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2. Tues..Toronto Assizes (Criminal Court), Wlion, J.
3. Wed..Gretna Green marriages abolished, 1857.
6. Sat....Epiphany. County Court Term ends. Chancery Christmas vacation, and vacation for Judges Queen's Bench and Common Pleas sittings singly ends.
7. SUN..*1st Sunday after Epiphany.*
8. Mon..Hamilton Assizes.—Harrison, C.J.
10. Wed..Postal cards first Introduced into England, 1870.
11. Thur..Toronto Assizes (Civil Court) —Wilson, J.
12. Frid...Sir Charles Bagot, Governor-General 1842,
14. SUN..*2nd Sunday after Epiphany.*
15. Mon..Municipal Councils (ex County Council) holds first meeting.
16. Tues..Heir and Devisee sittings end.
21. SUN..*3rd Sunday after Epiphany.*
23. Tues..County Councils holds first meeting. Law Society Primary Examinations.
28. SUN..*Septuagesima.*
30. Tues..Law Society, 1st Intermediate Examinations.
31. Wed..Earl of Elgin, Governor-General, 1847. 2nd Intermediate Examinations.

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THE
Canada Law Journal.

Toronto, January, 1877.

IN view of the recent disturbances on the Grand Trunk Railway, a decision of the Supreme Court of Illinois, reported in the Chicago *Legal News*, is not devoid of interest. Regarding the responsibility which arose from delay in transporting freight, the Court laid it down that the company is responsible for the delay resulting from the refusal of the employees of the company to do their duty; but otherwise when the delay was attributed to the lawless violence of men not in the employment of the company. We print the opinion of the Court (from which three Judges dissented) in full in another place.

Armour v. *Usborne* referred to in our last has been reheard, but decides nothing except that where a plaintiff serves a bill endorsed with the special endorsment for foreclosure, mentioned in Sched. S. of the Con. Orders, and makes no mention therein of his intention to apply for the additional relief of a personal order for payment, &c., that such additional relief will not be granted on a hearing *pro confesso*, even though expressly prayed for in the bill. The full Court adopted the view of Blake, V.C., that a special endorsement might have the effect of misleading a defendant. What is the proper form of a decree of foreclosure, where a personal order for payment is granted, seems therefore to be still unsettled.

THE *Law Times* calls upon the Council of Law Reporting to call in the Digest that has just been issued, on the ground that it is utterly useless, and of a most mischeivous tendency. This is certainly not "damning it with faint praise." A

correspondent of the same journal also says, that "a more worthless good-for-nothing work was never inflicted upon the profession." He might have made the same remark as to the Digest at the end of each volume of these reports. The compiler, if a lawyer at all, is singularly devoid of the organ of analysis. It is not given, however, to every man, even to make the simplest index, and many books, in themselves mines of learning, are in a great measure useless from incapacity on the part of the subordinate to whom the making of the index is often thoughtlessly entrusted.

The Attorney, Solicitor, Notary Public, Conveyancer and Commissioner, (also a B. A.) whose card, published in a Paisley paper, some time ago attracted our attention, still implores the public to believe of him, that, "N.B.—All suits in Superior Courts of Law attended to with promptness" (*sic*). We really must ask our brother to be at ease in his mind. Even if he has heretofore (of which we are ignorant) been dilatory in suits in the "Superior Courts of Law,"—we are sure it must have been forgotten by this time; why perpetuate the memory? Besides, he can comfort himself with the thought that he does not seem to have been accused of want of promptness in suits in the "Superior Courts" of *Equity*. He should, however, not forget the maxim "*Expressio unius, &c.*" What about the Inferior Courts of Law, or Equity? There is a hideous silence in the advertisement on this point.

We have seen many unprofessional advertisements, and have never failed to express a decided opinion upon them. We have also heard of attorneys advertising coals for sale; but it has remained for a firm of attorneys in a western city in Canada to aid an official assignee to "run off at once" the stock of an insolvent, "at prices regardless of cost." Surely the attorneys in question, who are said to do a large and respectable business (to a great extent collections) are not aware that their names are appended to a printed notice, said to have been addressed to a debtor of the insolvent, which reads as follows:

> "Insolvent Estate of Jerry Robinson.—"London, December, 1876.—The stock of the above Insolvent is now selling at prices regardless of cost, as it must be run off at once. We find you are indebted to the above estate to the amount of $56.59. You are requested to settle at once with Mr. D. McMonnies, at the old stand, so as to save costs, as all accounts not paid by 31st December, will be placed in court.
>
> "Yours respectfully,
>
> "&c., &c.,
>
> "Attorneys."

CONTEMPT OF COURT—THE QUEEN v. WILKINSON.

We would fain make no reference to a suit which is said to bring up questions of party politics, but it would be affectation in a legal journal to ignore the judgments recently delivered in *Regina* v. *Wilkinson*, by the Chief Justice and Mr. Justice Morrison, involving as they do matters of great professional interest which it is our duty to notice.

It must always be a subject of regret, to see—as we have seen—the Court of Queen's Bench divided against itself in a matter so important on public grounds and of such vital interest to the welfare of the Bench We must regret that on every material point the opinions of the two learned Judges were in direct opposition; and we must still say this whether we accept the judgment of the Chief Justice, powerful in its reasoning on the legal points and facts involved, and true to judicial traditions in its assertion of the majesty of the law and the dignity of Bench; or the judgment of Mr. Justice Morrison, who held—and we

have less to find fault with in what he said than what he left unsaid—that no contempt should be punished, which is not brought before the Court forthwith, either by the Attorney-General or by the person aggrieved, and only by the latter when his case is likely to be prejudiced; or which the Court does not itself, at the time the offence was committed, think proper to take notice of, (even though the contempt be afterwards justified, repeated and enlarged upon before the presiding Judge), and that no person, not even a party to the suit, has a right to initiate proceedings for a contempt (except as aforesaid) which the Court at the time, to use the language of his judgment, "did not think worthy of notice." "*Worthy of notice*"—in these three words lies the whole difficulty. If the slanders on Mr. Justice Wilson, sitting as one of the Judges of the Court of Queen's Bench, by the most powerful and most widely-circulated journal in Canada, the slander having been written and justified by one of the most prominent and influential public men in the Dominion are "not worthy of notice"—it will not be worth noticing *any* libel by *any* person on *any* Judge in Canada, from this time forth forever; and it was not worth noticing the contempt for which Mr. Houston a few days before, in the same suit, apologised, and for which he was severely reprimanded by the Court and ordered to pay costs. If this be so, the offence of contempt of Court is abolished, and the dignity of the Courts, and therein incidentally the due administration of justice, must forever depend solely and without other aid upon the good sense and good feeling of the people. If this is to be the law, let it be so enacted, but at present it is not the law, and we doubt the wisdom of the Courts being deprived of a power which, in this country at least, has been sparingly invoked and discreetly exercised.

The profession will deplore that Mr. Justice Morrison did not take the high ground assumed, and rightly so, by the Chief Justice. He may possibly have felt straitened by what are, we believe, generally thought to have been two great mistakes: firstly, the omission by the Court itself, or the Attorney-General on its behalf, to take notice of the insult offered to the Court in the person of Mr. Justice Wilson; secondly, granting the rule nisi *at all*, if Mr. Justice Morrison's opinion be correct that the application was made too late. And here we may refer to what we respectfully submit was another mistake, though we fully appreciate the motives which therein actuated the learned Judges—allowing the delinquent to repeat and add to these insults in the face of the Court itself.

The Court was somewhat in a false position, and Mr. Justice Morrison was led away, we venture to think, by side issues from the great principle involved. He may have been perfectly right in saying that the person aggrieved had, under the circumstances, no *locus standi* before the Court, but it is impossible to forget the forcible words of Mr. Christopher Robinson, of counsel for the applicant, in an argument said to have been one of the most perfect ever heard in Osgoode Hall: "The contempt is there and the Court is there; it is for the Court to deal with it, and it is for the Court to do what they may consider right and becoming in the discharge of their high office"—The Court and the contempt still confront each other. He also said, "Is the law to prevail or is Mr. Brown to be above the law?"—let each reader answer this question for himself. There is an unhappy feeling abroad that in some way or another, or for some reason or another, and whether justly or unjustly, and whosesoever the fault may be, the dignity of our Courts has suffered, and the majesty of the law has been

shaken; and there is a danger that the due administration of public justice may, in a greater or less degree, have been impaired in consequence. But whether this be so or not, of one thing there is no doubt,—if this case be reported, as we suppose it will, it will be the only one to be found in the books where a contempt of Court so gross, and language so insulting and so shamelessly justified has gone unpunished.

PRACTICE OF CONVEYANCERS.

Questions of real property law, many in number, and great in importance, have been settled by conveyancers, whose course of practice in the investigation of titles has been recognized and usually adopted by the Courts, when the like points arose for decision. It has been remarked that as a conveyancer never advocates an opinion which he does not entertain, his duties have a good deal of the judicial character about them. The practice of conveyancers, to be found embodied in such works as those of Coventry, Lee, Preston and Hubback has been settled by a manner of procedure peculiar to English conveyancers. Thus when one conveyancer considers a title objectionable on any point, another is usually applied to by the opposite party to answer or confirm the objection. If the two differ, the difficulty is solved by being referred to some eminent member of the profession, with the understanding that both sides are to abide by his decision. The opinion of this referee becomes, when pronounced, a part of the practice of conveyancers, and it may almost be said, of the law of the land.

It is not uninteresting to contrast the contemptuous style in which the early conveyancers were alluded to by some of the judges, with the respect and deference ultimately accorded to the learned men and their successors, such as Mr. Shadwell (father of the Vice-Chancellor), Mr. Bell and Mr. Sanders, whose opinions were usually confirmed by the courts, and whose valuable conclusions systematized and consolidated the practice of conveyancers. Lord Keeper Henley refers to the duties of conveyancers in *Pelham* v. *Gregory*; 1 Ed. 522, and says, "great Pyrrhonists they are." Afterwards, the same judge, when Lord Northington, adverts to "the want of of curiosity and oscitancy of conveyancers, which, he says, is "natural enough, their time being more dedicated to perusal than thought:" *Drury* v. *Drury*; 2 Ed. 58. As against this compare the encomium of Lord Hardwicke, in the same case in appeal: "The opinions of conveyancers at all times, and their constant course is of great weight. They are to advise, and if their opinion is not to prevail, must every case come to law? No: the received opinion ought to govern. The ablest men in the profession have been conveyancers. Sir Orlando Bridgman (a book of whose precedents has been published); Webb, a great practiser in the King's Bench, was an able conveyancer, and the present Mr. Filmer," 2 Ed. 64. In later times, Lord Eldon, in the great case of *Smith* v. *Doe* v. *Jersey*, 2 Bro. & Bing. 599, thus expressed himself: "My Lords, we hear of the practice of conveyancers, and that amounts to a very considerable authority; and I am justified in that assertion by the opinions of the greatest men who have sat in Westminster Hall, who, I am persuaded in many instances, if matters had been *res integræ* would have pronounced decisions very different from those which they thought proper to adopt, if they had not taken notice of the practice of conveyancers as authority." And in this opinion he is followed by Lord Redesdale in the same case at p. 611. See also *Candler* v. *Candler*, Jac. 232, where Lord Eldon summarises the matter by observing that a long course of practice sanctioned by professional men is often the best expositor of the law. Again, in *Howard* v. *Ducane*, 1 T. & R. 86, we find the same

judge recurring to the same subject. "I think that the practice of conveyancers has settled a great deal of law. I put this case on the practice of conveyancers, and I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice."

