DIARY FOR MARCH.

1. SUN.. 2nd *Sunday in Lent.*
3. Tues... Last day for notice of trial for County Court, York.
6. Fri.... Name of York changed to Toronto. 1834.
7. Sat... Last day for Local Clerks' return under Mun. Act. s. 199.

8. SUN.. 3rd *Sunday in Lent.*
10. Tues.. Gen. Sess. & Co. Ct. York beg. Last d. for J. P.'s to ret. conv. to Clk. of Peace (32 V. (Ont.) c. 6, s. 9; 32-33 V. c. 31, s. 76; 33 V. c. 27, s. 3). Prince of Wales married, 1863.
12. Thurs. Irish Union Bill defeated; Gladstone resigns, 1873.

15. SUN.. 4th *Sunday in Lent.*
17. Tues.. *St. Patrick's Day.*
19. Thurs. Insurrection of Parisian Troops, 1871.
20. Fri.... Flight of Napoleon III. to Dover, 1871.
21. Sat.... Princess Louise married, 1871.

22. SUN.. *Passion Sunday.*
25. Wed.. *Annunciation.*
27. Fri.... American Civil War commenced, 1861.

29. SUN.. *Palm Sunday.* Cambridge wins Univ. Boat Race, 1873.
31. Tues.. Last day for return by Local Clerks under s. 191-2 of Mun. Act.

CONTENTS.

THE
Canada Law Journal.

Toronto, March, 1874.

In a case reported in the *Central Law Journal*, St. Louis, of Nov. 1873, upon the question as to the validity of Railway Aid Bonds, it was held by the Supreme Court of Kansas that the law did not authorize the submission to a single vote of the question of subscribing stock and issuing bonds to two or more corporations. The question of making the subscription to each corporation must be submitted separately to the electors.

The exercise of the power to punish for contempt of Court is fast approaching the region of comedy. It appears, says the *Solicitors' Journal*, that the unfortunate gasman who rules the lights in Westminster Hall was brought before that Court whose justices are, in the language of Lord Coke, "the sovereign justices of Oyer and Terminer, gaol delivery, conservators of the peace, &c., in the realm," and solemnly informed that to dazzle the eyes of the judge by turning on too strong a light would be deemed contempt of Court. The Judge who fulmined was Blackburn, J. The reason of the glare, as explained by the terror-stricken official, arose from the demand in the Divorce Court for "more light."

LAWYERS' FEES.

We do not propose now to discuss the wisdom of the present system of making unfortunate litigants contribute such enormous sums as they do to the coffers of the country, nor to enlarge upon the odium attaching to lawyers for the large fees they are *supposed* to receive for services rendered, but we desire to state a few facts touching the latter sub-

ject which may interest some of our readers.

There may be those who have taken the trouble to estimate the extent to which attorneys and solicitors are the collecting agents for the public treasury, sheriffs, clerks of courts, witnesses, criers, &c. We would draw the attention of those who have not done so, to a recent return made to the Legislature of Ontario, by the Clerk of the Court of Queen's Bench. This return applies only to common law Suits; in Chancery proceedings it is even "more so."

The return we speak of gives an approximate estimate of the average sum paid in law stamps in each suit in the Court of Queen's Bench, as well as an approximate average of the percentage of disbursements in each bill of costs.

For the purpose of the return, Mr. Dalton averaged the costs upon forty judgments; twenty of which were entered upon verdicts, and twenty were judgments recovered at different stages of the suit before verdict. In all cases counsel fees were put down among fees to attorney, and not as disbursements.

The full amount of costs was $3013.64. The disbursements to sheriffs, witnesses, postage, &c., other than stamps, $798.82. Disbursements in stamps, $281.16. Upon this result, therefore, it appeared: (1) that the average sum paid in law stamps in each suit was $7; and (2) that on the average nearly 36 per cent. of such bills of costs was disbursements. The average of disbursements would have been increased if a proper proportion of counsel fees were added to the disbursement column.

The large increase to the fees to Sheriffs, Clerks of County Courts, &c., which has been recently made, will make the percentage of disbursements much larger. It may, with reference to these officers, be advisable to discuss at some future time the propriety of the adoption of some scheme, different from the present one, for remunerating them

ADMINISTRATION OF JUSTICE ACT—CHANGES IN PROCEDURE.

It is, of course, impossible to predict what will be the course of practice and procedure in the Superior Courts of Law and Equity, whether ultimately the rules which obtain in Courts of Equity will prevail over those of the Common Law, or *vice versâ*. It is manifestly desirable that there should be, as far as possible, and as soon as possible, mutual modifications of practice between the Courts of Law and Equity, so that the systems may, while approximating, be made to work harmoniously together, as auxiliary the one to the other. We doubt not that the Judges of the Common Law Courts will be ready in matters of procedure to adopt the language of Blackburn, J., when he says "We are not bound to follow the rules of the Courts of Equity, but if we saw that their principle was sound and just, we should apply it:" *Elkin* v. *Clarke*, 21 W.R. 447. And so the Chancery Judges will be willing to avail themselves of the rules and practice of Common Law Courts in matters which have hitherto fallen exclusively within the jurisdiction of the latter. The best conceivable thing to be done at the outset, in dealing with the new state of affairs introduced by the Administration of Justice Act, would be for the Judges to unite in framing a comprehensive set of rules or orders for determining the course of procedure under this Act. But so multifarious are the judicial duties, and so great is the pressure of every-day work, that it is well-nigh impossible to secure the requisite leisure for such an undertaking, and so in all likelihood things will be left pretty much to shape their own course. Out of the disorder, no doubt, a system

of procedure will in due course of time become formulated by the decisions of the Judges. Meanwhile there are some probabilities as to the effect of the Act in question upon some branches of the law, which we propose briefly to consider.

And first, as to demurrers in Equity for multifariousness, the practice will be somewhat altered. This objection is one which must be taken by demurrer; otherwise, if passed over, so that the cause comes to a hearing, the Court will administer appropriate relief. The objection for multifariousness generally is open to the defendant, when upon the record distinct matters are united, which it would be inconvenient and undesirable for the Court to try at the same time. In *Loucks* v. *Loucks*, 12 Gr. 343, Spragge, V. C. remarked (adopting the language of Lord Cottenham)—"To lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities, utterly impossible." But he goes on to say, "It is a just ground of complaint with the demurring defendants, that distinct matters, wholly unconnected, in which they have no interest, are united in the same record with the case they have to answer." Now, according to the former practice, the objection would not be good on demurrer if the multifarious matters united were such as could only be cognizable at law, and in respect of which there was not jurisdiction in Equity. Thus it is laid down in Story's Equity Pleadings, section 283, referring to *Knye* v. *Moore*, 1 Sim. & Stu., 61. "If one of the distinct subject matters be clearly without the jurisdiction of a Court of Equity for redress, it seems that the Court will treat the bill as if it were single, and proceed with the other matter, over which it has jurisdiction, as if it constituted the sole object of the bill."

But the effect of the 32nd section of the Administration of Justice Act, giving Equity jurisdiction in Common Law matters, will alter the law in this respect, so that the demurrer for multifariousness in such a case as *Knye* v. *Moore* (*supra*), would be probably upheld.

Again, a very important advance in the administration of the law was made in this Province by Strong, V. C., when he decided in *Longeway* v *Mitchell*, 17 Gr. 190, that the beneficial provisions of the statute 13 Eliz. cap. 5, were open to all creditors. Before this decision, the rule was to refuse relief to a creditor seeking to avoid a fraudulent conveyance made by his debtor, unless the person seeking relief had obtained a judgment and execution at law. But, as the Vice Chancellor observed, "if a simple creditor could not maintain such a bill, he might be entirely defeated by a conveyance by the fraudulent grantee to a *bona fide* purchaser, whilst the action at law, in which he seeks to recover his judgment, is actually in progress." Now under the provisions of the same 32nd section it seems to us that a creditor seeking to impeach a fraudulent conveyance, could proceed concurrently, and by one and the same suit in equity, to establish his right as a creditor by the decree of the Court, (which would be equivalent to a judgment at law,) and also to have it declared, in a proper case, that the conveyance impeached was fraudulent and void as against his claim. In cases such as *Longeway* v. *Mitchell*, the Court did not heretofore order the land to be sold for the satisfaction of the creditor, because not having his execution in the Sheriff's hands, the Court would not expedite the sale of the lands. Yet we think under the new Act, this relief by way of sale of lands could be worked out in such a suit by an ordinary creditor, whose rights as a creditor are established by a decree for the payment of the debt.

ATTACHMENT OF DEBTS IN DIVISION COURTS.

The Member for London has introduced in the Provincial Legislature, a Bill proposing to limit the right of attaching debts by exempting the wages of workmen and labourers from liability to seizure, to satisfy creditors. Since the passing of the Act of 1868-9, respecting Division Courts, the right to garnishee debts has been found an efficacious means in the hands of creditors for recovering small sums which thousands of dishonest debtors previously contracted and kept beyond their reach. The right extends to "any debt due or owing to the debtor from any other party." We do not, for a moment, question the *bona fides* of the motives which have suggested the proposed legislation, but it would be idle to deny that there have been those who have evinced a morbid desire to pander to ignorance and sympathise with the *poor debtor*, to the total disregard of the rights and privileges of *the poor creditor*.

It may be that this Bill will not go beyond a second reading. But in the possibility of the law on this subject undergoing change, it is proper for us to refer to decisions that have been made under the Act, which, if not correct expositions of the intention of the Legislature, ought to be placed beyond doubt by an amending statute. It has been held that the costs of a primary creditor cannot be recovered against a garnishee unless the garnishee disputes the debt claimed,—that so much of the debt attached and no more than will satisfy "the claim" and "to the extent of the primary debtor's claim" only—can be held liable, that the Act provides nothing for costs, that the proceeding interposes an authority for forcing away from a primary debtor a chose in action which he, and he only, can dispose of and control, and that any sum which is not taken from him by the force of this statute, is still vested in himself; the Act only providing a discharge for so much; so that for any sum which is not legally attached the garnishee is still liable to be sued by the primary debtor; for that can only be legally attached which the statute says shall be, and all the rest the garnishee must pay to the primary debtor, and that whatever may not be legally recovered by this proceeding of garnishment may be recovered by some other. Without committing ourselves to any particular opinion on this subject, we may mention that the question was brought before the County Judges at their last meeting, and as we have stated in a previous number, a paper was read maintaining this view with some conclusiveness and force. The large majority of those present concurred in it, so that if the intention of the Legislature was really to enable primary creditors to recover costs in cases where the fund in the hands of garnishees will admit of it, the statute should be amended in order to prevent hardship, and thereby make this very useful provision more efficient than it is at present in counties where Judges hold the view we have mentioned.

Another question has been mooted which is of some consequence to creditors to consider, particularly if proceedings by garnishment are to be taken at their own costs and charges; and it is this: by sub-section 4 of section 6, it is enacted that "whether any such attaching order shall or shall not have been made the primary creditor" &c., may summon the garnishee in the form D in the schedule. A reference to the form shews that the clerk issues the summons—which is to be served on the garnishee; section 9 gives the same effect to the issuing and serving of that summons as is given by the 2nd sub-section of section 6; the question has arisen what is the need or use with this provision of applying to the Judge on affidavit

for an attaching order under the first sub-section of section 6. The question has been answered in this way by some of those Judges who have given time and thought to its consideration; the affidavit required under the first sub-section of section 6, shews (1st) the recovery of a judgment and when; (2nd) that some one or more parties is or are within the Province, and is or are indebted to the primary debtor, &c.; then the attaching order issues, the service of which has the effect of attaching and binding all debts due to the primary debtor. This section and the form C in the schedule shew the intention of the Legislature to have been that all debts owing to the primary debtor from any party in the Province should be attached and bound to the extent unsatisfied on the judgment, and a payment by a garnishee into Court, or to the primary creditor, of the debt attached is declared to be a discharge to the extent of the debt owing from the garnishee to the primary debtor. The attaching order may be served and is binding in any county. The summons issued by the clerk, to be effectual under sub-section 4, can only be legally issued from a Division Court, and can only be served in the Division in which the garnishee resides or carries on business, and can only include one garnishee on a separate or two or more garnishees on a joint debt; whilst the attaching order of the Judge binds *all debts*, (all over the Province) due by all such parties, whether such debts are joint or several debts or not. The summons by the clerk calls the garnishee before the Court to answer the claim and state whether he owe any and what debt to the primary debtor, and why he should not pay it to satisfy the judgment. The order by the Judge merely attaches the debt, and must if necessary be followed up by the primary creditor by subsequent proceedings in the proper Division Court, in any and every county where garnishees reside or carry on business, until his judgment is satisfied; so that if there be only one debt to attach or if the garnishees are all within the jurisdiction of the Division Court issuing the process, a Judge's attaching order may be dispensed with by issuing a summons for each garnishee.

