DIARY FOR SEPTEMBER.

2. Wed..Last day for notice of re-hearing.
6. SUN..13*th Sunday after Trinity.*
7. Mon..Recorder's Court sits.
8. Tues..Quarter Sessions and County Court sits in each County.
10. Thurs Re-hearing Term commences.
13. SUN..14*th Sunday after Trinity.*
20. SUN..15*th Sunday after Trinity.*
27. SUN..16*th Sunday after Trinity.*
29. Tues..*St. Michael.*
30. Wed..Appeals from Chancery Chambers.

THE

Canada Law Journal.

SEPTEMBER, 1868.

THE WHALEN TRIAL.

This most engrossing case is so familiar to every one in the Dominion that it would be but a waste of time to refer to it at length. There are, however, some important and suggestive features in it which demand attention.

It is in the first place a proud thing to feel that the reliance of our people in the strength and majesty of the law is such, that they are content to leave to the even course of that law the punishment of a dastardly crime against it; and not only a crime against the law as such, but a crime revolting to the better instincts of our nature, and, from attendant circumstances, rousing a bitter feeling of indignation and horror, a feeling which would naturally find vent in a desire for speedy punishment or perhaps vengeanee on the perpetrator. But it was not thought necessary even to accelerate the sittings of the ordinary tribunals, much less to do what had a strong shew of necessity owing to the peculiarities of the case,—the appointment of a special commission for the trial of the offender. We have seen under somewhat similar circumstances in our near neighbourhood the bad policy and the evil effects, to use no harsher words, of allowing the passions of the hour, just and righteous enough within proper limits, to influence the due and orderly administration of the law.

It is of less importance (except for the effect produced in justifying the confidence of the public, and so sustaining the feeling we have alluded to) that the result has been to discover and legally fasten the crime upon the real criminal, for it can scarcely be questioned by any sane man, nor is it doubted by any person, that we have secured the perpetrator of the deed in the individual who has been found guilty and sentenced to suffer the extreme penalty of the law on the 10th day of December next. And in connection with this, we may remark, that one of the strongest features of the case against the prisoner, though one to which we have only seen a passing allusion, is, that no shadow of suspicion appears to have fallen upon any person other than the convicted prisoner. From first to last every circumstance has told against him, and against no one else, nor has there been any suggestion by the prisoner or any one else that any other person known or unknown might have committed the murder.

To those who consider that the guilt of the prisoner was proved on the trial beyond all reasonable doubt, it may seem a pity that there is still a possibility that he may yet go unpunished, for it cannot be denied that on a new trial there might and probably would be a difficulty in producing all the evidence that the Crown had at the last trial, and that it would give the unscrupulous friends of the prisoner an opportunity of manufacturing evidence difficult to rebut, or of buying up or making away with the witnesses on whose evidence the verdict lately given was founded. We do not at present desire to discuss the probabilities of a new trial, the only possible ground for which is of course the ruling, that a prisoner must exhaust his peremptory challenges before he challenges for cause,—though we cannot but regret that, apparently in this single matter, the counsel for the Crown failed in that tact which, with this exception, he evinced in the conduct of the case throughout. The exigencies of the prosecution did not require a strict enforcement of the rule of law contended for by the Crown, if such rule there be, for even an indulgence to the prisoner in this matter would not, in all human probability, have affected the result, and no doubtful question would then have arisen.

But supposing the objection to be sustained, and the claims of justice delayed or defeated, though we may regret that in this particular case the example required for such evildoers may not be made for the prevention of similar crimes, we must not forget that the objection is intimately connected with one of the safeguards provided by that same law that overtook the criminal, for the protection of those who might be falsely accused.

The very strength and majesty of the law implies a tenderness to the accused which few would wish to see destroyed. The finite understanding of humanity renders it necessary that the law for one man should be the law for another, and that there should be no distinction of persons.

To those concerned in the conduct of this remarkable trial, whether we speak of the conduct of the judge on the bench, the patience and attention of the jury, or the unvarying fairness, good temper, tact and zealous devotion of the counsel on both sides, great praise is due. With respect to the counsel for the Crown, his able management of the case, with the one exception already alluded to, was only equalled by his fairness to the accused. As to those on the other side, we need not here speak of the conduct of Mr. Farrell, of whom the less said the better, particularly as he is not a member of our bar, nor amenable to, and possibly ignorant of, rules which are supposed to guide professional men, at least in this part of the Dominion.

Nor is it necessary to discuss whether the senior counsel, who so ably and faithfully conducted the defence, was right or wrong in accepting a brief for the prisoner. Every lawyer knows that he would have been disgraced if he had refused to do so. For although his talents are supposed, from his position as Queen's Counsel, to be peculiarly at the service of the Crown, that, in itself, does not debar him from defending a prisoner; and it is not the practice in this country, as we believe it is in England, to obtain for a Queen's counsel a license for that purpose. His character as leader of the Bar of Ontario, and his knowledge of his responsibilities in that respect, preclude the thought that he would have hesitated for a moment in assuming even a much more odious position in the eyes of the public if his duty required him to fill it. It is only because some few persons, who, perhaps, ought to know better, appear to be ignorant of these matters, that it is worth while, even at this length, to refer to them.

There is much more difference of opinion as to the propriety of a member of the local Government accepting a retainer in a case of this kind, and under its peculiar circumstances—circumstances which may be said to have imparted to the crime a treasonable character, and made the trial somewhat of a state trial. The crime was, partly at least, aimed as a blow against the state by some one who would seem to have been in some way connected with, and perhaps the chosen agent of an organization avowedly desiring the overthrow of the power of our Sovereign. If the acceptance of office in a government is a tacit retainer in such a case as we have described, on the supposition that a distinction is to be drawn between such a case and an ordinary trial where the Queen is the nominal prosecutor, and if his duties as a sworn adviser of the Crown could, by any possibility, interfere with his duty to his client (and this really seems the principal difficulty), and if he could not take to the consideration of any point which might arise in the case, and come before him as a member of the Government, a mind perfectly free from bias, which few human beings could do, he might well have refused to act for the prisoner. If otherwise, the duty of the learned counsel, however anomalous his position might appear on the surface, was clear, and he acted properly in not refusing to defend a person (innocent by the law of England until proved guilty), who chose to call upon him to do his duty by him as a fearless advocate should. The question with Mr. Cameron, probably, was not—can I find an excuse for refusing this brief—but, is there any conclusive argument or absolute reason why I should not accept it, for if not, I am *bound* by my barrister's oath to do so. Different men take different views of what their duty would be under a particular state of facts, and the view which Mr. Cameron took, and acted upon, though some may think it an extreme one, must be respected as the conscientious opinion of an honorable advocate, acting on his own view of the principles involved.

Anything that would have been grateful to the feelings of our late revered Chief Justice, Sir John Beverley Robinson, if he were alive, cannot but be of interest to those who cherish his memory. The thought arises from hearing of the success achieved by his youngest son, a lieutenant in the Rifle Brigade, in obtaining the appointment of Instructor of Military History at Sandhurst. The position, in itself an honorable and lucrative one, was purely the reward of merit, and his success is the more marked, as the competition was open to officers of the army in general.

SELECTIONS.

LORD CRANWORTH.

Within two years of fourscore Lord Cranworth died suddenly on Sunday last, the 26th ult. The plain record of his birth, education, and subsequent career is this: Robert Monsey Rolfe, first Baron Cranworth, was the eldest and only surviving son of the Rev. Edmund Rolfe, of Cranworth, Norfolk, who was first cousin of Horatio, Viscount Nelson. He was born Dec. 18, 1790; educated at Winchester and Trinity College, Cambridge, 17th Wrangler in 1812, going out as M. A. He was called to the Bar at Lincoln's inn 1816; made a K. C. 1832; was Solicitor-General 1834 and 1835-39; a Baron of the Exchequer 1839-50; a Vice-Chancellor 1850-51; one of the Lords Justices 1851-52; and Lord High Chancellor 1852-58, and again 1856-66. He was M. P. for Penryn 1832-39; was also a governor of the charterhouse. He married, in 1845, Laura, youngest daughter of T. W. Carr, Esq., of Frognel, Middlesex, but leaves no issue.

"It was just one year after Waterloo," observes a contemporary critic, "that he was called to the Bar and took chambers in Lincoln's Inn; having made up his mind to 'eat' his way to the Woolsack. For many years it did not seem as if his ambitious dream were at all likely to be realised and he had shown himself for many seasons in Westminster Hall—appearing chiefly in the equity courts—before briefs came in to him in any remunerative number. But he was patient and laborious, steady and sound, and in due course of time, as his merits became known among the solicitors, things began to change for the better. He had good connections among the members of the Liberal party, and some of the business which more talented men declined came to his hands. In this he showed such patience and good sense, and such sound knowledge of the intricacies of the law, that the little brook of fees gradually became a stream, and the stream had increased to the dimensions of a tidy-sized river in 1832, when he was honoured with a silk gown. He was already Recorder of Bury St. Edmunds. Like many another ambitious brother of the wig and gown, he made in the mean time one or two unsuccessful efforts to get into Parliament, but he did not achieve his object until the general election in Dec. 1832, when he was returned in the Liberal interest for the Cornish borough of Penryn, for which he continued to sit, without interruption, until his promotion to the bench."

The same writer also faithfully relates the conspicuous features of Lord Cranworth's judicial life. "A seat on the judicial bench was held by him in one capacity or another, without a break, for nearly twenty years, first as a puisne Baron, then as a Vice-Chancellor, then as a Judge of the Court of Appeal in Chancery, and ultimately as Lord Chancellor; but through these twenty years there is scarcely any one very great and important matter of public interest with which his name as a judge was mixed up. He presided, indeed, at the Norfolk assizes in 1849, when Rush was tried for the murder of Mr. Jeremy, and kept his temper and presence of mind with exemplary firmness when browbeaten by the hardened villian who stood before him as the 'prisoner at the bar;' and in memory of this occasion he was often called by familiar friends, 'My Lord Killrush.' Firmness, steadiness, soberness, patience, dignity, wide knowledge of points of law, and of the relative value and weight of scattered pieces of evidence—these were legal and judicial virtues for which he deserved all praise; but to the masterly grasp of legal principles which marked Lord Eldon in the days of our fathers, and Lord Mansfield in those of our grandfathers, he could not, and did not, ever prefer a claim. Among legal circles his name will be associated most intimately, perhaps, in future years, with the removal of the sittings of the equity courts from Westminster to Lincoln's-inn. He held the great seal a second time, from the resignation of Lord Westbury until the recent return of the Tories to office. Sir Robert Monsey Rolfe, as Solicitor-General, and as a judge, it was often said, had a kind heart and an ever-smiling face. His looks did not belie the real nature of the man within. As an advocate in the courts, indeed, and as a member of the House, he showed no symptoms of fancy, or even of liveliness: and he seemed as if he could not for the life of him imagine what anything light or playful could have to do with either side of Westminster Hall. His speeches were even dull and somnolent; and often must both the judge and the audience have desiderated a little bit of vivacity or wit. But it never came. There was nothing but an even flow of dull and dry, but correct, legal matter, unrelieved by the shadow of a joke or jest, even when the subject invited it; and yet his ever-pleasing countenance was radiant with smiles. When, therefore, he sat upon the bench as a judge and became Lord Cranworth, he had no jocose habits to unlearn, no impaired dignity to regret. Somewhat under the average height, rather feebly made, and with a pale complexion, his slightly angular and prominent nose and light grey amiable eyes made his personal appearance prepossessing, and their owner a favourite with all who were bronght into contact with him."

We have not adopted the practice of giving contemporary opinions of great lawyers, considering that an opinion of a lawyer upon a lawyer, as a lawyer simply, is almost valueless. The opinions of contemporaries in the press and in the senate on the other hand may be well preserved. Lord Cairns thus speaks of the deceased ex-chancellor, before commencing a speech on the Bribery Bill:—"I must commence by responding very sincerely to the statement made by the noble earl with reference to the great loss your lordships have sus-

tained since the last meeting of this House, in the case of my late noble and learned friend Lord Cranworth. My lords, of the loss of Lord Cranworth as a friend to those who had the privilage of enjoying his friendship, I feel it impossible to speak; but this I may say, that your lordships and the public in him have lost one who has passed through a long career of high judicial office without a tarnish upon his name, and I will venture to say that in the discharge of his great duties his courtesy of manner, his careful and conscientious efficiency as a judge, and above all, his sound and exquisite common sense, have never been surpassed by any person who ever before held the same office."

The *Times* remarks that "Although Lord Cranworth lived in agitated times, he never made a personal enemy, and, although during the years in which he held the Great Seal he presided over debates of the keenest interest, the demeanour of the House of Lord was under him maintained unruffled. His career was of a kind of which Englishmen are not unnaturally proud. He was the son of a country parson, and he made his way in the world by his own good abilities and sterling character. A sedulous schoolboy, a successful if not a distinguished student at the University, an advocate of trusted reputation, a Judge of the first rank both on the common law and equity sides of Westminster Hall, distinguished as a lawyer by his freedom from the prejudices of his profession, and as a politician by his perfect temper and consistency, Lord Cranworth earned the position he held, with the approval of all men. It was as impossible for him to sympathise with the stormy violence of Brougham as with the dogged resistance Eldon offered to change. His life had been too easy to allow him to be revolutionary, and owing nothing himself to privilege, he was never tempted to engage in a vain battle in defence of privileges. He had worked hard for many years, but his labour had been well rewarded; and as he kept his mind open to fresh impressions to the last, he never sank into the optimism of those who think the world must be perfectly well ordered because they are themselves tolerable comfortable in it. Few men enjoyed greater personal popularity. He was a thorough Whig, but he never allowed the keenness of his partisanship to cloud his judgment or to warp his actions. Fair and equal to all, no man grudged him his elevation, but rather everyone rejoiced at a conspicuous instance in which abilities carefully cultivated had obtained distinguished reward."—*Law Times*

THE NEW JUDGES.

The names of the gentlemen selected by the Lord Chancellor to fill the additional judgeships, established under the Election Petitions and Corrupt Practices Act, have been published. Mr. Serjeant George Hayes is to be the new judge of the Court of Queen's Bench; Sir W. B. Brett, Q.C. the new judge of the Common Pleas; and Mr. Anthony Cleasby, Q.C., the new baron of the Exchequer. Mr. Hayes was called to the bar in January, 1830, and has practised on the Midland Circuit. He was called to the degree of Serjeant-at-Law in 1856, and received, in 1860, a patent of precedence, ranking next to Mr. A. J. Stephens. He has also for some years held the appointment of Recorder of Leicester. Sir William Baliol Brett was called to the Bar in 1846, made Queen's Counsel in 1861, and appointed Solicitor-General in February of that year, upon the elevation of Sir C. J. Selwyn to the Bench. Mr. Anthony Cleasby was called to the bar in June 1831, and made Queen's Counsel in 1861. Both Sir W. B. Brett and Mr. Cleasby practised on the Northern Circuit.

It is very difficult to offer any just criticism on these appointments. There are, no doubt, some gentlemen whose claims to promotion seemed strong and the expectation of the profession has not in every respect been realised. The Solicitor-General had, both by virtue of his office and his genuine merits, an irrefragable claim. He will not only strengthen the commercial ability of the Court of Common Pleas, but he will render great service in expediting business, when necessary, in the Court of Admiralty, and also in the Divorce Court. It is open to the Bar to deny him genius of a high order, but his knowledge of mercantile law, and his great experience in all kinds of shipping and commercial transactions, are beyond question. Mr. Serjeant Hayes has won his chief renown at Nisi Prius, and enjoys a world-wide fame for humour, keenness of wit, and perception of the motives and tendencies of human action. It may therefore be fairly expected that he will exercise his judicial functions at Nisi Prius with perfect success. Mr. Cleasby is a gentleman of high literary attainments, and is possessed of a trained and accomplished mind. His utility will be displayed in Banco rather than at Nisi Prius. University men will note with satisfaction that Sir W. B. Brett and Mr. Cleasby are *alumni* of Cambridge, at which seat of learning the latter gentleman distinguished himself by acheiving the position both of a wrangler and a first-class classic. It will be remembered that Mr. Cleasby contested the representation of the university of Cambridge in February last, but was defeated by Mr. Beresford Hope.—*Solicitors' Journal.*

A RUN OF LEGAL PATRONAGE.