Upon questions of title this practice has received very clear and express judicial and legislative sanction in the Province of Ontario. The Quieting Titles Act permits the court to receive and act upon any evidence which the practice of English conveyancers authorizes to be received on an investigation of title out of court (sec. 9). By the general orders in Chancery, the vendor is to afford the purchaser all the means of verifying the abstract in his power, in the manner and according to practice usual with conveyancers (G. O. 394).

One of the characteristic points of distinction between conveyancers, evidence and that ordinarily adduced in courts of justice is adverted to by Strong, V.C. in *Re Higgins*, 19 Gr. 310. "In weighing the sufficiency of evidence, the practice of conveyancers is more strict,—in determining the admissibility—more lax, than that of courts of justice." Another exception was commented on by Mowat V.C. in *Brady* v. *Walls*, 17 Gr. 700, as to the admissibility of affidavits in establishing questions of fact arising between vendor and purchaser. The Vice-Chancellor there adopts the language of Lee on Abstracts, where it is said that a purchaser may be often compelled to complete a contract upon evidence which would not enable him to recover the estate in an adverse suit against a hostile party in possession.

The Legislature of Ontario has sought to remove this anomaly to some extent by declaring that many pieces of evidence heretofore well recognized as satisfactory in the practice of the profession, as between vendor and purchaser, shall likewise be evidence in the litigated proceedings at law against hostile parties in possession: 39 Vict. cap. 29, secs. 1, 7. The important question, as to the principle upon which the court will deal with evidence on summary applications, under this act to obtain the opinion of the court in respect to requisitions or objections (s. 3) recently arose before Vice-Chancellor Blake. He laid it down that the evidence sanctioned by conveyancers' practice, was sufficient, and that answers given upon matters of fact by means of statutory declarations, were in effect, evidence upon which the court would act in compelling the completion of a purchase. These declarations have now lost their voluntary character, and have now acquired the force of affidavits by virtue of the Dominion Statute, 37 Vict. c. 37. This was one of the objections commonly urged against the admissibility of these declarations as evidence: the other was that of their unsatisfactory character, because made to serve a purpose and *exparte*. This is however a question of degree, and if the statements are by well-known persons, who are disinterested, and who have from their age and circumstances special means of knowing the facts, and if their statements are not only uncontradicted, but corroborated by other statements it was laid down that according to the fractions of conveyancers, the answers so made to the objections and requisitions were sufficient.

LAW SOCIETY OF ONTARIO.

Michaelmas Term, 1876.

The following is the *resumé* of the proceedings of the Benchers during this term, published by authority:

Monday, 20th November, 1876.

Hon. Stephen Richards, Q.C., was elected Chairman to preside in convocation, the death of the Hon. John Hillyard Cameron, Q.C., having caused a

vacancy in the office of Treasurer of the Society.

Mr. D. B. Read, Q.C., having reported the death of the late Treasurer, the Hon. John Hillyard Cameron, it was moved by Mr. James Maclennan, seconded by Hon. James Patton, and

Resolved, That Hon. Stephen Richards be Treasurer of the Society until the next statutory election.

Moved by Mr. Maclennan, seconded by Hon. M. C. Cameron, and

Resolved, That the Benchers of the Law Society in Convocation assembled, have learned with feelings of the profoundest sorrow and regret of the death, on the fourteenth instant, of their late Treasurer, who held the office continuously for the long period of seventeen years. That Convocation also record in its minutes its sense of the great loss sustained by the Benchers and the profession generally, as well as by the community at large, by the death of Mr. Cameron, who as well by his amiable personal qualities as by his professional eminence and ability had gained universal esteem and admiration throughout the Province.

That a copy of this resolution be communicated by the Secretary to the widow and family of the deceased.

The gentlemen whose names appear in the usual lists were called to the Bar and received certificates of fitness.

The petition of Charles W. Mortimer was presented and ordered to stand over.

Tuesday, 21st November, 1876.

The report of the examining committee on the examination of students for admission was adopted.

The balance sheet for the third quarter of 1876 was laid on the table.

Ordered, That all accounts up to the first Saturday of this term be audited by the Auditors.

Mr. Henderson, Q.C., gives notice of motion to amend rule No. 14 of the Law Society, respecting the day for the election of a Treasurer, and that notice of such election be given to the Benchers.

Mr. McKelcan moved, seconded by Dr. Henderson,—

That the resolution passed in Convocation on the fifteenth day of February, 1876, "that the fees thereafter to be paid "in Michaelmas Term yearly for certificates for Attorneys and Solicitors, and "including term fees should be thirty "dollars per annum," be and the same is hereby rescinded, and that the sum of twenty dollars be the fee payable by each Attorney or Solicitor for his annual certificates in Michaelmas Term of each year under rule 143 of this Society, such sum of twenty dollars not to include the fee of two dollars per annum, payable by each Barrister under rule 81 of this Society.

Moved by Mr. Read, seconded by Mr. Patton

That the motion of Mr. McKelcan relative to the resolution of convocation of the eighteenth of February, 1876, in regard to the fees for annual certificates, and the motion of Mr. Armour in regard to the Law School be adjourned for consideration to Saturday next, and that a call of the Bench be made for that day.

Moved by Mr. Armour, seconded by Mr. Benson,—

That the expenses of the funeral obsequies of the Hon. J. H. Cameron, late, and for seventeen years Treasurer of the Law Society, be paid by the Law Society. Carried.

Ordered, That all notices of motion given for to-day do stand for the next meeting of convocation.

Saturday, 25th November 1876.

The resolution of Mr. McKelcan, relation to the annual certificate fees adjourn-

ed from the 21st instant, was read a first and second time.

Ordered, That the examiner be paid the usual fee of fifty dollars.

Mr. Maclennan presented the report of the Committee on Reporting. Consideration of it ordered to stand until Monday, 27th inst.

Ordered, That Mr. Grant's letter, relation to his position as reporter of the Court of Chancery, dated 23rd November, 1876, be referred to the Committee on Reporting for their consideration and report.

Mr. Crickmore's resolution relating to the Law School, and the subject of the Law School generally was referred to a special committee composed of Messrs. McCarthy, Crickmore, Bethune, H. Cameron, Patton, E. Martin, McKelcan, and Maclennan, to report to convocation next term.

A letter from Mr. Armour dated 22nd instant, tendering his resignation as a Bencher was read.

Ordered, That the Secretary be instructed to reply to Mr. Armour's letter, expressing the regret of the Benchers that he should have tendered his resignation, and their hope that he will reconsider the same.

Ordered, That Mr. McCarthy's notice of last term for the reconsideration of the rules for the call of Barristers, and the admission of Attorneys in special cases, do stand over to the last Friday of this present term for consideration.

Ordered, That Mr. Irving be added to the Library committee.

Ordered, That Messrs. Crickmore, Patten and Osler be the Benchers to superintend the scholarship examination under section 6 of rule 145.

Ordered, That Convocation adjourn until Monday next, 27th November, at 10:30 o'clock A.M.

Monday, 27th November, 1876.

Ordered, That the Clerk of the Crown and Pleas furnish the Law Society forthwith with a certified copy of the Attorneys roll of the Court of Queen's Bench, and that the Law Society pay the expense thereof.

Ordered, That the County Court Judges have the privilege of using the Benchers rooms while at Osgoode Hall.

Mr. McKelcan's resolution relating to the annual fees was read a third time and carried.

Friday, 8th December, 1876.

In the absence of the Treasurer, Mr. Read occupied the chair.

The petitions of Messrs. Duggan and Colquhoun were read and disposed of.

Mr. George Tifany's application to be allowed to matriculate without examination, on certificate of having matriculated in the London University, was refused.

The Reporting Committee to whom Mr. Grant's letter, relative to his position as reporter of the Court of Chancery was referred, brought in their special report which was adopted.

The general report of the Committee on Reporting was adopted.

The petition of Mr. Cooper was read, and a small increase on his salary granted.

A letter from the Deputy Minister of Education, accompanying General Eaton's report on the Public Libraries of the United States, was read and referred to the Library Committee to acknowledge.

Mr. Charles E. Miller's petition, praying that he be called to the Bar in Ontario under 39 Vict. chap. 31, was refused.

Mr. Evans was appointed Examiner for next term.

The proceedings of the London Bar on the subject of the decease of the late Treasurer, were laid on the table, and the Secretary directed to acknowledge the same.

Mr. Hodgins was added to the com-

mittee on the Law School appointed this term.

Mr. Pollard's letter as to the alleged unprofessional conduct of an attorney was read.

The plans of increased accommodation in the library, were laid on the table and referred to the Finance and Library Committees.

Ordered, That the subject of law stamps, and of all contracts between the Government and the Law Society be referred to a committee composed of the following Benchers, namely: Messrs. Hodgins, Maclennan, Bethune, M. C. Cameron, and Meredith, to report to convocation on the last Tuesday of the year.

Tuesday, 26th December, 1876.

Mr. Crickmore in the chair.

The report of the Examiners on the Scholarship Examinations was received, read and adopted, the scholars being:

4th year, Mr. Fullerton.
3rd year, Mr. T. Ridout.
2nd year, Mr. Sheppard.
1st year, Mr. Hodgins.

The Special Committee on Stamps and Contracts between the Government and the Law Society, was re-appointed.

A letter from Mr. Armour, refusing to reconsider his resignation, was read.

Ordered, That Mr. Armour's resignation be accepted, and that a call of the Bench be made for the first Tuesday of next term to elect a Bencher in his place.

Mr. Osler gave notice that he would move on the first Tuesday of next term for the appointment of a Committee on Discipline, under the Act of last session.

Mr. Casey's petition to have his intermediate examination was granted.

MECHANICS' LIEN LEGISLATION.

The manifest injustice to which our present mode of tinkering statutes sometimes leads is well illustrated by the case of *Walker* v. *Walton.* In that case the plaintiff acquired a lien under the Mechanics' Lien Act of 1873, and duly registered his lien as required by that Act; the plaintiff, however, had given the defendant credit which did not expire until after the passing of the Mechanics' Lien Act of 1874, he consequently had not commenced a suit before that Act came into operation.

Under the Act of 1873, section 4, it would have been sufficient to keep the plaintiff's claim alive if he had commenced his suit and registered a *lis pendens* within 90 days after the period of credit expired. The 14th section of the Act of 1874, however, provides "that every lien shall absolutely cease to exist after the expiration of thirty days *after the work shall have been completed* * * * unless in the meantime proceedings shall have been instituted to realize the claim *under the provisions of this Act,* and a certificate thereof is duly registered, &c." And the 20th section comes in with the usual, although unnecessary declaration "that all Acts inconsistent with the provisions of this Act are hereby repealed."

Under this legislation, the Court of Chancery has been driven to hold that although the plaintiff up to the time of the passing of the Act of 1874, had a perfectly good lien equivalent in point of fact to a mortgage on the property for the amount of his debt, yet the moment that Act came into operation, that lien was blotted out, because he did not fulfil the condition which the legislature had imposed by the Act of 1874, of taking proceedings under a statute, which, at the time fixed for taking the proceedings had not even been passed!

We commend this instance of *ex post facto* legislation, and the taking away of vested rights by Act of Parliament, to the attention of the House at its present session.

