DIARY FOR APRIL.

1. Sat. Last day for Collector to return roll to Treasurer. Clerks and Deputy Clerks of Crown and Master and Registrar in Chancery to make quarterly return of fees.
2. SUN. *Palm Sunday.*
3. Mon. County Court (York) Term begins.
7. Frid. *Good Friday.*
8. Sat. County Court Term ends.
9. SUN. *Easter Sunday.*
11. Tues. Last day for Master and Registrar in Chancery to remit fees to Provincial Treasurer.
16. SUN. *1st Sunday after Easter.*
23. SUN. *2nd Sunday after Easter. St. George.*
25. Tues. *St. Mark.*
29. Sat. Last day for Articles, &c., to be left with Secretary Law Society. Last day for Clerk to return occupied lands to County Treasurer.
30. SUN. *3rd Sunday after Trinity.*

THE

Canada Law Journal.

APRIL, 1871.

PAYMENT OF EXECUTORS.

SECOND PAPER.

It remains now to consider the scope and application of the enactment in the Consolidated Statutes of Upper Canada, and the rates of compensation which have been sanctioned thereunder by the Court of Chancery in the administration of estates. There are no reported decisions of the practice pursued in the Surrogate Courts; but there is little doubt that those tribunals follow the rules laid down by the Superior Court, in passing executors' accounts.

I. *Jurisdiction of Chancery as to compensation.*—In one of the first cases after the statute, Vankoughnet, C., laid down lucidly the grounds upon which his Court fixed the rates of compensation to executors. He says:

"Until the statute, no administrator, as such, could claim any allowance for his services. This rule, in regard to persons holding fiduciary relation, was established early in Courts of Equity, and was inflexible; but it was a rule forged, as it were, by the Court itself, and which the Legislature has broken.

"I have been asked whether the Court would refer it to the Judge of the Surrogate Court to fix the rates of remuneration. As a rule, this Court does not leave its work incomplete, nor ask the aid of other tribunals to perfect it. Seised of the subject-matter of litigation or dispute, it disposes of it entirely; and in this particular of remuneration, almost more than any other, the Court which has surveyed the conduct of the trustee, has taken the accounts, and has adjudicated upon them, is the most competent to form an opinion. Being relieved from the restriction which in this respect it had imposed upon itself, it will not seek elsewhere for an opinion as to whether remuneration should be allowed to the trustee for his labours, or what the amount of that remuneration should be:" *McLennan* v. *Heward*, 9 Gr. 279.

It has been the settled practice of the Court of Chancery for the Master, in passing the accounts of executors, to allow them compensation under the Statute, instead of putting the executors to the expense of procuring an order for such compensation from the Surrogate Judge. This new principle of compensation to executors being introduced, it became a principle of the law, which the Court of Chancery has uniformly acted upon in the administration of estates. It is now the duty of the Master, in taking accounts and making all just allowances, to make a just and proper allowance for such compensation, which he can better do, from his knowledge of the estate, than the Surrogate Judge: *Biggar* v. *Dickson*, 15 Gr. 233. It is not competent, therefore, for an executor, who is passing his accounts in the Court of Chancery, to intercept the judgment of the officer of this Court who has cognizance of the matter, by an application to the Surrogate Judge for an allowance. Any order made under such circumstances by the Surrogate will not be binding in the Court of Chancery as fixing the amount, but the Master must exercise his own judgment as to the propriety and reasonableness of the allowance: *Long* v. *Wilmot*, cited in 15 Gr. 236; and *Biggar* v. *Dickson*, 15 Gr 233. By making such application to the Surrogate, pending a suit in Chancery, unnecessary expense is incurred, and the Surrogate cannot tell what the conduct of the executor has been, or in what manner he has administered the estate. At the instance of any party interested, the Court of Chancery will restrain any such application by the executor: *Cameron* v. *Bethune*, 15 Gr. 486.

It would seem, however, that if the parties have allowed the amount to be fixed by the Surrogate Judge, and make no objection thereto, the Court will adopt it. And the same result would follow if the allowance had been made before the institution of the suit

in Chancery: *Harrison* v. *Patterson*, 11 Gr. 105; see s. c., 7 Gr. 531.

II. *Scope of the jurisdiction.*—The Court will not extend this act to all trustees, but to those only who act under wills or testamentatory dispositions of property. In other cases the general rule applies as it obtains in England: *Wilson* v. *Proudfoot*, 15 Gr. 109. Soon after the act was passed, it was held that compensation was thereby authorized to trustees and other persons acting under wills in respect of real estate, as well as to executors in respect of personal estate. This has always been followed, and may now be regarded as the settled rule of the Court on this point: see *Bald* v. *Thompson*, 17 Gr. 157, 158.

III. *Grounds upon which compensation is allowed, or disallowed.*—In considering in what cases remuneration should be awarded, it is of value to bear in mind the considerations which influenced the Court formerly in refusing any allowance. One, if not the principal consideration was, that the trustee might not make his duty subservient to his interest—that he might not create work with which to charge and load the estate. If it was considered necessary to remove every temptation of this kind, by refusing all payment for such work, it may fairly be argued that it never could have been intended by the Legislature that the trustee should be paid when he had not done the work, or had done it in such a way as to prejudice the estate or benefit himself.

The statute means that for such portion of the duties as the executor has bestowed his care, pains, trouble and time upon, in the proper administration of the estate, he shall receive reasonable compensation. When he has neglected any portion of his duties, or has applied his care and pains in mal-administration, it would scarce be asked that in respect of it, however much trouble may be brought upon him thereby, he should receive any wages or reward. The Legislature did not intend that when an executor had been guilty of any misconduct he should be deprived of any remuneration whatever, even in respect of those partial services which had been faithfully rendered. The statute evidently contemplates and indeed provides for payment of work from time to time. Looking to the large powers which this act presumes to compel defaulting trustees and executors to make amends for their misconduct, it would not have been considered necessary to deprive them, any more than any other agent, of payment for what had been well done: *McLennan* v. *Heward*, 9 Gr. 279.

The compensation is for care, pains, and trouble, and time expended: hence as a general rule an executor should not be allowed commission on sums which he has not realised and with which he is chargeable in consequence of his neglect or other misconduct: *Bald* v. *Thompson*, 17 Gr. 154. In respect of all moneys disbursed by him, the executor should have his commission, and if disallowed by the master the court will rectify his finding in this respect: *Ib.* In no case will executors be entitled to any allowance for services performed for the estate by another person who acts gratuitously, unless it can be shewn that they had labour and trouble during the same time in the management: *Chisholm* v. *Barnard*, 10 Gr. 479.

The misconduct of an executor may be punished, not merely by charging him with interest and costs, but also by the disallowance of all compensation to him under the statute, his right to such compensation depending altogether upon the circumstances of the case, having regard to whether or not his conduct has been blameworthy: *Gould* v. *Burritt*, 11 Gr. 523. When an executor has retained moneys of the estate in his hands, and has been charged with interest and rests in passing his accounts, yet he will not be deprived of his commission if he acted in the exercise of his best discretion in keeping such moneys in hand: *Gould* v. *Burritt*, *ubi sup.*, and see *McLennan* v. *Heward*, 9 Gr. at pp. 284, 285; *Landman* v. *Crooks*, cited in 9 Gr. 285.

If the executor deal with the estate in a manner not authorized by the will, but yet in the event his dealings assume a shape sanctioned by the will, a commission may be allowed in respect of such transactions, if they have been as profitable as if the directions of the will had been strictly followed; but if less profitable, then no commission should be allowed: *Thompson* v. *Freeman*, 15 Gr. 384.

We shall in our next and last paper on this subject arrange the remaining cases under their appropriate heads.

TREASURER OF THE LAW SOCIETY.

We publish with much pleasure the following address to the late Treasurer of the Law Society by his brother Benchers on the occasion of the last meeting of Convocation under the late *regime* and his answer thereto :—

"*To the Hon. John Hillyard Cameron, Treasurer of the Law Society of the Province of Ontario:*

"Sir,—On the occasion of the approaching dissolution, under the recent act of the Legislature of Ontario, of the corporation of the Law Society as constituted at the end of the last century, we, the Benchers of that honourable society, of which you have been the Treasurer for eleven years, cannot allow the last term in which we shall be assembled together, to close, without giving expression to our feelings of regard and esteem for you, and our sense of the great benefits that have accrued to the profession at large from your unwearied labours and constant supervision, as the head of its governing body, the good effects of which are every day more distinctly felt and acknowledged.

"During your Treasurership many useful measures have been originated, among which we may particularize the creation of the Law School, and the establishment of Scholarships, both of which have tended so materially to the benefit of students; while the courtesy which you have at all times exhibited to the members of the Bench, and of the Profession in general, have contributed so much to that good feeling and pleasant intercourse which ought always to mark an honourable profession, and we believe does now essentially exist in ours.

"We sincerely hope that under the new organization of the Law Society, its members may lose none of the advantages that they have hitherto enjoyed, and that our successors to be elected by the Bar throughout the Province, may maintain the standard of legal education that you so happily inaugurated, and which has already borne such excellent fruit.

"In bidding you farewell in our old relations, we offer to you our warmest regard, and we know that in whatever position you may hereafter be placed, your most earnest endeavours will continue to be used in the promotion of a good understanding and high tone among the members of our common profession.

To this address the Treasurer replied as follows :—

"*Gentlemen and Brother Benchers:*

"Allow me to offer to you my warmest thanks or your kind and flattering address.

"The position of Treasurer of the Law Society of Upper Canada has always been to me a source of the greatest satisfaction and pride, and the knowledge that you have conferred it upon me by your unanimous voices for eleven years in succession, and now, in the breaking up of our old constitution, that you as unanimously give me your approval of my course while acting as your head rewards me amply for those labours and efforts which you have been kind enough to eulogize.

"You are all aware how deep an interest I have ever taken in my profession, and how anxious I have been that our young men who have become students of the law should have every opportunity of acquiring the highest legal education and of adopting the best means of fitting themselves for practice at the Bar; and if the measures which you have aided me in passing, have been attended in their results with some degree of success, you are yourselves entitled to share in any meed of praise that may be awarded to them.

"If in my position I have acted in a spirit of courtesy towards yourselves and the other members of the Law Society, I have only acted in the spirit that the uniform kindness and consideration that have always been shown to me have called forth, and I have specially to thank those hundreds of students who have been before me in the legal examinations for the forbearance and good feeling that they have uniformly exhibited, which have never been departed from, even in cases where the result of the examinations has been adverse.

"I trust that the Law Society will be managed under its new organization in the same spirit it has hitherto been. The honor and interests of the Bar should be as safe in the hands of the whole body as they have been in the hands of a few of its senior members. The standards of merit and position cannot fail to be recognized by the profession at large, as the true standard for election to its governing body; and, as in the past, no disturbing element outside of their professional work or duty has ever been introduced among the benchers, so, we will hope, it may be in the future.

"I thank you for your kind expressions of personal regard. It is pleasant to me to remember, now that our old relations are being severed, that in all our intercourse I have never had the slightest difficulty with any one of you, and I can assure you that you judge me truly when you say that my most earnest endeavours will continue to be used in the promotion of a good understanding and high tone among the members of our common profession."

All lovers of our profession will also hope that the result of the elections may show that the standards of merit and position will not fail "to be recognized by the profession at large as the true standard for election to its governing body." The intelligence, *esprit de corps* as well as business ability of the Bar of Ontario ought to keep them right in a matter of this kind, and we hope it may do so, despite the corroding influences of elective institutions.

It may not be amiss here, when the last Treasurer under the old system is giving his closing address, to give the names of those who have held the office up this time. The first that appears on the list is John White, in 1797. Then follow, generally chosen several years in succession and some returning again from time to time:—Robert Isaac Dey Grey, Angus Macdonell, Thomas Scott, D'Arcy Boulton, William Warren Baldwin, John Beverley Robinson, Henry John Boulton, George Ridout, Robert Baldwin Sullivan, Robert S. Jameson, Levivs Peter Sherwood, William Henry Draper, James Edward Small, Robert Easton Burns, John Godfrey Spragge, Robert Baldwin, Sir James B. Macaulay, John Hillyard Cameron.

ELECTION OF BENCHERS.

As most of our readers are aware, two lists have been distributed amongst the profession, suggesting the names of various gentlemen as Benchers under the elective system: the first emanating from a meeting of some of the members of the Hamilton Bar, and the second from Toronto. Both lists contain many good names, and persons who doubtless possess the confidence of their brethren. But in view of the ground we have taken in this matter, we desire to make a few observations, which may assist in rectifying, and in some respects reconciling these lists; and out of both, with a few alterations, making one more acceptable to the bulk of the profession.

To begin with, we must not run away with the idea that there is any necessity or even possibility of representing the different sections of the country. The Society is to be looked to as a whole, irrespective of the incidental fact that the members of it are scattered in different parts of the Province, although proper deference must be paid to the feeling of the country Bar in this respect. We must also keep in view the fact that the routine work of the Society must be done in Toronto, and that we cannot expect country Benchers to be as regular in their attendance as Toronto men, especially as, when they do attend, they must do so at their own expense. Nor should the country Bar forget that all the *ex-officio* Benchers, except one, reside out of and east of Toronto.

Great surprise has been expressed on all sides, so far as the Hamilton list is concerned, at the selection of names from the Hamilton Bar itself; not of course arising from any objection to any of those who are on the list, but surprise that names which the Bar would have expected to have seen there, are absent. We trust that such names as George W. Burton, Miles O'Reilly and S. B. Freeman, have been omitted by inadvertence, for certainly there would seem every reason to suppose, if a selection has to be made from any one locality, that they would be elected in stead of their juniors, who appear on the list referred to.

Again, with reference to the Toronto list, one would expect to see Mr. Edward Blake's name; for if we have to make a selection between the brothers, the senior would naturally be chosen; but it is unnecessary further to particularise, nor is it pleasant to feel that we have to leave out any name when so many good ones present themselves; only thirty, however, can be elected, and we sincerely trust that the good sense and brotherly feeling of the members of the bar one to the other will prevent any thought of jealousy, and that all will get the credit for voting for those whom they conscientiously believe will individually and collectively be the best fitted, from a combination of qualities, to form the governing body of the Law Society.

It may not occur to some, and we therefore take the liberty of reminding them, that business capacity, and spare time to attend to Law Society business are important elements for consideration, and should be kept in view in this selection of Benchers.

We publish the following list at the suggestion of several members of the Bar who could not attend the meeting here, and of some of the country Bar, who have taken an interest in the matter, and who do not altogether approve of the lists that have been sent out;

and though we do not concur with it in every particular, we confess to thinking it, on the whole, the best that has so far been circulated —at least it may suggest some fresh names:

1. J. D. Armour ..... Cobourg.
2. H. C. R. Becher ..... London.
3. John Bell ..... Belleville.
4. Edward Blake ..... Toronto.
5. G. W. Burton ..... Hamilton.
6. John Crickmore ..... Toronto.
7. John Crawford ..... Toronto.
8. S. B. Freeman *or* Æ. Irving Hamilton.
9. R. A. Harrison ..... Toronto.
10. James A. Henderson ..... Kingston.
11. S. B. Harman ..... Toronto.
12. J. B. Lewis ..... Ottawa.
13. W. R. Meredith ..... London.
14. And. Lemon *or* G. Palmer, Guelph.
15. Thomas Moss ..... Toronto.
16. Dalton McCarthy, Jun. .. Barrie.
17. Rolland McDonald ..... St. Catharines.
18. Kenneth McKenzie ..... Toronto.
19. James Maclennan ..... Toronto.
20. D. McMichael ..... Toronto.
21. Miles O'Reilly ..... Hamilton.
22. T. B. Pardee ..... Sarnia.
23. C. S. Patterson ..... Toronto.
24. Albert Prince ..... Sandwich.
25. D. B. Read ..... Toronto.
26. S. Richards *or* A. Crooks, Toronto.
27. R. W. Scott ..... Ottawa.
28. M. R. Vankoughnet ..... Toronto.
29. E. B. Wood ..... Brantford.
30. R. S. Woods ..... Chatham.