Although the remarkable good fortune of Conservative lawyers during the past two years has been frequently made a subject for comment, at no time has either a complete list of the appointments or an estimate of the value of the patronage been given. Now that three new judges have been added to the already long list, there may be some interest in knowing how the composition of the judicial

bench has been changed since the present Government came into power. Including two new Lord Chancellors in England and two in Ireland, 27 equity and common law judges have been created. The following are the appointments, distinguishing the three kingdoms:—

England.

Bovill, Rt. Hon. Sir W....	Chief Justice of Common Pleas.
Brett, Sir W. B.	Puisne Judge of Common Pleas.
Cairns, Lord.....	Lord Justice of Appeal; now Lord Chancellor.
Chelmsford, Lord	Lord Chancellor.
Cleasby, Mr.....	Baron of the Exchequer.
Giffard, Sir G. M.....	Vice-Chancellor.
Hannen, Sir J.....	Puisne Judge in Queen's Bench.
Hayes, Sergeant.....	Puisne Judge in Queen's Bench.
Kelly, Rt. Hon. Sir F.	Chief Baron of the Exchequer.
Malins, Sir R.	Vice-Chancellor.
Phillimore, Rt. Hon. Sir R.	Judge of the Admiralty Court.
Rolt, Rt. Hon. Sir J.....	Lord Justice of Appeal.
Selwyn, Rt. Hon. Sir C....	Lord Justice of Appeal.
Wood, Rt. Hon. Sir W. P..	Lord Justice of Appeal.

Ireland.

Blackburne, Rt. Hon. F...	Lord Chancellor.
Brewster, Rt. Hon. A.	Lord Justice of Appeal; now Lord Chancellor.
Chatterton, Rt. Hon. H. E.	Vice-Chancellor.
Christian, Rt. Hon. J.	Lord Justice of Appeal.
George, Rt. Hon. J.....	Puisne Judge in Queen's Bench.
Lynch, Mr.	Judge of Landed Estates Court.
Miller, Mr. S. B.....	Judge of Bankruptcy Court.
Morris, Right Hon. M.	Puisne Judge of Common Pleas.
Napier, Rt. Hon. Sir J....	Lord Justice of Appeal.
Walsh, Right Hon. J.....	Master of the Rolls.
Whiteside, Rt. Hon. J.....	Chief Justice of the Queen's Bench.

Scotland.

Inglis, Rt. Hon. J.....	Lord Justice General.
Patton, Rt. Hon. G.	Lord Justice Clerk.

It will be seen that the office in which the changes have been most numerous is that of Lord Justice of Appeal. In England Lord Cairns left it for the woolsack, and Sir John Rolt, after holding the appointment only six months, was compelled to resign through ill-health. The nomination of Sir Joseph Napier to the Court of Appeal in Ireland was objected to so strongly on account of his suffering from deafness that he sent in his resignation before he had entered on the duties of his post. His successor, Mr. Brewster, held the office eight months, when he was promoted to the Chancellorship. It may be added that thirteen of the new judges were returned as members of the present Parliament, and that the offices of Attorney and Solicitor-General in England and Ireland, and of Lord Advocate and Solicitor-General in Scotland, have been filled and re-filled nineteen times. The vacant Solicitor-Generalship in England will now render a twentieth nomination necessary.

The value of the judical offices which have been filled during the past two years varies from £2,000 to £10,000 each, and represents a sum of £145,000 a-year.—*Daily News.*

LAWYERS' WIGS.

The heat has raised the question of wigs, and with it a discussion, never yet settled in England, as to the merits or demerits of official costumes. The subject looks a small one, but it is worth arguing, for it involves in a very direct, though it may be a rather ridiculous way, a matter of some importance, namely, the end which the social reformers of the day intend to seek. Are they, to put it colloquially, going in for reality in all things, or only for equality in all things? The two ends are very different, and we do not know that the difference can be better illustrated than by this very dispute about clothes. The able judge who presides in the Divorce Court, Sir James Wilde—who, be it remarked, *en passant*, has filled Sir Cresswell Cresswell's seat in a manner which was said to be impossible, showing himself at once a consummate judge, a man of the world, and a man of principle—this week advised the Bar to lay aside their wigs during the extreme heat. They complied very gladly, and the momentary breach of etiquette was taken advantage of to decry the somewhat antiquated and inconvenient costume still worn by the members of the Bar. In India and America, it was argued, the whole absurdity has been abolished. Judges are there considered citizens, invested with certain functions for the benefit of the community, and wear, without detriment to their office, the ordinary dress of gentlemen; barristers plead in frock-coats, and wigs are only worn at masquerades. Why should not the lawyers do the same in England?—why, in fact, should not everybody dress in the same costume, and the special office be left to enforce and receive such respect as is inherent in its powers, or its merits, or even its antiquity, and not in its clothes? There is no doubt that with the advocates of equality, and indeed, more or less, with most men of democratic opinions, this matter of robes is a sort of crucial test; that they heartily dislike them as relics of feudalism or other deceased organisation of society, and will, if they can, abolish them altogether. An active and, so to speak, powerful impression of that kind deserves study, if only that we may know on what basis of reason our prejudices rest; and this particular impression, as we have said, involves much.

Primâ facie, the weight of reasoning would seem to be all against the clothes, if only because the ordinary arguments in their favour are so singularly inapt. The defence from the analogy of uniform, for instance, is an absurd one, for uniform is worn by soldiers and sailors as their weapons are worn, to increase their direct efficiency. A body of soldiers or sailors in uniform is more easily recognisable by its officers and its own members than a body without such uniform, and that power of easy recognition is a valuable and indeed an essential element of force. It is usual to say that a uniform gives a soldier pride, and helps to

preserve a sense of honour and that tradition of merit which has all the beneficial effect of pedigree; but the original motive of uniform was the more vulgar one, increased efficiency, increased power of distinguishing between friend and foe. The proof of the fact is that in a night attack, when ordinary uniform would be indistinguishable, able commanders always try to devise a new one, a white sleeve, or a cross, or other mark which can be recognised when there is very little light. Uniform has other uses, the greatest, perhaps, being that it marks the soldier from the civilian, and therefore, by making the armed man specially visible, makes him also specially responsible; but its main use is the increase it affords of direct power to the soldier to do the work for which he is educated, privileged, and paid. No such advantage can be claimed for most ceremonial uniforms, for those worn by deputy lieutenants, courtiers, diplomatists, or even, with all respect be it spoken, barristers and judges. They could do their work as efficiently in ordinary costume as in special dress, and the popular defence of their robes needs examination before it is accepted. It is said, again, that the robes and the wigs increase the respect with which judges and the counsellors are regarded by the multitude, and as it is well that the multitude should respect the ministers of the law, it is well that the latter should wear dresses which inspire respect. The argument deserves more attention than the analogy from uniform, because, to begin with, its two main propositions are undeniably true. Nothing, no one sentiment man has ever evinced, is quite so valuable as respect for law. That is, we hope and believe, the feeling, or, to say what we really mean, the faith which as civilisation advances will be the sufficient substitute for "reverence" in its social sense, "loyalty," "obedience," and many other sentiments which, once real and beneficial, are now becoming unreal and therefore mischievous. It is also true that the masses of half-civilised men do respect authority in fine clothes, or rather in exceptional clothes, more than autbority in ordinary dress; do feel more inclined to obey a "Red Judge," than a judge in a frock-coat; do hesitate more to criticise a decision given by a man in a wig than one delivered by a man without one. But this is not quite the whole case. If this reverence for clothes, inborn as it seems to be in some Western races, is founded in any noble feeling, *cadit quæstio*, let us cultivate custom, but if it is founded in a base proclivity of the human mind, then not even the value of reverence for law, not even the aid the false respect lends to the administration of justice, is a sufficient excuse for pandering to such a depravation of instinct. The American Democrat is then right, who holds all such things degrading; and not the Continential Democrat, who holds them degrading or ennobling according to their social intent, who, for example, like most Reds, would have all men dressed alike, *unless* honoured with a function from the people. The point is not what it is supposed to be, the effect of clothes in securing the obedience of the multitude—which we admit to the full, and might, possibly, exaggerate—but the effect of exceptional clothes worn by officers of the state or of the law in elevating to the multitude. If that is not secured, the case of the clothes will ultimately be lost, for the sentiment of equality, as far as it goes—and it goes a wonderfully little way—does ennoble men, and is not lightly to be disregarded. There is this much to be said even for the election of judges, in itself the most fatal custom democrocy has instituted, that it does force the ordinary man to consider what the law he helps to make really is, and why its exponent, whom he has helped to appoint, is deserving of his sedulous respect, a consideration much more to his mental and moral advantage than blind fear of the judge's power.

We confess we do see grave reason to believe, though we shall irritate many sober thinkers by saying so, that the system of official clothing will stand this supreme test; that the special robe worn by the judge, or the barrister, or the policeman does actually elevate and not simply blind those it is intended to affect, does appeal to a certain nobleness and not to a certain baseness in their inner nature. We doubt whether the feeling which we English are compelled to describe by a Latin word, solemnity, be not a sound instead of an unhealthy state of mind, whether it does not often mean, whether in church or court, or ceremonial, supposing it always to be real and not factitious, that the better nature of the man is struggling to the front, that his brain and heart are quickened and raised under it, instead of being debased or deteriorated. Any severe call on a man, even if it be only a call to self-defence, makes him, or should make him, more of a man, would make him, if he were in the mental condition we all desire to see him reach; and there is no call quicker or more certain of a response than that made by any real solemnity. If that is true—and we all acknowledge it in connection with worship, though half of us seek the exciting means in a simplicity which, so to speak, reveals God, and the other half in a magnificence which honours Him—the case for the clothes is won, for nothing produces solemnity like a sudden change in the ordinary circumstantials and surroundings of life. We could produce it, for example, most effectually in a court of justice without any change of clothes, by merely altering the colour of the atmosphere. We do not doubt that if every criminal were tried under red light, or blue light, or green light, or any light to which mankind are unaccustomed, the effect on him, on the bar, on witnesses would be one of awe; that there would be greater reluctance to tell lies, greater fear of resistance to law, greater disposition to realise the divinity, so to speak, of the whole machinery, than if there were no such diver-

gences from the appearances of everyday life. That contrivance, though once familiar to many quasi-religious tribunals, is at once too inconvenient and too theatrical for our own time or for habitual use; but its effect, though differing in degree, would be identical in kind with that of the exceptional clothes worn in English courts of law—would, that is, bring home to all present the fact that they were in an atmosphere different from that of everyday life, an atmosphere in which truth was more indispensable, fairness more certain, justice more swift, than in the street or the home. Why should the strong though temporary concentration of mind produced by such an atmosphere debase instead of ennobling? As a matter of fact, we know that it does not, that, for example, although there is much lying in English courts of justice—frightfully much, especially when the object is to make of moral legal evidence—still, witnesses are more truthful, more conscious that they ought to be truthful in a court than in the street. It may be said, that is all the fear of punishment; but we would ask any honourable man who means to speak truth always, whether he did not become in court more exact, more literal, in fact, though not in intention, more truthful than when he was out of it. He would be so in any court, whether the judge were robed or not? Doubtless, because the aspect of every court, the mere fact that the assembly is a court, makes him so; but the effect will be all the more rapid and complete for any violent divergence from the associations of everyday life, and the easiest of such divergencies is a change of costume.

It may be said that this argument would justify any amount of official bedizenment, any absurdity in special costume; but that is a mere assertion, to be tested by the effect of the clothes. In some cases the effect of divergence is distinctly bad, as, for example, when it produces any kind of reverence for the clothes themselves, as must happen whenever they increase the prominence and visibleness of an unreal or bad idea. That would be the case, for example, if mere differences of rank were marked in the modern world by sumptuary laws. Or the clothes themselves may be objectionable, not because they are meaningless so much as because they awake some false or grotesque association. That is the case with English Court dress because it is so like a footman's, with the Windsor uniform for almost the same reason, and with one form of episcopal dress because it is so nearly that of another sex. The ordinary English clergyman's robe of office wakes no such feeling, but on the contrary warns the audience that the speaker is about to address them on subjects higher than those of a public meeting, helps to put them in a frame of mind more instead of less receptive of the ideas he has to communicate. We might as well argue that gesture is no part of oratory, melody no part of poetry, form no part of substance, as that dress can lend nothing to solemnity of ceremonial except an emotion which is either a surplusage or a baseness. It is neither, if our view is correct, but an aid, tending to concentrate, and therefore, to strengthen, the impulses and faculties we all desire to call out.—*Law Times.*

NATURALISATION.

The Congress of the United States has passed a Bill nominally for the protection of its own naturalised subjects, but, in fact, dictating to other countries how they shall deal with their own citizens.

The alleigance of every man is due to the country of his birth. Of that allegiance he cannot divest himself, save in the manner prescribed by the laws of *his own* country. Manifestly no other country has a right to determine on what conditions the subjects of another State shall be released from their allegiance.

For instance, the Legislature of the Dominion would have no right to make a law declaring that a citizen of the United States by crossing the frontier into Canada shall be discharged from his allegiance to the United States. But they could, and it is all they could, enact that a stranger should become naturalised in Canada by residing there for a week or a day, that a residence under such a law should make the visitor a Canadian subject, but it would not unmake him a subject of the United States.

This is, however, the form which the new law has taken in America. It does not say in so many words that a British subject shall cease to be such by complying with the conditions of naturalisation in the States, for even more than Yankee audacity would be required for such a clause. But it does the same thing in effect, for it says that, the law of his own country notwithstanding, any foreigner, becoming naturalised according to the law of America, is to enjoy all the priveleges of Americans by birth, and one of these privileges is that in his own native country that man is not to be amenable to the law from whose obligations he has not been discharged.

We may endeavour to disguise what it is inconvenient to acknowledge, but the truth is that this law is levelled at England, and is designed to assist the Fenian conspiracy. It recognises as American subjects many thousands of traitors whom the British law still recognises as British subjects, and it can scarcely fail to cause some dangerous complications. There can be no desire on the part of this country to keep the allegiance of the Fenians; England would willingly make a present of them to America, and would consent to the shortest possible residence in the States as the condition of being quit of them. But then many other consequences follow. If they choose to leave us, we must alter the terms on which they are to be allowed to return. With their allegiance, they must forfeit all right of succession to property, or to hold property—in short they must cease to be British subjects

for all purposes. Moreover, we shall be compelled for our own security to place them under a very strict surveillance when they choose to pay a visit to Ireland, and the practice of the mixed jury must be abolished. Even America cannot dispute our right to prescribe our own terms for the admission of foreigners into our territories, and perhaps it will be found that those terms may make speedy naturalisation in the States by British subjects, not quite so desirable as it may have appeared. Mr. Reverdy Johnson should take for the first essay in his new office of minister in London an honourable settlement of this difficult question, before quarrels have grown out of the hasty Act of Congress.—*Law Times.*

PROFESSIONAL COURTESIES.

We of the present generation are apt to be rather impatient with our seniors when they tell us of the great worthies of their day, and how incomparably superior they were to the ablest men we can produce. By their report there were giants in those days, and we live amongst pigmies. While there can be little doubt that in memory, as in nature, "distance lends enchantment to the view," and softens many hard and unpleasant lines in character, yet making every allowance for this influence we cannot help feeling that in some respects there may be good cause for this contrast which is so much to the disadvantage of the age in which we live. Not to speak of weightier matters or qualities of more moment, we think it must be admitted by even the most ardent and enthusiastic admirer of this age of progress, that in one virtue of our ancestors, namely, courtesy, there is a most observable decline amongst us.

