DIARY FOR SEPTEMBER.

1. Fri. *St. John's*
2. Sat. County Court Term (York) ends.
6. SUN. *13th Sunday after Trinity.*
8. Fri. *Nativity of the Blessed Virgin.*
10. SUN. *14th Sunday after Trinity.*
21. Thes. *St. Matthew.*
17. SUN. *15th Sunday after Trinity.*
27. SUN. *16th Sunday after Trinity.*
29. Fri. *St. Michael.*

THE

Canada Law Journal.

SEPTEMBER, 1871.

HOW TO BECOME A LAWYER IN ONTARIO.

FIRST PAPER.

Scarcely any other portion of the statute law appears to be so rarely read and so little understood as the Acts which directly affect the profession itself. We very much doubt whether one in every five among the readers of this article can tell when and by what statute the necessity for "keeping term" was obviated, and probably a still fewer number can refer to the enactment which provides that volunteer service may be reckoned as part of the time of an articled clerk.

And this neglect of the golden maxim, "Read and you will know," seems especially to characterize those members of the profession who sign themselves *students* at law, but who appear to forget that he who aims at becoming a successful lawyer must take nothing for granted, must depend for his information not upon the officials of the Law Society or the conductors of legal and other journals, but must *for himself* "read, mark, learn and inwardly digest" the statutes which are open to him as well as to the most learned counsel in the land.

We are constantly in receipt of letters from young men of inquiring minds, but not so certainly of studious habits, each of whom seems to regard his case as peculiar and exceptional, and to be blissfully ignorant of the fact that every step in his legal career from its inception to its consummation, has long since received the attentive consideration of the Legislature and the Benchers; and we understand that some "that are in authority over us" in the Law Society, have even more reason than ourselves to complain of this want of independent research among those who are just entering the profession.

We make these remarks in no censorious spirit. Nothing can possibly give us greater pleasure than to afford every assistance in our power to those, who after making use of all the means at their command, are still unable to decide the questions which will arise upon the construction of these statutes and regulations. What we protest against is not the *use* but the *abuse* of "the right to inquire," and the practice of rushing at once into print for a solution of difficulties which the most cursory reading of the statutes would often set at rest.

The law relative to the admission and conduct of barristers and attorneys is contained in chaps. 34 and 35 of the C. S. U. C., and in the following amending statutes:—23 Vic. chaps. 47 & 48; 28 Vic. c. 21; 29 Vic. c. 29; 29-30 Vic. c. 49; 31 Vic. c. 23 (Ont.), and 32 Vic. c. 19 (Ont.). Only three of these are of any length, each of the remaining ones consisting of a single sentence only.

The 23rd Vic. chaps. 47 and 48, amends the Consolidated Act by providing that a University degree, in order to entitle its possessor to admission or call in three (instead of five) years, must have been taken before the commencement of, and not during, his legal career. This statute (chap. 47) with the Act which it amends, are the only enactments of the Legislature affecting barristers *as such*, that branch of the profession having been considered competent to govern itself.

The statutes remaining to be considered apply only to attorneys, who are, to a much greater extent than members of the bar, under the control of the Legislature.

Of these, the 28 Vic. c. 21, extended the time of service necessary to entitle a Canadian or English barrister to be admitted as an attorney, from one year to three years; made certain verbal amendments in the two first sub-sections of the C. S. U. C. c. 48 s. 3; and required that an articled clerk on applying for admission, should, together with his own affidavit, file a certificate from his principal of due service under his articles.

29 Vic. c. 29 simply repealed the fifth subsection of sec. 3 of the Consolidated Act.

29-30 Vic. c. 49 (Hon. J. H. Cameron's Act), made new provisions respecting attorneys' annual certificates, and in the concluding sec-

tion (sec. 7) provided that the Benchers might allow to an articled clerk any time spent on active service with the volunteers or militia, as time served under his articles; a power which is, we believe, almost invariably exercised.

Then follows Mr. Blake's Act (31 Vic. c. 23, Ont.), to which we shall refer more fully hereafter; and, finally, the Act of 32 Vic. c. 19 (Ont.), which briefly dispensed with the attendance of law students upon the sittings of the courts during term. If, in addition to these statutes, the student will refer to the regulations of the Law Society which are collected in the last edition of the Law List, pp. 74–101, he will have completed his examination of the authorities which affect the question of admission to the profession, and his lucid explanation of points which are generally thought to be

"Wrapped about with awful mystery,"

will entitle him to be regarded as a legal oracle among those of his compeers who are not readers of the *Law Journal*.

In comparing and examining these not very numerous authorities, he must, however, keep clearly in mind the distinction between the course marked out for a "student at law," which ends in call to the bar, and that which is prescribed for an "articled clerk," terminating in his admission as an attorney. In order to the first, no service under articles is necessary, and no intermediate examinations are required *by enactment of the Legislature*, which has delegated its power over barristers at law (in both their embryonic and fully developed condition), almost wholly to the Law Society.

By resolutions of the Benchers, however, (Law List p. 99) the same examinations are required of students at law as are necessary in the case of articled clerks; and if the candidate adopts the usual, indeed the almost invariable plan of taking both these courses at the same time, he will (so far, at least, as his intermediate examinations are concerned) require to pay attention only to the regulations respecting the admission of attorneys; for by No. 6 of the resolutions aforesaid, the examinations required by statute (31 Vic. c. 23, s. 1) to be passed by him as an articled clerk, shall be allowed him as a student at law "without further examination or certificate to that effect by the Secretary of the Law Society"

Supposing then that "our hero," having attained the mature age of sixteen years, (Law List p. 76), has chosen for himself the profession of the Law, his first care will be to give notice that he intends to present himself before the examiners for admission. This he can do by asking any legal friend whose business requires his presence in Toronto during the coming term, *i. e.*, between the 20th of November and the 9th of December next, or any City barrister or student, to give such notice for him; taking care to accompany the request with a fee of five shillings, which must be paid to the Secretary on filing the notice.

He will then, in all probability, select an office (or have it selected for him) and article himself to a practising attorney or solicitor to serve him for the term of five (or three) years "fully to be complete and ended." The only point worthy of remark with regard to the articles is that they should be filed (with proper affidavits of execution), within three months from their date, in the office of the Queen's Bench or Common Pleas at Osgoode Hall; for, if not filed within such time, "the service of the clerk *shall* be reckoned *only from the date of filing;*" (28 Vic. c. 21 s. 9), and the previous service will not be counted as part of the five (or three) years required.

To return to the subject of admission to the Law Society. If the notice above mentioned be given during the coming Michaelmas term, (*i. e.*, between the 20th November and the 9th December), the candidate will present himself for examination at Osgoode Hall on Tuesday, the 23rd January, 1872. He will probably have received from the Secretary of the Law Society, a notice informing him of the day when the examination is to take place, but should no such notice be sent he will be justified in appearing at the time we have named (Law List, p. 76), prepared to pay his admission fee of $46, and with the first and third books of the Odes of Horace and the three first books of Euclid at his finger-ends, —figuratively, of course, for no literal contact, with the latter at least, will be permitted. If he intends to "go up" in the Senior or University Class, he must also read the first book of the Iliad; and if this and the Horace are prepared as they should be, he need not (with deference to the dread tribunal be it spoken) feel any intense anxiety as to his mathematical attainments. Of course, in

thus expressing ourselves, we are not speaking in any sense "with authority;" but we are aware of no instance for some time past in which a graduate or senior student to whom Homer and Horace seemed as familiar as they ought to be, was required to demonstrate a proposition in Euclid, or terrified by a question on Locke, Logic, or Astronomy.

So soon as the candidate has passed (we trust with credit) through this preliminary ordeal, and has had the usual item, mentioning his "creditable examination," "compliments of the Benchers," etc., duly inserted in the local paper,—we should recommend him, if he be what is called "a three years' man," to fall at once to the work of preparing for his "first intermediate."

A careful perusal of Mr. Blake's Act (31 Vic. c. 23, Ont.), will shew that this examination may be passed *at any time* during the third year of a five years course, or during the first year of service in case the clerk has previously taken a degree. There seems to be an impression, especially among the latter class, that a year must elapse after admission and before this first examination. Such, however, is not the case, and, as will be seen hereafter, a mistake on this point may occasion a delay of three or even six months before admission to practise. It is true the third resolution respecting *students at law* provides that the first intermediate examination of a three years' man "shall be in his *second** year, and the second within the first six months of his third year;" but the effect of this regulation must not be misunderstood.

In the first place, it is *not intended* to apply to articled clerks, who are exempted from its scope by resolution No. 6 (already referred to) and are fully provided for in sec. 1 of the statute. The third resolution affects those only for whom no statutory provision has been (or indeed could be) made, and fixes the times of examination in the case of students at law *who are not*, at the same time, *articled clerks*.

Secondly, if an articled clerk should thus attempt to "serve two masters," and conform to a resolution on the face of it intended only for students at law, he would inevitably incur the delay above spoken of. For since by the statute, one year at least must elapse between each examination and the succeeding one, the effect of postponing the first intermediate to any time *within* the second year of service, would be to defer the final (attorneys') examination for at least three months beyond the three years. We are aware of several instances in which this has actually been done, and where articled clerks, in attempting to comply with the regulation referred to, have been compelled to wait for three months after the expiration of their term of service before presenting themselves to be examined for admission.

The first intermediate, then, should be passed early in the antepenultimate year of service. Between the first and second of such intermediate examinations, the interval of a year is required by the Act (sec. 1), and in these cases it is somewhat strictly enforced. So far as we are aware but one instance has yet occurred in which the Benchers have exercised the power conferred upon them by section 6 to shorten the interval between these examinations in certain cases.

Between the second intermediate and the final examination for admission, *one year at least* must elapse. According to the words of the statute, this second examination must be passed "at some time not less than one year" after the first intermediate, "and *during the year next but one* before the time of the final examination."

We may notice here the peculiarity of the wording adopted in this section of the Act. "Thereafter" in the seventh line grammatically refers to the final examination, which would of course be absurd, the intention being that it should refer to the examination to be had in "the year next but two, &c.," *i.e.*, the first intermediate examination.

It is clear then that a student admitted in the junior class of November, 1867, or in the University class of November, 1869, who has not passed his first intermediate until November, 1870, *must* take the second intermediate in Michaelmas term, 1871, or else be delayed three months beyond the statutory period before he can go up for admission. He cannot pass this second examination *before* November, 1871, since it must be "not less than one year" after the first, nor can he pass it *after* November, 1871, if it is to be

* The substitution of "third" for "second" in the Law List, p. 99, and elsewhere, is evidently a clerical error or printer's mistake.

"during the year last but one before the time of his final examination" (November 1872), for that year will expire in November, 1871. Therefore, since this last condition is statutory and imperative, if the first of the examinations under Mr. Blake's Act be delayed until February, 1870, or the second be not passed in November, 1871, the final examination and admission of the student will be delayed until February, 1873,—three months beyond the term of service required by the statute.

There is no doubt, however, that *as a student at law*, a candidate may pass the intermediate examinations at intervals not necessarily the same as those mentioned in the Act, (See Rules E. T. 1868, Law List p. 99), but this will be of no avail *quoad* his admission as an attorney, for although the Benchers may allow the examinations of an articled clerk, passed under the statute, to enure to his benefit as a student at law, there is no provision, nor, from the nature of the case, have they any authority to provide that the converse of this shall also be true. The attorney is almost wholly a creature of the Legislature, which has prescribed the time of his examinations, and fixed the intervals between them; and no resolution of the Law Society can possibly overrule the express enactment of the statute.

It is probable, also, that no question would arise as to whether a student had complied with the law in this respect, until his final examination, when any failure to satisfy the provisions of the statute would of course become apparent on the certificate of the Secretary under the 7th resolution respecting articled clerks.

It is only necessary to remark, in addition to what has already been said, that these examinations take place at 10 a. m. on the first Wednesday of every term, and that under Rule 1, every articled clerk, before presenting himself for examination, must file with the Secretary of the Law Society a certificate signed by himself, shewing the date of the execution and filing of his articles, the name of his principal, the number of assignments, the year of his service, and whether he is a graduate of any University. This certificate should, strictly speaking, be filed on or before the first day of the term; but, in practice, is usually received by the Secretary on the morning of the examination. A fee of one dollar is required on filing it.

The subject of examination for call to the bar and admission to practise will be discussed in a future article, but here, for the present at least, we may resign the post of Mentor to our imaginary Telemachus, feeling sure that by the time he is prepared to "go up for his final" he will have learned the lesson of self-help well enough to depend no longer upon editorial opinions, and will, we trust, have ceased to take up the time and trespass upon the patience of certain Benchers whose kindness to students has become proverbial, by rushing into a correspondence which can only end in referring him to the Acts respecting Attorneys.

LAW REFORM COMMISSION.

The following gentlemen have been appointed Commissioners to inquire into and report upon the present jurisdiction of the several Law and Equity Courts of Ontario, and upon the modes of procedure now adopted in each, and upon such other matters and things therewith connected as are set out in the commission:—Hon. Mr. Justice Wilson, Hon. Mr. Justice Gwynne, Hon. Vice-Chancellor Strong, His Honor Judge Gowan, and Mr. Christopher Patterson, Barrister. Amongst other matters, they are to consider the advisability of a fusion of Law and Equity, and to suggest a scheme for carrying it into effect.

