shall have all the powers, authority, and jurisdiction of a court of equity in Ireland" The Court then had the same power to deal with its own conveyances as a court of equity would have for rescinding or varying any contract for sale in the matters incident to or consequent on a sale under the Act. Francis Wren did not pledge his oath that he believed he purchased this yard: *Collis's estate*, 14 Ir. Ch. 511. The principle which guides the local equity court in such cases is that if by any fraud, negligence, or other misconduct of the party having the carriage of the sale, he procures the Court to sell and convey to him property which ought not to have been sold or conveyed, the Court has jurisdiction to compel him to reconvey: *Langley's estates* (not reported), mentioned in argument in *Collis's estate*, 14 Ir. Ch 514. In *Re Vesey's Estate*, 1 Ir. Jur. N. S. 66, Baron Richards, then Chief Commissioner, says, "that the Court had full jurisdiction to amend the conveyance in any matter arising from mistake" The late Master of the Rolls (Smith) in *Locke* v. *Ash*, 4 Ir. Jur. 180, where lands, as in the case under consideration, were sold, discharged of a subsisting lease, thus expressed himself in giving judgment on a motion to have the receiver discharged from over the lands so sold; "Were I the commissioner who sold this property, I have little hesitation in saying that I would, under the circumstances, order the conveyance to be re-lodged, for the purpose of having the lease, which was lodged in court for the purposes of the sale, set out in the schedule to the conveyance." In answer to the argument on the 85th section, that it ousts the jurisdiction of the Landed Estates Court as well as the Court of Chancery, and precludes the possibility of taking objection to anything behind the conveyance, we say that the conveyance is conclusive only so long as it stands. [The Lord Justice of Appeal.—Tkat is to say, the conveyance may be impeached by the allegation of those things, of the non-existence of which the conveyance itself is made conclusive.] *Re Giraud*, 32 Beav. 385.

Henry Fitzgibbon appeared for Mr. Redmund, also in support of the order of the Court below.

Brewster, C.—This is an appeal from Judge Dobbs. The order of that learned judge directs that Mr. Wren should reconvey a certain yard or portion of the premises conveyed to him, or, that in case Wren should decline to do so, then the conveyance should be recalled and cancelled. I pass over all technicalities in this case and go directly to the point, which is of the utmost importance. The premises here were divided into two lots. Lot No. 1 was conveyed to one party, and lot No 2 to another. Each of the purchasers of these lots purchased by exact measurements the lots which were set up to be sold; after the conveyance of lot 2 has been made, the purchaser of lot 1 says that he will not give the purchaser of lot 2 what he purchased, namely, the yard, which was at the rear of his house, and which he holds in his possession. A motion was accordingly made to Judge Dobbs, and he made this order now appealed from. I am bound to say that that learned judge has exceeded his power in ordering Mr Wren to bring back this conveyance for the purpose of rectification; such an order is clearly opposed to law as well as to natural justice. He it was that was the seller of these premises, and he had taken Mr. Wren's money, and Mr. Wren had purchased on the faith of the statements in the rental; but the judge finding that he himself had made a mistake ordered the purchaser to bring in the conveyance for the purpose of having that mistake rectified. The judge had no such power. Once the conveyance left his hands he had no more to do with it than any person outside the Court, he then was powerless to undo what he had done. The judge of the Landed Estates Court is the creature of the statute, and was in nowise empowered to defeat its purposes. The law is explicit that the party who has become the purchaser in the Landed Estates Court, and has had a conveyance executed to him by that Court, has such a title as he can enforce in the ordinary courts of justice. In a word, the act of the judge in executing the conveyance is irrevocable. The policy of the Legislature was to make conveyances of the Landed Estates Court indefeasible; to this end did they pass the Landed Estates Court Act; they thereby gave specific powers to the Court; large powers, but which must not be exceeded. Have these powers enabled the judge of the Landed Estates Court, having executed a conveyance and perfected the title in the purchaser, to take that title from him of his own will and pleasure? The 37th section of the Act has been relied upon in support of the order of the Landed Estates Court, and it was urged that that Court was a Court of record, and that it was to have all the powers, authority, and jurisdicion of a Court of Equity, and therefore it possessed within itself all the incidents of a court of record. I cannot, however, find that a court of equity ever claimed the power of doing what has been done in this case. A court of equity is of a nature entirely different from the Landed Estates Court, which has no powers at all except those defined by the statute; a court of equity does not itself convey an estate to a purchaser, it merely directs the parties to do so, and it regulates their rights. The case we are now dealing with is one of mere

mistake, and that on the part of the vendor of the property. I am not aware that even a Court of equity could reform a deed where only one of two parties had committed a mistake, for unless the mistake be mutual a Court of equity will not reform a mistake. It was the ancient law of this country that deeds solemnly entered into were not to be treated as waste paper; we must now take that to be law, handed down as it is to us from remote antiquity. Here it was not one party who conveyed to the other, it was the judge who conveyed, and then he turns round and says, "Oh! I have made a mistake; the solemn deed I have executed is worth nothing; bring it back, and if you don't I'll put you in gaol." Great as the powers are which the Landed Estates Court has, no Act of Parliament ever gave them such wide prerogatives as these. The Legislature in passing this, the Landed Estates Court Act, have defined all the preliminary steps to be taken where a sale is had in that Court, I need not occupy the public time in going through them further than so much of the 61st section as applies to leases; that section declares that "every such conveyance or assignment executed by the said judge upon the sale of a lease or rentcharge, or an annuity charged on land, or any partial or lesser estate than an estate in fee simple, shall be effectual to pass the estate created or agreed to be created by such lease then remaining unexpired, or by the instrument creating such lesser or partial estate." Now clearly this leasehold interest was conveyed, and the 85th section declares that conveyances, assignments, and orders for partition, exchange or division and allotment made by the Landed Estates Court, shall be conclusive. That section is analogous to the 49th section of the Incumbered Court Act, 12 & 13 Vict. c. 77, and the decision of the House of Lords in *Errington* v. *Rorke*, 7 H.-L. C. 630, puts the question beyond all doubt. The case of *In re Langley*, cited, or rather reported, in the statement in *Collis's Estate*. 14 Ir. Ch. 512, has been relied on in support of Judge Dobb's order. The case of *In re Langley* was decided in the Incumbered Estates Court, and was about being appealed from, but the case being compromised the appeal fell to the ground, and is a case of no great weight and authority, and I am very much disposed to think was much weaker than Judge Hargreave was willing to allow; and I am not disposed to go against the plain words of an Act of Parliament on the extra-judicial opinion of any judge. No judge that I am aware of ever made such an order under the authority of either the Incumcumbered Estates Court Act or Landed Estates Court Act as the order we have now under our consideration. Judge Hargreave has merely told us extra-judicially what the Court would do, so that this case is now one of first impression, and we are not hampered by any authorities whatever. Need I call attention to *Power's Estate*, 10 H. L. C. 645, a case of the very highest authority, an appeal from the Court of Appeal in Chancery in Ireland? It was there held that a conveyance made under the 21 and 22 Vict. c. 72 ("Sale and transfer of lands, Ireland) is by section 85 for all purposes "conclusive evidence" that all previous proceedings leading to such conveyance had been regularly taken. There can be no doubt that that case and *Errington* v. *Rorke* are conclusive on the case under consideration.