We are far from thinking or desiring to assert that there are few gentlemen in the present day, but we are forced to the conclusion that courtesy is a quality held at an exceedingly low estimate just now. If we desire to see true gallantry and politeness we turn not to the youth, but to the elders of our day. It is amongst them we find that thoughtful courtesy, and regard for the feelings of others, which is so characteristic of the true gentleman. In the present day men do not seem to have either the time or inclination to cultivate the *suaviter in modo*. It is not, in the estimation of the majority, a sufficiently productive or profitable quality to be worth cultivation. Perhaps the importation of Transatlantic "notions" into this country may, in some measure, account for the degeneracy of manners in the present day, and for the freedom, amounting to positive vulgarity, which is sometimes to be met with where we should least expect it. Whatever may be the cause, we regret to say, the fact is too patent to be denied that in the present day the courtesy which used to govern many relations of society is manifestly declining. We are old enough to remember when journalists treated each other with respect and politeness, even when they were most opposed in politics. Now no such courtesy seems to be used or expected, and editors abuse each other in the strongest terms of vituperation, and exhaust the vocabulary of invective in their efforts to prejudice a contemporary in the eyes of the public.

But this want of courtesy has latterly become apparent in a sphere in which we are more particularly interested. Without the extent of memory possessed by an octogenarian, we can remember when politeness and dignity were the usual attributes of an advocate, and when counsel at the bar uniformly observed towards each other that respect to which their honorable profession so justly entitled them. The weapons of argument were not then less keen, nor the shafts of wit less brilliant than now, but they were never directed personally against professional brethren. There was a time when an early meeting in the Fifteen Acres would have been the result of such encounters between counsel as take place now without remark or surprise from the judge, the jury, or the public. Happily such modes of settling disputes have become obsolete, but surely it is possible to conduct trials at law without having recourse to weapons so unworthy of a learned and noble profession as personal scurrilities. How can we expect the public to respect a profession, the eminent members of which give such an exceedingly bad account of one another. One learned counsel deliberately charges the highest member of the Bar, and whose honour *is* as clear as crystal, with conducting his case like a "thimble rigger," while another charges his opponent, in open court, with the offence known in professional circles as "hugging attorneys," and in being afraid in the discharge of his duty, to cross-examine a solicitor too severely, lest it might cause him to lose a brief on some future occasion.

We regret exceedingly having to comment upon this subject, but we feel that the interests and dignity of the Bar demand that it should be noticed. If behaviour of this kind is to be the rule in our highest courts of procedure, what are we to expect from advocates before inferior tribunals? Yet we believe that in some courts of petty jurisdiction such personalities between the practitioners of the court would not be tolerated. We do not desire that members of the Irish Bar should emulate the cold and uninterested manner which often characterises eminent Nisi Prius lawyers in England; but we think that in the matter of propriety and decorum the former might sometimes, with advantage, imitate the latter. With us such an advocate is oftentimes, in fact, a great performer entertaining an amused audience, rather than a learned advocate enforcing his case before a jury. It is to this *ad captandum* kind of advocacy we trace those personalities between gentlemen of the Bar, which are our present cause of complaint, The argument does not need them, the jury

do not need them, and in fact they are merely indulged in for popularity, and "to split the ears of groundlings."

It is said that an experienced advocate once advised a professional brother, whenever he had a bad case for a defendant, to abuse the plaintiff's attorney. This suggestion seems now to be extended a degree further, and the next best thing to such a course appears to be to abuse the opposite counsel. We trust this practice may soon fall into disuse, as, in our judgment, it is one "more honoured in the breach than the observance."—*Irish Law Times*

The case of *Perry* v. *Taylor* has attracted general attention, both from the public and the legal profession. The defendant, the Rev. Dr. Taylor, is a minister of the Canada Presbyterian Church, who had married the son of the plaintiff, a lad of 16, to a widow, aged 49 The parties presented themselves before Dr. Taylor with a license, and the boy being asked his age by the clergyman, declared himself to be 22 years of age. This marriage was annulled by the Superior Court in a previous suit brought by the plaintiff for that purpose, the ground of nullity being the want of consent on the part of the parents of the minor. The action, *Perry* v. *Taylor*, was instituted for the recovery of damages for the illegal marriage. Mr. Justice Monk, on the 9th of July, after reviewing the facts appearing in evidence, expressed the opinion that the reverend gentleman should have done more than merely ask the age of the minor, the disparity of age and other circumstances being such as to awaken suspicion. He considered that a want of proper care had been manifested by the defendant, and on this ground he condemned the defendant to pay $100 damages, and the costs of the action as brought.

This decision seems to have been pretty generally approved by the public, as far as we have observed. It is certainly desirable that clergymen should not be in any uncertainty as to their responsibility in respect to the parties whom they marry.—*L. C. Law Journal.*

ONTARIO REPORTS.

PRACTICE COURT.

(Reported by Henry O'Brien, Esq., *Barrister-at-law, Reporter to the Court.)*

Leslie v. Foley.

Insufficient affidavit—Toronto agent of attorney.

In an application of strict right the court will not conjecture circumstances in favor of the applicant, who should support his case by the best and fullest evidence, and not, as in this case, with defective materials.

In such an application it will not be assumed by the court that the affidavit made by "the agent" of a person is the professional Toronto agent of such person, and that such person is a practising attorney.

[P. C. Easter Term, 1868.]

J. A. Boyd obtained a rule calling on the plaintiff to shew cause why a rule absolute, granted herein in the previous Term should not be set aside with costs for irregularity, on the ground, that the rule absolute was granted in pursuance of a rule *nisi* to pay over the amount of an award, which rule *nisi* should have been and was not personally served, and the materials on which the rule absolute was made were insufficient, and because the same was moved absolute prematurely, and before it was returnable.

The application was founded on an affidavit of Mr. Boyd, shewing that a rule *nisi* was obtained in this cause last Hilary Term calling upon the defendant, upon notice of the rule to be given to him, his attorney or agent, to shew cause why he should not pay to the plaintiff an amount awarded against the defendant and the costs taxed: that the rule issued on the 11th February, and was served on that day on the agents of the defendant's attorney, and that it was made absolute on Friday, the 14th, and issued on the 29th February, and that no further proceedings appeared to be had on it up to the time of this application. It was contended on the part of the defendant, that notwithstanding the object of the rule was to obtain an execution against defendant's goods under the statute, that the service should have been made personally, as in the case of seeking an attachment, and that the rule *nisi* could not have been moved absolute until after the 14th February.

C. S. Patterson showed cause, and, amongst other things, objected that the materials upon which this motion was made were insufficient, and that the only affidavit filed, and upon which the application rested, not shewing that the person who assumed to act as the professional agent of the attorney of the defendant, who was also a practising attorney, was such an agent.

J. A. Boyd supported his rule.

Morrison, J.—It is unnecessary for me to give judgment on the principal points raised, as I am of opinion that I ought to give effect to the objection that the materials before the court are insufficient to entitle the defendant to make this rule absolute. This application is one of strict technical right, and the defendant must make out a clear case. The only affidavit filed is Mr. Boyd's, which states that Messrs. Read and himself are agents in Toronto of the defendant, but in what respect or for what purpose does not appear. I cannot necessarily assume that the defendant is an attorney or barrister, for nothing in the affidavit or papers filed shew that he is, and if I ought to do so, as suggested by Mr. Boyd, in that case I would be more stringent in exacting, on account of his professional knowledge, the strictest regularity in his proceedings. Now all that appears here is, that Mr. Boyd a few days before the 22nd of May last, searched with the clerk of this court as to proceedings in this cause: that he was informed that a rule *nisi* (the one in question), issued on the 11th February, and was made absolute on the February 14: that an affidavit of service of a copy of the rule *nisi* was attached to it, shewing that it was served on the 11th on the agents of the defendant's attorney, and that the rule absolute was taken out on the 29th February: and Mr. Boyd states

that he verily believes that no cause was shewn against said rule, and that no copy of it to his knowledge was served on the defendant; and he states that he cannot obtain a copy of the rule absolute, as it is not filed.

All this no doubt is perfectly true, but notwithstanding, the defendant, or his attorney or counsel, may have appeared and shewn cause, or consented to the rule going. The rule *nisi* itself on its face is regular, for assuming that the general practice requires personal service (which I do not decide) the court may dispense with it, and order the rule *nisi* to go calling on the defendant upon notice to be given to his attorney or agent to shew cause.

The rule was served on the defendant's attorney, no affidavit is filed by that gentleman shewing whether or not he took any step in the matter; neither does the defendant himself make any affidavit denying that the rule came to his knowledge, or that he has or had any grounds or merits for opposing the rule, nor is it suggested that the proceedings injuriously affect his rights; and no excuse is given why the defendant or his attorney have not filed any affidavit, there being abundance of time between the 11th February and the 22nd May to do so; and as neither of them think it worth their while to make an affidavit stating the facts, and setting at rest any doubts as to what they did in the matter, or shew that they have any substantial ground of complaint, I do not think I am to conjecture circumstances to entitle the defendant to succeed. By doing so I should be sanctioning a loose and careless practice.

A party seeking relief, as sought in this case, ought to support his application with the best and fullest materials at his command, and not, as here, only file the affidavit of a gentleman, who merely states what appears on the files of the court, matters quite consistent with the regularity of the proceedings complained of.

Rule discharged.

IN RE SOULES V. MORTON.

Arbitration—Right of parties to go into case afresh before an umpire.

Where a case is referred to the award of two persons, and, in case of disagreement, to the decision of a third person, either as an umpire or as a third arbitrator, the parties have the right to insist that such third arbitrator or umpire shall have before him the evidence and witnesses produced before the two arbitrators, as well as the right to appear and state their case to such third arbitrator or umpire, before a binding award can be made.

[P. C., Easter Term, 1868.]

D. McMichael obtained, on behalf of Soules, a rule *nisi*, to set aside the award herein, on several grounds, one of which was that one of the arbitrators was not appointed until after evidence taken, and gave his award without having heard the parties or the evidence; also, that the arbitrator heard evidence on behalf of Morton, in the absence of Soules or any one on his behalf.

The submission was by deed dated the 17th April, 1868, and after reciting that disputes, &c, were pending between the parties, in reference to the annual sum of money to be paid to Mrs. Morton in lieu of dower, &c, and in order to settle the amount, &c., the parties agreed to refer the same to the award of two named arbitrators, and in the event of these two not being able to agree within two days from the date of the deed, then they could appoint a fit and proper person as third arbitrator by a memorandum to be endorsed on the deed, and the award of any two of them should be final and conclusive. The award was to be made in writing, on or before the 23rd April, with power to the arbitrators to extend the time, &c. On the 17th April the two arbitrators appointed the third arbitrator, and on the 23rd April the three arbitrators made the award now moved against, awarding an annual payment of $82 50, &c.

It appeared from Soules' affidavit that the two arbitrators proceeded with the arbitration on the 17th April: that both parties attended before them with their evidence, and were heard by the arbitrators, and although they had appointed the third arbitrator he was not present, nor did he hear the parties. The two arbitrators being unable to agree, they called in the third arbitrator, and the three arbitrators considered the matter among themselves and made their award, and did so without notifying Soules, and without his being heard by the third arbitrator, and he swore that if he had been allowed to place his case before the third arbitrator he would have convinced him that the annual amount was unusually large. Smith, one of the arbitrators, also made an affidavit stating that they named the third arbitrator to meet the event of the two not agreeing: that having considered the subject with his co-arbitrator they were unable to agree, and they then called in the third: that Soules and his evidence was not heard, nor was he offered an opportunity to be heard by the third arbitrator: that the son of Soules asked if they did not require his father, but he was told they did not, and Smith also swore that he was not aware that it was necessary or proper for the third arbitrator to hear Soules.

On the part of Mrs. Morton several affidavits were filed, going principally to show that the award was a reasonable one.

Harrison, Q C., shewed cause.

McMichael supported his rule.

MORRISON, J.—There is no dispute about the fact that the two named arbitrators first heard the parties; that being unable to agree upon the amount to be annually paid to Mrs. Morton they called in the third arbitrator, to whom, we may assume, they related the case made by the respective parties, and without the third arbitrator hearing the case except as stated; they conferred among themselves, and they then came to the conclusion of awarding as they did. It is to be regretted that the parties were not heard by the three arbitrators, as from the affidavits filed it is, I think, clear that the award is a fair and proper one, and if it were possible to uphold it I would do so, for it is just one of those cases in which the arbitrators, neighbours residing in the immediate vicinity of the land in question, could determine upon the statement of the parties alone, what was fair and reasonable, but on principle the award cannot be upheld. The third arbitrator was either intended to be an umpire or a third arbitrator. In either case the parties had a right, personally or by counsel, to

place their case before him, as well as the other two arbitrators. The award is a joint judicial act. The judgment of the three arbitrators was not the result of hearing the parties, for that of the third arbitrator was based on what the other two told him, in the absence of the applicant, and without his being notified that the third arbitrator was called in to deliberate on the subject. It is impossible to say what the parties would have done, or what course they might adopt to bring their case before the third arbitrator. If the case had been reheard they might have suggested a new view of the case, as said by Littledale, J., in *Salkeld* v. *Slater*, 12 A. & E. 767.

The general rule is, that an umpire to whom a case is referred by arbitrators must hear the evidence over again, and in the case cited Lord Denman says—"It is important to have it understood that the umpire, as well as the arbitrators, ought to hear and see the witnesses." And so in this case, the third arbitrator should have seen and heard the statement of the case from the parties themselves, or any witnesses they might produce. The parties are entitled to have their case, as made by themselves, put directly to the arbitrators, and are entitled to the benefit of the judgment of all three on the case, as made. Two of the arbitrators heard the case, apart from the third arbitrator, and the third heard it at second-hand and apart and in the absence of the parties, (as said by Coleridge, J., in *Plews* v. *Middleton*, 6 Q. B. 845)—"whereas it ought to have been considered by the arbitrators and umpire jointly, in presence of the parties." There is no imputation on the motives or conduct of the arbitrators; it is only the irregularity of the proceedings that invalidates the award; and the Court, in such a case, sends back an award to the same arbitrators, where there is no reason to believe that they are not to be trusted. I think that this is a case in which I ought to exercise that power, and that it should go back with an intimation that the third arbitrator should have an opportunity of hearing the parties and considering the evidence with the other two arbitrators.

COMMON LAW CHAMBERS.

In re O'Donohoe v. Warmoll.

Delivery and taxation of attorney's bill—Business done by attorney, as an attorney, though not in any suit.

An attorney or solicitor may be ordered to deliver a bill of his charges for business done by him *as such*, though the services performed were not, in whole or in part, for business done in court, as in this case, where the retainer was to investigate the title of and purchase property.

[Chambers, Sept. 17, 1868.]

A summons was obtained calling upon the above attorneys to show cause why they should not deliver a bill of costs to one William Charles Pulaski, for professional services rendered in reference to the investigation of title to and purchase of certain property, situate, &c., wherein they acted as attorneys for the said Pulaski, shewing the moneys by them received from and paid out for the said Pulaski, with dates and items, &c.

The affidavit of the applicant stated that these attorneys were employed by him as such attorneys, in reference to the purchase of a certain lot of land; that as such attorneys they had transacted business and paid out money for him; and that, though frequently asked for, the applicant had not obtained any account of the services done, and money paid, &c.

Givins showed cause, and contended that, as the services performed were not wholly or in part for business done in court, there could be no reference of the charges to taxation. He referred to *In re Lemon and Peterson*, 8 U. C. L. J. 185.

