DIARY FOR MAY.

1. Sat. ..Candidates for Attorney to leave Articles with Secretary of Law Society.
2. SUN..*Rogation Sunday.*
4. Tues..Primary Examination of Students and Articled Clerks.
6. Thur..Ascension Day.
9. SUN..1*st Sunday after Ascension.*
10. Mon...Law School Examination begins.
11. Tues..County Court and General Sessions in York. Interim Examinations.
13. Thur..Candidates for Call to pay fees. Examination for Attorneys.
14. Frid ..Examination for Call.
15. Sat. ..Examination for Call with Honors.
16. SUN..*Whit Sunday.*
17. Mon...Easter Term commences.
21. Frid ..Paper day, Q. B. New Trial day, C. P.
22. Sat. ..Paper day, C. P. New Trial day, Q. B.
23. SUN..*Trinity Sunday.*
24. Mon. .Queen's Birthday. Paper day Q. B. New Trial day C. P.
25. Tues..Paper day, C. P. New Trial day, Q. B.
26. Wed ..Paper day, Q. B. New Trial day, C. P.
27. Thur..Paper day, C. P. Open day, Q. B. S. H. Strong appointed Justice of Court of Error and Appeal, 1874.
28. Frid ..Last day for Notice of Trial in Sup. Court cases for County Court. New Trial day, Q. B. Open day C. P.
29. Sat. ..Open days.
30. SUN..1*st Sunday after Trinity.* W. Proudfoot appointed Vice-Chancellor, 1874. G. W. Burton appointed a Justice of Court of Error and Appeal, 1874.
31. Mond..Paper day, Q. B. New Trial day C. P.

CONTENTS.

THE

Canada Law Journal.

Toronto, May, 1875.

It does not seem to be generally known that the Chief Justice of Ontario decided some time ago, in a case of *Gordon* v. *Fraser*, that a party to a suit who attends to be examined under an order granted pursuant to the Administration of Justice Act, is entitled to the same fees as a witness, and must be paid his travelling expenses. The question came up on an application to commit a party for contempt in not obeying such an order. It appearing that an insufficient sum had been paid him for travelling expenses, the order was refused.

The *Solicitors' Journal* suggests that in actions of tort for unliquidated damages, where the defendants pay money into Court, that the jury should be kept in ignorance of the amount paid in, and be bound to assess the damages without reference thereto. If a less sum is awarded, the difference to be returned to the defendant. It is very truthfully remarked that juries usually give a little more than is paid in, and the knowledge of the sum paid in is really furnishing them with a "ready reckoner" for the computation of damages.

The Marine Court of New York lately held, in *Palmeter* v. *Wagner*, that a sleeping car company were responsible for the loss by theft of the personal baggage of a passenger who was asleep in one of their cars. The judge placed his decision on the ground that though the company are not insurers, yet they are bound to use due diligence to protect a passenger and his personal property during sleep.

Editorial Items.

It has recently been decided in a French provincial Court that a hotel keeper is bound to wake a traveller who desires to leave by a train during the night. If the host refuses or neglects, he is liable to pay damages. The judge animadverted in strong terms on the practice of some landlords, who wilfully delayed the departure of travellers in such circumstances, and thereby secured the price of an extra day's board and lodging.

There was rather a curious case some months ago at an Assize on the Western Circuit, which we do not remember to have seen noted, and which, though now stale, may be worth referring to. A man was tried the previous year for shooting with intent, &c., and sent to the penitentiary for three years. The man he shot then sued for the assault, and the convicted man was brought up to give evidence for himself. Neither he nor his wife could be called on the former trial, and both could be heard on the civil case. They were the only two who saw the act except the prosecutor and his son. If the testimony of the latter did not defeat the action it would seem hard to keep the man in prison.

We are not aware what the result of the case was, but it points to a somewhat curious phase of the law of evidence.

Application was made in Common Law Chambers lately to a case of *Roy* v. *Turnbull* for a *certiorari* to remove a cause from a Division Court. The suppliant at the feet of a Judge of the Queen's Bench complained that a certain Deputy Judge, not a hundred miles from the head of Lake Ontario, had failed, after three several attempts, to do justice, or at all events, equity, between the parties. The case would seem to have been tried three times before the Judge, and with a varying result each time. Doubtless the Judge looked upon himself as a jury, and of course, three different juries, and felt that it was his privilege, being three successive juries as aforesaid, to alter his mind and arrive at three different results, as well might, and probably would, the three sets of five men each, if it had been a "jury case." Whether, in truth, the evidence varied on each occasion whereby a different conclusion was properly arrived at, does not appear. The learned Judge of the Queen's Bench, Mr. Justice Wilson, did not seem to think the different judgments arose from any difficult questions of law being involved, because there were no points of law particularly about it. He ordered the case to stand over until the Judge below was heard from, remarking, however, that the mere fact of a Division Court Judge not always promulgating good law, is no ground for removing a cause from his jurisdiction, and an appeal from his decision cannot be had by a side wind. One cannot always expect to get good law in Division Courts. In fact one does not go there for that, for these Courts are more Courts of equity and good conscience than anything else; though, even in this matter, some men's notions of equity are so crude and so peculiar, that an adherence to common law would, perhaps, in most cases be preferable, and more appreciated by suitors.

That time-honoured palladium, trial by jury, was not, of course, without its incidents on a recent occasion. In an action of libel, part of the complaint being that the plaintiff was wrongly charged with having acted in a manner not professionally reputable, "twelve good and lawful men" were placed in the perplexing position of

deciding as to the conduct of a professional man thirteen years ago, a matter which the profession even were not agreed upon at the time the events took place. We should not have been surprised if, instead of a nominal verdict for the plaintiff, they had agreed to disagree, though at the same time we are glad that their verdict may be taken as clearing the plaintiff, a legal gentleman now occupying a high position, of any complicity in proceedings which showed every unfair conduct to certain of his brethren who were upholding on behalf of their order, a high standard of professional feeling and conduct. The promptitude of the jury however, in coming to a conclusion, and their simple earnest belief in their capacity to decide such a knotty matter would seem, if technical difficulties could be got rid of, to point them out to an admiring profession as a desirable adjunct to the Law Society.

In small communities where everybody knows everybody else's business, where the prominent lawyers are, as a rule, prominent public men, and where legal matters are more or less mixed up with public matters, there is a manifest difficulty in conducting a legal journal with that freedom of thought and expression that is desirable. We have hitherto erred on the safe side, and we hope to keep our character for calmly discussing legal matters with a scrupulous avoidance of anything approaching to political matters. We mention these things as a reason for having on various occasions declined to discuss subjects which, though legitimate objects of discussion in a legal journal, were in the eyes of many of more importance in other ways. For example, it was difficult to touch the law of libel when libel suits by the score have been brought by or against prominent political partisans, without touching forbidden ground. It would not have been out of our legitimate province to discuss the mode in which Crown Counsel should conduct public prosecutions, a subject which in fact engaged the attention of the Court of Queen's Bench on a recent occasion, and whether under the circumstances of that case the Crown had a right to order jurors to stand aside. We might have remarked upon the fact that the liberty of the press had often run into license, and that juries had unequivocally set their faces against such things by generally giving verdicts for plaintiffs. We might have discussed whether it is professional for a solicitor to take business coupled with certain restrictions as to remuneration, and whether exception could be taken to the conduct of one professional man to another, under circumstances brought out (whether wisely or not, is none of our business) in a recent case, and which arose out of a story long forgotten, the revival of which could serve no good purpose.

Some of our correspondents will, perhaps, on reflection, better understand our silence on these and kindred matters.

SHORT HAND WRITERS.

In every Governmental department, in other departments of public service, in the office of every manager of any important railway company, in offices of lawyers, bankers, mercantile men, manufacturers, &c., whether in England, the United States or Canada, are to be found labour-saving and time-saving machines, in the shape of short-hand writers. The courts of law, where they would be eminently useful, are alone without them.

The employment of stenographers is daily becoming more common. Where they have once been established they have become a necessity. In most of the courts in England and the United States

evidence is taken down by short-hand writers. The result is equally beneficial to the Judge, to counsel and to suitors. The following observations taken from the *Chicago Legal News* are in point:—

"We fully endorse what Judge Longyear says in his opinion, printed in this issue, in regard to the importance of having the proceedings and evidence, in the federal courts, taken by short-hand reporters. We hope Congress, at its present session, may pass some law that will provide at least for taking the evidence and charge of the judge in short-hand in important cases. Very few cases are tried in the federal courts of this district without the aid of a short-hand reporter. The Chicago bar would as soon think of dispensing with telegraphs and railroads, as short-hand reporters."

A short-hand writer was employed recently in the Court of Chancery with great benefit.

The advantages of the system we advocate are so many and so obvious, the disadvantages so few, and the expense so trifling that it is unnecessary to go into particulars. The fact is admitted, that evidence given at trials should be taken down, as nearly as possible, verbatim, and by some one other than the Judge, who has more important duties to perform than the manual labour of writing. What he writes is necessarily in the nature of hieroglyphics, which, though sufficiently intelligible to the writer, convey but a faint idea of the evidence really given by the witness to those who endeavour from these notes to obtain an accurate knowledge of what transpired at the trial. If the evidence were taken down by a short-hand reporter, the difficulties as to Judge's notes, which every Barrister at Osgoode Hall is familiar with, would be got rid of. This "looking at the Judge's notes" is a fruitful source of annoyance, perplexity and botheration to all concerned. The Judges can, of course, take what notes they please, and these would be their own private property, but the reporters' notes would be open to all, upon payment of a fee for copying.

Let a short-hand writer be attached to each circuit; let them attend on special examinations; let them save the time of the Judges in taking down, if desired, judgments from the lips of the Judge which he might revise before delivery. If necessary, let them assist the Law Reporters of the Courts when occasion might require. In a dozen different ways their services might be utilized.

At first there will be a difficulty in obtaining writers who are familiar with legal terms. This, however, will only be temporary, and cannot stand in the way of an improvement on the present system. A change is imperatively necessary, and must come, sooner or later.

The matter of expense is of no practical importance. In fact there would, in the long run, be a saving to the public. We trust the Government of the Province will take such steps in the premises as may be necessary to bring about the desired result.

LAW OF MORTMAIN IN THE COLONIES.

(*Continued from p.* 100.)

The question first arose in the year 1833, as to whether this Statute of 9 Geo. II. c. 36, was in force in this Province. It was discussed in *Doe d. McDonell v. McDougall*, 3 O. S. 180, and although the decision of that case went off on another point, yet two of the Judges expressed their opinion on the constitutional question involved. The Chief Justice, (Robinson, C. J.,) did not consider the Mortmain Acts to be necessarily introduced by the Statute of 32 Geo. III. c. 1., which enacts that in all matters of controversy relative to property and civil rights, the laws of England should be the rule for the decision of the same (Con.

Stat. U. C. cap. 9). On the contrary, his opinion was that that statute was not in force here for the reasons given by Sir W. Grant, in the *Attorney-General* v. *Stewart*, 2 Mer. Mr. Justice Sherwood appeared to lean the same way, as he adverted to the law of mortmain as originating in national policy, and as of the same class as the revenue laws, the laws relating to fisheries and those for the improvement of the sea-coasts of the kingdom. Macaulay, J., gave no opinion in the case.