So much for this kind of legislation. But as to the subject matter involved, probably the best thing to do would be to repeal the Mechanics' Lien Act *in toto.* The enactment is in itself unnecessary and illogical, the wording is obscure, and its provisions unintelligible and contradictory. The Act has resulted in more harm than good to the honest and prudent mechanic. The legislation on this subject, though following in a measure a somewhat similar law in some of the United States took its origin here, and probably there also, in an improper bid on the part of politicians for the votes of what is called the "working class." It is scarcely to be wondered at, under these circumstances, that a provision conceived in such a spirit, and so carelessly carried out should lead occasionally to results as unjust as they are absurd.

DOMINION BAR SOCIETY.

The following is a report taken from the *Halifax Citizen* of a meeting of the Nova Scotia Bar Society, specially called to consider the report of the committee appointed to promote the formation of a Dominion Bar Society. Their Honors, Judges Wilkins and Smith courteously adjourned the civil and criminal courts to permit a full attendance of Barristers.

The following report of the committee was read by the Secretary:

"Nova Scotia Barristor's Society.

Halifax, Oct. 20th, 1876.

"Report of the Committee to whom was referred the formation of a Dominion Barrister's Society.

"Your Committee report that as soon as practicable after their appointment they prepared a circular on the subject of the proposed Society which they sent to the office-bearers of sister societies, and also to leading members of the Bar in the Provinces of Ontario, Quebec, New Brunswick and P. E. Island, there being no society yet organized in P. E. Island. The circular is printed in the *Law Journal* for October.

"That on the first of September one of the committee, Mr. James, having occasion to visit the Upper Provinces, took the opportunity, with the assent of the committee and of the council of this Society, to spend some time in visiting the parties to whom the circulars had been sent and other prominent members of the Bar, and advocating personally the expediency of forming the contemplated Association. That he was received as the delegate of this Society with marked kindness and distinction, and the object of his mission, after undergoing the most thorough discussion in all its aspects, was in every instance approved, and the greatest encouragement expressed in favor of the project—not only by the Bar, but many members of the Bench of the Upper Provinces. Official answers have not yet been received from the Law Societies of the Provinces of Quebec and New Brunswick, but the approbation of the scheme so uniformly expressed is sufficient to induce your committee to recommend that measures be continued to procure the formation and organization of the Society without delay.

"That it was the intention of your Committee to recommend the Society to invite the delegates from the Law Socities and other Barristers to assemble in Halifax next vacation to organ e the Society, but the officers and leading members of the Societies in Ontario and Quebec, while they would gladly accept our invitations, urged strong reasons in favor of organizing the Society at Ottawa during the ensuing session of the Legislature. The reasons urged appear to your Committee sufficiently cogent to indu them to recommend that course; and if our Society shall consent, the Committee suggest that a general meeting of the new Society be held in Halifax, next July or August. That the meeting be made as numerous a meeting as possible of the Bar of the Dominion, and that provision be made for the reading of a series of able papers on legal subjects by leading member of the Bench and Bar of the Dominion. You Committee believe that such a meeting woul be attended with invaluable results to the Bar, and the public of the Province and the Dominion.

"The Committee recommend that the meeting at Ottawa be called on the invitation of the Bar at Ottawa, the Law Society of Ontario, or the Law Society of the district of Montreal, to be followed by our invitation to be given at Ottawa for the meeting here in next vacation.

"The Law Society of Ontario has given the project the unanimous and hearty approval of their Benchers in Convocation, and favorable

answers are daily expected from the other societies.

"In conclusion the Committee recommend that the thanks of the Council be extended to the office-bearers of the Law Societies of Ontario, Montreal and Quebec, and to the members of the Judiciary and Bar of the Upper Provinces for the distinction and kindness with which they received the delegate of this Society on his late visit, and the warm interest manifested by them in the undertaking; and also that a special meeting of the Society be held to consider the subject.

"All of which is respectfully reported.

"The following resolutions were then, after an animated discussion on each in turn, passed unanimously, with the exception of a very mild dissent from one of the meeting to the third resolution:

"Moved by Shannon, Q.C., seconded by Mr. Eaton:—

"*Resolved*, That the report be received and adopted, and that the committee be requested to continue their efforts to promote the formation of the Society.

"Moved by James, Q. C., seconded by McCoy, Q. C:—

"*Resolved*, That the thanks of this Society be given to the Honorable J. H. Cameron, Q.C., Treasurer, and the other officers of the Law Society of Ontario, William H. Kerr, Esq., Q.C., Battonnier, and the other officers of the Law Society of Montreal; J. Dunbar Esq., Q.C., Batonnier, and the other officers of the Law Society of Quebec, for the distinction and kindness with which they received the delegate of this Society on his late visit, and for the interest manifested by them in the proposed undertaking.

"Moved by J. S. D. Thompson, seconded by Mr. Coombes:—

"*Resolved*, That this meeting authorise the Committee, if they consider it advisable, to call a meeting in Halifax, in July or August next, for the purpose of organizing the proposed Society, or for the purpose of holding the first general meeting in case it shall have been previously organized at Ottawa.

"Moved by Johnston, Q.C., seconded by Mr. Haliburton:—

"*Resolved*, That the members of the Society look forward with much interest to the formation of a Dominion Law Society, believing that it will tend to elevate the tone and status, as well as to strengthen the hands of the profession throughout the Dominion, while it will promote fraternal intercourse with our Brethren in the other Provinces.

"Moved by Mr. Motton, seconded by Mr. Power.

"*Resolved*, That the thanks of the Bar Society be tendered to the Committee for their efforts in promoting the formation of the proposed Society, and especially to Alexander James, Q.C., Esq., for the able, efficient and satisfactory manner in which he discharged his duty on the recent delegation to the Upper Provinces.

"The meeting was also addressed by the President, McDonald, Q.C., and the Vice-President, Ritchie, Q.C., and by Messrs, J. G. Foster, L. G. Power and other gentlemen.

"The project was discussed in its various bearings and the spirit of the meeting was cordially in its favor."

The Bar of Nova Scotia have taken this matter up with energy and deserve great credit for the proper spirit which they have evinced in setting forward the movement.

SELECTIONS.

CHIEF JUSTICE WHITESIDE.

With profound sorrow we have to record the death of the Right Hon. James Whiteside, Lord Chief Justice of Ireland, which melancholy event took place on last Saturday afternoon at Brighton, where, under medical advice, that eminent judge and distinguished Irishman had been sojourning for some time past. Mr. Whiteside was born on the 4th of August, 1804, at Delgany (Co. Wicklow), of which parish his father, the Rev. Wm. Whiteside, was the rector. In 1825 he entered Trinity College, Dublin, where his career was respectable rather than brilliant. He twice unsuccessfully competed for a scholarship; but he won some classical honours, and distinguished himself as a member of the Historical Debating Society. In 1828, before graduating, he had entered as a law-student in London, where he studied, first in the chambers of Mr. Chitty, the eminent pleader, and afterwards in those of Mr. Swanston, a chancery practitioner in high repute and the annotator of Lord Eldon's decisions. He won several prizes in the University of London while attending the lectures of Professor Amos; and in the Debating Society attached to that institution made a considerable figure—so much

so that an American writer, who there met young Whiteside, describes his eloquence as "the glory and the admiration of the University," and dilates on the "intense enthusiasm, earnestness, and vehemence" of his style, and the "appropriateness and expression of his action." A few months after joining the Society, Whiteside was elected its president, and delivered the inaugural address. And within the walls of that Society it was that he became intimate with Joseph Napier, afterwards his brother-in-law, and Lord Chancellor of Ireland, and with W. E Foster, biographer of Goldsmith, for whose "Vicar of Wakefield" Mr. Whiteside ever cherished a peculiar predilection. At this time, also, the young student wrote and published some vivid descriptions of the legal celebrities who came under his observation while attending the courts.

In 1830 Mr. Whiteside was called to the Irish Bar, and shortly afterwards joined the North-East Circuit. In 1832 he took his degrees of B.A. and M.A. in the University of Dublin, and in the year following married Miss Napier, the Right Hon. Sir Joseph Napier's sister, by whom he has left no issue. He soon acquired a considerable practice, and became famous especially for his defence of prisoners. He took silk in 1842. In the year 1843 O'Connell and his associates were summoned to the Bar of the Court of Queen's Bench to answer a charge of sedition. The great State Trials followed. The eyes of Europe were turned on those for ever famous proceedings; their story was translated into every civilised tongue, and discussed in every land in Christendom. The mighty Tribune defended itself. The other traversers were represented by the greatest lawyers and advocates of the day; Henn, Fitzgibbon, Shiel, O'Hagan, Pigot, Perrin, Hatchell, Monahan, Moore, were there arrayed, and there, too—of counsel for Mr. (now Sir Charles) Gavan Duffy, the proprietor of *The Nation* newspaper—stood forth James Whiteside. And equal indeed to that great occasion did our Whiteside prove himself, and when at the close of his speech, says a writer in *The Dublin University Magazine*, after "a magnificent burst of impassioned eloquence, he sank completely exhausted into the arms of one of his fellows, the triumph of the man was complete, the feelings of those present, wound up to the highest pitch of tension, found vent in a burst of enthusiastic applause which the court, apparently under the influence of strong emotion itself, found it difficult for many moments to subdue." By this noble effort of forensic oratory Mr. Whiteside was at at once raised to the front rank of his profession; he became not only famous at the Bar, but an idol of the people; and O'Connell himself paid him the marked tribute of entrusting to him the motion for a new trial, upon which the judgment of the House of Lords, setting aside the verdict, was ultimately given. In the midst of triumph he was struck down. Unequal to the strain imposed upon him by the flood of business that poured in, his health gave way, and he was obliged, in the very zenith of his fame, to quit the sphere of his professional labour, and travel in Italy for two years. His active mind, however, still required, like Byron's, "something craggy to break itself on," and while seeking repose and health under Italian skies, he employed his literay talents in the production of a work entitled "Italy in the 19th century." Returning to Ireland restored to health, Mr. Whiteside almost immediately resumed his position as a leader of his profession; and soon after another great opportunity occured which riveted his reputation. In 1848 another State trial took place—that of Smith O'Brien and his associates—and to Whiteside was entrusted the defence of Mr. O'Brien. His skill and eloquence on this occasion added to his laurels and to his popularity, and thenceforth no cause of any importance was tried in which he did not take a leading part; we might mention *Butler* v. *Mountgarrett*, *Colclough* v. *Colclough*, *Att-G.* v. *Wilson*, the *Fitzgerald* will case, and many others. In 1851 Mr. Whiteside was returned to Parliament for Enniskillen. In 1852 he was appointed Solicitor-General for Ireland, under the ministry of the late Lord Derby, and continued to hold office during its brief tenûre of power. On Lord Derby's return to office, in 1858, Mr. Whiteside was appointed Attorney-General, was sworn in a member of the Privy Council, and elected a Bencher of the King's Inn. In 1859 he took his degree of L.L.D., and was returned to Parliament for the Dublin University. In the year 1862 a case was tried in Dublin, which, in its romantic and extraor-

dinary character, exceeded any of the *causes celebres* of the Victorian age. As the chivalrous advocate of Theresa Longworth in the Yelverton case, Mr. Whiteside delivered one of the most splendid addresses ever spoken; and it has been related that when, overwhelmed with the plaudits of his countrymen, he hurried over to Parliament, the great advocate was the object in the British House of Commons of an ovation unique in its annals, being received as he entered the chamber with general and enthusiastic applause, amidst which a grave member for the city of London, carried away by the spirit of the hour, exclaimed, in a tone audible throughout the entire House, "England is proud of her Irish orator." In 1865, under Lord Derby's third administration, Mr. Whiteside was re-appointed Attorney-General, and, after holding that office for a few weeks, was, in 1866, elevated to the dignity of Lord Chief Justice of Ireland, on the retirement of Chief Justice Lefroy, on whose behalf he had, previously, so generously and ably spoken in the House of Commons; and that position he continued to hold until, at the age of 72 years, the great old man passed away in the full vigour of his intellectual powers, and mourned by his countrymen of every class and opinion—rich and poor, learned and simple alike.