This, we have no doubt, will present a new view of this interesting subject to many of our readers, but those introductory words of sub-section 4, "*Whether any such attaching order shall or shall not have been made*," lead us strongly to the conclusion, that the view taken by some of our most experienced County Judges to whom we allude is correct, and if there be doubt upon it, it should be settled by the Legislature now in session.

There exists a contrariety of practices under section 7, "when the primary creditor's claim is not a judgment," arising from a difference of opinion as to whether a summons issued in the proper Division, as to the garnishee, can properly cite a primary debtor to a Court other than which would have jurisdiction, supposing the proceedings were an ordinary suit for the recovery of the same debt; this contrariety should be set at rest by legal enactment. The 7th section provides with certainty for the case of the garnishee; he must be summoned to the Court in the Division in which he lives or carries on business; nothing whatever is laid down as to the primary debtor, excepting that, if practicable, the summons must be served on him unless the Judge shall, for sufficient reason, dispense therewith. The question here arises, have the rights of an ordinary defendant been taken away from the primary debtor on the mere allegation and for the convenience and advantage of a primary creditor? We think not, and that a Judge could not for any reason of such mere convenience of the creditor and garnishee, dispense with service, but

should insist on its being made in every case which requires personal service in ordinary cases—*if practicable;* if the primary debtor *has been duly served with summons*, judgment may be given against him; if he has not been "duly served" section 12 specially provides that no judgment can be rendered against him "until the summons and memorandum with an *affidavit of the due service of both* be filed, unless the Judge, for special reasons, shall otherwise order. What, it has been asked, is due service within the meaning of this section? There is no express provision explaining it, in the Act of 1868-9, it is therefore argued that it cannot be left to inference or conjecture, but resort must be had to the practice on the subject which existed previously. By section 21 of the Act in question, "The Division Courts Act and this Act" are to be read as one Act. Con. Stat. U. C. sec. 71 prescribes that "the suit may be entered and tried in the Court holden for the Division in which the cause of action arose or in which the defendant, or any one of the defendants resides or carries on business at the time the action is brought, notwithstanding that the defendant or defendants may at such time reside in a County or Division different from the one in which the cause of action arose." There were other previous special provisions with reference to the Courts in which suits may be entered and tried—and with the exception of these, we do not quite see how a primary debtor can be legally summoned to a Court, or how any Court has jurisdiction over a cause of action against him, other than that which is prescribed by the statutes existing previously to the statute of 1868-9. It is contended by some who have studied the question, that the primary debtor may be summoned to the Division Court of the Division in which the garnishee may be summoned, although that may cause him to go to a distant County for the purpose, no matter at what inconvenience to him personally, to say nothing of injustice where he has a meritorious defence to claim, possibly "trumped up" against him, and which he must defend at great expense. Others, on the contrary, contend that when the primary debtor and garnishee are not both legally amenable to the jurisdiction of the same Court, the primary creditor should first obtain a judgment against the primary debtor and then proceed against a garnishee under section 6. As the Act of 1868-9 was clearly intended to meet either case and both cases, it is urged that it must be read in consistence with the previously existing statutes. Hence it is desirable, if the principal features of this useful law are to be continued, that the practice under it should be better settled by the Legislature.

JUSTICE SHALLOW.

"I am Robert Shallow, Sir, a poor Esquire of this county, and one of the King's Justices of the Peace."—*King Henry IV., Part* 2.

It is the popular impression that law would be a very simple matter if it were not for the lawyers. If "Common Sense" were only allowed its proper influence in the administration of Justice, law and justice might come to mean the same thing. Unhappily the lawyers have outwitted common sense, and hence the delays, the extortions and the failures of justice. Common sense, it is true, is not entirely denied the privilege of assisting justice, for juries and Justices of the Peace still exist; but how saddening it must be to the reflective layman to mark how these pillars of the constitution are being undermined by an aggressive Legislature. He knows how juries have been slighted and assailed. He will perceive a threat of danger to the Justices in that clause of the new Administration of

Justice Act which dispenses with the presence of an "Associate or any other Justice of the Peace" at the Courts of General Sessions.

Though we cannot as lawyers be expected to entertain any great reverence for common sense, we cheerfully admit the great services of Her Majesty's Justices of the Peace. Sir Edward Coke said, "The whole Christian world hath not the like office as Justice of the Peace, *if duly executed.*" Common sense alone does not insure its being "duly executed," but we must not look for perfection in human beings, and it is unfair to expect that a man, largely gifted with common sense, should possess other rare qualities.

In this country at least, if the Squire makes mistakes, they are generally harmless: they are more often of the head than the heart. He may be ignorant, but he is not usually despotic: he moves us to laughter more often than to anger.

And we may laugh at him as much as we will, for the law, probably in her antagonism to common sense, if she does not actually encourage us, secretly joins in the laugh against her much abused minister. For instance, we read with pain that, in the time of Holt, an irreverent person wrote of Sir Rowland Gwyn, who was a J.P., in a discourse concerning a warrant made by him, "Sir Rowland Gwyn is a fool, an ass and a coxcomb for making such a warrant, and he knows no more than a stick-bill." And this slanderer was neither hanged nor imprisoned, nor put in the stocks, but went scot-free. "To say a Justice is a fool," said Holt, C. J., "or an ass, or a coxcomb, or a blockhead, or bufflehead, is not actionable:" 2 Salk. 688. And you may with confidence tell a Justice of the Peace that he is "an ass and a beetle-headed Justice," and, if he expostulates, cite Holt again to his discomfiture, and you may do this "because a man cannot help his want of ability, as he may his want of honesty: otherwise where words impute dishonesty or corruption:" 2 Salk. 695. It is satisfacfacty to know how far the law allows us to go in expressing contempt for a magistrate who obstinately refuses to accept our views. What balm it would afford to the wounded feelings to intimate to such a one, when he has descended from the bench, "Sir you are an ass, a coxcomb, and a buffle-head, and C. J. Holt says I may tell you so." Whether it is becoming, or just, to treat our magistrates with levity, we will not here discuss. It is simply our wish to note down some thoughts suggested by reading of two famous and typical Justices, the name of one of whom heads this article. If any living Justice shall profit by what we write, shall learn something to avoid and something to emulate, shall be lifted up to a higher and holier sense of his duties,—we shall be surprised, but gratified.

Some 300 years ago there lived a Justice in Warwickshire named Sir Thomas Lucy, whom accident and a severe temper have immortalized. There was a difference of opinion between the good people of those parts and Sir Thomas, as to which of them had the best right to the deer in the park of the latter. Sir Thomas strongly favoured his own title, and having magisterial authority to support it, prosecuted trespassers on his lands without mercy. It is said that amongst the mad fellows who broke his fences and the heads of his keepers and stole his deer, was a Master Will Shakespere. He offended this young man mortally by his arrogance and severity, and the consequence is that Sir Thomas Lucy, who would otherwise have been gathered to his fathers and forgotten, has come down to posterity in the person of Justice Shallow.

Perhaps if we had to find a generic

name under which to classify Justices of the Peace, we could not get a more convenient one than Shallow. Not that Justice Shallow presides in the inferior courts alone. Arbitrary monarchs have found it profitable to honour him with the highest judicial position in England. We would not venture to say that there is no colonial bench on which he may be found. He was well known in Ireland in the troubled times just before and after the union. "I rather think," said an Irish Shallow, solemnly thinking out the construction of a will, "I rather think the testator meant to retain in himself *a life estate.*" "Oh, my Lord," said Curran, "Your Lordship must be taking *the will* for *the deed.*"

It was Squire Shallow who lately decided that a verbal contract required a stamp. It was also Squire Shallow before whom a "sharp" lawyer won his case, in spite of an authority directly against him, cited from Greenleaf on Evidence. The lawyer insisted that Greenleaf was not intended as "an authority," and in support of his assertion read the following passage from the preface:

"Doubtless a happier selection of these principles might be made, and the work might have been much better executed by another hand. For, now it is finished, I find it but an approximation toward what was originally desired. But in the hope that it may still be found not useless, it is submitted to the candour of a liberal profession."

To return to the original Shallow: we are introduced to him (in Henry IV., Pt. 2) at his house in Gloucestershire, where, with his cousin Justice Silence, he is expecting Sir John Falstaff, who is going about the country on a recruiting expedition. Shallow is a garrulous old donkey. He has a mind of the "glutinously indefinite" sort, like that worthy modern magistrate Mr. Brook of Middlemarch, and like him rambles hopelessly in conversation. He interrupts his reflections on the uncertainty of human life with an inquiry as to the price of bullocks at Stamford fair, and from that passes, with cheerful irrelevance, to the days of his youth. In his youthful days, of which he is very proud, he lost the magisterial quality of common sense, if he ever had it, for he studied the laws, as the sons of country gentlemen in that age often did. He himself informs us:

"I was once of Clement's Inn, where I think they will talk of mad Shallow yet.

SILENCE—You were called "Lusty Shallow" then, cousin.

SHALLOW—By the mass, I was called anything, and I would have done anything indeed, and roundly too. . . . . Then was Jack Falstaff, now Sir John, a boy and page to Thomas Mowbray, Duke of Norfolk.

SILENCE—This Sir John, cousin, that comes hither anon about soldiers.

SHALLOW—The same Sir John, the very same. I saw him break Skogan's head at the court gate . . . and the same day did I fight with one Sampson Stockfish, a fruiterer, behind Grey's Inn. Oh the mad days that I have spent!"

An edifying glimpse, truly, of the life of the "sad apprentice of the law" in the days of Queen Bess, for of course the poet describes the manners of his own age. We know from historical sources that the students of the Inns of Court did not lead a very sedate life. They gave as much of their time to the fencing-school and the play-house, as to the discussion of 'moots.' They cultivated a taste for beating watchmen and other boisterous sports, from which the refined and industrious law-student of the present day would shrink with abhorrence. When in the mood for a particularly inspiriting lark, they playfully took the road and relieved helpless travellers of their purses. This may seem incredible, but it is well authenticated that one of the ablest and most upright Judges of that day was in his youth one of a band of amateur highwaymen. Happily he conceived a distaste for this business

in good time, exchanged his pistols for his law books, and rose to eminence in his profession, and when he became Chief Justice of the Queen's Bench, it was observed that gentlemen of the road found no mercy at the hands of Chief Justice Popham.

Here, for the present, we must take leave of Justice Shallow. We may have something more to say about him, when we come to speak, as we hope to do, of his worthy colleague Justice Silence.

SELECTIONS.

THE YEAR 1873 IN ENGLAND.