We have heard it remarked that there is an undue preponderance of Common Law men on the Board; but this objection can scarcely be said to be well-founded, when we remember that Mr. Gwynne, though now on the Common Law Bench, for many years devoted himself principally to Chancery business, and was for some time a student in the office of Mr. Rolt in England; and again Mr. Gowan, so far as he represents a class, must be looked upon as a representative of the Division Court system, in which courts, justice is to be administered according to "equity and good conscience." Even if there is anything in the objection it must be remembered that the Commission will embrace other subjects than the fusion of Law and Equity, some of which would seem to require greater knowledge of procedure at law than in Chancery.

As to the qualifications of the several members of the Commission, especially for that branch of it to which we have particu-

larly referred, the selection has been most happy. Judge Wilson, who is to be Chairman, is a man of most patient industry, great research and comprehensive mind, and will give the matter no light attention, and with his coadjutors may be relied on to investigate the subject thoroughly. Judge Gwynne, from his intimate knowledge of both systems, practically as well as theoretically, will be especially competent to form a correct opinion as to their relative merits, whenever it may be necessary to contrast the two, and what can best be taken from each to form a complete whole; and he will enter upon the discussion free from any supposed bias of either system, natural enough to those who have devoted themselves almost entirely to one of them. Than Vice-Chancellor Strong, no man is more competent to explain the theory and practice of that Court, which has been a witness of his intellectual power and learning. Mr. Gowan has long enjoyed the confidence of and given great assistance to successive administrations in various ways, and has an increasing reputation. No person in Canada has such intimate knowledge as he of the theory and practical working of the Division Court system, which is really the nearest approach at present to a fusion of law and equity, albeit the notions of some of its judges as to equity are of the crudest. And to conclude, the reputation of Mr. Patterson at the Bar, is very high; without the showy qualities of some others, he is known to be a man with broad views of things, and of much learning and industry, and will be a most useful element in this Commission.

It may be a question, however, how far it is advisable for the Commission to mature any scheme for the consolidation or alteration of any of the Courts as at present existing, until some decided step has been taken in England, where a similar subject has received the careful attention of a most intelligent and learned Commission for some time past. There is no such necessity for an immediate revolution in our Courts, even admitting, for the sake of argument, that a change is advisable, as to warrant any hasty action, whereby we should lose the benefit to be derived from the light to be thrown on this most difficult subject in England.

SELECTIONS.

The Free Navigation of the River St. Lawrence by the Citizens of the United States.

The consolidation of the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, into the Dominion of Canada, has opened a wide field for the exercise of statesmanship to the leaders of the Canadian people. Dependent but in name, Canadians are now free to shape the destinies of their country.

With increased powers have arisen new responsibilities. The Dominion must now bear a full share of the burthens of the realm in lieu of the trifling weights laid on the infant Provinces by the Mother Country. Conflicting rights require adjustment, national and religious prejudices claim treatment, and international difficulties demand settlement. To restore friendly commercial relations with our neighbours, but lately sources of prosperity; to subdue the jealousy of race—the bane of the Province of Canada; to extinguish the embers of religious feud, now threatening to burst into flame; to arrange the Fishery, the St. Lawrence, and the Fenian difficulties, all pregnant with war, if not settled at once and for ever,—are some of the tasks of the Ministry of the day. Verily, the bark of State requires skilful handling by its pilots to avoid the reefs and shoals lying in its course.

With a population of but four millions, Canada is bounded to the south by the United States, inhabited by nearly forty millions of people. The absorption of Mexico and the Dominion into the Union is favoured by many American statesmen; the Continent of North America, with the adjacent islands, forming one vast Republic, is the dream of United States politicians. The instability of parties, the corruption pervading the body politic, and the power of the mob, all combine to make the policy of the United States uncertain and dangerous to their neighbours. No expedient to divert the minds of their people from the strife of party, would be so popular as a foreign war, undertaken for the acquisition of territory on this continent; each individual would think that in the national losses he would secure a fortune, and would smother his patriotism in his selfishness.

For many years past the United States Government have nursed grievances against their neighbours—it is of more importance that the Alabama claims should never be settled than that by a money payment far exceeding the actual losses, the grievance should be abated. The Fishery, the St. Lawrence, and the Fenian questions, are all open sores, irritating to Canada and Great Britain, which, when the opportunity is favourable, may furnish pretexts for a declaration of war.

The Free Navigation of the River St. Lawrence.

It is the object of this paper to investigate the claim so persistently brought forward by the United States to the right of free navigation of the River St. Lawrence, to determine its validity, and to suggest, if possible, a mode in which it can be quieted for ever.

President Grant, in his Message to Congress, delivered on the 5th Nov. 1870, thus drew the attention of his countrymen to the subject:

THE NAVIGATION OF THE ST. LAWRENCE.

A like unfriendly disposition has been manifested on the part of Canada in the maintenance of a claim of right to exclude the citizens of the United States from the navigation of the St. Lawrence. This river constitutes a natural outlet to the ocean for eight States with an aggregate population of about 17,600,000 inhabitants, and with an aggregate tonnage of 661,367 tons upon the waters which discharge into it. The foreign commerce of our ports on these waters is open to British competition, and the major part of it is done in British bottoms. If the American steamer be excluded from this natural avenue to the ocean, the monopoly of the direct commerce of the Lake ports with the Atlantic would be in foreign hands, their vessels on transatlantic voyages having an access to our lake ports which would be denied to American vessels on similar voyages. To state such a proposition is to refute its justice. During the administration of Mr. John Quincy Adams, Mr. Clay unquestionably demonstrated the natural right of the citizens of the United States to the navigation of this river, claiming that the act of the Congress of Vienna in opening the Rhine and other rivers to all nations showed the judgment of European jurists and statesmen that the inhabitants of a country through which a navigable river passed have a natural right to enjoy the navigation thereof as far as the sea, even though passing through the territory of another power. This right does not exclude the co-equal right of the sovereign possessing the territory through which the river debouches into the sea to make such regulations relative to the policy of the navigation as may be reasonably necessary, but these regulations should be framed in a liberal spirit of comity, and should not impose needless burdens upon the commerce which has the right of transit. It has been found in practice more advantageous to arrange these regulations by mutual agreement. The United States are ready to make any reasonable arrangement as to the police of the St. Lawrence which may be suggested by Great Britain. If the claim made by Mr. Clay was just when the population of the States bordering on the shores of the lake was only 3,400,000, it now derives greater force and equity from the increased population, wealth, production, and tonnage of the States on the Canadian frontier. Since Mr. Clay advanced his argument on behalf of our right, the principles for which he contended have been frequently and by various nations recognized by law, and by treaty extended to several other great rivers. By the treaty concluded at Mayence in 1831, the Rhine was declared free from the point where it is first navigable into the sea. By the convention between Spain and Portugal, concluded in 1835, the navigation of the Douro, throughout its whole extent, was made free for the subjects of both countries. In 1853, the Argentine Confederation, by treaty threw open the free navigation of the Paran and Uruguay rivers to the merchant vessels of all nations. In 1856, the Crimean war was closed by a treaty which provided for the free navigation of the Danube. In 1858, Bolivia, by treaty, declared that it regarded the Rivers Amazon and La Plata, in accordance with the fixed principles of national law, as highways or channels opened by nature for the commerce of all nations. In 1859, the Paraguay was made free by treaty, and in December, 1866, the Emperor of Brazil, by Imperial decree, declared the Amazon to be open to the frontier of Brazil to the merchant ships of all nations. The greatest living British authority on this subject, while asserting the abstract right of the British claim, says it seems difficult to deny that Great Britain may ground her refusal upon strict law; but it is equally difficult to deny, first, that in so doing she exercises a law harsh in the extreme, and secondly, that her conduct with respect to the navigation of the St. Lawrence is in glaring and discreditable inconsistency with her conduct with respect to the navigation of the Mississippi. On the ground that she possessed a small domain in which the Mississippi took its rise, she insisted on the right to navigate the entire volume of its waters. On the ground that she possessed both banks of the St. Lawrence, where it disembogues itself into the sea, she denies to the United States the right of navigation, though about one-half of the waters of Lakes Ontario, Erie, Huron, and Superior, and the whole of Lake Michigan, through which the river flows, are the property of the United States. The whole nation is interested in securing cheap transportation from the agricultural States of the west to the Atlantic seaboard, to the citizens of those States. It secures a greater return for their labour to the inhabitants of the seaboard. It offers cheaper food to the nation, an increase in the annual surplus of wealth. It is hoped that the Government of Great Britain will see the justice of abandoning the narrow and inconsistent claim to which the Canadian Provinces have urged their adherence."

Wheaton, in his "Elements of International Law," gives a statement of the controversy on the subject in the following words:

"The claim of the people of the United States of a right to navigate the St. Lawrence to and from the sea, was, in 1826, the subject of discussion between the American and British governments.

"On the part of the United States Government, this right is rested on the same grounds of natural right and obvious necessity which had formerly been urged in respect to the river Mississippi. The dispute between different European powers respecting the navigation of the Scheldt, in 1784, was also referred to in the correspondence on this subject; and the case of that river was distinguished from that of the St. Lawrence by its peculiar circumstances. Among others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river which passes within the dominions of

Holland, was entirely artificial; that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at a great expense.

"Hence, probably, the motive for that stipulation in the treaty of Westphalia, that the lower Scheldt, with the canals of Sas and Swien, and other mouths of the sea adjoining them, should be kept closed on the side belonging to Holland. But the case of the St. Lawrence was totally different, and the principles on which its free navigation was maintained by the United States had recently received an unequivocal confirmation in the solemn act of the principal States of Europe.

"In the treaties concluded at the Congress of Vienna, it had been stipulated that the navigation of the Rhine, the Neckar, the Mayn, the Moselle, the Maese, and the Scheldt, should be free to all nations. These stipulations, to which Great Britain was a party, might be considered as an indication of the present judgment of Europe upon the general question.

"The importance of the present claim might be estimated by the fact that the inhabitants of at least eight States of the American Union, besides the territory of Michigan, had an immediate interest in it, besides the prospective interests of other parts connected with this river, and the inland seas through which it communicates with the ocean. The right of this great and growing population to the use of this its only natural outlet to the ocean, was supported by the same principles and authorities which had been urged by Mr. Jefferson in the negotiation with Spain respecting the navigation of the river Mississippi. The present claim was also fortified by the consideration that this navigation was, before the war of the American Revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the Mother Country and the Colonies in the war of 1756. The claim of the United States to the free navigation of the St. Lawrence was of the same nature with that of Great Britain to the navigation of the Mississippi, as recognized by the 7th article of the Treaty of Paris in 1763, when the mouth and lower shores of that river were held by another power. The claim, whilst necessary to the United States, was not injurious to Great Britain, nor could it violate any of her just rights.

"On the part of the British Government, the claim was considered as involving the question whether a perfect right to the free navigation of the River St. Lawrence could be maintained according to the principles and practice of the law of nations.

"The liberty of passage to be enjoyed by any one nation through the dominions of another, was treated by the most eminent writers on public law, as a qualified occasional exception to the paramount rights of property.

"They made no distinction between the right of passage by a river, flowing from the possessions of one nation through those of another to the ocean, and the same right to be enjoyed by means of any highway, whether of land or water, generally accessible to the inhabitants of the earth. The right of passage then, must hold good for other purposes besides those of trade,—for objects of war as well as for objects of peace,—for all nations, not less than for any nation in particular,—and be attached to artificial as well as to natural highways. The principle could not therefore be insisted on by the American Government unless it was prepared to apply the same principle by reciprocity, in favour of British subjects, to the navigation of the Mississippi and the Hudson, access to which from Canada might be obtained by a few miles of land carriage, or by the artificial communications created by the canals of New York and Ohio. Hence the necessity which has been felt by the writers on public law, of controlling the operation of a principle so extensive and dangerous, by restricting the right of transit to purposes of *innocent* utility, to be exclusively determined by the local sovereign. Hence the right in question is termed by them an *imperfect* right.

"But there was nothing in these writers, or in the stipulations or treaties of Vienna, respecting the navigation of the great rivers of Germany, to countenance the American doctrine of an absolute natural right. These stipulations were the result of mutual consent, founded on considerations of mutual interest, growing out of the relative situation of the different States concerned in this navigation. The same observation would apply to the various conventional regulations which had been, at different periods, applied to the navigation of the River Mississippi. As to any supposed right received from the simultaneous acquisition of the St. Lawrence by the British American people, it could not be allowed to have survived the treaty of 1783, by which the independence of the United States was acknowledged, and a partition of the British dominions in North America was made between the new government and that of another country.

"To this argument it was replied, on the part of the United States, that if the St. Lawrence were regarded as a *strait*, connecting navigable seas, as it ought properly to be, there would be less controversy. The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas drawing after it that of passing the straits.

"The United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects

them with the ocean. The right to navigate both (the lakes and the ocean), includes that of passing from one to the other through the natural link.

"Was it then reasonable or just that one of the two co-proprietors of the lakes should altogether exclude his associate from the use of a common bounty of nature, necessary to the full enjoyment of them?

