DIARY FOR SEPTEMBER.

4. Sat. ..Trinity Term ends.
5. Sun. ..Fifteenth Sunday after Trinity.
7. Tues...Court of Appeal sittings begin.
9. Thur..Sebastopol taken, 1855.
11. Sat. ..Peter Russell, President, 1796.
12. Sun. ..Sixteenth Sunday after Trinity.
13. Mon...Quebec taken by British under Wolfe, 1759.
14. Tues...Court of Appeal sittings begin. County Court sittings for York begin.
17. Fri. ...First Upper Canada Parliament met at Niagara, 1792.
19. Sun. ..Seventeenth Sunday after Trinity.
24. Fri. ..Guy Carleton,,Lieutenant-Governor, 1766.
26. Sun... Eighteenth Sunday after Trinity.
28. Wed...Michaelmas Day.
30. Thur..Sir Isaac Brock, President, 1811.

CONTENTS.

Canada Law Journal.

Toronto, September, 1880.

We understand that Mr. W. E. Hodgins, Barrister, and his brother, Mr. Frank Hodgins, are preparing and will shortly publish a complete extended index of the Revised Statutes of Ontario. We suggested some time since the desirability of such an undertaking, and are glad to hear that the want will soon be supplied. It would be convenient to have the complete index for both volumes bound up at the end of each.

As any one may be a member of Parliament now-a-days, it is of importance to know that the ancient privileges of the body are in full force. The other day Hall, V. C., held that the privilege of immunity from arrest extended to a person who has been a member of a Parliament which has been dissolved, and this extends for a period of forty days after the dissolution: *Re the Anglo-French Co-operative Association*, 28 W. R. 580

It is a trite saying that one has to go away from home for home news. Apropos of this we find in the *Solicitor's Journal*, as copied from the London *Times*, that there is, in the city of Rochester, New York, a lawyer named W. A. Gibbs, who is of the age of ninety-three years, and is still in practice. The discouraging part of the thing is, that though he has done a good amount of business, he has not become and never was rich. Small hope of wealth for those men then who knock off work at the early age of seventy or eighty.

It appears from the *Solicitors' Journal*, in the current volume, p. 586, that

several gentlemen having patents appointing them Queen's Counsel, made application to the Court of Sessions, in Scotland, that their patents might be recorded "in order to give them due precedence at the bar." But the Lord President said as there was no inner and outer bar, he did not see any reason for the Court taking special cognizance of their appointment. This indicates what will, perhaps, be found to be the true view of the Queen' Counsel question, which has been so much perplexed by the deliverances of some of the judges of the Supreme Court at Ottawa, in *Lenoir* v. *Ritchie*, 3 S. C. R. 575. The dignity is not in the nature of a degree like that of Sergeant-at-Law, which confers social precedence, and is therefore a *status*, the creation of which emanates from the Crown as the fountain of honour. It is simply an appointment which may give the right to precedence in the courts by the grace of the judges. But upon them it depends, and they may or may not choose to recognise the holder of the patent, and may or may not choose to call him within the bar.

We have received, but too late for review in this number, several new law books by Canadian authors:—Surrogate Practice, by Mr. Alfred Howell; The Law on Bills of Sale and Chattel Mortgages, by Mr. John A. Barron, and the Indictable Offences and Summary Convictions Acts, by Judge Stevens, of New Brunswick. At present we can only say they reflect credit on the publishers, Carswell & Co. The last-named volume is, as regards type, paper, and general appearance, equal to anything published by the best houses in England.

In addition, we have before us Mr. O'Brien's annotations on the Division Courts Act of 1880. The notes seem very full, and will be a useful addition to his previous work, which was so well received by those interested in these Courts, which are beginning to encroach rather too hugely on their more sedate brethren.

We are in receipt also of No. 6 of the third volume of Supreme Court Reports. We notice a marked improvement in the current volume over the previous ones. It is to be regretted that Mr. Justice Fournier's judgment in the Great Seal case is given in French only, a language all ought to be familiar with, we grant, but the contrary, unfortunately, is the fact.

IMPEACHING THE CREDIBILITY OF WITNESSES.

Lord Denman used to say that law was susceptible of being classified under three heads—(1) Statute law; (2) Case law; and (3) Law taken for granted. A remarkable example of this last division may be found in the usual *nisi prisi* rulings of the present day, touching the questions which may be asked when a witness is called to impeach the credibility of another witness. It is usually assumed that the end can only be properly reached by means of a gradation of interrogatories: thus, (1) Do you know the character of the witness for truth and veracity in the neighbourhood where he lives? (2) Is that character good or bad? (3) From your knowledge of his character, so obtained, would you believe him on oath? It does not appear, however, from the authorities that this is by any means a correct view of the law. If we turn to Fitzjames Stephens' "Digest of the Law of Evidence," we find it stated that the credit of any witness may be impeached by the adverse party by the evidence of persons who

swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons, he goes on to say, may not, upon their examination-in-chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted. *Art.* 123. This point has been subjected to very minute discussion in Chancery, where the application to put in such evidence was made, after publication, the alleged matter of impeachment having been discovered only after the general examination of witnesses. In *Purcell* v. *McNamara*, 8 Ves. 323, it was agreed that, after publication, it was competent to examine any witness to this point whether he would believe that man upon his oath. Lord Eldon refers to this decision with approval in a later case of *Carles* v. *Brock*, 10 Ves. 50, and continues,—"It is not competent even at law to ask the ground of that opinion; but the general question only is permitted." He says also, in this case, "In examining a witness to credit, the examination is either to be confined to general credit; that is, by producing witnesses to swear that the person is not to be believed upon his oath, or by contradicting the witness you seek to discredit as to particular matters deposed to by him." The *syllabus* to the case in 10 Ves. puts the point thus: "The general question only is permitted; whether he is to be believed on his oath?" Refer also to *Penny* v. *Worts*, 2 De G. & Sm. 527, and *Anon* 3 V. & B. 93. *In Mawson* v. *Hartink*, 4 Esp. 102, Garrow, of counsel, put the question in this way, "Have you the means of knowing what the general character of this witness was; and from such knowledge of his general character would you believe him on his oath?" Lord Ellenborough ruled that this question might be put in that way, as it would then be open for the opposite side to ask, as to the means of knowing the witness's character; so that it would be judged what degree of credit was due to the question from the means that the witness then called had of informing himself and forming his judgment. The same counsel, when on the bench, as Mr. Baron Garrow, gave his views on this point in *Rex* v. *Dispham*, 4 C. & P. 392. A witness was called who stated that he had known the witness impeached for three years, and would not believe him on his oath. The Judge then asked "Have you such a knowledge of his general character and conduct that you can conscientiously say that from what you know of him it is impossible to place the least reliance on the truth of any statement that he may make?" And in summing up to the jury, he said a man may have been guilty of such immoral and profligate conduct for a length of time as to convince respectable persons that his statements are wholly unworthy of belief. The question, therefore, really amounts to this, has the witness such a want of moral character that other persons cannot trust a word he says.

In *Sharp* v. *Scoging*, Holt N. P. Ca. 541, the practice which obtained then, 1817, is very clearly stated. A witness named Chilcott proved the case of the plaintiffs. The defendant then called witnesses who swore they would not believe Chilcott on oath. Gibbs, C. J., said: "When you endeavour to destroy the credit of a witness, you are permitted to call other witnesses who know him, and to ask them this general question,—would you believe such a man upon his oath? You cannot ask them as to particular acts of criminality. But as no man is to be permitted to destroy a witness's character without having grounds to state why he thinks him unworthy of credit, you may ask him his

means of knowledge, and his reasons of disbelief."

In *Macnabb* v. *Johnson*, 2 F. & F. 293, Erle, C. J., allowed evidence of immorality to be given (as to cohabitatiou of a person as mistress), as a circumstance tending to impeach the general credit of the plaintiff who had been called as a witness.

The head-note in *Reg.* v. *Brown*, L. R. I. C. C. R. 70 (1867), expresses the practice thus,—"In order to impeach the character of a witness for veracity, witnesses may be called to prove that his general reputation is such that they would not believe him on oath; but in the case stated for the opinion of the Court, all that appeared was that the defence proposed to call witnesses to prove that they would not believe witnesses for the prosecution on their oaths; and that the Court declined to receive such evidence."

In *Rex* v. *Rudge*, Pea. Add. Ca. 232, Lawrence, J., said that the way in which a witness should be discredited was by general evidence of persons, who were acquainted with him, as to their belief of his credibility on his oath.

From these decisions we submit the weight of authority is in favour of this position, that you can, without any preliminaries, at once ask the question (as indeed it is given in Roscoe N. P. Evid., p. 183, 14thed). "From your knowledge of the witness, do you believe him to be a person whose testimony is worthy of credit?" One can easily see how the present formula has taken shape in course of time, namely,—in the anxiety of counsel to anticipate the exposure of the insufficiency of the witness's opinion if it were based on anything short of common repute, and so, by his own manner of questioning, to place the opinion, if possible, on the foundation of general bad character, and not merely on the spleen or spite of the individual witness. These authorities also show that the enquiry into character, when entered upon in order to impeach veracity, need not be confined to a man's truth-telling or the reverse, but may embrace the totality of his moral character as it stands among his neighbours.

THE DOMINION AND THE EMPIRE.

"May He, who hath built up this Britannic Empire to a glorious and enviable height, with all her daughter lands about her, stay us in this felicity."
—*Milton.*

We cannot but congratulate ourselves upon the almost simultaneous production of the three works mentioned below. They seem to indicate a demand for information upon the institutions of our country, which, in a community so young, so free, and with such an extended franchise as our own, it is pre-eminently desirable that every subject should possess. Our days are cast in the early youth of the Canadian national life; the community is plastic to a degree to which it can never be hereafter; and upon ourselves, more than upon later generations, must depend the future of our country.

All who are impressed with this elevating thought must needs welcome warmly and gratefully such a work as that which Mr. Todd has now given to the public. We could, indeed, wish that it were made a necessary book in the curriculum of every university throughout the British Empire. Englishmen could scarcely fail to derive from it increased

Parliamentary Government in the British Colonies. By Alpheus Todd, Librarian of Parliament, Canada; author of "Parliamentary Government in England," &c. One vol. Little, Brown & Co.

The Powers of Canadian Parliaments. By S. J. Watson, Librarian of the Parliament of Ontario. One vol. C. B. Robinson.

A Manual of Government in Canada. By D. A. O'Sullivan, Esq., M.A., of Osgoode Hall, Barrister-at-Law. One vol. J. C. Stewart & Co.

sympathy with the efforts of colonists to modify and adapt to their altered circumstances those institutions which have made Great Britain the land, above all other lands, where Freedom and Law have met together, and, also, an increased and ennobling pride in the position of their country as the Mother of Nations: while, on the other hand, it could not fail to produce in the mind of colonists renewed love and reverence for the old land, and a more lively and just appreciation of the wisdom and statesmanlike moderation with which, for the last forty years at all events, the Home authorities have dealt with the varied interests of the Empire.