The question next came squarely before the Court in 1844, when it became necessary to adjudicate upon the applicability of the 9 Geo. II. c. 36, to the devise impeached in *Doe d. Anderson* v. *Todd*, 2 U. C. Q. B. 82. The Chief Justice remained of his former opinion and for the same reasons, but inasmuch as since the case of *Doe d. McDonell* v. *McDougall*, the Provincial Legislature had passed certain Statutes providing for the holding of lands by certain religious societies, "anything in the Statutes of Mortmain to the contrary, notwithstanding," he came to the conclusion that the Legislature had acted as its own interpreter, and by this language had intimated by inference, that the Statutes of Mortmain had been introduced into this Province by the Constitutional Act, 32 Geo. III. c. 1. Mr. Justice Jones took much the same stand and came to the same conclusion. Mr. Justice McLean agreed, but upon the ground (which may fairly be said to be quite untenable) that the statutes of Mortmain were applicable to the state of affairs in this country.

The result was, therefore, as put by Hagarty, J., in *Hallock* v. *Wilson*, 7 C. P. 28, that the Statutes of Mortmain were held to be in force in this Province, principally on the ground that in some of the enactments of the local legislature granting privileges inconsistent with those Acts, it is stated that such privileges are granted, "notwithstanding the Statutes relating to Mortmain." *Hallock* v. *Wilson* followed and recognized the authority of *Doe d. Anderson* v. *Todd*, but it was not the judgment of a full Court. Draper, C. J., C. P., was then absent, and his subsequent observations do not manifest complete satisfaction with the current of decision. In *Mercer* v. *Hewston*, 9 C. P. 355, he is reported (after observing that since *Doe* v. *Todd*, the question is settled till raised in the Court of Appeal,) as follows: "I wish to be understood as resting my conclusion, that this Statute, (9 Geo. II. c. 36.) is in force here on the decision of the Queen's Bench, and the recognition of that case in this Court in *Hallock* v. *Wilson*." Many other Judges have also given the same uncertain sound as to these early cases. Thus, in *Paine* v. *Kilbourn*, 16 C. P. 66, Wilson, J., speaks dubiously of the statute as one which rightly or wrongly we have adopted as part of our Statute Law. So Gwynne, J., in *Hambly* v. *Fuller*, 22 C. P. 143, proceeds upon the doctrine, *stare decisis*, and says, "Until a Court of Appeal shall otherwise decide, we must upon the authority of *Doe d. Anderson* v. *Todd*, *Hallock* v. *Wilson*, &c., &c., hold that 9 Geo. II c. 36, is in force in this Province." And Blake, V. C., in *Brown* v. *McNab*, 23 Gr. 180, observes, "It must now be here admitted, till a higher Court overrules such decision, that the Statutes of Mortmain are in force in this Province."

The statutes adverted to in *Doe d. Anderson* v. *Todd* as giving by retro-action a legislative exposition of laws covered by 32 Geo. III. c. 1, are 3 Vict. c. 73 and c. 74. From the former, relating to certain religious bodies, we have already cited the operative words. The latter is known as the "Church Temporalities Act," and sec. 16 provides that the conveyance of land to a Bishop and his successors shall be valid and effectual, "the Acts of Parliament commonly called the

Statutes of Mortmain, or other Acts, laws or usages to the contrary thereof notwithstanding." And it further provides (what is not in the other Act), that in order to the validity of such deeds they are to be executed six months before the death of the grantor, and to be registered within six months after his death. It was this clause, that, more than anything else, influenced Robinson, C. J., for he thought that as this condition placed the Church of England under special disabilities not attaching to other churches by virtue of Provincial legislation, it was only fair to all to hold that by the introduction of the English law of Mortmain, all should be in the same plight. Now this would be some justification for the introduction of the laws of Mortmain to a limited extent, in so far namely, as corporations sole and aggregate are concerned. All the provincial legislation relied upon and wherein reference is had to the Statutes of Mortmain, is with regard to *corporate* bodies, and it does not at all deal with or advert to that special prohibition introduced for the first time by 9 Geo. II. c. 36 whereby were forbidden donations to unincorporated trustees for charitable purposes. There was no introduction of this latter branch of the law, even by fair implication.

But we incline to think that the whole structure rests on too slender a foundation, and that an appeal to the highest Court of the Province so often hinted at, if not invited, would result in a change of the law. If this however, be not so, we are persuaded that the legislature might well interfere (a veritable *Deus ex machina*) and declare that the Statute of 9 Geo. II. c. 36, is not in force in Ontario. No special or sufficient reason exists for such an Act. There is no such epidemic here, gendered of a belief that treasures may be laid up in heaven by bestowing it upon churches and chapels on earth, as necessitates legislative intervention. The theory of the Statute in question is praccally the very antithesis of the present spirit of the times. Now-a-days it is idle to talk of people being juggled into a disherison of their heirs for the benefit of "the church." Now-a-days the whole current of popular opinion is setting in an opposite direction. For, changing the figures and adopting that of Dean Stanley, science is now battering at the ecclesiastical citadel, and the strength of that citadel is doubted by many who man its walls.

THE GREVILLE MEMOIRS.

The lawyers appear so frequently in "The Greville Memoirs" that a reference to the work in a legal journal is not out of place. The most prominent figure amongst the lawyers, indeed the most prominent figure in the book next to the Duke of Wellington, is Brougham. Nor is it surprising that a person writing of the period of the English Reform Bill should be constantly occupied with the conduct and motives of one who was suspected of aiming at an authority in the State, such as no man of his profession had possessed since Clarendon.

The remarks of the author upon the character and conduct of Brougham are interesting, as being a record of the impressions of a shrewd, if somewhat cynical spectator, reflecting not only personal observation, but current opinion. But we must not expect to rise from the perusal of the book with an increased respect for the subject of those remarks. Mr. Greville hated him for his politics, and envied him as he appears to have envied most others who attained a success denied to his own abilities. We must expect, therefore, to find him bringing into prominence the meaner phases of Brougham's character; impugning his motives, and detracting from his services. A good life of Brougham has

yet to be written. Lord Campbell had too often felt the superiority of his great contemporary to deal with him fairly. On the other hand the Autobiography is permeated by the vanity of the author, who is inclined to magnify his own services, and to give himself credit on every occasion for the purest intentions. In the Greville Memoirs we meet with Brougham in many situations, dignified and degrading, great and small, from which we may gain some new insight into his extraordinary character. We are reminded also, and very painfully, that in this world the loftiest enthusiasm may be marred by selfish ambition: that philanthropy may exist beside personal animosity: that the most splendid genius may stoop to intrigue: and the haughtiest self-esteem humble itself to sordid considerations.

Mr. Greville thus describes his impressions of Brougham after meeting him for the first time:—

"Brougham is certainly one of the most remarkable men I ever met; to say nothing of what he is in the world, his almost childish gaiety and animal spirits, his humour mixed with sarcasm but not ill-natured, his wonderful information and the facility with which he handles every subject, from the most grave and severe to the most trifling, displaying a mind full of the most varied and extensive information and a memory which has suffered nothing to escape it. I never saw any man whose conversation impressed me with such an idea of his superiority over all others. As Rogers said the morning of his departure, 'This morning Solon, Lycurgus, Demosthenes, Archimedes, Sir Isaac Newton, Lord Chesterfield and a great many more have gone away in one post-chaise.'"

Of the vast and almost universal range of Brougham's knowledge Mr. Greville has recorded some curious illustrations. Fowell Buxton was entertaining a distinguished party and treating them to an inspection of his brewery. There were people waiting to explain everything, but Brougham took the explanation of the whole business into his hand the mode of brewing, the machinery, down to the feeding of the cart-horses, and when the account books were produced, he entered into a dissertation on book-keeping. On another occasion he went with some people to the British Museum, where all the attendants were in readiness to receive them. He would not let anybody explain anything but did all the honours himself. At last they came to the collection of minerals, when it was expected that he would be brought to a stand-still. Their conductor began to describe them, when Brougham took the words out of his mouth, and dashed off with as much ease and familiarity as if he had been a Buckland or a Cuvier. In truth it would have been difficult to discover a subject about which he did not know something. At an early age he had turned his attention to the natural sciences, and no doubt fancied that he might have rivalled Newton in that field. At the age of 18 he wrote an essay on the Properties of Light, which was printed by the Royal Society. At a later day he contributed articles to the *Edinburgh Review*, upon the same and kindred subjects. His inquiring mind had led him to attend medical lectures, and this enabled him to comment learnedly in the *Review* on "A new method of performing Lithotomy." He is even credited with an article on "Chinese Music," a subject which was once hit upon to test the universal knowledge of Whewell. But the man who takes all knowledge for his sphere must not hope to reach the highest elevation in any particular branch. Brougham might have been great as a scientist, a statesman, an author, a lawyer. His restless ambition would not be content with fame in any one of these vocations: he tried to be great in all but failed of attaining the first place in any. We must admit the correctness of the judgment which Mr. Greville passes upon him.

"After all, Brougham is only a living and very remarkable instance of the inefficacy of the most splendid talents, unless they are accompanied with other qualities which scarcely admit of definition, but which must serve the same purpose as ballast does for a ship. Brougham has prospered to a certain degree: he has a great reputation, and he makes a considerable income at the bar; but as an advocate, he is left behind by men of far inferior capacity, whose names are hardly known beyond the precincts of their courts or the boundaries of their circuits. As a statesman he is not considered eligible for the highest offices; and, however he may be admired or feared as an orator or debater, he neither commands respect by his character nor confidence by his genius, and in this contrast between his pretensions and his situation, more humble abilities may find room for consolation and cease to contemplate with envy his immense superiority."

Brougham never submitted his versatile mind to the steady and plodding discipline which every man must go through who aspires to be a truly great lawyer. With his extraordinary powers he found no difficulty in getting up enough law *pro re nata*, but when Chancellor he often provoked a smile by his startling dicta from the men, deeply read in the lore of their craft, who practised before him. If he had been for any length of time in the Court of Chancery he might have mastered the whole theory and practice of equity; but his short sojourn there and his want of special knowledge have caused his performances as a judge to be looked upon with light estimation. It is as a law-reformer that he has real claims to the reverence and gratitude of posterity. Lord Eldon had sat in the Court of Chancery for twenty years and had never lifted a finger to remedy abuses that had caused his court to be imprecated as a den of iniquity. Brougham had hardly been an hour on the woolsack before he brought down a bill to reform the practice, one effect of which was to diminish his own emoluments. The difficulties of the task he undertook in the reform of the Court of Chancery, would have daunted a spirit less resolute than his. He approached it with all the fire of his enthusiastic nature, and persevered in the dry details of the work till he had effected great and lasting improvments. The changes he brought about in common law procedure were even more radical and beneficial. At this day few people, perhaps, remember that to Brougham we are indebted for the abolition of fines and recoveries, and the pernicious subtleties of special pleading, and for such familiar statutes as the Act respecting the limitation of actions at present in force, and the Act permitting parties in a cause to give evidence on there own behalf. But there is hardly a measure of Law Reform which has been brought about in England within the last fifty years which is not either due directly to the exertions of Brougham, or was not at least suggested in the germ by his enlightened mind.

"Great and important," he himself writes, speaking of the work done by the 'Reform' Administration, "were the changes in almost every department of the law; vast improvements in pleading and procedure were introduced, not in the Common Law Courts only, but largely in the Court of Chancery, in which department alone offices were abolished effecting a saving of not less than £100,000 a year. By the issue of commissions the way was paved for an entire reform of the municipal corporations; and, although I mention it last, not the least important of the measures we carried was the Poor Law Act. To Lyndhurst's mischievous opposition we owed the loss of my Local Courts Bill. But that could only be postponed; a measure so obviously for the benefit of the whole community must pass some day in spite of attorneys or future Copleys. I wish I could look forward with the same hope to an Act for the

registration of deeds and titles, but that I fear me is too improbable, for, as Cromwell said on a similar occasion, 'the sons of Zeruiah are too strong for us.'" Recent proceedings in the English Parliament indicate that Brougham's despondency about the registration of titles was not well grounded.