"The distinction between the right of passage claimed by one nation through the territories of another, on land, and that on navigable water, though not always clearly marked by the writers on public law, has a manifest existence in the nature of things.

"In the former case, the passage can hardly ever take place, especially if it be of numerous bodies, without some detriment or inconvenience to the State whose territory is traversed. But in the case of a passage on water, no such injury is sustained. The American Government did not mean to contend for any principle, the benefit of which, in analogous circumstances, it would deny to Great Britain.

"If, therefore, in the further progress of discovery, a connection should be developed between the River Mississippi and Upper Canada, similar to that which exists between the United States and the St. Lawrence, the American Government would be always ready to apply, in respect to the Mississippi, the same principles it contends for in respect to the St. Lawrence.

"But the case of rivers which rise and debouch altogether within the limits of the same nation, ought not to be confounded with those which, having their sources and navigable portions of their streams in States above, finally discharge themselves within the limits of other States below.

"In the former case, the question as to opening the navigation to other nations, depended upon the same considerations which might influence the regulation of other commercial intercourse with foreign States, and was to be exclusively determined by the local sovereign. But in respect to the latter, the free navigation of the river was a natural right in the upper inhabitants, of which they could not entirely be deprived by the arbitrary caprice of the lower State. Nor was the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect to the navigation of the European rivers, sufficient to prove that the origin of the right was conventional and not natural. It often happened to be highly convenient, if not sometimes indispensable, to avoid controversies by prescribing certain rules for the enjoyment of a natural right.

"The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail which is called for by the complicated wants and varieties of modern navigation and commerce. Hence the right of navigating the ocean itself, in many instances, principally incident to a state of war, is subjected by innumerable treaties, to various regulations. These regulations—the transactions of Vienna, and other analogous stipulations—should be regarded only as the spontaneous homage of man to the paramount Lawgiver of the universe, by delivering His great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected."

Description of the course of the river St. Lawrence, and of the St. Lawrence and Welland Canals.

The St. Lawrence ceases to be the boundary between the United States and Canada at or near St. Regis, an Indian village situated about sixty miles above Montreal.. To the west of that place the northern shores of the river, Lake Ontario and Lake Erie belong to Canada, the southern to the United States, From St. Regis eastward the territory on both sides of the river belongs to Canada. Between St. Regis and Montreal are the Cedars, Cascade and Lachine rapids, all navigable by vessels of small draft of water descending to the sea, but unnavigable by all vessels ascending. The Beauharnois and Lachine canals have been built on Canadian territory, enabling vessels going up the river to pass from Montreal to St. Regis. The Cornwall canal is also on Canadian territory, but the Longue Sault, which it enables vessels to pass, is above St. Regis, and consequently is owned on the south *ad filum aquæ* by the United States. Between Lakes Erie and Ontario the river precipitates itself over the Falls of Niagara. On Canadian territory is the Welland canal, affording means of communication for schooners and propellers of moderate size, between those lakes.

Authorities on the question of free navigation of rivers.

By the Roman law rivers were public, that is to say, belonged to the particular people through whose territory they flowed, but could be used and enjoyed by all men: the use of their banks also was public.

"Riparum quoque usus publicus est juris gentium, sicut ipsicus fluminis. Itaque navem ad eas adplicare, funes arboribus ibi natis religare, onus aliquod in his reponere cuilibet liberum est sicut per ipsum flumen navigare; sed proprietas earum illorum est quorum prædiis hærent; qua de causa arbores quoque in iisdem natæ eorundem sunt." *

The doctrine in England, from a period anterior to the publication of Selden's "Mare Clausum," has been, not only that certain portions of the open sea can be reduced into the absolute possession of a nation, but that all straits and rivers running through its territory belong to the nation in absolute property. Writers upon international law term

* Ins. lib. 2, tit. 1, § 4.

this right that of exclusive use, but at bottom the right claimed and exercised is not the less one of absolute property.*

Of late years the question of the free navigation of rivers flowing through conterminous States has frequently been considered, and many treaties have been made regulating such navigation, to which several of the States of Europe and America have become parties:

Treaty of Paris, 30th May, 1814.
" " 30th March, 1856.
" " 1763.
" " 1783.

Art. 109 de l'acte finale du Congrès de Vienne du 9 juin 1815, concernant la navigation fluviale.

Acte de navigation due Danube, signé le 7 Nov. 1857, Art. 1.

Treaty between Austria and the Duchies of Parma and Modena of the 3rd July, 1849.

Treaties of 12th and 13th October, 1851, of Rio Janeiro.

Treaty of 10th July, 1853, between General Urguiza and the representatives of France, Great Britain, and the United States.

Decret du 10 Oct., 1853 de la bande Oriental.

Treaty between Brazil and Peru of 23rd Oct., 1851.†

The rights of States holding territories on rivers, as the United States and Canada do on the St. Lawrence, are treated in the following manner by the text writers:

"En vertu de ce principe l'état pourra exercer une surveillance et une police pour regler la navigation du fleuve; et pourra pourvoir, par des règlements opportuns, à concilier l'interêt de sa sureté avec le droit des autres nations de se servir du fleuve comme d'un moyen de communication; mais il ne pourra pas défendre positivement aux autres natious la navigation sur ce fleuve."‡

"Si le fleuve parcourt ou baigne plusieurs territoires, les Etats riverains se trovent dans une communion naturelle à l'égard de la proprieté et de l'usage des eaux, sauf la souveraineté de chaque Etat sur tout l'entendue du fleuve, depuis l'endroit où il atteint le territoire jusqu'au point où il le quitte. Aucun de ces Etats ne pourra donc porter atteinte aux droits des autres; chacun doit même contribuer à la conservation du cours d'eau dans les limites de sa souveraineté et le faire parvenir á son voisie. De l'autre part chacun d'eux, de même que le propriétaire unique d'un fleuve, pourrait '*stricto jure*' affecter les eaux à ses propros usages et à ceux de ses regni cŏles, et en exclure les autres." ‖

Wheaton thus expresses himself of what is called "the right of innocent use."

"Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using those elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an innocent use. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating for commercial purposes a river which flows through the territory of different States, is common to all the nations inhabiting the different parts of the banks; but this right of innocent passage being what the text writers call an *imperfect* right, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise." *

APPLICATION OF AUTHORITIES TO QUESTION.

The publicists who favour the doctrine of free navigation of straits running through different States, found their opinions upon the principle, that such straits were made and intended by nature to serve as channels of communication between navigable seas, the common property of all nations. The basis of the American claim to the free navigation of the St. Lawrence is, that nature intended that river as the channel of communication between the Atlantic Ocean, the common property of all peoples, and the great lakes, the joint property of Great Britain and the United States.

The right then of free navigation of the St. Lawrence depends upon the fact of that river being a natural channel of communication between the Atlantic Ocean and the great lakes. If it be not such natural channel, the American claim to its free navigation must be pronounced unfounded.

In order that a strait may be a channel of communication between seas, it must be navigable. If by nature it be not navigable, it cannot be a channel of communication between seas. Therefore no right can exist to navigate an unnavigable strait.

The first point then to be established as the basis of the American claim to the navigation of the St. Lawrence from St. Regis to the ocean, is the navigability of that river in all its course through Canadian territory.

It has already been shewn that at three places between St. Regis and Montreal, the St. Lawrence is unnavigable by ascending

* See 1 Twiss p. 109.

† See Carathéodary "Du Droit International concernant les Grands Cours d'Eau," pp. 112—151.

‡ 1 Fiore Nouveau Droit International, p. 357.

‖ Heffter, § 77, p. 155. See Kluber, § 76; Bluntschli, § 319, 322; 1 Ortolan Dip. de la Mer. p. 146; 1 Kent, pp. 35, 36; Wolsey, § 58.

* Laurence's Wheaton, ed. 1863, p. 346, § 12.

vessels, though navigable by those of a light draught of water descending. It cannot therefore be considered navigable in the full sense of the term, owing to the impossibility of its being used as a channel of communication from the Ocean to St. Regis. The right of the Americans then being measured by the natural facilities of its course for navigation, it may safely be laid down that they have a right to its navigation down to the Ocean, but have no right to navigate it from the Ocean to St. Regis.

Granting, then, the right of navigation from St. Regis to the Atlantic Ocean to the Americans, it remains to be seen whether it can be exercised independently of the Government of Canada.

From the authorities already cited, it is apparent that vessels passing through a navigable strait are subject to the sovereignty of the State to which the strait belongs. The right of passage exists in favour of the foreign vessel, the rights of jurisdiction and sovereignty of such State are unimpaired in every other particular. A State has the right of taking such precautions as may be necessary for self-defence, and the preservation of its revenues and rights within its own territory. The right to search neutral vessels on the high seas exists in favour of belligerents. The right to search all vessels coming into its maritime territory exists in favour of each State in the world, as well in peace as in war time. A State owning a strait has therefore at all times the right of search over passing vessels, and can take such precautions as may be necessary to insure that such passage be not productive of harm to itself. As a natural consequence of the principle, foreign vessels have but the right of innocent passage through such strait, and must submit to the regulations made by the State proprietor, to prevent their abusing the privilege accorded.

The pretension of the British Government in 1826 as to the right of passage through such strait being but an imperfect right, is incontestable.

The navigation downwards of the St. Lawrence would be of but little use to the inhabitants of the United States, if it were impossible for their vessels to make return voyages through the Gulf to the great lakes. The St. Lawrence presents insuperable obstacles to vessels trying to ascend the channel between Montreal and St. Regis. The canals on Canadian territory alone enable vessels to take advantage of the navigable, and to avoid the unnavigable portions of the river, and thus make the upward passage to United States territory.

Without the right of navigating the canals, that of navigating the St. Lawrence would be almost worthless. As yet no direct claim of right to such canal navigation has been advanced by the United States; but in the claim so persistently pressed for many years is concealed in embryo that to the navigation of the canals, to be brought forth at the proper moment.

The foundation whereon reposes the American claim to the navigation of the St. Lawrence from St. Regis downwards is, that that river is the natural channel of communication for vessels from the great lakes to the Ocean, and that it is impossible to make use of such channel without navigating that portion of the river which flows through Canada. Thus the impossibility of passing over United States territory forms part of the corner-stone of the right of United States vessels to pass over Canadian territory, in making use of a bounty of nature.

But above St. Regis, Canadian and United States vessels have equal rights in the navigation of the river, each country owning one of the banks. There are no canals in United States territory, whilst on Canadian soil canals have been made by which vessels can avoid the Longue Sault rapids and the unnavigable parts of the Niagara river, and thus pass with ease from St. Regis up the St. Lawrence to Lake Ontario, and thence through the Welland canal to Lake Erie.

The first objection to the claim to navigate the canals is, that the basis on which rests the American right to navigate the St. Lawrence, viz.: that that river is a natural channel of communication between the great lakes and the sea, does not support a right to navigate artificial canals. It may be urged that they are accessional to the navigation of the river, that having been erected by the government with the intention of thereby overcoming the difficulties of navigation, they are dedicated to the public use of all entitled to exercise the right of navigating the St. Lawrence; that the Americans have the same rights of navigation of the St. Lawrence as British subjects, and consequently they have the same rights in the Canadian canals. On the other hand, it may be urged that the Canadian canals are built on Canadian soil, over which the Americans never possessed any rights; that being superstructures on land, they are owned by the proprietors of the land on which they are built; that having been erected by Canadian labour and capital, they follow the natural order of things and belong to those who built them; that the facts of their having been erected by the State and destined to public use do not give any right to foreign nations freely to navigate them, as in such case the use contemplated was merely that by British subjects; that canals do not necessarily, any more than railroads, by the law of nature, form portions of the public property of the State within which they are built, and that consequently when they are private property no foreign State can possess even a right of servitude upon them, and that to canals generally; the principle of the Roman law which submitted its banks to the use of vessels navigating the river, never has been and cannot now be extended.

If the claim to navigate the canals of Canada be admitted, on the same principle the Erie and the Whitehall canals should also be thrown open to Canadian vessels.

But the impossibility, which may be urged so far as the Cedars, Cascades and Lachine Rapids are concerned, of the United States making canals on their own territory by which those rapids may be avoided, cannot be pleaded in favour of the claim to the navigation of the Cornwall and Welland Canals. The south banks of the St. Lawrence and the Niagara belonging to the United States, canals might be built thereon, affording to American citizens the same facilities now presented by the Cornwall and Welland Canals to British subjects. If then canals are not in existence on those banks, the United States cannot turn their want of enterprise to advantage by claiming a portion of the benefits secured to British subjects by the enterprise and expenditure of the Canadian government, and insist upon a right to navigate the Welland and Cornwall Canals.

A great deal of ridicule was wasted upon the President's desire, as it was said, to navigate the Falls of Niagara, but it is perfectly clear that the claim advanced was merely to the navigation of the St. Lawrence between St. Regis and the sea.