The late Lord Chief Justice can hardly be said to have been a great judge or a profound lawyer, but he was an eminently constitutional magistrate, and

> "To him the humblest right that cheers the hut,
> Outweighed all treasures of the golden East."

His veneration for Coke and the ancient masters of our jurisprudence was intense, and so intimately had he imbued his mind with the spirit of their teaching that often when his exposition of the letter of the law failed in perfectness he yet, as it were instinctively, reached a sound conclusion. But, his judgments on the whole are not such as to command a lofty legal estimate. That which will, perhaps, be found to display his powers at their best, however open to controversy may be the decision at which he arrived, appears to us to be his judgment in *O'Keefe* v. *Cardinal Cullen* (7 Ir. L. T. R. 100), which has been exclusively recorded *in extenso* in what he himself but lately called "that valuable publication, the *Irish Law Times*" (*Willes* v. *L. & N. W. Ry.*, Ir. R. 10 C. L. 103). Neither can we claim for him a position of a superior order in literature; but, the work which was the fruit of his sojourn in Italy won a success in its day, and exhibited some ability; while the magazine sketches written in his early manhood, and recently re-published, evince much acuteness of perception and pungency of humour However, though he had always a cultivated taste for literature—a taste which was curiously displayed during the State trials of 1843, when he insisted on the reading of the exquisite little lyric, "My beautiful, my own"—yet, his labours as a *littèrateur* were merely recreations, and serve but to show the catholicity of his highly-cultured intellect. That he could wield his pen at times, even to the last, with rare incisiveness and nerve is shown by his recent correspondence with the Treasury, in reference to Mr. Blackham's appointment (printed *in extenso*, *ante*, p. 485). Several lectures, delivered at public institutions, also remain, and further evince the versatility of his genius. His career and characteristics as a politician it comes not properly within our province to discuss, but it is allowed on all hands that he was ever true to his convictions, and that he was a consistent and honourable political opponent. He was a ready, fearless, and effective debater, but, as a parliamentary orator failed on the whole to equal his reputation as a forensic advocate. Beyond measure his greatest legislatitive achievement was the introduction of the Irish Common Law Procedure Act, 1853; nor should it be forgotten that the Act of 1856, moreover, was to a great extent an embodiment of his suggestions. That in itself constitutes no inconsiderable claim to national remembrance, and it shows that, however hostile might be the fine old chief to the pretentious schemes of modern law-reform, his predelection for the ancient ways prevented him not from joining in the march of real improvement. But it is as an orator, above all, that Whiteside will be remembered in after years. Matchless his rhetoric, brilliant his dialectic power, impressive and impassioned his language; every variety of forensic eloquence was at his command—humour, pathos, passion, stern sarcasm, scathing invective, wit in its raciest vein,

fancy in its most graceful sallies; and his too, in an incomparable degree, was that supreme excellence in an orator, the δεινότης of the Greek rhetoricians, that passionate eviction and all-persuasive *vehemence* of contention—

> "Spurr'd at heart with fiercest energy
> To embattail, and to wall about his cause
> With iron-worded proofs."

In him the Forum has lost a great advocate, the Bench an upright conscientious magistrate, Ireland an illustrious and patriotic son. He had won the admiration of his profession, the esteem of his judicial brethren the applause of his country; and who but mourns with us to-day that, by the relentless hand of death.

> "The work is done,
> That neither fire, nor age, nor melting envy,
> Shall ever conquer."

—*Irish Law Times.*

PRIVILEGE OF COUNSEL.

The recent case of *Lewis* v. *Higgins*, which came before the Lord Chief Baron and a special jury on Monday, 4th Dec., seems to have thrown our daily contemporary the *Echo* into a state of some excitement and indignation. The action was brought by Mr. George Lewis, the well known solicitor, against Mr. Napier Higgins, Q.C., for a slander uttered by him whilst addressing the court on a motion in his capacity of counsel. As soon as it appeared that the language complained of was pertinent to the matter then before the court, and that it was spoken by Mr. Higgins as counsel in the case, the Lord Chief Baron ruled that the action was not maintainable, and a nonsuit was accordingly entered.

The *Echo*, in commenting upon the case, after intimating that "a barrister with a wig on is a chartered libertine," and that "a law court, which should be the home and safeguard of justice, is the only charmed spot in England where gross injustice, as far as defamation of character is concerned, may be perpetrated," concludes its remarks thus: "Since the people have obtained more power we have seen a few law reforms accomplished, and possibly we shall some day see one carried in reference to the privilege of barristers. Lord Chief Justice Erle said many years ago that he hoped he should live to see the day when counsel would be held responsible for their words. Had we been present, we should have said 'Amen.'"

It is difficult to imagine how a writer, professing to write in the public interest, could deal with the question in this spirit. He must clearly be ignorant of the grounds on which this privilege rests, and seems altogether to have lost sight of the true interests of the public, whose cause he professes to advocate. The fact is that the privilege of counsel is the privilege of the public; and it is for the public convenience and in the public interest alone that that privilege is accorded.

This was pointed out as long ago as the year 1818, by Lord Ellenborough, in the case of *Hodgson* v. *Scarlett*, when he said: "So a counsel entrusted with the interests of others, and speaking from their information, *for the sake of public convenience*, is privileged in commenting fairly and *bonâ fide* on the circumstances of the case, and in making observations on the parties concerned, and their instruments or agents in bringing the cause into court." "In truth," they said "the freedom of speech at the Bar is the privilege of the clients, and not of the counsel." And this was pointed out still more clearly by the Lord Chief Baron when he said: "I think it essential that you (the jury) and the public should clearly understand that the privilege claimed by the defendant, Mr. Higgins, as applicable to this case, is not that of counsel, but the privilege of the people of England as represented by counsel. It is essential to the well-being of the whole community that a counsel, when once engaged, should discharge his duty fearlessly, without the shadow or shade of apprehension as to the consequences."

There can be no doubt that this is the true ground of the privilege, which also arises from the reason of the thing itself. This is pointed out so clearly in the argument of the counsel in the case of *Hodgson* v. *Scarlett* that we reproduce their remarks here: "If the counsel are not protected by law, it will be a very great misfortune to the clients of persons placed in similar situations. Every man's efforts will be shackled unless he is to be allowed to make such observations as, in the

fair and honest discharge of his duty, he may think necessary for his clients. In truth the freedom of speech at the Bar is the privilege of the clients, and not of the counsel. It would be impossible for matters properly to be discussed at Nisi Prius, unless considerable latitude were allowed, and if any evil follows from this, it must be endured for the sake of the greater good which attends it."

The first case in which this question of privilege arose in a court of law was the case of *Brook* v. *Sir Henry Montague* (Cro. Jac. 90), decided in the reign of King James the First, where it was held that "a counsellor in law retained hath a privilege to enforce anything which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false." And so in *Wood* v. *Gunton* (Styles, 462), decided in 1655, "If a counsel speaks scandalous words against one, in defending his client's cause, an action lies not against him for so doing, for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." In *Hodgson* v. *Scarlett* (1 B. & Ald. 240) decided in 1818, the question was fully considered, and the same doctrine was laid down. Lord Ellenborough, as before pointed out, putting it on the ground of public convenience. Justice Holroyd, put it on a similar ground, viz., that the privilege of counsel was the same as the privilege afforded to the party in the judicial proceeding. "It would seem," he said, "that such an action cannot be supported for words false and malicious spoken by a party conducting his own case before a court of competent jurisdiction; and if a counsel be in the same situation as the party, then such an action cannot be supported against counsel. If they be fair comments upon the evidence, and be relevant to the matter in issue, then, unless express malice be shown, the occasion justifies them. If, however, it be proved that they were not spoken *bonâ fide* or express malice be shown, that they may be actionable; at least our judgment in the present case does not decide that they will not be so." It will be seen that Mr. Justice Holroyd seemed to be inclined to qualify this privilege, and to hold that it was by no means absolute; but we apprehend that in the present state of the law that qualification does not exist, and that the privilege is absolute when the comment is revelant to the matter in issue. When, in the case of *Lewis* v. *Higgins*, Mr. Serjt. Parry proposed to put his client, Mr. Lewis, into the box, the Lord Chief Baron intimated in the most decided manner that he should allow no questions to be put to Mr. Lewis except such as went to show that the words were in fact spoken. Addressing Serjt. Parry he observed, "If you think fit to put Mr. Lewis in the box, I cannot prevent your doing so, but I must tell the jury that assuming it is proved that the words were spoken by the defendant, yet if they were spoken by him in his character of counsel in a suit, the action cannot be maintained. I cannot enter into any other question, nor can I receive any evidence as to what were Mr. Higgins instructions. I can receive evidence only to show first that the words were spoken, and, secondly, the occasion on which they were spoken. I must tell the jury that the law of England forbids me to enter into any other questions in the case, and does not authorize them to enter into and to determine upon the merits of a case affecting the character of a member of the Bar of England, which depends entirely upon what has been stated by him in a cause legitimately before the judge in a court of justice." The privilege accorded to counsel, when properly understood, is a wholesome privilege, and one that is absolutely necessary for the due administration of justice, and to further the true interests of the public. In the words of the Attorney-General, Sir John Holker, "an advocate is worthless if he be not fearless," and we by no means look forward to the day when the tongues of counsel shall be tied, and when advocates shall shrink from doing their duty to their clients for fear of the consequences resulting to themselves. The greatest safeguard against the abuse of this privilege lies in the general good sense and honourable feeling of the Bar, together with the judicious controlling influence of the Bench. Possibly it may occasionally be abused, but we believe that the occasions are very rare indeed; and, at all events if any evil does follow from the exercise of the privilege, which we are far from admitting, "it must be

endured for the sake of the greater good which attends it."—*Law Times.*

THE COSTS OF ATTORNEYS' LETTERS.