Bigelow, contra cited, *In re Eccles et al.*, 6 U. C. L. J. 59; *Smith* v. *Dimes*, 4 Ex. 32, 40; 1 Ch. Arch. 11 ed. 109; C. S. U. C. cap. 35, sec. 35, and cap. 91, sec. 5.

Draper, C. J.—The Imperial Stat. 6 & 7 Vic., cap. 73, as affecting this application, differs from our Act principally in this—that when no part of the business has been transacted in any court of law and equity, the Lord Chancellor or the Master of the Rolls, may refer the bill to be taxed, or may order the delivery of such bill under the English Act, while the same powers are in language substantially identical, given to any of the Superior Courts of law or equity or to any judge thereof.

In the present case two questions arise:

1st—Is this a case in which business has been done by any attorney or solicitor as such, that is business of a professional character, which the respondents in this case were employed to do by reason of their character as attorneys or solicitors. The business is stated to be proof of personal services rendered in reference to the investigation of title to and purchase of certain property. Now an action would lie against an attorney for negligence in such investigation or for investing his client's money on insufficient security, and that shews the acts are professional services proper to be rendered in the character of attorney or solicitor, on a retainer as such. I think therefore the client is entitled to a bill.

2nd—In our statute, power is given to every judge of the Superior Courts of law and equity, to order the delivery of a bill for business done by any attorney or solicitor as such.

I think the order should go.

CHANCERY CHAMBERS.

(Reported by J. W. Fletcher, Esq., *Barrister-at-Law).*

Griffin v. McGill.

Infant—Investment and application of fund for maintenance and education of.

In this suit a legacy bequeathed to one Sarah Shuter Hall had been paid into court, and the executors of the testator's will discharged from all liability in respect thereof.

S. H. Blake, on behalf of the said Sarah Shuter Hall, moved *ex parte* on petition for the investment of the said moneys, and for payment out of the interests or dividends thereon to Sidney Smith, the uncle of the petitioner. The petition was supported by the affidavit of the said Sidney Smith, and it appeared that the said

Sarah Shuter Hall was an infant: that she was in poor circumstances: that she was not able out of her own means to continue and complete her education: that she had lately been removed from school because she was unable to defray the necessary tuition and other fees and charges: that unless the said moneys were invested, and the interest or dividends thereon applied for her support and education that she could not continue or complete her education. In this affidavit Mr. Smith undertook to apply the interest or dividends aforesaid in and towards the support, maintenance and education of the petitioner, if such interests and dividends were paid out to him.

The Judge's Secretary, after consulting the Chancellor of Ontario, granted the prayer of the petition, ordering the said Sidney Smith to account when the petitioner attained her majority for the application of the dividends upon the said fund, which was directed to be invested in Dominion stock—such dividends to be paid out half yearly—the accrued interest since payment of said fund into court to be paid out forthwith to said Sidney Smith.

Re Coleman's Trusts, 1 Irish Eq. 292; *Re McFarlane*, 2 J. & H. 673; *Re Law*, 30 L. T. Ch. 572, were referred to.

McMartin v. Dartnell.

Practice—Affidavit—Erasures and interlineations in—Not properly referred to in notice of action.

Smart, on behalf of the defendants Dartnell and Morland, applied for an order for security for costs against plaintiff. The application was supported by an affidavit of one Edward Taylor Dartnell.

S. H. Blake objected to the reading of the affidavit on the ground that there were numerous erasures and interlineations in it, which had not been initialed by the Commissioner before whom the affidavit was sworn, and also that the day upon which said affidavit was filed was not mentioned in the notice of motion.

The Judge's Secretary ordered the original affidavit to be brought before him from the office of Records and Writs. After examination:—The objections are good. Since the year 1860 erasures or interlineations in affidavits had to be initialed. The notice of motion ought to have mentioned the day on which the affidavit was filed, as it had been filed several days before the said notice of motion was served. The objections are fatal and the application must be refused with costs.

Glass v. Moore.

Practice—Order pro confesso—Setting down cause—Decree.

In this suit an order for substitutional service of the bill on the defendant by advertising had been made. The advertisement having been duly published and no answer having been filed although the time limited in that behalf had expired, an application was made to allow the service, the usual material being produced.

The Judge's Secretary.—The practice since the decision of His Honor Vice-Chancellor Mowat in *Mitchell* v. *Ellis* (not reported) has been changed. In mortgage suits, such as this, where the bill has not been personally served, it is not proper to move for allowance of service according to the former practice. When a defendant in such cases is in default for want of an answer, an order *pro confesso* must be taken out, and the cause set down and heard *pro confesso*; instead of taking out a præcipe decree immediately upon the allowance of service, the decree is now made in Court.

DIVISION COURTS.

(In the Fourth Division Court, County of Wentworth, before His Honor Judge Logie.)

Waugh v. Conway.

Division Courts—Jurisdiction—Reduction of claim by payment.

An action on an unsettled account exceeding $200, which was reduced by *payment* to $100, *held*, not to be within the Division Court jurisdiction.

Miron v. *McCabe*, 4 Prac. R. 171, considered.

[Hamilton, 7th Sept. 1868.]

In this action the plaintiff claimed $104 17, gave credit for $3 50, and abandoned 67c., reducing the claim to $100.

The claim was for the amount of an account, one item being "balance of account due on building, $55 17;" the other items being for hay, wheat and lumber sold by plaintiff to defendant. There had been no settlement of the building account, and no admitted balance, on the contrary, every item of that account as well as the account in suit was disputed. The building account was produced, and consisted of a number of items for building materials, teaming and labour, exceeding $200, but reduced by payments to the balance claimed of $55 17. It became necessary, therefore, to prove all the items of the building account, as well as of the other; the two accounts amounting to about $300, when

Wardell for the defendant, contended that the court had no jurisdiction to try the case.

Durand for the plaintiff, cited *Miron* v. *McCabe*, 4 Pr. Rep. 171.

Logie, Co. J.—The 59th section of the Division Courts Act, contains a proviso, that no action shall be sustained for the balance of an unsettled account, where the unsettled account in the whole exceeds $200. Under that proviso I have always held that I had no jurisdiction to try an unliquidated account exceeding $200, though reduced by payment to a sum below $100; the intention of the Legislature apparently being to prevent these small debt courts from investigating large and important transactions. *Miron* v. *McCabe*, 4 Pr. Rep. 171, however, seems to be an authority for the position urged on behalf of the plaintiff, that this court has jurisdiction to try a disputed claim exeeeding $200, where it has been reduced to $100 by payment. The point certainly was raised in that case, but it does not seem expressly decided in the judgment; on the other hand in *Higginbotham* v. *Moore*, 21 U. C. Q. B. 326, the court assume as a matter of course, that in such a case the Division Court has no jurisdiction. It was an action to recover the amount of an account and, as amended, the balance due upon two notes, the amount of the notes being reduced by *payment* to the balance claimed; and there the court held that the notes being settled or liquidated amounts, the proviso in the statute did not apply,

the balance due on the notes and the account not exceeding the jurisdiction of the Division Court. Robinson, C. J., in giving judgment says:—"the plaintiff's claim as first delivered in stating an account of which the debit side exceeded £73, stated a case not within the jurisdiction of the court, according to the 59th section, although the balance claimed was only £25—that is if the whole account is to be taken as unsettled, notwithstanding there were among the items two notes, which in themselves were liquidated demands." I have known cases to be brought in the Division Courts for the balance of an unsettled acount exceeding $1000, but reduced by payment to $100; if the Court had jurisdiction in such a case, there would be this anomaly, that a case *could* be tried in a Division Court which would be above the jurisdiction of a higher court, the County Court. The intention of the Legislature to give jurisdiction to the Division Court in such a case as this, must be very clear and decisive of the point, more express than in *Miron* v. *McCabe*, before I would assume the jurisdiction claimed on behalf of the plaintiff.

Gilbert v. Gilbert Executrix of W. Gilbert.

Splitting cause of action.

Claims, such as promissory notes, which would each constitute a distinct cause of action if sued upon directly, become within the rule as to splitting of causes of action in Division Courts, when the nature of the action upon them is changed to an indirect action as for money paid by an endorser to the use of the maker.

[Hamilton, 7th Sept., 1868.]

At the June sittings of the Court, an action was brought to recover the amount of two promissory notes, made by the deceased Wm. Gilbert to other parties; the plaintiff claiming that he had signed the notes as security for Wm. Gilbert, and had to pay them. The claim was allowed to be amended, to one for money paid for the use of the defendant as administratrix, &c. A set-off was put in and proved, and the plaintiff had judgment for a small balance. At the trial the plaintiff produced another note made in the same way, which he said he had paid, but did not give it in evidence. At the last sittings of the court, he brought another action for money paid on that note, and objection was made that he could not recover, on the ground that it was a splitting of a cause of action. For the plaintiff it was contended, that the three notes being all payable to different persons, formed different causes of action, and therefore the plaintiff was entitled to recover.

Logie, Co. J.—In *Wickham* v. *Lee*, 12 A. & E. N. S. 526, Erle, J. says:—"It is not a splitting of actions to bring distinct plaints, where in a Superior Court there would have been two counts. I am not sure that the Court of Exchequer puts it so, but that is the true construction of the Act." All the cases on the subject, illustrate the correctness of the rule laid down by Mr. Justice Erle, and I have always acted upon that rule in deciding upon what constitutes a splitting of a cause of action.

In this case the actions are not brought upon the notes directly, for then they would form distinct causes of action, but for money paid by the plaintiff for the use of the defendant in taking up the notes. In a Superior Court there would have been one count for money paid, under which the amounts of the three notes could have been recovered, making one cause of action though the notes were payable to different persons; as in *Grimsby* v. *Aykroyd*, 1 Ex. 479, where the orders were given to different persons, but were held to give only one cause of action. The plaintiff should have sued for the whole at once, and not having done so, he cannot now recover the amount claimed in this action.

ENGLISH REPORTS.

HOUSE OF LORDS.

Routledge et al. v. Low et al.

Copyright—Alien author—Temporary residence in British colony—5 & 6 Vict. c. 45

A domiciled subject of the United States took up her temporary residence in Canada, while a book of which she was the authoress was being published in England by Messrs. S. L. and Co., the respondents. The appellants, Messrs. R. and Co., having subsequently printed and sold copies of the same work, a bill was filed against them to restrain the publication, to which defendants demurred:

Held (confirming the decision of the court below), overruling the demurrer, that under the 5 & 6 Vict. c. 45, an alien friend who first publishes in the United Kingdom a work, of which he is the author, if at the time of publication he is resident in the British dominions, even though such residence should be only temporary: and the fact that the temporary residence is in a colony with an independant legislature, under the laws of which he would not be entitled to copyright, does not prevent his acquiring this privilege.

Per the Lord Chancellor (Cairns) and Lord Westbury, Lords Cranworth and Chelmsford dissenting: The protection of copyright is given to every author who first published in the United Kingdom, wheresoever he may be resident, or of whatever state he may be the subject.

Jeffereys v. *Boosey* commented on.

[18 L. T., N. S., 874.]

This was an appeal from a decree of the Lords Justices made on the 24th Nov. 1865, and the question in dispute was, whether an author of a book, who was an alien, and not domiciled within any part of the British dominions, and between whose Government and that of Her Majesty no convention pursuant to the International Copyright Act (7 & 8 Vict. c. 12) was in existence, had acquired, by a temporary residence in a British colony, such residence being during and merely for the purpose of the publication of the book in England, the protection of the law of English copyright. A further question was, whether by the Copyright Act (5 & 6 Vict. c. 45) protection is given throughout all the British dominions, and especially whether it extends to colonies having a local and independant legislature by the statute law of which such alien author acquired no copyright.

The facts were these:—A Miss Cummings, who was domiciled in the United States, transmitted to the respondents, Messrs. Sampson Low, and Co., the MS of a book composed by her, called Haunted Hearts. She then went to Montreal and purposely resided there for a few days, while the book was being published. Immediately after the book had been published in London it was also published in America Messrs. Routledge and Co. subsequently printed and sold copies of it at the rate of 2*s.* each, Messrs. Low's price being 16*s.* A bill for an injunction was filed to restrain the rule and for an account. The appellants demurred; but the Vice-Chancellor overruled the demurrer, and the injunction was grant-

ed. Messrs. Routledge appealed, and the respondents having, at the suggestion of the Lords Justices, served notice of motion for a decree, the appeal motion and the cause were heard together in Nov. 1865. The Lords Justices made a decree in favour of the respondents: hence the present appeal.

The case is reported in the court below 10 L. T. Rep. N. S. 838, and 33 L. J. 717, Ch.

Sir *Roundell Palmer* and *Shapter*, Q. C. (*Schomberg* with them) for appellants.—The Copyright Act (5 & 6 Vict. c. 45), does not affect Canada, which has a legislature of its own, there is no express mention of Canada in the Act, and general words will not suffice to include it. We had already professed to give up legislating for Canada, by the 3 & 4 Vict. c. 35, and prior to the Copyright Act the Canadians had passed a copyright Act of their own, the terms of which the authoress in the present case had not complied with. Under the Canadian Act, she is not entitled to copyright, but if the decision of the Lords Justices be upheld she will obtain it under 5 & 6 Vict. c. 45 in direct contravention of the Canadian Act. It is a well-known principle of law that where there is a general and special statute, and the provisions of the one are not consistent with the provisions of the other, that the special statute ought to prevail, therefore in this case the Canadian Act must be held to govern the respondents claim: (*Fitzgerald* v. *Champneys*, 2 Jo. & H. 31, 55; 30 L. J. N. S. 777, Ch.) The remarks of Lord Cranworth in *Brook* v. *Brook*, 9 H. of L. Cas. 193, 222, in reference to the limitation of the operation of the 5 & 6 Will. IV, c 54, may be applied with advantage to the present Act. A foreigner residing in Canada cannot be held to be a British subject within the meaning of the Copyright Act; the only claim to the rights of a British subject that the respondent has, is derived from the temporary residence in a British colony. Such local presence can only confer local and temporary rights, not the full rights of a British subject, unless by express enactment of the British Legislature. We have a national and also an international code affecting this subject, and this of itself is a proof that the statute was meant to benefit only *boná fide* subjects of the Crown. This Act cannot be supposed to be incorporated in the law of Canada; its provisions are entirely local. Penalties are to be recovered in the courts of the United Kingdom; copies of new works are to be delivered within a month at the British Museum, and in fact its provisions generally keep in view the state of things in the United Kingdom. This case, then, is governed by the decision in *The Attorney General* v. *Stewart*, 2 Mer. 143. *Jefferys* v. *Boosey* decided that the author must be either a British subject or an alien residing in the United Kingdom. The language of the Statute of Anne (8 Anne, c. 19) is not enlarged by the present statute. *Oilendorf* v. *Black*, 4 DeG. & S. 209; 20 L. J. 162, Ch., the decision turned entirely on a *boná fide* residence in England.