The President endeavours to fortify his position by referring to the treaties regulating the navigation of the Rhine, Danube, and other rivers in Europe and America. Such treaties, he pretends, show the judgment of jurists and statesmen on the subject; so far as regards the *expediency* of throwing open the rivers in question to navigation he is correct in his pretensions, but with regard to the rights of other nations to navigate a river or part of a river, exclusively the property of one State, he is wrong. Principles of international law are not created by treaties. That law in its entirety was in existence ere men had banded into tribes; it has ever been and shall ever be immutable. Man sees but dimly in this world and has discovered but few of its principles, whereof still fewer are universally admitted, but as well deny that the laws of gravitation had existence before Newton, as affirm that God, ere nations were known, had not framed a perfect code of laws for their government.

But the treaties referred to have really no bearing on the pretensions advanced: 1st. because none of them apply to a river similar in its nature to the St. Lawrence; 2nd. because they all apply to rivers, only from the points where they first become navigable to the sea.—*La Revue Critique.*

An opinion given by law officers of the Crown at the request of Mr. Canning nearly fifty years ago, concerning the question of the liability of the British Government for damages in cases analogous to that of the *Alabama*, is interesting in connection with the Washington Treaty. It runs thus:—"The strongest suspicion that a vessel building in a port of this country or about to proceed to sea, is destined to be armed elsewhere, and to become a vessel of war in the service of a belligerent—the strongest suspicion that a particular cargo of arms, sailing from a port of this country, is destined for the purpose of arming that very vessel in a foreign port, would not justify the Government either in detaining the vessel or in seizing the arms, the vessel herself sailing unarmed, and the cargo of arms being entered at the custom-house as merchandise. The law applies only to what can be proved, and the attempt to execute it without proof would expose the officers of Government to heavy pecuniary damages.—(Signed), Chr. Robinson, D.C.L., King's Advocate; J. S. Copley, Attorney-General; Charles Wetherell, Solicitor-General."—*Law Times.*

Professional Ethics.—The following is now so old, that it may be given to some few perhaps as new, and it is quite good enough to be read a second time. A contemporary, in re-publishing it, calls it "Legal Ethics in one easy Lesson:"—

I asked him whether, as a moralist, he did not think that the practice of the law in some degree hurt the nice feeling of honesty.

Johnson: Why no, sir, if you act properly; you are not to deceive your clients with false representations of your opinion; you are not to tell lies to a judge.

Boswell: But what do you think of supporting a cause which you know to be bad?

Johnson: Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly, so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it, and if it does convince him, why, then, sir, you are wrong and he is right. It is his business to judge, and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion.

Boswell: But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends?

Johnson: Why no, sir, every body knows you are paid for affecting warmth for your client, and it is, therefore, properly no dissimulation; the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet.—*Boswell's Life of Johnson.*

ONTARIO REPORTS.

PRACTICE COURT.

Lutz v. Beadle.

Ejectment—Order for costs—Purchaser after action brought.

In an action of ejectment, the defendant appeared and claimed title as tenant of one R. Two days before appearance, R. had disposed of his interest in the lands to S., who, after notice of trial, applied on affidavits setting out the conveyance and the subsequent attornment to him of defendant (now his lessee) to be admitted, as landlord, to defend the action; but the application, being opposed by the plaintiff, was refused.

Plaintiff having succeeded, applied for a rule ordering S. to pay the costs of the action, on the ground that the defendant was insolvent, and the conduct of S. in making the above application, as well as at the trial and subsequently thereto, proved him to be the real defendant.

Held, that plaintiff was not estopped from making such an application, by having opposed the prior application of S., and the rule was made absolute.

[Practice Court, E. T., 34 Vic.—*Gwynne, J.*]

This was an action of ejectment in which judgment was obtained by the plaintiff.

Freeman, Q. C., during last term, obtained a rule upon one Simeon Cline, to shew cause why he should not be ordered to pay the costs of the plaintiff in the suit, upon the ground that the defendant was only nominally interested as tenant of Simeon Cline, and that the suit was defended in the interest of, and for the benefit of the said Cline.

F. A. Read shewed cause.

The facts sufficiently appear in the judgment.

June 24.—Judgment was now delivered by

Gwynne, J.—The cases of *Hutchinson* v. *Greenwood*, 4 E. & B. 324, 24 L. J. Q. B. 2; *Anstey* v. *Edwards*, 16 C. B. 212, and *Mobbs* v. *Vandenbrande*, 33 L. J. Q. B. 177, sufficiently establish that the court has jurisdiction to make the order asked for, under the 77th section of the Consolidated Statutes of U. C., ch. 27, notwithstanding that the action of ejectment is no longer a fictitious one. The only question, therefore, appears to be, whether it is or is not proper, that under the circumstances appearing, I should exercise that jurisdiction. By the affidavits filed on the part of the plaintiff, it appears that the action was commenced on the 23rd day of April, 1869, and was entered for trial at Hamilton in the fall of that year. An appearance was entered for the defendant on the 10th day of May, 1869. With this appearance was filed a notice to the effect that, besides denying the plaintiff's title, the defendant claimed to be entitled to the possession of the said lands as tenant of Ransom Cline. In the month of October, 1869, and just before the cause was entered for trial, Simeon Cline applied to be made a defendant in the cause jointly with the defendant Beadle In an affidavit made by him upon that application, a copy of which was filed in support of the present application, after setting out the service of the writ upon Beadle, his appearance, and notice of claim as above, he swore that on the 8th day of May, 1869, he, Simeon, purchased the interest of Ransom Cline in the said lands, and that, on the 17th day of June following, the said Beadle attorned to, and became tenant of the said lands under Simeon, and accepted a lease thereof from him for the term of one year, at the yearly rent of one dollar; that Ransom Cline had not appeared to the said action; that he, Simeon, was then in the possession of the land by his tenant, the defendant, Beadle; and that notice of trial had been served on the 29th September, for the then next assizes, to be held in the County of Wentworth, on the 11th of October then instant.

This application, being opposed by the plaintiff's attorney upon the ground that Simeon had purchased after action brought, was refused.

In the plaintiff's affidavit, filed upon the present motion, he swore that Simeon Cline attended at the trial, which took place in the month of April, 1870, and that he appeared to be the only person interested in the defence; that he was instructing the attorney and counsel for the defendant, and looking after the witnesses, and taking on himself the entire management of the cause; and that plaintiff believes that throughout the whole progress of the suit, or, at all events, since he purchased the alleged interest of Ransom Cline, in May, 1869, as stated in his own affidavit, he has been the only person who has given instructions for the defence of the suit, and who has been really interested in the result thereof. The plaintiff further swore that at the trial, neither the defendant, nor Ransom Cline, who is a brother of Simeon, appeared to have anything to do with the suit, except as witnesses; that the defendant, Beadle, is hopelessly insolvent, and has no property whatever out of which the plaintiff can recover his costs of suit; and that several times since the commencement of the suit, Simeon Cline has told the plaintiff that he, Simeon, claimed the property as his own; and that since the trial, he has said to the plaintiff that he would yet have the property, and that he would not submit to the verdict rendered.

Simeon Cline filed no affidavit of his own in answer to this application, but an affidavit of the attorney of the defendant on the record was filed, and he swore that, on the 7th day of May, 1869, he was retained and employed by the defendant, Beadle, and by Ransom Cline, who then claimed to be the owner of the property in question in the cause, and from whom the defendant, Beadle, leased the same,—as attorney to defend the suit. That he entered an appearance for the defendant on the 10th May, 1869, and at the same time served a notice of claim of title under Ransom, which he set out at large, and which is to the effect stated by plaintiff in his affidavit. The attorney further swore, that he never knew Simeon Cline in any way in the matter of the suit *up to the 21st day of May*, 1869; nor did he ever receive instructions of any kind from him in the above suit, *previous to the said 21st day of May*, 1869. This is the only affidavit used in answer to the notice.

I was asked by Mr. Freeman also to notice judicially the evidence taken at the trial, and which was before the Court of Common Pleas on a motion to set aside the verdict, (upon which motion judgment has been given sustaining the verdict,) with a view to seeing that the defendant was put forward solely for the purpose of asserting the title which Simeon Cline claimed at the trial, and that the whole defence was in his interest. On the other hand, Mr. Read ob-

jected, that I should only look to the matters brought before me on affidavit on this application.

I think there is sufficient before me on this application to determine the point: Simeon Cline making no affidavit himself, and his affidavit made in October, 1869, expressly states that he asserts title in himself, and that the defendant was only in possession as his tenant; and the affidavit of the attorney on the record admits, as I take it to admit, in effect, that his original instructions were from Ransom Cline, whose interest Simeon Cline acquired by a purchase made before appearance entered, and that since the 21st day of May, 1869, before ever Beadle attorned to Simeon, or took the lease for a year at $1 rent, he had taken his instructions from Simeon; I take it to be established beyond all doubt, that Beadle has been throughout only nominally a defendant, and that the defence has wholly been made by and in the interest of Simeon Cline.

The case which is established is, then, the common case for making the order asked for, unless the fact that the plaintiff by his attorney opposed Simeon's application to be admitted to defend as landlord, is subversive of his claim to have his present motion granted, and this, in fact, was the only ground upon which the rule was opposed.

No case has been cited to me in support of this contention, and upon reflection, I do not think that the fact of the plaintiff having opposed the former application, should prejudice the present one. He may possibly have thought that the alleged sale to Simeon Cline was a fraudulent contrivance, and that it was still Ransom who claimed the property, and he may have wished to retain a claim upon him; but it now appearing that it is Simeon who really defended in his own interest, he seeks to make him responsible. Simeon, by making the application to defend, admitted his liability for the costs of the defendant in right of the interest which he claimed in the property. Had he been admitted to defend, he would have been subject to the costs, and liable to pay them, because of such his alleged interest, and of the defence made upon behalf thereof.

Although not admitted to defend, Simeon's interest has remained the same, and he has had the benefit of asserting his claim to the property, to the same extent precisely as if he had been a defendant. The defence made to the suit has been no less his defence, and in his interest, than it would have been if he had been a defendant on the record. He has had the full benefit of the defence, as if he had been admitted a defendant on the record, and I cannot see any reason, why, having enjoyed this benefit, he should not also bear the burthen. He must be clearly liable to the plaintiff, unless the latter's opposition to his application operates as an estoppel to his making the present motion, and I cannot see that it should be held so to operate.

In justice therefore, I think the rule must be made absolute.

Rule absolute.

COMMON LAW CHAMBERS.

In re Roberts and Holland.

Fence-viewers—Watercourses—Contiguous lots.

To constitute a "joint interest" within the meaning of sec. 7, C. S. U. C. C. 57, it is not necessary that the lands occupied should be contiguous lots.

The question whether such interest exists is to be determined entirely by the fence-viewers, and

Their discretion cannot be reviewed if fairly and reasonably exercised.*

Semble, the absence of a demand under section 15, may be waived by the subsequent conduct of the parties.

[Chambers, March 19, 1871.—Wilson, J.]

A summons was taken out on the 26th of February, 1871, calling on Robert Dale, clerk of the seventh division court of the County of Lambton, and John Coulter, the bailiff of the said court, to shew cause why a writ of prohibition should not issue to prohibit the said clerk from issuing execution against the goods and chattels of Patrick Holland and Charles Holland, according to the determination of fence-viewers in a matter of dispute between the said James Roberts and the said Patrick Holland and Charles Holland, and why the execution of the said writ of execution, if issued, should not be restrained, upon the ground that the clerk of the court had no jurisdiction to issue the said execution; that the alleged award or determination of fence-viewers was void, and on grounds disclosed in affidavits and papers filed

The proceedings shewed that on the 5th of June, 1870, Joshua Payne, a justice of the peace, summoned Patrick Holland and Charles Holland to attend, on the 11th of the month, on lot No. 27 in the 3rd concession of the township of Moore, then and there to meet three fence-viewers of the township, to shew cause why they, the said Patrick Holland and Charles Holland, refused or neglected to open up a fair portion of a regular watercourse running across the said lot.

The three fence-viewers, Peter Scott, John Maguire and Thomas Boulton, on the 14th June, made their award. The award recites that they, the fence-viewers, had been summoned by James Roberts, on lot No 28, in the 4th concession of Moore, to examine a watercourse running across the west half of lot No. 27, in the 4th concession, owned by Robert Cathcart, and also across lot 27, in the 3rd concession, owned by Patrick Holland and Charles Holland, and that they found on examining the said watercourse that "this is the proper course for the water running from James Roberts' land;" then they awarded that a ditch should be opened across the said lots—the ditch to be six feet wide on top, eighteen inches deep, and three feet wide at bottom, the earth to be kept four feet from the side of the ditch—commencing at a certain stake on the side line between lots 27 and 28, in the 4th concession, following the natural course of the water, as already marked out by the fence-viewers, measuring 320 rods from the said stake; and that the first 80 rods, next the side line, should be opened by James Roberts, the second 80 rods by Robert Cathcart, the third 80 rods by Patrick Holland, and the fourth 80 rods by Charles Holland—the whole to be finished by the 20th of August, 1870.

*But see *Re Cameron & Kerr*, 25 U. C. Q. B. 533; *Re McDonald & Cattanach*, 5 Prac. Rep. 288; 30 U. C. Q. B. 432.—Eds. L. J.