During the progress of a trial, not very long since, before the Lord Chief Justice of England, it transpired that the writ had been issued and served without the usual preliminary of an attorney's letter demanding payment. His lordship most properly condemned the attorney's conduct in the matter, observing that "nothing could justify such a course but absolute necessity." In another case, *Rinder* v. *Deacon*, 11 Ir. Jur. N. S. 414, it appeared that the defendant (resident in Ireland) paid the amount of his debt to the plaintiff (resident in England) without informing the plaintiff's attorney, and without paying the costs of the writ which had been issued and served. The attorney, knowing nothing of the payment, marked judgment, and levied an execution. The defendant then moved to set aside the judgment, but it was held that the motion should be refused with costs, but that the judgment should be reduced by the amount paid. There Pigot, C. B., said:—"I hesitate about giving costs in favour of plaintiff's attorney, for I think this motion indicates that it is the practice, prevailing too much at present, that an attorney, instructed to collect the debts of an English client, makes the summons and plaint the medium of his demand. The attorney's duty to the community at large and to his client was, *not* to make the summons and plaint the first means of collecting his client's debts, but to apply by letter, in the first instance, to defendant." It is hardly to be expected, however, that attorneys should conduct their business on principles of pure benevolence, and if the duty is imposed on them of writing to their opponents, in the first instance, one would suppose that the suitor who, by neglecting or refusing to pay the demand in question, caused the litigation, should pay the costs of at least one preliminary letter, incident to the recovery of the demand. So, in Bewley on Taxation of Costs, p. 124, it is said:—"As between party and party, the costs of no letter will be allowed except *one* letter of application prior to the issuing of the writ (*Capel* v. *Staines*, 5 Dowl. 770), and such duplicates as the number of defendants may require." To the same effect, see Gray on Costs, 497. The case above referred to, which thus decides, was determined in 1837; and the same proposition was laid down seven years previous in *Morrison* v. *Summers*, 1 B. & Ad. 559. In those cases, however, the previous decision of *Kirton* v. *Braithwaite*, 1 M. & W. 310, was not cited, in which Parke, B., intimated a contrary opinion. In 1859 the question again arose in *Holmar* v. *Stevens*, 6 Jur. N. S. 124, more fully reported 33 L. T. R. 148, where *Kirton* v. *Braithwaite* and *Capel* v. *Staines* were cited and underwent much discussion. There the attorney had written to the defendant demanding payment of two bills of exchange, together with 13s. 4d. costs of application. The amount of the debt was tendered at first without any costs of the letter, but afterwards with 5s. for the letter. The plaintiff's attorneys considered that they were entitled to 13s. 4d. on the ground that, although only one letter was written, the two bills were in the hands of different holders, so that there were two clients and two applications; but they said that they would have been satisfied to accept the 5s. only that then the form for the writ was made out, and the clerk was just then going to issue it. The writ was issued accordingly, and the defendant moved to set it aside. Willes, J., after referring to those facts, said:—"It appears, then, that this writ was issued, not for the purpose of enforcing payment of the client's claim, but for the purpose of exacting payment of what the attorneys had no legal right to. The writ is the commencement of the action, and an attorney has no claim for any letter until a writ is issued. At the time of the Common Law Commission, it was proposed that a simple letter claiming payment should be the commencement of the action; but it was thought that the commencement of an action should be a more solemn proceeding, and the writ was continued. The attorneys having no legal right to charge for the letter, the issuing of the writ for the purpose of exacting payment for it is merely an abuse of legal process." And

Byles, J., added that "the attorney's letter does not prevent the tender of the principal without any costs." The writ was set aside accordingly. That case, therefore, is an authority against the right of an attorney to recover the costs of a preliminary letter before writ issued. That case was cited, but distinguished by Palles, C. B., in *Allen* v. *O'Callaghan*, appearing in our present issue (10 Ir. L. T. R. 135); but the interlocutory *dicta* of the Court, exclusively recorded in our Report, will be found to support at least a *semble*, that an attorney of a creditor, retained to demand a debt, has no right to insist on payment of any costs of his letter demanding the debt, previously to issuing a writ of summons and plaint.

It will thus be seen that the authorities on this question are rather conflicting; but it must be allowed that it would be a hard thing if a creditor who was kept out of his money should be obliged to pay his attorney for trying to get it, without redress against the debtor, who, by tendering the debt in such case, adopts the attorney's letter, by reason of which alone he obtains authority to tender at all to the attorney.—*Irish Law Times.*

CANADA REPORTS.

DOMINION.

IN THE EXCHEQUER COURT OF CANADA.

IN CHAMBERS.

(Reported for the *Law Journal*, by Robert Cassels, Jr., Barrister-at-law).

WOOD v. THE QUEEN.

Petitions of right—Application for security for costs. When to be made.

Held, 1. Where by a letter addressed to the suppliant the Secretary of the Public Works department stated that he was desired by the Minister of Public Works to offer the sum of $3,950 in full settlement of the suppliant's claim against the department, an application on behalf of the Crown for security for costs was refused on the ground that the Crown could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application.

2. Application for security for costs in this Court must be made within the time allowed for filing statement in defence, except under special circumstances.

[Ottawa, Nov. 28, 1876].

The petition of right in this cause was filed on the 1st September, 1876, by the suppliant who described himself therein as "of the city of London and county of Middlesex, in that part of Great Britain and Ireland called England," claiming a sum of $50,000 for alleged services in connection with the Parliament Square in the city of Ottawa.

On the 27th September, the day before the statement in defence was due, the counsel for the Crown asked the solicitors for the suppliant for further time to answer, and obtained one week. The statement in defence was not filed at the expiration of the week, but on the 27th October the solicitors for the Crown wrote to the solicitors for the suppliant stating that the statement in defence was in the hands of the printer, and, for the first time, asking security for costs. Some correspondence ensued, but security was refused. On the 13th November, the agents of the solicitors for the Crown took out a summons calling upon the suppliant to show cause why security for costs should not be given, and and for a stay of proceedings. This summons was enlarged until the 27th November, when

Cockburn, Q.C., shewed cause. There is some obscurity about the practice to be followed in this Court on such an application—whether that of the Court of Chancery or that of the Common Law Courts. In Chancery the application must be made before time for answering expires or is extended, when the residence of the plaintiff appears on the face of the bill. This application is too late, further time to answer having been given; see *Smith* v. *Day*, 2 Chy. Ch. 456. *Arthur* v. *Brown*, 3 Chy. Ch. 396. But the government have security in their own hands. By a letter from the Secretary of the Public Works department the suppliant is offered the sum of $3,950 in full settlement of his claim against the department. A copy of this letter with an affidavit verifying it, was read, and see *Re Carroll*, 2 Chy. Ch. 305, and *Lenomand* v. *Prince of Capua* there cited and Ch. Arch. 12th ed. 1418.

McIntyre for Attorney-General. There is no rule of the Exchequer Court applicable to security for costs. But rule 258 provides that "in proceedings to which the provisions of rule 1 shall not apply, and which are not otherwise provided for by these rules, the practice in use

in H. M. High Court of Justice in England shall be had recourse to, and followed as nearly as may be." The English rules made under the Judicature Act, 1875, do not make any special provision as to security for costs, but sec. 21 of the Supreme Court of Judicature Act of 1875 provides that the methods of procedure, which at the commencement of the Act, were in force in any of the Courts whose jurisdiction is transferred to the High Court may be continued to be used and practised in the High Court of Justice, where no other provision is made. The Petition of Right Act, 1876, sec. 15, also introduces the English practice where no other provision is made. Now by English Petition of Right Act, (23 & 24 Vict., cap. 34, sec. 1), a party may intitule his petition in any one of the Supreme Courts of Common Law or Equity, at Westminister, in which the subject matter of such petition or any material part thereof would have been cognizable if the same had been a matter in dispute between subject and subject, and sec. 7 makes the practice and procedure of the Courts of Law and Equity, respectively applicable to Petitions of Right. This petition is framed after tne Common Law form, and would have been tried in a Common Law Court, and therefore the Common Law rules as to security for costs should be followed, which is that security can be applied for at any time before issue joined. As to the 2nd objection—the funds referred to are not such as would satisfy a demand for security for costs: *Kilkenny Railway Co.* v. *Fielding*, 6 Exch.; *Higgins* v. *Manning*, 6 Prac. R. 147. The letter of the Secretary of the Public Works department offers a sum as a settlement, but not on account, and this being refused, the crown stands on its strict rights.

Fournier, J. The application for security for costs in this case ought to have been made within the time allowed for filing the statement in defence. The Crown has asked for and obtained an extension of time to file a statement in defence, and has thereby waived its right to demand security for costs. Application for security for costs in this Court must be made within the time allowed for filing statement in defence, except under special circumstances. The power of ordering a party to give security for costs being a matter of discretion, and not one of absolute right, and it appearing that the government offered by letter from the Secretary of the Public Works department the sum of $3,950 to the suppliant in settlement of his claim—in the exercise of my discretion, I, on this ground also, refuse the application, as, in my opinion, the doing so cannot subject the Crown to any inconvenience, whilst its allowance might cause great hardship to the suppliant.

The summons is therefore discharged. Costs to be costs in the cause to the suppliant.

Summons discharged.

CHANCERY.

Re Shipman—Wallace v. Shipman.

Deficiency of personal estate—Personal representatives—Administration of Justice Act.

Since the Administration of Justice Acts an executor or administrator is not entitled to come to this Court for the purpose of administering the estate of the deceased, even when the personal assets are insufficient for the satisfaction of the debts.

Hearing on further directions.—This was a proceeding for the administration of the estate of a testator, in which the proceedings were taken upon the application of the executors who had proved the will. The grounds upon which they sought to have the estate administered were that the debts shewn to be due by the testator exceeded the amount of his personal estate, and that it would be necessary to resort to his real estate in order to satisfy them. The Master's report shewed that the debts exceeded the amount of the personal estate which had come to the hands of the executors, to a small extent.

Moss for the executors claimed that they were justified in taking the course they had done, as it appeared that the debts were in excess of the personalty: *Re Ette*, Prac. R. 159, and *Doner* v. *Ross*, 19 Grant 229. It further appeared that the defendant who was the residuary legatee and devisee had consented in Chambers to the granting of the Administration Order.

W. Cassels for defendant urged that since the Administration of Justice Acts, the reason for granting such an order had ceased. That executors or administrators no longer require the protection of the Court of Chancery, even when there appears to be a deficiency, for now upon being sued at law they can plead the deficiency and obtain an administration from the Court of Law. He referred to *Parsons* v. *Goading*, 33 U.C. Q.B. 499.

Blake, V. C.—Inasmuch as under the Administration of Justice Acts the executors can upon being sued at law by any creditor sufficiently protect themselves by a plea shewing the deficiency and claiming administration, there is no longer any necessity for them to come to Chancery for protection. There is no allega-

tion here that the executors were threatened with suit; nor is there anything to show that the executors could not have divided rateably the assets, in their hands, to the satisfaction of the creditors. Acting on this principle I have on two occasions recently declined to grant orders for the administration of estates at the instance of the personal representatives. As, however, it appears that the defendant, who, as residuary legatee, is entitled to the balance of the estate, consented to the order for administration, and had obtained the benefit of the proceedings, the executors, under these exceptional circumstances, are allowed their costs.

ASSESSMENT CASES.

In the matter of the Appeal of James Hamilton from the decision of the Court of Revision of the Township of Biddulph.

(Reported for the *Law Journal*).

Assessment—Road Company—Highway—Exemption— 32 *Vict., cap.* 36, *sec.* 9, *ss.* 6.

The Proof Line Gravel Road company was incorporated under the Joint Stock Company's Act, (C. S. U. C. cap. 49) and constructed their road on a public highway or road allowance in the Township of Biddulph. The Township assessor assessed the property in the road against James Hamilton as Secretary of the Company.

Held, 1. That the assessment was illegal, because although the road was vested in the company by sec. 60 of the Joint Stock Companys Act, it was, nevertheless, a public highway, and therefore exempt from taxation by 32 Vict., cap. 36, sec. 9, subsec. 6.

2. That in any event the assessment should have been in the name of the company, and not in that of one of its officers.

The assessor for the Township of Biddulph assessed the property in the Proof Line Gravel Road company as real estate, in the name of James Hamilton as Secretary of the Company, so describing him. From this assessment Mr. Hamilton appealed to the Court of Revision, on the grounds (1) that property in a Road company is not assessable as real estate against the company, but (2) even if so the name of the company and not that of an officer of the company should appear on the roll. The Court of Revision confirmed the assessment, whereupon Mr. Hamilton appealed to the County Judge of Middlesex, but as he was absent the case was heard before His Honour Judge Hughes of St. Thomas.