Mr. Flanagan brought forward another case, and I confess I do not look on that as any authority whatever, the case of *Re Giraud*, 32 Beav. 385, thus:—"By an order made under the Trustee Act real estate was inadvertently vested in an alien. The Court declined to vary the order by inserting the name of a natural born subject without the consent of the Crown, but the order was made on a rehearing." What has that case to do with the present? The Trustee Act does not confer any indefeasible title, and there was nothing I can see from preventing the Master of the Rolls from varying his order at all. I ask how is that case any authority on the construction of the Landed Estates Court Act?

It is expected that all parties in the Landed Estates coming before the Judge should take care that all matters of detail are brought accurately before him. It is utterly impossible for any judge o. any court to see that every minute detail of all proceedings brought before him is in accordance with the truth. It is sufficient that parties coming before a judge have that regard for their own interest which would induce them to see that matters of detail are correct. The judge of the Landed Estates Court has a right to expect that no rental should be prepared, or conveyance presented to him for execution, which is not in accordance with the fact; and it would be expecting a judge to perform a duty beyond all human power to accomplish. to expect him to be responsible for an error such as has unfortunately raised the difficulty in this case. The judge or his immediate officer would require omniscience to do that which the parties ought to do for themselves. Therefore, with reference to the judge having executed the deed of conveyance, no person could wonder at it; on the contrary, it would be matter of wonder if he had not executed it in the shape in which it was presented to him, and, particularly, he being in profound ignorance of the matters brought before the Court on this appeal. Somebody, of course, must suffer for the mistake; but all the Court has now to say is, that the judge has exceeded the bounds which the law had set to his power, and, therefore, the order made by him must be reversed.

Christian, L. J.—I concur with the Lord Chancellor in the judgment his Lordship has just pronounced. This is a case of no ordinary importance,—nothing would be more calculated to shake the faith of the public in the parliamentary titles conferred by the Landed Estates Court than the course taken here by the judge of that court. At present the public are attracted to that court by the prospect held out of an indefeasible title being conferred by it It is believed that once the deed of conveyance has been executed a veil is drawn over the past, over all antecedent transactions, and that an impregnable bulwark is raised against the re-opening of any matter lying behind that deed. What is to become of that confidence, if months, and it might be years, after a conveyance has been executed, the purchaser is to be called upon to submit to the alternative of a re-conveyance or

a cancellation, not on the ground of fraud or mistake on his part, but on the ground of mistake by the court, or the party having the carriage of the proceedings? That is the point before the Court. This conveyance contains no mistake so far as Mr. Wren is concerned, as to what he intended to purchase. I have no doubt he intended exactly to purchase what was conveyed, the very measurement in the leases made by the Corporation in 1808. I shall consider the question before the Court on the broad ground—Whether any such jurisdiction as has been assumed by Judge Dobbs can be claimed for the Landed Estates Court? What is the effect of the conveyance? According to the 61st section of the Landed Estates Court Act, the effect of the conveyance is to draw everything out of the owner, and out of every person in the community in whom any particle of interest existed, and to vest it in the purchaser, subject to nothing but what it is stated on the face of the conveyance it is to be subject to. Again, the 86th section provides that the conveyance shall be complete evidence of title, and represent on the face of it the precise limits of that Parliamentary title which the Court professes to convey. Once that conveyance is executed it becomes irrevocable. The 86th section is a final bar to any interference by the Court of Chancery, because it makes the conveyance conclusive as to everything behind it: it is equally a bar to any further proceedings by the Landed Estates Court in respect of it. In fact, all jurisdiction with respect to the conveyance after its execution is ousted, and no mistake, miscarriage, or neglect lying behind it can be remedied by subsequent proceedings. It is itself conclusive evidence that there was a thorough investigation of the owner's title before it was executed, and that everything necessary to extinguish every right in bar of it has been properly done. The present is the case of one of the public, who, attracted by the advertisement of the Court that a certain property was for sale, walked into the auction room, paid his money for it, and left with the conveyance in his pocket. The judge of the Landed Estates Court was entirely *functus officio* as regarded that purchaser, and he was as utterly powerless to call upon him to give up the deed for cancellation or amendment as he was to demand from the Duke of Leinster the title-deeds of his estates. I have very great pleasure in concurring with the Lord Chancellor in the judgment which he has pronounced, and I feel assured that in reversing the order of Judge Dobbs this Court is conferring a boon upon the Landed Estates Court, by removing from its records an order fraught with future mischief and insufficiency in its working. The appeal must be allowed with costs.

Appeal allowed with costs.

LOWER CANADA REPORTS.

The Northern Railway Company of Canada. v. Patton et al.

Held, that the pendency of an appeal to the Privy Council, from a judgment rendered in Upper Canada when security has been given for the costs only, is no defence to a suit brought upon such judgment in Lower Canada.

[L. C. Rep., February 5th, 1867.]