The year which has just closed was a remarkable year from a legal point of view. The judicial system which has been the growth of centuries—the great division between equity, the offspring in its recent developments of the power arrogated to themselves by successive lord chancellors, and law, the creature of custom and statute extended and explained by judicial decision—has been swept away by the strong hand and overwhelming influence of a lord chancellor who accomplished his reform while still a novice in his high office. The profession and the public during the last twenty years had welcomed small innovations in the respective jurisdictions, the introduction of common-law remedies into chancery, and of equitable defences into common law, without venturing to contemplate the fusion of equity and law. And perhaps the most remarkable circumstance connected with the great measure of reform which will render ever memorable in our legal history the year 1873, is that it does not on its face enact a fusion of two branches of jurisprudence. Its noble and learned author foresaw that if he were to propose to merge the courts and shuffle the judges together, and submit all questions upon our different laws to courts so merged, there would be an outcry based on reason which might imperil the success of the measure. With a prudence which many chancellors of perhaps a higher order of genius than Lord Selborne have lacked, he preserved existing courts and their judges, keeping the courts distinct even in their nomenclature, and providing for the business to run almost precisely in the groves in which it has run hitherto.

We feel that when the magnitude of the Judicature Act is regarded, all other measures sink into comparative insignificance. At any other time the Railway and Canal Traffic Act, which took away an important jurisdiction from a common-law court, and gave it to commissioners, would have been looked upon as a very important measure—much as the Election Petitions Act of 1868 was considered, seeing that it took from the House of Commons the exercise of important judicial functions, and transferred it to the common-law judges. And the act of this year is undoubtedly one of great moment, as it seems to facilitate the redress of grievances alleged by and against the great carrying companies of this country. The general legislation of the session we have already noticed in these columns, and we do not propose to carry our readers over the ground again.

Next in importance to the great change in the judicial system of this country is the operation of death and promotion in the ranks of the judges and the Bar. The death roll for this year exhibits the names of men who could ill be spared. One of the greatest lawyers England ever saw was lost to our court of ultimate appeal in the person of Lord Westbury. The Court of Chancery had scarcely been adorned by the elevation of Sir John Wickens, one of the most scholarly, accomplished and able men of his generation, before illness incapacitated him to perform the duties or his office, and in a short time terminated fatally. The Court of Common Pleas lost its Chief Justice, who, while more distinguished at the Bar than on the Bench, was a painstaking and conscientious judge, and particularly capable in presiding over his court at Guildhall, which, at the time of his appointment, was a favourite tribunal for the trial of heavy commercial causes. The Court of Exchequer sustained a serious loss in the retirement of Baron Channell, who died shortly after. An Irish Judge of eminence, Chief Baron Pigot, died at the close of the year; and this completes the list of our judicial losses. Dr. Lushington, for a long period Judge of the Court of Admiralty, died during the year, but he had previously

retired from all judicial duties. The other lawyers of position or note abroad and at home, who must be named as having been lost to us, are: Chief Justice Chase (of the United States), Mr. T. Chisholm Anstey, the Hon. Sir George Rose (ex-Judge of the Court of Review), Mr. Thomas Tomlinson, Q. C., Mr. James R. Hope-Scott, Q.C., Mr. T. H. Hadson, Sir Wm. Alexander, attorney-general to the Prince of Wales; Mr. Serjeant Bellasis, Mr. Serjeant O'Brien, Mr. Edward Masson (formerly attorney-general for Greece), Mr. Dominick M'Causland, Q.C., Mr. Edmund Fitz-Moor, Q.C, and the Hon. William Jardine, Judge of the High Court of the Northwestern Provinces of India.

The changes in the Bench and Bar by promotion have been gradual, but in one sense remarkable. When we say gradual, we intend to indicate that Government has not made any appointment until the very last moment. By the retirement of Lord Romily from the Mastership of the Rolls it became necessary to appoint a successor. With some motive, never thoroughly comprehended by the profession and the public, Lord Selborne assumed the functions of a judge of first instance, and transacted, for a considerable period, the business of the court. At length Sir George Jessel was appointed, thereby, although not necessarily, removing from the House of Commons a politician having little influence as a law officer, and who had particularly distinguished himself as the uncompromising opponent of reform in legal education. The Rolls Court proved to be for him a congenial sphere, and the appointment was universally acknowledged the only one which could properly be made. On the retirement of Baron Channell, Mr. Pollock, Q.C., was raised to the Bench in the Court of Exchequer; and the death of Vice-Chancellor Wickens made an opening on the Equity Bench to which the stuffgownsman in the largest practice at the Equity Bar was promoted, and Sir Charles Hall has proved himself to be a capable judge.

The promotion of Sir George Jessel vacated the office of Solicitor-General, to which, after considerable delay, as usual, a member of the Bar and the House of Commons who had distinguished himself for his ability and independence, was selected, in the person of Mr. Henry James. The Government having sustained a succession of reverses in the constituencies, the re-election of their solicitor became a matter of vital importance, and rarely has the contest on the re-election of a law officer proved so exciting. The solicitor was re-elected, but when the year closed the return was still threatened by petition. Within a few weeks of Mr. James' appointment and re-election, the attorney-general (Sir John Coleridge) was raised to the vacancy created by the death of Chief Justice Bovil, and Mr. James became attorney-general. This rapid rise of one whose reputation at the Bar had not been of the highest order, but who had been known as a shrewd lawyer and clever speaker, is perhaps unparalleled, and deserves a prominent position in the facts of the year. The solicitor-generalship vacated by him was filled by the appointment of Mr. Vernon Harcourt, an accomplished debator but not a practical lawyer. Sir John Coleridge, soon after his elevation to the Bench, was further elevated to the House of Lords, to which assembly he will add judicial strength for the remaining period that it will be required, and debating power of an essentially aristocratic order.

The business transacted in our courts has been such as to call for little observation. In the Queen's Bench a trial at bar has been in progress for more than half the year, keeping at work all the long vacation three learned judges and a strong bar. The case which has occupied the attention of the court is in itself extraordinary, but it has been embellished with forensic asperity and impudence which will make it a subject of curiosity and wonder to coming generations. The case will further be considered as proving the extremely useful purpose which is served by our system of trial by jury, for twelve men have evinced an amount of intelligence and practical knowledge which has done much to facilitate the just determination of the most gigantic prosecution which has ever encumbered a court of law.

It must be considered that, speaking generally, the legal business in the country has declined, whilst, we believe, both branches of the profession have considerably added to their numbers. Vigorous measures have been taken during

the year by the solicitors to improve the Incorporated Law Society and to bring within it, or into action with it, the important law societies of the provinces. The agitation for improved legal education, which lay dormant during the passage of the Judicature Act, was revived by a deputation to the Lord Chancellor at the close of the year, and promises to lead to legislative action with reference to the Inns of Court.—*Law Times.*

MERCANTILE AGENCIES.

The most important question with regard to mercantile agencies is as to how far their communications made to their patrons and customers and affecting the credit and commercial standing of others are to be regarded as privileged communications. However useful these agencies may be to traders and merchants when properly conducted—and that they are useful there can be little question—they may yet, if recklessly and dishonestly managed, become engines of great evil, and sources of great injury to the worthiest and most solvent business men of the country.

As these agencies are an outgrowth of modern times, there are but few cases to be found in the reports relating particularly to them, but it is believed that enough may be found to settle, pretty clearly, the extent of their rights and liabilities in the matter of communicating information.

The earliest case bearing upon the subject is that of *Goldstein* v. *Foss*, 2 Carr & Payne, 252 (1826). The facts were these: A society had been formed, called "The Society for the Protection of Trade against Swindlers and Sharpers," into which all fair traders were admissible. It was the duty of defendant, its secretary, to ascertain and designate to the members, the names of such persons as were deemed improper persons to be balloted for as members. The libel complained of was a communication addressed to the members of the society, in which it was stated that the plaintiff was reported to this society as improper to be proposed to be balloted for as member thereof. Lord Tenterden told the jury that there could be no doubt that such a communication was libelous, and the jury gave a verdict for plaintiff.

The case of *Fleming* v. *Newton*, 1 H. L. Cas, 363 (1848), is, however, more nearly akin to the precise subject we have in hand. There the appellants were directors of a Scottish mercantile society, formed "to concentrate and bring together, from time to time, a body of information for the exclusive use of the members, relating to mercantile credit of the trading community, with a view of diminishing the hazards to which mercantile men were exposed. The rules required the secretary to collect from the public records of protests, etc., the names and designations of debtors in trade, etc., and to print his information and forward it monthly to each member of the society. The respondent had dishonoured two notes, and procured an interdict against the publication of the protests by the appellants. The laws of Scotland required all protests to be registered in a public register, and it was conceded that the extracts complained of were taken from this record, and were made for a limited purpose, and for the use of the society. The House of Lords dismissed the interdict. In the course of the judgment the Lord Chancellor spoke as follows: "They (the society) are engaged in mercantile affairs in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the register, is not disputed, and that they might communicate to each other what they had found there, is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt, if the matter is a libel, this is a publication of it; but the transaction disproves any malice and shows a legitimate object for the act done." The turning point in this case was probably the fact that the matter claimed to be libelous was copied from a public record.

The earliest case in this country, so far as we have been able to ascertain, was that of *Billings* v. *Russell*, 8 Boston Law Reporter, 699, tried before Dewey, J., at Nisi Prius. The plaintiff was a merchant, and the defendant the proprietor of the "*Boston Mercantile Agency.*" The defendant had received from his agent, on what was supposed to be reliable au-

thority, a report injurious to the credit of the plaintiff. This report had been read by defendant's clerks to regular subscribers to defendant's agency, who were interested in knowing the standing of the plaintiff. The report was incorrect and unjust. The Court charged that if defendant, as the constituted agent of a commercial house, upon the application of his principal, made inquiries at the proper places, and under proper and reasonable guards to insure accuracy and privacy as to the information thus obtained, and the information which he thus obtained was repeated *bona fide* to his employer, and to him alone, as the result of such inquiries, and for the purpose of governing his conduct in his business transactions with the party as to whom the inquiry was made, such communication may be justifiable as a confidential communication, and the defendant would not be responsible although the information was incorrect and unfounded in fact, the defendant acting in good faith and believing it to be true at the time he communicated it, but that the privilege of a confidential communication would be confined to the agent, and if the principal repeated it to others he would be responsible.

In *Taylor* v. *Church*, 8 N. Y. 452 (1853), the question was fully discussed before the Court of Appeals of this State. Several mercantile firms of the city of New York associated together, and employed the defendant to travel in the southern and western States, to obtain information in relation to the standing of merchants and traders residing there. The information obtained was transmitted in the form of a report to one of the associated firms, and by them printed, and a copy sent to each member of the association. The defendant having made a report unfavourable to the credit and standing of the defendant, a merchant in Mississippi, which report was circulated in the usual manner, the plaintiff brought an action for libel and recovered judgment, which being affirmed by the Court in banc, an appeal was taken to the Court of Appeals. The judgment was reversed on the ground of improper rejection of evidence; but on the question of libel or no libel, Jewett, J., who delivered the opinion, said: "I think the Court below was right in holding that the publication could not be included within the protection of privileged communications. In this case the communication was not even confined to persons making the inquiries of the defendant. The libel complained of was printed by his procurement, and distributed by him to persons who had no special interest in being informed of the condition of the plaintiff's firm." This was all that was said on this point. But on the question being propounded to the Court—"Was the alleged libel a privileged communication?" all the members of the Court who heard the argument were of opinion that it was not.

This decision must rest solely upon the ground that the information claimed to be libelous was communicated to persons other than those who had a direct and special interest in it, and, as we shall see, it is an authority for nothing beyond that.