It was further awarded that if any of the said parties should neglect or refuse to open his share of the ditch allotted to him within the above date, any of the other parties might, after first completing his own share, open the share allotted to the party in default, and be entitled to receive not exceeding 40 cents per rod for the same from the party in default; and they awarded that all the costs of the fence-viewers should be paid by James Roberts.

On the 25th of November, 1870, Matthias Ross, Alexander Jenkins and John Reynolds, three other fence-viewers made an award, which after reciting that they had been required by summons issued by G. B. Johnston, a justice of the peace, to examine a ditch in dispute on lot 27, in the 3rd concession of Moore, between Patrick and Charles Holland, complainants, and James Roberts, defendant, stated that they had examined the ditch in dispute, dug by award of fence-viewers, made the 14th of June, 1870, and that they could see no benefit that complainants received or could thereafter receive from the ditch, for the following reasons:

1. The ditch had been carried on an angle across unimproved land, and nearly parallel with the main channel of the west branch of Clay Creek.

2. It has not been carried on direct to the main, most direct, or shortest channel to an outlet.

3. Had James Roberts turned easterly 138 rods from the present outlet, and at a stake put down by them (the last-named fence-viewers), and dug 50 rods, he would have had as good an outlet and have saved 88 rods of digging in the present ditch: both outlets in same creek.

They (the last-named arbitrators) therefore awarded that all expenses of digging the said ditch in dispute should be paid by Jas. Roberts, who was forcing the ditch for his own direct benefit, and that he should also pay all expenses attending this examination and rendering this award.

On the 5th of December, 1870, Mr. Payne, the magistrate, notified Patrick and Charles Holland to attend on lot 27, in the 3rd concession of Moore, and there meet the three fence-viewers on the 10th of December, at 11 A.M., and shew cause why they refused to pay their fair portion of a ditch running on their lot, awarded by the said three fence-viewers on the 14th of June, 1870.

On the 12th December, 1870, the first fence-viewers, Scott, Boulton and Maguire, addressed a notice to Patrick and Charles Holland, to the effect that having been called by summons to appear on the lots of Patrick and Chas. Holland to examine the outlet running through lot 27, in the 4th concession, and lot 27 in the 3rd concession of Moore, the said outlet having been awarded by them on the 14th of June, 1870, they found that James Roberts had finished the whole of the outlet according to the award—eighty rods being his own share and eighty rods the share of Robert Cathcart; and that they found James Roberts had finished the shares of Patrick and Charles Holland, being one hundred and sixty rods awarded to them, they being defaulters in respect to the aforesaid award.

On the 13th of December, 1870, Mr. Payne, the magistrate, sent a notice to the clerk of the seventh division court, to the effect that he had sent to the clerk the decision of the three fence-viewers on the ditch between James Roberts and Patrick and Charles Holland, and that the ditch was done according to their award.

Accompanying this notice was a minute of the costs of the award, amounting to $6 68, and of the 160 rods of ditch at 40c. per rod, $64, in all $70 68, exclusive of bailiff's fees, for all of which it was said Patrick and Charles Holland were defaulters, and were to pay the whole expenses.

On the 17th December, 1870, Charles Holland was served with a copy of the award and costs, and on the 19th of the same month Patrick Holland was also served.

An execution was afterwards issued by the clerk of the division court against the goods and chattels of Patrick and Charles Holland, and delivered to the bailiff to be executed.

Mr. Francis, a surveyor, on 29th October, 1870, certified to Patrick Holland that in his opinion the water had not been taken down its proper channel according to the award, but diverted from it, and that lot 28 in the 4th concession, could, in his opinion, be drained cheaper and quicker than in the way proposed by the fence-viewers, and that it was not to the joint interest of the parties mentioned in the award to have the ditch made.

Charles Holland, on 30th January, 1871, made affidavit that he attended on lot 27 in the 3rd concession of Moore, on the 10th December, 1870, at the hour named in the notice, but did not meet the fence-viewers nor any person representing them. That the award ordering the money to be paid was made on the 12th of December, and that the ditch was not dug till the 14th of December, and was not finished up to the present time (the date of his affidavit, 30th January, 1871); and that the ditch runs about 8 rods through the west hundred acres of 27, in the 3rd concession, being that portion of the lot owned by him.

Patrick Holland, by his affidavit made the 21st of January, 1871, said he attended the arbitrators with his witnesses, but no evidence was taken to shew the proper course of the water. Feeling aggrieved by the award made by Scott, Maguire and Boulton, he got other three fence-viewers, Ross, Jenkins and Reynolds, and they made their award: that the defendant's land and the land of Charles Holland are not adjacent or adjoining to the land of Roberts: that the course which Roberts wishes to take is not the natural outlet for the water: that the ditch as dug is a direct injury to defendant, as it overflows his land: that no demand was made on him to dig the ditch: and that the ditch is not according to the award of the fence-viewers.

Benjamin Milligan, John Milligan and Charles Coyle also swear the ditch is no benefit but an injury to the Hollands: that the ditch is not eighteen inches deep through Holland's land, nor six feet wide at the top, and the clay is not four feet from the edge: that the ditch causes a large flow of water through the lands of the Hollands, brought from the side line ditch: and that the distance from the commencement of the ditch to the boundary line of the Hollands' lands is 120 rods.

Charles Holland confirmed Patrick's affidavit.

G. D. Boulton showed cause.

The award is made in accordance with the statute. The directions have all been carefully followed. The clerk of the court was the proper person to issue the process. The merits cannot now be disputed. The fence-viewers were the proper judges of all such matters, and all that can now be done is to try whether the proceedings which are disputed were legal or illegal. He referred to C.S.U.C. c. 57, s. 7; *Siddall* v. *Gibson*, 17 U. C. Q. B. 98.

Harrison, Q. C., *contra*, appeared for Patrick Holland only.

1. Patrick Holland was not an adjoining proprietor of Roberts.

2. Patrick Holland had not a joint interest with Roberts in the making of the drain.

3. No demand was made on Patrick Holland to do his work according to secs. 14 & 15 of the Act, before the work was done.

4. Then it appears Charles Holland appeared to the magistrate's summons, under sec. 16, requiring him to attend on the 10th of December, but the fence-viewers were not present, and so he has never refused to pay, nor been a defaulter in any form: *Murray* v. *Dawson*, 17 U. C. C. P. 588; 19 U. C. C. P. 314; *Dawson* v. *Murray*, 29 U. C. Q. B. 464.

Wilson, J.—It appears that Roberts lives on lot 28, in the 4th concession of Moore. The drain "taps the side line ditch dug by the municipal council through the third and fourth concessions, and from there runs 120 rods to the boundary line of the east half of 27 in the 3rd concession." Robert Cathcart lives on 28, in the 4th concession, to the east of Roberts, and some one, not named, lives on 28 in the 3rd concession, to the south of Roberts. Charles Holland's land, the west half of 27 in the 3rd concession, comes at the north west angle, just opposite to the south east angle of Roberts' land, which is on the other side of the said line; and Patrick Holland's land, the east half of 27 in the 3rd concession, is all the width of Charles Holland's half lot distant from Roberts' land. From these facts it is said that the following words of the Act do not apply:

Sec. 7. "Where it is the joint interest of parties resident to open a ditch or watercourse for the purpose of letting off surplus water from swamps or low miry lands, in order to enable the owners or occupiers thereof to cultivate or improve the same, such several parties shall open a just and fair proportion of such ditch or watercourse according their several interests."

By sec. 8 three fence-viewers are to decide all disputes between the owners or occupants of adjoining lands or lands so divided or alleged to be divided as aforesaid, in regard to their respective rights and liabilities under the Act, and all disputes respecting the opening, making or paying for ditches and watercourses under the Act.

From the facts stated, it appears Roberts desired to have surplus water let off his land. It appears also that Cathcart, to the east, has a good deal of marshy land on his lot, and that it runs down southerly upon a good deal of the north east quarter of Patrick Holland's land. Cathcart has paid for the work done through his lot. The two Hollands have not.

It must always happen, where there are more than two lots lying the one from the other as lots in the same concession, numbering 1, 2, 3, 4, &c., that there must be some of the lots which do not touch or abut upon the other or others of them, and yet all these lots may require to be drained, or to be so grouped together as to constitute an adaptable block for the purpose of draining some one or more of them, though the others may not require the proposed drainage in any way.

The statute does not restrict the question of drainage to the owner or occupier of only the two coterminous lots, as it does when provision is made for fences.

By section 1 the enactment as to fences is—"Each of the parties occupying adjoining tracts of land shall make, keep up and repair a just proportion of the division or line fence on the line dividing such tracts, and equally on either side thereof," every word of which shews that provision is made for *the line fence between the immediate occupants on each side of it.*

That enactment is very different from the language of sections 7 and 8, before quoted, and the nature of the subject required that it should be different.

In my opinion then, the statute, with respect to the provisions which relate to drainage, does not require that the rights or duties of coterminous occupants can be or shall be alone considered. The interests of all those who are affected by the work may and must, I should think, be jointly considered in the one reference and award.

So far, then, I have no doubt that Roberts, Cathcart, Charles Holland and Patrick Holland, each of them representing different lots, may be brought into the same project, and have their rights severally adjudicated upon in carrying out the joint or general scheme of drainage which the fence-viewers shall decide or do decide to be for their common interest, more or less, although Patrick Holland and Roberts are not between themselves coterminous occupants.

That disposes of the first objection.

The second objection is that Patrick Holland had not a joint interest with Roberts in the making of the drain. That is a question of fact with which I have properly nothing to do. The fence-viewers or arbitrators are to decide that. If they decided persons to be jointly interested in a work of this kind who were in no sense so interested, relief must be had in some way; I do not say by application to a superior court—though possibly the proceedings may be reviewable on *certiorari*,—but by action, if a case of fraud or corruption can be established.

Here it is not said they may not be interested in the work from the juxtaposition of property, but not interested because the drain made does not drain the land of the complainant, and because it has not been cut in the place where the natural flow of water is.

These are matter of detail for the fence-viewers, whose discretion I cannot supersede or control if fairly and reasonably exercised: and I see no reason to doubt it, though the complainant and some others for him deny it.

The fence-viewers are to settle what portion of the work shall be done, "according to their several interests," (sec. 7); and they are to decide all disputes between the parties "in regard to their respective rights and liabilities," (sec. 8); "and if it appears to the fence-viewers that the owner or occupier of any tract of land is not sufficiently interested in the opening of the ditch or watercourse to make him liable to perform any part thereof, and at the same time that it is necessary for the other party that the ditch should be continued across such tract, they may award the same to be done at the expense of such other party; and after such award, the last-mentioned party may open the ditch or watercourse across the tract at his own expense, without being a trespasser." (Sec. 12.)

These enactments enable the fence-viewers fully and equitably to deal with all cases which are brought before them, and I cannot say they have not done so between these parties. It is not likely that Roberts would pay $80 for doing the work he claims to be repaid for, when he can only get back and has been awarded only $64 for it, if it were not a work beneficial for himself, at any rate; and it is not likely the fence-viewers would have awarded Patrick Holland to pay the sum if they had not thought the work to be beneficial to him.

I cannot interfere on this ground.

Thirdly, it is said no demand was made on Patrick Holland to do the work through his own land before Roberts did it for him.

Roberts swears Patrick and Charles Holland "neglected and refused up to and after the 20th of August, 1870, to do their portion of the work;" that the ditch was dug in October and November, 1870; "and both the Hollands were frequently at the ditch during the time it was being dug: and that Patrick Holland instructed the men as to the digging of the ditch."

The statute requires a demand in writing to be served on the party to do his work, and a refusal by him before the other party can do it for him—or make him pay for it. Patrick Holland says—"I told one John Walker, one of the parties digging the ditch, not to attempt to enter upon my lands to dig said ditch." It is quite clear, then, that Patrick Holland was determined not to allow Roberts to dig the ditch on his land, and I can quite believe, from this, that he refused to do the work, as Roberts swears.

I do not think I should, if I was quite certain of possessing the power, stay all proceedings because the demand had not been *in writing*, or even if no demand at all had been made on Patrick Holland to do the work, when it appeared he saw it done and gave directions for the doing of it, without any objection at that time. I do not interfere, then, on that ground.

The fourth ground is that Charles Holland swears that he attended at the time and place appointed on the 10th of December, 1870, to shew cause why he should not pay the sum demanded from him, "but did not meet the fence-viewers nor any person representing them."

Charles Holland had no one representing him on the return of the summons, though it seems he concurred and united in procuring it. That he was present is of no consequence, then, on this argument. Patrick Holland does not say he was present, or if he was he does not say he did not meet the fence-viewers, nor does he say the fence-viewers were not present. Charles Holland himself does not say the fence-viewers were not present at the time and place. He says he "did not meet them nor any person representing them." That may have been because he *would* not meet them. The place of meeting is "on lot 27, in the 3rd concession."—rather a wide circuit. Charles lives on the west half of that lot, and he may never have left his own house, and yet have been able to make the affidavit he has made, that he *did not meet* the fence-viewers, though he may have seen them all the time they were upon the lot. He may not have met them because he was in his house or on another part of the lot than they were upon, and yet they may have been on the lot, and he may have seen them or known of them being there all the time.