Some may have sent in their lists before seeing this; but if they desire to make any changes, they have a perfect right to send in a fresh list, and recall the former one.

Attention has at length been drawn, in the House of Commons, to a subject which must sooner or later, and the sooner the better, receive the careful attention of the Legislature. We speak of a Court of Admiralty for our inland seas. Years ago we urged the importance of some such measure as is foreshadowed — though in a feeble and imperfect manner—in the following resolutions, introduced by Mr. Street:

1. That it is expedient that power be given to attach ships and vessels for provisions furnished and repairs made to them, by a summary process.

2. That where there is no Admiralty Court or Admiralty jurisdiction, such process shall issue out of the County Court or Court of Inferior Jurisdiction.

3. That under such process proceedings may be had to judgment, and ships or vessels so attached may be sold thereupon.

4. That a Bill shall be founded on these resolutions, with the necessary forms of procedure thereon.

These resolutions were, after a debate, withdrawn; but the subject is too important, and the necessities of our marine too great, to allow it to be shelved for any length of time.

ACTS OF LAST SESSION.

An Act to amend the Act intituled "An Act respecting the Municipal Institutions of Upper Canada."

(Assented to 15th February, 1871.)

Her Majesty, &c., enacts as follows:—

1. Section 6 of the Act passed in the thirty-first year of Her Majesty's reign, chaptered thirty, is amended by adding the following words after the word "ward" on the third line of said section:—"When there are less than five wards, and of two councillors for each ward where there are five or more wards."

2. Sub-section 12 of section 296 of the Act passed in the session held in the 29th and 30th years of Her Majesty's reign, chaptered 51, is amended by striking out all the words after the word "Runners" in said sub-section.

3. Sub-section (*a*) of sub-section 6 of section 246 of the said Act is repealed, and the following is substituted in lieu thereof:—"Upon any person, for the non-performance of his duties, who has been elected or appointed to any office in the corporation, and who neglects or refuses to accept such office, unless good cause be shown therefor, or takes the declaration of office, or afterwards neglects the duty thereof, and."

4. The council of every municipality may pass by-laws for preventing and removing any obstruction upon any roads or bridges within its jurisdiction.

5. Sub-section 8 of section 299 of the said Act is amended by adding thereto the following: — "And for acquiring and assuming possession of, and control over, any public highway or road in an adjacent municipality (by and with the consent of such municipality, the same being signified by a by-law passed for that purpose), for a public avenue or walk; and to acquire from the owners of the land adjacent to such highway or road, such land as may be required on either side of such highway or road, to increase the width thereof, to the extent of one hundred feet or less, subject to the provisions of section 325 of this Act, and to other provisions of this Act relating to arbitration."

6. The following sub-section is added to section 349 of said Act: — "For granting bonuses to any railway, and to any person or

persons, or company, establishing and maintaining manufacturing establishments within the bounds of such municipality, and for issuing debentures, payable at such time or times, and bearing or not bearing interest, as the municipality may think meet for the purpose of raising money to meet such bonuses."

7. Section 341 of the said Act is amended by adding after the words "Separating two townships in the county," the following:—"And over all bridges crossing rivers, over five hundred feet in width, within the limits of any incorporated village in the county, and connecting any highway leading through the county."

8. Section 342 of said Act is amended as follows, by adding thereto the following words: "And further the County Council shall cause to be built and maintained in like manner all bridges on any river over five hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county," and may pass a by-law for the purpose of raising any money by toll on such bridge to defray the expenses of making and repairing the same.

9. Sub-section 3 of section 344 of said Act is amended by adding thereto after the words "Townships of the county," the words "Or any bridge required to be built or made across any river, over five hundred feet in width, within any incorporated village in the county, connecting any public highway leading through the county."

10. Sections 301 and 302 of the said Act shall apply to towns and incorporated villages as well as to cities; provided always that the right of appeal as provided by the said 301st section shall be to the judge of the county court.

11. Sub-section 2 of section 301 of said Act is amended by inserting the following words after the word "sidewalk," in the sixth line: "or any bridge forming part of the highway."

12. Section 302 of the said Act is amended by adding to the end thereof the following proviso:

"Provided also, that in cases where the council of any city or town shall decide to contribute at least half of the cost of such local improvement, it shall be lawful for the said council to assess and levy in manner provided by the 301st, 302nd, 303rd, 304th and 305th sections of this Act, from the owners of real property to be directly benefited thereby, the remaining portion of such cost without petition therefor, unless the majority of such owners representing at least one-half in value of such property shall, within one month after the publication of a notice of such proposed assessment in at least two newspapers published in such city or town, petition the council against such assessment."

13. Sub-section 12 of section 341 of said Act is repealed, and the following substituted therefor:

"It shall be the duty of County Councils to erect and maintain bridges over rivers forming township or county boundary lines; and in the case of a bridge over a river forming a boundary line between a county and a city, such bridge shall be erected and maintained by the Councils of the county and city; and in case the Councils of such county or city, or the Councils of such counties, fail to agree on the respective portions of the expense to be borne by the several counties, or city and county, it shall be the duty of each Council to appoint arbitrators, as provided by this Act, to determine the amount to be so expended, and such award as may be made shall be final."

14. The following sub-section is added to section 280 of said Act:

"Whenever any stream or creek in any township is cleared of all logs, brush or other obstructions to the town line between such township and any adjoining township into which such stream or creek flows, the Council of the township in which the creek or stream has been cleared of obstructions may serve a notice in writing on the head of the Council of the adjoining township into which the stream or creek flows, requesting such Council to clear such stream or creek through their municipality; and it shall be the duty of such last named Council, within six months after the service of the notice as aforesaid, to enforce the removal of all obstructions in such creek or stream within their municipality to the satisfaction of any person whom the Council of the county in which the municipality whose Council received the notice is situate shall appoint to inspect the same."

15. Section 243 of the said Act is amended, by adding "or thirty duly qualified electors of any municipality" after the word "council" in the first line,"

16. Any by-law which shall be carried by a majority of the duly qualified voters voting thereon, shall, within six weeks thereafter, be passed by the Council which submitted the same."

17. Section 27 of the said Act is repealed, and the following enacted in lieu thereof:

"In case of a township laid out by the Crown in territory forming no part of an incorporated county, the Lieutenant-Governor may, by proclamation, annex the township, or two or more of such townships, lying adjacent to one another to any adjacent incorporated county."

18. Section 153 of the said Act is amended by inserting after the word "aforesaid" in the first line, the following words: "as well as the assessment rolls, voters' lists, poll books, and other documents in the possession of or under the control of the clerk."

19. Sections 29 and 35 of chapter thirty of the Act passed by the Legislature of Ontario in the thirty-first year of Her Majesty's reign shall be and the same are hereby repealed.

SELECTIONS.

MARRIAGE BY REPUTE.

The case of *Hill* v. *Hibbit* is sure to interest the public. It is full of incident, sensational, and highly spiced and has also some interest for the lawyer, we do not mean that any new principle is enunciated or any old principle developed, but the judgment of the Lord Chancellor in respect to the validity of the marriage of Eliza Phillips and James Hay brings into strong light the elementary doctrine of the English law of marriage.

The main facts are these: Hay met Phillips in London, and they cohabited; but, as the Lord Chancellor remarked, it is clear they were not married in England. They went to Scotland, where Hay introduced Phillips as his wife, and she was treated as his wife by the members of his family. Hay went to America. Phillips followed. In America Phillips used her maiden name, as it is alleged, for the purpose of earning her living. Phillips (said the Lord Chancellor) was plainly of unsound mind, and of a family subject of insanity; she was subject to fits, and, though perfectly sane for some time, liable to fly off at any moment. She was for some years in a lunatic asylum. Hay visited England, met Harriet Hibbit, cohabited with her for one night, subsequently met her in America, and was publicly married to her. Was this a valid marriage? Or was it interdicted by the connection between Hay and Phillips?

That there was a marriage according to the Scotch law there can be no doubt, because there was no mere repute, but there was also acknowledgment. Hay introduced the woman to his family as his wife, and she was received as his wife. This would appear to settle the case. No act of the man or of the woman can have the force of a divorce. A marriage by consent cannot be dissolved by consent. Yet it is true that in penal cases, such as bigamy, the prior marriage cannot be proved by mere repute. If Eliza Phillips had remained in a sound state of mind, the Lord Chancellor intimated that the case might have had a different complexion, because she would then have countenanced the idea that she had never been married. Certainly it would be a cruel hardship for a woman who is publicly married to find that her marriage is invalid, and her offspring bastards, because the man had years before lived in Scotland with some other woman as his wife, that woman having resumed the use of her maiden name. On the other hand, it is difficult to understand how a marriage by consent, being at law a valid marriage, can be dissolved by the acts of the man or woman, or by their joint assent. Divorce is extremely easy in some American States, but divorce by consent, without the intervention of a Court of Law, has not yet been admitted anywhere. It is more difficult to establish a consensual marriage by mere repute than by repute and acknowledgment; but we apprehend that, the marriage being established, it is in law as binding and lasting as any other marriage.—*Law Journal.*

HOW TO DIFFER.

Judges differ, being fallible men; but they differ with great respect for the opinions of each other, being conscious of their own fallibility. Now and then, however, we suppose that even the judicial mind chafes at legal dogmas as advanced by other judges. Else how can we explain the brusque style in which the House of Lords overruled the Court of Exchequer Chamber in *Taylor* v. *The Chichester Railway Company*, reported in the December number of the *Law Journal Reports?* In the Court of first instance, Lord Chief Baron Pollock and Barons Martin, Bramwell, and Pigott gave judgment unanimously in favour of the plaintiff. On appeal the Court of Exchequer Chamber reversed this decision. The majority consisted of Mr. Justice Keating, Mr. Justice Mellor, Mr. Justice Montague Smith, and Mr. Justice Lush; Mr. Justice Willes and Mr. Justice Blackburn dissented, and upheld the judgment of the Court below [36 Law J. Rep. (N.S.) Exch. 201]. This state of judicial opinions, which by the way is an apt illustration of the absurd constitution of the Exchequer Chamber—the minority of judges prevailing in the result—brought the case to the House of Lords in a condition very favourable to the appellant.

To read the report one would say, not exactly that the case came up with an immense amount of prejudice in favour of the appellant, but that at an early stage of the argument their Lordships had come to a conclusion, and to a very definite conclusion, on the question before them. The Lord Chancellor is a man of mild temper, and by no means possessed of an overweening belief in his own powers and ideas. Yet the Lord Chancellor knocked the majority of the Court below down like ninepins. Thus he said: "Can anyone conceive such a contest as that being raised? * * * Would such a contract ever be suggested or dreamt of? * * * I need not dwell upon the plain and obvious reasoning which is consonant in every way with good sense with regards to contracts. Nobody ever heard of a contract being a one-sided one. * * * I confess I have endeavoured to follow the judgment of the learned judges in the Court of Exchequer Chamber, from whom I have the misfortune to differ in this case. I cannot see any force in the reason which they there allege," &c. But all this is a trifle to the sledge-hammer style in which Lord Westbury expressed his dissent from the judges in the Court below. After stating the propositions put forward by the respondents, and sanction-

ed by that Court, his Lordship says:—"The whole thing is mere imagination about the agreement being *ultra vires*, and about the company committing a breach of trust. It proceeds only from a want of more accurately understanding the meaning of terms and the rules by which they are applied. Then to that must be added another extraordinary illusion." Then, after speaking of an argument drawn from the ultimate destination of certain money payable by the respondents, he says, "That is an utter confusion with respect to the provisions," &c., and again, "This is only another instance of misconception of the nature of the provisions applicable to this subject;" and his Lordship finished thus: "I regret that Sir C. Taylor has been put to the necessity of coming here to correct his misapprehension. This case is an extremely clear one, and I am clearly of opinion that the judgment of the Court of Exchequer Chamber must be reversed." Surely it was a very exceptional case which met with or deserved such crushing language from the Chamber of the Lords.—*Law Journal.*

WRETCHED TRUSTEES.

If you are a trustee, and you entertain a doubt as to the title of your alleged *cestuis que trust*, what ought you to do? Our student, fresh from the study of Mr. Lewin, would answer: "Pay the money into Court under the Trustee Relief Acts." This is a good answer so far as it goes. But suppose that your doubt or difficulty turns out to be an unreasonable one, you may be ordered to pay the costs of the payment into Court. How then are you, being an unlearned person, to find out whether your doubt or difficulty rests on a sound foundation, or is a creature of the merest imagination? The student will answer: "Take counsel's opinion." That reply, which on its face is wise and prudent, may lead the unlucky trustee into worse mischief. For here is the *dictum* of Vice-Chancellor Stuart in *Gunnell* v. *Whitear*, in the current number of our Reports:—"A trustee *ought not to consult counsel as to the right of his cestuis que trust.* If he has any reasonable difficulties and doubts as to their title, he should pay the trust money into Court under the Trustee Relief Acts. He is not to consult counsel as to the title of his *cestuis que trust.*" Of course his Honour did not mean that such an act would be improper or indecorous, but that costs would not be allowed. But if the trustee is not to consult counsel, how is he to know whether his doubts are reasonable or not? We confess that this *reductio ad absurdum* fairly staggers us. The only possible solution is that, in the eye of equity, every trustee undertakes to bring to bear upon the duties of his office such an amount of legal knowledge and skill as will enable him to decide whether or no reasonable doubts do exist as to the rights of his *cestuis que trust*; and if this rule is to prevail, we think it only fair that trustees should have distinct notice thereof. Perhaps the learned Vice-Chancellor had in his mind the celebrated case of *Jenkins* v. *Betham*, 15 C.B. 168, in which the Court of Common Pleas held that a person who holds himself out as a valuer of ecclesiastical property is bound to know, and to value according to the principle laid down in *Wise* v. *Metcalf*, 10 B. & C. 299. The analogy is not precise, because surveyors generally pursue a profitable calling, whereas trustees, like the victims of the ancient ordeal, walk among hot ploughshares, and very often stumble against them.—*Law Journal.*

France, like the Federal States, under the presidency of Lincoln during the civil war, is now governed by lawyers. According to the *Réveil* there are six barristers in the Government of National Defence, viz., Picard, Crémieux, Arago, Favre, Ferry, and Gambetta, and their four secretaries are of the same profession. Six of the ministers, nine of the higher ministerial officials, the police prefect and his general secretary, twenty-four of the commissioners despatched to the departments with extraordinary military and political powers, the whole of the newly-formed Council of State, the eight men at the head of the Paris Municipal Government, ten of the sanitary and food commissioners, six members of the War Department, six diplomatists, and five finance officials are also advocates.

All this is intelligible. The Paris bar is, and has been since 1789, republican to the backbone, and the party of the Left has throughout the Imperial *régime* looked for its champions among the great legal advocates. The system which has for its maxim, "Once a barrister always a barrister," has fostered this state of things to an extraordinary extent. The French barrister works under no obligation to uphold authority, and the temptations to resist it are to him many and powerful. Then, again, the bar must in all countries contain an exuberance of ambition. A barrister without ambition is an impossibility, and there are to be found in this class of men a host of persons strong in head, tongue, and heart, and these are the persons who naturally come to the front in critical times. In addition to these considerations, it is obvious that the bar affords exceptional opportunities of exhibiting talent; and however clever a man may be, he does not get into power unless his countrymen have means of detecting his ability. Whether the bar of Paris will gain in public repute by its present position is another matter. Marvellous as are the energy and the pluck of M. Gambetta, his treatment of the French generals is likely to form a complete set-off to his virtues. It is not our business to go into this question. It is enough to point to the phenomenon of France being entirely ruled by the bar.—*Exchange.*

At the Leeds Assizes, a witness, in a case before Mr. Justice Byles, was inaudible, which is not a very uncommon incident. The witness had a beard and moustache. The judge said:—

"An ornament is now generally worn by gentlemen which certainly much impedes the voice. (His Lordship glanced round the barristers' table, where several flowing beards were conspicuous.) But I would rather restrain what I was going to say. I was not aware; but I hope no gentleman will take my observation as intended for him. I do not mean it, I assure you. But what I said as to the hirsute ornament is the result of long observation."