Ormsby v. *Douglass*, 37 N. Y. 477 (1868), was an action of slander against the owner of a mercantile agency in New York. By the terms of the subscription to this agency—which constituted the contract between the defendant and the person to whom the alleged slanderous words were uttered—all information was to be considered strictly confidential and furnished only for the use of subscribers. One Benton, a subscriber, holding a note indorsed by the plaintiff, applied to the defendant for information as to his credit, responsibility, etc. The books of the agency were consulted by the clerks, and the result communicated to the defendant, who thereupon informed Benton that plaintiff was "a man of no responsibility; he was a bad man and worked for counterfeiters, and was a counterfeiter." On the trial, a non-suit was granted on the ground that the communication was confidential and privileged. This judgment the court of appeals affirmed, on the ground that the words were communicated by the defendant in the performance of a duty imposed upon him, to a person who had an interest in the matter, and who had a right to require the information. This decision is in accordance with the rule so well stated by Parke, B., in *Toogood* v. *Spryling*, 1 Comp. M. & R. 143—and which has been since universally approved—that a communication is privileged, if fairly made, by a person in the discharge of some public or private duty, whether

legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.

The doctrine laid down in *Taylor* v. *Church*, that communications derogatory to the credit or standing of another were not privileged if made to those who had no special interest therein, was re-asserted in *Sunderlin* v. *Bradstreet*, 46 N. Y. 188; 7 Am. Rep. 322. In that case the defendant had a commercial agency, and distributed to his subscribers, semi-annually, 10,000 copies of a publication giving the credit and standing of merchants. He also issued a weekly sheet of "corrections," which was sent to all subscribers to the semi-annual publication, and which contained the alleged libelous matter—to wit, that the plaintiffs had failed—which was false. The defendant appealed from a judgment against him, and the judgment was affirmed for the reason above stated. The court said: Whether a libel or slander is within the protection accorded to privileged communications, depends upon the occasion of the publication or utterance as well as the character of the communication. The party must have a just occasion for speaking or publishing the defamatory matter. A communication is privileged within the rule when made in good faith, in answer to one having an interest in the information sought; and it will be privileged, if volunteered, when the party to whom the communication is made has an interest in it; and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or, at least, proper that he should give the information." Precisely the same conclusion, and on the same grounds, was reached in *Commonwealth* v. *Stacey*, 3 Phil. Leg. Gaz. 13, which was an indictment for an alleged libel contained in the circular of a commercial agency.

It follows, then, from these decisions, that a communication from a commercial agency to a subscriber is privileged, provided the subscriber have a special interest in the particular information communicated, but that if the communication be published to all subscribers, whether having a special interest in it or not, it is not privileged, and if defamatory, may be made the subject for an action.—*Pittsburgh Legal Journal.*

ASSURANCE ON LIFE OF HUSBAND FOR BENEFIT OF WIFE.

In *Brossard* v. *Marsouin*, in the superior court at Montreal, October 21, 1873, before Beaudry, J., a question was ruled which appears to be novel and worthy of note, although the court is not one of last resort. The defendant, a public trader, holding her goods apart from those of her husband, effected a policy of assurance upon his life in the sum of $1500, which sum was stipulated to be paid to her in the event of his death. The husband having died, and the defendant becoming embarrassed, one of her principal creditors forced her into bankruptcy. The defendant put the assignee in possession of all her goods, but refused to surrender to him the policy of assurance. The assignee filed his petition asking that she be compelled to deliver the policy as a part of the estate of the bankruptcy belonging to the creditors. The defendant responded that the provincial statute, 29 Vict., ch. 17, which authorizes similar assurances, provides that the amount shall be paid *in the manner directed in the policy*, and cannot be subjected by any creditor or creditors whatever. The assignee contended that the creditors mentioned in the Act are those *of the husband*, and not those of the wife; but the Court took the same view of the statute as did the defendant, and dismissed the petition with costs.

We do not recall any case similar to the above, and after a considerable search, have not been able to find any. In the case of *Murrin*, bankrupt, 2 Dillon C. C. 120; S. C. 2 Ins. Law Jour. 524, a wife possessed of a separate estate secured to her by an ante-nuptial settlement, obtained, in 1869, a policy of insurance *upon her own life*, payable upon her death *to her husband*. She paid the premium for a year out of her own estate. Before the year expired her husband was adjudged a bankrupt. Out of her own estate she paid the premium for the two following years, 1870 and 1871, and before the next premium fell due, she died; and it was held, in a contest between her husband and his assignee in bankruptcy, that the former was entitled to the proceeds.—*Central Law Journal.*

PARENT AND CHILD.

The question whether a father can, by contract, surrender his rights over his infant child, has recently been canvassed with seriousness, in the courts of Lower Canada, and has been finally answered in the negative, by the Queen's Bench at Montreal. We allude to the case of *Barlow* v. *Kennedy*, 17 L. C. Jurist, 253. Kennedy was a day laborer, in indigent circumstances. His wife died, leaving him a female child, the issue of their marriage, about eighteen months old. Both Kennedy and his deceased wife were Catholics, and the child had been christened in that faith. Unable to care for the child, he gave her to Barlow, a Protestant, in good circumstances, agreeing, by parol, that the latter should have her to rear, educate, and dispose of, during her minority, to all intents and purposes, as though she were his own. This contract was reduced to writing before a notary, which writing Kennedy agreed several times to sign, but failed or neglected to do so. Finally, Kennedy re-married; and, after Barlow had had the exclusive custody of the child for more than four years, in pursuance of the agreement, and without any compensation from Kennedy, the latter demanded that she be restored to him. This being refused, he sued out a writ of *habeas corpus* to recover possession of her. The Judge of the superior court having heard the case upon issues which he had caused to be made up, rendered the following judgment:

"The Court having heard the parties by their respective counsel, examined the proceedings of record and deliberated, considering that it is satisfactorily proved that petitioner, some three or four years ago, placed Mary Ann Margaret Kennedy, his infant child, under the care and guardianship of the respondent, William Barlow, and delegated his, said petitioner's right, authority and control over her person, under the express understanding and agreement that said respondent should bring her up and educate her as his own child; considering that said respondent then accepted the guardianship of said Mary Ann Margaret Kennedy, and has ever since, with great care and kindness, and at great expense, brought her up, according to the said understanding and agreement, and desires to continue so to do; considering that it would be more conducive to the comfort, happiness and welfare of the said Mary Ann Margaret Kennedy to suffer her to remain under the care of said respondent, who and his wife have become much attached to her, and to whom she has also become much attached, than to consign her to the guardianship of the said petitioner, a poor day laborer, and a stepmother, to whom she is an entire stranger, doth dismiss the petition of said petitioner with costs, and remand said Mary Ann Margaret Kennedy to the guardianship and custody of the said respondent."

This judgment was removed to the Court of Review and there reversed; and the respondent having appealed to the Court of Queen's Bench, the judgment of the Court of Review was affirmed.

Badgley, J., of the Queen's Bench, said: "It is unnecessary to enter into detail of the right of a father to have the custody of his infant child: as a matter of justice and of law, the father requires no provision of law to secure to him that right, which no one can disturb or force from him, nor deprive him of, except on account of his own bad conduct or by his own consent. Except in the case of insanity, or some deliberate course of immorality or criminal act of his own, no father can forfeit or lose his paternal right, and even a contract by him to part with his child is, so unnatural, that the law does not recognize a man's right to violate his most sacred duty, least of all to bind himself by a contract to do that which is inherently immoral and *ab initio* illegal, and in the eyes of the law null and void. Even, therefore, if a father had signed such a contract, it would not be binding, and he could still demand and have the custody of his child."

Monk, J., of the same court, said that the judgment of the court of first instance was an extraordinary one; and that it was monstrous to think that a father could divest himself of his right to his child.

The cases upon the subject of the right of a father to the custody of his infant child, and which determine under what circumstances a court of equity, or a court of law, in a proceeding by *habeas corpus*, will control that right for the benefit of the child, are very numerous.

Their effect is very well shown by Mr. Schouler, in his work on the Domestic Relations, pp. 334, *et seq.* Contests of this character generally arise between husband and wife, in the event of separation or divorce; and there appear to be but few cases upon the precise point involved in the case above considered, namely, whether a father may, *by contract*, surrender to another his parental rights over his infant child.

In an English case in point, the father of an infant daughter, the mother having died recently, had agreed to let it live with an uncle, who was to maintain and educate it until it should be able to provide for itself, and the father promised not to take the child away from the uncle, and to pay a certain sum monthly for its support; the agreement was acted upon for some months; but it was held that, notwithstanding the agreement, the father was at liberty to revoke his consent to the child's living with its uncle; and in a proceeding by *habeas corpus*, the child was delivered to the father: *Reg.* v. *Smith*, 16 Eng. Law and Eq. 221. But in a case in Massachusetts, where a child had been given up at its birth, the mother having then died, to its grandparents, who kept it for thirteen years at their own expense, without any demand made by the father for its restoration, the court (Shaw, Ch. J.,) refused to restore the child to its father. In *Mayne* v. *Baldwin*, 1 Halst, Ch. 454, an infant daughter was restored to her father on *habeas corpus*, although he had committed her to the respondent, and agreed that the respondent should *be her father* until she should attain the age of twenty-one years. The same view was taken by the supreme court of New Hampshire in *State* v. *Libbey*, 44 N. H., 321, where the precise question is considered, upon a state of facts which appear from the imperfect statement in the opinion, to be very similar to the case in Canada. The Court say: "In this case the child, when about two years and five months old, was placed with respondent in February, 1859, and maintained by him until December, 1861, when this application was made; and it appeared that until December, 1861, a period of nearly three years, the father gave no notice of his wish to have the child restored to him. Upon the subject of the terms upon which the child was taken by the respondent, the evidence is conflicting; but upon a careful consideration of it, we think that the relation is not impeached, but that the father placed the child in the custody of the respondent, with an agreement that it should be his, and be brought up by him. And the question now is, whether in the exercise of a sound discretion, the custody of the child ought to be withheld. The child had been suffered to remain with the respondent nearly four years before the application, and she is now about six and a half years old; and assuming that there is nothing in the character of the father or stepmother that renders them unsuitable to be entrusted with the nurture of the child, we can see nothing in the other circumstances that would make the change of custody sought for, hazardous to the permanent interests and welfare of the child; certainly not to such an extent as to justify a final severing of the ties which bind the parent and child together. * * * Our opinion, therefore, is that, *upon refunding the sums of money expended by the respondent, under the agreement*, the father may revoke his consent, and thereupon, the custody of the child may be awarded to him." But it has been held, that where a father, whose wife had died, gave his female child, three years old, to her aunt, with whom she remained six years, the father during that time visiting her but once a year, and contributing nothing to her support, his right to her custody was gone: *Com.* v. *Dougherty*, 1 Pa. Legal Gazette 63.

The principle declared in the case in Canada has been carried even further. It has been held that a husband cannot, *by agreement with his wife*, delegate to her the care and custody of their infant children: *People* v. *Mercein*, 3 Hill, (N. Y.) 399, 408; *Johnson* v. *Terry*, 30 Conn. 259, 263; *Earl of Westmeath's case*, Jacob, 251, note (*c*). Although such agreement be by deed. Jac. 251.

And, excepting of course, those cases where the father, by reason of immoral habits, extreme poverty, or otherwise, is unfit to have the custody of his infant child; and excepting also, contests between husband and wife for the custody of their minor children, as well as cases governed by the laws relating to the apprenticeship of minors, the rule undoubtedly is as stated by Mr. Justice

Cowen, in *People* v. *Mercein*, *supra*, that a father holds his children under a personal trust which he cannot alienate. And the supreme court of Illinois has recently held that the right of a father to the care, custody and nurture of his child cannot be *infringed by the State*, except for gross unfitness for the charge, or for the commission of crime by the child, exposing him to imprisonment; and hence, that a statute authorizing children to be committed to a reform school, without any charge of, or trial for crime, but merely because they appear to officers of the law to be destitute of proper parental care, and growing up in idleness, vice, etc., is unconstitutional, as involving imprisonment without due process of law; and that a child thus committed may be discharged on *habeas corpus*, on the father's petition: *People* v. *Turner*, 55 Ill. 280.—*Central Law Journal.*

THE CHANCERY IN OLDEN TIMES IN ENGLAND.