Unique, as we believe, of its kind, Mr. Todd's work shows an acquaintance with the records of the Colonial Office, which may well be called marvellous. Admirably printed and arranged, it presents to us, in a convenient and accessible form, not only the general principles on which responsible government in the Colonies is carried on, and reconciled with the supreme authority of the Imperial Parliament and the Crown, but also a series of precedents, taken from the political history of various colonies, containing many verbatim extracts from the most important despatches, and conveniently printed in a somewhat smaller type than that of the general text. On almost all recent and current questions of Canadian politics, Mr. Todd's book directly or indirectly throws light, and wherever he criticises the past, he does so, not in the narrow spirit of the party writer, but without bias and on broad constitutional principles. Moreover, no less in the formal, but most important point of book-making, than in the treatment of the subject itself, does Mr. Todd's work elicit our admiration, and show the old and experienced hand. To the excellence of the type we have already alluded, and we may add to this a broad margin, a habit of always giving authorities, and of giving them with exactness, so that they may be easily verified; from time to time summing up the results arrived at in a few well-chosen sentences; of always mentioning pages when referring to preceding and subsequent parts of the book; and last, but not least, we find the crowning blessing of a full and admirable index.

We wish we could discover the same care in regard to minor points in the *Manual of Government in Canada*. The general object of this little book must commend itself to all. "The aim of this little Hand Book," the author tells us, "is to furnish such information on the manner in which we are governed as every student should know, and to furnish it in as plain language as the subject will permit in the hands of the author" (p. 1). Nor have we any serious complaint to make as regards the general style of writing. Moreover it is possible, though we cannot agree with him, that the author may consider the fact that the work being elementary renders expedient somewhat scanty and very vague references to authorities. We think we may say that, in no single instance, except occasionally when referring to a case in the Reports, does Mr. O'Sullivan refer to the volume or page of the authority cited. It is less easy, however, to condone occasional carelessness in language. For example at p. 33 the author says: "The speaker must be a Senator; and in this particular *the Senate*, as to that officer, differs somewhat *from the speaker* of the House of Lords, etc." At p. 63 we find: "The Governments of the Provinces are *ones* of enumerated powers." At p. 79, speaking of the executive, Mr. O'Sullivan says: "This is divided into two parts by some writers, viz., Administrative

and Judicial Government; *but the three duties of Government in making, explaining and enforcing laws will be found to be convenient.*" Then there is a sentence which has a tendency to make one feel giddy. Speaking of the Auditor-General of Canada, at p. 89, the author writes: "He issues all cheques under the Parliamentary appropriation, and unless in these cases no cheque of the Finance Minister shall issue unless upon his certificate." We fear we might mention many more examples, but will only give one other. At p. 235 occurs this sentence, which we cite without comment: "Local concerns in a large country are managed most satisfactorily by Local Administration; and *it wont matter any* whether such Administration is a District Council or a Parliament."

These faults, however, though we cannot call them minor faults, do not annul the general merit of Mr. O'Sullivan's work, and may easily be amended before a second edition appears. The little Manual gives much information which "every schoolboy" ought to know, but which is, we fear, possessed by few. Whether, indeed, the author's constitutional doctrine is always sound is questionable. Certainly, Mr. Todd would join issue with him when he says (p. 78): "This is not saying but that the Crown has certain abstract rights; *but these are obsolete and disused in England, and can have no application here.*" We may have occasion hereafter to allude to other statements of Mr. O'Sullivan, but will take this opportunity to revert to Mr. Todd's important work.

In his preface Mr. Todd informs us that his book forms the completion of a design, long contemplated, and partly fulfilled by the publication thirteen years ago of his *Parliamentary Government in England.* It is intended to explain the operation of "Parliamentary Government," in furtherance of its application to colonial institutions.

After some introductory chapters, Mr. Todd divides the main body of his work into three natural and convenient divisions, viz.:

1. Imperial Dominion exercisable over self-governing Colonies.

2. Dominion exercisable over subordinate Provinces of the Empire by a central Colonial Government.

3. Local Self-Government in the Colonies.

The second part of the book may, indeed, be said to amount to little more than a very instructive and welcome treatise on the British North America Act, and we propose to devote a separate article to it; and it will be then that Mr. Watson's interesting little volume will most fitly come under our notice. The Dominion, in fact, occupies naturally and necessarily a very large and predominating place in the work, not only because Canada has been the centre of Mr. Todd's labours, but also because to her first of all the colonies was responsible government conceded; and because in the Dominion we have the only instance in which the confederation of various colonies—the latest stage in England's Colonial policy—has been successfully effected.

Moreover, although Mr. Todd does not forget the avowed purpose of his work, viz., the explanation of the operation of Parliamentary Government in relation to colonial institutions, yet his prevailing idea has evidently been to bring out with special prominence the proper constitutional position of the Crown, as represented, on the one hand, by the Sovereign and his Ministry at Home, and on the other hand by Governors and their Executive Councils in the Colonies. At p. 584, indeed, Mr. Todd says:

It has been the aim of the present writer to define, with the utmost possible precision and impartiality, the actual position and functions of a Governor in his political relations, so far as the same are capable of being determined by reference to authoritative documents and other unimpeachable sources of knowledge.

And in his Preface he says:

I would further remark that in this—as in my larger work—I have directed particular attention to the political functions of the Crown, which are too frequently assumed to have been wholly obliterated wherever a "Parliamentary Government" has been established. In combating this erroneous idea, I have been careful to claim for a constitutional Governor nothing in excess of the recognised authority and vocation of the Sovereign whom he represents; while, on the other hand, I have endeavoured to point out the beneficial effects resulting to the whole community from the exercise of this superintending office, within the legitimate lines of its appropriate position in the body politic.

We, therefore, propose to lay before our readers some of Mr. Todd's views as to the proper position of the Crown in our constitutional system, and as to the power and functions of Governors in British Colonies possessing responsible government, and to cite some instances in which Colonial Governors have most beneficially exercised their legitimate influence and authority.

(To be continued.)

COMPENSATION FOR DISTURBANCE (IRELAND) BILL.

There has probably been no Bill before the Imperial Parliament, since that for the disestablishment of the Irish Church, which has called forth such intense feeling among the educated classes at home as that which is popularly known as the Irish Disturbance Bill. Before it had passed the third reading in the Lower House it had already caused the resignation of one of the Ministry, the Marquis of Lansdowne; and if report says true, had very nearly caused a further split in the Cabinet by the secession of the Marquis of Hartington and Lord Spencer. Nor was it finally passed before two-thirds of the Liberal majority in the Commons had gone over to the enemy. Perhaps, indeed, it would not have passed at all had it not been considered certain that it would be rejected by the Lords, where, in fact, after a brilliant debate extending over August 2nd and 3rd, last, it was thrown out on the second reading by the enormous majority of 231.

After the first day's debate, the *Times* commenced a leading article on the subject, as follows,—we quote it for the purpose of showing the interest excited by the occasion:—

Seldom in our recent political history has the House of Lords been the centre of so much public interest as it was yesterday, when the Irish Disturbance Bill came on for the second reading. The body of the House, and especially the Opposition side, was crowded with peers to an extent very unfamiliar to those who are accustomed to see the red benches more than half unfilled even upon important occasions. The Peeresses' Gallery presented a spectacle of unsurpassed brilliancy, and every available inch of room accessible to spectators was invaded by an excited throng. Nevertheless, no critical division was anticipated, nor, perhaps any remarkable display of eloquence. The gravity of the question, however, to be decided by the Upper House in dealing with the Ministerial measure has been brought home to the public mind by recent discussion, not only in Parliament, but in the Press. It is not alone those interested in Irish landed property, or landed property elsewhere, to whom the debate in the House of Lords is a matter of direct concern. To many it appears that the legislation proposed by the Government calls in question the principles by which all proprietary rights whatever are guarded against unjust invasion by the State; others believe that the Ministerial policy tends to whet the appetite of Irish agrarian agitation and to imperil the true interests of Ireland.

And after the division on the second day an article in the same paper contained the following remarks, which form a good introduction to those passages bearing upon the more exclusively legal aspect

of the question, which we propose to quote from Lord Cairns' now famous speech :—

The debate in the House of Lords last night upon the Irish Disturbance Bill, which ended in the loss of the motion for the second reading by the extraordinary majority of 282 votes to 51, brought to a close a long and embittered controversy. The rejection of the measure upon a division by a great majority was fully anticipated, and the speeches in its favour partook of the gloom and langour of overshadowing defeat. Lord Cairns resumed the discussion upon the assembling of the House in a powerful and exhaustive criticism, which erred, perhaps, upon the side of length and elaboration, but which practically disposed of every argument adduced by the supporters of the Bill. A more thoroughly destructive speech has not often been delivered in Parliament. The late Lord Chancellor may be compared as a master of detail with Mr. Gladstone himself, and in dealing with the questions debated yesterday he had the advantage of an intimate knowledge of Ireland, and of a trained legal intellect. We have great difficulty in believing that any unprejudiced person who listened yesterday to Lord Cairns' lucid and cogent reasoning can have remained unconvinced that the Ministry were from the first ignorant of the real scope and effect of the measure, or that, after they discovered the grave objections to it, they attempted to defend it by crude and hasty arguments. Of the Bill thus originated in ignorance, impatience, and inconsistency, it can be no matter for surprise that it has been found to involve pernicious consequences, of which Mr. Forster, justly confident in the excellence of his own intentions, had no suspicion.

We will, however, first present to our readers, the terms of the Bill itself as amended in Committee, The Bill is worded as follows :—

Whereas, having regard to the distress existing in certain parts of Ireland arising from failure of crops, it is expedient to make temporary provision with respect to compensation of tenants for disturbances by ejectment for non-payment of rent in certain cases;

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and nsent of the Lords Spiritual and Temporal, and Commons, in this Parliament assembled, and by he authority of the same, as follows :—

1. An ejectment for non-payment of rent for recovery of the possession of a holding valued er the Acts relating to the valuation of rateable property in Ireland at an annual value of not more than £30, situate wholly or partially in any of the Poor Law unions mentioned in the schedule hereto, or where any electoral division is specified in the said schedule situate wholly or partially in such electoral division, and which shall be commenced after the passing of this Act and before the 31st day of December, 1881, or which shall have been commenced before the passing of this Act, and in which any judgment or decree for possession shall be executed after the passing of this Act and before the 31st day of December, 1881, shall be deemed and declared, by the Court having jurisdiction to hear and determine land claims in and for the county in which such holding is situate, to be a disturbance of the tenant by the act of the landlord within the meaning of the third section of the Landlord and Tenant (Ireland) Act, 1870, notwithstanding anything contained in the said Act, - -

If it shall appear to the Court—

(*a*) That such non-payment of rent by the tenant is owing to his inability to pay, caused by such distress as aforesaid; and

(*b*) That the tenant is willing to continue in the occupation of his holding upon just and reasonable terms as to rent, arrears of rent, and otherwise; and

(*c*) That such terms are refused by the landlord without the offer of any reasonable alternative.