His Lordship could not refer to a profusion of whiskers, for which the bar of England has long been famous, or to beards, which certainly cannot affect the voice. The hirsute ornament denounced by the learned judge must be the moustache. We are surprised at his Lordship's dictum. In Parliament, in Courts of justice, on the platform, and even in the pulpit, speakers wear moustachios, and we have never observed that the hirsute ornament was an impediment to speech. On the contrary, we were under the impression that, by protecting the throat and lungs, it promoted clearness and strength of utterance. Perhaps Mr. Justice Byles was only indulging in good-natured banter about the hirsute ornament which our fathers thought was given by nature for the purpose of enabling razor-makers and barbers to gain an honest living.—*Exchange.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

The Township of Walsingham v. The Long Point Company.

Assessment—Appeal—Statute labour.

An island forming part of a municipality, but situated in no road division, and deriving no benefit from the roads of the municipality, having been assessed for statute labour, the owners appealed to the County Judge on the grounds of over assessment, and that the property was not liable to statute labour.

On an application to restrain proceedings before the Judge, *Held*, that though a County Judge has authority to increase or reduce an assessment, or to rectify errors in or omissions from the roll, the question of liability for statute labour is beyond his jurisdiction. A writ of prohibition was accordingly granted.

[Chambers, Nov. 24th, 1870—*Galt, J.*]

A summons was obtained on behalf of the Township of Walsingham calling upon the Long Point Company, and the judge of the County Court of the County of Norfolk, to shew cause why a writ of prohibition should not issue, prohibiting and restraining the said judge and the said company from proceeding before the said judge in the matter of an appeal by the said company from the Court of Revision for the Township of Walsingham, so far as the said appeal relates to statute labour, and the liability of said company to perform statute labour in road division No. 4 in said township: on the ground that the said judge had not and has not any jurisdiction to entertain such appeal, so far as the same relates to statute labour.

By a resolution passed by the Municipal Council of Walsingham, on the 21st February, 1870, it was resolved that road division No. 4 should be held to include the whole of Long Point, and that all persons, either resident or non-resident on said Long Point, liable to perform statute labor, should perform the same in said road division No. 4 unless commuted for in money, in which case the proceeds thereof should be expended in the said division No. 4, until otherwise ordered by the Council. The Long Point herein mentioned was the property of the Long Point Company, and it appeared from the papers filed on this application that this was the first time that the property in question was included in any road division or assessed for statute labour. In making up the assessment roll for this year, the assessors served a notice of assessment, stating the number of acres to be 14,300, the value to be $8,500, and the number of days of statute labour 30, in accordance with the rate established by sec. 83 of 32 Vic., ch. 36.

From this assessment the company appealed to the Court of Revision, who dismissed the appeal, and thereupon the company appealed against the decision of the Court of Revision to the judge of the County Court on the following grounds:—

1. That the property of the said Long Point Company is not liable for the performance of statute labour on the grounds that it is in no road division in the said township, and that no roads are within a reasonable distance thereof, upon which statute labour can be performed, and that the assessment of the same for statute labour is contrary to law.

2. That the property of the said Long Point Company is over-assessed, and at a higher proportionate rate than other property in the said township of Walsingham.

3. That the assessment of the said company's property is excessive, and improper, and unlawful.

4. That the proceedings of the said Court of Revision were unlawful and imperfect.

This appeal was heard by the learned Judge on the 20th of June, and on the 9th of July he gave judgment reducing the assessed value of the lands of the company to $7,000, and directing that the statute labour assessed against the lands of the company should be struck out, and the assessment roll of the said township amended accordingly. This judgment was as follows:—

The matter of appeal may be substantially divided into two heads.

1st. Our assessment on the value of the property.

2nd. The liability of the property of the company as situated to be assessed for statute labour.

As to the first point, it appears from the evidence that the property of the company was assessed for $5,200 in 1868, that being the first year of their ownership. In the following

year it was raised to $7,000, when a general increase was made in the assessed value of all the property in the township. This year, (1870), it is again sought to be raised to $8,500, although the evidence shows that no general increase has been made in the assessed value of the property in the municipality, but if anything, rather a decrease It seems that the ground is kept as a shooting and trapping preserve, where game and fur are protected, and that it is unremunerative to the proprietors in a pecuniary point of view, costing them more yearly than the revenue derived from it.

From the evidence of value and other matters proved, I am satisfied that $7,000 is the full assessable value of the said property, and I therefore reverse the decision of the Court of Revision upon that point, and decide, and direct, that the said property shall be assessed for the sum of $7,000, and no more, and that the assessment roll of the township be amended accordingly.

As to the second point, I find that the property of the Company consists of an island composed of land and marshes, the nearest part of which is three or four miles, and the farthest part twenty-five miles from the road division in which the council has placed it. I find that no roads built over the main land would be of any service, value or benefit to the property of the company. It does not, therefore, seem reasonable or just that the property should be laid under a burthen, which will, under no circumstances, produce a benefit to them; and upon examining the Assessment Act, and the Municipal Institutions Act, while I find that power is given to municipal councils to divide the municipality into road divisions, I also find that every resident shall have the right to perform his whole "statute labour, in the statute labour division in which his residence is situated, unless otherwise ordered by the municipal council," (see sec. 89), and also, "in all cases, when the statute labour of a non-resident is paid in money, the municipal council shall order the same to be expended in the statute labour division, where the property is situated, or where the said statute labour tax is levied." (see sec. 88). It seems to me, therefore, that the council, though they have the power to regulate and make the road divisions, must exercise such power in a reasonable manner, and that it would be unjust and absurd to contend that they have the power to order a man to come twenty-five miles to perform his statute labour, or that they can so make road divisions, that property can be taxed for roads which cannot by any possibility be of any service, value or benefit to the property. Such contention is certainly unreasonable, and it appears to me totally at variance with the spirit and intention of the Assessment Act.

I therefore reverse the decision of the Court of Revision on the second point also, and direct that the statute labour assessed against the lands of the said company, be struck out, and the assessment roll of the said township, amended accordingly. And I direct the respondents to pay the costs of this appeal.

Galt, J.—There is no question as to the jurisdiction of the learned Judge to reduce the amount of the assessed value of the lands, but the point raised on the present application is whether he had any jurisdiction to entertain the question as to the liability of the company to statute labour. It is to be observed that the dispute was not as the number of days statute labour assessed for. That is regulated by the 83rd section, and is a mere matter of computation on the assessed value of the property: but the point in dispute was the liability to perform statute labour at all, and this in my opinion is not the subject of appeal, either to the Court of Revision or from their decision. Section 60 of the Assessment Act of 1869 regulates the proceedings for the trial of complaints; sub-section 1 is as follows:—"Any person complaining of an error or omission in regard to himself, or having been wrongfully inserted on or omitted from the roll, or as having been undercharged or overcharged by the assessors in the roll, may personally, or by his agent, within fourteen days after the time fixed for the return of the roll, give notice in writing to the clerk of the municipality, that he considers himself aggrieved for any or all of the causes aforesaid." Sub-section 2 is: "If a municipal elector thinks that any person has been assessed too low or too high, or has been wrongfully inserted on or omitted from the roll, the clerk shall, on his request in writing, give notice to such persons and to the assessor, of the time when the matter will be tried by the court, and the matter shall be decided in the same manner as complaints by a person assessed." These are the only sub-sections to which it is necessary to refer in considering this question, and from these it appears to me that the subject matters of complaint are confined to overcharge and undercharge as respects value, and the entry or omission of a person on the roll. These then are the only matters from a decision upon which an appeal lies to the County Judge. There can be no appeal as regards the question of statute labor as a separate and distinct complaint for the reason already given, namely, that the amount of statute labour is regulated by the assessed value of the property by section 83. I am, therefore, of opinion that the learned Judge had no jurisdiction to decide the question as to whether the company were properly entered on the assessment roll as liable for statute labour. By section 332 of the Municipal Act of 1866, authority is given to township councils to pass by-laws "For regulating the manner and the division in which statute labour or commutation money shall be performed and expended," and if such by-law is unjust or improper, steps should be taken to have it quashed. The municipal council of the township of Walsingham did by the resolution of the 21st of February, 1870, regulate the manner and the division in which statute labour as regards the land in question should be performed, and while that resolution remains in force, I do not see that either the Court of Revision or the Judge of the County Court has any power to amend the roll by striking out the statute labour.

Let the writ issue as regards the statute labour.

Prohibition granted.

McKinnon v. Van Every.

Contract with Indian—Interpretation of Statutes—Repealing acts.

A debt contracted by an Indian while Con. Stat. Can. cap. 9 was in force, cannot now be sued for under 32 33 Vic. cap. 6.

[Chambers, Dec. 10, 1870—*Galt, J.*]

This was a summons, calling upon the plaintiff and the Judge of the County Court of the County of Haldimand, to show cause why a writ of prohibition should not issue to restrain any further proceedings on aplaint brought in the First Division Court of the County of Haldimand to recover a debt contracted (while the Con. Stat. Can., cap. 9, was in force) by the defendant, who was admitted to be an Indian, within the provisions of that statute (now repealed), and of 32 33 Vic. ch. 6.

——— shewed cause, citing *Ellis* v. *Watt*, 8 C. B., 614; *Zohrab* v. *Smith*, 5 D. & L., 635.

Harrison, Q.C., supported the summons, and cited 13 14 Vic., ch. 74, sec. 53; C. S. Can., cap. 9; 31 Vic., cap. 42; sub secs. 14, 33. 32; 32 Vic., ch. 66. sec. 23; *Jaques* v. *Withy*, 1 H. B. 65; *Hitchcock* v. *Way*, 6 A. & E. 943; *Rex* v. *McKenzie*, R. & R., C. C., 429.

Galt, J.—It is admitted by the learned Judge in his very clear argument in this case, to which I am much indebted not only for a statement of the facts, but for a reference to the authorities, that so long as Con. Stat. Can., cap. 9, was in force, this suit could not have been maintained, but he is of opinion that the repeal of that statute has the effect contended for by the plaintiff.

The 2nd section was—"No person shall take any confession of judgment or warrant of attorney from any Indian within Upper Canada, or by means thereof, or *otherwise however* obtain any judgment for any debt or pretended debt unless" etc., referring to circumstances which it is not pretended exist in the present case. It is contended that, although when this debt was contracted there was no remedy for its recovery, yet that now a judgment may be obtained by reason of the repealing statute.

The learned Judge, in his argument, says:—"As to the objections founded on the statute relative to Indians, the case of *Jaques* v. *Withy*, 1 H. B. 65, cited on behalf of the defendant, decides that a debt declared illegal by a repealed Act, and contracted during its operation is not legalized by its repeal. *Hitchcock* v. *Way*, 6 A. & E. 943, also cited, decides that the law as it existed when the action was commenced must decide the right of the parties unless the legislature express a clear opinion otherwise. If the debt contracted in this case had been prohibited by the statute then in force it is probable that it would have been within the decision referred to, and that the present cause of action being founded on an illegal consideration might have been avoided on this ground, but by Con. Stat. Can., cap. 9. the remedy only was prohibited, and not the debt, and the prohibition being removed, as I think it has been for reasons hereinafter stated, the debt remains subject only to the provisions of statute now in force. See *Surtees* v. *Ellison*, 9 B. C. 752."

With every respect for the opinion of the learned Judge, I am obliged to say that I differ from him in the construction to be put on the cases of *Hitchcock* v. *Way* and *Surtees* v. *Ellison*. The former was an action against the acceptor of a bill of exchange by a *bonâ fide* holder, *brought to issue before* the passing of Stat. 5 and 6 Wm. 4, ch. 41, but tried afterwards. It was held that the defendant might avail himself of statute 9 Anne ch. 14, and was entitled to non-suit if he proved the bill to have been given for a gaming consideration. When the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties unless the legislature by the language used shew a clear intention to vary the mutual relation of such parties. The matter in dispute, it will be observed, in that case was whether an Act of Parliament, passed after a suit has been commenced, would without express words deprive a defendant of a defence which he was entitled to urge but for the passing of the Act, and it was held it would not.

In the present instance the plaintiff insists that although when this debt was contracted there was a positive prohibition against his obtaining a judgment against this defendant, the repeal of that enactment enabled him to do so now, although there are no words used which would show that such was the intention of the legislature. I must say that the above case appears to me to establish the contrary doctrine. It is true that Lord Denman, in giving judgment, refers to the commencement of the suit as determining the rights of the parties, but it must be borne in mind that this was said as regarded pleadings, not as respected the right of action, and it would be singular if no remedy existed when the debt was contracted, and in fact where such remedy was actually prohibited, that the repeal of such prohibition should have an *ex post facto* operation, and enable the plaintiff to obtain a judgment for a debt contracted during the existtence of the prohibition

It is not necessary for the decision of this case to express an opinion as to what the rights of parties giving credit to Indians are under the present law, but I think it very doubtful whether even now a judgment can be obtained against an Indian. The case of *Surtees* v. *Ellison*, *ubi sup.* appears to me decisive against the plaintiff. It was an action brought by the assignees of a bankrupt against the sheriff of Durham. At the trial it appeared that before and in the year 1823 the bankrupt had carried on business as a seed merchant, and during that period had contracted a debt of £100 to the petitioning creditor, but he had not actually carried on business after that time. In 1826 the 6 Geo. IV. cap. 16 was passed, repealing the laws previously in force relating to bankrupts. In 1827 the bankrupt committed an act of bankruptcy by keeping house, and a few days afterwards the sheriff made the seizure complained of. For the defendant it was contended that the commission could not be supported, inasmuch as there was no trading after 6 Geo. IV. cap. 16 was passed. In giving judgment on the rule to enter a nonsuit, Lord Tenderden, C. J., says: "The rule for entering a nonsuit in this case must be made absolute It has been long established that when an act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as

if it had never existed." The other members of the court concurred in this view.

Now, apply that case to the present. There had been no trading since the passing of the 6 Geo. IV. in the one case, nor after the passing of the 31 Vic. in the other; the transactions in both were passed and closed, and could not therefore be affected by any subsequent legislation, unless such an intention was plainly expressed. To give effect to the contention of the plaintiff in this case, I must be prepared to hold that although up to the date of cap. 6 of 32 & 33 Vic. (1869,) no judgment could have been obtained against this defendant, yet that the passing of that statute shall leave not only the present defendant but every Indian in this Province liable for debts contracted during a course of years during which the legislature had most distinctly prohibited persons like the plaintiff from obtaining judgments against them. In my opinion the learned judge had no authority to direct a judgment to be entered in this case, and that the prohibition should issue.

Prohibition granted.

NEW BRUNSWICK.

SUPREME COURT.

Burke v. Niles.

A lot of land was described in a grant as "beginning a a stake standing on the bank or edge of Round Lake, thence," &c. (describing three lines of the lot), "to a stake standing on the westerly bank or edge of the said lake, and thence following the several courses of the said bank or edge to the place of beginning."

Held, 1st. That the title under the grant extended to the margin of the lake, and was not limited by a stake standing on the bank. 2nd. That the grantee was entitled to land formed in front of the lots by the gradual receding of the waters of the lake.

Under a grant of a "*lake*," reserving to the grantor all mines and minerals, the soil of the lake passes.

Trespass for breaking and entering the plaintiff's close and carrying away grass, with a count for assault and battery. The defendant pleaded not guilty, with a plea of justification of the assault in defence of his property.

It appeared at the trial that the plaintiff was the owner of lot No. 2, in a grant from the Crown to Joseph Burke and others, dated 28th April, 1828, in which the land was described as follows: "Beginning at a stake standing on the bank or edge of Round Lake, (so called), the said stake being distant 53 chains from a marked spruce tree standing on the rear or south-easterly line of the grant to John Downing and associates; thence north 15 degrees west, &c., (stating several courses); thence south 75 degrees east, 110 chains to a stake standing on the westerly bank or edge of the said lake, and thence following the several courses of the said bank or edge in a northerly direction to the place of beginning; and also particularly described and marked out on the plan of survey hereunto annexed." Round Lake was about half a mile wide, and navigable for boats.