This action was brought upon a judgment recovered by the plaintiffs against the defendants in the Court of Common Pleas of Upper Canada. The defendants pleaded, by dilatory exception, that the judgment having been confirmed by the Court of Error and Appeal, they had appealed to Her Majesty in Privy Council, and that, when this suit was brought, the appeal was undetermined.

It was admitted by the parties that, although the defendants had appealed from the judgment declared upon, and although they had given security for the prosecution of the appeal before the Privy Council, and the payment of the costs and charges, yet that they had not given security for the debt and interest for which the judgment was rendered, and that, according to the laws of Upper Canada, the appeal, under such circumstances, had not the effect of staying execution in the cause.

Meredith, C. J.—The parties in this case have been heard upon the merits of the dilatory exception. It appears that the plaintiffs have recovered judgment against the defendants, in Upper Canada; that they have appealed to Her Majesty, in her Privy Council; that the appeal is still undetermined; that the defendants have given security for the prosecution of the appeal and for the payment of the costs and charges, but not for the capital of the judgment; and that, by the laws of Upper Canada, the security thus given by the defendants has not the effect of staying execution in the cause. The question to which these facts give rise is this; Can the plaintiffs, upon the Upper Canada judgment, now in appeal before the Privy Council, recover judgment in Lower Canada, against the defendants?

On the part of the plaintiffs, it was contended that a judgment must be considered good until reversed, and that they should not, as to their rights under their judgment, be more restricted here than in Upper Canada, and that, in Upper Canada an appeal, with security such as that given in the present instance, is not sufficient to stay the execution, and therefore, that such appeal ought not to prevent the plaintiffs from recovering a judgment here. On the part of the defendants, it was contended that, as a general rule an appeal, when allowed, suspends the judgment appealed from, and that it would be hardly reasonable to ask a Court to give effect to a foreign judgment without any examination of the justice of the judgment sought to be enforced, if the question as to the justice and legality of such judgment was still being considered in the Courts of the country where it was rendered

I must say that, at the time of the argument, I was inclined to think that the appeal had the effect of suspending the judgment, and that the Upper Canadian statute should be regarded as conferring upon the plaintiffs an exceptional right,

which ought not to be extended so as to enable the plaintiffs to enforce their claim by an action here. I find however, that it is settled by English decisions, "that where an action is brought on a "judgment obtained in a foreign Court, the pendency of an appeal in the foreign court against that judgment is no bar to the action." In the case of *Scott* v. *Pilkington*, 2 Best & Smith, p. 38, Cockburn, C. J , certainly one of the ablest men and most distinguished judges of our day, commenced his judgment in the following words: "The plaintiff sues upon a judgment obtained by him against the defendant, in the Supreme Court of the county and city of New York. The defendant in his plea sets out the record of the judgment at length, and concludes with an averment that the judgment is erroneous, according to the law of New York, and is liable to be reversed, and that the defendant is prosecuting proceedings in appeal, which are now pending;" and the learned Chief Justice added; "as far as regards this part of the plea we expressed our opinion in the course of the argument, that though the pendency of the appeal in the foreign Court might afford ground for the equitable interposition of this court to prevent the possible abuse of its process, and on proper terms to stay execution in the action, it could not be a bar to the action."

This was all that was said on the subject by Chief Justice Cockburn; but his view appears to have been concurred in, without any difficulty, by the other judges present, namely, Judges Crompton and Blackburn, and no opposing authority was cited by the counsel for the defendant in that case.

In the case of *Alivon* v. *Furnival*, C. M. & R. 277, which was cited by the counsel for the plaintiff in *Scott* v. *Pilkington*, a judgment was recovered in England upon a judgment or award rendered in France. The defendant having been charged in execution upon the English judgment, moved upon affidavit stating that an appeal was pending in France from the judgment or award upon which the plaintiff had proceeded and recovered in England, and that the fact of such appeal existing had not been brought before the court in the proceedings that had already taken place. Baron Parke, it is true, observed that the appeal ought to have been insisted upon by the defendant at the trial. But the court held, "that, at that stage of the proceedings in the French court there was no ground for the relief prayed; but that if the Court of Cassation reversed the judgment, the application might be renewed."

I observe that in neither of the English cases to which I have adverted was the point raised by a plea in the nature of a dilatory exception; the judgments, however, do not appear to have turned upon that point, but to have been decided, according to the observation of Chief Justice Cockburn, in the course of the argument in *Scott* v. *Pilkington*, on the ground, that "an appeal being pending, cannot be subject of a plea."

It seems to me that, upon a question, such as that now under consideration, which is to be determined by the principles of international law, and according to the comity of nations, I ought to be guided by English decisions; and accordingly I hold that the appeal pleaded by the defendants cannot prevent the plaintiffs from recovering a judgment; and I therefore overrule the dilatory exception.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR THE MONTHS OF FEBRUARY, MARCH AND APRIL, 1867.

(*Continued from page* 278.)

Marriage.

Property was bequeathed to the children of A., provided he should marry an English lady. A., in 1859, married a woman named Hannah Tuhi Tuhi, the offspring of an alleged marriage between B. and a native woman of New Zealand, named Tuhi Tuhi. The only evidence of this marriage was that of B., who said that he was a British subject, born abroad, of British parents; that he came to New Zealand in 1828, and had lived there ever since; that, in 1829, he married Tuhi Tuhi, and that such marriage was solemnized according to the laws and customs then in force in New Zealand; that New Zealand was not then a British colony, and there was not then a Christian minister, nor any register of marriages, in the island; and that Tuhi Tuhi had always lived and still lived with him as his wife. B. did not state his parents' name. He said that Hannah, before her marriage, was called Tuhi Tuhi, and not by her father's name, in conformity with the customs of the natives of New Zealand, but there was no evidence what the laws and customs of such natives were. *Held*, that there was insufficient evidence that A. was a British subject, and that he had married Tuhi Tuhi.—*Armitage* v. *Armitage*, Law Rep. 3 Eq. 348.

Married Woman.—*See* Husband and Wife.

Master and Servant.—*See* Apprentice; Principal and Agent, 1.