2. The acceptance of compensation for disturbance under this Act shall be a bar to any claim, under the provisions of the Act passed in the twenty-third and twenty-fourth years of Victoria, chapter one hundred and fifty-four or otherwiee, to be restored to the possession of the premises included in the ejectment for non-payment of rent; provided always, that if it appears to the Court that any person other than the tenant has a specific interest in the holding, notice of the proceedings shall be given to every such person, and so long as any such person may be entitled to redeem the holding no acceptance of such compensation shall be valid, nor shall the amount awarded, or any part thereof, be payable, unless every such person shall consent thereto. or the Court, having regard to all the circumstances of the case shall so direct.

3. The amount of rent which may be allowed by any landlord to accrue due during the period of the operation of this Bill shall not be reckoned against him in calculating the arrear of rent which might in any case of ejectment for non-payment of rent be sufficient to subject him to damages for disturbance under the 9th section of the Landlord and Tenant (Ireland) Act, 1870.

4. This Act may be cited for all purposes as the Compensation for Disturbance (Ireland) Act, 1880, and shall be read and construed for all purposes, including the making of rules for carrying

into effect the provisions of this Act, as one with the Landlord and Tenant (Ireland) Act, 1870.

It now only remains to add, as the best possible comment on the Bill, that portion of the Lord Chancellor's speech, which deals with the legal side of the question. Earl Cairns, after a few introductory remarks, spoke as follows :—

Now, it is desirable that we should in the first instance know what is exactly the present position of an Irish tenant with respect to his holding. My lords, the great statute with respect to landlord and tenant in Ireland was passed in 1870. It begins by declaring that the relation of landlord and tenant in that country is founded upon contract, and it states that that contract may be either express or implied—that is to say, where the landlord and the tenant have stipulated between themselves upon particular grounds the contract is express; where they have not done so, and where the law imports certain terms into the contract, the contract is implied. But, whether it is express or whether it is implied, it is one entire contract upon which the relation of landlord and tenant is founded. Now, let us put aside for a moment the cases arising under the Custom of Ulster, which are somewhat confusing and have little or no bearing upon the present measure, and let us see what is the position of a tenant in Ireland to whom the Custom of Ulster does not apply. Well, he is bound to pay his rent. If he does not pay his rent, there are three remedies which the landlord possesses. He may distrain for rent in arrear; he may bring a civil action for its recovery; or if there is a whole year's rent in arrear he may proceed to evict the tenant from his holding. And then, supposing that to be done, the law steps in and imports further consequences into the contract. If the tenant is entitled to compensation for improvements, he maintains that title and continues to possess that right even though he should be evicted for nonpayment of rent. Eviction for nonpayment of rent in no way injures his right to compensation for improvements. If he is evicted for any other reason but nonpayment of rent, he may have a claim for disturbance. But, with the law as it now stands, if he is evicted for nonpayment of rent, he has no claim for any payment in the shape of damages for disturbance except in two particular cases specified—the one where there is an old arrear of rent hanging over him, and the other where under tenancies existing in 1870 he can show in the case of a holding under £15 a year that the rent is exorbitant. My lords, those are the conditions under which an Irish tenant at present holds. But let me say one word with respect to the question of eviction. In addition to the rights which I have mentioned, the tenant in Ireland who is to be evicted for nonpayment of rent has certain other privileges which are peculiar to that country, and which are of considerable value. In the first place he has the right for six months to come to his landlord and tender the rent in arrear, and so redeem his holding; in the next place, he has a privilege which is not unimportant—the Judge who directs the process of eviction has a power which I believe is entirely peculiar to that country, and which would very much surprise a Judge in this country, that in all cases of decrees for ejectment the Judge shall be at liberty to grant such stay of execution as he may in the circumstances consider reasonable. So that the tenant is guarded in this way—he has six months to redeem his holding, and if he can show the Judge any reason why as a question of mercy and kindness he should not be evicted, the Judge has a discretion to suspend the execution of the eviction which has been decreed. That being the present state of the law, let me show your lordships in the next place what this Bill proposes to do. In the first place, with respect to the area covered by the Bill, I do not know whether your lordships have observed the map exhibited in your library which shows by colours the portions of Ireland to which this Bill would apply. But I may further, for the convenience of the House, state roughly that the Bill would apply to more than half the acreage of Ireland—to 11 millions out of about 20 million acres. But that is not a complete statement of the case. Of the four provinces, Ulster, Leinster, Munster and Connaught, we may put aside Ulster, because the Bill would have really no operation in it; and of the other three provinces your lordships may take it roughly that the whole of Connaught and the whole of Munster are covered by the Bill, and that the only province out of Ulster not covered by it is Leinster. Therefore, putting aside the Custom of Ulster, you have two out of the three remaining provinces covered by the operation of the Bill. Well, what does the Bill propose to do? It takes possession of all existing contracts between landlord and tenant, and not only of all existing contracts, but of all existing actions between landlord and tenant, actions actually commenced, actions in progress up to any point short of complete execution. The Bill takes possession of the whole of those contracts, the whole of those actions, and suspends the landlord's right of eviction. My lords, I say suspends the right of eviction, because I do not expect that I shall hear in this House what I most repectfully say is nothing

more than a quibble used out of doors, that this is not a suspension of the right of eviction, but merely the affixing to the right of eviction certain penalties. My lords, it is just the same thing whether you say to a landlord, "You shall not use your right of eviction,' or whether you say "If you do use your right of eviction you shall pay such a sum as is certain to prevent you from resorting to the exercise of that right." (Hear, hear.) The whole foundation of the case for the Bill is that evictions have increased and that they ought to be limited, and, unless the Bill is meant to suspend or limit the right of eviction, the foundation of the Bill falls to the ground. (Hear, hear.) Well, now, my lords, I dwell for a moment upon this for the purpose of reminding your lordships that this is not a question of the freedom of contract. No doubt there was a time when all parties in the State were jealous on the question of freedom of contract. But the fashion of the Liberal party is now to sneer at the idea of maintaining the freedom of contract. (Hear, hear.) But my lords, we have not to argue that question this time. That is not the question raised by the Bill. The question of restraining freedom of contract does not appear to me to arise. The question which does arise is a very different and a much higher one, it is the question of maintaining contracts actually entered into. (Cheers.) The question which your lordships are called upon to investigate and determine is not whether this is a Bill interfering with the freedom of contract, but whether it is a Bill destroying contracts freely entered into. (Hear, hear.) It is well to remember that there are countries—countries too, which we are accustomed to regard as not fettered by the traditions that bind our own judgment—in which the possibility of legislation of this kind is not contemplated. No Legislature of any State in America would pass this Bill, or would impair in any way contracts actually entered into; nor, I am certain, would Congress ever impair the efficacy of such contracts. (Hear, hear.) I listened with interest last night to hear from the noble earl who introduced this Bill whether he could mention any precedent for a measure of this character. He referred to the question of tithe commutation; but the two cases, and the only two he mentioned with regard to contracts were these. He was good enough to refer to a Bill introduced by me this year, and which passed through the Honse. It was a Bill that contained one provision between landlords and tenants, and raised the question whether relief should be given to forfeiture for breach of condition in leases. If the noble earl will introduce into this Bill the provisions which were in mine with regard to the terms in which relief of forfeiture can be given as between landlord and tenant, I will vote for the Bill. My measure proceeded on the principle that all the damage that can be shown by the landlord to be occasioned by the tenant's breach of the cenditions of his lease shall be paid fully before the relief can be given to the tenant. (Hear, hear.) So much for the first Bill. The second Bill that he mentioned related to the law of hypothec in Scotland. But did that Bill interfere with any existing contract! If the noble earl will refer to that Bill, which I do not think he has done, he will find that it referred only to future contracts. (Hear, hear.) Now, these are the only precedents for such Parliamentary interference with existing contracts as is here proposed. I wish to ask your lordships next to consider the way in which it is proposed to do this by the Bill. I heard last night a noble lord (Lord Emly), who is not present to-day, express his opinion about the Bill. If I understood him, he said that it was very certain that the Bill, if it passed, would be little resorted to, that there would be scarcely any disputes between landlords and tenants, and that their affairs would usually be settled amicably and peaceably. It is one of the unfortunate things about the Bill that, by an ingenuity which I cannot but admire and lament, it has been arranged in such a way as to make it all but impossible to avoid constant collisions between landlord and tenant. In the jurisdiction of each County Court Judge there are 6,000 or 8,000, or even, in some instances, 10,000 tenants. Unless Irish tenants differ strangely and totally from others, they will be driven by the Bill to make a claim against their landlords in every case. The tenant will naturally say, "Here is a Bill which gives me such a chance as I never had before of getting a considerable sum of ready money. I will take that chance, and decline to pay rent. My landlord will proceed to eviction, and will bring me before the Judge. I shall then make a case against him under the Bill, and I shall proceed to show that, under the circumstances, I cannot pay my rent." Well, there are thirty-three County Court Judges in Ireland, of whom I wish to speak with the greatest respect; but it must needs be that among them there will be difference of action, of thought, and of judgment. One will lean, perhaps, to a more liberal scale of compensation than the others, and another will be more severe on the tenant; but the tenant takes his chance, and, we will suppose, receives from the Judge a sum of compensation money—seven years rental, possibly, or at least four or five. The landlord, of course, cannot draw back, and the tenant remains the mortgagee in possession till every shilling of the compensation is paid. (Hear.) The landlord is compelled either to pay or to allow the tenant to remain in possession till the money is paid, but the tenant, meanwhile, is as free as air. (Hear, hear.) If he

does not get the sum he reckoned on, all he has to do is to pay his rent within the six months allowed, and to keep his holding. Therefore, if the case goes against the landlord, the landlord is bound; but if against the tenant, the tenant is free. (Hear, hear.) I come next to the inquiry what are the terms indicated in the Bill as sufficient to justify the right of the tenant to compensation from his landlord. He is to prove his inability to pay the rent, and then to show that he is willing to continue in the occupation of his holding on just and reasonable terms as to rent' arrears of rent, and otherwise. I ask if any of your lordships has a clear impression of the meaning of these words. I own honestly that I have not, and the Government last night gave no sort of indication as to the sort of agreement that the tenant is expected to offer. We must therefore endeavour by ourselves to examine the words and see what they mean. I may assume, I suppose, that the Govenornment do t consider it reasonable that no rent should be paid. (Hear, hear.) Do the Government mean that the tenant is to give seeurity for the rent due? If that is meant, it would have been better to have said so in the Bill. But if the words mean neither that the tenant is to pay no rent nor that security is necessary for the amount he owes, it remains only that the tenant should propose to pay a smaller rent than at present. In the first place, I will ask your lordships to consider how far that view is in accord with that heralded to the world as the great inducement to pass the Land Act of 1870. On that occasion the Prime Minister said, "The Bill proceeds on the principle that, from the moment the measure is passed, every Irishman small or great, must be absolutely responsible for everv contract into which he enters," and the right hon. gentleman also said on the third reading of the Bill—"By every contract from the date of the passing of the Act to pay any rent, reasonable or unreasonable, he will be absolutely bound, and will not be able to escape the obligation." (Hear, hear.) After the lapse of only ten years, I contrast that with the explanation of the Chief Secretary as to what he proposed by the Bill now before the House. Mr. Forster says,—"The tenant must be willing to try his utmost to pay a reasonable rent"—observe, not to pay, but only to try to pay—"that is, to pay rent either reasonably reduced under the circumstances of the year, or with a reasonable time given in which to pay; and his landlord must be unwilling to make that reasonable reduction or to give him that reasonable time." Is it possible that in ten years such a spirit has come over the minds of the Government opposite—the same men who passed the Land Act—that one of those very Ministers can now come forward and propose, by interlarding every line of the Bill with the word "reasonable," to cut down the obligations to which they so recently declared that they would hold the tenant?(Hear, hear.)