The defendant claimed under a grant from the Crown, dated 10th March, 1851, in the following words: "All that certain lake in the parish of Botsford, distinguished as Round Lake, containing 245 acres, together with all profits, hereditaments, &c., thereunto belonging or appertaining, except and reserving nevertheless to us, our heirs successors, all coals, and also all gold and silver, and other mines and minerals"

After the defendant obtained the grant, he commenced to drain the lake, and reduced the depth of the waters about five feet, at the rate of about a foot a year, according to his evidence. The grass, for the taking of which the action had been brought, had been cut by the plaintiff on the shore of the lake between the top of the bank where the high land commenced, and the water; and the assault was committed by the defendant in driving the plaintiff off this piece of land where the grass was cut. The defendant contended that the plaintiff's grant was bounded by the top of the bank; also that the land where the grass was cut had been part of the bed of the lake which he had gained by drainage, and consequently that it belonged to him by his grant. The judge directed the jury that the plaintiff's grant was not limited to the top of the bank, but extended to the water of the lake, and that if the water receded gradually and imperceptibly, the land so left dry would belong to the plaintiff; though it would be otherwise if the reliction was visible and sudden, caused by the defendant's drainage; and he left it to them to find whether the place where the grass was cut had been dry land when the defendant's grant issued, or whether it had become so since by his drainage —directing them in the former case to find a verdict for the plaintiff for taking the grass. The jury being unable to agree on the question submitted to them, the judge then directed them to find for the plaintiff for the trespass, having doubts whether the defendant's grant gave him any interest in the soil of the lake. He also directed a verdict for the plaintiff on the count for the assault which was not justified, whether the *locus in quo* belonged to the defendant or not. The jury found a verdict accordingly; and a rule *nisi* for a new trial having been granted on the ground of misdirection,

J. J. Fraser shewed cause.—He contended, 1st. That the plaintiff's grant extended to the centre of the lake, or, at all events, that as he and the parties under whom he claimed had used the land between the top of the bank and the edge of the water for twenty years, it could not be taken from him by a subsequent grantee of the Crown without an inquest of office. 2nd. That the plaintiff was entitled to the accretion formed by the receding of the lake—the same rule applied as in case of a river. 3d. That the defendant's grant gave him no interest in the land; that the grant of a river *eo nomine* did not convey the soil, but only a right to use the water: Co. Lit. 4 *b*; 14 Vin. Abr. 92; Bac. Abr. *Grant* (1) 3; Woolrych on Waters 151; Angell on Watercourses, secs. 5, 41, 42, 52, 54; 2 Wash. on Real Prop. 524, 632.

A. L. Palmer, contrà, contended, 1st. That the plaintiff's land did not extend beyond the bank of the lake; 2nd. If it did, the accretion was not gradual and imperceptible, and consequently that the *locus in quo* did not belong to the plaintiff; 3d. That the grant to the defendant conveyed the soil. A grant of *stagnum* conveyed both the water and the soil: Cruise's Dig. *Deed,*

ch. 21, sec. 49; 4 Bac. Abr. 85; Angell on Watercourses, secs. 44, 56, 57, 157, 158. The exception of the "mines and minerals" showed that it was the intention of the Crown to grant the soil.

Ritchie, C. J., delivered the judgment of the court (after stating the grants under which the parties claimed)—The principal questions arising in this case are: 1st. Whether the plaintiff's grant extends to the margin of the lake, or was limited to the stake described as standing on the bank? 2nd. Whether the plaintiff, as the riparian proprietor, was entitled to any accretion from the lake in front of his own land? and 3rd. Whether the grant to the defendant conveyed the soil of the lake or merely the water?

In Angell on Watercourses, sec. 26, it is said: "If a boundary is described as running to a monument standing on the bank, and from thence running 'by the river,' or 'along the river,' it does not restrict the grant to the bank of the stream; for the monument in such case is only referred to as giving the direction of the line *to* the river, and not as restricting the boundary *on* the river." And in *Robinson* v. *White*, 42 Me. 218, it is said that although the monuments are described as standing on the margin or bank of the stream, the grant carries the title of the grantee to the centre of the river, unless its terms clearly denote an intention to stop at the margin The same principle is applicable here as to highways. Thus it has been held, that where a piece of land adjoining a highway, is conveyed by general words, the presumption of law is, that the soil of the highway, *usque ad medium filum*, passes by the conveyance, even though there is a plan annexed which would appear to exclude it: *Berridge* v. *Ward*, 10 C. B., N. S. 400; *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. 497. See also *Reg.* v. *The Board of Works, Strand*, 4 B. & S. 526. We think the intention of the Crown was, that the lake should be one of the boundaries of the plaintiff's grant, and that the words "bank or edge" were intended to express the same thing, and that they mean the margin of the lake—thus extending the grant down to the water's edge, and not leaving a strip of ungranted land or beach between the margin of the lake and the top of the bank where the highland commenced. The words "edge" and "margin" are synonomous terms, and therefore we think the words of the grant cannot be satisfied unless it is extended to the margin of the lake.

This involves another question—whether the plaintiff's grant is limited to the margin of the lake as it existed at the date of the grant, or whether it will also include any land formed in front by gradual and imperceptible accretion? In Angell on Watercourses, sec. 59, it is said that "if a navigable lake recede gradually and insensibly, the derelict land belongs to the adjacent riparian proprietors." The learned judge's direction to the jury was in accordance with that rule.

Then as to the effect of the defendant's grant. Whatever doubt, if any, there might be as to what would be conveyed by the word "lake" in a grant, the subsequent words of the grant in this case, whereby the mines and minerals are excepted, evidence a clear intention, on the part of the Crown, to convey the soil of the lake to the defendant.

Whether the place where the assault was committed was the defendant's land or not, the assault, or at least a part of it, was entirely unjustified according to the defendant's own account of it; therefore the plaintiff would be entitled to retain the verdict for the damages assessed on the third count; but unless he consents to confine the verdict to that count, we think there ought to be a new trial.—*American Law Register.*

ENGLISH REPORTS.

COMMON PLEAS.

Bechervaise v. The Great Western Railway Company.

Practice—Interrogatories—17 & 18 Vict. c. 125, s. 51.

In an action against a railway company to recover damages for personal injuries sustained by a passenger in consequence of an accident occurring to the train in which he was travelling, the Court disallowed interrogatories, asking the defendants whether what the train had come into collision with, was under their care; the application for leave to administer the interrogatories being made before declaration, and without any special affidavit showing the necessary relevancy of the information sought.

[19 W. R. 229.]

The plaintiff, before declaring, applied to Byles, J., at chambers, for leave to administer interrogatories to the defendants, on an affidavit which simply stated that he sued to recover damages for injuries sustained while travelling on the defendants' railway, through the negligence of the defendants' servants. Byles, J., allowed part of the interrogatories only.

Michael now moved to vary the order of Byles, J., by rescinding so much of it as disallowed the interrogatories in question, on the following affidavit of the plaintiff:—

1. "On Nov. 25, 1869, being at Great Malvern, I paid the fare to an official of the Great Western Railway Company for, and obtained a ticket entitling me to travel as a third-class passenger from Great Malvern to New Milford, in the county of Pembroke.

2. "I took my seat in a third-class railway carriage, forming part of a train belonging to the Great Western Railway Company, and which left Great Malvern at or about 6.34 in the evening.

3. "The train, proceeding on its way, arrived at Hereford at or about 7.20 p. m.

4. "The train left Hereford at about half-past seven p. m., and, shortly after leaving the station at Hereford, came into violent collision with something; but, owing to the darkness of the evening and great confusion prevailed, I was and am totally unable to state what it was the train came into collision with.

"I am advised and believe I shall obtain material benefit in this cause by ascertaining by means of interrogatories with what the train so came into collision."

The interrogatories sought to be administered were as follows:—

1. "Were the defendants on the 25th November, 1867, carriers of passengers, and as such did they profess to carry, or were they in the

practice of carrying passengers from Great Malvern Station to the New Milford Station?

2. "Did a train of the defendants on the 25th of November, 1869, leave the said Great Malvern Station to go the New Milford Station, at or after 6.34 p.m., by which a passenger whom the defendants as carriers of passengers had agreed to carry to New Milford Station might start on his journey from Great Malvern Station to New Milford Station, and if no such train started at 6.34., at what time on that day, after that hour did the first train leave Great Malvern Station by which such passenger could start as aforesaid on the said journey?

3. "If a passenger started from Great Malvern Station by that train, would he have been carried by the defendants to Hereford on the said journey to New Milford Station, and, if yea, by what train would he have been carried by the defendants on his said journey from Hereford towards New Milford Station, if he proceeded onward from Hereford as soon as practicable?

4. "Did any collision or other and what accident occur to the last mentioned train, on this said journey from Hereford, shortly after it left the defendants' Hereford Station, and before it reached any other station of the defendants?

5. "If you say that there was a collision, what was it that the said train in which the plaintiff was a passenger came into collision with? Were the defendants possessed thereof? Was it under the care of themselves, or one or more of their servants? Was it on the same rails with the same train? Was it standing still, or moving? If moving, was it moving towards Hereford, or in the opposite direction? How came it to be on the rails there? If there was any other cause of the collision, or other accident beyond what you have stated, what was it?

6. "Was or were any person or any persons injured in the said accident? If yea, what are their names and addresses?

7. "Was the railway at Great Malvern on the 25th of November, 1869, the defendants' railway? Was it then worked by the defendants, or by the defendants and any other and what company?

8. "Have the defendants ever had in their possession or control any and what report, or reports, letter, or letters, writing or writings, memorandum, or memoranda, entry, or entries, receipt, or receipts, document, or documents, relating to the matters in dispute in this action, or any of them? If, yea, which of them are now in the defendants' possession or control? And have the defendants any, and what, objection to produce any, and which, of them? And what do you know as to the possession or control of the others of them since they were last in in the defendant's possession or control? If any of them have been lost or destroyed what do you know of their contents so far as they relate to the matters in dispute?

The interrogatories which had been disallowed were the 5th (with the exception of the first sentence ending "collision with"), the 6th, and the 7th.

The following cases were referred to:—*Atkinson* v. *Fosbroke*, 14 W. R. 832, 35 L. J. Q. B. 182, L. R. 1 Q. B. 628; *Bayley* v. *Griffiths*, 10 W. R. 798, 31 L. J. Ex. 477.

Willis, J.—It is not enough for a party applying for leave to interrogate to show that the matter of the interrogatories is relevant to some possible issue in the cause. In framing the second Common Law Procedure Act the practice of the Court of Chancery was purposely avoided; and the discretion of the judge was interposed for the sake of avoiding costs. It is for the judge to determine at what stage of the cause discovery should be allowed. The discovery of a matter which is relevant when issue has been joined might be sought at an earlier period for heaping up expenses against the other party, and especially might this be the case in actions against railway companies. The judge at chambers therefore, must look closely at the circumstances under which the application for interrogatories is made, and see that they are not sought to be administered for the purpose of making or increasing costs. Here, when the plea has been delivered, it will probably be seen what is the nature of the case; but at present there is no affidavit before us showing that the information asked for must be relevant. If we were to do what we are now asked, a judge at chambers would in all cases feel himself bound to admit interrogatories against a railway company on the common affidavit. I think Byles, J., exercised a wise discretion.

Byles and Keating, J.J., concurred.

Rule refused.

EXCHEQUER CHAMBER.

(Appeal from the Common Pleas.)

Smith v. The London and South Western Railway Company.

Railway company—Negligence—Evidence for jury.

A railway company's servants, having cut the grass on the banks of the line, left it there fourteen days during extremely hot and dry weather. Soon after the passing of a train a fire broke out in one of the heaps of cut grass; it then extended up the bank to the hedge, and from the hedge to a stubble field, across the stubble field and an intervening road to the plaintiff's cottage. An unusually high wind was blowing at the time. The cottage was situated 500 yards from where the fire broke out.

Held (confirming the decision of the Common Pleas), that there was evidence of negligence (Blackburn, J., *dubitante*), and that if there was negligence it was no answer for the company to say that the damage was greater than could be anticipated.

[19 W. R. 230.]

This was an appeal brought by the defendant against the decision of the Court of Common Pleas, discharging a rule obtained by him to set aside the verdict for the plaintiff, on the ground that there was in evidence to go to the jury of any liability on the part of the defendant.

The pleadings and facts, together with the cases cited, are more fully set out in 18 W. R. 343.

The declaration stated that, by the negligence of the company in the management of their engines, and by heaping hedge trimmings on the banks, a fire was occasioned, which destroyed the plaintiff's cottages.

At the trial it was proved that next to the company's line of rails there was a green bank; that a hedge separated this bank from a stubble

field; that the plaintiff's cottages were situated across the field, 200 yards from the line, and were separated from the field by a lane; that the company's servants had the trimming the hedges along the line, and the tufts of grass of the banks and the trimmings had been left lying on the banks for a fortnight. The weather had been exceptionally hot and dry for some time, so that the little heaps became highly inflammable. About a quarter to one workmen were seen sitting on the bank, near the spot where the fire broke, but on the opposite side of the line, eating their dinner, and one of them was smoking a pipe. Shortly after a train was seen seen to pass; a fire broke out on, or close to, one of these heaps on the bank; it spread in two directions; the workmen and others succeeded in putting it out in one direction, but a high wind blowing at the time, the fire burnt through the hedge into the field, then ran up the stubble field across the road to the cottages, which were 500 yards from the place where the fire broke out, in spite of the exertions of the workmen. The cottages were destroyed.

The plaintiff did not call the company's servants as witnesses.

At the close of the plaintiff's case, it was submitted there was no evidences to go to the jury.

A verdict was taken by consent for £30, leave to move being allowed to the defendant.

Kingdon, Q. C. (*March* with him), for the appellants (defendants below).—There is no evidence to show that the fire originated in the heaps, or that it was caused by sparks from the engine which passed a few minutes before. Some men had been seen near the shortly before, and about half an hour previous one of them was smoking a pipe on the bank. The plaintiff might have called these men, but refused to do so. The fire might have been caused by a passenger throwing a fusee out of the carriage window. There is no evidence at what point the fire broke out. The bank itself was in a proper condition, the grass having been cut about three weeks previously. If, therefore, the fire originated in the short grass, on account of the unusual dryness of the season, and the extraordinary high wind blowing it to the plaintiff's house, there was no negligence. [Bramwell, B.—If, to suit the company's convenience, the heaps were left on the bank, and the plaintiff was injured by it, why should not the company pay? If the company had spread gravel over the grass, the fire could not have happened. They had sufficient notice to have taken proper precautions.]

Cole, Q. C.—If there was any evidence at all of negligence, the verdict is good.