Mellish, Q. C. and *Speed* (with them *Hardy*) for respondents.—The present Act expressly repeals the Act of Anne. The object of the present statute, which is clearly shown by its preamble, is to extend copyright in order to afford greater encouragement to literature. The question here is, who is an author? There are no words of limitation in the present Act with regard to it; it refers then to everyone who is an author, no matter what his nationality. Is an alien friend who comes into any part of the British dominion entitled to the benefit of this statute? The other side say that the respondent could only become entitled to the rights conferred by the Canadian law, but Canadian laws are of two sorts, one class being those enacted by the Imperial Legislature. Why then should an alien be restricted to the advantages of those alone which are enacted by the colonial Legislature? This Act applies to all persons residing within its scope, and it is clear from the Act itself that it extended to Canada. It was laid down by Lord Cranworth in *Jefferys* v. *Boosey*, that a residence of a single day was sufficient, and that under the Copyright Acts there was no distinction between temporary and permanent residence. But the present Act goes still further, and under it there can be no doubt that not only is a foreigner resident in England or within the British dominions entitled to copyright, but a foreigner resident abroad is also equally entitled to it, so long as he first publishes in England, which is the gist of the whole Act, and complies with the provisions of the 24th section. The opinion to the contrary expressed in *Jefferys* v. *Boosey* had nothing to do do with the *ratio decidendi*, which went entirely on the fact that the publication was not made by the author at all, but by a person to whom he had assigned; but that case was decided under the statute of Anne, and is no longer law. Under the present statute author is not confined to British subjects, but even if it were, Miss Cummings at the time of publication was temporarily a subject of the British Crown. It is admitted that an alien resident in England is an author within the Act. There can be no distinction in the position in law of an alien resident in England and and an alien resident in Canada. She was entitled to all the rights of a British subject except those from which aliens are specially excluded: *Calvin's case*, 7 Rep. 17b; 7 & 8 Vict. c. 66, s. 4

They referred also to *D'Almaine* v. *Boosey*, 1 You. & C. 288; 4 L. J. N. S., Exch. Eq. 21; *Bentley* v. *Foster*, 10 Sim. 329; *Cocks* v. *Purday*, 5 C. B. 860, 17 L. J., N. S., 273, C. P.; *Boosey* v. *Davidson*, 4 Ex. 145, 18 L. J., N. S., 174, Q. B.; *Boosey* v. *Purday*, 4 Ex. 145; 18 L.J., N. S., 378, Ex.

Sir *R. Palmer* in reply.

The Lord Chancellor.—In this case a decree was made in the Court of Chancery by Vice-Chancellor Kindersley, and affirmed by the Lords Justices, protecting in the usual way the copyright is a work called "Haunted Hearts," and Messrs. Routledge, against whom this decree was made, complain of it and appeal from it to your lordships. The book or work called "Haunted Hearts" was composed by the respondent, Maria Susanna Cummings. Miss Cummings is a domiciled citizen of the United States of America; but before she published the work she went by arrangement to Montreal, in Lower Canada, for a few days, and while sojourning there the book was published in London on the 23rd May 1864. The book was published by the respondents, Messrs. Sampson, Low and Co., and the copyright of the work, if copyright existed, was

duly assigned to them, and proper entries as to the copyright and the assignment were subsequently made at Stationer's Hall. The precise case, therefore, which your lordships have to consider, is whether an alien friend, publishing in London during the time of his or her temporary sojourn in a British colony or possession, an original work, is entitled to the protection of the English law as to copyright? The appellants maintain the negative, the respondents, the affirmative, of this proposition. This is a question of importance to the parties to this litigation; but even beyond the interests of the parties to this appeal, it is of great general importance that there should be no doubt or misapprehension as to the law on the subject. The great object of the law of copyright is to stimulate by means of the protection secured to literaray labour the composition and publication to the world of works of learning and utility; and the accomplishment of this object would be seriously thwarted by any want of clearness as to the terms on which, or the persons to whom, this protection is intended to be given. The statute applicable to this case is the 5 & 6 Vict. c. 45. It is not an Act by way of supplement to any former statute. It repeals the former statutes as to the copyright, and it proceeds upon the recital "that it is expedient to amend the law relating to copyright and to afford greater encouragement to the production of literary works of lasting benefit to the world." There are three questions arising upon this statute which I will ask you to consider; and the answer to them will, as it seems to me, dispose of the controversy in the present case. First, where, in order to obtain a title of copyright, must the publication of the work take place? second, what is the area in and throughout which the protection of copyright is given? and, thirdly, who is the person entitled to this protection? As to the question, where must publication take place, I cannot doubt that the publication must be in the United Kingdom. The words in the 3rd section are: "Every book which shall be published," without saying where; but it would be very inconsistent with the usual practice of the Imperial Parliament to create a system of copyright law for all the colonies and dependencies in the Empire, many of which have representative institutions of their own, without any consultation with those colonies or dependencies, and without any consideration whether an uniform and arbitrary system such as that introduced by this Act, would be suitable to the varied circumstances, states of naturalisation, and systems of jurisprudence and judicature, in these different colonies and possessions. But there are, as it seems to me, still clearer indication in the Act of the intention of the Legislature on this point. By the 8th clause copies of every book are to be delivered to various public libraries in the United Kingdom within one month after demand in writing, an enactment which, in the case of a publication at the Antipodes, could not be complied with. By the 10th section, penalties for not delivering these copies are to be recovered before two justices of the county or place where the publisher making default shall reside, or by action of debt in any court of record in the United Kingdom. By the 11th section the book of registry of copyrights and of assignments is to be kept at Stationers'-hall in London, and no registry is provided for the colonies. By the 14th section a motion to expunge or vary any entry in this regstry, it to be made in the Court of Queen's Bench, Common Pleas, or Exchequer. These clauses are intelligible if the publication is in the United Kingdom, but hardly so if it may be in India or Australia. Finally, in the 17th section, there is a provision against any person importing into any part of the United Kingdom, or any other part of the British dominions, for sale or hire, any copyright book first composed, or written, or printed and published, in any part of the United Kingdom, and reprinted in any country or place out of the British dominions; a provision showing clearly, as it appears to me, that publication in the United Kingdom is indispensable to copyright. I have gone into this detail as to the place of publication, not so much because any difficulty on that score arises in the present case, for the publication here was in London, as because I observe that Kindersley, V. C. appears to have thought that the whole of the British dominions are, by the Act, brought into what he terms a "ring fence" for every purpose of copyright, including publication. I am unable to take this view of the Act. The 6th section no doubt affords some countenance to this construction, for it provides for the delivery to the British Museum of a copy of every book published after the Act; the delivery to be within one or three months if published within the United Kingdom, or within twelve months after publication in any part of the British dominions. But, my Lords, I cannot look on this section as thro wing any light on the definition of copyright, or, indeed, as necessarily connected or correlative with copyright. It appears to me to have been introduced into the Act with the intention (whether that intention has succeeded or not is not now the question) of obtaining for the British Museum a copy of every book published anywhere under British rule, and whether there should be copyright in the book or not. The second question is as to the area over and through which protection is granted by the Act, and I cannot doubt that this area is the whole of the British dominions. The original Copyright Act (the 8 Anne, c. 19) protected copyright throughout Great Britain. The 43 Geo. 3, c. 107, extended this protection over the whole of the United Kingdom and the British dominions in Europe. The 54 Geo. 3, c. 156, extended the protection still further over the whole of the British dominions; and the 15th section of the the present Act repeats in substance the same area for the purpose of protection. I think, further, it is obviously with reference to the protection given by the Act, and the area over which that protection is given, that the 59th section provides that the Act should extend to the United Kingdom, and to every part of the British dominions. I come now to the third question, the most important one for the determination of the present case. To whom, as the composer or author of a work, is this protection given—to a native-born subject of the Crown; to an alien friend sojourning in the United Kingdom; to an alien friend sojourning in a colony; or to an alien friend resident wholly abroad? In my opinion the protection is given to every author who publishes in the United

Kingdom, wheresoever that author may be a resident or of whatever state he may be the subject. The intention of the Act is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. The benefit is obtained in the opinion of the Legislature by offering a certain amount of protection to the author, thereby inducing him to publish his work. This is, or may be, a benefit to the author, but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the Legislature is to increase the common stock of the literature of the country, and if that stock can be increased by the publication for the first time here of a new and valuable work composed by an alien who never has been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions, which should entitle such a person to the protection of the Act in return and compensation for the addition he has made to the literature of the country. I am glad to be able to entertain no doubt that a construction of the Act, so consistent with a wise and liberal policy, is the proper construction to be placed upon it. My lords, as opposed to this conclusion we were much pressed with the case of *Jefferys* v *Boosey*, decided by this House (8 H. of L. Cas.). That case was decided not upon the old Copyright Act of Qoeen Anne; on the construction of that Act six of the learned judges who advised your lordships were of opinion that a foreigner living at Milan, and composing a literary work there, could convey a title of copyright by assignment, under which his assignee, publishing here, was entitled to protection. Four of the learned judges were of different opinion, and your lordships unanimously held that the foreigner in that case could not give a title of copyright, and this must be taken to be the construction and effect of the statute of Anne. But it is impossible not to see that the *ratio decidendi* in that case proceeded mainly, if not exclusively, on the wording of the preamble of the statute of Anne, and on a consideration of the general character and scope of the Legislature of Great Britain at that period. The present statute has repealed that Act and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the world. And accepting the decision of this House as to the construction of the statute of Anne, it is, I think, impossible not to see that the present statute would be incompatible with a policy so narrow as that expressed in the statute of Anne. If you concur in this construction of the statute now in force, the respondent will clearly be entitled to our judgment, and I propose to move that the decree of the Court of Chancery should be affirmed, and the appeal dismissed with costs.

Lord Cranworth.—I concur with my noble and learned friend in thinking that this appeal should be dismissed with costs. But in so concurring I must guard myself against being taken as assenting to the suggestion of my noble and learned friend, that the Act now regulating copyright (5 & 6 Vict. c. 45) must be taken as extending its privileges to all authors, aliens as well as natural born subjects, who publish their works for the first time in this country. It is not necessary to come to such a conclusion in order to support the decree appealed from. It is remarkable that the modern statute, though it repeals all the former statutes, nowhere defines or declares what is to be understood by the word "copyright." It assumes copyright to be a well known right, and legislates in respect to it accordingly. I suppose, that copyright, except so far as it is extended expressley or impliedly by the language of the Act, must be taken to be confined to what it was at the passing of the Act, that is, to works first published in the United Kingdom. But I think it is a reasonable inference, from the provisions of the Act, that its benefits are conferred on all persons resident in any part of Her Majesty's dominions, whether aliens or natural born subjects, who while a resident publish their works in the United Kingdom. This was the case of Miss Cummings, and it is not necessary to say whether it extends further; though there seem to me to be reasons almost irresistible for thinking that it does not. She was a foreigner resident at Montreal, and while so resident, she published her work in London, which was its first publication, and that was, I think, sufficient to entitle her to the protection of the statute. The decision of your Lordships' house in *Jefferys* v. *Boosey*, according to the opinions of all the noble Lords who advised the House on that occasion, rested on the ground that the statute of Anne then alone in question must be taken to have had reference exclusively to the subjects of this country, including in that description foreigners resident within it, and not to have contemplated the case of aliens living abroad beyond the authority of the British Legislature. The British Parliament in the time of Queen Anne must be taken *primâ facie* to have legislated only for Great Britian, just as the present Parliament must be taken to legislate only for the United Kingdom. But though the Parliament of the United Kingdom must *primâ facie* be taken to legislate only for the United Kingdom, and not for the colonial dominions of the Crown, it is certainly within the power of Parliament to make law for every part of Her Majesty's dominions, and this is done in express terms by the 29th section of the Act now in question. Its provisions appear to me to show clearly that the privileges of authorship which the Act was intended to confer or regulate in respect to works first published in the United Kingdom, were meant to extend to all subjects of Her Majesty in whatever part of her dominions they might be resident, including under the term subjects, foreigners residing there, and so owing to her a temporary allegiance. That Her Majesty's colonial subjects are by the statute deprived of rights they would otherwise have enjoyed is plain, for the 15th section prohibits them from printing or publishing in the colony whatever may be their own colonial laws, any work in which there is copyright in the United Kingdom. It is reasonable to infer that the persons thus restrained were intended to have the same privileges as to works they might publish in the United Kingdom, as authors actually resident therein. And, threfore, I have no hesitation in concurring with my noble and learned friend in thinking that the decree

was right. I find it difficult to concur with him in the opinion that the present statute extends its protection to foreigners without saying that the case of *Jefferys* v. *Boosey* is not good law, a conclusion at which I should be very unwilling to come as to any case decided in this House, more especially as to one so elaborately considered as that of *Jefferys* v. *Boosey*, that case, as my noble friend has pointed out, was decided not on the construction of the Act of the 5 & 6 Vict. c. 45, but on the old statute of Queen Anne; but I own I do not, as at present advised, see any difference between the two statutes, so far as relates to the subject of foreign authors. I have felt it my duty to make these remarks, in order that I may not be taken to have accepted my noble and learned friend's exposition of the present statute as to foreign authors. If any question as to their rights should come before this House for decision, I wish to keep my judgment open on the point. In the present case, as I have already stated, I concur with my noble and learned friend in thinking that the present appeal should be dismissed with costs.

Lord Chelmsford.—The case of *Jefferys* v. *Boosey* finally decided that the statute of 8 Anne gives the copyright in a work only to British subjects or to foreign authors who at the time of the first publication are in this country. The direct subject of decision in that case was that a foreign musical composer resident abroad, having assigned his right in a musical composition of which he was the author to another foreigner who brought it to this country, and before publication assigned it, according to the forms required by law, to an Englishman, no assignable copyright in this musical composition existed in England. There can be no doubt from what was said by the learned judges who assisted, and by the noble Lords who advised the House in *Jefferys* v. *Boosey*, that if the foreign musical composer had himself brought his composition here, even though he came to this country solely with a view to publication, he would have entitled himself to copyright. Copyright under the statute of Anne was confined to Great Britian. Therefore, under this statute, in order to qualify himself to claim a copyright for any work which he had composed but not published abroad, a foreigner must at the time of its first publication have been resident within some part of the area over which the copyright extended and to which it was limited. But it was said that before the case of *Jefferys* v. *Boosey*, the copyright under the statute of Anne had been extended by the 41 Geo. 3, to "all the British dominions in Europe," and by the 54 Geo. 3, "to all the ports of the British dominions," and therefore the decision in that case that the foreign author of a work must have been resident in Great Britain to entitle him to copyright, necessarily excluded the sufficiency of a residence in any other part of the Queen's dominions. But the Acts of 41 Geo. 3, and 54 Geo. 3, gave no actual extension to the area of copyright, which was limited by the 8th of Anne. Practically, no doubt, when persons are prohibited from publishing a work in a particular place, and an action is given to the author of the work against them for doing so, he has a monopoly of the right of publication in that place. Yet strictly speaking his copyright under the statute is not thereby enlarged; but for its better protection a remedy is given for an infringement beyond the limits to which it extends. It is obvious that for the purpose of copyright a provision of this description cannot give any effect to a residence in any part of the Queen's dominions out of Great Britain which it did not possess before. It having been settled that the term "author" in the statute of Anne is only applicable to a foreigner when he is resident in Great Britain, the question to be determined in this case is whether the statute of 5 & 6 Vict. c. 45 has not given that term a more extensive application. By the 29th section it is enacted "that this Act shall extend to the United Kingdom of Great Britain and Ireland, and to every part of the British dominions." This section of the Act requires for its full effect that the area over which copyrights prevail should be limited only by the extent of the British dominions. But then it will follow that the term "author" must have a similar extension. For in the case of *Jefferys* v. *Boosey* it was not doubted that the term author, though intended to express a British subject, would apply to a foreigner taking up his residence within the limits to which copyright extended under the 8th Anne. And those limits being now enlarged by the 5 & 6 Vict., the residence which confers the rights of a British subject as to copyright upon a foreigner may be in any part of the Queen's dominions. It was admitted in argument that a resident native of Canada would be entitled to the benefit of an English copyright? What reason is there for denying to a foreigner resident in Canada the privileges in this respect of a native Canadian? There is a little difficulty in determining where the publication which confers the extensive privilege of copyright under the Act must take place. The 6th section requires a copy of every book to be deposited in the British Museum within one month after it shall be first published within the bills of mortality, or within three months if published in any other part of the United Kingdom, or within twelve months if published in any other of the British dominions. This section seems to refer to publications to which the privilege of copyright attaches, and consequently to contemplate the acquisition of this privilege by the first publication of a work out of the United Kingdom. But there are provisions in the Act which impose conditions upon a publisher entitled to copyright wholly inapplicable to publications in some distant part of the British dominions. And a non-compliance with these conditions exposing the publisher to penalties which are to be recovered either in a summary way on conviction before two justices of the peace for the county or place where he resides, or by action in any court of the United Kingdom, it seems to me to be clear, notwithstanding the language of the 6th section, that the only publication which entitles a publisher to copyright is that which takes place within the United Kingdom, although when obtained it exists throughout the whole of the British dominions. Our attention was called to a local law of Canada with regard to copyright; but it was not contended that it would prevent a native of Canada from acquiring an English copyright which would extend to Canada, as well as to all other parts of the British dominions, although the requisitions of the Canadian law had not been

complied with. It is unnecessary to decide what would be the extent and effect of a copyright in those colonies and possessions of the Crown which have local laws upon the subject. But even if the statute of 5 & 6 Vict. applies at all to the case, I do not see how such a copyright can extend beyond the local limits of the law which creates it. My noble and learned friend upon the woolsack has expressed an opinion that the statute of 5 & 6 Vict. has extended the privilege of copyright to an alien publisher who is resident wholly abroad. With the most sincere respect for this opinion, I cannot help entertaining a doubt whether it is well founded. If any stress is to be laid upon the preamble of the statute, it does not appear to me to differ very widely from that in the statute of Anne. One of the objects proposed by the statute of Anne is to encourage "learned men to compose and write useful books." The object of the 5 & 6 Vict. is expressed to be "to afford greater encouragement to the production of literary works of lasting benefit to the world." If, therefore, the statute of Anne did not confer the privilege of copyright upon an alien publisher residing abroad (which after the case of *Jefferys* v. *Boosey*, it must be taken not to have done, I cannot find anything in the 5 & 6 Vict., which appears to me to warrant the extension of its benefits to such a publisher. But it is unnecessary to consider this question more fully with a view to the determination of the present case. It is sufficient to say that copyright being extended to every part of the British dominions, the residence of Miss Cummings, the authoress of the work in question, in Canada, conferred upon her the same title to copyright upon the first publication of her work in England as a similar residence in the United Kingdom would have done; and, therefore, that in my opinion the decree appealed from ought to be affirmed and the appeal dismissed with costs.