Under Edward I, the officers of the Chancery (Court) lived and lodged together at an inn, or hospitium, which, when the King resided at Westminster, was near the palace, or, perhaps, part of it, until it was removed to the Domus Conversorum, under Edward III. The writs were sealed on a marble table, which stood at the upper end of the hall, and there they seemed to have been delivered out to the suitors. It is supposed that this table still exists beneath the stone stairs. When the King traveled he was followed by the whole establishment of the Chancery (Chancellor, clerks, and all), on which occasion it was usual to require a strong horse, able to carry the rolls, from some religious house bound to furnish the animal; and at the towns where the King rested during his progress, a hospitium was assigned to the Chancery.

Even as far back as the reign of James I. the Chancellor's duties were very weighty; when Lord-Keeper Williams first held the Great Seal, the press of business was so great that he was compelled to sit in his court for two hours before daylight, and to remain there until between eight and nine, and then repair to the House of Lords, where he stayed till twelve or one; after taking some refreshment at home, he would return to his court, and hear such causes as he was able to hear in the morning; or, if he attended at council, he would resume his seat in Chancery towards evening, and sit there until eight o'clock, and even later; on reaching home after all this fatigue, he read all the papers his secretaries laid before him; and then, although the night was far gone, would prepare himself for the House of Lords the next day. Whitelock mentions himself and his brother commissioners sitting in Chancery from five o'clock in the morning to five o'clock in the afternoon.

Sir Lancelot Shadwell, the late Vice-Chancellor of England, in his evidence before the Chancellor Commission, declared the business in the Court was then so heavy, "that *three angels* could not get through it." Sir Thomas More, when he took his seat for the first time in the Court of Chancery, addressing the bar and audience said, "I ascend this seate as a place full of labour and danger, voyd of all solide and true honour; the which by how much higher it is, by so much greater fall I am to feare." Laborious indeed it was then, and still more laborious is it now—but void of honour it never was, and never will be; and all such professions of indifference to its dignity, because of the duties annexed to that dignity, as much deserve contempt as they meet with neglect. "When I was Chancellor," says Bacon, "I told Gondomar, the Spanish Ambassador, that I would willingly forbear the honour to get rid of the burden; that I had always a desire to lead a private life." Gondomar answered that he would tell me a tale:—"My lord, once there was an old rat that would needs leave the world; he acquainted the young rats that he would retire into his hole, and spend his days in solitude, and commanded them to respect his philosophical seclusion. They forbore two or three days; at last, one hardier than his fellows, ventured in to see how he did; he entered and found him sitting in the midst of a rich parmesan cheese."—*Am. Land and Law Adviser.*

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

QUEEN'S BENCH.

Michaelmas Term, 1873.

Dullea v. Taylor.

Contract—Notice of intention not to perform—Right to sue.

Where a party, before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach and sue.

Declaration: that the plaintiff agreed to sell and defendants to buy certain land in Oshawa adjoining the lands of plaintiff, which would be thereby enhanced in value to plaintiff, for $325, upon the following terms: the money to be paid and the conveyance executed on demand, and that defendant should within eighteen months put up a factory thereon, of the dimensions specified, and carry on there the manufacture of plated ware; and that in case he should not do this, he could at the expiration of said eighteen months reconvey the land and receive back the purchase money; and all things happened and all times elapsed, &c., and plaintiff was ready to convey, and yet defendant did not pay plaintiff nor complete the purchase, but notified the plaintiff that he abandoned and would not perform the agreement, &c.

Plea, on equitable grounds, that defendant made the agreement on behalf of himself and others, who were about to associate themselves as a company to manufacture plated ware, on the said lot, and defendant with the intention of procuring said land as a site for their factory in case the company should decide to erect it thereon; that the plaintiff knew this when he made the agreement; and before any demand by plaintiff for payment, and before any conveyance of said land, defendant and the others decided not to carry on said business, and gave notice thereof to plaintiff, and that they would not require said land, and that the plaintiff was released, and defendant did not otherwise abandon said agreement.

Held, following *Holchester* v. *De Latour*, 2 E. & B. 678, that the declaration was good, and the plea no answer to it.

Biard v. Steele.

Foreign Commission—Proof of due taking.

Held, since 34 Vict. ch. 14 O., no objection to a foreign commission that the affidavit, that it was duly taken, was made before a Notary Public, and not before the Mayor or Chief Officer, as required by C. S., U. C. ch, 32 sec. 31.

The Joseph Hall Manufacturing Company v. Harnden et al.

Promissory note—Stamps—Affixing double duty—Payee a "subsequent party."

Held, following *Worley et al.* v. *Hunton et al.* 33 U. C. Q. B. 152, and dissenting from *Estcott* v. *Estcott*, 26 C. P. 305, that a payee is a "subsequent party" to a promissory note within the meaning of 31 Vict. ch. 9, sec. 12, who may pay the double duty provided by that section.

The plea was, that at the time of writing the note, no adhesive stamp or stamps whatever were affixed to the note; to which the plaintiff replied that they paid double duty "by affixing to the note stamps to the amount of double duty payable in respect thereof."

Quere whether the plea should not als have denied that the note was written on stamped paper; and *semble*, that the replication should have stated the amount in stamps affixed.

Gilchrist v. Gore District Mutual Fire Insurance Company.

Fire Insurance—Further Insurance by stranger—C. S. U. C. ch. 52, sec. 28.

Sec. 28 of the Mutual Insurance Act, C. S. U. C. ch. 52, makes a policy voidable "if insurance on any house or building subsists in the Company and in any other office or by any other person at the same time," without the consent of the Company.

Held, that the further insurance must be by the same person who has before insured, or in the same interest.

In re the Sheriff of the County of Lincoln and the Treasurer and the Corporation of the County of Lincoln.

Sheriff's account—County audit—Allowance by Government.

A sheriff's account against a county is payable as soon as audited by the county board of audit, and the county treasurer is not justified in withholding payment until the account has been allowed and paid by the Government to the county.

COMMON LAW CHAMBERS.

Canada Permanent Building and Savings Society v. Forest.

Administration of justice act 1873, *sec.* 24, *applicable to interpleader.*

[January 14, 1874—Mr. Dalton.]

The plaintiffs applied for an order to examine the defendant. It was urged that the same reasons for, and advantages arising from the examination of adverse parties, exist in the case of an interpleader issue as in any action-at-law.

Held, that the words "action-at-law," of the 24th sec., include an interpleader proceeding.

IRISH REPORTS.

COURT OF QUEEN'S BENCH.

Re Reardon.

Bringing up prisoners before Coroners—Jurisdiction of Police Magistrates—Habeas Corpus—44 Geo. 3, c. 102—Court of Record—Evidence of suspected person at inquest.

Where a prisoner committed to custody under a magistrate's remand, on a charge of homicide, desires to be present, in order that he may hear the evidence and be tendered as a witness before the coroner sitting upon the body of the deceased, and it appears that the coroner does not object to the prisoner's presence, and that it would not tend to frustrate the ends of justice, the Court will, in the exercise of its discretion, grant a writ of *habeas corpus* to have the prisoner in attendance at the inquest, and so that he may be examined as a witness upon the taking of the inquisition.

The Police Magistrates, in like case, have not jurisdiction to direct or authorize the production of the prisoner at the coroner's inquest.

[*Irish Law Times*, Nov. 8, 1873.]

Motion, on notice,* on behalf of Patrick Reardon, a prisoner confined in Richmond Bridewell, for a writ of *habeas corpus*, in order that he should be in attendance at an inquest before the coroner, and so that he might there be examined as a witness touching the subject matter of the inquisition.

The motion was grounded on an affidavit of the applicant's attorney, who deposed that the said Patrick Reardon was then confined in the Richmond Prison, on a charge of having caused the death of a woman named Kate Pyne, by throwing her into the river at Aston's Quay, Dublin, whereby she was drowned; that, on September 24th, 1873, said Patrick Reardon was brought before E. S. Dix, Esq., one of the divisional justices, at the Southern Police Court, charged with the commission of said offence, and that, some evidence having been given, the deponent applied to that magistrate that, inasmuch as the coroner for the city of Dublin was about to hold an inquest into the cause of the death of said Kate Pyne, and of the circumstances attending same, the said Patrick Reardon should be remanded generally, in order that, when the time at which the coroner should hold his inquest should be ascertained, the said Patrick Reardon might be again brought before the magistrate, and be by him transmitted, in the usual manner, in the custody of the police to the coroner; that the magistrate refused the application, and, on the conclusion of the evidence, remanded the said Patrick Reardon for the period of seven days; that, on the following day (Sept. 25th), Dr. N. C. White, one of the coroners for the borough of Dublin, held a court, having empannelled a jury of twelve, at the Morgue in Malborough-street, the place where the body of the said Kate Pyne was, for the purpose of inquiring when, how, and by what means the said Kate Pyne came by her death; that the deponent, at said court, informed the coroner that the said Patrick Reardon was suspected of having caused the death of said Kate Pyne, and made a request that Patrick Reardon should be present in that court upon the hearing, and objected to the reception of any evidence given against him in his absence; that the police authorities informed the coroner that the said Patrick Reardon was then in the custody of the Governor of Richmond Prison, on remand by E. S. Dix, Esq., charged as aforesaid; that the court was then adjourned by the coroner till October 6th, 1873, for the purpose of having the said Patrick Reardon present when the evidence against him should be heard; that the deponent, accordingly, applied by letter to the Crown, requesting that the said Patrick Reardon should be produced at the adjourned sitting of the said coroner's court, and in reply received a letter, declining to apply for a writ of *habeas corpus* for that purpose; that, on October 1st, the said Patrick Reardon was again brought before E. S. Dix, Esq., in said police court, and further evidence was heard against him; that the deponent then again (having detailed the transactions in the coroner's court) applied to the magistrate that the said Patrick Reardon be transmitted to the coroner, according to the practice theretofore adopted towards persons similarly suspected, but that, at the instance of the Crown, the magistrates refused the application, and further remanded the said

* It was so directed by Fitzgerald, J., in *this* case. See as to the practice, *Re Mathews*, 12 Ir. C. L. R. 241, 5 Ir. Jur. N. S. 225.—Rep.

Patrick Reardon to Richmond Prison for a period of seven days, where he remained still in custody of the Governor of said prison.

Byrne, in support of the motion.—According to the practice heretofore prevailing in this country, persons in custody charged with homicide have always been produced at coroner's inquests, under the orders or warrants of the magistrates, granted for that purpose. In this instance, after the discovery of the dead body, the coroner proceeded to hold an inquest, but, in consequence of instructions recently given to the police by the Crown authorities,* the police did not produce the prisoner at the inquest. He was brought before a police-magistrate, who remanded him for a week. The magistrate, on the opposition of the Crown, refused the application that the prisoner should be transmitted, in the usual course, to the coroner's court; and the Crown authorities, on being asked, refused to apply for a *habeas corpus* to have the prisoner so transmitted. The coroner adjourned the inquest, so that a *habeas corpus* might be applied for. The prisoner himself desires to be present; otherwise, in his absence a verdict of wilful murder may be returned against him. He wishes to hear the evidence affecting him, and it is necessary that he should be present, in order that he himself may be tendered as a witness, or that, even if not sworn, he may make a statement, according to circumstances; 1 *Hayes*, C.L., 199. For this purpose, the court is asked, in its discretion, to issue the writ in aid of the coroner's court.