H. Becher for the appellant.
Meredith, Q.C. for the respondent.

Hughes, Co. J.—I think there can be no question that the individual name of the appellant must be altogether erased from the assessment roll. It is conceded by the respondent's counsel that his name should not have been at all inserted therein, that the Court of Revision should have ordered his name to have been erased and the corporate name of the persons intended to be assessed inserted, that is if the property intended to have been assessed is assessable, as he contends it is.

The question then arises—is the property of that corporation of whom the appellant is secretary, and in whose name it was inserted in the roll, assessable under the Ontario statute, 32 Vict. (1868-9) cap. 36? By the 5th sec. the term "property" includes both real and personal property. The terms "personal property" and "personal estate" includes shares in incorporated companies and all other property, except land and real estate, which includes all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty and also excepting property in the act expressly exempted (see the first five sections of the Assessment Act). By sub-section 6 of section 9, "Every public road and way" * * is expressly exempted from taxation. By section 22, "Land is to be assessed in the municipality in which the same lies, and includes the land of incorporated companies as well as property, and personal property is to be assessed in the municipality in which the personal property is situated." By section 36, "The property of an incorporated company is not to be assessed against the corporation, but each shareholder is to be assessed for the value of the shares or stock held by him as part of his personal property; but in companies (such as the Proof Line Road company) who invest the whole of their means or the principal part of their stock in real estate already assessed for the purpose of carrying on such business, the shareholders are to be only assessed on the income derived from such investment."

The property which is the subject of this assessment is that part of "the Proof Line Gravel Road which passes through the Township of Biddulph" which was constructed on the public highway or road allowance formerly existing in that Township. It is contended on the one hand that it is real estate assessable as such; it is contended on the other, that it is a public road or highway and not assessable as real estate in that Township—but only as personal property—not against the corporation but

against each shareholder under the 36th section at their respective places of business or of residence.

The question arises at once what is it that the company owns which is assessable? On the principle laid down in the 9th section that all land and personal property in the Province shall be liable to taxation—it can never be contended that it is liable both as real estate and personal property, for that would be inconsistent with the intention of the 8th section which requires that taxes shall be levied equally upon the whole rateable property of the locality according to its assessed value, and not upon any one or more kinds of property in particular or in different proportions—in other words I do not apprehend it was the intention to have the interest of shareholders in a Road company in the same property taxed in one county as real estate and in another county as personal estate, which would be the case were the decision of the Court of Revision in this case upheld.

The Road company was incorporated under the Joint Stock Company's Act—Con. Stat. U. C., cap. 49—and under the decision of the Court of Queen's Bench in *Regina* v. *Davis*, 35 U. C. Q. B. 110, it is a public highway within the meaning of the Municipal Act as being a road laid out by virtue of a statute, and as said by Morrison, J. in that case, "we see nothing in any of the statutes to deprive the highway of its public character, or abridge or interfere with the rights of the public to the use and enjoyment of these highways."

It was contended here that because the 60th section of the Joint Stock Road Companies Act, vests the road and property of the company in the corporation, that therefore it is private property and assessable as land the same as any other property, but under the decision I have named, it is still a public highway in the same way as roads declared to be vested in Municipal corporations under the Municipal Act are declared to be so, and because it is a public highway it is within the exemption of the 6th subsection of the 9th section of the Assessment Act.

The authorities quoted in the judgment in the case of the *Toronto Street Railway Co.* v. *Fleming*, 35 U. C. Q. B. 264, go strongly to illustrate another principle upon which this property would not be assessable as real estate; (supposing there were no such exemption in existence as that provided by the 6th sub-section of section 9 of the Assessment Act), that is, that the company are not either occupants or owners of the property in the sense that they have the right (although owners of the road by statute) to occupy any part of it to the exclusion of others of Her Majesty's subjects, and exclusive occupation has been held to be the foundation of rateability. The decision of the Court of Revision, should therefore, I think be reversed.

COUNTY COURT OF THE COUNTY OF ONTARIO.

(Reported for the *Law Journal*).

Jones v. Holden.

Justice of the Peace acting mala fide and beyond jurisdiction—Quashing conviction bad on its face.

Trespass against a Justice of the Peace. The magistrate in a case brought before him by a complainant who alleged that the plaintiff had taken a sheep of his off the road and sheared it, and kept the wool, made an order which was subsequently embodied in a document purporting to be a conviction, which stated that the plaintiff "unlawfully took a certain ewe from R. W.'s flock on the 4th June last, at Pickering, and having heard the matter of the said complaint, I do adjudge that the said ewe and fleece is the property of the said W. and I order and adjudge the said Jones be discharged therefrom upon giving up the said ewe and fleece to the said W. and paying the costs of this suit." The costs were fixed at $20, and the paper contained the usual distress clause, but the warrant to commit in case of default was struck out.

Held, on motion for non-suit, that, although the pretended conviction was clearly unsustainable, it should nevertheless have been quashed before action brought.

[Whitby, Dec. 12th, 1876—Dartnell, J. J.]

The declaration contained a count in trespass and one in trover, the chattel in question being a sheep and its fleece. No special damage was alleged. Plea, not guilty by statute (C. S. C. cap. 126). It was stated by counsel that the real defences were that the defendant, in doing what he did, acted *bonâ fide* as a magistrate, and that the action could not be maintained until the conviction was quashed. It was admitted that the defendant was a Justice of the Peace for the county of Ontario.

The facts were as follows: one Ward having lost a sheep laid an information before the defendant. The defendant thereupon issued a search warrant setting forth "that on the 4th June, 1876, Ward had a ewe stolen off the highway near his place of residence, and that he had traced her to the residence of the present plaintiff and found said ewe with the wool then shorn." The information, as sworn to by Ward, was substantially to the same effect. The pres-

ent plaintiff appeared before the defendant when evidence was offered before the latter and two other magistrates, who also attending the hearing. The defendant was told by his brother magistrates, as well as by the counsel who appeared for the accused, that the charge was one of larceny, and that the magistrate must either dismiss the case, or commit the prisoner. The defendant's reply was that he knew the law (not stating that he differed from this view). His brother magistrates came to the conclusion that the matter was one of disputed ownership, in which a magistrate could have no jurisdiction, and expressed an opinion, and desired to record the same, that the complaint should be dismissed; but the defendant refused to recognize their authority to act, and made an order in the following words: "I find that the sheep and fleece in question belongs to R. Ward, and I authorize him to take the same, and I adjudge the said Jones to pay the costs *in the suit.*"

Thereupon Jones, in order to obtain his discharge, permitted the constable to take away the ewe; the defendant himself having already taken charge of the fleece.

Subsequently the defendant drew up and filed with the Clerk of the Peace a document purporting to be a conviction, the crime set out being that he Jones "unlawfully took a certain ewe from R. W.'s flock on the 4th June last, at Pickering, and having heard the matter of the said complaint, I do adjudge that the said ewe and fleece is the property of the said W. and I order and adjudge the said Jones be discharged therefrom upon giving up the said ewe and fleece to the said W. and paying the costs of this suit." The costs were fixed at $20, and the paper contained the usual distress clause, but the warrant to commit in case of default was struck out.

This alleged conviction had not been quashed. Evidence was adduced to shew that the defendant refused to take down material evidence, when requested to do so by the counsel for the accused and by his brother magistrates.

At the trial before Dartnell, J. J.

G. Y. Smith for the defendant moved for a non-suit.

Farewell contra.

Dartnell, J.J. (after taking time to consider). On considering the evidence, I must and do find that the defendant did not act *bonâ fide* in this matter. The presumption in law is that a magistrate acts in good faith, but I think the arbitrary and high handed proceedings of this defendant, in spite of direct advice and warning as to his duty, justify me in finding as I do that he acted *malâ fide.* I am strengthened in this by the circumstance that he himself is silent and not offered as a witness to rebut the very strong case made by the plaintiff. Having found that the defendant acted *malâ fide*, I think under the authority of *Cummins* v. *Moore*, 37 U.C. Q.B. 130, that a notice of action is not necessary, though a sufficient notice, I have already held, has been proved. But in any case I do not think the paper filed with the Clerk of the Peace can, in any sense, be called a "conviction," although it purports to be one. Suppose the crime had been one of rape, and the magistrate had awarded that the accused should marry the complainant. Would this be a conviction? I think not, and this document is almost as absurd. It is, in effect, on the face of it a decree or adjudication in a civil matter, and the magistrate has usurped the functions of a civil court. It was alleged that the defendant thought he had jurisdiction under sections 117, 118 and 119 of the Larceny Act. But this view, as well as that of his *bonâ fides*, he has not ventured to substantiate under oath. I cannot believe that any man of ordinary sense could have honestly believed this. Notwithstanding my opinion that the defendant has totally exceeded his jurisdiction and not acted in good faith, I think I must hold under the authority of *Graham* v. *McArthur*, 25 U. C. Q. B., 478, that the conviction existed *de facto*, however unsustainable, and that it is necessary that such *quasi* conviction should be quashed before this action be brought.

Though I hold the strong opinion that I do as to the high handed, and I may say, outrageous conduct of this defendant, nevertheless I feel I am compelled under the authority of the above case, which was not cited at the trial, to enter a non-suit.

As the plaintiff has the right to move in term for an entry of a verdict in his favor, should I be wrong in the above judgment, I think I should now fix the damages in case such entry should be made. There is no special damage laid in the declaration. It is probable plaintiff might have been entitled thereto if claimed (See *Brewer* v. *Dew*, 11 M. & W. 625). As it is I find the value of the ewe to be $9 and of the fleece $1. So that the damages will be assessed at $10.

The *Law Times* objects to a solicitor advertising his removal from one office to another; and sneeringly remarks that such intimations are commonly found in American newspapers. Not only common, but so far as we can see, quite unobjectionable. There is such a thing as being too particular.

NOTES OF CASES.

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

CHANCERY.

Skinner v. Ainsworth.

Dower—Specific Performance—Wife refusing to join in conveyance.

Where in a suit for specific performance the wife of the vendor refuses to join in the conveyance for the purpose of barring her dower, the proper mode of protecting the purchaser is to set aside a sufficient portion of the purchase money to indemnify him against the claim for dower in the event of the wife subsequently becoming entitled thereto by surviving her husband; the interest during the joint lives of the vendor and his wife to be paid to him, and also the principal also so set aside on her decease.

Ewart for the plaintiff.

Hector Cameron, Q.C., contra.

Wells v. Hews.

Interpleader suit by Assignee in insolvency—Costs—Insolvent Act of 1875, section 125.

A writ of attachment issued, under which the assignee in insolvency seized goods which were claimed by a person to whom it was alleged the debtor had transferred them. The assignee thereupon filed a bill of interpleader against the claimant and the creditors who had sued out the writ. *Held,* that the assignee was not compelled to apply to the Judge in insolvency under section 125 of the Act of 1875, and relief was afforded to the assignee: and the claimant failing to appear was ordered to be debarred of all interest in the goods in question, and to pay the costs of suit; and the assignee was given a lien on the goods in his hands for his costs.

Bethune, Q.C., for plaintiff.

Beaty, Q.C., and *J. C. Hamilton,* contra.

Barton v. Merritt.

Conveyance to wife of purchaser.