Misrepresentation.—*See* Vendor and Purchaser, 2.

Mistake.—*See* Election, 1; Vendor and Purchaser, 3.

Mortgage.

1. A., *bona fide*, purchased an estate under a power of sale in a mortgage; the exercise of power afterwards was declared to have been invalid. *Held*, that A. was not liable, as is a mortgagee in possession, to account for all rents which he might have received but for his wilful default.—*Parkinson* v. *Hanbury*, Law Rep. 2 H. L. 1.

2. A creditor agreed to remit part of the debt, on the debtor's giving him a mortgage

for the balance. A mortgage was given, with a proviso, that, if the mortgage debt were not paid within two years, the whole of the original debt should be recovered. The debt was not paid within the two years. *Held* (*per* Lord Chelmsford, L. C.), that the proviso was not part of the original agreement, and was a penalty against which equity would relieve (Turner, L. J., *dissentiente*). — *Thompson* v. *Hudson*, Law Rep. 2 Ch. 255.

3. Property was conveyed by M. to trustees to raise £75,000, and pay off prior mortgages, whose debts, including arrears of interest, amounted to that sum. The trustees did not raise the £75,000, but allowed A. to pay the prior mortgages, and take transfers of them; and then, in consideration of such payments, made a deed, to which M. was a party, purporting to assign to A. the £75,000 raisable, and to mortgage the property to A. for £75,000. *Held*, that, as against incumbrancers prior to this last deed, A. could not charge interest on £75,000, but could only stand as mortgagee for the principal and interest due on the transferred mortgages.—*Ib.*

See Fixtures, 1; Railway, 3; Sale, 2 Ship, 1-3.

Necessaries.—*See* Ship, 1, 2.

New Trial.

1. On an application to the Court of Appeal in Chancery for a new trial to reverse the findings of a vice-chancellor on an issue raising mixed questions of law and fact, if the decision of one of the questions of law suffices to dispose of the case, the Court of Appeal may give final judgment, without ordering a new trial.—*Simpson* v. *Holliday*, Law Rep. 1 H. L. 315.

2. A new trial of issues, tried by a vice-chancellor without a jury, claimed on account of improper rejection of evidence, will not be granted, unless the evidence has been formally tendered to the judge.—*Penn* v. *Bibby*, Law Rep. 2 Ch. 127.

3. After a trial by a vice-chancellor, a motion for a new trial was refused by the vice-chancellor, and on appeal by the lord chancellor: the vice-chancellor refused to suspend the final order for an injunction, pending the appeal to the House of Lords.—*Ib.*, Law R. 3 Eq. 308.

Nuisance.

1. It is no answer to a plaintiff complaining of a private nuisance, to say that others are committing the same sort of nuisance, if a distinct injury is clearly traced to the defendant. —*Crossley & Sons* v. *Lightowler*, Law Rep. 3 Eq. 279.

2. The issuing of smoke and effluvia from a factory chimney, and the making of noise in the factory, were restrained, though the factory was in a manufacturing town; such smoke, effluvia and noise being a material addition to previously existing nuisances.—*Crump* v. *Lambert*, Law Rep. 3 Eq. 409.

3. On an information under a statute imposing a penalty on any one using a furnace so negligently as not to consume as far as possible its smoke, *held*, that "as far as possible" meant as far as possible consistently with carrying on the trade in which the furnace was employed. —*Cooper* v. *Woolley*, Law Rep. 2 Ex. 88.

See Railway, 1; Watercourse, 2.

Parol Evidence.—*See* Principal and Agent, 2.

Parties.—*See* Covenant, 1; Specific Performance, 2.

Partnership.

By the agreement between two partners, each was to have interest on his share of the capital, and the profits were then to be equally divided. A decree was made for a dissolution, and a sale of the property, but the business was carried on for some time, till the property was sold. *Held*, that, after the dissolution, interest was not payable under the agreement; that, in dividing the proceeds of the sale, each should take what was found to be his share of capital at the dissolution, with the accumulations on such part of the proceeds as had to be taken for this purpose, and that the remainder should be equally divided.—*Watney* v. *Wells*, Law Rep. 2 Ch. 250.

See Fixtures, 1; Solicitor, 2.

Patent.

1. The new application of any means or contrivance may be patented, if it lies so much out of the track of the former use as not naturally to suggest itself, but to require some application of thought and study.—*Penn* v. *Bibby*, Law Rep. 2 Ch. 127.

2. The complete specification of a patent must not claim anything different from what is included in the provisional specification, but need not extend to every thing so included; and a provisional specification, if allowed by the law officer of the Crown, cannot be impeached as too general.—*Ib.*

3. The antecedent existence of an invention, which, if subsequent in date to a patent, would have been held a colorable imitation of it, does not necessarily invalidate the patent by anticipation.—*Daw* v. *Eley*, Law Rep. 3 Eq. 496.

4. A patent for improvements in dyes thus described the process: "I mix aniline with arsenic acid, and allow the mixture to stand for

some time; *or* I accelerate the operation by heating it to its boiling point, until it assumes a rich purple color." It appeared that heat was not necessary to produce the color, but evidence was given that a competent workman would apply heat. *Held*, that the specification was bad, and the patent invalid.—*Simpson* v. *Holliday*, Law Rep. 1 H. L. 315.

5. A patent was taken out in France, in 1858, by A., who, in 1861, obtained a patent for the same invention in England. The English patent was assigned by A. to C., who, in January, 1866, obtained a decree declaring the patent valid, and restraining E. from infringing it. In February, 1866, the French courts declared the patent void from February, 1864, on the ground of non-payment of the duties required by French law. On motion by C., in 1867, to commit E. for breach of the injunction, *held*, that, by 15 & 16 Vic. c. 83, § 25, the English patent was determined from February, 1866, but not from February, 1864; that, therefore, there was no error to be amended by bill of review in the decree of January, 1866, but that the injunction then granted expired with the patent, and there was no order of the court in existence, which E. could be said to have infringed. *Held*, further, that C., the assignee, was bound by the decision of the French court. —*Daw* v. *Eley*, Law Rep. 3 Eq. 496.