Lord Westbury.—The case of *Jefferys* v. *Boosey* is a decision which is attached to and depends on the particular statute of which it was the exponent; and as that statute has been repealed and is now replaced by another Act, with different enactments, expressed in different language, the case of *Jefferys* v. *Boosey* is not a binding authority in the exposition of this later statute. In the arguments on the construction of the existing Act it has been admitted (and I think rightly) that the benefit of the copyright which the Act creates extends to such works only as are published within the United Kingdom. This results from various provisions and conditions contained in the Act, which could not possibly be complied with if the first publication were to take place in distant parts of the British empire. But although for the creation of copyright it is necessary that the work be first published within the United Kingdom, yet, by the express words of the statute, the copyright, when created, extends to every part of the British dominions. This is the benefit which, by the words of the Act, is offered to authors, who shall first publish their works within the United Kingdom. The question then arises who are included in the term "authors." The word is used in the statute without limitation or restriction. It must, therefore, include every person who shall be an author, unless from the rest of the statute sufficient grounds can be found for giving the term a limited signification. It is proposed to construe the Act as if it had declared in terms that the protection it affords shall extend to such authors only who are natural-born subjects, or of foreigners who may be within the allegiance of the Queen on the day of publication. But there is no such enactment in express terms, and no part of the Act has been pointed out as requiring that such a construction should be adopted. The Act appears to have been dictated by a wise and liberal spirit, and in the same spirit it should be interpreted, adhering of course to the settled rules of legal construction. The preamble is, in my opinion, quite inconsistent with the conclusion that the protection given by the statute was intended to be confined to the works of British authors. On the contrary, it seems to contain an invitation to men of learning in every country to make the United Kingdom the place of first publication of their works; and an extended term of copyright throughout the whole of the British dominions is the reward of their so doing. So interpreted and applied, the Act is auxiliary to the advancement of learning in this country. The real condition of obtaining its advantages is the first publication by the author of his works in the United Kingdom. Nothing renders necessary his bodily presence here at the time, and I find it impossible to discover any reason why it should be required, or what it can add to the merit of the first publication. It was asked in *Jefferys* v. *Boosey*, why should the Act (meaning the Statute of Anne) be supposed to have been passed for the benefit of foreign authors? But if the like question be repeated with reference to the present Act, the answer is in the language of the preamble that the Act is intended "to afford greater encouragement to the production of literary works of lasting benefit to the world"—a purpose which has no limitation of person or place. But the Act secures a special benefit to British subjects by promoting the advancement of learning in the country, which the Act contemplates as the result of encouraging all authors to resort to the United Kingdom for first publication of their works. The benefit of the foreign author is incidental only to the benefit of the British public. Certainly the obligation lies on those who would give the term "author" a restricted signification, to find in the statute the reason for so doing. If the intrinsic merits of the reasoning on which *Jefferys* v. *Boosey* was decided, be considered (and which we are at liberty to do, for in this case it is not a binding authority), I must frankly admit that it by no means commands my assent. I abstain from criticising the arguments in detail, for the process could hardly be consistent with the great respect due to the judicial opinions delivered by your Lordships. The sum of the whole reasoning is the conclusion that a British statute must be considered as legislation for British subjects only; unless there are special grounds for inferring that the statute was intended to have a wider operation. But by the common law of England, the alien freind (*ami*) though remaining abroad, may acquire and hold in England all kinds of pure personal property, and when a statute is passed which creates or gives peculiar protection to a particular kind of

property which it declares shall be deemed personal property, and does not exclude the alien, why is he to be deprived of his ordinary right of possessing such property, or being entitled to such protection? It is said that the statute is intended for the benefit of British subjects; and that is given as the reason for the decision which involves this consequence, viz., that a British subject who has bought an unpublished work from a foreign author residing abroad, and then publishes it in conformity with the statute, shall have no property in that which he has bought and paid for, unless the foreign author happens on the day of publication to be bodily present for a few hours within some part of the British dominions. Surely this construction is injurious to the interest of the English subject? For these reasons, and not on the narrow ground that the foreign authoress of this work crossed the English border and stayed for a few hours on British ground during the day of first publication, in order that her assigns might escape from the limited views expressed in *Jefferys* v. *Boosey*, I am of opinion that this decree ought to be affirmed, and the appeal dismissed with costs.

Lord Colonsay.—My Lords, I concur with all your Lordships in thinking that this appeal ought to be dismissed. I have no doubt at all that in order to obtain the protection of copyright, the first publication must be within the United Kingdom. I have also no doubt that the area of protection extends over the whole British dominions; and, thirdly, I have no doubt that an author residing at the time of publication within any portion of the British dominions, although that author may be a foreigner, is entitled to the benefit of the protection. A more liberal view of the statute has been suggested, and it is an important one; but after the difference of opinion that I have heard expressed with regard to it, not having considered, in my deliberation upon this case, that a judgment upon that point was necessary to the solution of the question now before the House, I respectfully beg to abstain from expressing any opinion upon it, although I can easily see that there is very little benefit to be gained to British authors by refusing to extend the protection of copyright in the manner suggested, because nothing can be more shadowy than a distinction depending upon the circumstance of a few hours' or a few days' residence within some part of the widely-extended dominions of Her Majesty. But it is not upon considerations of that kind that we must decide this case, it is upon the ground that the right only exists by statute, and as I have not directed my attention to that matter, feeling it to be unnecessary to the decision of this case, I rather abstain from expressing any opinion one way or the other.

Decree affirmed, and appeal dismissed with costs.

CROWN CASES RESERVED.

Reg v. Glyde.

Larceny—Finding lost property—Belief that owner will come forward.

Where a man found a sovereign on the highway, and, with a knowledge that he was doing wrong, at once determined to appropriate it, whether the owner came forward or not, and did so; but, also, at the time of finding, believed the sovereign to have been *accidentally* lost, and had no reason to suppose or believe that the owner would become known to him, it was

Held, on the authority of *R.* v. *Thurborn*, 1 Den. 387, that he was not guilty of larceny.

[16 W. R. May 30, 1174.]

Case reserved by Cockburn, C. J.:

William Glyde was convicted before me at the last assizes for the county of Sussex on an indictment for larceny, in which he was charged with having stolen a sovereign, the property of Jane Austin.

It appeared that, on the evening of the 16th January last, the prosecutrix, being on her way home from Robertsbridge, where she had been to pay some bills, to her home at Brightling, and having some money loose in her hand, had occasion, owing to the dirty state of a part of the road, to hold up her dress, and in doing so let fall a sovereign. It being then dark, she did not stop to look for the sovereign, but on the following morning she started to go to the spot in the hope of finding the lost coin. In the meantime the prisoner, coming from Robertsbridge towards Brightling, in company with a man named Hilder and his son, and seeing, at the spot where the prosecutrix had dropped her sovereign, a sovereign lying in the road, picked it up and put it in his pocket, observing that it was a good sovereign and would just make his week up.

Proceeding onwards the men soon afterwards met the prosecutrix, then on her way to the spot where the sovereign had been dropped. According to her statement, on meeting the men, she addressed Hilder, whom she knew, and asked in the hearing of the prisoner, "if he had stumbled on a sovereign," stating that she had lost one and was going to look for it, to which inquiry Hilder answered in the negative. She was however, contradicted by Hilder, and his son, who were called as witnesses for the prosecution, as to any such conversation having taken place. But it was clear that the fact of the sovereign thus picked up by the prisoner being one which had been lost by the prosecutrix was speedily brought to the prisoner's knowledge. The fact of the prosecutrix having lost a sovereign and of the prisoner having found one having come to his master's ears—the master asked him if he had found a sovereign, to which he answered that he "was not bound to say." The master further asked if he had not heard that Mrs. Austin had lost one, to which the prisoner made the same reply. On the master asking whether it would not be more honest to give the sovereign up to her, he answered that "he could just manage to live without honesty."

Being asked by a police constable whether he remembered going up the Brightling road, and picking up a sovereign, he answered, "I do not know that I did." On the officer saying "I have been informed by witnesses that you did so, and if you did it did not belong to you—more particularly as you know to whom it belonged," the prisoner said he did not want to have anything more to say to the officer, and went into his house. On a subsequent occasion, however, he admitted to the same witness that he had picked up the sovereign.

The witness Hilder also stated that the prisoner afterwards came to him and asked him if he could say that he (prisoner) had picked up a

sovereign, and on receiving an answer in the affirmative, said that if that was so he must go and see the prosecutrix, who had applied to him several times, about it.

In summing up to the jury on this state of facts, I told them that where property was cast away or abandoned, any one finding and taking it acquired a right to it, which would be good even as against the former owner, if the latter should be minded to resume it. But that when a thing was accidentally lost, the property was not divested but remained in the owner who had lost it, and that such owner might recover it in an action against the finder. As to how far larceny might be committed by a person finding a thing accidentally lost, it depended on how far the party finding believed that the thing found had been abandoned by its owner or not. That where the thing found was of no value, or of so small value that the finder was warranted in assuming that the owner had abandoned it, he would not be guilty of larceny in appropriating it; or if, not knowing or not having the means of discovering the owner, the finder, from the inferior value of the thing found, might fairly infer that that the owner would not take the trouble to come forward and assert his right, so that practically there would be an abandonment, and so believing appropriated the thing found as virtually abandoned by the owner, he would not be guilty of larceny. So, although the value of the article might render it impossible in the first instance to presume abandonment by the owner, yet if, from the fact of no owner coming forward within a sufficient time, the finder might reasonably infer that the owner had abandoned and given up the thing as lost, there would be no criminality in an appropriation of it by the latter.

On the other hand, I pointed out that there were things as to which it could not be supposed that they had been intentionally abandoned, or the owner be supposed to have given up his property: thus, *e.g.*, a purse of gold, or a pocket-book containing bank notes, found in the road, could not possibly be supposed to have been intentionally placed there; or a diamond ornament, found outside the door of an assembly room, to have been intentionally dropped by the lady who had worn it, or a box or parcel left in a public conveyance or a hack cabriolet, to have been left with the intention of abandoning the property. That in all these cases as the property remained in the owner, and the presumption of abandonment was plainly negatived by the circumstances, a person finding such an article and appropriating it to himself with an intention of wronging the owner, if he knew who the owner was, or had the means of finding the owner—as where the name of and address of the owner were on the thing found—or had the means of ascertaining the owner, as in the case of a cabman who knew the house at which he had taken up or set down a person by whom an article must have been left in the carriage—would clearly be guilty of larceny. And even where the finder did not know the owner, if the nature of the thing found precluded the presumption of abandonment, and gave every reason to suppose that the owner would come forward and assert his claim, and the finder nevertheless determined to appropriate the chattel, and to keep it though he should afterwards become aware who the owner was, this too, if done with the intention of wrongfully depriving the unknown owner of property, which the finder knew still to belong to him, would be larceny, provided such intention was contemporaneous with the original taking of possession.

I told the jury that while, to constitute larceny in appropriating an article thus found, there must be a guilty intention of taking that which was known to belong to some one else, and which the party appropriating knew he had no right to treat as his own, this intention may be gathered from the value of the article and the other circumstances of the case, especially the conduct of the party accused, as to concealment or otherwise.

In this respect, I told them they might properly take into account the conduct of the prisoner Glyde in maintaining silence when he heard the question put by the prosecutrix to Hilder, if they believed that portion of her evidence; or, at all events, in refusing to say whether he had found a sovereign or not, and only acknowledging it when Hilder had told him he was prepared to speak to the fact.

As the result of this reasoning, I left it to the jury to say whether the prisoner, on finding the sovereign, believed it to have been accidentally lost, and nevertheless with a knowledge *that he was doing wrong*, at once determined to appropriate it to himself, and to keep it, notwithstanding it should afterwards become known to him who the owner was. I told the jury, if they were of that opinion, to find the prisoner guilty. But inasmuch as there was nothing to show that the prisoner, on appropriating the sovereign on finding it, had any reason to suppose that the owner would afterwards become known to him (or any belief that he would), I doubted whether an intention on his part of keeping it even if the owner should become known to him—he not believing that the latter event would come to pass—would amount to larceny. I therefore thought it right to take the opinion of this Court whether the conviction can be sustained on the facts I have stated.

The jury having found the prisoner guilty, I admitted him to bail, on his own recognizances to come up for judgment at the next assizes, if required so to do. Had I passed sentence at the time, I should have condemned him to imprisonment and hard labour for one calender month.

No counsel appeared for the prisoner.

Lumley Smith for the prosecution.—In *R.* v. *Moore*, 9 W. R. 276, 1 L. & C. 1, 30 L. J. M. C. 77, where a shopkeeper appropriated a note dropped in his shop, he was convicted, and that case differs from the present mainly in the fact that there the jury found specifically that when he picked up the note he believed the owner could be found. [Blackburn, J.—In that case, Wightman, J., referring to *R.* v. *Thorburn*, 18 L. J. M C. 140, 1 Den. 387, asks if there is any case of a conviction being quashed where the three ingredients concur—first, that the prisoner intended to appropriate the property from the first; second, that he believed at the time he took it that the owner could be found; third, that he acquired the knowledge of who the owner was before the conversion. It, therefore,

comes to this, whether a conviction can be supported where the first and third ingredient concur, but not the second] *R.* v. *Preston*, 21 L. J. M. C. 41; *R* v. *Peters*, 1 C. & K. 245. [WILLES, J.—You are going back to the deluge.] [MARTIN, B.—How can you make a man's mind worse than it is here?] [COCKBURN, C. J.—This is not the case of a man finding a thing, and, without either supposing the owner will turn up, or believing he will not turn up, appropriating it; but where the finder appropriates, not supposing the owner will turn up, but from the first determining to appropriate the lost property whether he does or not] The law upon the subject as laid down in *Thurburn's case, supra*, is unsatisfactory, as is pointed out in Russell on Crimes, vol. 2, p. 180, 4th ed., by Greaves. It is not to be supposed here that there was any abandonment, and, unless there was, this was larceny within the definition in Bracton, book 3, c. 32, f. 150.