Kelly, C. B.—I had some doubt at first, but on careful consideration of the facts I cannot but feel that there was evidence of negligence by the company to go to the jury, and evidence of negligence which was the cause of injury. It appears that soon after a train had passed the spot in question, which was drawn by an engine emitting sparks, a fire broke out on the adjacent land. It was a very dry season, and the defendants had cut the grass on the banks of the railway about a fortnight before, probably with a view to prevent fires taking place. Besides that, the company had trimmed the hedge which separated the railway bank from a field. The trimmings and cut grass, which were called rummage, were placed in little heaps on the railway bank, and had been lying there during a fortnight preceding the fire. On the other side of the hedge was a stubble field, which was also in a very inflammable state, on account of the dryness of the weather. Shortly after a train passing, a fire broke out at, or near, one of these heaps. It ran up the bank, burnt the hedge, ran across a stubble field, and reached the plaintiff's property, which was 500 yards from the spot where the fire broke out, and 200 yards from the railway in the most direct line. There is no distinct evidence what was the cause of the fire, or what took place immediately it occurred, for the persons who might have known how it originated were not called. But there was no doubt that it originated on the railway bank, and ran across the stubble field, and destroyed the plaintiff's property. Now, the only question is, if there was any evidence of negligence to go to the the jury, or on which, if they had returned a verdict, it would have been sustained. If the jury had proved that the fire had originated in the heaps, which had been caused by sparks coming from the engine and blown on to the heaps by the high wind at the time, and then spread to the plaintiff's property in the way described, could that verdict have been sustained? I think there was evidence that it originated in the heaps, and if that were so, the defendants are responsible. The defendants were bound to remove the heaps, knowing that the summer was exceptionally hot; knowing that engines passed along their lines which they could not prevent emitting sparks; and knowing that there was nothing more probable than that sparks might fall on the grass and the heaps, and set fire to them; and that such a fire might be communicated to the adjoining property. Having cut the hedge and grass, probably with the intention of preventing fires, I think they were guilty of negligence in not removing the trimmings when cut, for it might have been foreseen that it was probable that when the heaps caught fire it might spread to the stubble field. As to the observation made by Justice Brett, that no person would reasonably anticipate that there would be an unusually high wind, so that the fire would run from the materials on the banks for some hundred yards across a stubble field and lane, I quite agree with that; but that is not the true test of the defendant's liability.

But I think the law is, as they were aware that the heaps had been lying on the ground during an exceptionally hot and dry summer, and it was probable that the engines which emitted sparks would set them on fire, they were bound to protect the neighbouring property against the consequences of such probable fire, and that they were therefore bound to remove the cuttings as soon as the hedge was cut; and as they did not do so they are liable for all the natural consequences from the cuttings catching fire. The mere accident of the plaintiff's house being situated 500 yards distance from where the fire occurred does not alter the company's liability.

Martin, B.—I am of the same opinion, there was evidence of negligence to go to the jury.

[His Lordship, after stating the facts, said—] Had the fire come to the plaintiff's house through the negligence of the defendants? It think it had. There were heaps of dry rummage on the bank: directly after one of the company's engines passed, which emitted sparks, the heaps were on fire, and the fire spread to the plaintiff's house. There is, therefore, evidence that the fire originated in that way. The circumstance of the house being distant 500 yards has nothing to do with that. I consider that the sparks falling on the heap was the cause of the fire.

Channel, B.—The only question here is whether there was any evidence to show that the fire originated from a spark falling on the heaps. I think there was. As I think that is so, it is no excuse for the company to say that the damage was greater than they anticipated.

Blackburn, J.—I agree with the judgment of Channell, B. If I alone had to decide this matter I should require before giving judgment to have some doubts removed. I think, however, that there was evidence to go to the jury. I guard myself however from saying that such a verdict might not be set aside, since, in the case of *Vaughan* v. *Taff Vale Railway Company*, 8 W. R. 549, it was decided that a railway company are not responsible for an accidental fire caused by a spark falling from one of their engines upon premises adjoining the railway, if they have taken every precaution that science has suggested to prevent injury. But it was held that they were liable if they were guilty of some negligence in fact. But negligence cannot be implied from the mere employment of locomotive engines, as the use of them is permitted by the Legislature.

I agree entirely with that, and that the company has a duty cast on them to use all reasonable care to prevent any fire arising from the use of the engines. But is there any evidence here that the company unintentionally omitted to do that which a reasonable person would have done? To answer that question, we must look at what a reasonable man might anticipate or expect. Could any man giving a reasonable consideration as would regulate reasonable men under the circumstances, have anticipated that the fire would have spread beyond the fence. I have no doubt that if a railway company were to strew the banks with dry grass in a highly inflammable condition, and that there was no boundary to their property, by wall or otherwise, and that a spark from an engine set the grass on fire, and that highly inflammable property was situated next to their property, and that the fire destroyed the neighbouring property, that the company would be guilty of negligence. My doubt, however, is, without having more carefully considered the evidence, whether the fire was caused by the burning of the rummage, or whether it was not caused by the hedge, on account of the dryness of the season, being highly inflammable, catching fire. If the hedge had been green, as it usually is, it would have prevented the fire extending beyond the company's premises. What caused the damage, therefore, was, I rather think, the unusual state of the hedge. It is here that I doubt whether there was any evidence or negligence, or that the company would reasonably anticipate that damage would arise from the grass burning. When the line was made the company could anticipate that the grass would catch fire, but then in ordinary weather they would anticipate that the fire would not reach beyond the hedge. If there had been a stone wall in the place of the fence the fire would not have occurred. I hardly think that during this seven weeks of dry weather the company was guilty of negligence in not removing the hedge and building a stone wall.

I quite agree with Channel, B., that when once the company had set fire negligently to the adjoining premises it is no answer to say that the damage was greater than could reasonably be expected. If a person accidentally injures another he must pay for the injury, according to the position of the party injured. If a railway company negligently kills a passenger, they might be bound to pay one million; and it would be no answer to say that they expected poor and not rich people to travel by the train.

Pigott, B.—I have no doubt in this case. I agree with the judgment of Keating, J., in the court below, and by whom the case was tried. There was some evidence of negligence considering the extraordinary dryness of the season, and the fact that the company knew that the engines must nessarily emit sparks. I think they were guilty of negligence in leaving heaps of rummage on the banks until they became highly inflammable. It was a question for the jury if the fire arose in that way. I think there was evidence from which they might fairly conclude that it did When the fire once reached the field it spread in two directions; it was stopped in one direction, and it ran across the field towards the plaintiff's house in the other direction. Nothing, I think, happened but what the company might reasonably anticipate from leaving the heaps on the bank.

Lush, J.—The fire arose from sparks sitting fire to the heaps, the dryness of the season and the wind caused it to spread to the hedge. The more likely that the banks and heaps of cuttings were to catch fire, the more careful the company ought to have been in taking precautions against such an accident.

Bramwell, B., concurred.

PROBATE.

Crickett v. Field (Williams & Makepeace *Intervening*.)

Lost Codicil—Proof of factum and execution.

In propounding a copy of a lost codicil, it was proved by A. & B. that such a paper had existed, and by C. & D., the alleged attesting witnesses, that they had signed some paper for the deceased, but were unable to say whether it was testamentary or not. The Court held that in the absence of proof identifying the paper known to A. & B., with that signed by C. & D., there was not sufficient proof of the *factum* and execution of the codicil, and refused probate.

[19 W. R. 232.]

Charles Lane Crickett, late of Regent-square, Gray's-inn-road, died on 16th of October, 1869. His surviving issue consisted of one son, Charles Tomkins Crickett, and two daughters, Mrs. Field

and Mrs. Makepeace. Two duly executed testamentary papers were found at different times in the depositaries of the deceased: the one being a will dated the 5th of March, 1862, which was prepounded by Charles Tomkins Crickett, the plaiutiff, and the other being a codicil, dated the 31st of May, 1869, which was prepounded by Mrs. Field, the defendant. Subsequently, in June, 1870, Charles Williams, as the duly elected guardian of his son, Charles Crickett Williams, a godson of the testator, obtained the leave of the Court to intervene for the purpose of propounding a memorandum of the contents of a lost codicil, dated the 25th of December, 1863, by which certain bequest made by the will of 1862, in favour of Mrs Makepeace, were revoked, and diverted to the benefit of the son of the intervener, Mrs. Williams. In consequence of this intervention, Mrs. Makepeace and her husband, in their turn, obtained leave to intervene, and pleaded, in opposition to the codicil propounded by Mr. Williams, non-execution and revocation; the plaintiff also pleaded revocation for the same purpose. No alteration of the bequests made to Mrs. Makepeace in the will of 1862, was made in the codicil of 1867.

The cause came on for trial before Lord Penzance, on the 16th of November, the sole question for decision being whether the memorandum of the codicil of 1863 was or was not entitled to probate. On the part of the intervener Williams, it was proved that in 1864 the codicil was shown and read to him by the testator, and that, having thereupon made a note of the disposing part of it, he was now able to swear to its agreement so far with the memorandum before the Court. He had been an intimate friend of the testator. At the time the codicil of 1863 was made, Mrs. Makepeace had, by her conduct, rendered her father extremely dissatisfied with her. It was further proved that the testator's solicitor saw the codicil of 1863 when the codicil of 1867 was executed, and that the two codicils, together with the will of 1862, were then taken in his own custody by the testator, at whose request three other intervening codicils were at the same time destroyed.

The persons alleged to have attested the codicil were Miss Todhunter, the testator's amanuensis, and Harriet Wright, one of his domestics. Miss Todhunter deposed that she had signed, at various time, a considerable number of documents for the testator; and that on one occasion Harriet Wright had signed a paper in her presence. She was however unable to recollect having attested this codicil in particular. Harriet Wright, on the other hand, had only signed one paper for the testator, and she recollected that it was done on a Sunday (the 25th of December, 1863, fell on a Sunday). She was quite unable to say whether the testator had or had not signed the paper before her.

Dr. Swabey (*Searle* with him), for the plaintiff.

Pritchard for the defendant.

H. James, Q. C., (*Bayford* with him), for the intervener Williams.

Denman, Q. C. (*Inderwick* with him; Makepeace, submitted that there was no satisfactory evidence of the existence of the codicil of 1863.

Lord Penzance.—It has always been the practice of this Court to admit proof of the copies of the lost wills, but it has also invariably required that there should be sufficient proof of the *factum* of the instrument, the *onus* of proving its execution and contents being cast on those setting it up. In the present case, I am of opinion that there is not proof sufficient to meet the requirements of the Court.

One witness remembered that she went into a room and signed her name to a paper for the testator, but she was unable to give us any information from which we might gather what the nature of that paper was; it may have been any legal paper requiring signature. The other witness said she had, at different times, executed a great number of papers for the deceased, and her only evidence calculated to assist in identifying the paper signed by the other witness, was her statement that she recollected the servant being called into the room on one occasion, for the purpose of signing a paper in their presence. But this cannot be held to show that this paper was the paper in question, or that it was of a testamentary character. Then, again, as to identity, it is said that Mr. Williams and the testator's solicitor saw the codicil, and that they recollected it to have been attested by two women. Mr. Williams also recollects the name of one of its attesting witnesses to have been Miss Todhunter, but not that of the other.

It seems to me on these facts, that there is not a sufficiency of proof that the paper which the two men saw, was the same as that which had been witnessed by the two women, and that the proofs required by the Court have not been supplied; I must therefore pronounce against the codicil of 1863, and only hold the other two papers to be entitled to probate.

CHANCERY.

Prichard v. Prichard.

Will—Bequest—Words—"Principal money"—General personal estate.

In a very short will the testator gave the income of his "principal money" to his wife, for the support of herself and the education of his children, and at her death, or on her marriage, to be divided between them, and made no other disposition of his property. He died entitled to some real estate, and of personal property worth £40,000, consisting chiefly of the value of his shares in two businesses, but including certain leaseholds.

Held, that the words "principal money" included his whole personal estate, but not the pure realty.

[19 W. R. 226.]

This was a motion for a decree in a suit instituted by the executor of the will of Charles Henry Pritchard, to have it declared what was included in a bequest of the testator's "principal money."

The will was as follows:—

"This is the last will and testiment of me, Charles Henry Pritchard. I appoint Thomas Henry Pritchard to be my executor, and I desire that the income arising from the principal money shall be paid to my wife while unmarried for the support of herself and the education of my children, and at her death or on her marriage to be divided among them, and I desire that my

sisters Charlotte and Jennette, who have so long had the charge of my mother, and have so well learned how to secure her comforts should still continue to have care of her. As witness my hand this twenty-seventh day of June, 1864."

The testator died seized of real estate worth two or three thousand pounds, but mortgaged to nearly its full value, and personal estate worth about £40,000, which might be classed as follows: (1) The testator's shares in two businesses carried on by him in partnership, which, under provisions in the partnership deeds, were in each case to be taken by the surviving partner at a valuation and paid for by instalments, and which had been valued at £36,657 13s. 8d. respectively. (2) Certain leasehold premises valued at £268. (3) Furniture, &c., valued at £2,976 16s. (4) Shares in public companies valued at £65. (5) Cash at the bankers, £239 5s. 4d.; and (6) debts to the amount of £340.

It was admitted at the bar that the real estate could not pass by the will.

Ince, for the plaintiff, the executor.

Glasse, *Q. C.* (*Bird* with him), for the testator's widow.—Unless these is some explanatory context money means only cash, and money at the bankers: 1 Jarm. on Wills 3rd edit. p. 731. *Lowe* v. *Thomas*, 2 W. R. 499, 5 D. M. & G. 315 is in point. The value of the business is not money, though it will come to the testator's estate as money: *Manning* v. *Purcell*, 3 W. R. 273, 7 D. M. & G. 55.

W. Cooper, for the heir-at-law.

Cole, *Q. C.*, and *Sargant*, for the testator's children, were not called upon.

Malins, V. C., said the rule to be applied in interpreting the will was to ascertain the intention of the testator. The word money often meant money in the house, or at the bankers' only. If the testator gave his "ready money" or his "money" in such a manner as to distinguish it from his other property, money in the strict sense alone passed. Such was the case of *Manning* v. *Purcell*, where there was a residuary gift; and here, if there had been a residuary gift, money only would have passed. If the words were not restricted to mean the testator's money in the house and at the bankers only, they must be taken to mean his general personal property, and the question was between these two interpretations. Now it appeared the testator had very little money in the strict sense, and £40,000 worth of personal property. Under these circumstances, having a wife and six children to be provided for, he made a universal disposition of his property in these general words. [His Honour then read the will.]

By this will he intends to provide for his wife, and his children are to be educated out of the income. If he had said "estate," "property," or "effects," all his personal property would have passed, but he had used the words "principal money." What he meant was "principal" or "capital," and in using the word "money" he must have meant money or money's worth. The wife would therefore take the income of his whole personal estate, and after her death or second marriage it would go to his children.

The rule of this Court for a very long time had been that money might mean general property, or money in the strict sense of the word, and the only case against it was *Lowe* v. *Thomas*, which, in some respects, looked very much in Mr. Glasse's favor. He must confess he could not understand that case, and he should himself have considered that the words there carried the general estate, though he was, of course, bound to follow the decision. But in that case other property, as distinct from money, was given, and here the gift was a general disposition unaccompanied by any other gift.

As to the real estate, he thought the testator meant to include that also, but the Court always favoured the heir, and there were no words applicable to real estate. The same favour was not shown to the next of kin as to leaseholds, and he therefore decided, though not with so much confidence as he did with respect to the other personal estate, that the leaseholds also passed by the will.

Seaton v. Twyford.

Mortgagor and mortgagee—Principal not to be called in for a term—Default in payment of interest—Execution not stayed.

Where default having been made in payment of interest, a mortgagee has recovered judgment for the amount of the principal and interest, and a bill is filed to restrain execution and for specific performance, on the ground that the mortgage deed is not in accordance with the terms of a previous agreement, which provided that the principal should not be called in for a term still unexpired, an injunction will be refused except on the terms of the amount recovered being paid into court, since, if a clause in accordance with that provision in the agreement had been inserted in the deed, it would, as a matter of course, have made the not calling in of the principal conditional on the punctual payment of interest.

[19 W. R. 200.]

This was a motion to restrain the defendant Simson from proceeding to issue execution under a judgment recovered by him under the following circumstances:—

At the date of the agreement hereafter mentioned, the defendant, A. S. Twyford, was owner of a leasehold cottage and premises at Wimbledon, held by him on a lease for twenty-eight years from the 25th of December, 1863. By an agreement dated the 24th of April, 1868, the plaintiff agreed to purchase this cottage at the price of £500, and to take an assignment of the lease, and the defendant Twyford agreed to advance £400, part of the purchase money, on mortgage of the premises, and further agreed that this sum of £400 should not be called in for five years, though the plaintiff was to have the option of paying off the same at any time on giving six months' notice.