The plaintiff and M. became sureties for W., who absconded, and the sureties satisfied the claim by giving their note for $215, upon which judgment was subsequently recovered against them; whereupon M. absconded from the province. A year previously a conveyance of land had been made to the wife of M. which the plaintiff alleged was so conveyed to her as the appointee of her husband and for the fraudulent purpose of defeating the plaintiff in recovering contribution. The evidence adduced satisfied the Court that more than a year before the parties had entered into such suretyship the contract for purchase had been made in the wife's name, who paid the down instalment; and that the subsequent earnings of the sons and moneys belonging to the wife had been expended in erecting a house upon the premises and paying the balance of purchase money thereof. A bill seeking to charge the land as the property of the husband was, under such circumstances, dismissed with costs.

Duncombe for the plaintiff.

Robb contra.

McLean v. Burton.

Mortgagor and mortgagee—Timber cut on mortgaged premises—Reducing value on premises—Damages for cutting timber.

Semble, that standing timber is within the provisions of the registry laws, and that the purchaser of a right to cut the same is affected with notice of a conveyance from the original owner and a mortgage back from his vendee.

Unless a mortgagor prove demonstrably, so as to leave no room for doubt, that the mortgage premises remain ample security for the mortgage debt, the Court will restrain him from cutting over the whole land.

The jurisdiction as to restraining the cutting and removal of timber is not preventive only; the Court will in a proper case interpose where the timber could be followed. The Administra- of Justice Act (1873, sec. 32) it would appear, however, has removed any technical difficulty o this sort.

Where timber is cut without any intentional wrong, and in the absence of *malafides,* the injury actually sustained by such cutting is the measure of damage to the owner or mortgagee of the land.

Boyd, Q.C., and *Douglas* for the plaintiff.

Moss contra.

Preston v. Lyons.

Reputation of marriage—Revocation of will—Evidence of marriage.

The presumption which arises of a marriage having taken place between the parties by reason

of a man and woman having for many years cohabited and lived together as husband and wife may be rebutted; and after the death of the man the evidence of the woman alone, on which the Court placed full reliance, was received for that purpose, although she was then interested in negativing the fact of marriage, because if married at the time alleged, the will, under which she claimed all the property of the deceased, would under the Act have been revoked.

Bayly for plaintiff.

Moss for defendant.

QUEBEC REPORTS.

SUPERIOR COURT.

McKay v. The Mayor et al. of Montreal.

Militia called out—Payment to—31 Vict. cap. 40, sec. 27—Emergency.

Held, That under the Statute (Canada) 31 Vict. cap. 40, sec. 27, which enacts that the Active Militia shall be liable to be called out to aid the civil powers in riots "or other emergency," and authorizes two Justices of the Peace to call them out, payment for the services of the Militia cannot be resisted by the municipality on the ground that there was no emergency which justified the Justices of Peace in calling them out.

[Montreal, May 1, 1876—20 L. C. Jurist, 221.]

Mackay, J.— In June, 1871, an election was held in the Central Division of Montreal, when Mr. Holton was one candidate and Mr. Carter another.

The 22nd and 23rd were fixed to be the polling days. On the 21st two Justices of the Peace wrote to Col. Osborne Smith, requesting him to be prepared, as there was likely to be a disturbance.

Their letter read thus:

"From reliable information we have good reason for anticipating that the public peace will be disturbed and violence used by a large body of organized men, engaged to take possession of the polls on the 22nd and 23rd instant, in the Centre Division of Montreal. We have therefore to request that you will have sufficient Militia Force in attendance during those days to preserve the public peace, and to suppress any riots that may take place. Our information is that this organized body consists of not less than three hundred men."

Col. Smith on issues 21st his orders to plaintiff. On the 22nd and 23rd plaintiff and officers and 100 men mustered and served as required.

A bill was made up by plaintiff under our Act of Parliament, but defendants refused to pay.

The defendants pleaded that the two Justices issued their order without sufficient cause or reason; that the civil power did not require the aid of any Militia force; that in the absence of riot the Justices had no authority to call out the Militia or to make the city liable to pay them.

The action is based upon the 27th sec. of cap. 40 of 31 Vict., A.D. 1868, which enacts that the Active Militia shall be liable to be called out to aid the civil power in riots "or other emergency," and authorizes two Justices of the Peace to call them out.

The 82nd section of the same Act enacts: "Any officer, non-commissioned officer, or private, of the Militia who, when his corps is lawfully called upon to act in aid of the civil power, refuses or neglects to go out or to obey any lawful order of his superior officer, shall incur a penalty, if an officer, not exceeding forty dollars, if a private, not exceeding twenty dollars, for each offence."

"Where riot was merely anticipated or expected, until the law of 1873, 36 Vict., there was not the power in any two Justices to call out the Militia." (Say defendants.) No such thing; even before 31 Vict. cap. 40 there *was* the power, but who might have had charge to pay men called out might have been a question before the 31 Vict. cap. 40. I have no doubt the Justices here might call out the Queen's subjects in case of riot "or other emergency," and I think that they having required the aid of the military, the latter were warranted in going out, and that the city has to pay them.

Justices of the Peace are required to keep the peace, and to see it kept, to restrain rioters, and to prevent riots. If they fail in duty in these respects they may be indicted for neglect of duty.

Lord Mansfield in *Kennett's case*, A.D. 1781, who was Lord Mayor of London, said that by the common law, as well as by several statutes, Justices of the Peace are invested with great powers to quell riots, and as they may assemble all the King's subjects they may call in even the soldiers; but this should be done with great caution. Kennett was found guilty of neglect of duty.

In *Pinney's case*, A.D. 1832, who was Mayor of Bristol, Ch. J. Tindal with reference to the English Act 1 and 2 Wm. 4, c. 41, talks of it as having been passed just in order to prevent any doubt, *if doubt could exist* (he says) as to the power of Justices of the Peace to command the

assistance of all the King's subjects *by way of precaution*.

That Act 1, 2 Wm. 4, expressly authorizes the Justices to call out the King's subjects when tumult or riot is only likely to take place, or is reasonably apprehended. It was hardly called for, according to the Judges on Pinney's trial.

Surely Justices of the Peace having the duty of suppressing riots are not to be refused the right and power to prevent them.

Before any riot, Pinney, Mayor of Bristol, had called upon the people to aid him towards preventing any. Two days before the riot he swore in hundreds of special constables. Littledale, J., who charged the Petit Jury at the trial, said that this was what the defendant was bound to do. Defendant was acquitted, partly from having taken such precautions.

I have satisfaction at pronouncing this judgment; though having myself to bear part of the burden of the condemnation.

The militia military going out ought to be encouraged.

The 31 Vict. cap. 40, I think ought to be interpreted liberally. I think it may be read as follows:

"The corps composing the Active Militia shall be liable to be called out in aid of the civil power in case of riot or other emergency requiring such services, whether such riot or emergency occurs within or without the Municipality in which such corps is raised or organized;" * * * * * * "and the officers and men when so called out shall, without any further or other appointment and without taking any oath of office, be special constables;" * * * * * "and they shall, when so employed, receive from the Municipality in which their services are required the following rates of pay, that is to say;" * * * * * "and the said sums, and the value of such lodging if not furnished by the Municipality may be recovered from it by the officer commanding the corps in his own name," &c.

The twelve lines defining the duty of the Deputy Adjutant General of the District appearing in the body of the sec. 27, may be read (I think) as if they had been, always, at the end of that section.

The Militia ought to be encouraged to go out readily, when called upon to aid the civil power. Else order in society will disappear, and rowdyism be encouraged to go rampant, more rampant than at present. In the absence of a regular military force in the country we are constantly in danger. People do not reflect enough upon this. The power of the Executive to enforce the law is poor enough, except theoretically, of which we in Montreal have recently had examples.

If it be that the Justices of the Peace in the case before us issued their requisition for Militia without sufficient cause, let the defendants go against them.

I hold that as between plaintiff and the defendants, this question is of lesser importance; the plaintiff was called out, and it was not for him to catechise the Justices; as well might each of his hundred men have claimed the right to do so.

Judgment for plaintiff, with costs against the defendants.*

* The following cases were cited at the hearing:—*Rex* v. *Pinney*, 3 B. & Ad. 946; 5 C. & P. 264. *Rex* v. *Kennett*, 5 C. & P. 282. *Rex* v. *Neale*, 9 C. & P. 431.

UNITED STATES REPORTS.

SUPREME COURT OF ILLINOIS.

Pittsburg, Fort Wayne & Chicago Railway Co., Cleveland, Col., Cin. & Indianapolis R. R. Co., Atlantic & Great Western R'y Co., and Erie Railway Co., *Appellants* v. Chester Hazen, *Appellee.*

Appeal from Superior Court of Cook Co.—Liability of Railroad for delay in transporting—Acts of employees—Acts of violence.

1. Responsibility for Delay.—For the delay resulting from the refusal of the employees of the company to do duty, the company is responsible; for the delay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible, even though the men whose violence caused delay, had but a short time before been employed by the company.

Dickey, J.—On the 10th of December, 1870, Hazen shipped by the freight line of the railway company, a quantity of cheese from Chicago to New York. The cheese was delivered to the consignees at New York, on the 28th of December, eighteen days after the shipment. The proofs tended to show that the usual period of such transit, at that time, did not exceed twelve days; that the weather from the 10th to the 23d was not severely cold, but that severe cold occurred between the 23d and 28th, and that the cheese when delivered in New York was frozen, and thereby damaged to the amount

of $1,100.55, and for this amount was the verdict and judgment in favor of Hazen, from which the railway company appeal.

As an excuse for this delay beyond the usual period of such transit, the defendant at the trial below sought to prove that the sole cause of the delay was the obstruction of the passage of trains in the neighborhood of Lauitsburg, resulting from the irresistible violence of a large number of lawless men, acting in combination with brakemen, who up to that time had been employed by the railway company. That the brakemen refused to work, and were discharged, and other brakemen promptly employed; but the moving of trains was prevented by the threats and violence of a mob. This evidence was objected to by the plaintiff, and excluded by the court. This, we think, was error. It is doubtless the law that railway companies cannot claim immunity from damages for injuries resulting in such cases, from the misconduct of their employees, whether such misconduct be wilful or merely negligent. If employees of a common carrier suddenly refuse to work, and the carrier fails promptly to supply their places with other employees, and injury results from the delay, the carrier is responsible; such delay results from the fault of the employees. The evidence offered in this case, however, tends to prove that the delay was not the result of a want of suitable employees to conduct the trains, for the places of the "strikers" were (according to the proof offered) promptly supplied by others. The proof offered tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen and others acting in combination with them. These men, at the time of the lawlessness, were no longer the employees of the company. The case supposed is not distinguishable, in principle, from the assault of a mob of strangers. All the testimony on this subject should have been submitted to the jury for their determination of the question, whether, under all the circumstances, the period of transit was unnecessarily long.

To the delay resulting from the refusal of the employees of the company to do duty, the company is undoubtedly responsible; for delay resulting solely from the lawless violence of men, not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had but a short time before been employed by the company.

Where employees suddenly refuse to work and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributed to the misconduct of the employees in refusing to do their duty, and the misconduct in such case is justly considered the proximate cause of the delay, but when the places of the recusant employees are promptly supplied by others, competent men, and the "strikers" then prevent the new employees from doing duty, by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employees but arises from the misconduct of persons for whose acts the carrier is in no manner responsible.

The judgment is therefore reversed, and the cause remanded for a new trial.

Walker, Craig, & Scholfield, JJ.

We dissent from the reasoning and conclusion in the foregoing opinion.—*Chicago Legal News.*

REVIEWS.