I consider his affidavit as being intentionally so worded, in order to mislead. The difficulty has arisen, however, from the *whole* lot being specified as the place of meeting, instead of some determinate house or field, or other unmistakeable locality.

As Patrick has made no affidavit on this point, I presume he did not attend, or that the fence-viewers did attend at the time and place appointed under section 16 of the Act, and that they did determine as they say they did, that Roberts had done the work for Charles and Patrick Holland, "being 160 rods awarded to them—said Patrick and Charles Holland being defaulters to the aforesaid award."

This last objection fails also.

I must therefore discharge the summons with costs.

Summons discharged with costs.

ENGLISH REPORTS.

PRIVY COUNCIL.*

Day v. Day.

Land—Statute of Limitations (3 & 4 Will. 4, c. 27), ss. 2 and 7—Tenancy at will.

A tenant at will of land, to whom the management of the land was confided, underlet a portion of the land, and transferred his interest in another portion. The letting and transfer were with the knowledge and assent of the landlord of the tenant at will. The tenant at will had already been in possession of the land for ten years, and he and his tenant and transferee were in possession for a further period of twelve years and more.

The landlord, more than twenty-one years after the commencement of the tenancy at will, obtained possession of so much of the land as the tenant at will had remained in possession of or had let.

Ejectment was brought by the tenant at will.

Held, that the tenant at will was entitled to recover, the right of the landlord having been extinguished by the Statute of Limitations (3 & 4 Will. 4 c. 27), ss. 2, 7, 34, the statute running, upon the true construction of section 7† at latest at the end of the first year of the tenancy

* Present—Sir James W. Colville, Sir Robert J. Phillimore, Sir Joseph Napier, Lord Justice James, and Lord Justice Mellish.

† 3 & 4 Will. c. 27, s. 7 [C. S. U. C. c. 88 s. 7], enacts that: "When any person shall be in possession . . . . of any land . . . . . as tenant at will, the right of the person entitled subject thereto . . . . . to make an entry . . . . . or bring an action to recover such land . . . . . shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have been determined. . . ."

at will, even if there has been an actual determination of the tenancy, and though that actual determination of the tenancy may have taken place before twenty years have run out from the end of the first year of the tenancy. *Quære*, however, whether in the present case, by means of the letting and transferring by the tenant at will, any actual determination of the tenancy had taken place before twenty years had run out from the end of the first year of the tenancy.

[19 W. R. 1017.—P. C. C.]

This was an appeal from the Supreme Court of New South Wales in an action of ejectment.

The facts will be found fully stated in the judgment of the Judicial Committee.

July 15, 17.—*J. Brown*, Q. C., and *Laing*, for the appellant.—It is agreed between us that the English Statute of Limitations, 3 & 4 Will. 4, c. 27, applies* as was assumed below. The true construction of the 7th section is that which was put upon it by the dissenting judge in the Court below, viz., that the statute runs in the case of a tenancy at will from the determination of the tenancy, or from the end of the first year of the tenancy, "whichever shall first happen." It can never run from a later period than the end of the first year. That the true construction of the section is such as we say, is clear, and was expressly decided in *Bennett* v. *Turner*, 7 M. & W. 226 (not dissented from in error, 9 M. & W. 643); *Goody* v. *Carter*, 9 C. B. 863. The construction put upon it by Lord St Leonards is the same. Sugden's Vendors and Purchasers, vol. 2, p. 350 of 10th edition. Therefore, even if there was an actual determination of the tenancy at will in the present case by the tenant's underletting and transferring, that fact alone is immaterial. We admit that, if a tenant at will underlets, his landlord has a right to treat the tenancy as determined; but, if the landlord does not exercise his right, the tenancy remains, as in any other case of forfeiture. It is doubtful, therefore, whether in the present case there was an actual determination of the tenancy. No doubt if there was an actual determination of the tenancy, followed by the creation of a fresh tenancy, that may have been material; but a tenancy at will can only be created by actual agreement express or implied; *Ley* v. *Peter*, 6 W. R. 437, 3 H. & N. 101, 27 L. J. Ex. 239; and there was no evidence of such an agreement. It is clear that mere inaction of a landlord whose tenant at will had done an act determining his tenancy, cannot be construed as the grant of a fresh tenancy at will.

C. E. Pollock, Q. C., and *J. C. Day*, for the respondents.—The true construction of 3 & 4 Will. 4, ch. 27, s. 7, is that the statute is to run from the actual determination of the tenancy or from the end of the first year of the tenancy "whichever shall last happen," or that it is so to run, if there has been such an actual determination before the lapse of twenty years from the end of the first year of the tenancy. If that is not the construction of the section, then the true construction is, that the words "if there has been no actual determination of the tenancy" are to be considered as inserted, and the section is to be read thus:—The right of entry shall be deemed to have accrued either at the determination of the tenancy, or if there has been no actual determination of the tenancy (or no actual determination of the tenancy before the end of the period which would suffice to create a bar on the next following alternative) then at the expiration of one year next after the commencement of such tenancy. Either form of this construction is sufficient for us. There was not only an actual determination of the tenancy before the litigation arose but an actual determination before the end of twenty years from the end of the first year of the tenancy, *i. e.*, before the lapse of the time sufficing to give a bar upon the second alternative. Upon this view of the section, the section intended to provide for the case where the joint will of the lessor and the tenant could not be shown to have actually ceased, and, in such a case, to feign a determination of the tenancy at the end of one year from its commencement, which, by reason of the frailty of a tenancy at will, might not be an unreasonable fiction,—the statute being left to run from the actual determination of the tenancy, where an actual determination could be shewn to have taken place, or at all events where an actual determination could be shown to have taken place within twenty years from the end of the first year of the tenancy. There are, no doubt, decisions against such a construction, even in the second and modified form, but, as was said by Lord Campbell in *Randall* v. *Stevens*, 2 E. & B. 652, the question whether these decisions are right, is still open for consideration in a court of error. In *Doe d. Bennett* v. *Turner*, 7 M. & W. 226, the Court of Exchequer held that, although there had been an actual determination of the tenancy at will ten years after its commencement, the statute nevertheless ran from the end of the first year of the tenancy: but they held also that, if a second tenancy was created, the statute ran only from the second tenancy; and the Exchequer Chamber, affirming a ruling in accordance with the latter decision, expressly left the former point undecided; S. C. 9 M. & W. 543. In *Doe d. Dayman* v. *Moore*, 9 Q. B. 559, Patteson, J. speaks of the judges having always avoided the point, and says he always has. In *Goody* v. *Carter*, 9 Q. B. 863, the decision of the Exchequer was followed; but in *Randall* v. *Stevens*, 2 E. & B. 641, where the point was mentioned but did not need to be decided, the Court doubted (see p. 652) whether the point had been rightly decided; and in *Locke* v. *Mathews*, 11 W. R. 343, 32 L. J. C. P. 98, where a fresh tenancy was created, and the statute was held to run only from the fresh tenancy, Erle, C. J., says that, on the true construction, the statute runs from the end of the first year of the tenancy only where the tenancy has continued for the whole twenty-one years, and Willes, J., agrees with that construction, saying also that it is an open question in a court of error. If this construction is right, then the appellant must fail, for the acts done by the tenant at will in letting and transferring clearly amounted in law to a determination of the tenancy, the necessary condition that they should be known to the landlord being fulfilled. It is admitted by the appellant that, if a tenant at will lets the land, the landlord has a right to treat the tenancy as determined; but they have

* The 3 & 4 Will. 4 c. 27, was adopted in New South Wales, by the Colonial Act, 8 Will. 4, No 3. See *Devine* v. *Holloway*, 9 W. R. 642, 14 Moo. P. C. 290.

contended that the act of the tenant is a cause of "forfeiture," and that therefore the landlord must exercise his right, otherwise the tenancy continues as in any other case of forfeiture. But the act of the tenant is not a cause of forfeiture. The only authority treating the unauthorised act of the tenant as operating in the way of forfeiture, as distinct from determination of joint wills, is *Blunden* v. *Baugh*, Cro. Car. 302; all the other authorities, beginning with *Carpenter* v. *Colins*, Yelv. 73, hold the tenancy not forfeited but determined. The only reason why the law requires that the landlord should know of the acts determining the tenancy, is that otherwise, when coming for his rent, he might be met by the answer that the tenancy had been determined by acts of the tenant of which he then first heard. It is unnecessary on our construction of the statute to show that there was evidence of the creation of a new tenancy at will; but if there was such a new tenancy created, then, clearly, the statute ran only from the new tenancy, as was held in *Randall* v. *Stevens*, and *Locke* v. *Mathews*. And there was evidence in the present case of the creation of a new tenancy at will. A tenancy at will exists wherever, without other title, land is occupied with a concurrence of will of occupier and owner: Watkins on Conveyancing, Bk. I. ch. 1. It is a general principle that the law will not, where it need not, attribute tenancy of land to a trespass.

A reply was not called for.

The following authorities, in addition to those cited in the argument, were also before the Judicial Committee, being referred to in the judgments delivered in the Court below:—*Pinhorn* v. *Souster*, 1 W. R. 336, 8 Ex. 763; *Doe* v. *Groves*, 10 Q. B. 486; *Doe* v. *Coombes*, 9 C. B. 714; *Tayleur* v. *Wildin*, 16 W. R. 1018; *Moss* v. *Gallimore*, 1 Sm. L. C. 543; *Doe* v. *Thomas*, 6 Ex. 854; *Melling* v. *Leak*, 3 W. R. 595, 16 C. B. 652; Shelford's Real Prop. Stat. pp. 165—172; *Wallis* v. *Delmar*, 29 L. J. Ex. 276.

July 20.—The decision of the Judicial Committee was delivered by

Sir Joseph Napier.—The appeal in this case has been brought against an order pronounced on the 1st September, 1869, in the Supreme Court of New South Wales, by which it was ordered that the verdict found for the plaintiff herein be set aside and a new trial had between the parties. The action was one of ejectment, in which the plaintiff sought to recover a plot or parcel of ground in the city of Sydney, which had formerly belonged to the late Thomas Day the elder. His residence, and the premises on which he carried on his business as a boat builder, were situate on this property. In the month of May, 1842, he gave over the business and his property to his eldest son (the late Thomas Day the younger), then of age, and went to reside at a place called Pyrmont with his family. He had other property in addition to that which he gave over to his son. Thomas Day the younger, having thus been put in possession, as ostensible owner of this property, and manager of the business of boat builder, continued in the occupation from the month of May, 1842, down to the time of his death in December, 1864. He made his will and devised the property in dispute to his wife for life; she was the plaintiff in the ejectment. The defendants claim under the will of Thomas Day the elder, who, in 1867, procured attornments from the tenants on the property, to whom Thomas, the son, had let portions.

The trial of the ejectment took place before Chief Justice Stephen and a jury, in November, 1868. Evidence was given to prove the circumstances under which Thomas Day the elder gave up the property to his son Thomas, and put him in possession in 1842; to show the character of his occupation, and what he did in building on the property and letting to tenants; and that these acts and dealings were known to Thomas Day the elder and had his sanction. He did not execute any deed of conveyance to his son, and consequently it was admitted on both sides that the estate of the latter at the commencement was, in law, a tenancy at will.

The occupation of Thomas Day (the son) having been shown to have continued without interruption for twenty-two years, after the commencement of the estate at will in May, 1842, it was submitted at the trial on the part of the defendants that as it appeared on the evidence that at various dates commencing in or about 1852, Thomas Day (the son) let portions of the property in dispute on yearly and weekly terms, and received rent for the same, and transferred or purported to transfer part of the land to his brother William, who let and received rent for the same, of which letting and transfer Thomas Day (the father) had notice, at the times at which they took place respectively; and as the portion of the land sought to be recovered continued to be to the knowledge and with the sanction of Thomas Day the elder, in the occupation of Thomas Day the younger, or of tenants paying rent to him until his death in 1864—"these facts amounted to a termination of the original tenancy at will created in May, 1842, and to the creation of a fresh tenancy, so that the Statute of Limitations began to run in favor of Thomas Day, the son, only from such determination."

A non-suit was called for, but this was refused by the Chief Justice, who, upon the close of the evidence on both sides, submitted to the jury certain questions in writing, accompanied by an explanatory charge.

In answer to these questions the jury found that the authority given by the father to the son to occupy the property was not upon condition, but in perpetuity in his own right; that the acts of letting and transferring of portions of the property by his son were not in violation of the authority given by the father; that these acts were done with his knowledge and assent, and that no fresh authority was afterwards given.

The jury having returned these answers, were directed by the Chief Justice to find a verdict for the plaintiff, which they found accordingly.

A rule *nisi* was obtained to have the verdict set aside and a new trial granted. This rule was afterwards made absolute, the Chief Justice dissenting. The majority of the Court held that the jury were misdirected as to the question whether the original tenancy at will was determined by the underletting. One of the two judges who constituted the majority, thought that the jury were not sufficiently instructed

as to implying a new tenancy at will from the acts and conduct of the parties, without finding an actual agreement. The other judge was of opinion that the verdict was against evidence. He does not state whether this applied to all the answers of the jury or to which in particular.