SELECTIONS.

DRINKS, DRINKERS, AND DRINKING.

The dry and thirsty days of summer are here once more. Drinking is the order of the day. Our bodies require to be constantly moistened internally, else with the thermometer among the nineties, quickly would the human form divine become little heaps of dust and ashes. If we cannot drink just now, let us think about it. Longfellow says, "He who drinks beer, thinks beer; and he who drinks wine, thinks wine." Let us for a few minutes fondly imagine the converse of this to be true, and while we think of beer, cider, wine and ale, let us drink in fancy.

In dealing with this subject, let us take the division suggested by Lindley Murray's definition of a noun, and speak of "person, place and thing."

Then, firstly, as to the "person." A "common drunkard" is not a regular tippler, but one who is frequently drunk. Proof that one was drunk six times on six different days in three months, when there was no evidence of his state on the other days, does not entitle him to the presumption that he was sober on the other days. *Com.* v. *McNamee*, 112 Mass. 285. The rule of law is that things are presumed to continue *in statu quo.*

An "habitual drunkard" is one who has the habit of indulging in intoxicating drink so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold. *Magahay* v. *Magahay*, 35 Mich. 210.

The phrase "addicted to the excessive use of intoxicating liquors" means not the occasional excessive use, but the habitual excessive use. *Mowry* v. *Home Ins. Co.*, 1 Big. Life and Acc. Ins. Co. Cas. 698.

A court being called upon to define, in an insurance case, what was meant by saying that "a man had always been sober and temperate," very wisely concluded that such a thing could not be said of

one who, although usually sober and temperate in his habits, yet occasionally indulges in drunken debauches which sometimes end in *delirium tremens*. *Mutual Benefit Life Ins. Co.* v. *Hotterhoff*, 2 Cin. Sup. Ct.

To say that a man is "intemperate," does not necessarily imply that he is in the habit of getting drunk. *Mullidex* v. *People*, 76 Ill. 211. We fancy, however, the courts would not hold the converse of this.

A "saloon keeper" is one who retails cigars, liquors, *et hoc genus omne*. *Cahil* v. *Campbell*, 105 Mass. 60.

In England, one who on Sunday walked to a spa two and a half miles away from his home for the purpose of drinking the mineral water for the benefit of his health, and then took some ale at an hotel (to keep the water down, we suppose), was held by the Court of Common Pleas to be a "traveller." *Pepler* v. *Richardson*, L. R., 4 C. P. 168.

England is a small country. One cannot travel far in any direction there without getting his feet damp, like Kanute and his friends. We presume this is why what would here be called "taking a stroll" is there dignified by the name of "travelling."

In considering the question of selling liquor to a "minor," the court held that the fact that a youth wore a beard, and said that he was 21, was no proof that he was an adult. *Gelty* v. *State*, 41 Ind. 162.

The Bench doubtless believed that although every American boy may become President, still every one is not a George Washington; but that, as Mark Twain says, "Some Americans will lie." As to beards, nature occasionally "bursts out with a chin-tuft" before her turn, or where she should not.

Now as to "place." Judges do not exactly know, at least when on the bench—what a "saloon" is. They say that it does not necessarily import a place to sell liquors; that it may mean a place for the sale of general refreshments, *Kelson* v. *Mayor of Ann Arbor*, 26 Mich. 325; or that it may mean a room for the reception of company, or for an exhibition of works of art, etc. *State* v. *Mansker*, 36 Tex. 364. This latter idea shows how high-toned Texan judges are, and that they have travelled in foreign parts. Neither an enclosed park of four acres in extent, nor an unenclosed and uncovered platform, erected for the votaries of the Terpsichorean art, and where lager beer is sold, can rightly be considered a "saloon," or a "house," or "building," within the meaning of the Connecticut statute forbidding Sunday selling of intoxicating liquors, etc. *State* v. *Barr*, 39 Conn. 41.

We opine that the Texan court would have held both this park and platform a "saloon," as there would certainly be "room for the reception of company," and if the dancing was good, and the dresses of any Worth, these would be an exhibition of works of art.

A "cellar" may be referred to as "the above mentioned house." *Com.* v. *Intoxicating Liquors*, 105 Mass. 181. In England, it was held that a covenant not to use a house as a "beer house" was not broken by the sale under a license of beer by retail to be consumed off the premises. *L. & N. W. Railway* v. *Garnett*, L. R., 9 Ex. 26. One Schofield had a license to sell beer "not to be drunk on the premises." The bartender handed a mug of beer through an open window in Schofield's house to a thirsty soul, who paid for it, and immediately drank it, standing on the Queen's highway, but as close as possible to the window. The Court of Queen's Bench considered that this was not a case of selling beer "to be consumed on the premises." *Deal* v. *Schofield*, L. R., 3 Q. B. 8.

As to the "thing" itself. The phrase "spirituous liquors" does not include "fermented liquors." *State* v. *Adams*, 51 N. H. 568.*

Cider is not a "vinous liquor." *Feldman* v. *Morrison*, 1 Ill. App. 469. This seems reasonable enough in view of the decision that "vinous liquors" means liquors made from the juice of the grape. *Adler* v. *State*, 55 Ala. 16.

A "dram" in common parlance, in Texas, means something that has alcohol in it—something that can intoxicate; at

* But ale and strong beer are "strong and spirituous liguors." *Nevin* v. *Ladue*, 3 Den. 437, one of the most entertaining cases in the books. —Ed. Alb. L. J.

least so say the judges. *Lacy* v. *State*, 32 Tex. 227.

Some years ago, in Indiana, they were very virtuous, and the court decided that the mere opinion of a witness that common "brewer's beer" was intoxicating was not sufficient to prove that it was so, unless the testimony of the witness was founded on a personal knowledge of its effects, or of its ingredients or mode of manufacture; and the court could not take judicial notice that it was intoxicating. *Glaso* v. *State*, 43 Ind. 483.

But alas for the good old days and the childlike innocency of judges and jurymen! Now both courts and juries in that State will take notice of the fact that "whisky" is an intoxicating drink without any proof. *Eagen* v. *State*, 53 Ind. 162.

In Massachusetts, a jury was held warranted in finding "ale" to be intoxicating, merely on the testimony of a witness who saw and smelled, but did not taste it. *Haines* v. *Hanraham*, 105 Mass. 480. Perhaps these twelve men, good and true, had had a view themselves.

In Maine, one may be indicted and convicted for selling for tippling purposes "cider and wine," although made from fruit grown in the State, if the jury find that they are intoxicating. *State* v. *Page*, 66 Me. 418.

How much and how long would it take the jury to find this out? Would they be allowed to take specimens with them into their withdrawing room, as they do documents, to examine? Or would the judge look upon cider and native wine as Mr. Justice Creswell did upon water? A counsel once objected to a jury having water while considering their verdict. "Why not, Mr.——, why not?" queried the judge; "water is neither 'meat' nor 'fire,' and no sane man can say it is 'drink;' let the jury have as much as they want."*

The "Sabbath night" includes as well the time between midnight on Saturday and daylight on Sunday, as the time between dark on Sunday and midnight. *Kroer* v. *People*, 78 Ill. 294.

In England, "habitual drunkenness" is not cruelty in the eyes of the law. (N. B.—'Tis strange that justice should be blind and law a Polyphemus), so to entitle a wife to divorce. L. R., 1 P. & M. 46.

As to the mode of selling, Richards, C. J., thought that selling a "bottle of brandy" for $1.25 was selling by retail (*Reg.* v. *Durham*, 35 U. C. R. 508); and in another case, Hagarty, C. J., said that he would assume that a sale of a "bottle of gin" at sixty cents was a sale by retail. *Reg.* v. *Strachan*, 20 C. P. 184. While in Illinois the court held that proof that intoxicating liquors were retailed "by the drink" warranted a finding that the sale was in "no larger quantity than a quart" (as restricted in the Ill. Rev. Stat., 1845). *Lappington* v. *Carter*, 67 Ill. 482. See, also, *United States* v. *Jackson*, 1 Hugh. 531. The judges of this court clearly never heard of the Duke of Tenterbelly. Bishop Hall tells us that this famous nobleman, when returning thanks for his election, took up his large goblet of twelve quarts, exclaiming, should he be false to their laws, "Let never this goodly formed goblet of wine go jovially through me," and then, says the historian, "he set it to his mouth, stole it off every drop, save a little remainder, which he was by custom to set upon his thumb's nail, lick it off as he did."

Now that we have finished, we fear that the foregoing will not prove as satisfying as the descriptions of Hawthorne's old Inspector, and that not only is the reader and the writer, but also the thing written is "dry."

R. V. Rogers, Jr.

Albany Law Journal.

* The oath of the officer in charge of the jury, down this way, says "water excepted."—Ed. Alb. L. J.

CIRCUMSTANTIAL EVIDENCE.

About thirty years ago Paul Kunkel accompanied his brother to Baltimore, whence the latter was to sail for the home of his nativity in Germany. Having seen him off, Mr. Kunkel started on foot for his home in York, carrying with him an old umbrella. With him was a companion, who left him at Cockeysville, intending there to take the train and ride to Glenn Rock, his destination, having become tired of footing it. Kunkel kept on his way on foot, and at

Parkton met with a stranger with whom a conversation was begun, which finally ended in an exchange of umbrellas, the stranger giving a much better one than that which he received. Together the two men then kept on their way, until York was finally reached, and the stranger, who gave his name as Conrad Winter, persuaded Kunkel to receive him at his home. Winter remained with the Kunkels for several days, and had with him a number of articles which he endeavoured to give or sell to the family. He offered a pair of ladies shoes in exchange for one of Kunkel's shirts, and the bargain being a good one, as the shoes were quite new, it was accepted. He offered a cap to one of the boys, but it being too large, was told to keep it, and also presented a handsome snuff-box to one of the children, which was likewise declined, on the plea that the child had no use for it. On the first morning of his arrival he stated that a murder had been committed in Maryland, and that the murderer had not been caught. Soon after his departure, it was learned that a murder had recently been committed near Parkton, on the morning on which Kunkel had been seen in the place, and detectives, who were already on the trail, traced Kunkel to his home, where the umbrella and the pair of new shoes were identified as the property of Mrs. Cooper, the victim. He was at once arrested and thrown into the jail at York, where he was kept several months, being finally taken to Baltimore. Mrs. Kunkel, about that time gave birth to a child. Paul Kunkel, under the weight of trouble, became insane, or at least his reason was so unsettled that he could not give a lucid explanation of how the things had come into his possession, or from whom he had obtained them. A true bill was found against him, and several trials were had, which resulted in his conviction and sentence to death; the period of his confinement in the Baltimore prison was about ten months, during which time every effort was made to establish his innocence. Persons from York testified to his uniform good conduct, but the circumstantial evidence of his being in the vicinity at the fatal time, and the possession of the articles, was too grave to be overthrown. Being a Roman Catholic, the bishop of Philadelphia took a great interest in his case, visiting him in his prison at York, and, it is understood, in Baltimore also. Finally, about eight days before the time fixed for the execution, his mind became clear, and he was able to explain his leaving Baltimore with one man, and his meeting with the other, with whom he exchanged umbrellas, and described them both. Officers of the law were put upon the track, and before long the man with whom he left Baltimore was found, who, strange to say, shortly after parting with Kunkel, had met with Winter, and had seen the umbrella, shoes and other articles. Winter's appearance was described, tallying with that given by Kunkel, and once more the officers were successful in their search, Winter betraying himself by one of those slight actions which so often lead to the arrest of criminals when they feel the safest.