In the Greville Memoirs we often meet with Brougham's great rival Lyndhurst. He was Brougham's most formidable adversary in the Lords, as well from his learning and character as from his powers in debate and dauntless courage. Brougham, if inclined to overrate his own services and abilities, was, as a rule, generous in his estimate of other men. We cannot but be struck with this characteristic in reading his biographical sketches. Of Lyndhurst, although his persistent opposition to his favourite schemes sometimes called forth a little bitterness, Brougham speaks with his usual fairness. "Lyndhurst," he says, "was so immeasurably superior to his contemporaries, and indeed to almost all who had gone before him, that he might well be pardoned for looking down rather than praising. Nevertheless, he was tolerably fair in the estimate he formed of character; and being perfectly free from all jealousy or petty spite, he was always ready to admit merit where it existed. Whatever he may have thought or said of his contemporaries, whether in politics or at the bar, I do not think his manners were ever offensive to any body, for he was kind and genial. His good nature was perfect, and he had neither nonsense nor cant, any more than he had bitterness or spite in his composition."

SELECTIONS.

THE STABILITY OF THE LAW.

It is quite a common saying that nothing is certain in law. To those who entertain this idea, we recommend the consideration of an incident that recently took place in England. We refer to the re-entry by the reversioner of a lease of lands for a thousand years upon the expiration of the full term. This is a circumstance that could not have occurred in this country, for the very good reason, among others, that we are not old enough to render it possible, but also for the reason that among us the notion is quite prevalent that when one has used another's property for a good while it becomes his own. This idea is at the bottom of all our anti-rent disturbances. The man who thinks there is nothing certain in law, is quite apt also to think, that if he has for many years occupied a large farm belonging to another, for a rent which in the prolonged tenure of the occupancy has become ridiculously small, the farm ought to belong to him. Our national obligations, too, rest rather lightly upon our conscience. Already there is a large class of our citizens who are seeking ways and means of repudiating our national debt of only ten or fifteen years' standing. It is indeed very difficult for us to realize the expiration of a thousand years' lease. There are leases of a thousand years outstanding in New England, we believe, but as they will continue to stand out until about the year of grace 2700, we need not conjecture nor give ourselves much concern about them. When they fall in, New England will deserve a different name, and some other person than ourselves will doubtless note the incident for this journal. Even now we regard the one hundred year leases of Trinity church, some of which are about expiring, with a sort of awe and a self-congratulation that we allow the tenant of the fee io have his own again.

But to return to this English lease. It was executed in the reign of Alfred, that great and good man and wise law-giver, who did so much to raise his people out of the slough of degradation into which years of subjection had dragged them, and to establish them on a basis of order and

self-respect; who, "in the midst of a cruel war, of which he did not see the beginning nor live to see the end, did more for the establishment of order and justice than any other prince has been known to do in the profoundest peace." Its execution bears dates two centuries before the Norman conquest. When one looks back across this gulf of a thousand years, it almost staggers human belief to credit the incident. Through what vicissitudes of human history has this document survived! What changes, revolutions, conquests, has it witnessed! What else has survived the wreck of time? Westminster Abbey is called venerable, but it it is four hundred years younger than this document. While the contract is couched in a language which none but curious scholars are now conversant with, the judgment of re-entry is expressed in a national tongue thrice changed since Alfred. Human memory is racked to recall the succession of kingly houses which have ruled Great Britain—Plantagenet, York, Lancaster, Stuart, Hanover—forty monarchs since Alfred. In regard to many of these rulers history is engaged in conjecture;—was Richard really a cruel tyrant, or a courteous gentleman and good king; was Henry the Eighth a monster of jealousy or a considerate and fond husband; did Mary of Scots really write those damaging letters to Bothwell, and was she really a party to the murder of her husband;—how mythical these characters, and how doubtful the events of their times have already become! The parties to this instrument belonged to a barbarous, abject, cruel, and superstitous race—a few savages, struggling for existence against exterior enemies and internal dissension;—while the reversioner of today is of the richest, most enlightened, and most powerful people on earth; who rule the seas; whose language is spoken by forty millions of descendants in a world three thousand miles distant, and undiscovered until six centuries after Alfred; and whose councils and influence govern the world from the Hebrides to India, from Australia to California and the Gulf of St. Lawrence. This contract was entered into seven centuries before Shakspeare, the acknowledged king of universal literature, of whose achievements and very existence literary inquiry is even now beginning to raise grave doubts. Since those parties contracted, all the greatest facts of human history have occurred. Chivalry has risen and fallen; the discovery of the art of printing has set thought free and banished superstition; the invention of gunpowder has revolutionized warfare; the discovery of the telescope has enabled men to read the heavens and lift themselves a little nearer the Infinite; the birth of classical learning has softened the hearts of men, and refined their tastes by "the newly-disseminated poetry of Virgil, the eloquence of Cicero, and the glowing narratives of Livy;" the reformation has given mankind the open Bible; the discovery of America has given liberty a home and asylum; and the abolition of American slavery has demonstrated that there is such a thing as a national conscience, and such a being as an overruling God. The race who enforce the contract are as much above the race to whom those belonged who made it, as it is possible for human thought to conceive, and yet the contract is respected and enforced as if it had been made only a generation ago.

We daresay this incident does not excite much attention in England. Naturally it would be more remarked in a country like ours, whose beginning was only yesterday. But really it is an occurrence that speaks volumes for the constancy and integrity of the Anglo-Saxon race, and for the stability of its laws. We venture to say that such an occurrence would be impossible, historically, legally, or morally, in any other country than Great Britain. The Anglo-Saxon race is the only race that uniformly keeps engagements and recognizes the true idea of law. And strangest of all, the law that governs this people and by virtue of which an agreement is enforced a thousand years after its execution, exists but in tradition, and is unwritten. Laws inscribed on stone and brass have not been potent enough to cause other nations to keep faith; but here is a nation whose rule of action is omnipotent although it exists but in the oral consent of the people. The codes of Alfred and Canute have passed away, but equity and utility, the great principles on which all enduring law must be founded, survive, and command our admiration and obedience. If the spirit of the great Sax-

on law-giver takes any interest in the affairs of this world and of the people whom he regenerated and blest, we can faintly imagine the satisfaction and content with which he must view the fulfilment of an engagement made in his reign, the result of the ideas of equity, utility and good faith which he instilled into the minds of his subjects and stamped upon his laws. This incident should make us proud that we belong to Alfred's race, and that we have succeeded to the possession of his laws. It should also make us proud to belong to a profession whose ideal is so high, however far short of it we may come in practical administration, and whose office is so useful and benificent. As to those of us who are legislators it affords a significant admonition that it is not all legislation that deserves to live a thousand years, and that we should accede to none which might not usefully attain such a tenure of existence. *Albany Law Journal.*

AUTHOR AND CONTINUER OF NUISANCE.

In the law of *nuisance* a question of very frequent discussion and somewhat variable decision has been, against whom an action is proper to be brought, where the property causing the nuisance has, since the creation of the nuisance, passed into new hands; in other words, whether the *creation* or *continuance* of the nuisance is the substantial ground of action. The question has arisen alike with regard to the respective concurrent liabilities of *grantor and grantee,* and of *landlord and tenant.*

In an old case the declaration alleged that the defendant kept and maintained a bank, by which a brook was caused to flow around the plaintiff's land. The court said "there has not been any offence committed by the defendant, for he allegeth that he kept and maintained a bank, which is that he kept it as he found it, and it is not any offence done by him, for he did not do anything; and if it were a nuisance before his time, it is not any offence in him to keep it." The case is distinguished from those in which every using is a new nuisance, as the using of an aqueduct which takes water wrongfully from another. There every turning of the cock to let the water flow is a new nuisance. *Beswick* v. *Camden,* Cro. Eliz. 520.

In *M'Donough* v. *Gilman,* 3 Allen 264, it was held that in order to render a lessee liable as for a nuisance to a passageway for refitting a privy, the refitting must have rendered the privy more of a nuisance than it was before.

In *Roswell* v. *Prior,* 12 Mod. 635, the plaintiff recovered against the defendant for erecting a building which obstructed ancient lights. The defendant had leased the ground with the nuisance, and contended that the action should be against the lessee. But the court said: "Surely this action is well brought against the creator, for before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over, and more especially here where he grants over, reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz., the rent for the same; for thereby, when one erects a nuisance and grants it over in that manner, he is a continuer with an interest."

It is held that the lessor of premises for the purpose of carrying on a business necessarily injurious to the adjacent owners is liable as the author of the nuisance: *Fish* v. *Dodge,* 4 Denio, 311. See *Brady* v. *Weeks,* 3 Barb. 157; *Kint* v. *McNeal,* 1 Denio, 436. Also (in New York) that *an action of nuisance* against an assignee alone for maintaining a nuisance erected by his grantor was unknown to the common law, and is not authorized by the revised statutes: *Brown* v. *Woodworth,* 5 Barb. 550. So, if one erect a nuisance and then convey the land with warranty, he remains liable for the continuance of a nuisance: *Waggoner* v. *Jermaine,* 3 Denio, 306. A municipal corporation is liable for the continuance of a nuisance which it has created: *Pennoyer* v. *Saginaw,* 8 Mich. 534. More than twenty years before suit was brought, the defendant had constructed a sewer or water course through property owned and occupied by him. In 1845 he let a house, shop and cellar to the plaintiff (which he had previously occupied with the prop-

erty). In 1851 the water course burst, damaging the plaintiff's cellar and goods. In an action for negligently and improperly constructing the sewer, and keeping and continuing it in that state, the jury found that it was not originally constructed with proper care, and it was proved that it had been continued in the same state. *Held*, the action was maintainable, both upon the ground of "*sic utenetur*," &c., and because it was in derogation of the demise to the plaintiff to allow what was before rightful to become wrongful to him: *Alston* v. *Grant*, 24 Eng. L. & Eq. 122.

The remedy for a nuisance, however, is concurrent. If the owner of land on which a nuisance is created lets the land, or if a tenant, after creating a nuisance, underlets, and the nuisance is continued, an action lies at the option of the party injured, either against landlord or tenant: *Rex* v. *Pedley*, 1 Ad. & Ell. 822; *Staple* v. *Spring*, 10 Mass. 72; *Plumer* v. *Harper*, 3 N. H. 88.

The action lies for the continuance of a nuisance, though the plaintiff has accepted money paid into court in full satisfaction of the original erection: *Holmes* v. *Wilson*, 10 Ad. & Ell. 503.

In *Ryppon* v. *Bowles*, Cro. Jac. 373, Coke, C. J., inclined to the opinion that a tenant for years is not liable for the mere occupation of a building erected by his lessor, and which obstructs the plaintiff's lights, because his tearing down the building would be waste as to his landlord.

It is no defence to an action for continuing a nuisance, by acts done on the land of a stranger, that the defendant cannot enter to abate it without rendering himself liable to action by owner of the land. *Smith* v. *Elliott*, 9 Barr, 345. If the plaintiff recover damages for a nuisance from a lessee, who afterwards underlets, the nuisance continuing, an action still lies against the lessee for the continuance: *Rosewell* v. *Prior*, Salk. 460. See 12 Mod. 635. In a late case it it is held, that one who creates a nuisance not liable for its continuance after parting with the property with which it is connected, unless he is benefitted by such continuance, or warranted the continued use of the property, as enjoyed in connection with the nuisance. *Hanse* v. *Cowing*, 1 Lans. 288. And, in another recent case, a lessee in possession under a lease which binds him to keep the premises in repair, is held liable for a nuisance, in connection with the general principle that control of the premises creates such liability. *Fisher* v. *Thirkell*, 21 Mich. 1.