COCKBURN, C. J.—We are of opinion that this is not larceny. The question seems to turn upon whether the finder of the lost property supposes at the time that it is abandoned by the owner. Where the lost property is such as it was in the present case, it may be doubtful whether the owner will come forward or not. Suppose a case where it is doubtful whether the owner will come forward, as where, having regard to the value of the property, it is to be supposed that a poor man would make search for it, but that a rich one would not, and a person finding it doubts whether the owner will come forward, but yet knows that the property is not abandoned, and resolves, nevertheless, even if he does so, to deny that he has it in his possession, and to appropriate it, and does convert it with that intention, that might be larceny. But the rule in *Thurburn's case* does not go to that length. Here there is nothing to show that the prisoner had reason to believe the true owner would come forward. I think, therefore, that it is not within *Thurburn's case*. If the matter was one of greater magnitude, it might be worth while to reconsider that case.

MARTIN, B.—I agree; but, except for the authority, I should have said that this was larceny—where a man takes the property, resolving to appropriate it whether the owner came forward or not. I think, however, we ought not to overrule *Thurburn's case*.

WILLES, J.—I concur, and think that *Thurburn's case* is in point, and should govern this, and I have too much respect for the learned judge who delivered the judgment in that case to suppose that it was not well decided.

BRAMWELL, B., concurred.

BLACKBURN, J.—I should wish the law to be as my brother Martin would have it, but doubt whether the intervention of the Legislature would not be required to alter the law as it stands at present. Until reversed, the case is governed by Thurburn's.

Conviction quashed.

QUEEN'S BENCH.

READ v. GREAT EASTERN RAILWAY COMPANY.

Negligence—Action by executor—Lord Campbell's Act (9 & 10 Vict. c. 93)—Accord and satisfaction with deceased.

To an action by an executor under Lord Campbell's Act for negligence of the defendants, whereby the deceased lost his life, the defendants pleaded on accord and satisfaction with the deceased in his lifetime.

Held, on demurrer, a good plea.

(Com. Law, W. R., June 25, 1868.)

Declaration by the plaintiff, as widow and executor of D. Read, deceased, for negligence, by reason of which the deceased lost his life.

Plea.—That in the lifetime of D. Bead the defendants paid to him and he accepted a sum of money in full satisfaction and discharge of all claims and causes of actlon he had against the defendants.

Demurrer and joinder in demurrer.

By 9 & 10 Vict. c. 93 (Lord Campbell's Act), s. 1, it is enacted that "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, if such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Codd in support of the plea.—This action is a new remedy, and not the same as that which accrued to the deceased; *Blake* v. *Midland Railway Company*, 18 Q. B. 93; *Pym* v. *Great Northern Railway Company*, in error, 11 W. R. 922, 32 L. J. Q. B. 377. [LUSH, J.—If the deceased had brought an action and recovered, could the executor subsequently recover?) I must go as far as that. Accordingly, satisfaction with deceased is no bar to the fresh cause of action in the representatives, and the language of the Act seems to show that on death a new right springs up.

Philbrick, contra.—The plea is in respect of all claims for and in respect of all causes of action. There are no words in the statute giving the new right; all they give is an extended right of action to the executor in consequence of the death and the damage therefrom, for which the deceased himself could not recover. The assessment of damages on a different principle in the two actions does not show any right to bring both. There is no new cause of action arising from the original wrong. The words "persons who would have been liable if death had not ensued" point to a continuing liability.

Codd in reply.—This case fits in with every word of the section.

BLACKBURN, J.—I think this plea is good. Before Lord Campbell's Act the maxim "*actio personalis moritur cum persona*" applied to such a case, and the preamble to that Act points to the cases in which the wrong-doer escaped from liability. But here, taking the plea to be true, the Act would not have enabled the party injured to maintain an action because he had accepted an accord and satisfaction. In the second section the principle upon which the jury may give damages, and the persons to whom they

are to go, are new; but there is not otherwise a new cause of action. It would be straining the statute to hold that after the injured party has recovered the executor may recover also.

Lush, J.—The structure of the 1st section shows that it was not the object of the statute to make the wrong-doer pay twice over, but only to give to the executor a right to sue where there was a cause of action existing at the time of death, which was prevented from taking effect by the maxim *actio personalis moritur cum persona*. It is true that the measure of damages is different, and in that sense the action is new, but not otherwise.

Judgment for defendant.

Williams v. Earle.

Lease—Covenant not to assign without license—Covenant running with land.

A covenant not to assign without license runs with the land.

In an action against an assignee by license for breach of such a covenant the measure of damages is the loss (if any) to the lessor by the substitution of the liability of the last assignee for that of the defendant in respect of covenants contained in the lease.

[16 W. R., June 26, 1868.]

This was an action tried before Mellor, J., at the Manchester Spring Assizes, 1867, when a verdict was found by consent for the plaintiff, subject to a special case for the opinion of the Court.

The action was brought by the plaintiff as lessor against the defendant as assignee of the lease hereinafter mentioned, to recover damages for the breaches of covenants sustained therein.

The declaration set out the deed made between the plaintiff, Edward Morgan Williams, as mortgagee, of the first part, James Kirkman, as mortgagor, of the second part, and Harriet Carmont, William Carmont, and William Corbett, the lessees, of the third part, being a demise for fourteen years of the Clayton Forge, with the machinery, &c. By the lease the lessees covenanted with both the mortgagee and the mortgagor separately The first count of the declaration set out various breaches of covenants, which it is unnecessary to consider; the second was on a covenant that the lessees, their executors, administrators, or assigns, or any of them, would not assign over, underlease, or underlet, or otherwise part with the possession of the demised premises, or any part thereof, or of the lease, without first obtaining the consent in writing of the mortgagee (the plaintiff), his heirs or assigns, or of James Kirkman (the mortgagor), his heirs or assigns, and then only for such time, and subject and in such manner and under and subject to such restrictions as should be expressed in such consent. To this second count the defendant pleaded a denial of the estate of the lessees vesting in the defendant, and of the breach, and demurred on the ground that the covenant of the lessees not to assign without license did not bind the defendant as assignee.

The plaintiff and the mortgagor, James Kirkman signed a license to the lessee to assign, and the lessee accordingly assigned to the defendant, who took possession of the premises, but did not execute the assignment.

The mortgagor, James Kirkman, was suffered to remain in receipt of the rent of the premises, and the plaintiff never interfered in the management or dealing with the property, or disposal of the premises, except by executing the license, and the action was brought in his name on an indemnity being given by James Kirkman. The defendant assigned the premises without the license or consent of the plaintiff or the mortgagor, which was the breach of covenant alleged under the second count.

The questions for the Court were whether the plaintiff was entitled to recover, and if so, on what principle damages should be assessed.

Halker, Q.C., for the plaintiff.—The question is whether since 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, a covenant not to assign without license runs with the land. The covenant comes within the first and second resolutions in Spencer's case; it does not show a mere mode of occupation, but touches or relates to the land. He referred to *Paul* v. *Nurse*, 8 B. & C. 146, and *Hooper* v. *Clarke*, 15 W. R. 347. 8 B. & S. 150.

Jones, Q.C. (*Herschell* with him), for the defendants.—The breach of covenant here is the destruction of the relation of lessor and lessee, and relates to the nature, quality, value, or mode of occupation. He referred to *Doe d. Cheer* v. *Smith*, 5 Taunt. 795; *Bally* v. *Wells*, 3 Wils. 25.

Holker in reply.

Blackburn, J.—The rule has been established since Spencer's case, that where covenants are contained in a lease which in express terms are on behalf of the lessee and his assigns for things to be done by him and his assigns, which relate to and touch and concern the thing demised, though the original covenant is made with the tenant, still there is such a privity of contract between the landlord and the assignee that the former may sue for a breach of the covenant by the latter. In this case the tenant for himself and his assigns covenants not to assign without license, and the assignee having assigned without license, the question is whether this covenant runs with the land. I cannot see any reason why this should not be a covenant which relates, or touches, or concerns the land. It is for the benefit of the landlord, so that there shall not be a substitution for the person approved of by the landlord or some other person who may be unable to fulfil the covenants of the lease. This touches the land quite as much as a covenant for renewal of the lease: *Roe* v. *Hayley*, 12 East, 464; *Simpson* v. *Clayton*, 4 Bing. N. C. 758; or a covenant to reside on the premises: *Tatem* v. *Chaplin*, 2 Hy. Bl. 133; or a covenant by a lessee of tithes for himself and his assigns not to let any of the farmers in the parish have any of the tithes: *Bally* v. *Wells*, 3 Wils. 25; *Brewer* v. *Hill*, 2 Anstr. 413; which is very nearly akin to an agreement not to assign them over. The Court, in *Bally* v. *Wells*, say that a covenant not to assign generally must be personal and collateral, and can only bind the lessee himself, which refers to the case when the lessee only covenants for himself, and the covenant is gone and over when the first assignee comes into possession. On principle, therefore, I think that a covenant not to assign without license runs with the land. Still the assignment, although without license, is operative at

law, and the estate has passed from the defendant to his assiguee, and any breach since that has happened is not a matter of covenant for which the defendant is liable; the plaintiff can, however, recover *indirectly on* the second count, on the principle that if the covenant had not broken by the defendant he would have remained liable, and that by the assignment the lessor may have an inferior recourse against a person insolvent or less able to perform the covenants. In determining the damages the arbitrator will have to see in how much worse a position the plaintiff is than he would have been had he retained the liability of the defendant instead of the substituted liability.

[The remainder of the judgment related to the breaches in the first count of the declaration.]

Lush, J, concurred.

Judgment for plaintiff.

DIGEST.

NOTES OF CASES

FROM UNITED STATES REPORTS.

Agent—Attorney and Client—Equity Practice.

1. An attorney at law having no power *virtute officii* to purchase for his client at judicial sale land sold under a mortgage held by the client, the burden of proving that he had other authority rests on him.—*Savery* v. *Sypher*, 6 Wallace, 157, Pitts. L. J., May 25, 1868.

2. On an application to a court in equity to refuse confirmation of a master's sale and to order a resale—a case where speedy relief may be necessary—the court may properly hear the application, and act on *ex parte* affidavits on both sides, and without waiting to have testimony taken with cross-examination.—*Ib.*

Agent—Insurance—Ratification.

Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium-note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus: "The insurance on this application to take effect when approved by E.P.D., general agent," &c., does not make the previous transaction a nullity until approved: *Ins. Co.* v. *Webster*, 6 Wall.—7 Am. Law Reg. N. S. 571.

Hence though the general agent sent back the application, directing the agent who had delivered the policy to return to the party insured his premium-note, and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor cancelled the policy.

Collision—River Navigation—Damage.

1. Where the usage in navigating a river is, that both ascending and descending vessels shall keep to the right of the centre of the channel—which is the usage in the river Hudson—the omission to comply, seasonably, with that regulation, if the omission contributes to the collision, is a fault for which the offending vessel and her owners must be responsible.—*The Vanderbilt*, 6 Wallace, 225, Pitts. L. J., May 25, 1868.

2. Compliance with such a usage is required in all cases where the course of a vessel is such that, if continued, there would be danger of collision with other vessels navigating in the opposite direction—*Ib.*

3. Unless precautions are seasonable they constitute no defence against a charge of collision, although they may be in form such as the rules of navigation require.—*Ib.*

4. Objections to the amount of damages, as reported by a commissioner and awarded by the admiralty court, will not be entertained in this court in a case of collision where it appears that neither party excepted to the report of the commissioner.—*Ib.*

Criminal Law.

A criminal sentenced to pay a fine must have been in actual confinement three months before he can be discharged. — *Commonwealth* v. *Superintendent of County Prison*, Phil. Leg. Int. 1868.

Deed—Construction.

Where the purpose of the grant is clearly ascertained from the premises of the deed, this will prevail in the construction, and repugnant words will be rejected though they stand first in the grant: *Flagg, Administrator of Tyler* v. *Eames*, 40 Vt.

And where the premises contain proper words of limitation, and the *habendum* is repugnant to the grant, the *habendum* yields to the manifest intent and terms of the grant: *Ib.*

A deed conveyed in its granting part to the plaintiff's intestate "and her heirs and assigns for ever, a certain piece or parcel of land situated, lying, and being in Halifax, and is the same on which I" (the grantor) "now live; that is to say, one undivided half of the same, with the buildings thereon, with the privileges and appurtenances thereto belonging, bounded," &c. (describing the boundaries); "always

provided that, in the event of her decease, the same shall revert to me if living, if not, to my heirs—being the same farm which I purchased of Darius Plumb;"—*habendum* to the plaintiff's intestate "and her heirs and assigns, to her and their own proper use, benefit, and behoof for ever," with the usual covenants of seisin, warranty, and against incumbrances, and the following clause thereto annexed, viz.:—"Always reserving the reversion to myself and heirs as stipuluated in the deed."

Held, that the plain intent of the deed was to convey an estate for life, and not an estate in fee, and that the deed must have effect according to its intent: *Ib.*

Delivery.

Where the grantor in a deed hands the same to another with instructions to deliver it, as his agent, presently to the grantee, the delivery not depending on any condition, as between the parties to the deed, the title passes at the time of the delivery to the agent: *Ernst* v. *Reed*, 49 Barb.

Insurance—Agency—Rectification.

Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus; "The insurance on this application to take effect when approved by E. P. D., general agent," &c., does not make the previous transaction a nullity until approved.

Hence, though the general agent sent back the application, directing the agent who had delivered the policy, to return to the party insured his premium note, and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor canceled the policy.—*Insurance Co.* v. *Webster*, 6 Wallace, Pitts. L. J., May 25, 1868.

Lunacy.

1. A person cannot be confined upon the allegation of lunacy, unless there is danger to him, to others, or to his estate, or there has been a legal finding of lunacy.

2. A finding in lunacy without notice is a nullity. — *Commonwealth* v. *Kirkbridge*, Phil. Leg. Int., June 12, 1868.

Mandamus to State Courts—Federal and State Jurisdiction.

After a return unsatisfied of an execution on a judgment in the Circuit Court against a county for interest on railroad bonds, issued under a State statute in force prior to the issue of the bonds, and which made the levy of a tax to pay such interest obligatory on the county, a mandamus from the Circuit Court will lie against the county officers to levy a tax, even although prior to the application for the mandamus a State court have perpetually enjoined the same officers against making such levy; the mandamus, when so issued, being regarded as a writ necessary to the jurisdiction of the Circuit Court which had previously attached, and to enforce its judgment; and the State Court therefore not being regarded as in prior possession of the case.—*Riggs* v. *Johnson County*, 6 Wallace 166, Pitts. L. J., May 25, 1868.

Married Woman.

The Illinois Statute of 1861 giving a married woman exclusive control of her property, declaring that the same shall "be held, owned, possessed, and enjoyed by her, the same as though she was sole and unmarried," and exempting it from execution or attachment for the debts of her husband, does not give to her the power of conveying her real estate without the consent of her husband manifested by joining in the deed.

Although the effect of the statute is substantially to abolish the life estate of the husband in his wife's lands, during their joint lives, accruing to him by virtue of the martial relation, and also to abolish, during the life of his wife, his tenancy by the courtesy in her lands, in all cases where the title has been acquired by her since the passage of the statute, it does not abolish the tenancy by the courtesy after the wife's death, but leaves it unimpaired in the husband.—*Cole* v. *Van Riper*.

Misrepresentation—Money had and received.

W. and S., who had purchased land for $14,000, induced other persons to take stock in an oil company, by untruly representing in the newspapers that the land had cost $81,000. They received the money from subscribers as officers of the company, and it was paid to them individually as consideration money. *Held*, that the stockholders might recover, in an action against W. and S. for money had and received, the difference between the actual and represented cost of the land.—*The Vulcan Oil Co.* v. *Simons & Weeks*, Phil. Leg. Int., May 15, 1868.