6. When bills to restrain infringement have been filed against both the one who manufactures and the one who uses a patented article, and issues have been found for the plaintiff, he is entitled not only to an account against the manufacturer, but also to damages against the one using it.—*Penn* v. *Bibby*, Law R. 3 Eq. 308.

7. In prolonging the term of a patent, it was made a condition that licenses should be granted by the patentee to the public to manufacture the patented article, on the same terms on which he had before granted the almost exclusive license to manufacture to an individual.— *In re Mallet's Patent*, Law Rep. 1 P. C. 308.

PAYMENT.—*See* LIMITATIONS, STATUTE OF.

PENALTY.—*See* MORTGAGE, 2.

PERPETUITY.—*See* WILL, 12.

PLEADING.—*See* BILLS AND NOTES; COVENANT, 4; SHIP, 2.

POWER.

A lessor had power by the lease to divert a road, if he made a certain other alteration. *Semble*, that he might divert the road, though he made the alteration for the purpose of entitling himself to divert the road.—*Butt* v. *Imperial Gas Co.*, Law Rep. 2 Ch. 158.

PRESCRIPTION.

From 1808 to the present time, the fee paid on a marriage in a certain church was almost uniformly 13*s*. There was no evidence, before 1808. On a special case, in which the court were at liberty to draw inferences of fact: *Held*, that the amount of the fee, being so great that it could not have existed in the time of Richard I., was sufficient to rebut the presumption from modern enjoyment, that the fee had an immemorial legal existence (Blackburn, J., *dissentiente*).—*Bryant* v. *Foot*, Law R. 2 Q.B. 161.

PRINCIPAL AND AGENT.

1. The servant of a horse-dealer has implied authority to bind his principal by a warranty, though (unknown to the buyer) he has express orders not to warrant; and evidence of a general practice among horse-dealers not to warrant, when the horse has been certified by a veterinary surgeon to be sound, is not admissible to rebut the inference of such authority. *Semble*, that the servant of a private individual, employed on a single occasion to sell a horse, has not implied authority to warrant.—*Howard* v. *Sheward*, Law Rep. 2 C. P. 148.

2. An offer to sell goods was accepted by A., "on behalf of the G. company;" the G. company did not then exist. *Held*, that A. was personally liable on his contract, as for goods sold and delivered; that no subsequent ratification by the G. company could relieve him from his liability without the vendor's assent; and that parol evidence was inadmissible to show that personal liability was not intended. —*Kelner* v. *Baxter*, Law Rep. 2 C. P. 174.

3. The agent for a landowner contracted to execute drainage works as agent for a company, the landowner finding the money for the purpose, and being paid an agreed amount by the company. *Held*, that, notwithstanding the apparent terms of the contract, i might be shown that the agent was not the re contractor, and was not entitled to any profit on the contract. —*Waters* v. *Earl of Shaftesbury*, Law Rep. 2 Ch. 231.

4. The defendant, in London, wrote to the plaintiffs, commission agents at the Mauritius, that they might ship him 500 tons of cane sugar, at a certain maximum price, "to cover cost, freight and insurance; 50 tons more or less of no moment, if it enable you to get a suitable vessel." So much sugar as 500 tons could not be purchased in one lot at the Mauritius; and it was the usual course of business there, in carrying out an order for a large quantity of sugar, to buy it in smaller quantities, from time to time, of different ersons.

The plaintiffs had thus purchased for the defendant 400 tons, when prices rose, and, before the order could be completed, the defendant countermanded it. *Held*, that the defendant must be taken to have given his order with reference to the circumstances of the Mauritius market, and that each lot, as bought, was bought for the defendant, and he must pay for the 400 tons.—*Ireland* v. *Livingston*, Law Rep. 2 Q. B. 99.

5. The defendant, at Liverpool, wrote to the plaintiff, at Pernambuco, "I hope you will have executed fully all the cotton ordered. If executed, please regard this as an order for 100 bales more." The plaintiff, acting on this order, purchased and paid for 94 bales. No direct evidence was given of the state of the Pernambuco market; but the circumstances of the case rendered it reasonable to infer that the plaintiff, in purchasing the 94 bales, had done all that was practicable. The defendant declined to pay, on the ground that his order had been inadequately performed. *Held*, that the order must be construed with reference to the state of the Pernambuco market, and that it had been substantially complied with.—*Johnston* v. *Kershaw*, Law Rep. 2 Ex. 82.

6. A contract to buy shares in a company, entered into but not completed by transfer before the date of a petition to wind up the company, is not rendered void by 25 & 26 Vic. c. 89, § 153. A broker who has bought shares for a customer under such circumstances, and who has, in accordance with the rules of the Stock Exchange, been compelled to pay their price to the vendor, can recover from his principal the money so paid.—*Chapman* v. *Shepherd*, Law Rep. 2 C. P. 228.

7. The plaintiffs contracted to sell shares, which they had purchased from, and which were registered in the name of, C., to the defendant's agent, who gave his name, as principal, for insertion in the transfer, and who also received transfers executed by C. to the defendant, and paid for them with money given them by the defendant. The defendant refused to execute the deeds and have them registered, on the ground that he told his agents he meant to resell without taking a transfer, and that they had given his name without authority. The company was afterwards wound up, and on bill for specific performance (filed before the winding up), to which C. was not a party: *held*, that the plaintiffs were entitled to a decree, and that the defendant should execute transfers, and have his name registered.—*Paine* v. *Hutchinson*, Law Rep. 3 Eq. 257.

See Company, 1; Ship, 4; Trustee.

Probate Practice.

If the court has no reasonable doubt that a will was duly executed, and was destroyed without the fault or negligence of those in trusted with its custody, and if the next of kin consent to the application, the court will admit a draft of the will to probate, without calling on the executors to propound it.—*Goods of Barber*, Law Rep. 1 P. & D. 267.

See Administration; Foreign Court.

Quo Warranto.

A *quo warranto* will be granted, though the defendant has resigned the office, if the object of the relator is not only to cause the defendant to vacate the office, but to substitute another candidate at once in the office; as the relator is, in such case, entitled to have judgment of ouster or a disclaimer entered on the record.—*The Queen* v. *Blizard*, Law Rep. 2 Q. B. 55.