In the case of *French* v. *Richards* (Leg. Intel.), partly, however, upon the ground of a statute of Pennsylvania, the lessee of premises destroyed by fire was held entitled to contribution from the lessor, for expenses incurred in the removal of a wall which was left in a dangerous condition. Hare, P. J., suggests the following important distinctions: "It is a general and invariable rule in equity that charges necessarily incurred for a common object, or in pursuance of a legal obligation, shall be so apportioned or distributed that those shall bear the burden who receive the benefit. Under this salutary and comprehensive principle insurers may be liable for goods stolen or destroyed during the process of removal from a building which is on fire; the ship-owner bound to contribute to a loss occasioned by a jettison of the cargo; a landlord compelled to refund taxes paid by his tenants; or a tenant for life or in common entitled to require that the co-tenant or remainderman shall bear a due proportion of a charge or incumbrance resting on the land. A lessee from year to year has, by reason of the imbecility of his title, a stronger claim to protection against charges on the inheritance than a tenant for life. That the premises which he holds are destroyed by fire or devastated by a flood, will not, it is true, entitle him to call on the landlord for aid, or even suspend the rent. If he repairs the dykes or builds up the walls it must be at his own cost. If, however, under these circumstances, a duty is imposed by the law, which though primarily that of the lessor is yet obligatory on the tenant, and actually performed by him, the right to indemnity or contribution will be as clear as in the instances already cited; and such in effect is the case now in hand, because the walls being, according to the evidence, in a condition dangerous to all around, were a nuisance, requiring instant measures for its abatement. The

obligation to do this devolved in the first instance upon the tenants, as the person in possession, and who would have been liable civilly and criminally if injury had ensued. But inasmuch as the effect of removing walls that are unfit for use is to benefit the inheritance to the full extent of the expense incurred, the plaintiffs would probably have been entitled to call on the owners of the reversion for reimbursement, even if the duty of the latter had not been defined by statute."

It is generally held, in qualification of the liability for mere *continuance* of a nuisance erected by another, that the defendant had knowledge of its injurious character, or was notified or requested to remove it: *Pickett* v. *Condon*, 18 Md. 412; *Brown* v. *Cayuga*, 2 Kern, 486; *Hubbard* v. *Russell*, 24 Barb. 404; *Caldwell* v. *Gale*, 11 Mich. 77; *Crommelin* v. *Coxs*, 30 Ala. 318; Penruddock's Case, 5 Co. 100; *Winsmore* v. *Greenbank*, Willes, 583; *Woodman* v. *Tufts*, 9 N. H. 92.

In a late case, mere complaints and attempts forcibly to abate the nuisance were held not equivalent to the direct and unequivocal notice which the law requires: *M'Donough* v. *Gilman*, 3 Allen, 264.—*Central Law Journal.*

CRIMES OF VIOLENCE.

Offences against the person threaten to become the question of the day. One of our contemporaries harps incessantly upon it, and the Secretary of State has asked the opinion of the local administrators of justice thereon. Even judges are perturbed; and among politicians and social philosophers, many are in a fair way to lose their normal balance when addressing themselves to the consideration of this topic.

The latest instalment of statistical information on the matter comes from Liverpool, and last week the substance of what had appeared in the *Liverpool Albion* was given in our columns. It is unnecessary to repeat figures. The result, both of the statistics collected at Liverpool and of those collected elsewhere in England, may be thus briefly stated: If a period of five, six or seven years now last past be taken, and compared with a like preceding period, the actual number of offences against the person does not show an increase. If the relative violence of the offences be looked at, the later period shows an increase—even a marked increase—in this respect. If the number of offences against the person be considered absolutely, not comparatively, it is beyond all dispute immense; so immense as to form a very dark blot upon the social condition of the country. Again, if offences against property in all the large centres of population are reckoned, and a comparison of periods of five or ten years is made, there is seen a marked decrease. It would not be mathematically correct to say that the decrease in larceny varies exactly as the increase in crimes against the person; but, roughly speaking, the estimate is not very far wrong.

Nearly every discussion of this state of things has been limited to the means of repressing crimes of violence, and even in this very narrow area the debate has turned solely on the point whether criminals of this kind ought to be flogged. Thanks mainly to the exertions of one evening journal, we seem to be on the very eve of what may be called the Flagellant Reaction. We say Reaction advisedly, because the lash and the rod are the most primitive instruments of correction, and characterize the infancy of civilization in the history of every country on the face of the globe.

Now, why has larceny decreased? The first and most important answer to this question is, that men do not steal that which they do not want. Of late years in England wages have ruled high; employment has been abundant; the necessities, even the luxuries, of life have followed on the heels of genuine trade; and it has become rather a difficult thing in this country to starve. Clothes, such as working people wear, are cheaper here than anywhere else in the world; and as few need starve for want of food, so few are frozen for lack of raiment. All the whips, and scorpions, and gallows on earth will not prevent hungry men from stealing a loaf of bread; and, conversely, few who have the money in their pockets wherewith to buy food will run the risk

of six months in gaol for the pleasure of eating gratis. As auxiliaries to this grand motive not to steal, we have a vigilant police, the real effect of which is to make the calculation of the inutility of larceny rather more patent to the dishonest though not needy adventurer. As a further auxiliary we have the steady process of extermination of the breed of thieves, partly effected by the absence of demand for the thieving faculty in the midst of plenty, partly effected by bricks and mortar—railways and sanitary boards co-operating to that end—and partly again effected by the police. Given a continuance of material prosperity, and a continuance of order, the *professional* class of thieves is doomed to certain destruction under the processes thus described.

Not one of these means, which are so steadily operating to extinguish larceny, has any bearing whatever on crimes against the person—except, of course, the police; and there the action of that check is manifestly different as concerns crimes against property and crimes against person. In the former the police are a factor in the calm calculation of the thief, whereas in crimes of violence a policeman is almost as likely to be the victim as anybody else. The object of the thief is to evade the policeman. The fury of the doer of grievous bodily harm is just as often augmented, as it is stayed, by the appearance of a constable. His blood is up, and he means business; and, after all, knocking down a policeman does not materially increase the sentence for half-murdering some inoffensive old man. The element, therefore, of calculation of the chances of escape scarcely comes at all into reckoning with brutal assailants. Fear of punishment of course does; but, fear of punishment is one thing, and a calculation of the chances of evading punishment is another. Death itself is not nearly so effectual a deterrent as six months' imprisonment, if the odds are a million to one *against* incurring the former penalty and a million to one *on* incurring the latter penalty.

Not only are the causes which operate to stop larceny inoperative to check crimes against the person, but they even tend to augment and aggravate brutal assaults. "Jeshurun waxed fat and kicked" is as true now as it was three thousand years ago. The returns of the Excise are of themselves almost enough to account for the violence which reigns among us. It is not from vegetable-fed, water-drinking starvelings that acts which presuppose muscle and ferocity come. They may purloin, but they don't fight. The very plenty of meat and of drink wars against peace, for this plenty develops the brute both in body and pluck.

It may be said that, although the excitement of drink accounts for outrages committed under its actual influence, yet many of the worst cases of assault have occurred where there has been no proof of drunkenness. But such a reply would show some misapprehension of our meaning. That there is in the English nature a something, derived, as Hume would say, from the Saxon element, which may rise to sublime courage, and may sink to brutal ferocity, can hardly be denied. In war the English soldier has earned the name of "bull dog," and although in the present day his mercy may equal his valour, it was hardly so in the campaigns of the last century. Now, where there is neither morality, nor refinement, nor education, nor any atom of self-esteem, to control this something, it must more and more assume animal characteristics. In that case all that serves to develope the animal passions, augments it, till it assumes altogether abnormal proportions. Hence, it is perfectly intelligible that an era of unbounded material wealth should be coincident with an era of physical violence among the lower classes. Those who doubt, or have never considered, the effects on nations and individuals of diet had better read Mr. Buckle before they jeer at such ideas as mere speculations.

There is, moreover, this to be noted. During the eighteenth century the idle classes in this country were great eaters and great drinkers, and they were *pari ratione* great beaters. They beat their wives, their children, their men servants, their maid servants, their horses, and their dogs. It is true that the most aristocratic among them "pinked" people below them with the rapier on the least offence; but, although a rapier may be more genteel than a hob-nailed boot as a weapon, it is at least as uncomfortable to the party attacked. As morality, education, and refinement advanced, drunken-

ness, voracity, and violence became objects of contempt and emblems of degradation, not of gentility; and for at least forty years persons of leisure have found out that the first characteristic of a gentleman is to behave as such. Upon what conceivable principle are we to believe that this refinement is to stop exactly at the point to which it has now been brought? It has descended far below the small tradesmen; and there is only a residuum left, on which the leaven has yet to work. Why need we despair? Some people exclaim: Look at all this violence—in the face of the Education Act, too! Anachronism has its charms; and these people seem to fancy that Mr. Forster's statute somehow or other relates back to the boyhood of those who grew up in ignorance, and had no school but that of evil example.

In this state of things, what is it that justices, journalists, and even politicians propose? The lash. Abnormal severity of punishment by way of repressing some unpleasant symptom in the body politic, has been the resort of weak men in all ages of history. The old Statute Book of England, the bloodiest code of nations, bristled with penalties of the most dreadful kind. In days gone by people have been branded, pressed, boiled, burned, pillioried, ducked, flogged at the cart's tail, docked of their ears, and otherwise maimed, for a variety of crimes of various magnitude. Until the time of Sir Samuel Romilly, "hanging" was the ordinary specific for robbery. If severity of punishment alone could have checked crime, surely our ancestors were sufficiently ingenious in the discovery of torments. Their failure was as signal as their ignorance and their brutality. It is said that flogging has stopped garotte robberies, and the advocates of the lash for violence shout this out as if all the world was deaf. Now, in a robbery with violence there are two elements combined—an offence against property, and an offence against person. Offences against property have decreased, and are decreasing. Consequently, a crime, embracing an offence against property, ought by the same law to undergo diminution. Garotte robberies have not utterly ceased, any more than larcenies. They have simply become fewer.

The grand objection, however, to flogging is, that, like all brutal punishments, it tends to brutalize the community at large. It is true that the public are not allowed to be present at the floggings in Newgate, like the gentlemen of the last century, who used to make up parties of pleasure to see the wretched women who beat hemp in Bridewell, whipped. But if they cannot see these exhibitions with the natural eye, they can, through the photography of a newspaper report, see them with the eye of the imagination. To large numbers of the ignorant classes horrors have inexpressible charms; and if we may judge from the extraordinary prominence given to disasters by sea and land—to shipwrecks, railway accidents, explosions, fires, murders, and drownings—on the placards of the daily newspapers, and in the newspapers themselves, this morbid taste has quite sufficient hold on the community at large. The law of private executions was a step in the direction of removing dreadful spectacles from the public gaze, and is to be defended expressly on the ground that the contemplation of suffering is pernicious. No one has yet had the audacity to propose that we should have public floggings; but to inflict them in private, and give a minute and detailed account of them in public, is an evil only less in degree, but precisely the same in kind. The boundless circulation of the Press makes every reader in effect a spectator of these scenes.

Many persons, whose best feelings altogether revolt from the infliction of abnormal and violent punishments, are reconciled to them by a course of reasoning which would hardly deserve notice, if it were not unfortunately too common. We mean the old argument, "Serve him right." Now it is certain that it is not the business of the law to reward men according to their deserts. That is the attribute of a higher Power. Like vengeance, it lies not within the jurisdiction of a mortal judge. But the argument is put plausibly thus: "Why should you be so squeamish about flogging a brute of a fellow who has kicked a man's eye out for sport?" So far as concerns the man himself, who is to be flogged, squeamishness is very likely misplaced. But the question is not one of feeling—of indignation on one side and

sympathy on the other—but simply one of expediency. Will the use of the lash in this particular case effect the object in view? Even if it does, will its use not do more harm by tending to brutalise masses of people than good by checking a special offence? Moreover, is there not a peculiar danger in setting up an abnormal severe punishment for one special offence—namely, the danger of juries not convicting, or finding a verdict of guilty on some milder charge? Juries did strange things of old time *in favorem vitæ*, and so also did judges. From similar motives, why should not their descendants do likewise? —*Law Journal.*

[Whilst publishing the above, we do not quite agree with the writer in his conclusions. We have great faith in the lash for the backs of blackguards, bullies and wife beaters.—*Eds. C. L. J.*]

JUDICIAL INTERFERENCE WITH JURIES.