Notes of United States Reports.

Mortgage—Forfeiture.

1. Where it is stipulated in a mortgage that in case of a default in the payment of the interest, the principal shall immediately become due and payable, and that the mortgagee may immediately proceed on the mortgage, such a stipulation is an essential part of the contract entered into between the parties, and will be enforced.

2. Such a stipulation is not in the nature of a forfeiture or penalty against which equity will relieve.—*Gulden* v. *O'Byrne*, Phil. Leg. Int., July 3, 1868.

A sale under a writ of partition is a judicial sale, and discharges the lien of judgments and of a mortgage by one of the tenants in common of his undivided portion.

Such mortgage is discharge in Pennsylvania although it be a first mortgage and have priority of all other liens. The Acts of 1830 and 1845 only preserve the lien of such mortgage from discharge by sale under a *writ of execution.*

What irregularities in the proceeding for partition will not vitiate it.—*Farmers and Mechanics' National Bank* v. *Girard Insurance and Trust Co.*

Negligence.

1. A father's negligence is a defence to an action by the father for injuries to his child.

Permitting a child four years old to run at large in a city, is evidence of gross negligence.—*Railway Co.* v. *Glapey*, Phil. Leg. Int., June 5, 1868.

See Railway Company.

Profits of Office on Quo Warranto—Measure of Damages.

1. Where an intruder, ousted by judgment on *quo warranto* from an office having a fixed salary, and of personal confidence as distinguished from one ministerial purely, takes a writ of error, giving a bond to prosecute the same with effect and to answer all costs and damages, if he shall fail to make his plea good, thus, by the force of a supersedeas, remaining in office and enjoying its salaries, does not prosecute his writ with effect, and is, after his failure to do so, sued on his bond by the party who had the judgment of ouster in his favor, the measure of damages is the salary received by the intruding party during the pendency of the writ of error, and consequent operation of the supersedeas.—*United States* v. *Addison*, 6 Wallace 291.

2. The rule which measures damages upon a breach of contract for wages or for freight, or for the lease of buildings, where the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and where the damages which he is entitled to recover is the difference between the amount stipulated and the amount actually received or paid, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or electoral.—*Ib.*

Railway Company.—Negligence.

1. In an action against a railroad company for injury caused by an accident, evidence that the conductor was intemperate or otherwise incompetent is admissible to raise a presumption of negligence.

Admissions or declarations of the company, made subsequently to the accident, are not competent as part of the *res gestæ.*

The declarations of an officer of the company stand upon the same footing.

In an action for damages by a person injured by negligence, evidence of the number of plaintiff's family or of his habits and industry is not admissible unless special damage is averred.

It is no justification for the employment of an incompetent servant that competent ones were difficult to obtain.

Where a person injured by a railroad accident had accepted a ticket or pass describing him as "route agent, an employee of the Railroad Co.," this pass is competent evidence for the company, but it does not estop the plaintiff from showing that he was not, in fact, an employee of the company.

In an action for injury by negligence the damages should be compensation for the actual injury, and it is error to leave the measure and amount of damages, as well as the rules by which they are to be estimated, entirely to the jury.—*The Pennsylvania Railroad Co.* v. *Books* Am. L. Reg., 524.

2. A person receiving a printed notice on his ticket or check at the time of delivering his goods to a carrier is to be charged with actual knowledge of the contents of the printed notice.

Where such a notice stated that the carrire would not be responsible "for merchandise or jewelry contained in baggage, received upon baggage checks, nor for loss by fire, *nor for an amount exceeding* $100 *upon any article*, unless specially agreed for," &c., the words "any article" mean any *separate* article, not a trunk with its contents. The language bears that construction, and must be taken strictly against the carrier.

Therefore, a traveller who gave a single trunk to a carrier and received such a notice, was allowed to recover the value of separate articles in the trunk amounting to $700.

Baggage includes such articles as are usually carried by travellers. Books and even manuscripts may be baggage, according to the circumstances and the business of the traveller.

In this case a student going to college was allowed to recover the value of manuscripts which were necessary to the prosecution of his studies.—*Hopkins* v. *Westcott et al.*, 7 Am. Law Reg. N. S. 534.

It is negligence for a passenger in a railroad car to allow his arm to project out of the window, and if he receive injury from such position he cannot recover.

The railroad company is not bound to put bars across its windows to prevent passengers from putting their limbs out.—*Indianapolis and Cincinnati Railroad Co.* v. *Rutherford.*

Sale of Goods—Delivery.

1. Where goods are sold for cash, and the vendor delivers them to the vendee upon the faith of his paying cash for them, and immediately demands the cash, and the vendee refuses to pay it, such a delivery is not an absolute but a conditional delivery; and if the vendee refuses to perform the condition, no property in the goods passes to him.

2. Where goods are sold for cash, and they are delivered to a carrier to be transported to the vendee, and the vendor retains the bills of lading, and immediately draws upon the vendee for the price of the goods, and the bills of lading are tendered to the vendee when payment of the draft is demanded, which is refused, whereupon the bills of lading are retained by the vendor, who immediately attempts to reclaim the goods, these facts are evidence to go to the jury to show that the delivery was a conditional and not an absolute delivery. Opinion by Thayer, J.—*Refining and Storage Co.* v. *Miller*, Phil. Leg. Int., July 17, 1868.

Specific Performance—Equity.

The enforcement of a contract in equity is entirely in the discretion of the court, untrammelled by rule or precedent. *Per* Sherwood, J. —*Oil Creek Railroad Co.* v. *Atlantic and Great Western Railroad Co.*, Phil. Leg. Int., May 29, 1868.

Tax Sales—Inadequacy of price—Suppression of Competition—Equity.

1. Where land is sold for taxes the inadequacy of the price given is not a valid objection to the sale.—*Slater* v. *Maxwell*, 6 Wallace 268.

2. Where a tract of land sold for taxes consists of several distinct parcels, the sale of the entire tract in one body does not vitiate the proceedings if bids could not have been obtained upon an offer of a part of the property.—*Ib.*

3. Where a fact alleged in a bill in chancery is one within the defendant's own knowledge, the general rule of equity pleading is that the defendant must answer positively and not merely to his remembrance or belief.

Accordingly, when the bill alleged that, at the time that a very large tract of land, sold for taxes, was put up for public sale, a great many persons were present with a view to purchase small tracts for farming purposes, but that the defendant stated that the complainant would redeem his land from the purchasers, and in that way put down all competition, and had the entire property struck off to him for the amount of the taxes; and that this conduct was pursued to enable him to buy without competition, for a trifling amount, all the land of the complainant. *Held*, that an answer was evasive and insufficient when answering that the defendant has "no recollection of making said statement, nor does he believe that he stated that W. S. would redeem his land," and "that he believes the charge that he stated to the bystanders attending that sale that he would do so, to be untrue."—*Ib.*

4. It is essential to the validity of tax sales that they be conducted in conformity with the requirements of the law, and with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be strictly exacted.—*Ib.*

5. When the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale, or preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action or ejectment. Where, however, the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief.—*Ib.*

NOTES OF QUEBEC CASES.

Court Martial—Volunteer.

Held, that a volunteer is liable by 29, 30 Vic. cap. 12, to be tried by a Court Martial for misconduct while present at a parade of his corps, though not actually serving in the ranks at the time.—*Ex parte Rickaby*, 17 L. C. R. 270.

Deed—Delivery.

Held, that the constructive delivery contained in the following words, "said timber to be delivered at Ottawa, where the same shall be

manufactured, and to be considered as delivered, when the same is sawed and then to belong to, and to be the property of the parties of the second part," is not valid as regards a third party. without notice and actual delivery.—*White* v. *Bank of Montreal*, 12 L. C. Jurist, 188.

Franchise—Usurpation.

1. The petioner complained that the defendants exercised the occupation of carters in and within the limits of the City of Montreal, and carried and transported for hire, goods and merchandises from their depot, to and from the stores and residences of the citizens of the City of Montreal, and that they exercised an undue advantage, privilege and monopoly, injurious to the carters of Montreal, and to the citizens thereof, and the petition prayed for an injunction against the defendants.

Held:—1st. That it was not proved that the carters had suffered or had been directly aggrieved to an extent, or from such illegal courses directly affecting them, as would justify the issuing of an injunction in the present case.

2nd. That the facts of collecting and deliver ing by carters exclusively employed to that effect by the defendants, was not injurious, but on the contrary advantageous to the public.

3rd. That the defendants had a right as common carriers, and in prosecution of their lawful business as such to employ exclusively any carter or carters they might in their discretion select to collect from and deliver freight to their customers; and that such exclusive employment of particular carters is not a violation of their charter, inasmuch as the act itself was essential or incidental to their business as common carriers.

4th. That no injunction in law could issue to restrain the defendants from illegal acts, by and from which the petitioners were not shown to be directly aggrieved, and which were not at the same time proved to be injurious to the public.

5th. That none of the individuals or parties using the defendants' road, and paying their charges for cartage has complained in the present case, and for all these reasons the petition must be refused.—*Attorney General* v. *Grand Trunk Railway Co.*, 12 L. C. Jurist, 149.

2. *Held,* Inasmuch as the corporation impleaded was the corporation erected under the Provincial Act, known as "The Grand Trunk Railway Act of 1854," and inasmuch as the corporation complained of, and alleged to have been formed under the Provincial Act, instituted "An Act to incorporate the Grand Trunk Railway Company of Canada" has no existence, therefore the petition and writ in this cause were irregular and illegal, and not within the requirements of the Consolidated Statutes of Lower Canada, cap. 88.—*Ib.* 177.

Promissory Note—Usury.

Held, that a promissory note for $1,000 given on February 15, 1864, as a renewal of one dated 23rd May, 1862, which had been discounted by plaintiff in American greenbacks taken at par at the ordinary rate of seven per cent., and the payment in addition of a commission of $10 to cover alleged trouble connected with renewals, is null and void, as being tainted with usury.—*The Eastern Townships Bank* v. *Humphrey et al.*, 12 L. C. Jurist, 137.

GENERAL CORRESPONDENCE.

The Statute of Limitation as applied to Division Court Process.

To the Editors of the Canada Law Journal.

Messrs Editors,—You would oblige me and many of your readers by giving your opinion on a question relating to the application of the Statute of Limitations to Division Court suits under certain circumstances. The question is one that has arisen recently in Recorder Duggan's Court in Toronto and has doubtless arisen in many other Courts. It is this:—"A has a claim against B, due in 1861. He sues it in 1862, but the summons is not served. He takes out another summons in 1863 and tries to serve it, but cannot do so. B leaves Canada in 1863, and goes to the United States—but returns in 1867. A then goes to the clerk and continues his efforts to serve him, taking out another summons, in the same suit, and gets B served for trial in 1867. Now you will perceive that there is a hiatus or gap of say four years, when A did nothing in the suit because B was in foreign parts. It would have been useless for him to have done so until B's return."

The question is can A avail himself of his summonses issued in 1862 and in 1863 to stop—or to defeat a plea of the Statute of Limitations, pleaded in 1867, by B to A's claim? In Toronto the Division Courts are held twenty-four times in the year, and in other places they are held, sometimes monthly sometimes every two months. Again is there any reason why the old doctrine of continuances, that is, a constant issue of process, the one linked into

the other down to the last summons issued, and reaching back to the first summons issued before the claim was barred by the Statute, should be applied to Division Court suits? My opinion is that it should not. Suppose summonses were issued in this way in Toronto from Court to Court, for four years on a claim of $100. We would have ninety-six summonses issued to connect that of 1863 with that of 1867: or, if the Court were held six times in a year we would have 24 summonses. In the first case the costs could not be less than $200—in the last over $50. My idea is that if the plaintiff makes use of reasonable efforts to serve the defendant—sues him—enters his suit, but fails to serve him—that is a commencement of the suit, which if pursued within six years ought to stop the effect of the Statute.

The old doctrine of continuances applied to Courts of Record I think does not apply to Court not of Record.

Then, process issued from term to term—now it issues every six months. Continuances are abolished in Canada in Courts of Record, but the summons should no doubt in Courts of Record be issued and reissued or continued regularly every six months. I cannot see any necessity for this in Division Courts, where the action is once honestly commenced, and not abandoned, but only left in abeyance because the defendant has left the country, provided it is acted on within six years. What is your opinion Messrs. Editors?

The late Judge Harrison, I know, acted on the view I have taken.

"Scarboro."

Toronto, 12th Sept. 1868.

A Master's Right to order a Servant to go to Bed.—A singular case came before the County Court judge at Guildford (Mr. Stonor.) *Wheatly* v. *White*, was a claim of 16*s.* 8*d.* in lieu of notice. The defendant is the landlord of the Talbot Inn at Ripely. The plaintiff said she was in the service of the defendant, who had dismissed her without giving her any notice. The cause of her dismissal was that the defendant came down into the kitchen one night and told her to go to bed at a quarter to 10 o'clock. She refused to do so, as they never went to bed till half-past 10. On the following morning he threatened to kick her out of the house if she did not go. The Judge.—I think your master was quite justified in dismissing you When your master told you to go to bed it was your duty to do so, and as you did not obey his reasonable commands, he was quite justified in dismissing you. I shall find a verdict for defendant.—*Law Times.*

Bishop Burnet tells of Hale: "Another remarkable instance of his justice and goodness was, that when he found ill money had been put into his hands, he would never suffer it to be vented again; for he thought it was no excuse for him to put false money in other people's hands, because some one had put it into his. A great heap of this he had gathered together, for many had so abused his goodness as to mix base money among the fees that were given him." In this particular case, the judge's virtue was its own reward. His house being entered by burglars, this accumulation of bad money attracted the notice of the robbers, who selected it from a variety of goods and chattels, and carried it off under the impression that it was the lawyer's hoarded treasure.—*Jeaffreson.*

Wigs and Coats.—The heat in Court at Lewes assizes was productive, last week, of peculiar results. Baron Martin drove up to the Shire Hall without a wig, and sat all day on the bench with head uncovered. Several barristers imitated His Lordship's example, but no counsel addressed the Court or jury in that irregular habit. The jury were evidently infected by the contagion, for three or four of those gentlemen took off their coats, and considered their verdicts in their shirt sleeves. Mr. Serjeant Gaselee thinks that a man has a right to be hanged in public. On the same principle, we suppose, a criminal ought not to be sent into penal servitude by a wigless judge and a coatless jury. On Wednesday the Judge-Ordinary intimated that the barristers in his Court might dispense with their wigs, and set them the example. We do not know whether Sir. J. Wilde was aware of the precedent at Lewes, but it is to be hoped that no opportunity has been afforded for the intervention of the Queen's Proctor.—*Law Journal*

A Welsh Jury.—At the Montgomery Quarter Sessions, held at Newtown, last week, before Mr. C. W. Wynne, M.P., and a bench of magistrates, a tailor, named John Welsh, was placed in the dock, charged with stealing a milk-can, the property of David Davies, residing at Meifod. The prisoner was undefended, and the jury, after hearing the evidence, handed in a verdict of guilty, and Welsh was sentenced to three months' imprisonment, with hard labour. According to the local *Express* it has since transpired that, so far from finding the prisoner guilty, the jury were unanimous in the belief that he was innocent, and the foreman was charged with the delivery of a verdict accordingly, but that when he stood up to reply to the formal question of the clerk of the court the unfortunate man lost his presence of mind and delivered a verdict of "Guilty," and the prisoner was consigned to gaol in the presence of the jury, who were too frightened to interfere.—*Times.*

The *Times* cites the following from an Irish paper, the *Skibbereen Eagle*:—As Merry as Cricketers.—The first day of the Session at Bantry, judges, counsellors, lawyers, jurors, clients, and process-servers, for want of business, went cricketing."