W. Johnson, Q.C., on behalf of the Crown, *contra*.—We admit that the court has power to issue the writ, in its discretion; but, special circumstances should be shown in order to justify the granting of the writ. Had such special circumstances existed, the Crown would have applied for the issuing of the writ, and so saved the prisoner the expense of doing so; but, no such circumstances have been shown that would have warranted the application. A question of grave importance in the administration of the criminal law then arises, namely, whether, without special circumstances, and as a mere matter of course, a writ of *habeas corpus* is to issue, if a coroner wish to have a prisoner produced before him who is in custody on remand. No precedent is to be found in which a prisoner has been produced before the coroner, on a writ of *habeas corpus*.† This was admitted in *Re Cooke*, 7 Q.B. 653.† It is not enough that, as stated, an application was made to the magistrate and refused, to transmit the prisoner. The practice under which the metropolitan magistrates have, heretofore, transmitted prisoners to the coroner's court,* for some indefinite purpose, and for an indefinite period, was not warranted by any principle of law; and the law officers of the Crown, having been consulted, gave their opinion that the practice was unwarranted in law, that the person so transmitted would be in illegal custody, and that the persons who had the prisoner in charge during such transmission would be liable to an action for false imprisonment, and, if in attempting to escape he were resisted with violence, serious consequences might be entailed on those who inflicted the injuries.† The duty of a police constable is, the moment he arrests a person on a criminal charge, to take him with all reasonable expedition before a magistrate; and the constable has no power whatever to take the prisoner before a coroner, or to take him from the magistrate to the coroner. The duty of the magistrate is to discharge the prisoner forthwith, if no facts are shown to warrant the prisoner's detention; but, if a *prima facie* case be made against the accused, then the magistrate should either commit him for trial, or, if the case were incomplete, commit him on remand for further inquiry, in order that it may be ultimately decided whether the prisoner should be discharged or committed for trial. Here the magistrate, having been apprised of the opinion of the law officers, concurred in it, and, accordingly, declined to accede to the application to send the prisoner in illegal custody to the coroner. The jurisdiction exercised in the magistrate's court is wholly different from that of the coroner. The magistrate deals with a criminal charge, and either decides summarily upon it, if he has jurisdiction, or, if he has not, puts it in train for further inquiry; while, the office of the coroner is not to arraign or charge a prisoner, but simply to ascertain how and in what manner the deceased person came by his or her death; the person suspected should not be considered in the coroner's court as an accused person, nor is he such until after the verdict is found; and no man's evidence could be excluded at the inquest on the ground that he might criminate himself: *Wakely* v. *Cooke*, 4 Exch. 511; Jervis on Coroners, 253. There is

* See 7 Ir. L. T. 505; Com. *ib.* 483, 533.—Rep.

† See S. C. 14 L. J. M. C. 186, 9 Jur. 369.—Rep.

* See 7 Ir. L. T. 483, 533.—Rep.

† In *re Galwey*, 19 L. T. N. S. 262, where an application was made, under 43 Geo. 3, c. 140, s. 1, for a *habeas corpus* for the purpose of bringing a military officer, in prison for debt, before a medical board for examination as to health, Cockburn, C. J., said, "The Court is asked to compel the sheriff to take the additional risk of conveying the prisoner to and from prison, when, *if the Court has no authority to direct the writ to issue, he would be liable for an escape.* The Court has no authority under this section."—Rep.

nothing in the nature itself of a coroner's inquiry necessitating the presence of the suspected person. Evidence can be taken in his absence. If it were necessary to identify him, the witnesses who have identified him before the magistrate can attend, and repeat their evidence before the coroner, so that a writ of *habeas corpus*, being unnecessary for that purpose, would not be granted to bring the prisoner before the coroner: *Re Cooke*, 7 Q.B. 653. There the application was refused, although there was an affidavit to the effect that the coroner and jury could not proceed with the inquiry unless the prisoner was produced; and it was held, that the fact of the coroner desiring to have the prisoner produced before him would not constitute a special circumstance, in order to justify the granting of a writ for his production: *ib.* There is no evidence to show that the presence of the accused before the coroner is a special necessity. According to the statements of the affidavit, it is sought to have the prisoner produced, not to give evidence, but, to hear the evidence given; and the Court is asked to decide, in effect, that it is a matter of course that the writ should issue in every ordinary and unexceptional case, in order to enable the prisoner to be brought before the coroner, and to hear the evidence given at the inquest.

Byrne, in reply.—*Re Cooke* is distinguishable, as there the application was made, not as now on behalf of the prisoner, but, by the coroner. The claim of a suspected person to be present at an inquiry, upon which a verdict may be returned against him, rests upon a surer basis than upon the mere wish of the coroner that he should be present. It may be necessary or judicious for the prisoner's advisers to tender him as a witness. The coroner's jury are sworn to try "when, how, and by what means" the deceased came by his or her death*; and the verdict or finding of a coroner's jury is equivalent to an indictment. † Admitting that the police magistrate had no power to transmit the prisoner from his custody to that of the coroner, the practice was, at all events, sanctioned by convenience, and the object which it was intended to promote is approved by the ordinary principles of natural justice.‡ The abrupt departure from that practice, the setting up of the magistrate's court above that of the coroner, to which it is inferior in law, and the exposure of prisoners to the expense, delay, and needless affliction of a double procedure, places suspected persons in a position in which the law, presuming, as it does, that they are innocent, should assist them if possible. The prisoner is amenable to the jurisdiction of two courts sitting simultaneously, a preliminary investigation proceeding at the same time in each, and each enabled to send him forward for trial on the same charge. Upon this charge, at the investigation in the police court, evidence could not be received against the prisoner in his absence. The coroner has full power, either before or after the inquest, to order the arrest of a suspected person, he has the same power of commiting the prisoner for trial that the magistrate has, but the coroner's court is the superior court, and the coroner's inquisition is the more important in its consequences as affecting the prisoner; and yet, is it to be said that the prisoner should not be permitted to be present at the inquest, and that any circumstance is necessary in order to sustain an application for the purpose, other than the fact that he himself desires to be present at an inquiry which may possibly result in a verdict of wilful murder against him, and that his advisers desire to have the opportunity of tendering his evidence in aid of the inquiry, and so that the ends of justice may be accomplished? The same reason that should actuate the Crown and the police to bring forward evidence in the coroner's court, should operate to prevent the coroner's inquiry from being frustrated by keeping back the person against whom the admitted jurisdiction of the coroner attaches. If no opportunity be given of examining the prisoner, or tendering him as a witness at the inquest, and if no opportunity for cross-examination be afforded to him, the coroner's inquiry will be impeded, and the result of that inquiry rendered the more liable to error. And, if a verdict of wilful murder be found against the suspected person behind his back, that verdict operating as an indictment, the jurisdiction of the magistrate would be thereby ousted, and the prisoner could not again be brought before the magistrate on remand for the same offence.*

Fitzgerald, J.—It seems to me that the law officers of the Crown were correct in advising that, once an accused person has been committed to custody upon a remand on a criminal charge, the magistrates have no jurisdiction to order that the prisoner should be produced before the coroner, and that neither has the gaoler any authority, without a writ of *habeas corpus*, to pre

* See generally, 4 Inst. 271, 2 *ib.* 31; Brit. cap. 1, ss. 5, 13; R. v. *Herford*, 3 E. & E. 135, 29 L. J. Q. B. 249; 26 Vict. 2; 35 & 36 Vict. 76; 35 & 36 Vict. 77.—Rep.

† See *R.* v. *Ingham*, 5 B. & S. 257, 33 L. J. Q. B. 184.—Rep.

‡ See *Maubourquet* v. *Wyse*, Ir. R., I C. L 471; *Re Brook*, 16 C.B.N.S. 403: *Ex parte Kinning*, 4 C. B., 507.—Rep.

* *Sed quære? Cf. R.* v. *Spoor*, 11 C. C. C. 550.—Rep.

duce the prisoner at the inquest. The practice which hitherto prevailed was very convenient, but I am not aware that there was any legal warrant for it. I am of opinion that it is, upon all grounds, desirable that the prisoner should be brought before the coroner, and that I am bound to assist an application for that purpose if, in point of law, it be competent to me to do so. True it is, that there is no accusation formally before the coroner; but I cannot disregard the fact that, although the coroner's court is one for preliminary investigation only, the real inquiry before the coroner in the present instance is whether Patrick Reardon caused, or in any manner caused, the death of Kate Pyne, or assisted in her suicide. In substance, therefore, the inquiry before the coroner is the same as that before the magistrate. The difficulty in this case arises from the circumstance that the suspected person has been brought before and committed by the magistrate, instead of being detained and brought before the coroner, whose court ought, in the first instance,* to have charge of the preliminary inquiry. The real inquiry before the coroner being, practically, whether the prisoner is in any way chargeable with the death in question, it is on all grounds expedient, in order that the ends of justice may be accomplished, that he should be present at the investigation, if he so desires and the coroner does not object. It would be a strange anomaly, if, in the coroner's court, the person suspected in relation to the matter of the inquiry, and desirous of being present on the hearing, should be by law excluded. The magistrate's court—the inferior court—can only inquire and commit for trial, and yet, in the magistrate's court, the presence of the accused is essential. When the accused is amenable, he must have an opportunity of examining and cross-examining witnesses, and of hearing the depositions, which must be taken in his presence; and then, and then only, the magistrate may send the case for trial, that is, to be investigated by the grand jury and tried by a common jury. But in the coroner's court, though there is no technical or formal accusation, he might, on evidence given in his absence, although he had wished to be present, have a verdict of wilful murder returned against him—a verdict carrying with it certain consequences affecting him, and on which he may be put upon his trial. It is not at all of necessity that he should be present at the inquest. And it would be a grave mistake to suppose that, in his absence, evidence could not be gone into, or that, if affecting him, such evidence ought not to be received, for the evidence is not given technically upon a charge against any person, but merely for information in relation to the inquiry. Yet, while it is not necessary, I repeat that the suspected person ought to be present at the coroner's inquiry, unless his presence might tend to frustrate the ends of justice. It is admitted by the counsel for the applicant, that in such case a *habeas corpus ad subjiciendum* does not lie; and with this I concur, as that writ lies only to relieve from custody alleged to be illegal, whereas here the custody under the magistrate's remand is clearly legal. On the other hand, it is admitted by counsel for the Crown that, under special circumstances, the court may issue this writ in aid of the defective powers of an inferior court. Upon that question I do not, at present, express any judgment. There is no authority on it, although the precedents seem to warrant it, as also the *ex parte* case of *R.* v. *Hussey*, 11 Ir. C. L. R., Ap. 20.* If it were necessary to form a judgment upon it, I think that in this case special circumstances do exist. I would be disposed to hold that special circumstances exist where a prisoner himself says, "I desire to be present at the inquiry, and to hear the evidence affecting me; a question suggested by me upon cross-examination may dispel the suspicion which at present surrounds me; I wish to hear the case made against me, and upon which a verdict against me may depend." The coroner does not object; he, on the contrary, seems to approve of this proceeding, as he has adjourned his court to give opportunity to this application.† It may be that the coroner will not receive his evidence; but that is a question for the coroner to consider, and not for me to decide. In addition, the prisoner's counsel says, "I wish to have him present in order that he may hear the evidence, and that I may, at the proper time, tender him as a witness." I have the power, under the statute, to grant a *habeas corpus ad*

* In England, for a special reason, where the coroner commits a person for trial, an investigation should still take place before magistrates also, in order that the witnesses may be bound over and their expenses allowed, under 30 & 31 Vict., 35, 3, 5, "so that the prisoner might not be deprived of any assistance which the law gives him" (*per* Blackburn, J., *R.* v. *Spoor*, 11 C. C. C. 550.)—Rep.

* *Cf. re Galwey*, 19 L. T. N. S. 282.—Rep.