The issue raised by Dr. Kenealy's promised motion concerning the censure of juries by judges is, perhaps, wider than he contemplates. The verdicts of juries have in many recent instances been the cause of much surprise on the part both of the public and the Profession. Juries have been known to act from many motives other than the single motive of giving a verdict according to the evidence, and it is difficult for a judicial mind contemplating such a miscarriage of justice to refrain from giving expression to a certain amount of indignation. Whilst, therefore, it may be highly desirable that juries, so long as they exist, should have all possible freedom conceded to them, their constant abuse of that freedom may well suggest a doubt whether they should continue to be a part of the legal machinery in this country. In criminal cases, no doubt, danger might attend their abolition, but in civil cases unlimited liberty of obtaining new trials scarcely compensates for the loss inflicted by no verdicts at all, or verdicts palpably in conflict with the evidence. When juries are censured by the Bench it is absolutely certain that they are wrong. Censure of one jury must have a good effect upon other juries, who will be more careful in considering the evidence. Judges are not to be gagged, and if Parliament is to be appealed to upon every trifling exhibition of judicial temper, the life of a Judge will become intolerable. The motion was,

"To ask the First Lord of the Treasury, whether his attention had been called, to the two following cases of the interference of judges with the independence of juries at recent assizes. The first case he extracted from the *Dublin Daily Express*, where it was reported to have been tried at Limerick Assizes before Justices Lawson and Keogh. Two men, having been charged with homicide, were acquitted; whereupon the judge (Lawson) was reported to have said, "Is it possible that after hearing such evidence, you can have arrived at such a conclusion? I must observe that in the whole course of my experience I never witnessed a more distinct violation of the jurors' oath than has taken place in this case. This may be strong language, but in the discharge of my duty I am bound to use it." Subsequently he ordered the prisoners to be removed in custody. The second case was that of a man who was tried and acquitted at Brighton Assizes, the Lord Chief Justice (Cockburn) being the presiding judge. His Lordship immediately directed another jury to be sworn, and, addressing the prisoner, said, 'You are very fortunate, for I do not believe twelve human beings could have been found, except the jurors in the box, who would have returned such a verdict on the evidence.' He would ask the right hon. gentleman whether it was his intention to introduce any measure which would have for its object the better maintenance of the rights of jurymen to deliver verdicts according to their consciences and to the best of their ability, without censure from the Bench."—*Law Times.*

BAR EXAMINATIONS IN ENGLAND.

The present regulations of the Inns of Court prescribe that every person intending to be called to the Bar shall submit himself to an examination for the holding of which they make provision. This condition was imposed, as our readers are probably aware, to satisfy the exigencies of a public opinion, which was supposed to require all barristers to pass an examination. In this matter, perhaps, public opinion was not the best judge of what was necessary to test a man's legal attainments, but as the examination was conceded, there is no doubt it

should be sufficient and severe. This character the interests of the Profession require it should have. The benchers, however, have acted as though the interests of the Profession pointed in another direction, and the papers require so small a knowledge of law that practically the examination affords no test of legal knowledge. An amiable desire not to exclude men from being called to the Bar should not blind the benchers to the fact that when an examination is set up as a test of the fitness of the aspirants to a professsion, to follow it, each examination is a trial not only for the candidates but also for the profession to which they seek admission, and that to exact no knowledge and require no information as a necessary preliminary to becoming a barrister is a sure way of covering that branch of the legal profession with contempt.

A short consideration of the nature of the papers set by the examiners of the Inns of Court will amply justify the conclusion that they hold what may be nicknamed an examination. The questions put on all the required branches of legal study, viz., constitutional law and English History, real property, equity, common law, and civil law, amount in all to sixty, a number moderate enough. Of these twelve are employed for the purpose of testing the proficiency of the candidates in the doctrines of the common law. A *précis* of eight of these questions is as follows: Define a contract, a bill of exchange and promissory note, a tort, a special indorsement and an indorsement in blank, murder, manslaughter, perjury, and crime? Illustrate the difference between an executory and executed, an express and implied contract. Is a contract obtained by fraud a valid one? Is a wife, servant, or son, who commits an offence, excused because the commission is ordered by husband, master, or parent? What steps are to be taken when a Judge's ruling at Nisi Prius is objectionable in point of law? We have summarized the contents of the paper on common law at some little length, because space forbids us to set out all the papers *in extenso*, and an opinion will have to be formed of them as the bulk from which the above sample has been fairly drawn. With a single reservation, we have no hesitation in saying the intermediate examination which articled clerks undergo is far harder than the examination we have been discussing. Our reservation is this—the examiners place at the head of their papers "Candidates are requested to state their reasons for the answers which they give." In many cases a compliance with this demand is beyond human skill, and perhaps the questions are rendered easy in order to leave time for candidates to compass an impossible task. To ask a man to define what a contract is, and to give his reasons for his answer, is very like asking What is an elephant, and why? It would perhaps be better, instead of uniting questions that no one can answer with those which everyone knows, to devise papers which search out knowledge, and may be a bar to incompetence and folly.

We do not think the Benchers are so much to blame in the matter as perhaps they appear to be. The fault lies rather with their system than themselves. A large sum of money is annually expended in paying eminent queen's counsel to superintend the examination they have not time to overlook, and which they may not be specially qualified to conduct except by a readiness to do so. It would have been far better for the Inns to have left the conduct of the examinations in the hands either of their lecturers or of some well leisured men who could give a great deal of time to the really difficult task of inventing fair and searching papers. No doubt successful men are quite ready, like Lord Russell, to undertake anything, from commanding the channel fleet to carrying on an examination; but we venture to think that unless in future they show a greater aptitude for their task, they will better consult the interests of the Profession by leaving it to other hands less incumbered by business. The value of questions does not depend on the person setting them, but on their own scope and nature, and an examination is not valuable even if it were conducted by all the kings Candide dined with at Venice, if it resembles those gates one sometimes sees in Ireland, which, at a distance, seem to bar the roadway, but on a nearer approach are found to have a broad pathway on either side.—*Law Times.*

CRITICISM.

Criticism bids fair to become so dangerous a trade that ere long newspaper proprietors will find themselves constrained to refrain from noticing any book or play unless they can give it unqualified commendation. If an action for libel is to lie against a newspaper for saying that the works published recently by a particular firm are not so good as those published by the same firm some years back, newspaper criticism must sink into mere puffery. The case of *Johnston* v. *The Athenæum* is the latest instance of the danger of attempting to criticise modern productions.

We quote the above from the *Observer*' and if the statement were true a change in the law would be urgent. An author, especially in this busy age, is naturally anxious to have his work reviewed, for that is the best, almost the only way of attracting the attention of the public. If a novel gets a long notice in the *Times* it a commercial success. We may see the importance attached to criticism by looking at theatrical and book advertisements. The book or the play is recommended to the public by a string of extracts from newspaper and review notices. But it is not the business of the critic to please the author. He is rather the expert for the public. It is his duty to tell the public whether, in his opinion, this book is worth reading, or this play is worth seeing. Besides that, he should point out perfections and defects. If criticism is not free it is worse than valueless. If the critic were not allowed to censure as well as praise, the only use of criticism would be to promote the sale of worthless books, or to induce people to go to the theatre to see stupid plays. But the statement of the *Observer* is not well founded. Criticism is not a dangerous trade unless the critic exceeds the well-defined limits of literary and art criticism. Suppose a reviewer wrote of a novel:—"This is the most vile story it was ever our cruel fate to read. The plot is a jumble of plagiarised incidents. The personages are not characters, but Punch and Judy puppets. The author's style is weakest slip-slop. We observe that the price of this novel is £1 11s. 6d., but whoever pays for it a penny more than the waste-paper dealer will give for it will pay a penny too much." That might be an unjust criticism—as unjust as some of the slashing reviews that distinguished the early days of the *Edinburgh*. But, however unjust, it would not be unlawful. Or suppose a dramatic critic wrote of a play:—"This drama is beneath criticism, and we should not notice it except to warn the public not to waste time and money, and to incur a loss of temper, in visiting the theatre, whilst the manager insults his patrons by the production of such arrant trash. There is no plot; or, at least, we were not able to see any reason why this drama should not be played backwards. The dialogue is dreariest commonplace. We only marvel that any person could have strung together so many words without one line of humour, wit, or imagination. In our opinion the author has written the stupidest drama that has ever been produced on any stage.' That might be an unjust criticism, but it would not be unlawful. Surely, then, there is no pretence for saying that criticism is a dangerous trade for a reviewer; for a dramatic critic can hardly incur the risk of writing a libel if he says nothing except what appears on the face of the book or play. Now and then it is the duty of the critic to censure what he deems to be the moral tendency of a book or play; and that involves a risk of libel, because such a criticism is more or less a reflection upon the morality of the author. But even in such instances, a prudent—and we will add a just—critic can write with safety. If he barely asserts that a book or play is immoral, he may be unjust to the author. He may be wrong in his opinion, and he may unjustly deter the public from reading the book or seeing the play; and in such a case it is right that he should have to pay costs and damages, unless he can justify his language. But suppose the reviewer faithful describes some scenes in the novel, and quotes some passages, and writes:—'We consider these scenes and these passages immoral, and we hold that they render the novel an immoral novel;' it is very doubtful indeed whether the novelist would succeed in an action for libel even though the review of the critic was unjust, for he would have afforded everyone who read his criticism an opportunity of forming an independent judgment as to whether his sensure was or was not merited. So with regard to a play. When the critic barely says a

play is immoral, he incurs a needless risk. If he describes the scenes and quotes the dialogue that he deems immoral, he equally well fulfils his duty to the public, whilst avoiding a risk of libel.

But directly a reviewer draws on his own knowledge or suppositions in criticising the book, he writes at his peril; and if his injurious statements are false, or if their publication is not for the public good, he is legally liable to pay damages and costs. That is precisely the point in *Johnston* v. *Athenæum*. If the critic (Dr. Beke) had only censured the book there would have been no libel.—He might have written that it was the worst atlas ever produced by the firm.—He might have written that the atlas was imperfect and not worth buying. He might have written that it was not nearly so good as the atlas published by another firm. He might even have written that the atlas showed that the work now produced by the firm was not so good as formerly. In such censure, whether merited or unmerited, there would have been no libel. But unfortunately for the proprietor of the *Athenæum*, the critic referred to something that did not lie on the face of the book he was reviewing.—He wrote as follows:—

"The atlas now before us, though bearing the name of A. Keith Johnston, is neither the *primus* nor the *secundus* of that name, for the son is no longer connected with the house established by his late father, the merited reputation of which he was so well qualified to maintain, but has gone to seek his fortune in Paraguay; and not merely from the present work, but from others which have lately come to our notice, we regret to observe unmistakable signs of that true geographical acumen which Livingstone so justly lauded.

* * * * * * * *

"On the whole, we miss in the atlas the presence of the master mind, which in both father and son, gave to the house of W. and A. K. Johnston the character it has so long enjoyed, but we fear is now losing, in the world of science."