During all this time Winter, who was a blacksmith, had kept in his possession the stolen snuff-box, and one day, while at work at Ashland, pulled it from his pocket and handed it to a fellow-workman, who wished a pinch of its contents. This workman discovered what the murderer never had, that the name of Mrs. Cooper was engraved upon a silver plate within the box. Being familiar with the incident, he at once informed an officer, who made the arrest, and upon trial Winter was convicted and condemned. Paul Kunkel was saved.

Upon the scaffold Conrad Winter confessed his guilt, stating that when young he had been bound to a Mrs. Goodwin, residing near Parkton, who had compelled him to steal sheep for her benefit. On one of his expeditions he was captured and sent to the penitentiary for his offence, and while there swore revenge upon his mistress when he should be released. On the evening of the murder he was walking along the road when before him he saw a woman whom he took to be Mrs. Goodwin. Seizing a stone, a heavy blow crushed her skull, and she fell dead. Upon turning her over and seeing her face, he found that he had killed the wrong woman, it being Mrs. Cooper.

Drawing her to a fence corner he covered her with brush, took possession of the shoes she had just purchased from the store, with the other articles, and made his escape, meeting with Kunkel, and caused suspicion to be cast upon him as stated. Mr. Kunkel has lived to a good old age in the community, respected by all, the dark cloud of suspicion once resting upon him having been happily cleared away.—*Washington Law Reporter.*

ESCAPE.

We have long thought that to punish a prisoner for escape is a refinement of cruelty. To escape from restraint is an instinctive impulse. We see it in the smallest children. Man but obeys his natural promptings in breaking gaol. Why should society punish him for it? Why should an officer of justice be justified in pounding to a jelly or in shooting to death an escaping prisoner, charged with felony, if he cannot otherwise prevail on him to stay? Why may not society just as logically punish him for not having voluntarily given himself up to justice, as for trying to get away when justice has overtaken him? If a man cruelly whips a runaway horse, or tortures a squirrel recaptured after escape from his revolving cage, or a runaway dog which sees preparations for putting him to churn, Mr. Bergh will be on his track very quickly. Why punish a man for himself obeying the same instincts? It may be said, because he knows better than to escape. We should rather say he knows better than to stay to be caught or punished.

The foregoing may sound like a midsummer jest to old lawyers, but we are deadly serious. We have good backing, too. Dr. Wharton says, 2 Crim. Law, § 1678, *note*: "Whether, in a humane jurisprudence, the unresisted escape of prisoners from custody is a punishable offence, may well be doubted. The later Roman common law holds that it is not. The law of freedom, so argue eminent jurists, is natural; the instinct for freedom is irrepressible; if the law determines to restrain this freedom, it must do so by adequate means; and it cannot be considered an offence to break through restraint when no restraint is imposed. Undoubtedly it is a high phase of Socratic heroism for a man condemned to death or imprisonment, to walk back, when let loose, to be executed or imprisoned. But the law does not undertake to establish Socratic heroism by indictment. It would not be good for society that the natural instinct for self-preservation should be made to give way to so romantic a sentiment as is here invoked; and it is a logical contradiction to say that the scaffold and the cell are to be used to prove that the scaffold and the cell are of no use. If men voluntarily submit to punishment, then compulsory punishment is a wrong. Besides this, a jailer may argue that if we hold that a prisoner is under bond as much when he is let loose as when he is locked up, there is no reason for over-carefulness in locking up. Following these views, the conclusion has been reached that an unresisted escape is not *per se* an indictable offence, and this view has been adopted by all modern German codes. The English decisions on this point may be too firmly settled to be now shaken; but considerations such as those which have been mentioned may not be without their use in adjusting the punishment on convictions for unresisted escapes."

It seems to us more reasonable to reward a prisoner for staying quietly and obediently in jail, as some States now do, than to punish him for running away. If it is cruel to punish a man for breaking jail, what shall we say of punishing his wife for aiding him?

The law is guilty of cruelty quite worthy of the inquisition in this regard. For example, an imprisoned convict went by permission of his keeper about the land connected with the jail, went to market and brought back provisions for the inmates of the jail, cooked food for them in the kitchen of the dwelling-house attached to it, went to the adjacent barn and there fed and milked the cow, and from the barn departed and left the State. *Held*, a criminal escape. *Riley* v. *State*, 16 Conn. 47. What a cat-and-mouse-play doctrine is this! Even if the jail is so unhealthful and filthy as to endan

ger his life, he is punishable for breaking out (*State* v. *Davis*, 14 Nev. 439). "The necessity, to excuse," say the court, "must be real and urgent, and not created by the fault or carelessness of him who pleads it." He should have "exhausted the lawful means of relief in his power before attempting the course pursued. It was not shown or claimed that he had ever complained to the sheriff or the board of county commissioners, or that he had ever endeavoured to obtain relief by any lawful means." Well, suppose he had complained, and his complaints had not been heeded, he could not help himself. So held in *Stuart* v. *Board of Supervisors*, 83 Ill. 341; S. C., 25 Am. Rep. 397; *People* v. *Same*, 84 Ill. 303; S. C., 25 Am. Rep. 461. In these cases there was a disclosure of frightful filth and unhealthfulness, but the Court of Chancery in the first case said the prisoner had a remedy at law, and they would not enjoin the use of the jail; and in the latter the court of law said that they could not compel the supervisors to provide a suitable jail, so long as they provided any. So the prisoner had to stay until the bugs should carry him out. It is a comfort, however, to know that if the jail takes fire he is not bound to stay and be burned to death; 2 Whart. Crim. Law, § 1676; and that he may go to a necessary, in the yard, at night to attend a call of nature, if there are no accommodations in the jail. *Pattridge* v. *Emmerson*, 9 Mass. 122. But he cannot go for this purpose to the yard unless there is a necessary in it. *McLellan* v. *Dalton*, 10 id. 191. The two last were cases of imprisonment on civil process.

But he is bound to stay in jail even if he is innocent. So held in *State* v. *Lewis*, 19 Kans. 260; S. C., 27 Am. Rep. 113. The prisoner awaiting trial on a criminal charge, escaped, and being rearrested, was tried and acquitted of that charge. Then they tried him for escape, and held that he could not plead his acquittal of the main charge as a defence. "He escaped 'before conviction,'" say the court. "When a party is in legal custody, and commits an escape, we do not think that it depends upon some future contingency whether such an escape is an offence or not." Perhaps so, if you try him for the escape first, but if it is first demonstrated that he is innocent of the main charge, and consequently had a legal right to go free, why punish him for going free without awaiting the legal demonstration? In *People* v. *Washburn*, 10 Johns, 160, the prisoner was held not indictable for aiding the escape of one indicted "on suspicion of having been accessory to the breaking" of a certain house, "with intent to commit a felony," because no distinct felony was thus charged. But according to the Kansas court the escaping prisoner must have waited to have the indictment quashed.

And finally, to cap the climax of absurdity, the law holds that a prisoner has escaped when he has not actually escaped, but has the means of escape, as where, on civil process, the sheriff committed a jailor to his own jail, of which he continued to hold the keys, but where he remained. *Steere* v. *Field*, 2 Mass. Under this doctrine St. Peter would have been indictable for escape, although he did not offer to go, and assured the jailor, "we are all here." So in this case the law holds the prisoner to blame for *not* following the instincts of nature, and availing himself of the opportunity to set himself free.—*Albany Law Journal.*

NOTES OF CASES

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

SUPREME COURT OF CANADA.

June Sessions, 1880.

Parsons v. The Queen Insurance Co.
Parsons v. The Citizens' Insurance Co.
Johnstone v. The Western Assurance Company.

Insurance—Jurisdiction of Local Legislatures over subject matter of Insurance—Secs. 91 and 92 B. N. A. Act—"The Fire Insurance Policy Act" R. S. O. c. 162—Applicable to foreign and Dominion Insurance Companies—What conditions applicable when statutory conditions not printed on the policy.

The Queen Insurance Company, an English company doing business under an Im-

perial charter, the Citizens' Insurance Company—incorporated by an Act of the Dominion Parliament, passed in 1876—and the Western Assurance Company, incorporated by the Parliament of Canada before Confederation, and whose charter was subsequently amended by the Dominion Parliament, having been authorized to do fire insurance business throughout the Dominion of Canada by virtue of a license granted to them by the Minister of Finance under the Acts of the Dominion of Canada relating to Fire Insurance Companies, issued respectively in favour of the plaintiffs, The Queen Insurance Company an interim receipt, and the other two companies a policy of insurance, whereby they insured certain properties situate in the Province of Ontario.

In all these cases, which were decided by the Ontario Courts in favour of the plaintiffs (see 4 App. Rep. pp. 96, 103, and 281), the question of the constitutionality of the Ontario "Fire Insurance Policy Act," R. S. O. c. 162, was raised, and the Supreme Court of Canada, after hearing the arguments in all these cases, delivered one judgment treating separately the other points raised on the argument by each particular company, and it was—

Held, 1. That the Fire Insurance Policy Act, R. S. O. c. 162, is not *ultra vires*, and is applicable to insurance companies (whether foreign or incorporated by the Dominion) licensed by the Dominion Parliament to carry on insurance business throughout Canada.

2. That the legislation in question prescribing conditions incidental to insurance companies contracting within the limits of the Province is not a regulation of trade and commerce within the meaning of these words in sub-section 2, section 91, B. N. A. Act.

3. That an insurer in Ontario who has not complied with the law in question, and has not printed on his policy or contract of insurance the statutory conditions in the particular manner indicated in the statutes cannot set up against the insured his own conditions or the statutory conditions; the insured, alone, in such a case, is entitled to avail himself of any of the statutory conditions.

Per Taschereau and Gwynne, J. J., dissenting.—That the power to legislate upon the subject matter of insurance is vested exclusively in the Dominion Parliament by virtue of its power to pass laws for the regulation of trade and commerce under the 91st section of the B. N. A. Act.

Robinson, Q. C., and *Bethune*, Q. C., for appellants, and *McCarthy*, Q. C., for respondents in *Citizens Ins. Co.* v. *Parsons*.

Robinson, Q. C., and *Small* for appellants, *McCarthy*, Q. C., for respondents in *Queen Ins. Co.* v. *Parsons*.