† That it is discretionary with the coroner to hold the inquest in private, see *Garnett* v. *Ferrand*, 6 B. & Cr. 626, 9 D. & R. 657, where Lord Tenterden observes, "It may be requisite that a suspected person should not, in so early a stage, be informed of the suspicion against him, and of the evidence on which it is founded, lest he should elude justice by flight, tampering with witnesses, or otherwise." As to the publication of *ex parte* proceedings before the coroner, see *R.* v. *Fiest*, 1 B. & Aldr. 384.—Rep.

testificandum. The language of the statute which authorizes me to grant a *habeas corpus ad testificandum*, in order to assist in any inquiry in any court of record, is quite large enough to enable me in this case to issue the writ, as the coroner's court is a court of record.* The affidavit, however, at present before the court, is defective in not stating that the prisoner is advised and believes that it is necessary to tender himself as a witness at the inquest. If this defect be supplied by another sufficient affidavit, I shall issue a *habeas corpus*, under which the prisoner will be legally brought forward at the inquest before the coroner.

A supplementary affidavit was, accordingly, made by the applicant's attorney, stating that he was advised and believed that the presence of the said Patrick Reardon would be necessary at the coroner's inquest on the body of said Kate Pyne, to be held on October 6, inasmuch as it was intended to tender the said Patrick Reardon as a witness, and to examine him in relation to said inquest.

And, thereupon, a writ of *habeas corpus* was issued, directed to the sheriff of the city of Dublin, and to the Governor of Richmond Bridewell, commanding as follows:—"That you have before N. C. White, gentleman, one of the coroners, on Monday, the 6th day of October instant, at the place known as and called the Morgue, in, &c., the body of Patrick Reardon, being committed and detained in, &c., together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, in order and so that he may be then and there in attendance before the said coroner, at, upon, and during the taking of a certain inquest and inquisition holden by the said coroner at the time and place aforesaid, touching the death of one Kate Pyne, and in order and so that he may be then and there examined as a witness, at and upon the taking of the inquest and inquisition aforesaid, and so from day to day, until the taking of the said inquest and inquisition shall have concluded. And, when the taking of the said inquest and inquisition shall have concluded, then that you take him back without delay to said gaol, under your custody, and cause him to be detained therein, under safe custody, until he shall be from thence discharged by due course of law."

* See 1 & 2 Ph. & M. c. 13, s. 5; 2 Hawk., P. C., coroner b., 2, c. 9, s, 31; 2 Hale P. C. 65; *Garnett* v. *Ferrand*, 6 B. & C. 611, 9 D & R. 657. So, in *Thomas* v. *Chirton*, 31 L. J. Q. B. 140, 2 B. & S. 478, Crompton, J., observes, "My Lord is coroner of England, and I think that every coroner is a judge of a court of record; it shows what a high office he holds, and what high functions he has." And further, as to the dignity of coroner see 2 Inst. 31, 173; and that the Chief Justice of the Court of Queen's Bench is Supreme Coroner, see *R.* v. *Js. of Gloucestershire*, 7 E. & B. 805, 29 L. T., 180. As to where a *habeas corpus ad test.* lies, under 44 Geo. III., c. 102, see also, *Re Galwey*, 19 L. T. N. S. 262.—Rep.

REVIEWS.

A Treatise on the Law relating to the Execution and Revocation of Wills and to Testamentary Capacity. By Richard Thomas Walkem, of Osgoode Hall, Barrister-at-Law. Toronto: Willing and Williamson, 1873.

The Wills Act of 1873 was not passed before the necessity for some legislation on the subject was felt. The law had been for many years in an unsatisfactory position, not only in many particulars affecting the execution and revocation of wills and testamentary capacity, but from the fact that much of the law on the subject, being contained in Imperial Acts, was inaccessible to laymen generally, as well as to many of the profession in the rural districts. A somewhat similar measure, based upon the English Act, was, we believe, prepared by the late Chancellor Vankoughnet when in Parliament, and was understood to have been revised at his instance by Sir James Macaulay and Judge Gowan, but for some reason it never came to anything. There seemed to have been some feeling at that time that it might be dangerous in a country like this to impose rigid rules with regard to the execution of wills, which were commonly drawn not by lawyers, but by laymen throughout the country. Whatever weight there may have been in this objection, it can scarcely be doubted that the time has come for putting the law upon a proper footing and assimilating it in many respects to the Imperial Acts. One great advantage is, that we shall now get the benefit of the light which has been thrown upon similar provisions in England by numerous decided cases.

The public is indebted to Mr. Meredith for the introduction of the Act which came into force here on the 1st January last. His object was in the first place to do away with the unsatisfactory state of things already alluded to; and, in the next place, to introduce into our law those amendments made by the Imperial Act, 1 Vict. cap. 26, which had not already been intro-

duced, amongst which may be mentioned: The power to dispose of rights of entry and contingent interests; lapsed devise to fall into the residue; words importing either a failure of issue of a person in his lifetime or at his death, or an indefinite failure of issue, to mean a failure of issue in the lifetime or at the death, and not an indefinite failure of issue; devise of an estate tail not to lapse if any issue of the devisee living at the death of the testator; gifts to issue not to lapse if any issue by the devisee or legatee living at the death of the testator; wills of personalty to be executed with the same formalities as wills of real estate.

Various sections of the Imperial Act referred to had been re-enacted in this Province at different times, but many important provisions had not been.

The Acts consolidated in the measure which recently became law are: (1) The Imperial Act already referred to; (2) the provisions of the Act of 1865, relating to property and trusts, which refer to devisees in trust raising money by sale notwithstanding want of express power in the will (sections 13, 14, 15, 16, and 17, of the Act of 1865), and the provisions relating to mortgage debts being primarily chargeable on lands (section 33 of Act of 1865), with the amendments to that section contained in 35 Vict. cap. 15, and (3) the Act 33 Vict. cap. 18 (Ontario) as to powers of executors and administrators. The new provisions would appear to be (1) the repeal of section 16 of the Married Women's Act (Con. Stat. U.C. cap. 73) and giving to married women the same right to dispose, by will, of their property as unmarried women have; (2) an extension of the provisions of 33 Vict. cap. 18 (Ont.) so as to enable executors to exercise power of sale contained in a will where no person is by the will appointed to exercise the power.

The mode of executing and attesting a will is that prescribed by the Imperial Act, 1 Vict. cap. 26, instead of the two methods which were formerly open, viz., under the provisions of the Statute of Frauds, or under section 13 of Con. Stat. U.C., cap. 82.

There appeared in this journal last year some articles on the Wills Act of 1873. They will lose none of their value by being known to have been from the pen of Mr. Walkem, the author of the book now before us. Knowing the careful study that he had given to the subject, we felt that we should merit the thanks of our readers by giving them the benefit of his research. A comprehensive sketch was there given of the main features of the Act, the reason for the changes, and the result effected. Mr. Walkem, in the volume just published, dips yet deeper into the subject treated of, and our expectations founded on the articles alluded to have been more than realised in the masterly and thorough manner in which the author has handled that part of the law of which he treats.

It is scarcely necessary to speak more at length of a book which will, ere this reaches our readers, be found in most of their libraries. Should there be any who have not yet provided themselves with it, we would advise them at once to do so.

Some seven hundred decided cases are referred to throughout the work, and their bearing carefully and intelligently considered, not strung together "as the manner of some is," evincing a thorough knowledge of his subject, and a capacity to convey that knowledge to others. The appendix contains the text of the Act and a number of concise and useful forms of Wills. The index is full and complete, and the general typographical appearance of the book reflects much credit upon the enterprising publishers.

It is desirable that treatises having especial reference to the law as administered in Canada should, so far as and whenever they are worthy of the distinction, be used in the course of instruction in the Law School, or as a test of knowledge in the examinations for call or admission. We shall be surprised if this book is not in due course placed upon the list

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The Central Law Journal, (weekly). St. Louis, Mo.: Soule, Thomas & Wentworth, Publishers.

We have to welcome a valuable addition to legal periodicals in this new journal, which had its first issue on the first day of this year. The name of the editor is a guarantee for the excellence of the paper,—that editor being Judge Dillon, who has already acquired reputation as a

legal author, by his treatise upon Municipal Corporations. It is, by the way, a noticeable feature of the industry of the United States Bench, that so many of the judges occupy themselves and benefit the profession by engaging in legal authorship. Among other judges of eminence, there is Judge Cooley, who, besides having on hand a treatise upon Fraud, is the supervising editor of articles pertaining to jurisprudence in a new edition of Appleton's American Cyclopedia. By way of contrast, we observe that Chief Justice Cockburn is relieving the tedium of the Tichborne trial by preparing a series of papers upon that interminable literary puzzle, Junius. One of the distinguishing features of Judge Dillon's journal is the very able summary of the law appended to most of the cases reported therein, by way of notes—as for example in the spring-gun case, which we intend to republish; also a department entitled, "Notes and Queries," for the disentanglement of knotty points of law. We extract from some of the numbers articles relating to Canadian case-law, as expounded in Quebec, which will be found elsewhere. We wish our new contemporary a long and successful career.

The Washington Law Reporter, (weekly). Washington, D.C.: Powell & Suick, Publishers.

This publication is intended mainly to supply decisions hitherto unreported of cases determined in the Supreme Court of the District of Columbia, and so to afford to the Washington bar the means of ready reference to local precedent. It contains besides legal information and discussions of general interest, and herein affords another example of the wonderful developement of legal journalism in the United States. To this source the *Law Magazine and Review* traces the excellence of American lawyers as jurists; and in this aspect periodicals such as the present, published at the Federal capital, wield great influence and accomplish great good.

The Southern Law Review. January, 1874. Nashville: Frank T. Reid, & Co., Publishers.

This quarterly is always welcome to us, the more so that it mingles law and literature in its columns. The present number contains very pleasant reading in the reminiscences of English Judges in 1807, consisting of extracts from the diary of Chief Justice Taylor of North Carolina, during a visit to England in that year, and the racy article of Mr. Hill on "How the law has fared in literature." The more severe articles, particularly that on the rule in Shelley's case, are well written and maintain the high legal character of this excellent Review.

Blackwood and the British Quarterlies. Leonard Scott Publishing Co,, 140 Fulton Street, New York, U. S.

The first number of Blackwood for the year 1874 comes in larger type and on a larger page, a great improvement, and more like the original Ebony.

"The Parisians," by Bulwer, is finished—a remarkable book, which will perhaps be more appreciated ten years hence than now. "The story of Valentine and his Brother" promises well.

We also find the second number of "International Vanities," treating of "Forms." It tells of the wording of diplomatic and other documents and the languages in which they are written, and is interspersed with quotations showing the style of royal letters, treaties, etc.

The other articles are "John Stuart Mill, an autobiography;" "The Indian Mutiny: Sir Hope Grant"—and the usual political article, etc. The number is an exceedingly good one in every way.

CORRESPONDENCE.

Meaning of "Cause of Action."

To the Editor of the Canada Law Journal.

Sir,—You have recently been discussing the meaning of the phrase "cause of action," in the 44th section of the Common Law Procedure Act, and several recent cases upon its construction. You say that our Court of Queen's Bench in *McGiverin* v. *James*, 33 U. C. Q. B. 203, follows the decision of the Queen's Bench in England in *Cherry* v. *Thompson*, L. R. 7 Q. B. 573, and think that the *whole* cause of action must arise

within the jurisdiction, and not merely the act or omission which completes the cause of action.

As I understand *McGiverin* v. *James*, the case does not decide that the *cause of action* means the *whole* cause of action, as surely the *whole* cause of action means both contract and breach: while in this case the contract was made at Hamilton, and the breach occurred at Liverpool. Now, to my mind, the whole cause of action in this case arose neither at Hamilton or Liverpool. It could not have arisen at Hamilton, for the breach did not occur there; and it did not arise at Liverpool, for the contract was not made there. It seems to me that the case does not decide that the *whole* cause of action must arise within the jurisdiction.