We are not surprised that Mr. Clark, publisher, of Edinburgh, said that 'the meaning he drew from the article complained of was, that the writer wished to convey the impression that the work was not Dr. Keith Johnston's or that of his son, although reputed to be so:' and, therefore, we hold that the jury was right in finding a verdict for the plaintiff. But we deny that the case of *Johnston* v. *The Athenæum* is an instance 'of the danger of attempting to criticise modern productions.' It is an instance of the danger of a critic exceeding his legitimate jurisdiction and writing something that does not lie on the very face of the book he is criticising. The *Athenæum* has not been cast in damages for the criticism of the book, but for making injurious statements on the reviewer's own authority.

As the case is not finally disposed of, we shall not say anything about the amount of damages except this, that when there is nothing to show malice the damages should not be successive. If the Messrs. Johnston have sustained any material loss in business they ought to be recompensed; but, otherwise, an amount that shows the opinion of the jury and carries costs should be sufficient. The defendant clearly proved that the work was given out to review in the usual manner; that it was given to an eminent geographer, and consequently there could be no malice on the part of the proprietor or editor.—*Law Journal.*

THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS.

While we are disposed to make every allowance for the sudden burst of strong feeling in favour of retaining the House of Lords as a final court of appeal, and for the arguments which Mr. Alfred Wills has put forward in the *Times*, we cannot but view with unqualified regret the concessions to the reactionary party which Lord Cairns has thought proper to make. The chief arguments in favour of retaining the House of Lords we take to be these: that being composed wholly of appellate judges, it is a court completely unprejudiced; that having among its members at least one Scotch and one Irish Judge, and many Scotch and Irish lay members, it commands the respect of Scotland and Ireland; that inheriting the traditions of centuries, it commands the respect of the empire; and lastly, which we think is an argument which has outweighed all the others, that the "Imperial Court of Appeal" was wanting in permanence, and contained too many judges of the First Instance.

Dealing with the last argument first, we can only say that in our opinion the difficulties in reconstituting the House of Lords (and that it must be reconstituted is admitted) will be found to be far greater than would have been the difficulties of amending the now withdrawn Bill. We quite agree that original and appellate jurisdiction should be kept distinct as far as possible; but it would be far easier to accomplish this with our present materials than to frame a "Supreme Court of Judicature," regulated by statutes, which is at the same time to be subordinate to a court regulated by its own standing orders. The grievances of Scotland and Ireland might surely be remedied by making certain Scotch and Irish judges, or ex-judges, "*ex-officio*" instead of "additional" judges of the Imperial Court of Appeal (*see* sec. 6 of the Judicature Act, 1873). The sister countries would then have a right to be represented on the judiciary, and it would not be dependent on the pleasure of the Crown whether judges of their nation should be appointed or not. As to breaking with the past and the "inherited traditions of centuries," we can only say that, just for once, we confess to a wish to break with the past; and if we are either to sacrifice our Supreme Court of Judicature to the House of Lords, or the House of Lords to the Supreme Court of Judicature, we prefer to make the latter sacrifice. A reference or two to the Act of 1873 will show our meaning. The title must go, for the court will no longer be "supreme." Sec. 54 must go, for it would be absurd for judges not to be allowed to sit on appeal from their own judgments, in one part of Westminster Hall, whereas the Lord Chancellor might do so in the House of Lords as often as he chose. The whole framework of the Act of 1873 must go for a similar reason, unless, indeed, the words "High Court of Parliament" can be inserted in the 3rd section. Otherwise we continue the anomaly of a court regulated by statute being overruled by a court regulated by its own standing orders, and whose procedure no statute, from the nature of its constitution, has ever yet controlled. Add to this, that the matter is *res judicata* (for it cannot be too carefully borne in mind that the appellate jurisdiction of the House of Lords at present stands abolished by sec. 20 of the Act of 1873), and that the Bill has been withdrawn without argument and at the suggestion of an irresponsible committee, and we think we have shown sufficient reason for the expression of unqualified regret with which we commenced our remarks. Those who wish to go more deeply into the subject may peruse with profit the able speech of Lord Coleridge, delivered at Plymouth in 1872, at the meeting of the Social Science Association, and published among the minutes of the Association for that year.

To conclude with some practical proposal. Let the "High Court of Parliament" (omitting lay members from that designation) take its place along with the courts consolidated by sec. 3 of the Act of 1873, and let the jurisdiction of it be among the jurisdictions transferred by sec. 18 to the Court of Appeal. Let it be "the duty of the ex-chancellors" (with increased pensions) to attend the sittings of the Court of Appeal in the same manner as it is the duty of the salaried judges to attend the Judicial Committee, under sec. 1 of the Judicial Committee Act 1871. Lastly, let no judge of the First Instance be a judge of the final Court of Appeal, and let the restriction upon appeals from the intermediate to the final Court of Appeal be as proposed in the now withdrawn Bill.—*Law Times.*

NEW BRUNSWICK REPORTS.

NOTES OF RECENT DECISIONS.

(*From* Pugsley's Reports, *Vol.* 2.)

Boundary Line.

When a division line is in dispute between parties, and they agree to establish a line, and do so, and act upon it by putting up their fences, and severally occupying the land on each side, they are bound by their agreement, whether the line is right or wrong, and can not repudiate it, though they have not held under it for a period of twenty years, so as to gain a title by adverse possession.—*Perry* v. *Patterson.* 367.

Distress for Rent.

In trespass for seizing and selling tools under an illegal distress the plaintiff may re-

cover not only the value of the goods distrained and sold, but also damages for being deprived of the use of them, if thereby he is thrown out of employment, and, in estimating the damages, the jury have a right to take into consideration the circumstances in which the plaintiff was placed, and the difficulty of obtaining employment in his trade without tools.

A distress is illegal when there is no fixed rent; so also is a distress of the tools of the tenant's trade illegal when there are other goods on the premises which could be distrained.—*Reilley* v. *McMinn.* 370.

Local Legislature—Ultra Vires.

Defendant was in custody on the first of October, when the Act 37 Vict. c. 7, abolishing imprisonment for debt came in force, and applied for his discharge under the Act. It was objected that the Act was *ultra vires*, but the Court held otherwise—limiting their decision, however, to the present case, in which it was shewn the defendant was not a trader and not subject to the Insolvent Act of 1869.—*Armstrong* v. *McCutchin.* 381.

Sessions—Affidavits.

Defendant was summoned to appear before the Sessions of Queen's County in January, 1872, to answer a complaint of selling liquor without license. The affidavit of service of the summons was sworn before a commissioner. Defendant did not appear and the hearing was postponed from one Session to another until January, 1874,—the defendant at no time appearing—when he was convicted of the offence. In the copy of proceedings returned by the clerk, an entry was made that "notice to appear was served on defendant."

Held, on an application for a *certiorari*, that this was not sufficient, but that the clerk should have entered how the service was proved, and when, and how it was made; also that a commissioner had no power to take the affidavit which should have been made in open court.—*Reg.* v. *Golding.* 385.

Delay in moving rule.

Where a conviction was made on the 20th January, and the copy of proceedings delivered to defendant on February 3, but only reached the counsel on February 10, and was forwarded to Fredericton for the purpose of moving for a rule *nisi* in Hilary term, but was accidentally mislaid; the Court held that, under the peculiar circumstances of the case, a rule *nisi* was properly granted, though defendant did not apply till Easter.—*Ib.*

Estoppel.

Where a party joins in an indenture, which refers to another instrument, approving of it, and treating it as a valid writing, he is thereby estopped from afterwards disputing the validity of the instrument so referred to.—*Brown* v. *Moore.* 407.

False imprisonment.

A person is not liable to an action for false imprisonment, who merely lodges a complaint before a Justice, and leaves the proceedings to be taken in the discretion of the Magistrate.—*Ib.*

Assignment of bail bond.

The bail bond given to the Sheriff in the case of a *capias* issued out of the County Court, being assignable by virtue of the County Courts Act, the Statute of Anne relating to the assignment of bail bonds, has no application, and it is not necessary that the assignment should be made in presence of two credible witnesses.—*Smith* v. *Smith.* 420.

QUEBEC REPORTS.

NOTES OF RECENT DECISIONS.

(*From the L. C. Jurist, Vol.* 13.)

Continuing Penalty.

A conviction based upon a by-law making a penalty for every day that a thing is done, while the Statutes upon which the by-law is framed do not clearly give authority to impose more than one penalty, will be quashed. *Ex parte Brown* v. *Sexton.*

Extradition.

1. Sub-section 2 of section 3, of the Imperial Extradition Act of 1870, is inconsistent with the subsisting Extradition Treaty between Great Britain and the United States, and is therefore, not in force, *quoad* any application under such treaty.

2. A copy of a Bill of Indictment found against a prisoner in the United States cannot be received as evidence.

3. The evidence adduced was sufficient to sustain the application.—*In re application of U. S. Government for extradition of Rosenbaum.*

Opening Letters.

The opening and reading of a private letter by a person to whom it was not addressed and for whom it was not intended, renders the person who thus violates the sanctity of private correspondence answerable in damages. *Cordingly* v. *Neild.*

Larceny—Partner.

An indictment for larceny will not lie against a partner under 32-33 Vict. cap. 21, sec. 38.—*Regina* v. *Lowenbruck.*

Restitution of Stolen Goods.

The Court will not give an order for the restitution of stolen goods, where the ownership is the subject of a dispute in the Civil Courts.—*Regina* v. *Atkin.*

Habeas Corpus.

A Writ of Habeas Corpus will be granted to liberate a prisoner charged with process in a civil suit (*contrainte par corps* against *Gardien*) issued out of a Court of inferior jurisdiction, when it appears on the face of the writ of arrest that the proceedings had are beyond

the jurisdiction of the Court from which it issued.—*Re Lebœuf & Viaux.*

A guardian of cattle and hay seized simultaneously, under the same writ, has a right to use the hay for feeding the cattle, even although it be afterwards proved that the cattle did not belong to the defendant.—*Johnson* v. *O'Halloran.*

Libel—Mixed Jury.

Where, to obtain six jurors speaking the language of the defence (English) the list of jurors speaking that language was called, and several were ordered by the Crown to stand aside; and the six English speaking jurors being sworn, the clerk re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, and one of those previously ordered to "stand aside" was again called, the previous "stand aside" stood good until the panel was exhausted by all the names on both lists being called.—*The Queen* v. *Dougall.*

Insolvency.

The giving of notice, required by section 105 of "The Insolvent Act of 1869," does not include the necessity of notice to each individual creditor required by section 117.—*In re Starke & Shaw.*

An assignee, under an assignment to him by an insolvent for the general benefit of his creditors, *not made under the provisions of The Insolvent Act*, has no quality to sue in his own name for anything connected with such assignment.—*Prevost et al.* v. *Drolet.*

Parliamentary Election.

An election held on illegal voters' lists will be set aside, notwithstanding that the petitioners themselves fail to prove that they were legally entitled to petition.—*Caverhill et al.* v. *Ryan.*

UNITED STATES REPORTS.

SUPREME COURT OF ILLINOIS.

Langaber v. Fairbury, Pontiac & N. W. R. R. Company.

Issuing Injunctions on Sunday.

1. *Held*, that in certain case a bill in chancery may be filed, and an injunction issued and served on Sunday.

2. Courts on Sunday Anciently.—That anciently courts of justice did sit on Sunday; that the early Christians of the sixth century and before used all days alike for the hearing of cases, not sparing Sunday itself; but in the year 517 a canon was promulgated exempting Sundays, and other canons were afterwards adopted exempting other days, which were all adopted by the Saxon kings, and all confirmed by William the Conqueror and Henry the Second, and in that way became a part of the law of England; that by these canons other days were declared unjudicial, as the day of the purification of the Blessed Virgin Mary, the feast of the Ascension, the feast of St. John the Baptist, and All Saints and All Souls days. These were as much unjudicial days as Sunday, yet the most devoted admirer of the common law would not hesitate to say that the proceedings of a court of justice in this State on either of those days would be valid.