Land Transfer Made Easy. Practical Suggestions, with Concise Precedents. By E. H. Barlee, Esq., Solicitor of the Supreme Court, England. London: Waterlow and Sons (Limited).

The author has thrown together in this pamphlet several practical suggestions for improving the system relative to the transfer of land. In England the trouble and outlay to which vendors and purchasers are exposed are very great, and the author suggests that, without uprooting the present system in England, there might be an *ad valorem* scale, in some measure assimilating land transfers to those of stocks and shares. He also proposes the establishment of deed registries in England, in the capital towns of the different counties. Reference is made to registries of this kind in other countries, where they undoubtedly work well. The pamphlet is deserving of notice in view of the attention which the more easy transfer of land is attracting in England and her colonies.

CORRESPONDENCE.

Letters before Suit.

To the Editor of the Law Journal.

Sir,—I find at page 322, of the Law Journal for last year, the following: "The rule that an attorney must first write before proceeding to action, is a harsh one, inasmuch as he can, even in England, collect no fee for such labour," but on referring to "Chitty's Archbold," 12th Ed., page 511, I find as follows: "An attorney is entitled to his costs for writing a letter to the defendant demanding the debt before writ issued." Which of the two statements is correct?

Yours, &c.,

A Subscriber.

[See this matter discussed on page 15. —Eds. L. J.]

Suggested amendments—Realising Mortgage debts on execution

To the Editor of the Law Journal:

Sir,—I refer "Lex" to C. S. U. C. cap. 22, sec. 266. Notwithstanding the provisions of this and the following sections, there are difficulties in the way of realising mortgage debts upon an execution against the mortgagee, and they appear to be two-fold: First, the difficulty of knowing where to place the executions so as effectually to bind the mortgage debt: Second, the difficulty in the way of the sheriff getting hold of the mortgage in order to realise it, under the provisions of the C. L. P. Act.

To meet the first difficulty it might be provided that a *fi. fa.* goods placed in the hands of the sheriff of the county in which the mortgaged lands are situated shall bind the mortgagee's interest without any actual seizure of the mortgage security, but such execution should not prevail against any *bonâ fide* payment made by the mortgagor without actual notice of the execution, otherwise every time a mortgagor made a payment on a mortgage he would have to make a preliminary search in the sheriff's office.

To meet the second difficulty, I would suggest that a summary process might be provided for enabling an execution creditor upon production of a certified copy of the mortgage, or the registered memorial, with the registrar's abstract showing that no assignment had been registered, to obtain a reference to one of the Masters in Chancery, to take all necessary proceedings for redemption or sale, as in a mortgage suit. The provisions of 36 Vict., cap. 8, sec. 36, (O) do not appear ample enough for this purpose.

If the first suggestion should be adopted, it would be necessary to guard against the conflict of right which might otherwise arise between an execution creditor who has seized the mortgage itself in the county of A., and another who has a prior execution in the county of B. where the lands are situate.

G. S. H.

Certificate of Lis pendens at Law.

To the Editor of the Law Journal:

Sir,—Allow me to inform "Lex" that in the case of *Medcalf* v. *Richards*, a certificate of *lis pendens* was granted on the 10th December inst., by Mr. Dalton. The full Court of Chancery, however, on the previous day had determined in *Burns* v. *Griffin* that the inability of the Common Law Courts to issue such certificates was a sufficient ground for a plaintiff coming into Chancery to obtain the fruits of an action at law, notwithstanding the provisions of the Administration of Justice Act, 1873. This decision was mentioned to Mr. Dalton, who granted the certificate *quantum valeat*.

Yours, &c.,

Q.

FLOTSAM AND JETSAM.

A disciple of Coke in Charleston, S. C., when asked by a "brudder" to explain the Latin terms "de facto" and "de jure," replied: "Dey mean dat you must prove *de facts* of de case to de satisfaction of *de jury*."

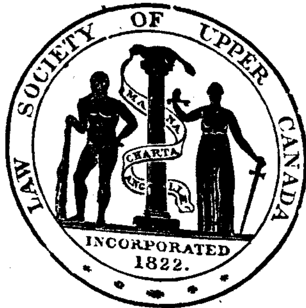
The Bar and the Moustache.—Although the Paris students may fairly claim to be more free and disorderly than those of London or Berlin, it is quite clear that the Paris Bar is under as strict a discipline as that of any city in the world. An edict has gone forth to the effect that moustaches are at once and irrevocably to disappear from the upper lips of all advocates in the Palais de Justice. Of late years the dread authorities of the Faculté de Droit had connived at the wearing of these unprofessional ornaments, and grave Professors had even carried into the lecture-room the forbidden embellishments. But the Minister of Justice has interfered to correct the scandal, and the learned counsel will no longer be permitted to dispense with their razors. The incident has given occasion not only to a great deal of grumbling on the part of those gentlemen, but to some considerable amount of discussion in the public press as to the history of moustaches. —*Irish Law Times.*

At an examination for admission to the bar of Ohio, the examiner propounded this question: "A great many years ago there lived a gentleman named Lazarus, who died possessed of chattels, real and personal. After this event, please inform us, young man, to whom did they go?" The student replied, "to his administrator and his heirs." "Well, then," continued the examiner, "in four days he came to life again; inform us, sir, whose were they then?" Which interesting inquiry we submit to the lawyers. I am not a lawyer, but I see no difficulty in the inquiry. Lazarus died and was buried. As soon as he died, his property, if he left no will, vested in his legal heirs. The law gives no man the right to die for four days and then come to life again. Legally, Lazarus could't rise. I have no doubt the Supreme Court would decide that the Lazarus who rose was not the Lazarus who died. He was a new Lazarus. The new Lazarus would of course know and feel within himself that he was the old Lazarus, and go around boring his legal friends by talking about his legal wrongs, but every lawyer would leave him as quickly as possible, saying in parting, "It's a hard case, but if your heirs can prove your death, and that they came in legally under the statute, there is no way for to make them disgorge. All you can do is this—you're a young fellow about sixty—hire out as a clerk, try to save something from your salary so as to go into business again, build up a grand estate, and perhaps your heirs will reconize your identity.—*Cleveland Herald.*

Death of Sir John Stuart.—We record with regret the death of Sir John Stuart, which occurred on Sunday last. Sir John had reached the mature age of eighty-three years, and up to the age of seventy-eight years he had discharged the arduous duties of Vice-Chancellor. The learned gentleman was much respected, his private character presenting traits worthy of all admiration. Moreover, his delightful vein of humour, his grand manner, and his extraordinary adhesion to ancient ideas and theories, made him a man of mark, altogether independently of his legal and judicial career.

In political life he was famous for the extremity of his opinions in the direction of absolute and unyielding Toryism, and on the bench he was prone to take liberties even with Acts of Parliament which clashed with his own views of equity. Few judges have been more beloved by the profession, or have attracted a larger circle of friends; but the authority of Sir John Stuart on points of law never stood high, his resolution to do what he considered justice in defiance of precedent and positive law having tempted him into decisions from which his intellect and learning would otherwise have recoiled.

Sir John was the second son of the late Dugald Stuart, of Ballachulish, in the county of Argyll, and was born in the year 1783. He was called to the bar at Lincoln's Inn in November, 1819. In January, 1846, on Mr. Gladstone becoming Colonial Secretary under Sir Robert Peel, Mr. Stuart entered on parliamentary life, being returned to the House of Commons for the constituency of Newark, in the Conservative and Protectionist interests. He sat for Newark till 1852, when he exchanged its representation for that of Bury St. Edmunds. In the October of the same year he was raised to the bench as one of the Vice-Chancellors, when he received the honour of knighthood. He continued to sit as a judge in equity for nearly twenty years, retiring on a well-earned pension in 1871, when he was sworn a member of Her Majesty's Privy Council.



LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Michaelmas Term, 40th Victoria.

During this Term, the following gentlemen were called to the degree of Barrister-at-Law.

H. H. G. Ardagh.
J. S. Fraser.
E. P. Clement.
W. H. Culver.
D. W. Clendenan.
I. W. Liddell.
J. W. Nesbitt.
A. C. Galt.
H. Symons.
A. Ogden.
J. L. Whiteside.
F. W. Casey.
C. L. Ferguson.
F. S. Nugent.
T. E. Lawson.
R. Harcourt.
G. A. Cooke.
J. C. Patterson.
J. C. Judd.

Mr. R. E. Wood who passed his examination last Term, and Messrs Maitland McCarthy, E. W. Scane, James Warren and Francis Tyrrell, who applied under 39 Vict., cap. 31, were also called to the Bar.

The following gentlemen received Certificates of Fitness:

John L. Whiting.
John Crerar.
A. C. Galt.
F. W. Patterson.
W. H. Culver.
E. F. B. Johnston.
C. W. Woodward.
C. L. Ferguson.
J. L. Whiteside.
C. S. Jones.
T. M. Mahon.
T. M. Daly.
F. S. Nugent.
J. Creighton.
H. E. A. Kent.
R. J. Duggan.
J. C. Patterson.

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

Graduates.

John B. Rankin, B.A.
William Mundell, B.A.
Richard Willis Jameson, B.A.
John Brown McLaren, B.A.
Alexander Chrysler, B.A.
Henry Edmund Morphy, B.A.
Frederick Covert Moffat, B.A.

Junior Class.

Allan McLean.
James Thompson.
Edward A. Peck.
Harry Fowler Lee.
William Blackader.
William Valleau Maclise
John W. Redick.
Thomas Adam.
Samuel Squire Young.
William Cayley Hamilton.
Alfred Beverley Cox.
John A. Gilbert.
Archibald McKay.
Robert K. Cowan.
Frederick A. Dawson.
William Havelock Garvey.
Daniel Fraser McWatt.
Robert Gilray.
Harry V. Carter.
George S. Lynch Staunton.
John Barry Scholefield.
Frank Marshall McDougall.
George Rivers Sandesson.
Arthur H. McKenzie.
William R. Thompson.
William Proudfoot.
Henry Stephen Blackburn.
Newenham Graydon.
Alexander John Snow.

Articled Clerks.

Charles Howard Widdifield.
Robert Miller.

After Hilary Term, 1877, a change will be made in the Preliminary Examinations.

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

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

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

LAW SOCIETY, MICHAELMAS TERM.

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

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

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vict. c. 16, Statutes of Canada, 29 Vict. c. 28, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows :—

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

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

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

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

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

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

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

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

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

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

Treasurer.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

TO THE BENCHERS OF THE LAW SOCIETY :

The Committee on Legal Education beg leave to submit the following report :

Your Committee have had under consideration the representations made from time to time to the Benchers, and referred to your Committee, respecting the different courses of study prescribed for Matriculation in the Universities, and for Primary Examination in the Law Society, and now recommend :—

1. That after Hilary Term, 1877, candidates for admission as Students-at-Law, (except Graduates of Universities) be required to pass a satisfactory examination in the following subjects :—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law ; Ovid, Fasti, B. I., vv. 1 300 ; Virgil, Æneid, B. II., vv. 1-317 . Translations from English into Latin ; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic ; Algebra, to the end of quadratic equations ; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar ; Composition ; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek :

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musaeus, Stumme Liebe Schiller, Lied von der Glocke.

2. That after Hilary Term, 1877, candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), be required to pass a satisfactory examination in the following subjects :—

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

3. That a Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

4. That all examinations of Students-at-Law or Articled Clerks be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

OSGOODE HALL, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

Treasurer.