By deed, dated the 9th of May, 1868, the premises were accordingly assigned to the plaintiff for the remainder of the term; and by another deed of the same date, made between the plaintiff of the one part and the defendant Simson of the other part, the plaintiff, in consideration of £400, then paid by Simson to Twyford, morgaged the same premises to Simson, the deed containing the usual covenant for payment of the principal within six months, and for payment of interest every 25th of March and every 29th of September, until the principal should be paid, and providing that, in case of default, the mortgagee might enter and take possession, but

containing no provision that the principal should not be called in for five years.

On the 12th of August, 1870, default having been made in paying the interest due on the previous 25th of March, Simson issued a writ against the plaintiff, claiming £409 15s. 10d. for principal and interest then due, and £2 15s. for costs; and on the 17th of November, 1870, judgment was given in his favour for those amounts. On the 1st of December, 1870, the plaintiff filed his bill against Twyford and Simson, praying that Simson might be restrained from issuing execution; that Twyford might be decreed to specifically perform the agreement of the 24th of April, 1868, and that, if necessary, the mortgage deed might be rectified.

On the part of the plaintiff it was contended that the defendant Twyford had acted as his solicitor in all these transactions, and was bound consequently to see that the mortgage deed contained the stipulation agreed upon, that the principal money should not be called in for five years. The plaintiff further alleged that he had executed the deed without any perusal or explanation of its contents. On this point there was a direct conflict of testimony.

It appeared from the evidence that, besides failing to pay the interest punctually, the plaintiff had neglected to pay the ground-rent due to the superior landlord until great pressure had been put upon him.

Willcock, Q. C., and *Terrell*, for the plaintiff.—The defendant Twyford was plainly the solicitor of the plaintiff, and bound to protect his interests. The action was founded on a covenant which ought not to have been introduced into the mortgage deed. As the judgment ought never to have been obtained, it is not incumbent on the plaintiff to pay the amount recovered into court.

Kay, Q. C., and *E. T. Holland*, for the defendant.—Supposing that the clause contended for had been inserted, it would, of course, have been in the usual form, which provides that, if the mortgagor makes no default in paying interest, the mortgagee will not call in the money for a certain period: Davidson's Precedents, vol. 2, pt. 2, p. 539. Here default has been made, so that the mortgagee can no longer be restricted in the exercise of his rights. See *Edwards* v. *Martin*, 4 W. R. 219, 25 L. J. Ch. 284; *Burrowes* v. *Molloy*, 2 Jo. & Lat. 521; *Ex parte Rignold*, 3 Deac. 151. Again, this defence should have been pleaded in the action as an equitable plea; also the plaintiff has been guilty of delay in filing his bill.

Willcock, in reply.—An equitable plea cannot stand unless the court of law can work out all the equity, connected with the case: Kerr on Injunctions, p. 27. As to the defendant to an action pleading an equitable plea thereto, and its effect on his right to an injunction to restrain that action, see *Waterlow* v. *Bacon*, 14 W. R. 855, L. R. 2 Eq. 514.

Bacon, V.C., said that he regretted the conflict of evidence, but that, in his view, it would not be necessary for him to decide which evidence was the more credible. His decision turned on the terms of the agreement. A mortgage had been executed; an action had been brought, and judgment recovered for the principal and interest due on that mortgage security; and a bill had been filed to restrain the mortgagee from issuing execution and to enforce specific performance of the agreement. Assuming that the plaintiff was entitled to specific performance, and that, under a decree to that effect, a reference had been made to chambers to settle the mortgage deed in accordance with the agreement, the deed, as so settled, would of course have been in the usual form, and the stipulation that the principal money should not be called in for five years would have been worded in such a way as only to bind the mortgagee so long as the mortgagor punctually paid the interest. No cases were required to prove that the failure of a mortgagor to observe his covenants would release the mortgagee from restrictions which were conditional on the observance of those convenants. This was a very strong case. The security was a small house, held for a short term, and subject to a heavy ground rent. The safety of the mortgagee required punctual payment of the interest. According to the argument at the bar, the mortgagee was to be utterly at the mercy of the mortgagor, who might at any time fail to pay the ground rent, and cause the forfeiture of the lease. Had there been a decree for specific performance, no such provision as that could have been inserted in the deed. It seemed to him that the facts, appearing in this suit, might have been pleaded as an equitable plea to the action; and, though there was great weight in the argument that possibly a court of law could not on that plea work the complete justice sought to be obtained by the bill, yet he was clearly of of opinion that in that case the plaintiff ought at least to have filed his bill earlier. No injunction would be granted except on the terms of the plaintiff paying into court the whole amount which had been recovered on the judgment.

IRISH REPORTS.

COMMON PLEAS.

McMahon v. Irish North Western Railway Company.

Jurisdiction of Civil Bill Court—Costs—Common Law Procedure Act, 1856 (Ireland) (19 & 20 Vic., c. 102), s. 97—"Reside"—Railway Company—"Cause of action."

Section 97 of the Common Law Procedure Act, 1856 (Ireland), enacts that "if in any action of contract . . . where the parties reside within the jurisdiction of the civil bill court of the county in which the cause of action has arisen the plaintiff shall recover less than £20," he shall not be entitled to costs.

Held, that a railway company "resides" in every county in which it has a ticket office.

Held further, that "cause of action" means "entire cause of action," and therefore, where a contract made in county C. was broken in county M., in which the plaintiff and defendant resided, that the cause of action did not arise in county M. within the meaning of section 97 of Common Law Procedure Act (Ireland) 1856

[19 W. R 212.]

Motion by way of appeal from the taxation of costs in this suit, that the taxation of plaintiff's costs might be reviewed, and that plaintiff might be disallowed any costs of the proceedings in this cause. The action was brought in the Court

of Common Pleas upon a contract made in the county of Cavan, and broken in the county of Monahan, in which the plaintiff resided, and where the defendants had a ticket office. At the trial the jury returned a verdict for the plaintiff for £50, which was subsequently reduced by the court to one shilling.

Walter Boyd, in support of the motion.—There are two questions in this case, both of which depend on the construction of section 97 of the Common Law Procedure Act, 1857.* First, do the parties "reside" with the same civil bill jurisdiction? Secondly, did the "cause of action" arise in the County of Monahan? As to the first, the plaintiff admittedly resides in the county of Monahan. The defendants had a ticket office in that county, which is a sufficient residence for the purposes of the section: *Evans* v. *Great Southern and Western Railway Company*, 5 Ir. Jur. O. S. 329. Secondly, "cause of action" means that which gives the plaintiff a right to be in court, *i. e.*, the breach which took place in the county Monahan: *Betham* v. *Fernie*, 4 Ir. C. L. 92; *Powell* v. *Atlantic Steam Packet Company*. 10 I. C. L. L. App. xiii.; *Aston* v. *London & North Western Railway Company*, 15 W. R. 694, I. R. 1 C. L. 604; *Jackson* v. *Spittal*, 18 W. R. 1162, L. R. 5 C. P. 542. *Sichel* v. *Borch*, 12 W. R. 348, 2 H. & C. 954, was decided on the grounds that defendant was a foreigner, and Pigott, B., expressed doubts though he acquiesced in the decision. In *Crowder* v. *Irish North Western Railway Company*, I. R. 4 C. L. 371, no judgment was given.†

Purcell, Q. C., and *Wilson*, opposed the motion.—A railway company resides where it carries on its business, but that is its general business: *In re Brown* v. *London & North Western Railway Company*, 11 W. R. 884, 4 B. & S. 326; *Shiels* v. *Great Northern Railway Company*, 9 W. R. 739, 30 L. J. 331; Shelford's Law on Railways, 14. Cause of action means entire cause of action. *Hurley* v. *Lawlor*, 6 Ir. Jur. 344; *Hernaman* v. *Smith*, 3 W. R., 208, 10 Ex. 659; *Borthwick* v. *Walton*, 3 W. R. 203, 15 C. B. 501; *Aris* v. *Orchard*, 9 W. R. 106, 6 H. & N. 160.

Walter Boyd, in reply,

Cur. adv. vult.

Monahan, C. J. (after stating the manner in which the case came before the court.)—The question we have to determine is whether the plaintiff is entitled to any costs. It is necessary to ask whether the plaintiff reside within the jurisdiction of the civil bill court in which the cause of action has arisen. First, as to residence, the plaintiff does, no doubt, reside within the jurisdiction. Does the railway company do so? The question has arisen, and been decided many years since, whether a railway company resides where it has a ticket office. In the Civil Bill Act of 1851 (14 & 15 Vict. c. 57) there is a precisely similiar section to this. The question first arose in the Court of Exchequer in *Evans* v. *Great Southern Railway Company*, 5 Ir. Jur. 329. In that case the question arose on the Act of 1851. It was there decided that the railway company having ticket-offices upon the line within the county, had a sufficient residence there within the terms of the Act to enable the plaintiff to have proceeded against by civil bill within that county. A question arose whether this decision would apply under the Common Law Procedure Act of 1856 in a case in this court, *D'Arcy* v. *Hastings*, 10 Ir. C. L. App. xxiv. It was there held that the new section must have the same construction as that of the former Act. There has been a more recent case in the Court of Exchequer, where it was admitted that the parties resided within the same jurisdiction, the only question being whether the cause of action arose in that jurisdiction: *Enright* v. *Kavanagh*, 15 I. C. L. 142. The uniform course has therefore been such as has been stated. But it was argued that the decisions were different in England: and *In Re Brown* v. *London & North Western Railway Company*, 4 B. & S. 326, was cited. The words of the English Act are different (9 & 10 Vict. c. 95.) Therefore we adhere to the uniform course, and hold that the company, having a ticket-office in the county of Monahan, have a sufficient residence within the meaning of the section.

But what is necessary in order that the cause of action should be considered as arising in the civil bill jurisdiction? It is sufficient that the breach should be committed there? This question arose in *Hurly* v. *Lawler*, 6 Ir. Jur. 344. This was an action for maliciously suing out a judge's fiat, and was decided on the ground that the entire cause of action should arise within the jurisdiction in order to entitle the plaintiff to costs. That case had been followed since in this country in *Crowder* v. *Irish North Western Railway Company*, Ir. R. 4 C. L. 371. It was objected that the judges gave no reasons for their decision in this case.* They did decide the case, and it is an express decision upon the point. We say that the decision is right. In England it has been held that in order in serve a process without the jurisdiction it is only necessary that part of the cause of action should accrue within the jurisdiction. In *Jackson* v. *Spittall*, 18 W. R. 1162, L. R. 5 C. P. 542, this very question was considered in an elaborate judgment. It was decided on this ground, that the Common Law Procedure Act is not an Act giving jurisdiction to the Court. The Court has inherent jurisdiction. The Act merely relates to practice and procedure, and therefore ought to get a liberal construction to bring such cases within its jurisdiction. But the civil bill courts got their jurisdiction from Act of Parliament. Therefore we think this case is distinguishable, and we will hold to a number of decided cases in refusing this application.

Morris & Lawson, J. J., concurred.

No rule.

* See note *ante*.

Section 97 of 19 & 20 Vict., c. 102, enacts that, "If in any action of contract . . . in the superior courts . . . where the parties reside within the jurisdiction of the civil bill court of the county in which the cause of action has arisen, the plaintiff shall recover . . . less than £20 . . . the plaintiff shall not be entitled to any costs unless the judge certify," &c., &c.

† The judgments in *Crowder* v. *Irish North Western Railway Company* are to be found in the report of the case in 17 W. R. 804. The judgments are not given in the report of the case in I. R. 4 C. L. 371.

UNITED STATES REPORTS.

Before U. S. Commissioner George Gorham, Esq.

Reported for the *Law Journal* by F. W. Macdonald, Esq., Barrister-at-Law.

In the matter of the Application of the Canadian Government for the Extradition of Thos. Primrose, a fugitive from justice.

Extradition—Robbery—Holding accused without process—Proceedings before U. S. Commissioner—Questions of fact for jury—Reasonable and probable cause—Trial by foreign courts.

On the 1st day of April, 1870, at Westminster, Ontario, one John Smith was assaulted and robbed by Thomas Primrose and others. Primrose fled, and was, on the 9th day of August, 1870, arrested in Buffalo, and immediately thereafter brought before Judge Burrows, on a writ of *habeas corpus*, and his discharge asked for, on the ground that he was detained without legal process. He was, however, held under this writ until the 27th day of December, 1870, on evidence being adduced that an application was being made by the Canadian Government for his extradition; and on that day, a mandate for his examination having arrived from the President, the writ was discharged, and prisoner taken into the custody of the United States Marshal, on a warrant issued by United States Commissioner Gorham.

Certified copies of depositions taken in Canada were filed with the Commissioner, and evidence adduced *pro* and *con*.

Held by Commissioner: 1. That his duty was merely that of a committing magistrate, and that he had only to enquire whether there was probable cause to believe that the crime of robbery had been committed, and that accused committed the crime.

2. That questions of fact were the exclusive province of a jury.

3. That the fact that Primrose, if held for extradition, is to be taken away to be tried in the courts of a foreign country, ought not to influence his decision one way or the other.

4. That he had entire confidence that accused would receive a fair trial in Canada: to suppose otherwise would be unjust and discourteous.

5. That the Extradition Treaty should be construed liberally and fairly to the prisoner; and while every reasonable opportunity should be given to the foreign power seeking the benefit of the treaty, the prisoner should not be remanded for trial unless there be a *prima facie* case against him, which is not overborne by the evidence adduced on his part.

[Buffalo, U.S., Dec. 20, 28, 1870.]

The prisoner, Thomas Primrose, was charged with having, on the evening of the 1st day of April, 1870, at Westminster, county of Middlesex, Ontario, in company with others, assaulted and robbed one John Smith, and of being accessory to the murder of one John Dunn. He was arrested in Buffalo in August last; and was subsequently brought before Judge Burrows, of that city, on a writ of *habeas corpus*, and his discharge asked for, on the ground of illegal detention, no process having been issued for his arrest. But in view of an application having been made for his extradition by the Canadian Government, and evidence as to that fact being given, he was from time to time remanded to jail, to await the mandate from the President for his examination before a United States commissioner; which mandate subsequently arriving, addressed to United States Commissioner George Gorham, informations were thereupon laid before the commissioner, charging the said Thos. Primrose with the said offences of robbery and murder; and the commissioner issued his warrant, addressed to the United States Marshal, commanding him to take the said Primrose into his custody upon the said charges, and bring him before the said commissioner for examination thereon. The above facts having been made appear in a return to the said writ of *habeas corpus*, the same was thereupon discharged, and the examination of the said Thomas Primrose, upon the charge of the robbery of one John Smith, was then proceeded with before the said commissioner, counsel for claimants declining to offer evidence upon the charge of murder.

The following copies of the original information, taken before Lawrence Lawrason, Esq., police magistrate, at London, and warrant issued thereon, duly certified to be true copies by the said police magistrate, were filed with the commissioner on behalf of the claimants:

Canada, Province of Ontario, County of Middlesex. To wit. } I, Lawrence Lawrason, of the City of London, in the County of Middlesex, in the Province of Ontario, and Dominion of Canada, one of Her Majesty's Justices of the Peace in and for the said County, do hereby certify that the paper writing annexed hereto, and marked A, is a true copy of the original information or deposition, taken before me, by John Smith, on complaint against Thomas Primrose and others for the crime of robbery: and I further certify that upon the laying of such information or deposition, I did issue a warrant for the arrest of the said Thomas Primrose and others therein mentioned: and I certify that the paper writing hereto annexed, marked B, is a true copy of the warrant so issued by me as aforesaid, and that the same was duly delivered into the hands of Thaddeus VanValkenburgh, a constable for the said County, to be by him executed according to law: and I further certify that the said original information or deposition is in my possession, and that the said constable has the said original warrant. And I also certify that the annexed copies of deposition and warrant are hereby properly and legally authenticated, so as to enable them to be received in evidence, in the tribunals of Canada, of the criminality of the person charged therein of robbery.

Given under my hand, at the City of London, in the Province of Ontario, and Dominion of Canada, this 26th day of September, A.D. 1870.