Let me say a few words upon what I think the *cause of action* means. When two parties enter into a contract, it is presumed that they mean to perform it—it is not presumed that a cause of action will arise at all. In fact the mere making of a contract, to be performed at a future day, does not create a cause of action at all, and it is in cases of executory contracts that the question most frequently arises. It is only when the contract is broken that a cause of action arises, and not before, and it seems to me that if the breach of a contract took place in Ontario, though made elsewhere, our Courts would have jurisdiction.

You seem to think that the cases of *McGiverin* v. *James*, and *Cherry* v. *Thompson*, are inconsistent with or overrule *Jackson* v. *Spittal*, and *Denham* v. *Spence*. But it seems to me that the cases can stand together by considering that the cases of *Jackson* v. *Spittal* and *Denham* v. *Spence* refer to the first part of sec. 44, "the cause of action," and *McGiverin* v. *James* to the next clause, "in respect of the breach of a contract made in Ontario." Then it will be held that the action may be brought in Ontario; if either the contract be made here, as in *McGiverin* v. *James*, or if the breach take place here, as in *Jackson* v. *Spittal*, and *Denham* v. *Spence*, and thus the decisions will appear quite consistent and reconcilable.

I have not lost sight of the suggestion that the first clause as to "the cause of action," refers to torts only. But it is not necessary to confine the first clause to torts; as if a tort be committed, the cause of action arises immediately, I presume in the place where committed. And certainly the Courts of Common Pleas and Exchequer do not appear to confine it to torts.

Do you suppose that if the contract in *McGiverin* v. *James* had been made by plaintiff in Liverpool, with defendant, to deliver iron to him in Hamilton, our Courts would hold that they had no jurisdiction? I hardly think they would disregard the decisions of the Courts of Common Pleas and Exchequer in the cases referred to.

In the case of a contract made in Ontario, no matter where the breach occurs, the jurisdiction is clear under the Statute; and the party who fails to fulfil his contract cannot complain if he is sued in a country where he engages to perform his contract, and where the loss arising from the breach can be more satisfactorily estimated.

Another question would arise, if a plaintiff having recovered here, upon a contract where the breach occurred here, were to sue upon the judgment in the Courts of another country—whether the judgment would be enforcable if the laws of that country did not recognize the rules of law upon which the judgment was founded to be just, or proper to be enforced.

Yours truly,

J. R.

Law Society—Legislative Tickets of Admission?

To the Editor of the Canada Law Journal.

Sir,—Is it right of the Law Society to insist upon a classical examination before placing Students for call upon the books of the Society, seeing that the Legislature of Ontario now permits so many to get over the fence without this test?

It would save a great waste of feathers if our tyros were only allowed to carry their plumes with them into the "Temple of Justice," instead of having them in so many instances rudely and ignominiously "plucked" off them at the threshold. This "plucking" process is a very cruel one at any rate, and the Law Society is now getting so advanced, that they might advance in a generous direction, and do away with these tests, instead of putting so many members of the

legal profession to the expense of an Act of Parliament.

Yours, &c.,
Osgoode Hall.

Several Moot Points.

To the Editor of the Law Journal.

Sir:—Permit me to submit for your consideration a "batch of queries."

1. Supposing that on a trial of a case in Division Court a verdict be entered for the plaintiff with leave to the defendant to move to enter a non-suit. Is such an application good if made *fifteen* days after the day of trial, or must it be made within *fourteen* days?

2. Does the right of precedence hold good where A., a barrister, and B., an articled clerk, appear before the Clerk of the Crown to enter Records; or is the rule, first come first served, to apply? The point arose when entering Records for the Assizes just closed for York, and the poor clerk was ordered to give way.

3. In Country Causes, is a Deputy Clerk of the Crown justified in entering Records before the commission day of assize? The C. L. P. A. merely says they shall be entered before noon that day. How far, if at all, would the principle of Eng. Stat. 15, 16 Vic., cap. 73, apply? True our Judges are not attended by Marshals to receive Records, in the absence of which officer could the Deputy Clerks of the Crown be considered as such? The case of *Hingston* v. *Whelan*, 8 U. C. L. J., cannot be considered as settling the difficulty.

Inops Concilii.

[1. This question is now before one of the Judges of the Superior Court for adjudication.

2. We should hardly think there would be any right of precedence in such a case. A barrister, as such, has nothing to do with entering Records. That is the appropriate work of the attorney or his clerk.

3. We are not aware of any authority to enter such records before Commission day.]

FLOTSAM AND JETSAM.

The death of the celebrated Siamese twins has caused the following curious reflections on the part of a lay contemporary: "It is a very fortunate thing that the Siamese twins were law-abiding citizens. Had they not been they would have given the authorities no end of trouble. In fact, it seems to us that they could have committed all sorts of crime with impunity, had they been so inclined. If Chang had committed an assault, how would it have been possible to have arrested him without arresting Eng also; and had Eng been entirely innocent of all participation in the affair, why should he have been arrested? In order to punish the guilty, it would have been necessary to punish the innocent also; and locking up Chang would have included locking up Eng. We do not see any way out of the dilemma that would have arisen except a temporary one; and that is the confining of Eng as a witness. But when it came to punishing the guilty party, justice would have been nonplussed, for the law does not permit an innocent party to suffer for crimes he had not committed. If Eng, on the other hand, had perpetrated a murder, he could never have been hanged, no matter how strong and conclusive the evidence had been against him. He could not have been imprisoned for life, for in these instances it would have necessitated the death or the life-long confinement of the unoffending Chang, who, having a separate identity, could have obtained a writ of *habeas corpus*, and demanded his liberty. Had one of these twins been a rogue, he would have, therefore, caused no end of embarrassment to the officers of justice. If Chang were drunk and disorderly in the streets, what policeman could have arrested him without laying himself open to a charge of false imprisonment from the unoffending Eng? Had these twins been evil-minded, and conscious of the perplexities they could have originated, there is no knowing what might have happened. The law would have been powerless, for vice must have triumphed and virtue been oppressed, or, virtue triumphed and vice gone unpunished. Twins of this description are by no means desirable under such possible contingencies."

Lord Norbury hated a bill of exceptions almost as much as he did a nonsuit. On this subject a remarkable scene occurred between him and O'Connell. To appreciate it we must recollect that they detested each other, and we must picture to ourselves O'Connell lowering and raging as the Judge smiled and sneered. Daniel, to Norbury's great dissatisfaction, tendered his bill of exceptions to the Judge, which, if he refused, subjected him to a heavy penalty. "You're surely not in earnest, Mr. O'Connell?" "I never was more in earnest in my life," said Daniel, bowing both lowly and leeringly, "I hope I know my duty to the

Court." "No man knows it better, or performs it better—Jackson, call the next case." "May I, my Lord, without offence, request your signature to the bill of exceptions!" "Offence, offence, Mr. O'Connell! you never offended me in your life—nor anybody else, I do believe. You're too good-natured and good-humoured a man—*and you look it.*" "Oh, my Lord, let me at least implore of you to spare your compliments." "Truth, truth, Mr. O'Connell—and you know truth's no compliment." "Once more, my Lord, I very deferentially ask your signature—or *your refusal.* All I want is a categorical answer." "No doubt, no doubt, you'd be satisfied with a refusal. But I don't refuse you—indeed I don't think I could refuse you anything; so mind, I don't refuse, but I do nothing in a hurry; come to me in my chamber when the court rises—your time's valuable, and so it ought—your talents make it so." "My Lord, my Lord, you at least may spare me the infliction of your panegyric." Daniel departed, the victim of the Judge's cajolery; but Norbury in private gave the autograph, and saved at once the publicity and the penalty.

This reminds us of a story of a certain Judge in the Western part of the Province, who is said to have fined a Barrister for contempt of Court for objecting to his charge, (or rather what he was pleased to call his charge). The fine was paid, and some time afterwards the learned Judge, on thinking the matter over, gave the mulcted individual an order to get the money back. It is also said that the bewildered Barrister has ever since neglected his business in a vain endeavour to ascertain whether he was in fact fined, and if so, why; and further, why he paid the fine (if paid), and what authority the Judge had to order its return, and why he so ordered, or how otherwise.

Here and there, lingers a strong prejudice against Judge Taney for his decision in the Dred Scott case, and especially in New England, some of whose citizens object to the proposed portrait of the chief justice alongside that of Chase in the supreme court room; but Judge Nelson, upon whose memory so many honors are being bestowed, would have decided the same way. This same Judge Nelson, in the United States Supreme Court, on the Dred Scott case, quoted a very remarkable letter written by Judge Story in 1828, relating to a case analogous to that of Dred Scott. Judge Story was accustomed to write at least once a year to Lord Stowell, sending him a copy of his judicial decisions, which the latter reciprocated. At length a case arose in the English court, (of which Lord Stowell was chief justice), where an Antigua slave was carried by his master to England, for temporary residence, and was subsequently taken back to Antigua. He brought suit for his freedom, and the inferior court decided against his right to freedom. In the appellate court, Lord Stowell, in behalf of a majority of the court, affirmed the judgment below. Lord Stowell sent the decision to Judge Story, who delayed replying so long, that Lord S. again wrote to him, expressing regret at not receiving a reply, and the hope that their pleasant correspondence, of so many years' standing, would not cease. To these letters, Judge Story replied as follows:

"Salem, near Boston, Sept. 2, 1828.

"*To Rt. Hon. Wm. Lord Stowell:*

"My Lord—I have the honor to acknowledge the receipt of your letters of January and May last, the former of which reached me in the latter part of spring, and the latter quite recently. * * * I have read, with great attention, your judgment in the slave case from the vice-admiralty court of Antigua. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called to pronounce judgment in a like case, I should certainly have arrived at the same result, though I might not have been able to present the reasons which led to it in such a striking and convincing manner. It appears to me that the decision is impregnable.

"In my native State (Massachusetts), the state of slavery is not recognized as legal, and yet, if a slave should come hither and afterward return to his own home, we should certainly think that the local law would reattach upon him, and that his servile character would be reintegrated. I have had occasion to know that your judgment has been extensively read in America (where questions of this nature are not of unfrequent discussion), and I never have heard any other opinion but that of approbation of it, expressed among the profession of the law. I cannot but think that upon questions of this sort, as well as general maritime law, it were well if the common law lawyers had studied a little more extensively the principles of public and civil law, and had looked beyond their own municipal jurisprudence.

"I remain, with the highest respect, your most obedient servant.

Joseph Story."

—*New York Express.*

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 37th Victoria.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

No. 1276. Robert Hamilton Dennistoun.
" 1277. John Henry Metcalf.
" 1278. J. Howatt Bell.
" 1279. William Drummond Hogg.
" 1280. Kenneth McLean.
" 1281. Edward Meek.
" 1282. Edward Harry D. Hall.
" 1283. William McDonnell, Jr.
" 1284. E. Burritt Edwards.
" 1285. A. Elswood Richards.
" 1286. Henry Arthur Reesor.

The above named gentlemen were called in the order in which they entered the Society as Students, and not in the order of merit.

The following gentlemen received Certificates of Fitness:

William Drummond Hogg.
Henry Arthur Reesor.
William G. Murdoch.
J. Howatt Bell.
E. Burritt Edwards.
William McDonnell, Jr.
Albert Edward Richards.
Frank D. Moore.
Edward Meek.
Archibald McKinnon.
George M. Roger.
Mortimer A. Ball.
John MacGregor.

And on Tuesday, the 3rd February, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

Edward Poole.
Ancus Martius Peterson.
William Macbeth Sutherland.
Colin George Snider (as an Articled Clerk.)
Lafayette Alexander McPherson.
Henry Peter Milligan.
Frank Nicholls Kennin.

Junior Class.

William Beairsto.
William Leigh Walsh.
David Burke Simpson.
Chester Glass.
Thomas P. Galt.
William H. Best.
Alexander H. Leith.
Frederick Case.
John Kelley Dowsley.

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

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

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.