The material question in this appeal is, whether the occupation of the late Thomas Day the younger, from May, 1842, until December, 1864, was such as to have conferred on him an indefeasible title to the property, so that it passed by his will to his widow and devisee. His occupation at the commencement was that of a tenant at will. His father must be taken to have been the legal owner and proprietor, subject to the tenancy at will. If before and at the time of the death of the son, the father's right of entry, or of bringing an action to recover this property, was barred, the son died seised, and the plaintiff's title is good.

This depends on the construction and effect of the Statute of Limitations (3 & 4 Will. 4, c. 27).

The second section of the statute enacts, that no person shall make an entry on any land or bring an action to recover it, except within twenty years next after the right to make that entry or to bring that action shall have first accrued to him.

A right of entry may be said to exist at all times in him, under whom, and at whose will the occupier holds, for he may enter at any time, and determine his will.

But the 7th section enacts, that the right of the person entitled, subject to a tenancy at will, to make an entry or to bring an action to recover the land shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined

The reasonable construction of this provision is (according to Lord St. Leonards) that the right shall accrue ultimately at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy.

In the present case, the right under the statute must be deemed to have first accrued to Thomas Day, the father, in May, 1843, at which time the tenancy at will under which the occupation began, must, for the purposes of the bar of the statute, be deemed to have determined. The condition of Thomas Day, the son, was, for these purposes, but that of a tenant at sufferance, from and after May, 1843, unless and until a subsequent tenancy at will was created by a fresh agreement of the parties

The defendants submitted that there was a determination of the original tenancy within twenty years before the end of the period of limitation. The acts on which they relied in order to show that the original tenancy was so determined, were consistent with the character of the occupation confided to Thomas, the son, and were beneficial to the property. It seems difficult to conclude that acts which were conformable (not contrary) to his father's will, which had his sanction, and so far were authorised, not wrongful, should have determined the tenancy at will. It might be more reasonable to regard them as acts of a like character, done by a mortgagor or *cestui que trust* in possession are regarded—that is to say, as impliedly authorised by the character in which, and the circumstances under which, he occupies at will.

It seems to their Lordships, that as in this case the statute began to run from May, 1843, the question of a subsequent determination of the original tenancy, is only relevant so far as it may have been preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation. In any other view, such a determination of the original tenancy after the end of the first year is *per se* irrelevant. When there is an alternative given by the statute sufficient to set it running, it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which, if time had not been running, would in itself have set it running. The actual subsequent determination of the tenancy could only have the effect of making the tenant, for *all* purposes, what he was already, from the end of the first year, for the purposes of the bar of the statute—a tenant at sufferance.

Their Lordships, therefore, are of opinion that the defence made at the trial, as stated in the 11th paragraph of the respondent's case, cannot be maintained. It submits "that the statute began to run in favor of Thomas Day, Jun., only from such determination," *i. e.*, the alleged determination by the acts stated in the 8th, 9th, and 10th paragraphs. They are clearly of opinion that the statute began to run in favor of Thomas Day, the son, in May, 1843, at the end of the first year of his tenancy, and that a subsequent determination of that tenancy could not of itself be sufficient to stop the running of the statutory bar.

When the statute has once begun to run, it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual occupation of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will.

It was contended that there was not only a determination of the original tenancy at will, but the creation of a fresh tenancy, inasmuch as after such alleged determination, "the portion of the land sought to be recovered continued to be, to the knowledge and with the sanction of Thomas Day, Sen., in the occupation of Thomas Day, Jun., or of tenants paying rent to him, until his death in December, 1864."

The Chief Justice put the question in writing to the jury whether, with the knowledge of the acts done by Thomas, the son, a new authority to occupy was given by Thomas, the father, and this was answered in the negative; and afterwards, he put orally a question to the jury, whether a new tenancy at will was created by a new authority to occupy, then given, or fresh arrangement made between the parties. This was also answered in the negative by the jury.

Their Lordships cannot concur in the opinion of Mr. Justice Cheeke, if he meant to say that both or either of these answers was contrary to

the evidence; nor can they concur in the opinion of Mr. Justice Hargrave, that the jury may have been misled by not having been sufficiently instructed as to their power to imply a new tenancy at will from the acts and conduct of the parties, without finding an actual agreement.

Assuming that there was a determination of the tenancy, and that the occupation of Thomas Day, the son, continued without interruption, to the knowledge and with the sanction of Thomas Day, the elder, this would constitute an occupation at sufferance to all intents, and so far as related to the purposes of the statutory bar, no alteration would be made in the status of Thomas, the son. The right of entry created by the 7th section of the statute was not thereby waived, suspended or extinguished; there was no revesting of possession: the running of the statute was in nowise impeded. Doubtless, an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved as ought to satisfy a jury that the parties actually made such an agreement; and in that event it is proper to be found by a jury as a material fact in issue. No such evidence has been given in this case.

The express exception in favour of cases within the 14th section of the Act, where there has been a written acknowledgement of the title, shows the pervading purpose of the Legislature in creating the bar under the previous sections. Besides, as stated by Sir W. Erle, C.J., in *Locke* v. *Matthews*, 11 W. R. 343, 13 C. B. N. S. 864, "If the owner enters effectively and creates a new tenancy at will, he has twenty-one years from that period before he can forfeit his estate." The language and policy of the statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, *and with an intention to* create a fresh tenancy at will.

The question in effect is, whether the prescribed period has elapsed since the right accrued to make an entry or bring an action to recover the property, where such entry or action might have, but has not, been made or brought within such period. It seems to their Lordships that in this case the prescribed period of limitation elapsed at the end of twenty-one years from the commencement of the tenancy at will; that whether this tenancy was determined by the acts of the parties is not material, inasmuch as there was not a fresh tenancy at will created within this period. They think that the findings of the jury were according to the evidence, and that there was not any misdirection on the part of the Chief Justice, by which the jury could be supposed to have been misled. It is not necessary for their Lordships to review in detail, or further to express an opinion on the positions of law in the elaborate and able judgment of the learned Chief Justice. It is enough to say that, in the opinion of their Lordships, there was not any misdirection upon any material point; that the findings of the jury were warranted by the evidence, and that the verdict for the plaintiff is a right verdict, and ought not to be set aside.

They will, therefore, humbly recommend her Majesty that this appeal be allowed; that the order of the Supreme Court of New South Wales, by which the verdict was ordered to be set aside and a new trial had, be annulled; the rule *nisi* be discharged with costs; and the postea delivered to the plaintiff to enter judgment on the verdict.

The appellants to have the costs of this appeal.

EXCHEQUER.

Robinson v. Davison.

Contract for personal services—Excuse of non-performance—Act of God.

In contracts to render services purely personal there is implied a condition that the parties shall be exonerated from the contract if performance thereof is prevented by inability resulting from the act of God.

The plaintiff engaged the defendant's wife to play the piano at a concert he was about to give; meanwhile she fell ill, and consequently the concert did not take place. The plaintiff then brought this action to recover his expenses and loss of profits from the defendants, on behalf of whom the wife had made the contract.

Held, that the contract was conditional on the lady being in a fit state of health to play, and that there had not been any breach of contract on the part of the defendant.

Quære, whether the plaintiff was entitled to notice of the lady's inability to perform the contract.

[19 W. R. 1036, Exch.]

Declaration—that in consideration of twenty guineas to be paid by the plaintiff to the defendant, the defendant promised that his wife should perform at a musical entertainment to be given by the plaintiff, but that she did not perform, whereby the plaintiff was unable to give the entertainment, and lost the profits that he would have made, and incurred expenses in taking a room and circulating advertisements.

The question in the case arose on the 9th plea, which averred that the promise made by the defendant was subject to a certain term and condition—namely, that if his wife should be unable to perform at the entertainment in consequence of illness, the defendant should be exonerated and discharged from fulfilling his promise, and that she was unable to perform at the entertainment in consequence of illness.

The action was tried before Brett, J., at the Lincolnshire Spring Assizes, when it appeared that the defendant's wife was Madame Arabella Goddard, the well known pianist; and that on the 17th of December, 1869, she agreed with the plaintiff, a music master at Gainsborough, to play at a concert to be given by him at Brigg, in Lincolnshire, on the 14th of January, 1870; nothing was said about what was to be done in case of her illness. Madame Goddard had been ill for some days before the 13th of January, and about one o'clock on that day her doctor told her that she would not be well enough to go into Lincolnshire next day, and it was ultimately admitted by the plaintiff that she was, in fact, prevented by illness from fulfilling her engagement.

When Madame Goddard found that she was too ill to go, she wrote to tell the plaintiff; her letter was delivered to him about nine o'clock on the morning of the 14th, and he thereupon put off the concert and returned the money he had taken.

His claim in this action was for £70, of which £30 was for the expense of hiring a room, advertising, &c., and £40 the profit he reckoned

he would have cleared if the concert had taken place.

It was admitted that Madame Goddard had contracted as agent for her husband, the defendant.

The learned judge directed the jury that "when a professional person like Madame Goddard enters into an engagement, it is part of the contract that if she is so ill as to make it unreasonable and practically impossible that she should perform her engagement, she is not obliged to do it; and if under those circumstances she does not do it, she is not liable to an action for not having done it. But at the same time if a person in her position is disabled by illness, or is so ill as to be unable to keep her engagement, she is bound within a reasonable time after she knows that she cannot from illness keep her engagement, to inform the person with whom she has contracted of that fact." A count for not giving such reasonable notice was added at the trial, and it having been proved that the plaintiff had spent £2 13s. 9d, for telegrams and mounted messengers to prevent people coming from the country to the concert, which would not have been necessary if Madame Goddard had notified her illness by telegram instead of letter, the jury found on the only question left to them, that she had not given reasonable notice, and gave a verdict for £2 13s. 9d. on the added count.

The plaintiff having obtained a rule *nisi* for a new trial on the ground (amongst others) that the learned judge had misdirected the jury in telling them, as above stated, that the contract was impliedly conditional.

O'Brien, *Serjt.*, and *Wills*, showed cause.—The contract that the defendant's wife should perform at the concert was conditional on her not being incapacitated by illness; such a condition is implied in all contracts of this kind. This point was much discussed in *Hall* v. *Wright*, 8 W. R. 160, E. B. & E. 746, where to an action for breach of promise of marriage, the defendant pleaded that after the promise and before breach thereof, he fell into such a state of health that he became incapable of marriage without great danger of his life; the Court of Queen's Bench was equally divided on the question of the validity of this plea; and though the Court of Exchequer Chamber held that it did not afford any defence to that action, yet the tenor of the judgments delivered shows that such a plea is a good defence to this action. And in *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, it was held to be an established principle, that, if the nature of a contract shows that the parties must all along have known that it could not be fulfilled unless some particular thing continued to exist, such a contract is not to be construed as a positive contract, but as impliedly subject to a condition that a breach shall be excused, in case before breach performance becomes impossible from the perishing of the thing without default of the contractor, and although this principle was somewhat qualified by the decision of the Court of Common Pleas in *Appleby* v. *Meyers*, 14 W. R. 835, L. R. 1 C. P. 615, that decision was reversed in the Exchequer Chamber, 15 W. R. 128, L. R. 2 C. P. 651. Now in the present case the contracting parties have assumed the continuing existence of Madame Goddard's health, and as that failed, the contract came to an end.

D. Seymour, *Q.C.*, and *Cave*, in support of the rule.—Sickness is no excuse for non-performance of a contract of this kind. The cases go to show that nothing short of death affords such an excuse, and strictly speaking, the death of a party to a contract for personal services operates as a dissolution of the contract, and not as an excuse for its non-performance; the law is clearly so laid down in the case of *Stubbs* v. *The Holywell Railway Company*, 15 W. R. 869, L. R. 2 Ex. 311, and *Farrow* v. *Wilson*, 18 W. R. 42, L. R. 4 C. P. 745,* is to the same effect. When a party enters into an absolute and unqualified contract to do some particular act, the impossibility of performing it, occasioned by some inevitable accident or unforseen cause, is no answer to an action for damages for breach of contract: *Kearon* v. *Pearson*, 10 W. R. 12, 7 H. & N. 386; *Barker* v. *Hodgson*, 3 M. & S. 267. But these and other cases to the same effect refer back to and are grounded upon *Paradine* v. *Jane*. Aleyn, 27, in which case the material resolution of the Court was that "where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, then law will excuse him, but when the party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." That is adopted in *Clifford* v. *Watts*, 18 W. R. 925, L. R. 5 C. P. 577, which is the last case bearing upon the question. It is there laid down by Willes, J., in the course of his judgment that "where a thing becomes impossible of performance by the act of a third party, or even by the act of God, its impossibility affords no excuse for its non-performance; it is the defendant's own folly that has led him to make such a bargain without providing against the possible contingency." This case falls within the precise terms of *Hall* v. *Wright*, (*ubi supra*); putting it in the way most favourable to the defendant, Madame Goddard could not have fulfilled her engagement without endangering her life; it was prudent of her to stay away, but for so doing she must pay damages.