(Signed) L. Lawrason,
J. P. & P. M.

and further certified by the principal diplomatic or consular officer of the United States resident in Canada, as follows:

Canada, Province of Quebec, City of Montreal. } I, William H. Calvert, of the City of Montreal, Dominion of Canada, Vice-Consul-General of the United States of America, and being the principal diplomatic or consular officer of the United States of America at present residing in Canada, do hereby certify that Lawrence Lawrason, of the City of London, in the County of Middlesex, Province of Ontario, and Dominion of Canada, Esquire, was, on the first day of April, in the year of our Lord 1870, and from that time up to the present has continued to be, and still is, a Justice of the Peace in and for the County of Middlesex, in the said Province of Ontario, and, as such Justice of the Peace, was and is duly authorized to hear all complaints of felony and misdemeanor, and take informations, and grant warrants thereon: and I do hereby further certify that he is by the laws

of Canada authorized to sign and issue such warrants as such Justice of the Peace. And I do further certify that the annexed copies of information or depositions, warrant and certificate, are properly and legally authenticated, so as to entitle them to be received in evidence, in the tribunals of Canada, of the criminality of the person charged therein of robbery. And I do further certify that the signature, L. Lawrason, to the annexed certificate, is in the proper handwriting of him the said Lawrence Lawrason.

Given under my hand and seal of office, at the City of Montreal, in the Province of Quebec, and Dominion of Canada, this fifth day of Oct. 1870.

(Signed) Wm. H. Calvert,
Vice-Consul-General.

Evidence was adduced on the part of both claimants and prisoner. On the part of the former it was proven that on the evening of the 1st day of April, 1870, one John Smith was at a tavern, kept by one Lively, at Westminster, in the county of Middlesex, Ontario, in company with a pensioner named Dunn, who had that day drawn his pension-money. The prisoner and several other persons, charged as his accomplices in the subsequent robbery, were also there, drinking with Smith and Dunn, according to Smith's evidence, who says that about half-past seven o'clock that evening he started to go out of the tavern, and was followed by the prisoner, who insisted upon seeing him (Smith) home; that after he had proceeded about three rods from the door of the tavern, he was caught from behind and pinioned; that prisoner raised his (Smith's) arm, and forced it back so as to cover his mouth, bending his head back; he says he was also struck on the head with something; his pockets were then searched, and some money and articles extracted therefrom. Upon regaining an upright position, he recognised prisoner, who still had hold of his arm. After being robbed he was allowed to go at liberty, and at once made his way to the London police station, and there stated to the chief that he had been robbed at Westminster, and was afraid Dunn would share the same fate. The chief declined interfering in the matter, as Westminster (which is divided from London by Clarke's Bridge) was not within his jurisdiction. A man named Hughes testified that he passed Lively's tavern at six o'clock on the evening in question, and saw prisoner and Smith there, as also those charged as prisoner's accomplices. The chief of the London police corroborated Smith's evidence as to the complaint made by him, and further stated that Smith, although he appeared to have been drinking, told a straight story. This, together with evidence that prisoner had not been seen in London or thereabouts since the robbery, closed the case of claimants.

The defence set up was, that Primrose was not on the Westminster side of Clarke's Bridge from five o'clock until half-past nine o'clock on the evening of the first day of April, and therefore could not have committed the offence charged. A man named Gagan stated that he was with prisoner on the London side of the bridge all that time; Albert, a brother of prisoner, said he saw Gagan and prisoner on the London side of the bridge that evening; and Edward Primrose, another brother, stated that he was a brakesman on the Great Western Railway, and that on the day in question his train (a construction train) arrived at London from Windsor about four o'clock, p.m., and on going on to the platform of the station he met his brother (the accused) and Gagan, and remained with them until half-past eight o'clock, p.m., with the exception of an interval from a quarter past five o'clock to six, p.m., when he was at tea. Other evidence was adduced to show that Smith was not at Lively's when the alleged robbery took place. On this evidence rested the case for the defence.

In rebuttal, counsel for claimants produced the conductor of the train on which Edward Primrose was brakesman, and he testified that on the day in question he started from Windsor with his train at 10.50 a.m., and did not arrive at London until 8.25 p.m.; and that Edward Primrose was with him on said train all that time, as one of his brakesmen. He also produced his time-book (kept by all conductors), in which entries were made each day of the departure and arrival of his train at each station, which bore out his testimony, and in which Edward Primrose's name was entered as brakesman on the day in question.

This closed the evidence on both sides, the taking of which had extended over several months, and on the 20th December last the case was argued before the said commissioner.

J. Cook, of Buffalo, counsel for the prisoner, moved for his discharge:—

As to the fact of the robbery having been committed, the claimants must rely altogether upon the evidence of Smith; and such being the case, Smith's evidence was contradicted in so many particulars by the evidence on the part of the defence, that it was unsafe to place implicit reliance upon it. The facts disclosed raise a very strong suspicion, if not presumption that Smith had robbed his friend Dunn, and in order to avert suspicion had accused the prisoner and other parties of the crime alleged. The commissioner must be satisfied, first, that an offence had been committed; second, that Primrose is the guilty party. The evidence produced on the part of the defence prove a complete *alibi*, and a sufficient doubt is raised as to the guilt of prisoner to entitle him to a discharge. If the commissioner should find against the prisoner he does not simply commit him to the courts of the United States, as a proper case to be presented to a grand jury of said courts, but his decision is of vastly more importance, as he would commit him to be taken to a foreign land, to be dealt with by strangers, amongst whom might be one who might regard his own safety as depending upon a conviction of the prisoner. If prisoner is extradited upon the suspicious testimony of Smith, uncorroborated as it is, where is the protection which the Government of the United States guarantees to those who are entitled to it?—for it has been well observed, that if this doctrine were to prevail, the liberty and character of every man in the country would be placed at the mercy, not of the examining magistrate (for he would have to assume that he had no discretion), but of any corrupt and infamous individual who might think proper to make a positive oath that a felony had been committed by the person whom he accused. The commissioner is to judge of the credit to be given to the

witnesses who are produced to sustain the charge, and it is his duty to discharge the accused unless he is entirely convinced that there has been a *prima facie* case made out against him.

F. W. Macdonald, of the Ontario Bar (who was allowed to conduct the case for the claimants by the courtesy of the Commissioner and counsel for prisoner), for claimants:

The evidence of Smith is corroborated in every particular by witnesses produced on the part of the claimants, except as regards the actual commission of the offence, of which he is the only one who can give evidence. With regard to the *alibi* attempted to be proved, that was most effectually disposed of by the evidence of the conductor of the train on which Edward Primrose was brakesman; and as the evidence of the witnesses for the defence all point to the same day, it is evident that they are speaking of a day other than the first day of April, or are committing wilful perjury.

The Extradition Treaty provides that the prisoner shall be extradited on such evidence of criminality as, according to the laws of the State of New York, would justify his apprehension and committal for trial: 1st vol. Brightley's Digest, p. 270, sec. 7; 6 Opinions of Attorney-General, 207; 14 Howard's Supreme Court Rep. 193, 144; 3 Wheeler's Cr. Cases, 482.

The rule of evidence is prescribed by the Treaty: 4 Opinions of Attorney-Gen., 330, 201. If, after the examination of complainant and witnesses on both sides, it appears that an offence has been committed, and that there is probable cause to believe the accused guilty, the commissioner must commit for trial: Rev. Stat. N. Y., p. 709, sec. 25; Barbours's Cr. Law, 567.

The true enquiry is, whether the whole evidence has furnished reasonable and probable cause for believing that prisoner is guilty of the alleged crime or offence. If it does, he should be committed: 1st vol. Arch. Cr. Pleadings, 45, note. When the commissioner or magistrate is convinced that the facts as proved do not furnish probable cause for believing prisoner guilty, he ought to discharge him; but, on a question of facts entirely, if he should have a reasonable doubt, he ought to commit prisoner for trial, as it is the province of a jury to decide questions of fact. But if not entirely satisfied that prisoner is guilty, yet if the circumstances proved are positively suspicious, and such as to render his guilt probable, and the crime be an indictable offence, he should commit: Swan's Justice, 482; 1 Burr's Trials, 11, 15; 4 Dallas, 112. That degree of evidence is not required which would be necessary for the conviction of the party. The commissioner must ascertain whether there is reasonable ground to believe that the party accused may have committed the crime: Barbour's Cr. Law, 565.

It must be proved, 1st, that an offence has been committed; 2nd, that it is within the Treaty; 3rd, that there is reasonable and probable cause to believe prisoner guilty.

1st. The offence charged is robbery. As to its commission, we have the depositions taken at London before the police magistrate there, properly certified, &c., which are in themselves evidence of the fact that a crime has been committed, and that the accused is the person who committed the same: 1 vol. Brightley's Digest, 270; 2 Ib. 134. There is also the evidence adduced on the part of the claimants, which is positive.

2nd. The crime charged is robbery, and is within the Extradition Treaty.

3rd. The evidence, as a whole, furnishes reasonable and probable cause sufficient to warrant the committal of the accused for trial. Before the commissioner can come to the conclusion to discharge the prisoner, he must be satisfied that the case made out by the claimants is so entirely displaced by the evidence on the part of the defence, that there can be no doubt of the innocence of the accused.

The defence set up is purely an *alibi*, which must be strictly proved in the face of the evidence on the part of the prosecution, and must be so overwhelming in all its parts as at once to carry conviction with it. Is it so in this case?—or rather, is not the *alibi* so completely met as to fall to the ground? There is an evident attempt to get in false testimony to sustain the theory of the defence. If proved false in part, does not suspicion attach to the rest?

There is no process to compel the attendance of witnesses, and it is a difficult matter to induce parties to attend in a foreign country to give evidence, the natural inclination of parties being to refrain from giving evidence against neighbours. The claimants have experienced this difficulty in this matter.

It is ridiculous to suppose that Smith should endeavour to throw suspicion on prisoner, and at the same time state that so many persons were at Lively's, any one of whom could disprove his allegations if untrue.

No evidence of good character was adduced on the part of the defence.

As to conflicting evidence, &c., see *In re Bennet G. Burley*, 1 U. C. L. J., N. S., 46, 48, 49, 50; *Ex parte Martin*, 4 U. C. L. J., N. S., 198; *Regina* v. *Reno & Anderson*, Ib. 315, 321.

When the court enters upon the consideration of evidence for defence, a trial of fact has begun, and it is the peculiar province of a jury to determine questions of fact. If the prosecution make out a good *prima facie* case, and evidence on the defence throws doubt upon it, it is the province of a jury to pass upon it.

It is certainly due to the citizens of the United States that they should be protected against murderers, and those who attempt to commit murder, and against pirates, robbers, &c., and that these men should be extradited on the demand of a foreign government, where the crime was committed, and there punished.

George Gorham, U. S. Com.—The prisoner's extradition was asked for upon two charges, one of murder and the other of robbery, both at Westminster, Province of Ontario, and Dominion of Canada. The person murdered is said to have been John Dunn, and the robbery was from the person of John Smith, and both deeds are alleged to have been done on April 1st, 1870.

Aside from the complaint made before the Canadian magistrate, and the warrants issued thereon against this prisoner, there is no evidence to warrant me in holding Thomas Primrose upon the charge of murder; and as that is not suffi-

cient, he is discharged from custody upon that charge.

Upon the charge of robbery, a long and exhaustive examination has been had, and every facility afforded both to the British Government and to the prisoner.

It is not necessary to review the testimony at length. Smith, the complainant, was produced, and swore positively that he was robbed, as charged, by Primrose, on the evening of April 1st, 1870; and the defence offered is, that at the hour when the crime is alleged to have been committed, Primrose was in London, and so far from the scene of the robbery that its commission by him was impossible. The prisoner's brother, a brakesman on a working train of the Great Western Railway, testified to having left his train at London, at the close of work, about four o'clock in the afternoon of April 1st, and having been in company with prisoner nearly all the time after that, until nine o'clock in the evening, and that one Gagan was with them; and Gagan is produced, and makes a similar statement. A young boy, another brother of the prisoner, testified to seeing the prisoner and Gagan and Edward Primrose in London, as detailed by Edward.

If these statements be true, Thomas Primrose did not commit the crime; but I am not satisfied of the truth of these stories.

The prosecution have produced the conductor of the train upon which Edward Primrose was employed, and he has shown his time-book (kept by all conductors); and I am satisfied that on the first of April Edward Primrose did not reach London till about eight o'clock, and that either he and Gagan and the lad are mistaken in the day of which they speak, or have committed wilful perjury. Smith, too, is borne out in his statements by other witnesses, who swore to seeing prisoner at the place of the alleged robbery about the time in question.

My duty is simply that of a committing magistrate, and I am only to enquire whether there is probable cause to believe that the crime of robbery has been committed; and if so, whether there be like cause to believe that the prisoner committed the crime. I am not to try issues of fact: this is the exclusive province of a jury, with which I have neither the right nor the inclination to interfere.

The fact that if held for extradition, the prisoner is to be taken away from this country, to be tried in the courts of a foreign power, ought not to influence my decision one way or the other. I have entire confidence that the accused will receive a fair trial in Canada: to suppose otherwise woule be unjust and discourteous.

The Extradition Treaty should be construed liberally and fairly to the prisoner; and while every reasonable opportunity should be given the foreign power seeking the benefit of the Treaty, the prisoner should not be remanded for trial unless there be a *prima facie* case against him, which is not overborne by the evidence adduced on his part.

In this case I cannot have any doubt but that had the crime been committed in my own country, any magistrate would deem it his duty to commit the prisoner to await the action of a grand jury; and, entertaining such views, I cannot deny the application of the British Government.

The prisoner will therefore be recommitted to the custody of the Marshal, to await the granting of a warrant of extradition by the President.

SUPREME COURT OF PENNSYLVANIA.

Garrabd v. Hadden.

Where a blank in a note had, after signing and delivery by the maker, without his consent, been filled so as to increase the amount, and not be detected by inspection, *held*, that the maker was answerable for the full face of the note, as altered, to any *bona fide* holder for value in the usual course of business.

Opinion of the Court by Thompson, C.J, Jan. 3rd, 1871.

There could be no question but that the alteration made in the note in this case would avoid it as between the maker and payee, the consent of the latter to it being wanting, and there being neither an implied or express authority for making it.

But how is it with the plaintiff, an innocent holder for value, in the usual course of business? There was a blank in the body of the note (a printed note) between the words "one hundred" and "dollars," when the maker signed and delivered it. The payee afterwards filled the blank with the words "*and fifty*," which made the note read "one hundred and fifty," instead of "one hundred," the sum for which it was drawn. In this condition it was taken by the plaintiff, without the least grounds existing for any doubt of its entire genuineness. "By inspection of the note," says the learned judge in his opinion on the reserved question, "the most skilled expert would have failed to detect any alteration in its make." There was no difference in the handwriting between the words added and those which preceded them; no difference in the ink, and no crowding of words, to put the most careful man on inquiry, or to raise a suspicion that all was not right. The note thus clear on its face, was taken on the credit of the drawer, and now shall he be discharged from its obligation by reason, or on account of his own negligence in delivering a note that invited tampering with? He could have saved all difficulty by scoring the blank with his pen. It would have been impossible almost to have written all this without leaving traces of the alteration. In that case a purchaser of the note would take it at his own risk. This is, therefore, one of the cases in which it is a maxim, that "where one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and the loss." Story, Eq, ss. 387. "If a bill or check be drawn in so careless a manner as thereby to enable a third person to practice a fraud, the customer and not the banker must bear the loss." Chitty on Bills, s. 6; Byles on Bills, 332; 22 Eng. L. & Eq., 516; 31 Barb. 100; 41 Ib. 465. "A party who entrusts another with his acceptance in blank is responsible to a *bona fide* holder, although the blank be filled with a sum exceeding that fixed as a limit by the acceptor. Though the filling of the blank in violation of the agreement of the parties be a forgery, the acceptor is estopped from setting up

the fact." 7 Smith (N. Y. Rep.) 531. Denio, J., in delivering the opinion of the Court of Appeals in this case says, among other things, "the principle which lies at the foundation of these actions, I think, is that the maker who by putting his paper in circulation has invited the public to receive it of any one having it in possession with apparent title, is estopped to urge the *actual defect* of title against a *bona fide* holder." The doctrine of the point is ably discussed by the learned judge, and the cases touching the subject are noticed and discussed. The doctrine is, however, but an elaboration of a great principle of justice, that if one by his act, or silence, or negligence, misleads another, or in any manner affects a transaction whereby an innocent person suffers a loss, the blameable party must bear it. Story's Eq. 386-87.