Opinion by Breese, J.

This was a bill in chancery in the Livingston Circuit Court, praying for a writ of injunction to restrain the Fairbury, Pontiac & North-Western Railway Company from taking possession of one of the principal streets (Walnut) in the incorporated town of Fairbury, for the purpose of grading, tieing and ironing the same for the track of their railroad. The bill is filed by a large property owner on the street to be taken by the railway, and it alleges that the company, immediately after twelve o'clock of the night of Saturday, with a large force of men had taken violent possession of the street, for the express and avowed purpose of finishing their track through its entire length before the next Monday morning, and that they had selected Sunday for the work for the express purpose of evading an injunction, and avoiding the process of court, and for the purpose of obtaining and holding the street without paying for it, or the damages thereby occasioned to the property owners upon it. That the company has not paid or offered to pay anything to any person injured by the proposed occupancy of that street, nor taken any steps or measures to estimate the damages, or have the same assessed in pursuance of law. It is also alleged the company is wholly insolvent, and if it is permitted to take possession, control and use that street for the purpose of operating their trains over the same, without paying complainant the damages he will sustain in consequence thereof, he will be without remedy in the premises, and will absolutely lose at least one-half the value of his property in consequence thereof, and that the grading for railway purposes will greatly injure the street and complainant's property, and unless the company, the contractors and their agents and servants are restrained by injunction issued forthwith, the road will be finished through the street to-day, Sunday, and that the company and its contractors are doing the work on this day, Sunday, in order to avoid paying complainant his damages, and to defraud him out of the same, which they will accomplish successfully unless immediately enjoined by process of the court.

This bill was presented to the master in chancery in the absence of the circuit judge on Sunday; the writ of injunction was ordered by the master on that day, and issued by the clerk, and served by the sheriff on the same day. At the September term following a motion was made to quash the writ, which was allowed and the bill dismissed.

Complainant brings the record here by writ of error, and assigns this action of the court as error.

The bill on its face presents strong grounds for the interference of a court of chancery, and justified the ordering and issuing a writ of injunction. But the defendant insists if this be so, no valid writ could issue on Sunday. He insists that the order of the master in chancery being made on Sunday was void, for the reason it was a judicial act, and Sunday is not a judicial day.

As a general proposition it may be conceded Sunday is not a day in law for proceedings, contracts, etc. 2 Inst., 264. Anciently, however, courts of justice did sit on Sunday. The early Christians of the sixth century and before, used all days alike for hearing of causes, not sparing the Sunday itself; but in the year 517 a canon was promulgated exempting Sundays. Other canons were adopted in subsequent years, exempting other days, which were all revised and adopted by the Saxon kings, and all confirmed by William the Conqueror and Henry the Second, and in that way became a part of the common law of England. *Swann* v. *Broome*, 3 Burrow, 1595. By the canons of the church, Sunday was decreed *dies non juridicus*, and by the same canons other days were declared unjuridicial, as the day of the purification of the blessed Virgin Mary, the feast of the Ascension, the feast of St. John the Baptist, and All Saints and All Souls days. These were as much unjuridicial days as Sunday, yet the most devoted admirer of the common law would not hesitate to say that the proceedings of a court of justice in this State on either of those days would be valid. Yet by the common law no valid judicial act could be performed on either of those days. Why, then, if such an act can be done and have binding force on these unjudicial days in this State, why should not equal efficacy be accorded to the same act if done on the other unjudicial day, viz.: Sunday? It is answered that secular employment of any kind is prohibited by our criminal code, and reference is made to section 144.

We had occasion, in *Johnson* v. *The People*, 31 Ill., 469, to express briefly our views of this question, the case being one where a recognizance had been taken by a magistrate on Sunday, from which the cognizor sought to be discharged, on the ground that having been taken on Sunday, and being a judicial act, it was void and of no effect. This court said, generally judicial acts can not be performed on Sunday, but the recognizance was held to be valid and no violation of the section referred to. That we were to understand by the word "necessity" not a physical and absolute necessity, but the moral fitness or propriety of the work done under the circumstances of each particular case; that any work, therefore, necessary to be done to secure the public safety by the safe-keeping of a felon, or delivering him to bail, must come within the true meaning of the exception in the statute; that neither the peace or good order of society was disturbed by such a proceeding, as it may be, and usually is, silently conducted. The notion that Sunday is a day so sacred that no judicial act can be performed, had its origin with ecclesiastics of an unenlightened age, and rests upon no substantial basis; and if it is the doctrine of the common law, it need not have application here, in this day of thought and increased enlightenment. Men are freer now than then, and are permitted to regard acts as innocent and harmless which were then deemed sacrilegious and worthy of anathema. So long as our own statute is not violated, so long as nothing is done which it forbids, there can be no reasonable ground for complaint. There is nothing in our Constitution of government inhibiting the General Assembly from declaring Sunday to be *dies non juridicus*. One step has been taken in that direction, by providing, by law, as follows: On proof being made before any judge or justice of the peace, or clerk of the circuit court within this State, that a debtor is actually absconding or concealed, or stands in defiance of an officer duly authorized to arrest him on civil process, or has departed this State with the intention of having his effects and *personal* estate removed out of this State, or intends to depart with such intention, it shall be lawful for the clerk to issue and the sheriff or other officer to serve an attachment against such debtor on a Sunday, or any other day, as is directed in this chapter. R. S. 1845, ch. 9, sec. 27. Here this *dies non juridicus* was selected by the railroad company as the proper day to commit a great outrage upon private and public rights, believing the arm of the law could not be extended on that day to arrest them in their

high-handed and unlawful design. To the complainants, the acts they were organized to perpetrate on that day were fraught with irreparable injury. Feeble, indeed, would be the judicial arm if it could not reach such miscreants. To save a debt of twenty dollars, judicial acts can be performed on Sunday, and ministerial as well. To prevent the ruin of an individual such an act must not be done! Lame and impotent conclusion. In Comyn's Digest, title "*Temp*," under the head *Dies non juridicus*, it is said the Chancery is always open. So the Exchequer may sit upon a Sunday, or out of term; p. 333 (c. 5). There is nothing, to an intelligent mind, revolting in this. Suppose, in times of high political excitement, a citizen is indicted for treason, and judgment of death pronounced against him by a servile judge, who, not a slave of the Crown, as were Trevelyan, Scroggs, and Jeffries, but yet the slave of an enraged populace, on an indictment never returned into court or found by a grand jury, and defective in every essential, and this judgment pronounced on Saturday, and the time of his execution fixed on the following Monday. To arrest this proposed judicial murder, an application is made to a member of the appellate court on the intervening Sabbath; who would justify the judge should he fold his arms, and, on the plea the day was not a judicial one, suffer the victim to be led to execution? The necessity of the case would be the law of the case. The judge who has no respect for this principle is unworthy the ermine, and an unfit conservator of the rights of the citizen. The case before us is not one of life or death, but involves irreparable injury to property. An imperious necessity demanded the prompt interposition of chancery. On that principle the act is fully justified. This is the dictate of right, of reason, of common justice and common sense.

The decree of the court below, quashing the writ of injunction and dismissing the bill, is reversed, and the cause remanded for further proceedings.—*Chicago Legal News.*

HARRIET M. HAIGHT v. FRANKLIN MCVEAGH and WAYNE MCVEAGH.

The Act of 1861, *relating to a married woman's separate property, and of* 1869, *relating to her earnings, construed. A married woman may be a partner in business, and sued in an action at law.*

The defendant below was a married woman residing with her husband, and with his consent carrying on the business of a retail grocery store in her own name, in conjunction with one Chase, who was a silent partner. The husband had no interest in the business, but was acting as clerk for the firm. The account for the collection of which suit was brought, was for goods purchased by appellant in her own name, to be used in her business. No plea in abatement for the non-joinder of Chase was filed. The Court, after discussing the act of 1861 and of 1869, giving to a married woman her own earnings, and the decisions of the court construing the same, say, in this case, the goods were purchased by the appellant, to be used in her business as proprietress of a retail grocery store. There is no pretense that they were purchased by the husband, or for his use, or under such circumstances that the law will infer his liability. They became appellant's sole and separate property, and either she must be held to pay for them, or it must be held that while married women have the right to contract and acquire property, they shall nevertheless be exempt from complying with their contracts made for that purpose.

2. CHANGE IN LAW—DUTY OF COURT.—The legislative department has seen fit to make a radical change in the common law relating to the property rights of married women, and it is the duty of the court to enforce the law as they have made it.

3. CONSTRUCTION OF LAW AS TO EARNINGS AND PROPERTY.—That it is not to be supposed that it was within the contemplation of the legislature, in conferring upon married women the right to receive, use and possess their own earnings, and to sue for the same in their own names, that it was to be limited to such only as should result from manual labor, or that in conferring upon them the right to have their separate property under their sole and separate control, and to hold, own, possess and enjoy the same as though they were sole and unmarried, they were to be restricted in its use or disposition. That the right to control is indispensable to the acquisition of earnings, and to the unrestricted possession, control and enjoyment of property.

4. RIGHT TO EARN MONEY IN TRADE.—The court perceives no reason why a married woman, invested with these rights, may not, at least, with the consent of her husband, earn money in trade as well as at the wash-tub or with the sewing machine; why she may not as well be the proprietress of a grocery store as of a farm; contract debts for goods to be used in trade as for animals and farming implements or lands or farm labour.

5. EFFECT OF REMOVING COMMON LAW RESTRICTIONS.—That in removing the common law restrictions upon her right to acquire and to control her property, the legislative have left her to determine, at all events when her husband shall not object, from the dictates of her own judgment, in what lawful pursuits she will engage, and whether it shall be prosecuted alone or in conjunction with others.

6. WHEN JUDGMENT MAY EXCEED DEMAND ON SUMMONS.—That interest may be added, even if it makes the judgment exceed the demand endorsed on the back of the summons by the justice.—ED. LEGAL NEWS.

The opinion of the court was delivered by Scholfield, J.

The principal ground upon which a reversal of the judgment of the court below is asked, is, that the appellant is, and was, when the cause of action accrued, a married woman, residing with her husband; and that the judgment should, therefore, have been against her husband and self jointly, and not against her individually.

It is conceded that appellant was, with the consent of her husband, carrying on the business of a retail grocery store, on West Madison street, in Chicago, in her own name, in conjunction with one Chase, who was a silent partner; that her husband had no interest in the business, but was acting as clerk for the firm; that the account, for the collection of which suit is brought, was for goods purchased by appellant, in her own name, to be used in her business, and that she acknowledged the correctness of the account, and promised to pay it before suit was commenced.

No plea in abatement was filed on account of the non-joinder of Chase, and no objection is now urged questioning the regularity of the proceeding in that respect.

The first section of the act approved February 21, 1861, (Laws of 1861, p. 143), conferred upon a married woman the right to possess, control, and enjoy her separate property, acquired in good faith, from any person other than her husband, the same as though she were sole and unmarried. And the first section of the act approved March 24, 1869, (Laws of 1869, p. 255), conferred upon her the right to receive, use, and possess her own earnings, and sue for the same in her own name, free from the interference of her husband and his creditors.