Railway.

1. The owner of a house, none of whose lands have been taken for a railway, can recover, against the company who constructed the railway, compensation, under 8 Vic. c. 20, §§ 6 & 16, for injury to the value of the house, from the noise, smoke and vibration, caused by another company's running trains, in the ordinary manner, on the railway (Channell, B., *dissentiente*).—*Brand* v. *Hammersmith & City Railway Co.*, Law Rep. 2 Q. B. 223.

2. A railway company were let into possession of land, by agreement with the owner, and made their railway over it, giving bond to pay the purchase money on a future day. Default was made in payment. *Held*, that the company would not be enjoined from continuing in possession till they paid the purchase money.—*Pell* v. *Northampton & Banbury Junction Railway Co.*, Law Rep. 2 Ch. 100.

3. A mortgage debenture of a railway company assigned "the undertaking of the company, and all the tolls and sums of money arising upon or out of the said undertaking," as security for money lent. *Held*, that the "undertaking" was the going concern created by statute; that the "sums of money" are moneys *ejusdem generis*, as the tolls; and that the debenture did not give the holder such a charge on the company's surplus lands as to entitle him to an order for a receiver of the sale moneys or *interim* rents.—*Gardner* v. *London, Chatham & Dover Railway Co.*. Law Rep. 2 Ch. 201.

4. A railway company may charge the moneys to arise from the sale of its surplus lands

with a debt due to the constructors of the works.—*Ib.*

5. The Court of Chancery will not appoint a manager of a railway.—*Ib.*

Revocation of Will.—*See* Will.

Sale.

1. It depends on the intention of the parties whether the property in goods, to which something remains to be done before delivery, passes to a buyer at the time of the sale or on the completion of the goods. A., a brickmaker, in embarrassed circumstances, sold to B., to whom he was largely indebted, a large quantity of bricks. B. sent an agent, with an order from A., for the delivery of the bricks, and A.'s foreman told him he was ready to commence delivering, if a man who was in possession, under a distress for rent, was paid out; and he pointed out three lots, one of finished bricks, a second of bricks still burning, and a third of bricks moulded, but not burnt, as those from which he should make the delivery. A. having become bankrupt, the landlord sold some of the bricks, and B. sold the rest to C., who removed them. In trover, by A.'s assignee against C., *held*, that the conduct of A.'s foreman was a sufficient appropriation of the bricks, and that the property in the whole of them passed to B. at the time.—*Young* v. *Matthews*, Law Rep. 2 C. P. 127.

2. A broker employed by the plaintiff to buy shares, which the plaintiff paid for, procured the transfer to the plaintiff, and the plaintiff's signature thereto, and received from him the certificates and transfer to be registered. Soon after, he fraudulently procured the plaintiff to cancel his signature, and by the cancelled transfer and the certificates induced the vendor to make a fresh transfer to himself. He then had the shares registered in his own name, and mortgaged them. *Held*, that the first transfer was not destroyed by the cancellation, fraudulently procured, and the registration and mortgage should be set aside.—*Donaldson* v. *Gillot*, Law Rep 3 Eq. 274.

See Principal and Agent, 1; Ship, 3: Vendor and Purchaser.

Separate Estate.—*See* Husband and Wife, 1.

Servant.—*See* Master and Servant.

Service of Process.

The Court of Chancery has, under the general orders, jurisdiction to order service abroad in any suit.—*Drummond* v. *Drummond*, Law Rep. 2 Ch. 32.

Set-off.

A landlord was liable to his tenant for the costs of an injunction writ, which had been dismissed. He subsequently recovered judgment against the tenant, in an action for rent. Afterwards he became liable to the tenant for damages assessed in respect of the wrongful injunction. *Held*, that he was entitled to set off his judgment debt against the damages, which were of less amount than the debt, but that he could not set off the debt against the costs of the suit.—*Throckmorton* v. *Crowley* Law Rep. 3 Eq. 196.

Ship.

1. A mortgagee in possession of a vessel is not liable for necessaries, unless the master, in ordering them, acted as his agent.—*The Troubadour*, Law Rep. 1 Adm. & Ecc. 302.

2. In a cause of necessaries, an allegation that a defendant was in possession of the vessel at the date of the supplies, and personally liable for them, is not a good reply to an answer of the defendant claiming to be a mortgagee prior to the date of supply.—*Ib.*

3. A shipbuilder in America built several ships, mortgaged them there, and sent them to England for sale. The mortgages were duly registered in the United States; but notice of the mortgage having, in one case, been indorsed on the certificate of registry, and having impeded the sale, it was agreed that no such notice should be indorsed in future. Another ship was accordingly sent over and sold; the shipbuilder received the purchase money, and failed. The mortgagee filed his bill against the purchaser. *Semble*, that a purchaser of a foreign ship is bound to inquire as to the title; but *held*, that the mortgagee had so acted in this case as to suppress the mortgage, and to make the shipbuilders his agents for sale, and the bill could not be maintained.—*Hooper* v. *Gumm*, Law Rep. 2 Ch. 282.

4. A ship was chartered for a voyage from O., to load from the factors of the affreighter a full cargo at 18s. per ton; the captain to sign bills of lading at any rate of freight without prejudice to the charter; the ship to be addressed to charterer's agents at O., on usual terms. The ship was accordingly consigned to the charterer's agent at O., and was put up by them as a general ship, without any intimation that she was under charter. The plaintiff, not knowing that the ship was chartered, shipped some casks of wine, and received bills of lading in the common form, signed by the master. The wine was stowed by a stevedore appointed and paid by the charterer's agents, the money being ultimately repaid them by the master. The wine having leaked from improper stowage, *held*, that as the charter did not

amount to a demise of the ship, and the owners remained in possession by their servants, the master and crew, the shippers could look to the owners as responsible for safe carriage.—*Sandeman* v. *Scurr*, Law Rep. 2 Q. B. 86.