Bethune, Q. C., and *Mowat*, Q. C., for appellants, and *McCarthy*, Q. C., for respondent in *Western Assurance Co.* v. *Johnstone*.

Bickford v. Lloyd.

Award—Motion to set aside—Time for moving.

This was an application by the Court of Chancery to set aside an award. The award was made on the 13th August, 1878; Trinity Term began on the 26th August and ended on the 7th September,—Michaelmas Term began on the 18th November and ended on the 7th December. The notice of motion was given on the 2nd December, 1878. Before the Supreme Court the plaintiff contended *inter alia* that the delay had been caused by the act of the party supporting the award, who had on the 14th September before the end of the next term served a notice on him of his intention to appeal.

Held—Affirming the judgment of the Court of Appeal for Ontario that the submission being made within the 9 & 10 Wm. III. the application to set aside the award was too late, and no sufficient reason had been assigned for the delay.

Hector Cameron, Q.C., for appellant.

McCarthy, Q.C., for respondent.

Wellington Mutual Ins. Co. v. Frey.

Mutual Insurance Company.

Held—That a policy issued by a Mutual Insurance Company is not subject to the requisites of the R. S. O. c. 162, and

therefore the appellant company were entitled to set up against the insured a non-compliance with the provisions of 36 Vic. c. 44.

Ballagh v. *Royal Mutual F. In. Co.* approved of.

Canada Southern Railway Co. v. Norvell, Duff, Cunningham and Gatfield (4 cases).

Award.

Appeals by the Canada Southern Railway Company from the order of the Court of Appeal of the Province of Ontario, dated the 14th day of January, 1880, which dismissed the appeal of the Canada Southern Railway Company to that Court from the decrees pronounced in four cases in the Court of Chancery, wherein Norvell and other respondents were plaintiffs, and the Company defendants, by the Hon. Vice-Chancellor Proudfoot in favour of the said Norvell and others. The decrees, after making The Canada Permanent Loan and Savings Company, and the Molsons Bank, parties, plaintiffs, in the Norvell suit, as encumbrancers upon Norvell's interest in the lands in question, declared that the said Norvell and others were entitled to enforce against the Company the specific performance of the awards set out in the bills of complaint, and that the Company should pay to Norvell the sum of $9,294 92, being the amount of his award with interest and costs; and to Cunningham $2,480; to Duff, $2,500; and to Gatfield, $1,680; and upon payment that they should release to the Company the lands which had been expropriated by the Company for their line of railway.

Before the Supreme Court of Canada the Counsel for the appellants for the first time contended, 1st. That the award in Norvell's case was bad, because the arbitrators had dealt only with the equity of redemption interest of the amount. 2nd. In all the cases that the awards were bad on their face, as being signed by only two arbitrators without notice to the third, and that the awards should show that the third arbitrator was notified, as a condition precedent to its validity—and it was

Held, Per Curiam—That Norvell should be at liberty to amend his answer to raise the point that the award is invalid as being in terms confined to the limited interest of the land owner as mortgagor instead of embracing the whole fee simple of the estate, and when answer so amended, the judgment to go without costs that the award is void for that reason.

In the cases of Duff, Cunningham, and Gatfield, appellants, to be at liberty to amend answers by raising the points as to the award being made in the presence of two arbitrators only, in the absence of the third, and without notice to the third. If the land-owner in each case before the tenth day of September, 1880, files a signification signed by counsel that he desires a new trial, judgment to go therefor without costs to either party; but if he declines a new trial, then judgment in answer may go for the Company without costs.

Cattanach, counsel for appellants.

J. A. Boyd, Q. C., for respondents.

COURT OF APPEAL.

From C. C. York.] [June 2.

Campbell v. Prince.

County Court—New trial—Matter of discretion—Costs.

Although the jurisdiction of the Court of Appeal is not limited in appeals from the County Court as it is in appeals from the Superior Courts under sec. 18, s-s. 3 of the Appeal Act, it will not in ordinary cases interfere where a new trial has been refused in the Court below upon a matter of discretion only. In this case, however, where the new trial was asked for on the ground that the verdict was against evidence, the Court of Appeal granted a new trial as the evidence strongly preponderated in the defendant's favour, and the learned Judge had misdirected the jury. No costs of appeal—Costs of former trial to abide the event.

Ferguson, Q. C., for the appellant.

Delamere for the respondent.

Appeal allowed.

From Proudfoot, V. C.] [June 2.

McLean v. Caldwell.

Interlocutory injunction—Irremediable injury—Balance of convenience.

The bill was filed by the plaintiff for the purpose of having it declared that he was entitled to the user of certain streams where they flowed through his lands, as well as to the improvements which he had constructed thereon, and to restrain the defendants from using these improvements in floating down their logs.

Proudfoot, V. C., granted an interlocutory injunction restraining the defendants from using the improvements until the hearing, on the plaintiff's giving the usual undertaking to pay damage in case the Court should be of opinion that the defendants sustained any injury by reason of the order.

Upon appeal the Court of Appeal reversed this order of the Vice Chancellor, on the ground that it was not shewn that irremediable damage would be caused the plaintiff by not granting the injunction, nor that the balance of inconvenience preponderated in his favour.

Bethune, Q. C., & *C. Moss*, for the appellants.

Blake, Q. C., & *Creelman* for the respondents.

Appeal allowed.

From Q. B.] [June 30

Backus v. Smith.

Lateral support—Easement.

The house which the plaintiff occupied as tenant to S., fell two days after the defendant H. had excavated the adjoining lands, which he owned, to within a few feet of his line, close to which the house stood and the plaintiff sued to recover damages for injury to his business. The house in question was built by S. in 1854 upon planks laid about one foot under the ground, so that he could remove it at the end of the ten years' lease which he held. S., however, afterwards acquired the fee and before the expiration of the twenty years, in 1871, he became the owner of the defendant's lot for about a year, when he conveyed it to H. There was no evidence that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way, or that the excavation would have damaged the plaintiff's land unweighted by the house.

Held, that there had been no such user of the servient tenement as to justify the presumption that an easement had been acquired by grant, nor had there been twenty years possession of the support as an easement owing to the unity of seisin of S.

Held, also, reversing the judgment of the Queen's Bench, that as the plaintiff had no right to support the defendant's land, and as the only evidence of negligence was that the defendant excavated to within a few inches of his line the plaintiff could not recover.

Robinson, Q. C., for the appellant.

Boyd, Q. C., and *C. R. Atkinson*, for respondent.

Appeal allowed.

CHANCERY.

Proudfoot, V.C.] [July 28.

Givins v. Darvill.

Will, construction of—Life estate—Vendor and Purchaser's Act.

A testatrix devised all her estate to trustees, and directed that part should be retained as a residence for her two younger daughters until they should marry, when the property was to be sold and the proceeds added to and form part of all the residue of her estate to be equally divided amongst all her "children—sons and daughters—share and share alike, then living." The two daughters attained majority and remained unmarried, when a contract was entered into by all the children of the testatrix and the trustees of the estate with the defendant for the sale of the property so directed to be retained.

Held, that the two daughters had, under the devise a perfect right on attaining 21 to dispose of their estates for life and while unmarried, and that all the children, in-

cluding the two younger daughters, and the trustees joining in a conveyance could convey a good title to the purchaser.

Van Norman v. Grant.

Practice—County Court—Garnishee proceedings.

Proceedings were taken before a County Judge to garnish certain moneys payable by the County to the plaintiff, as Clerk of the Peace and County Crown Attorney, and which moneys that Judge ordered to be attached in favour of the defendant, whereupon the debtor—the defendant in those proceedings—filed a bill in this Court seeking to restrain proceedings on such order.

Held, that this Court had not jurisdiction to grant the relief asked; that the proper course to obtain the relief sought was to appeal from the ruling of the Judge to the Court of Appeal; and without determining whether the claim of the debtor against the County was such as could be garnished. The motion was refused with costs.

Davidson v. McGuin.

Fraudulent conveyance—Insolvent Act—Marriage.

M. had been carrying on business in partnership, and in October, 1876, purchased his partner's interest for $1,332. About this time M. was paying his addresses to the defendant, whom he led to believe, as he himself believed, that he was doing a flourishing and profitable business, and during the negotiations for their marriage, the defendant's father proposed to M. that he should erect a house he was speaking of building, on a lot of his (the father's), and that he should convey the same to his daughter as a marriage dowry, to which M. assented. The marriage took place in November of that year, and during the following year M. erected a house on the lot as proposed, at a cost of about $900, and in fulfilment of the arrangement the father conveyed the lot to his daughter. In January, 1880, M. became insolvent, and a bill was filed by his assignee impeaching the transaction as a fraud upon creditors under the 132nd section of the Insolvency Act of 1875. The Court (Proudfoot, V.C.) thought that the evidence did not establish any fraudulent intention on the part of M, and distinctly negatived any knowledge by the defendant or her father when entering into the arrangement, of any such intention; and that, under the circumstances, the transaction could not be impeached under the statute of Elizabeth and dismissed the bill with costs.

Sheritt v. Beattie.

Practice—New hearing—Surprise.

A defendant knew exactly the question to be tried at the hearing, but took no steps to adduce any evidence on his behalf, and a witness whom he would have called was called by the plaintiff and gave evidence which the defendant swore was different from what he had anticipated he would give.

Held, that this was not such a case of surprise as entitled the defendant to have the cause opened and a new hearing had; and a motion made for that purpose was refused with costs, although the defendant swore that the evidence given by the witness was incorrect and would be contradicted by the wife and son of the defendant.

Cleaver v. The North of Scotland Canadian Mortgage Company.

Specific performance—Compensation for crops.

By the terms of a notice and condition of sale it was stated that there were 50 acres of fall and spring wheat and peas on the premises. The fact was that one half the crops were owned by parties in possession of the lands, under an agreement with the owner.

Held, that a person purchasing at the sale was entitled to compensation for one-half the crops, the value of which, unless agreed to by the parties, should be ascertained on a reference to the Master.

Proudfoot, V.C.] [August 17.

Merchants' Bank v. Graham.

Mortgagees and joint owners of vessels—Evidence.

A mortgagee of a vessel, until he takes

possession, or does something equivalent thereto, is not entitled to an account of the money earned by the vessel for freight. But where in a suit, by the mortgagees of a part-owner of a vessel, the defendant, the owner of the other shares, admitted that he was sailing the vessel for the joint benefi of himself and the other owners, other than the plaintiffs, though previous to the institution of the suit he had only asked for evidence that the agent of the plaintiffs really held for them :

Held, that the fair inference was that the defendant was sailing for whomsoever might be the owners, or entitled to the earnings, and that, having had sufficient information to acquaint himself of the fact that the plaintiffs had not acquired an absolute title to the shares mortgaged to them, he had thus recognised the right of the mortgagees to demand an account.

Quære, whether co-owners of a vessel have a right to share in the profits thereof, earned in ventures to which they do not assent; as a majority of the owners can employ the vessel against the will of the minority, who, however, can compel the majority to give a bond to restore the vessel in safety, or pay the minority the value of their shares :—In such case the minority do not share the hazard, neither are they entitled to the benefit of the voyage.