In *Carpenter* v. *Mitchell*, 54 Ill., 126, it was held that a married woman, under the act first referred to, has power to purchase real estate and bind her separate property for the payment of a debt thus incurred. It was there said: "This provision contemplates the acquisition of property in different modes by married women, and a fair interpretation of the language employed embraces a purchase by her. It names the acquisition by descent and devise, and instead of limiting it to that mode, enlarges the power by recognizing other unenumerated modes, by the expression 'or otherwise,' which is broad enough to embrace a purchase. If, then, the statute authorizes a married woman to purchase real estate, she must, when she exercises such a power, do it on the same terms and conditions which attach to others not under disability, so far as to be bound by her purchase and render her separate property, in equity, liable to discharge indebtedness thus incurred."

In *Howarth* v. *Warmser*, 58 Ill., 48, it was held that the effect of the act last referred to was to relieve the husband from the payment of the debts of the wife, contracted before marriage; that by taking away the husband's control of the earnings of the wife, the reason of the common law rule holding him liable for the payment of such debts was removed, and the reason ceasing, the rule must also cease.

Upon like principle it was held in *Martine et al* v. *Robson*, September term, 1872 (reported 5 *Chicago Legal News*, p. 304), that the husband is no longer liable for the torts of the wife when not committed by his direction, nor with his consent.

And it has been repeatedly held that the husband may act as the agent of his wife, in the control and management of her property, and that where he so acts in good faith, and is not permitted thereby to defraud others, it in no wise impairs her right to her property, or to its increase or profits.

By reference to these and other decisions bearing upon the question, it will be seen that it has been the settled policy of this court to give a liberal construction to the acts referred to, and to enforce their several provisions according to the plain and obvious meaning of the language used. The wisdom of these statutes we are not authorized to question, as they are not in conflict with any part of the Constitution. The legislative department has seen fit to make a radical change in the common law, relating to the property rights of married women, and it is our duty to enforce the law as they have made it.

It is not to be supposed that it was within the contemplation of the legislature, in conferring upon married women the right to receive, use, and possess their own earnings, and to sue for the same in their own names, that it was to be limited to such only as should result from manual labor, or that in conferring upon them the right to have their separate property under their sole and separate control, and to hold, own, possess, and enjoy the same, as though they were sole and unmarried, they were to be restricted in its use or disposition. The right to contract is indispensable to the acquisition of earnings, and to the unrestricted possession, control, and enjoyment of property.

We perceive no reason why a married woman, invested with these rights, may not, at least with the consent of her husband, earn money in trade as well as at the wash-tub or with the sewing machine;—why she may not as well be the proprietress of a grocery store as of a farm; contract debts for goods to be used in trade, as for animals or farming implements, or lands or farm labour. In removing the common law restrictions upon her right to acquire and to control her property, the legislature have left her to determine, at all events when her husband shall not object, from the dictates of her own

judgment, in what lawful pursuit she will engage, and whether it shall be prosecuted alone or in conjunction with others.

In this case the goods were purchased by the appellant to be used in her business as proprietress of a retail grocery store. There is no pretense that they were purchased by the husband, or for his use, or under such circumstances that the law will infer his liability. They became appellant's sole and separate property, and either she must be held to pay for them, or it must be held that while married women have the right to contract and acquire property, they shall, nevertheless be exempt from complying with their contracts made for that purpose.

In *Cookson* v. *Toole*, 59 Ills., 515, the case of *Mitchell* v. *Carpenter, supra*, was so far modified that it was held that a married woman is liable on her contracts at law, as well as in equity. That case was assumpsit, brought by the plaintiff against the defendant, a married woman, to recover for work and labor done and performed by plaintiff for defendant, at her special instance and request. The coverture of the defendant was pleaded, to which the plaintiff replied that the work and labor in the declaration mentioned were done and performed in and about the improvement of the defendant's farm, and in taking care of her stock thereon, which farm and stock were her sole and separate property, derived from persons other than her husband, held and enjoyed by her for her sole benefit, and without the control or interference of her husband.

The court below sustained a general demurrer to the replication. It was held that the matters alleged in the replication were sufficient in avoidance of the plea of coverture, and that the court below erred in sustaining the demurrer.

And in *Hadley* v. *Ball* (September Term, 1872), suit was brought against a married woman; pleas of coverture were interposed, to which it was replied that the several premises and undertakings in the declaration mentioned, were for services performed, materials furnished, and money expended concerning the necessary care, and for the benefit of the separate property of appellee, then owned by her, etc. It was held, following *Cookson* v. *Toole, supra*, that the replications were sufficient, and that under the law now in force, a *feme covert* may be sued at law on her contracts.

It is also objected that the judgment is for a larger amount than that indorsed on the back of the summons.

The excess is accounted for by the accumulation of interest, after the account was presented to appellant, and she acknowledged its correctness, and promised to pay it. It was then liquidated, and it was proper to allow interest upon it from that time forth, at the rate of six per cent. per annum. In such cases the judgment, although exceeding the amount indorsed upon the summons issued by the justice of the peace, is not erroneous: *Rives* v. *Rumler*, 27 Ills., 293; *Dowling* v. *Stewart*, 3 Scam., 195.

The judgment of the court below is affirmed.

Sheldon, J., dissents.—*Chicago Legal News.*

REVIEW.

Addison on Contracts, being a Treatise on the Law of Contracts. By C. G. Addison, Esq. Seventh edition, by Lewis W. Cave, of the Inner Temple, Barrister-at-Law, Recorder of Lincoln. Stevens, Sons, & Warwick, 119 Chancery Lane, London. Willing & Williamson, Toronto. 1875. 1222 pp.

The very name of "Addison on Contracts" is suggestive of fullness and amplitude. It was always an exhaustive dictionary of the law on the innumerable points which arise in the discussion of the engagements and relations of life known as contracts. In the hands of Mr. Cave the subject has received a more scientific arrangement, though in all material respects it is the "Addison on Contracts," with which all are so familiar.

The work is now divided into three books—the first, treating of the law of contracts generally; the second, with particular contracts, and pointing out how in these the general law is developed or modified, whilst to the third is consigned the subject of stamps, which is not of much practical importance to us as yet.

The editor gives the scheme of the present edition at some length in his preface. The first book is divided into six chapters. The first, deals with the principles governing the formation of contracts; and thus having ascertained by whom contracts can be made, and how they must be authenticated, the second chapter proceeds to deal with the interpretation of contracts. But there are some contracts which the law

will not enforce, either as void, *ab initio*, or voidable by one or other of the parties, and the third chapter speaks of these. The fourth chapter considers how contracts which the law will enforce may be discharged. The complications arising from assignments, or from the death, marriage, or bankruptcy of one of the parties are explained in the fifth chapter. The sixth deals with the remedies for actual or contemplated breaches of contract, either by an action of damages or specific performance. The second book treats of a variety of particular contracts. The mere enumeration of these occupies no less than twenty pages of the table of contents, and the discussion of them seven hundred pages of the book itself.

Some idea of the vastness of the work may be obtained from the fact that over four thousand cases are referred to in the work as authorities for different propositions, and that it contains over twelve hundred pages of solid law.

We do not pretend to say that we have even attempted to analyze the labours of Mr. Cave, except in the most general manner; nor could any words of ours either detract from or add to the generally received opinion of the value, in fact the necessity almost, of this elaborate work to the legal practitioner. It is, in fact, unnecessary to do more than call attention to the fact that a new edition, bringing down the cases to the latest possible date, has been published, and to note the salient points of difference in arrangement between this and the previous editions. Our namesake in England thus sums up its notice of the book: "Mr. Cave, aided by Mr. Horace Smith has done more than sustain the reputation of this treatise. He has greatly added to it."

The type has been enlarged and other improvements have been made in the mechanical execution of the work, which is in the best style of the enterprising publishers.

FLOTSAM AND JETSAM.

CURIOSITIES OF THE LAW REPORTERS.

Thomas's case—Dyer 996, quoted in Phillimore's Law of Evidence, 136. One witness of his own knowledge, and another of hearsay from him, though at the third or fourth hand, are two sufficient witnesses in high treason.

In a very recent case in Tennessee we find one of the learned judges saying: "The same doctrine is to be found in Bracton, *Lord* Bacon, in Bacon's Abridgment, and was a maxim of the civil law." *Girdner* v. *Stephens*, 1 Heiskell, 286.

In an old case—Bagnal *contra* Langton, Mich. T., 9 Jac. 1—a man stole his wife against her friends' consent, and sued them for her portion in this court—the Court of Chancery—but was refused relief on the ground, as it was quaintly stated by Sir Thomas Egerton, that "he who steals flesh, let him provide bread how he can."

"We must not steal leather to make poor men's shoes," said Mr. Justice Twisden in *Earl of Plymouth* v. *Hickman*, 2 Vern. 167.

The virtue of a woman does not consist merely in her chastity. 2 Atkyns, 338; 1 Coop. Temp. Cottenham, 536, note.

The following language used by Maule, J., in *Martindale* v. *Falkner*, 2 C. B. 720, is characterised by Blackburn, J., in *Regina* v. *Mayor of Tewkesbury*, L. R. 3 Q. B. 629; 37 L. J. Q. B. 288, as clear and common sense:—"There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so."

In The *Protector* v. *Geering*, Hardress, 85, 99 Atkins says, *arguendo*: "Errors are like felons and traytors; *any* man may discover them; they do *caput gerere lupinam*." See 1 Man. & Gran. 16 note.

Testators should be prevented, if possible, "from sinning in their graves." This expression, which has become one of the current byephrases always used in courts of equity on the fitting occasion, fell from Sir John Strange, in *Thomas* v. *Britnell*, 2 Ves. Sen. 314.

An inhabitant in a county goes with wares in the same county from one house to another to sell them. He is a *rogue* within the statute of 39 Eliz. cap. iv. and other statutes. Jenk. Cent. viii. Cas. 16.

In a case in which it was held that a bond in consideration of past cohabitation is good in law, Mr. Justice Bathurst "pleased the sanctimonious by enriching his judgment" with quotations from the books of Exodus, ch. xxii. v. 16. and Deuteronomy, ch. xxii. v. 28, 29, to prove that "wherever it appears that the *man is the seducer*, the bond is good." *Turner*, spinster, v. *Vaughan*, 2 Wils. 339. We wonder when a case will occur in which the question of the validity of the bond, the woman being the seducer, shall be solemnly adjudged and reported.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 38th Victoria.

During this Term, the following gentlemen were called to the Degree of Barrister-at-Law, (the names are given in the order in which the Candidates entered the Society, and not in the order of merit):

G. Morrice Rogers.
Warren Burton.
Colin G. Snider.
George B. Gordon.
John Bruce.
Louis W. P. Coulter.
Charles Gamon, under special Act.
W. Darby Pollard, " "

The following gentlemen received Certificates of Fitness:

Haughton Lennox.
J. D. Matheson.
J. T. Lennox.
W. H. Ferguson.
Francis Rye.
John G. Robinson.
F. E. P. Pepler.
T. Caswell.
Alexander Ferguson.
Warren Burton.
David Ormiston.
J. C. Judd.

And the following gentlemen were admitted into the Society as Students of the Laws:

Graduates.

William Malloy.
George F. Shipley.
Eugene Lewis Chamberlain.
—— Nicholls.

Junior Class.

James Haverson.
J. R. Kerr.
Thomas Stewart.
Michael J. Gorman.
Charles Edward Hewson.
John Cowan.
James Alexander Williamson.
J. Pasman Ross.
Henry S. Lemon.
Hugh Blair.
Peter V. Georgen.
Frederick Wm. Gearing.
Daniel Byarde Dingman.
Christopher Wm. Thompson.
Reginald D Pollard.
Peter Stewart Ross.

The following are the days fixed by the general orders or the various examinations:

Preliminary Examinations—Second Tuesday before Term. Intermediate Examinations—Tuesday and Wednesday next before Term. Examination for Certificate of Fitness—Thursday before Term. Examination for Call to the Bar—Friday and Saturday before Term.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

J. HILLYARD CAMERON,
Treasurer.