In *Young* v. *Grote*, 4 Bing., 253, and reported in 12 Moore, 484, also, the very case in principle with the one in hand may be found. It was an alteration by filing spaces or blanks negligently left in a check, and filled by the holder so as to increase the amount and not be detected by inspection of the paper. The bank paid it, and the drawer was held chargeable for the full amount on the ground of his negligence. The same doctrine was held in two Scotch cases, viz: *Ragore* v. *Wylie* and *Graham* v. *Gillespie*, to be found in full in Ross on Bills and Promissory Notes, 194-95. It is true that the case of *Wade* v. *Wittington* in 1st Allen 561, seems to limit the doctrine to cases where the alteration is made by an agent, clerk or confidential party; but this, in my opinion, is against an earlier decision in that State—I refer to *Putman* v. *Sullivan*, 4 Mass. 45, in which no such restriction appears, and is an impracticable limitation.

In *Hall* v. *Fuller*, 5 B. & C., 750, the case was that of an alteration of a bill *perceptible* on its face. The bankers paying it were only allowed to charge the drawer with the original amount put in the draft, for it was negligence on their part to pay the face of it in its altered aspect. Such seems to have been the doctrine applied by this Court in *Worrall* v. *Gheen*, 3 Wr., 388; although the case of *Hall* v. *Fuller*, asserting the same doctrine, does not seem to have been cordially approved in the opinion.

I regard this case as depending on the principles of the other cases cited above, and not that of *Worrall* v. *Gheen*. That was a case of a perceptible alteration, and the plaintiff was allowed to recover only to the extent of the original unaltered note, the holder (the plaintiff) being entirely innocent of the alteration, or of knowing anything about it. But in the case in hand there was no perceptible alteration on the face of the note whatever. The handwriting was all the same, and there was no crowding of words to effect the insertion—all was natural and regular in appearance. The words "and fifty" were inserted in the space between the words "one hundred" and the word "dollars" in the note, by the same hand that filled up the note originally. It had been delivered to him in this condition. The authorities I have referred to hold the drawer of such a note answerable for the full face of the note as altered to any *bona fide* holder of it for value, on the ground of the negligence of the maker in leaving the blank in the note which was thus filled up after its execution, and so we now hold, notwithstanding as between the maker and payee, or other person making the alteration, it would be a forgery and void.

We think this rule is necessary to facilitate the circulation of commercial paper, and at the same time increase the care of drawers and acceptors of such paper, and also of bankers, brokers and others in taking it. This rule will not apply to cases where the alteration is apparent on the face of the paper. There it is possible the rule of *Worrall* v. *Gheen* may apply. The only error, therefore, which we discover in the judgment on the reserved question, was against the defendant in error. By the rule which I have endeavored to deduce from the cases, he was entitled to judgment for the face of the note and interest. But the defendant in error is not a complainant here, and the plaintiff in error makes no complaint that the judgment against him is too small, and as there is no error of which he complains, the judgment is affirmed. —*Pittsburgh Legal Journal.*

Everly v. Durborow.

Where one partner contributed money to the common stock, and the other his time and skill, and the whole was lost: *held*, that the partner contributing the money could not recover any part of his loss from the other.

Sur bill, answer and agreement of counsel as to facts.

Opinion by Sharswood, J. Delivered February 4th, 1871.

The question presented upon the agreed statement of facts is one of some novelty; at least the industry of the counsel has not furnished me with any decisions which throw light upon it. Two persons enter into a co-partnership; one agreeing to contribute $10,000 as capital, the other nothing but his knowledge of the business. After two years the firm is dissolved, its affairs wound up, all its debts paid; and it is found that its entire capital has been lost. The partner who contributed the money capital now calls upon his copartner to bear half his loss, to repay him half the sum he put in. It is beyond a question that the money was put in as stock or capital; it was not an advance or loan to the firm. The article is unequivocal, "Everly shall contribute the sum of ten thousand dollars capital against Durborow's knowledge of the business." Mr. Lindley says: "Whatever, at the commencement of a partnership, is thrown into the common stock, belongs to the firm, unless the contrary can be shown:" Lindley on Partn. 546. What is added does not contradict this. "At the expiration of this partnership this capital shall be returned without interest before final division of profits." But here there are no profits to be divided; there is no capital to return. Everly has lost his money, and Durborow has lost what he set against it, his time and services, enhanced in value by his knowledge of the business.

Bill dismissed with costs.

—*Legal Gazette.*

CORRESPONDENCE,

Will making in the Ontario Legislature.

To the Editors of the Law Journal

Gentlemen:—As I hear the Parliament of Ontario are making and changing the wills of testators, I wish to enquire of you whether it would probably be of any use for me to apply to that Honourable body to supply a deficiency in my father's will. The elder brothers of the family and my sister had each their farms given them many years ago by proper deeds, but my father kept the homestead in his own hands until his death, and disposed of it by will to my younger brother and myself, who had worked the farm from our boyhood after our brothers left home, and took care of him in his declining years, but he unfortunately got a neighbor to prepare the will, which the lawyers say is all right in every respect, except, that *there is but one attesting witness.* Do you think the Parliament would pass an act to make the will valid notwithstanding? If not, why should they not as well as change the will of the late Mr. Goodhue, of London.

Yours, &c.,

Neil McKellar.

[The difficulty is not so much to know what the members of the Legislature of Ontario, who have just returned to their homes, *would* have done, but rather what they *would not* have done—at least, so far as private Bills is concerned.

In the case put, there would be some show of reason for passing an Act to make the will valid, for it would probably be carrying out the wishes of the testator; whilst in the Goodhue case the collective wisdom, justice and equity of Ontario not only did not carry out the testator's carefully expressed intention, but did exactly the reverse. They felt so alarmed, however, as to the lengths this kind of legislation might lead *their successors*, and so ashamed of their part in it, that immediately after passing the Goodhue Act they passed another, giving power to the Judges to report to the House "in respect of any estate Bills, or petitions for estate Bills, which may be submitted to the Assembly." As far as precedents are concerned, there are enough and to spare for our correspondent's comfort.] —Eds. L. J.

Professional advertising.

To the Editors of the Law Journal.

Gentlemen,—I am a subscriber to *Lovell's Dominion Directory*, and having just received a copy, I find that while I am simply mentioned as Barrister, &c., one of our legal firms appears as follows:

"M. & C., (names given in full) barristers, notaries, &c—are highly recommended for making prompt collections in all parts of Ontario. Cor. King and James Streets."

If this emanated solely from Mr. Lovell or his agent, I must be content with complaining of his partiality to these gentlemen; but if the advertisement, as I suspect is the case, was written or prompted by that firm, I think it should get a little more publicity by appearing in your Journal—unless indeed you object to anything *so unprofessional* having a place there. I am yours, &c.,

An Aggrieved Subscriber.

Hamilton, 20th February, 1871.

[We do certainly object to any thing unprofessional, and do not propose to give any further advertisement to this firm, except in a legitimate manner, and therefore put only the initials. We trust it was only a little spontaneous generosity on the part of the publishers of the Directory.]—Eds. L. J.

REVIEWS.

The Law Times and Law Times Reports. 10 Wellington-street, Strand, London, W.C.

The Solicitor's Journal and Weekly Reporter. 12 Cook's Court, Carey-street, London, W. C.

The Law Journal. 5 Quality Court, Chancery Lane, London.

Our readers have ample means of judging of our appreciation of the value of these standard legal periodicals, from the liberal use we make of their pages. The new issue of Law Reports may have affected them to a certain extent, so far as the increase of circulation of the several reports is concerned, but in no respect have the reports deteriorated: in fact the competition has only incited them to greater efforts.

The following notice appears in the *Law Times* of 25th February

"In accordance with a generally expressed desire that the *Law Times Reports* should be printed in a larger type, so as to be more readily referred to in the Courts where they are now so extensively cited, the number of next week, beginning a new volume, will be printed accordingly. This will necessitate a slight increase in the size of the page, but no additional charge will be made.

"The series called the *Bar Reports* will close with this number, and will in future be styled the *Law Times Reports*, and will be published in a wrapper, in weekly numbers at 1s., so that in future the *Law Times* may be had without the *Reports*; or the *Reports* (in a wrapper) without the *Law Times*; or together as hitherto."

American Law Review. January, 1871. Little, Brown & Co., Boston.

The articles in this number are: I. The Burden of Proof in cases of Negligence; II. Expert Testimony; III. Contraband of War; IV. Ultra Vires; and the usual Digests of English and American Reports, Book Notices, Summary of Events, Correspondence, &c. In the Summary of Events we notice the following:—

"At a recent sale of part of Chancellor Kent's library, in Boston, a copy of 'Story on the Constitution' was bought, on the fly leaf of which was discovered this curious note, in the Chancellor's handwriting:

'March 18, 1835. Judge Story called on me at my office in New York. He said that he should write and publish a volume of Commentaries a year, until he had published twelve volumes. The one now forthcoming is on English and American Equity Law, and the one after that will be on Practice and Pleadings in Equity. The last two will be (1) on Natural and Public Law, and (2) on the Principles of International Law, as adapted to modern society. His greatest authorities on the science of government, as he thinks, are Aristotle, Cicero and Burke. In a French translation of Aristotle on Politics, he found that Aristotle treated of representative government of the people, and said it would not do, and never could do, because the people never could be brought for any length of time to choose the most wise and virtuous men to govern them. Whoever reads *Cicero de Republica* would see the evils of democracy as they are and always will be. He says that Hamilton was the greatest and wisest man of this country. He saw fifty years ahead, and what he saw then is *fact now*. Next to him in wisdom and sense, intuitive rectitude and truth and judgment, is C. J. Marshall.

'He says all sensible men at Washington, in private conversation, admit that the Government is deplorably weak, factious and corrupt; that everything is sinking down into despotism, under the disguise of a democratic government. He says the Supreme Court is sinking, and so is the Judiciary in every State. We began with first-rate men for judicial trusts, and we have now got down to the third-rate. In twenty-five years there will not be a judge in the United States who will not be elective, and for short periods, and on slender salaries. Our constitutions were all framed for man as he *should be*, and not for man *as he is and ever will be*.'"

The Law School of Harvard College. By Joel Parker.

This is the title of a pamphlet published in answer to some remarks that appeared in the *American Law Review*, relating to the School of which Mr. Parker was for nearly twenty years the senior professor. The matter of it is doubtless interesting to those who are connected with that institution, and we presume its character is safe in the hands of Mr. Parker. It only occurs to us, as an outsider, to remark upon the curious and somewhat irreverent mixture of quotations that appear on the outside and inside title page. The former introduces the subject with the beginning of that inimitable *brochure*, which commences thus:

"Which I wish to remark,
And my language is plain,
That for the ways that are dark,
And for tricks that are vain,
The heathen Chinee is peculiar,
Which the same I would rise to explain."

The very next page, similar in all other respects, has simply this quotation:

"So fight I, not as one that beateth the air."

Either one, possibly, might have been appropriate, but the combination is objectionable.

Scientific American. Munn & Co., New York.

We notice in the "Votes and Proceedings" of the House of Commons a report of the learned and invaluable Librarian in which he says:

"In the selection of books for the augmentation of the library, it has been deemed advisable to bestow particular attention to the subject of mechanics and engineering, on account of the great and increasing demand, amongst those who

frequent the same, for information thereon. Your Librarian has accordingly purchased complete series of the Minutes of Proceedings of the Institution of Civil Engineers since 1837; of the Journal of the Franklin Institute of Pennsylvania from 1826; and from the *Scientific American* from 1859; all of them works of the highest utility in practical science, and which, from their cost and magnitude, are beyond the reach of ordinary private purchasers."

Canadian Illustrated News. Montreal.

This improves week by week, and is a credit to the Editors and Publishers.

The Law of Negligence. By Robert Campbell, M.A. Stevens & Haynes, Bell-yard, Temple Bar, London.

Will be fully noticed hereafter.

Law Magazine and Law Review. February, 1871. Butterworths. Fleet Street, London.

Will be fully noticed hereafter.

La Revue Critique de Legislation et de Jurisprudence du Canada. Montreal: Dawson Brothers.

Will be fully noticed hereafter.

La Revue Legale. Recueil de Jurisprudence et d'arrets. Vol. 2. Sorel, P. Q.

American Law Register. D. B. Canfield & Co., Philadelphia.

The Court of Queen's Bench.—The Court of Queen's Bench has during the last ten days played the part of a strict disciplinarian. Terrible threats of striking out cases in the Special Paper when counsel are wanting at the moment the cases are called on, threats of fines and striking out when judges' notes are unstamped, or even when the paragraphs of special cases are unnumbered—these and like menaces put forward to frighten counsel, attorneys, and attorneys' clerks into a proper attention to the business of the court, have been followed in certain instances by fulfilments which show that this time the court is really in earnest. This *de rigueur* style of action necessarily inflicts anxiety, trouble and inconvenience on the bar and the attorneys, and expense on the innocent suitors. But what is the Court to do? If it were always easy, good-natured, and obliging, willing to condone this omission, pardon that offence, ready to postpone this cause and to bring on that cause out of its turn, chaos would inevitably return and sit triumphant in the very seat of law and order. It is impossible for a Court exercising so varied and extensive a jurisdiction to keep down the arrears in the Crown Paper and in the Special Paper, and to get through the New Trial Rules before new sittings and new assizes bring in a new flood of cases, unless some attempt is made to compel attorneys to be in readiness at the given moment. English judges are possessed of proverbial patience, and their thunder is always more alarming than their thunderbolt. But that they should be annoyed when matters of form universally known are neglected, to the absolute destruction of business, is neither astonishing nor desirable. —*English paper.*

Lawyers in Europe.—Recent statistics develope some facts of interest with regard to the number of lawyers in different European countries, and their ratio to the population at large. For example, we learn that in England there is one lawyer to every 1,240 of the population; in France, one for every 1,970; in Belgium, one for every 2,700: and in Prussia, one for every 12,000 only. Another curious fact is, that in England the number of persons belonging to each of the different professions is nearly the same. Thus, there are 34,970 lawyers, 35,485 clergymen, and 35,895 physicians. In Prussia, on the other hand, there are 4,809 physicians to only 1,362 lawyers.—*Bench and Bar.*

Railway Accidents.—A learned judge remarked that he had lately five cases before him of claims for compensation against railway companies, and that the jurors had found in favour of the defendants. The companies had better pause before they agitate to take from juries the right of assess damages. Such a change would be exceedingly unpopular, and we are not sure that the companies would get better treatment from any other tribunal. The juries give the companies the benefit of any doubt as to their responsibility; but if the responsibility is proved, they give the unfortunate sufferers ample compensation. We hold that the rule is fair and wholesome. Recent catastrophes will not dispose the public to reduce the just responsibility of the companies.—*English paper.*

The Court in a Fog—Last week Mr. Justice Blackburn reprimanded the usher of the Court for opening or not opening the windows on foggy mornings, and subsequently told persons with coughs to leave the Court. Likely enough clergymen would be glad to order coughers to leave the church if they had the authority to do so. The learned judge ordered the gas to be put out, which resulted in partial poisoning, as the gas could not be turned of as soon as it was put out. Upon candles being called for, the usher informed the Court that there were only two candlesticks, which the judge shared with counsel. It did not occur to the usher to invest twopence in potatoes and extemporise candlesticks. When the new Law Courts are built there will be no more discomfort for lawyers or suitors. And when will the new Law Courts be built? Perhaps our great-grandchildren may see them commenced.—*English Paper.*