One C. entered into agreements with several parties to carry freight for them at certain named prices, "to be paid to the defendant," not mentioning any particular vessels in which the same was to be carried, and then agreed with the defendant, as part-owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon; and the defendant and C. both swore that the arrangement had not been made by C. as the agent of the defendant :

Held, that the fact of the defendant having rendered an account in his own name, and also such for a portion of the freight, was not sufficient to countervail the positive denials of the defendant and C. that the contracts had not been made on behalf of, and as agent for, the defendant; freight being *prima facie* payable to the master of a vessel, and the cargo need not be delivered by him until the freight thereof is paid; although in any other transaction such conduct would have been very strong evidence of the defendant having been the principal contractor.

CANADA REPORTS.

ONTARIO.

INSOLVENCY CASES.

IN RE CRONK.

Married woman—Claim on husband—Insolvent estate—Money paid him by her.

[St. Thomas, Aug. 4.

The claimant was a widow when she married the insolvent; her former husband had devised lands in trust for the benefit of herself and an only daughter. After her marriage with the insolvent she handed over the rents of the lands to him, which he used in his business. No entries were made in his books of the receipt of such moneys, nor had she any memorandum acknowledging such receipt. The daughter lived with her mother as a member of the family of the insolvent during her minority. In liquidation of the daughter's share of the rent, the insolvent purchased a piano for her, which she accepted as in full of her claim. After the estate of the insolvent was placed in compulsory liquidation, the wife claimed all the rents for more than eight years with interest, and sought to be ranked as a creditor therefor. She had also owned separate property which the husband induced her to sell and give him the proceeds, some $800. In order to secure her in that sum, he caused the title of certain land in Aylmer to be conveyed to her and himself jointly. He subsequently fell in arrear with his creditors, and induced her, in order to improve his credit, to part with her interest and convey it to himself on the express stipulation and condition that he would purchase other property worth $800, and have it conveyed to her own use. That was never done. His affairs were placed in liqui-

dation by his creditors, and his wife sought to rank upon his estate for both claims, on the ground that she and her husband had often "reckoned up" what sums he had got from her from time to time, but the assignee contested the claim as there were no entries of the transactions on the books of the insolvent, and nothing in writing to show the existence of any debt whatever.

Hughes, Co. J.—I think with regard to a large portion of this claim, that, under the rule laid down in the case of *Lett* v. *Commercial Bank*, 24 U. C. R. 552, I must hold the claimant precluded from the right to recover, for, apart from the Statute of Limitations, if the wife chooses to give her own money to her husband, to enable him either to carry on his business, or to be used as the common fund of the family of her husband and her daughter and herself, or if she gave him money out of her own personal separate estate to enable him to purchase goods, or pay off his debts, or keep good his credit, it then becomes his money, and as set forth in the judgment of Hagarty J., at page 561 of the case above noted, "It can hardly be believed that the legislature intended that a large amount of rents received by a married woman from her separate estate should be employed in buying a stock of goods with which the husband might open a shop, contract debts with various persons, and that, neither the goods, nor the moneys received from their sale, could be touched by his creditors."

The parties were married since 1859, and there was no ante-nuptial contract. The former husband of the claimant devised certain property to her, out of which she derived an income to her own use and to the use of her daughter. That money, when received by the claimant, was handed over, from time to time, to this insolvent, her present husband, without any memorandum or entry of any kind being given or made to evidence or show its being a loan to her husband. And with the exception of the money referred to in the fourth paragraph, I think I must hold their occasionally reckoning up how much money he had got from her from time to time in that way did not constitute it a debt proveable against his estate. On the contrary I must and do hold that she *gave* it to him to enable him to carry on his business and keep good his credit, and for the common good of the whole family—to promote their prospects and interests in life, and that it was "controlled and disposed of" by the insolvent, with the consent of the claimant, and that no *chose in action* or claim, as for a debt, could or did arise in respect thereof. Under the circumstances which appear in this contestation, she could give away all such moneys just as she might choose to any person, or invest them in securities and dispose of the accumulation as she might please; or she might apply them to the support of her husband and his family, and, in many other ways, enjoy the substantial benefits of the statute protecting her separate property, without subjecting her husband to an action, as for a debt or as for money loaned in respect thereof.

I do not think the numerous cases cited in the argument, by the claimant's counsel, are at all analogous to this case. I think the payment by the claimant to the insolvent, her husband, of the moneys received by her on the rent of her former husband's farm, which was her separate estate, has no right to be treated as a debt, for, according to my views of the intention of the parties, under the circumstances set forth in the evidence, it operated as a reduction of so much into the possession of the insolvent, her husband, and cannot be recovered back, especially as there is no evidence furnished by any entry in his books of a contrary intention, in fact no entry at all.

Then as to the claim of the $800 and the interest thereon, it was, after being handed to the insolvent to be paid to his creditors, secured by a title made to herself and the insolvent jointly, of the fee simple of and in a house in Aylmer. This title she afterwards parted with, and conveyed her interest to the insolvent, because, as she herself says, his credit would be better—that she received no consideration whatever for making that conveyance; there never was any writing between them in respect of her giving up that title and interest, and there never was any reckoning of what, it

is now alleged, the insolvent owed her for either principal or interest.

The claimant says she does not claim the whole $800, because the $258 paid the daughter was to be deducted out of it, so that that would leave a balance due and claimed by her of $542 and interest. I may say with regard to that, that I think the claim a just one, inasmuch as the debt was plainly secured to her, and she parted with her interest in the estate, upon which it was secured, on the distinct understanding and contract on the part of her husband, that the insolvent was to procure her another house in lieu of such security. The purpose for which she parted with her interest in the real estate was to make it appear that he was the sole owner of it, whatever his personal liabilities in respect to the change of title might be; and, as I have no doubt that the Court of Chancery would have, on a bill filed for the purpose, had the insolvent been in a position to carry out the arrangement, ordered the husband to have satisfied the balance due her by the purchase of another property (see *Ex parte Pyke* v. *Gleaves*, 7 L. T. N. S. 46), I think I am justified in deciding this contestation as to the said sum of $542 and interest due thereon in favour of the claimant.

I therefore find that there was and is due to the claimant for principal the sum of $542, and for interest for six years, $195, making together the sum of $737, for which sum I order the said claimant to be collocated on the said estate as a creditor thereof.

And lastly, I order the costs of the said contestation to be paid by the contestant out of the said estate, after taxation.

QUEBEC.

QUEEN'S BENCH.

Regina v. Berthe.

Indictment—Setting fire maliciously to manufactured lumber—22-23 Vic. c. 22, s. 11.

[July Term, 1880.

The prisoner Berthé was indicted for having, "at the township of Wright, feloni-"ously, unlawfully, and maliciously set fire "to a certain quantity of manufactured "lumber, to wit, three thousand shingles "and nineteen piles of boards," and the indictments against the other prisoners, after setting forth that Berthé had set fire to the lumber in question, charged them with having aided and abetted Berthé in so doing.

Aylan and *Foran*, for Berthé, upon his arraignment, moved to quash the indictment on the ground that it did not allege that the setting fire was done "so as to injure or to destroy" the lumber in question;—32-33 Vic. c. 22, s. 11 (Ca).

Fleming, for the Crown, and *Gordon*, for the private prosecution urged that if the indictment were insufficient under s. 11, it was valid under s. 21, which makes the setting fire to "any stack of corn . . any steer or pile of wood or bark" a felony.

The defence replied that s. 21 applied only to firewood or wood in an unmanufactured condition.

Bourgeois, J. I have given much thought to the points raised by the defence. The indictment is assailed on several grounds, but more especially because it is not averred that the setting of the fire injured or destroyed the lumber. A party charged with a statutory offence has a right to see that every ingredient of the offence is stated. No matter how grievous the charge, no one should be held to answer an indictment which sets forth no crime. It has been urged that the accused should be put upon his trial, and be left his recourse in error; but this would be most unfair, and where there is a material irregularity, the Court will even stop the trial after evidence has been put in. The charge cannot evidently be sustained under sec. 11. It was suggested by the Crown that it might be upheld under sec. 12, and this shows the unfairness of the pretensions of the prosecution. How can the accused know what to plead when the accuser is ignorant or doubtful of the charge he intends to prefer? No *attempt* is set out, so that sec. 12 cannot be relied on. The argument that the prisoner may be held under sec. 21 is plausible. The perusal of that section, however, shows that it cannot be held to apply to manufactured lumber. "Wood"

does not mean "manufactured lumber" any more than "wool" means "cloth." There is a special section enacted to cover crime committed upon the manufactured article; why then should sec. 21 be held to apply to the raw material and to the manufactured article likewise? Another point raised by the defence is equally decisive. If sec. 21 could avail, the indictment should have used the words of the statute. A pile of boards may or may not be a pile of boards of wood. An innuendo cannot extend the meaning of the terms which precede it;—2 Saunders on Pleading, 922; Archbold, 830. The forms given at the end of the Procedure Act of 1869 are most misleading, and their defects are well shown by Judge Taschereau in his second volume. The indictment is therefore quashed.

The prisoner was discharged upon motion to that effect.

UNITED STATES REPORTS.

MARYLAND COURT OF APPEALS.

Short v. Baltimore City Passenger Railway Company.

Removal of snow by Street Railway Company.

A street railway company having a franchise to operate its road on a city street has a right to remove the snow from its track, and place it upon another part of the street, and if it exercises ordinary care and prudence in doing these acts it will not be held liable for injury done to adjoining property by reason of such snow obstructing the flow of water in the street.

[*Albany Law Journal.*

Appeal by plaintiff from a judgment in favour of the plaintiff. Sufficient facts appear in the opinion.

J. T. Mason, for appellant.

Arthur W. Machen, for respondent.

Robinson, J. The appellant is the owner of a house in the city of Baltimore, on Hoffman Street, near its intersection with Gay; and the appellee is the owner of a horse railway, running along the bed of Gay Street, and across Hoffman.

On the 6th January, 1877, there was a heavy fall of snow, and in clearing its track, it is alleged the appellee threw the snow off toward the curb, making a ridge or bank on Gay Street, and across the mouth of Hoffman, thereby obstructing the natural flow of water at the intersection of the two streets.

On the other hand, the appellee proved that the snow which had been pushed off the track by the snow-plough lay between the track and the gutter, and did not obstruct nor in any manner interfere with the natural flow of water from Hoffman Street.

On the night of the day in question it rained very hard, and the appellant's house was flooded with water, and this suit is brought to recover damages for injuries thereby sustained.

At the trial below, the appellant asked the court to instruct the jury: that if they should find the appellee obstructed the natural flow of water from Hoffman Street, and that by reason of said obstruction the house of the appellant was flooded with water, he was entitled to recover damages for the injuries thereby sustained.

This instruction the court granted, subject, however, to the following modification:—

"That if the jury should find the appellee exercised ordinary care in the management of its track on Gay Street, and removal of the snow therefrom, and clearing out the gutter extending along Gay Street at the side of its track, and that the damage suffered by the plaintiff was attributable either to the conformation of the ground and situation of his premises, or to a storm of such extraordinary severity that the usual drainage provided by the city would not carry the water off, then their verdict should be for the defendant."