5. A sailing ship of 2,000 tons, with an auxiliary steam screw of 130 horse-power, and carrying 550 tons of coal, sailed from Australia for England, and soon after so damaged her masts by collision with an iceberg as to lose all power of sailing. She reached Rio under steam alone, having nearly exhausted her stock of coals. The repairs necessary to restore her sailing powers would have cost many thousand pounds more than in England, would have taken several months, and would have required her cargo to be unshipped. The captain therefore purchased coals, and completed the voyage under steam alone. The ship-owners sought to charge the cost of the coals against the owners of the cargo as general average. *Held* (1), that assuming any of the expenses of repairing at Rio to be chargeable as general average, yet that expenses incurred by one course could not be apportioned according to what might have been the facts if a different course had been adopted; (2) that the shipowners were bound to give the services of the auxiliary screw, and to make disbursements for all necessary fuel, though circumstances caused these disbursements to be extraordinarily heavy.—*Wilson* v. *Bank of Victoria*, Law Rep. 2 Q. B. 203.

See Freight.

Solicitor.

1. If a plaintiff continues the authority of his attorney after judgment, by allowing him to proceed to obtain satisfaction, the attorney retains power to bind his client by a compromise.—*Butler* v. *Knight*, Law Rep. 2 Ex. 109.

2. One member of a firm of attorneys has no implied authority to bind the firm, by a post-dated cheque drawn in its name.—*Forster* v. *Mackreth*, Law Rep. 2 Ex. 163.

3. The court will permit articles of clerkship to an attorney to be enrolled *nunc pro tunc* (the stamp duty and penalty being paid), when the omission to stamp and enrol them at the proper time arose from some unforeseen circumstance. —*Ex parte Darville*, Law Rep. 2 C. P. 244.

See Award, 2; Contempt, 2.

Specific Performance.

1. Specific performance will not be decreed of a contract to purchase land, made for the purpose of setting aside, on the ground of fraud, a previous agreement affecting the property.—*De Hoghton* v. *Money*, Law Rep. 2 Ch. 164.

2. One filing a bill for specific performance cannot join, as defendants, persons claiming under a previous agreement which the bill seeks to impeach.—*Ib.*

3. A railway company agreed with a landowner to make a road in a certain manner, but afterwards altered the plan. While the work was going on, the landowner filed a bill for specific performance of the agreement, and a motion for injunction had been ordered to stand to the hearing, the company undertaking to abide by the decision of the court. The railway had since been opened for traffic. *Held*, that the convenience of the public was no ground for refusing specific performance.—*Raphael* v. *Thames Valley Railway Co.*, Law Rep. 2 Ch. 147.

4. On bill filed for specific performance of a resolution by the directors of a company to allot a certain number of shares to the plaintiff, it appeared that all the shares had been allotted before the filing of the bill. *Held*, that as specific performance was impossible, the plaintiff's claim for damages in equity, under Sir H. Cairn's Act, failed also.—*Ferguson* v. *Wilson*, Law Rep. 2 Ch. 77.

See Award, 2; Principal and Agent, 7; Will, 9.

Statute of Frauds.—*See* Frauds Statute of.

Statute of Limitations.—*See* Limitations, Statute of.

Surety.

The surety on a note given to secure a loan to a member of a club formed for the purpose of raising money by monthly subscriptions, lending it to the members, and dividing the proceeds when the shares are fully paid up and the loans repaid, cannot rely on the monthly subscriptions and premiums paid by his principal, to reduce his liability on the note.—*Wright* v. *Hickling*, Law Rep. 2 C. P. 199.

Survivorship.—*See* Will, 4–6.

Tenant for Life and Remainderman.

1. A testator gave real and personal estate to trustees to receive and accumulate the rents and profits till A. should attain twenty-one, when he was to be put in possession of the estate for life. *Held*, that there must be an apportionment of the rents and profits, under 4 & 5 Wm. IV. c. 22, up to the time of A.'s attaining twenty-one.—*Wheeler* v. *Tootel*, Law Rep. 3 Eq. 571.

2. In 1831, A., a tenant for life, impeachable for waste, with remainder to his son B. in fee, cut timber, such as the court, if applied to, would order cut, and received the proceeds. B. came of age in 1854; lived with, and was in

partnership with A. for some years, and died intestate in 1844, leaving C., his only child. A. died in 1864; C. came of age in 1865, and in 1866, as executor of B., filed a bill against A.'s executor for an account of the proceeds. *Held*, that the right of suit accrued to B. in 1864, and therefore was barred by the Statute of Limitations; *held*, further, that the court would presume that B.'s claim had been settled between him and A.—*Seagram* v *Knight*, Law Rep. 3 Eq. 398.

3. If a trust fund has been paid into court under the Trustee Relief Act, the costs of a petition by the tenant for life, for payment of the dividends, must come out of the income.—*In re Marner's Trusts*, Law Rep. 3 Eq. 433.

See FIXTURES, 2.

TENANT IN TAIL.—*See* EQUITY, 1; WILL, 3, 4, 12.

TRADE MARK.—*See* COPYRIGAT.

TRUST.—*See* COMPANY, 1; CONFIDENTIAL RELATION; MORTGAGE, 3; TRUSTEE.

TRUSTEE.

The law of Jersey, in case of bankruptcy, entitles each creditor in succession, ranking from the latest, to take the whole of the bankrupt's estate, with its liabilities—to become, in fact, an assignee. A. was creditor of a bankrupt. A.'s trustee or *procureur* became such assignee. *Held*, that the fact that the trustee incurred a possibility of loss did not free him from the duty of accounting to his *cestui que trust* for all profits made by him as such assignee.—*Williams* v. *Stevens*, Law Rep. 1 P. C. 352.

See COVENANT, 4; LIMITATIONS, STATUTE OF, 1.

ULTRA VIRES.—*See* DIRECTORS, 1.

VENDOR AND PURCHASER.

1. A railway company, having contracted to buy property, took possession, and turned out the weekly tenants to whom the property was sublet by the vendor's lessees. After these tenants were turned out, the property was damaged by strangers, who entered and pulled some of the houses to pieces. *Held*, that the damage having been occasioned by the company's taking possession and turning the tenants out, they must pay the purchase money into court, and had lost the option of giving up possession.—*Pope* v. *Great Eastern Railway Co.*, Law Rep. 3 Eq. 171.