The appellant contends that he was entitled to the instruction as offered by him, and that the court erred in granting it with the qualification.

Assuming, then, that the snow, thrown on the street by the appellee in clearing off its track, obstructed the natural flow of water from the street; and that in consequence thereof the appellant's house was injured, the broad question is presented, whether he is entitled to recover damages irrespective of the question of negligence on the part of the railway company!

As a general rule, it is conceded that every

one must so use his own property, and exercise the rights incident thereto, in such a manner as not to injure the property of another. And it is equally true, that the *mere lawfulness of the act* is not in itself a test in all cases of exemption from liability for injuries resulting therefrom to the property of others. But yet there are certain rights incident to the dominion and ownership of property, in the exercise and enjoyment of which a person will not be liable for damages, although injury may be occasioned thereby to the property of another.

The books are full of cases of this kind and it is unnecessary to cite them here. The question, then, is, what is the true test in actions of this kind, by which the *exemption from liability is to be determined*? We think it may be safely said, both on principle and on authority, that the true test is, whether, in the act complained of, the owner has used his property in *a reasonable, usual and proper manner*, taking care to avoid unnecessary injury to others.

This is the rule laid down by the House of Lords, in the recent case of *Rylands* v. *Fletcher*, L. R., 3 Eng. and Ir. App. 330. There the defendant built a reservoir for the purpose of keeping and storing water, and the weight of the water broke through some old disused mining passages and works and injured the mine of the plaintiff.

The Court of Exchequer, Bramwell, B., dissenting, were of opinion that the plaintiff was not entitled to recover; but on appeal to the Exchequer Chamber, this judgment was reversed; and on appeal to the House of Lords, the judgment of the Exchequer Chamber was affirmed.

The Lord Chancellor said :—"The defendants, treating them as the owners or occupiers of the close in which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used: and if in what I may term the natural user of that land, there had been any accumulation of water either on the surface of the ground, or under water, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place.

"On the other hand, if the defendants not stopping at the natural use of their close had desired to use it for any purpose which I may term a *non-natural* use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water, either above or below ground, in quantities and in the manner not the result of any work or operation on or under the land, and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me, that which the defendants were doing, they were doing at their own peril."

The right of the plaintiffs to maintain their action was based entirely upon the ground that the defendants had used their land in an unusual, or, in the language of the Lord Chancellor, in a "non-natural" manner, but the right to use it for any purpose for which it might, in the ordinary course of the enjoyment of land be used, was distinctly asserted.

Now in this case the appellee was entitled under its charter and the ordinancesof the city of Baltimore to the use of the bed of the street for the purpose of a horse railway, and if its track was obstructed by snow, it had beyond all question the right to remove it. And the only question is, whether in clearing its track, and in throwing the snow on the bed of the street adjoining thereto, it can be said that the appellee was, under the circumstances, using the bed of the street in an *unusual or unreasonable manner*. We think not. The removal of the snow from its track being necessary in order to enable the company to use it for the public benefit and conveyance, it was obliged either to throw it on the bed of the street or to haul it away, and no one will pretend that it was under any obligation to do the latter. It had no right, of course, to throw the snow in the gutter, and thereby obstruct the natural flow of water from the street, because in so doing the appellee would have been guilty of negligence. Nor are we to

be understood as deciding that the railway company had the right to bank up the snow on Gay street so as to necessarily obstruct the natural flow of water. On the contrary, it was obliged to *exercise ordinary care and prudence*, not only in *removing the snow from its track*, but also in *throwing it on the street*. And this question was distinctly left to the jury by the modification of the plaintiff's prayer.

Nor do we agree with the appellant that the evidence was legally insufficient to prove either that the storm was one of unusua severity, or that the flooding of the plaintiff's house was owing to the peculiar conformation of the ground.

On the contrary, the appellant's own witness, Martinet, says, "it was a dreadful night—slush and snow ankle deep—one of the worst nights he ever knew."

Then as to the peculiar conformation of the ground, the proof shows that the first story of the plaintiff's house is several feet below the level of the street, and there was evidence tending to show that it was liable to be flooded from several directions, namely, through Reaney's house on the west, and then from the rear of the house, by the water coming down the hill-side of south of Hoffman Street, and lastly by the overflow of the front sidewalk, caused by the choking up of the Hoffman Street gutter.

The several instructions granted by the court presented, we think, the law of the case fairly to the jury, and the judgment below must therefore be affirmed.

Judgment affirmed.

Alvey, J., dissented.

CORRESPONDENCE.

Master and Servant Act, c. 133, R. S. O.

To the Editor of the Law Journal.

Sir,—In case the Court appealed to sustains an appeal under sec. 13, and quashes the conviction, has it power to order payment of costs against respondent?

If not, should not the law be reformed?

Yours,

Subscriber.

Invermay, Aug. 23rd, 1880.

[We are inclined to think that there is no power to award costs in such a case. The Act is silent on the point. The respondent would seldom be a person against whom an order for costs would be of much value.

The subject is touched upon in O'Brien's D. C. Manual, 1880. Eds. L. J.].

Impudent Invaders.

To the Editor of The Law Journal.

Sir,—I notice in your August issue a card, furnished you by a correspondent, of a "conveyancer" whose talents are not confined to that occupation. I find the following in a local paper:

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Aurora, Aug. 6th, '79. Notary Public.

Though we are agreed on principle that the practice of conveyancing should be confined to the legal profession, would it not be tyrannous to crush men who have the rare and versatile genius of the foregoing advertisers. I remain

Yours &c.,

A.

[We have no doubt the Benchers will agree with our correspondent. They will probably now abandon the superhuman

efforts they have hitherto made to protect their country brethren. For fear, however, that any reader should be unfamiliar with this subject, we would add, in the words of the poet "N.B. Th's is sarkastikul."—Ed. L.J.]

LAW STUDENTS' DEPARTMENT.

The following is the result of the recent Law Society examination for call and admission :—

BARRISTERS.

W. H. P. Clement, J. E. Lees, W. H. Biggar, R. W. Wilson, E. Mahon (without an oral on the merits) ; J. R. Brown, J. S. Hough, M. A. McHugh, J. J. Blake, W. G. Eakins, W. B. Ellison and W. P. McPhillips (equal), S. C. Elliott, C. E. Hewson, A. H. Leith and E. Morgan.

ATTORNEYS.

W. H. Biggar, J. E. Lees and R. W. Wilson (equal) ; W. H. P. Clement, W. B. Ellison, S. C. Elliott (without an oral on the merits) ; R. Miller, J. R. Brown, G. Gibson, J. H. Scott, F. B. Robertson, A. H. Manning, J. N. Muir, P. McPhillips, A. McNabb, N. Gilbert, C. E. Freeman, J. B O'Flynn, and H. W. Hall.

The following questions are taken from the English *Bar Examination Journal :*

Real and Personal Property.

Q. 1.—How far, if at all, can a married woman make a valid will ?

Q. 2.—Tenant in fee of some, and in tail male in possession of other common socage and gavelkind lands, died, in 1870, intestate, leaving a widow and the following issue :—Two daughters of his deceased eldest son, two sons, and the only son of a deceased daughter. Who are entitled to the lands respectively and for what estates and interests ?

Q. 3.—A testator bequeathed a leasehold house to A., and appointed B. his executor. A. has agreed to sell the house to C., and B. has agreed to sell it to D. Which contract can be enforced, and what compensation, if any, can the disappointed purchaser obtain ?

Q. 4.—Land stands limited to A., a married woman, for her life for her separate use, remainder to her son B. in tail male, with power for her to appoint by will a life interest to any husband who may survive her. B. is of age, and has issue only a daughter. Can a good present title be made to a purchaser, and if so, by what means ?

Q. 5.—What is meant by a tenant in tail after possibility of issue extinct ? Can he, and how, bar his estate tail with or without the subsequent remainders ?

Q. 6.—Mortgagor and mortgagee of freeholds and leaseholds, the leaseholds being mortgaged by demise, have sold the whole property. Briefly sketch the conveyance.

Q. 7.—An immediate legacy was bequeathed to a woman who was married at the testator's death ; her husband assigned it to a purchaser for valuable consideration, and died. The executor being now ready to pay the legacy, it is claimed by the woman, and also by the purchaser. To which of them must it be paid ?

Q. 8.—What difference is there between copyholds and customary freeholds ? To whom, in each case, do the minerals belong, and what rights has the owner of getting them ?

Q. 9.—A married woman is entitled, under a will made in 1857, to a leasehold house, subject to an existing life estate therein. She and her husband have agreed to sell the reversionary interest, which is not settled to her separate use. Advise the purchaser if they can make an effectual conveyance, and how ?

Q. 10.—If land is conveyed by deed to A., habendum to A., to the use of B., his heirs and assigns, and A. dies, what happens ?

Equity.

ADMINISTRATION.

Q. 1.—What is the provision in the Statute of Distributions respecting "advancement by portion" ? What is the meaning of this term ? Illustrate your answer by examples.

Q. 2.—Explain the term "marshalling assets." How does it differ from "marshalling securities" ? Give instances of each.

Law Society of Upper Canada.

OSGOODE HALL,

EASTER TERM, 43RD VICTORIÆ.

During this Term, the following gentlemen were called to the Bar. The names are placed in the order in which they stand on the Roll of the Society, and not in the order of merit.

SAMUEL SKEFFINGTON ROBINSON.
ALEXANDER GRANT.
JOSEPH BOOMER WALKEM.
EBENEZER FORSYTH BLACKIE JOHNSTONE.
FRANK FITZGERALD.
GEORGE A. F. ANDREWS.
THOMAS STEWART.
HENRY SCHUYLER LEMON.
JAMES HENDERSON SCOTT.
EUGENE DE BEAUVOIR CAREY.
GIDEON DELAHAY.
GERALD FRANCIS BROPHY.
WILLIAM HENRY DEACON.
ROBERT W. SHANNON.
DANIEL MCLEAN.
ARTHUR WILLIAM GUNDRY.
JOHN NICHOLSON MUIR.
JOHN BROWN MCLAREN.

On the 19th May the following gentlemen were admitted as Students-at-Law and Articled Clerks, namely .—

Graduates.

ROBERT PEEL ECHLIN.
WILLIAM HENRY WILBERFORCE DALEY.

Matriculants.

ALEXANDER B. SHAW.
LEONARD HUGH PATTEN.

Junior Class.

DOUGLAS ALEXANDER.
PAUL KINGSTON.
THEOPHILUS BENNETT.
EDWARD W. J. OWENS.
ALBERT J. FLINT.
DONALD MACDONALD.

Articled Clerk.

WILLIAM DUNCAN SCOTT.

And on the 22nd May the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

C. H. IVEY.
CHARLES R. IRVINE.
RICHARD WALLACE ARMSTRONG.

By order of Convocation, the option to take German for the Primary Examination contained in the former Curriculum is continued up to and inclusive of next Michaelmas Term.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

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

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisactory examination in the following subjects :—

Articled Clerks.

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

Students-at-Law

CLASSICS.

1880 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.