2. A condition of a sale authorized the vendor to annul the sale by written notice, if the purchaser should insist on any requisition which the vendor was unable to comply with. The purchaser insisted on a requisition, after being told that the vendor could not comply with it. *Held*, that the vendor could annul the sale by written notice, and that such notice need not give the purchaser time to waive his requisition; and further, that the description of property held under a lease for twenty-four years less three days, as held under a lease for twenty-four years (the vendor relying on the promise of the person entitled to the three days to concur), was not such a misrepresentation as to disentitle the vendor to the benefit of the above condition.—*Duddell* v. *Simpson*, Law Rep. 2 Ch. 102.

3. At a sale of land, stated in the particulars of sale as being let at an annual rental of £30, one of the conditions was, that if any error whatever appeared in the particulars of sale, such error should not annul the sale, but a compensation should be given, to be settled by two referees, one to be appointed by either party. After the conveyance had been executed, an error in the rental as stated was discovered. The vendor having failed to appoint a referee for seven days after the purchaser had appointed one, and after a written notice requiring him to appoint, the purchaser, under the Common Law Procedure Act, 1854, § 13, appointed his referee sole arbitrator, and he awarded compensation to the purchaser. *Held* (1), that the error was a proper subject of compensation, though not discovered till after the conveyance; but (2) that the reference, being one of the amount of compensation only, was not a reference of an existing or future difference within the meaning of the act, and that therefore the purchaser had no power to appoint his referee sole arbitrator.—*Bos* v. *Helsham*, Law Rep. 2 Ex. 72.

See AWARD, 2; CONFIDENTIAL RELATION; COVENANT, 1, 2; MORTGAGE, 1; SPECIFIC PERFORMANCE, 1, 2; WATERCOURSE, 2; WILL, 9.

VESTED INTEREST.—*See* WILL.

VEXATIOUS ACTION.

The plaintiff brought an action of ejectment to recover toll-gates, &c., as executor of the mortgagee of the tolls, in order to enforce payment, but, not being able to produce the mortgage deed, was nonsuited. He admitted at the trial that his testator had been bankrupt. After the trial, the trustees of the road obtained a new act, and inserted the testator's name in a schedule as mortgagee. The plaintiff then brought an action against one of the trustees, claiming a *mandamus*, commanding the trustees to execute a fresh mortgage to him as executor. Since the first action he had become bankrupt. *Held*, that the two actions were substantially the same, and, under the peculiar

circumstances, the second action was vexatious, and proceedings should be stayed till the costs of the first action were paid.—*Cobbett* v. *Warner*, Law Rep. 2 Q. B. 108.

Waiver.—*See* Covenant; Freight, 2; Lease, 4.

Warranty.—*See* Principal and Agent, 1.

Waste.—*See* Tenant for Life and Remainderman, 2.

Watercourse.

1. Mere non-user of an easement to discharge foul water into a stream is not in itself an abandonment, but is evidence of it; and permitting others to incur expense in preparing to do what, if continued for twenty years, would destroy the easement, is strong evidence of abandonment.—*Crossley & Sons* v. *Lightowler*, Law Rep. 3 Eq. 279.

2. A riparian owner, having a right to pour foul water into the stream, if he sells land on the bank of the river, cannot claim a right (unless reserved in the conveyance) to continue to pour foul water into the stream in front of the land sold, though the water of the stream be not in actual use by the purchaser; because every riparian owner has a right to use the water in its natural state, whenever he pleases, free from such pollutions as, if continued twenty years, would become rights privileged by prescription.—*Ib.*

GENERAL CORRESPONDENCE.

Law School examination.

To the Editors of the Law Journal.

Sirs,—Would you please inform me upon certain points in connection with the Law School in Toronto.

1st. Is it in November in each year the examination takes place.

2nd. I was admitted on the books of the Law Society as a law student in May, 1866, and am desirous of going up for a scholarship in 1868—What years scholarship am I to study for; is it the second or third? as there are only four Scholarships and five years study required of a Law Student, I am in doubt about it. By answering these few questions you will oblige,

Yours, A Subscriber.

[The examinations for the scholarships given by the Law School take place in November of each year, we believe, a few days before Michaelmas Term, and our correspondent will in 1868 be entitled to compete for the third year's scholarship, as he will then have entered the third year since his admission to the Society.—Eds. L. J.]

Digest of the Upper Canada Law Reports.

To the Editors of the Law Journal.

Gentlemen,—It would be a great boon to the profession if some arrangement could be entered into, whereby Robinson & Harrison's and Harrison & O'Brien's Digests, together with all the Reports since the latter, down to November last, could be put into one new Digest.

The former Digest has been out of print for some time, and is only to be found in the libraries of practitioners of some years standing, and now that the Law Society supply the Reports to all the members of the profession, I am convinced that if such a work as I have suggested were published, there is not a practising member of the profession but would take a copy. What do you think about it?

Yours,

A Barrister.

[We understand that the work suggested is in course of preparation, by Christopher Robinson, Esq., Q.C., Reporter of the Queen's Bench, assisted by Mr. F. J. Joseph, Barrister-at-Law. It will be a work of much labour, as the design is, if possible, to compress into one volume the two Digests already published, as well as the cases since decided; and this can only be accomplished by striking out obsolete cases, and abbreviating many of the head notes.—Eds. L. J.]

REVIEW.

The Law and Practice Under the Act for Quieting Titles to Real Estate. By Robert J. Turner, Esq., Barrister-at-law, Referee of Titles. Toronto: Adam, Stevenson & Co., Law Publishers, 1867.

New Dominion Monthly Magazine. Montreal, 1867.

The above new books have been received, and will be reviewed next month.

APPOINTMENTS TO OFFICE.

Major-General CHARLES HASTINGS DOYLE, to be Lieutenant Governor of Nova Scotia.—(Gazetted October 19, 1867.)

Colonel FRANCIS PYM HARDING, C.B., to be Lieutenant Governor of the Province of New Brunswick.—(Gazetted October 19, 1867.)