Kelly, C.B.—This case no doubt raises a highly important question. It appears that it was agreed that in consideration of a sum certain, the defendant's wife should be present on the 14th of January at Brigg, in Lincolnshire, to play the piano at a concert, of which the proceeds were to belong to the plaintiff; she was prevented by illness from fulfilling her engagement, the consequence of which was that the concert did not take place, and in answer to an alleged breach of the contract, it is pleaded that it was a condition of the contract that the defendant should be exonerated therefrom if his wife was prevented by illness from performing it, and that such, in fact, was the cause of her not performing it, and the question is, whether that is a lawful and sufficient defence. In my opinion it is. The contract is not merely for personal services, but it is one that could not have been performed by any other person, and the law applicable to such a case is laid down most clearly and accurately by Pollock, C.B., in

* For report of this case see 6 U.C.L.J.N.S. 17.—Eds. L.J.

Hall v. *Wright*, 8 W. R. 160, E. B. & E. 746, in these terms, "It must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. . . . . A contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would, in my judgment, be subject to the condition that, if the author became insane or the painter paralytic and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be liable if he had been removed by death." The law thus stated clearly applies to this case, which is that of an artiste who having contracted to play is prevented from so doing by illness, and it follows that in such a case the non-performance of the contract is excused. And the passage cited in the course of the argument from the judgment of the Court of Queen's Bench in *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, when construed with reference to the illness of a player on the pianoforte, is a strong authority in favour of the construction put upon this contract by the defendant. Indeed *Boast* v. *Firth*, 17 W. R. 29, L. R. 4 C. P. 1, and other cases all go to establish that non-performance of a contract for personal services is excused, if it is owing to a disability caused by the act of God or of the other contracting party. Some question has been raised as to the degree of illness which will excuse the performance of a contract of this kind, but if the party is unable to carry out the contract according to the real intention of the parties, that inability is an excuse for non-performance.

Then comes a further question: the plaintiff contends that if non-performance of the contract was excused by Madame Goddard's illness, he was entitled to have notice of it in sufficient time; I do not enter into the question of whether notice was necessary in this case; if the lady had been attacked by illness three or four weeks before the time when the performance was to take place, I do not say that she would not have had to give notice. But assuming that it was proper to leave to the jury the evidence as to the amount of damages resulting from insufficient notice, I think they found a very proper verdict. My brother Channell acquiesces in this, but does not express any opinion as to whether there was any legal liability to give notice of the illness.

Bramwell, B.—Following the example of my brother Channell, I will not say whether it was necessary for the defendant to give the notice, the want of which is complained of.

Mr. Cave seemed disposed to contend that it was not necessary for the plaintiff to amend, because the defendant was relying on a conditional condition which could not be of any avail to him, inasmuch as he had not sent the notice which was a condition precedent to his being entitled to claim exoneration from his contract by reason of his wife's illness. I do not agree with the argument; to give notice may have been the defendant's duty, but it was not a condition, non-performance of which would prevent the wife's illness from excusing the fulfilment of the original contract. If the plaintiff had replied that the condition pleaded by the defendant was itself subject to a condition which had not been performed, that would have been a departure.

I take it as admitted that the lady was practically not in a condition to play; she could not have played efficiently, and it would have been dangerous to her life to play at all—is it or is it not a condition of the contract that the lady, being in such a state, shall play? I will go further, is it not a condition that she shall not play? Could it be said that she was entitled to go down to Lincolnshire, and get her fee for playing in such a way as to disgust her audience?

It has been argued that to allow inability arising from illness to be an excuse for non-performance of this contract, is to engraft an implied on an express contract, but this is a fallacy, though such a consideration appears to have had weight in the minds of some of the learned judges who decided *Hall* v. *Wright* (*ubi supra*), of which case I entertain with unabated strength, the opinion I there expressed. The fallacy is in taking the original contract to be absolute and unqualified, and the new term to be a superadded condition, whereas the whole question is, what was the original contract, was it absolute or conditional? Of course there might be an agreement to play and not to die or be ill, and for breaking such an agreement, the defendant would have to pay in damages, but no such term formed part of the contract between the parties to this action, and in my judgment the contract between them must be taken to have been subject to the condition pleaded by the defendant. Were we to hold otherwise, we should arrive at the preposterous result that though the lady might have been so ill as to be scarcely able to finger the instrument, she would have been entitled to play and pay.

Cleasby, B.—I do not intend to express any opinion on the question of the necessity of notice.

The contract in this case was that the lady should play the piano, to do which well demands, as we all know, the greatest skill and most exquisite taste; if it is not well done, it is better left undone. Now, if the performance of such a contract is prevented by the act of God, as by a sudden seizure or illness, the parties are exonerated from the contract, for it is wholly based on the assumption that the musician will live, and will be in health at the time when the contract is to be carried out; that is an assumption made by both the parties to the contract, both are responsible for the imprudence and folly, if any, of making that assumption, but as it is the foundation of the contract, if that assumption fails the whole contract is at an end. The case of *Boast* v. *Firth*, was decided on the same principle, which is extremely well expressed by Brett, J., in these terms—"This contract is for personal services, and both parties must have known and contemplated at the time of entering into it that the performance of the services was dependent on the servant's continuing in a condition of health to make it possible for him to render them, and if a disability arises from the act of God, the non-performance of the contract is excused" I agree that that is the law and in my judgment, it is decisive in this case.

*Rule discharged.**

* Leave to appeal was refused.

CHANCERY.

Newill v. Newill.

Will—Construction—Gift of property "for benefit of wife and children."

A testator devised and bequeathed all his property to his wife, for the use and benefit of herself and of all his children.

Held, that it was a gift to the wife for life, with remainder to the children.

[19 W. R. 1001, V. C. M.]

This was an administration suit. The testator by his will, dated the 19th of October, 1863, devised and bequeathed unto his wife, Anna Elizabeth Newill, for the use and benefit of herself and all his children, whether born of his former wife, or such as might be born of her, Anna Elizabeth Newill, all his property of every description, real and personal, whether in possession, reversion, remainder, or expectancy, at the time of his decease.

The testator was twice married, and left eight children surviving him, six by the first marriage, and two by the second. He had no real estate, but died possessed of considerable personal estate.

The only children living at the date of the will were those by the first wife.

The suit now came on to be heard on further consideration, and the question was whether the widow and children took as joint tenants, or whether the widow took a life estate, with remainder to the children.

Pearson, Q.C., and *Holmes*, for the plaintiffs, the children of the first marriage, contended that the will created a joint tenancy between the widow and children. They cited *De Witte* v. *De Witte*, 11 Sim. 41; *Bustard* v. *Saunders*, 7 Beav. 92; *Bibby* v. *Thompson*, 32 Beav. 646

Marcy, for the guardian of some of the children, who were infants, supported the same view.

Glass, Q.C., and *Rogers*, for the widow, contended that it was a gift for life, with remainder to the children. They cited *Armstrong* v. *Armstrong*, 17 W. R. 570, L. R. 7 Eq 518; *Audsley* v *Horn*, 7 W. R. 125, 26 Beav. 195; *Re Owen's Trusts*, before Vice-Chancellor Wickens on the 26th of May (not reported); *Ward* v. *Grey*, 7 W. R. 569, 26 Beav. 485; *Crockett* v. *Crockett*, 2 Ph. 553; *Lambe* v. *Eames*, 18 W. R., 972, L. R. 10 Eq. 267;* *Jeffery* v. *De Vitre*, 24 Beav. 296.

Pearson, Q.C., in reply, referred to *Mason* v. *Clarke*, 1 W. R. 297.

Malins, V.C., said this was a mere question of the intention of the testator. It was quite clear he meant his property to go to his wife for the benefit of herself and his children, whether she and they took as joint-tenants, or whether she took a life estate with remainder to the children, but it would make a material difference to her which way it went. If he were to look at this will apart from the authorities, what was the testator's intention? What were the probabilities? What must he have meant? Considering it was his main duty to take care of his wife, he should conclude that it was his intention that she should have it all for her life—upon intention only that was the decision he should arrive at. Was he prevented from so deciding by the the authorities, which were very contrary? The current of authorities latterly had run in a direction opposite to what it did formerly, and it ran in a way which coincided with his opinion, that when a man gave property by will for the benefit of his wife and children he meant it to be for his wife for life with remainder for the children. There would be a declaration in accordance with that view.

* Reported 7 U. C. L. J. 222.

PROBATE.

Pearson v. Pearson and Pearson.

Will—Execution—Signature of testator unseen by witnesses—Insufficient acknowledgment.

The testator asked two persons, who were both unable to read or write, to "make their marks to a paper," and they did so. This paper was the testator's will, but he made no statement whatever as to the nature of its contents to the witnesses. The witnesses were unable to say whether or not the testator's signature was affixed previous to the attestation, and there was no evidence on this point.

Held, an undue execution.

Previous cases reviewed.

[19 W. R. 1014,—P. & M.]

George Pearson, gardener, late of Hockwold-cum-Wilton, in the county of Norfolk, died on the 31st of March, 1870; he left a will bearing date the 9th of October, 1865.

The will was entirely in the handwriting of the testator, and was signed by him. There was no attestation clause, but the will had been witnessed by a man and his wife, who, being unable to write, had subscribed their marks. Opposite to each of their marks was the name of the witness, and the word "witness" written in the handwriting of the deceased. The remainder of the facts are sufficiently stated in the judgment.

The plaintiff, as heir-at-law, propounded the will, and the defendants pleaded that it was not executed in accordance with the provisions of the Wills Act, 1 Vic. ch. 26.

Dr. Tristram, for the plaintiff, cited *In the Goods of Thomson*, 4 Notes of Cases, 643; *Cooper* v. *Bocket*, 4 Moo. P. C. C. 419.

G. Browne, for the defendants.

Cur. adv. vult.

May 13.—Lord Penzance.—The question in this case was, whether the testator's will was duly executed. The following is the evidence of the two attesting witnesses; Henry Whistler said, "The testator asked me to make my mark to this paper. I did so, and he then asked me if my wife was in. I said 'Yes.' He then told me to call her. I did so, and the testator told her to make her mark to the paper. She did so." Whistler's wife said "I was called in by my husband, and made my mark. My husband had made his mark before I was called. I did not see him make any mark." The witnesses were examined at some length with reference to the question whether they were both present at the same time, and it was contended that the wife should be supposed to have been present, because she was in the passage, and might have seen her husband affix his mark to the will. My judgment, however, does not depend upon that question, but I must say that, if it were necessary that it should be decided, I should decide against the witnesses having been present together.

The question seems to me to be whether assuming both witnesses to have been present at the time, what took place amounted to a due acknowledgment of his signature by the testator. Nothing was said by the testator to the witnesses, before they were asked by him to make their marks; they were not told by him that the paper was his will, nor was anything said as to its contents; neither is there any proof that the testator's name was on the paper, when the witnesses added their marks. The witnesses are illiterate people, unable to read or write, and therefore they cannot swear as to whether the testator had or had not signed before they attested. The Court took time to consider the question which was raised upon these facts, on account of a case cited in argument by Dr. Tristram, namely, that of *In the Goods of Thompson* (4 Notes of Cases, 643) There are some remarkable expressions in the judgment in that case, which seemed to render it advisable that I should review the decisions on this point.

The authority which has guided the court in questions of this kind, is *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200. Sir Cresswell Cresswell decided in that case, that, where at the time of the execution, the witnesses had been told that the paper they were attesting was the testator's will, and where, from the surrounding circumstances of the case, the court can arrive at an affirmative conclusion, that the testator's signature had been affixed before the attestation, there is then a sufficient acknowledgment by the testator. Such, I think, is in substance the decision in *Gwillim* v. *Gwillim;* and that decision has been followed by the court, in the subsequent cases of *In the Goods of Huckvale*, L. R. 1 P. & M. 375, and *Beckett* v. *Howe*, L. R 2 P. & M. 1, 18 W. R. 75. In the former of these cases the court said—"The result is, that where there is no direct evidence one way or the other, but a paper is produced to the witnesses, and they are asked to witness it as a will, the court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from these circumstances, and from the appearance of the document itself, as to whether the name of the testator was or was not upon it at the time of the attestation; and if it arrives at the conclusion that it was there at the time, the case falls within the principles of the decisions to which I have referred, and the execution is good. * * * I may add that there is a class of cases, the circumstances of which are such as to exceed the limits of the rule laid down in *Gwillim* v. *Gwillim*. One of those cases is *In the Goods of Hammond*, 11 W. R. 639, 3 Sw. & Tr. 94, in which Sir Cresswell Cresswell decided that where there was no evidence at all on the question, whether anything had been written before the signature of the testator, the court could make no presumption. To the same effect is *In the Goods of Pearsons*, 33 L. J. P. M. & A. 177. In both these cases the witnesses saw nothing but a blank piece of paper, and did not know anything about the nature of the instrument they were asked to attest. The circumstances of these cases seem beyond the limit to which the doctrine laid down in *Gwillim* v. *Gwillim*, ought to be carried." In the other case—*Beckett* v. *Howe*—the court said—"The sum and substance is, that the witnesses did not see the testator's signature, nor did the testator say it was there, but he did tell one witness that he was going to execute a will, and indirectly to both he expressed that intention, for he told them that some alteration was necessary in his affairs, by reason of his wife's death. The doctrine in *Gwillim* v *Gwillim* is this, that if the testator produces a paper, and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the court is satisfied that the signature of the testator was on the will at the time Whether that decision was right or wrong I have not to determine. It was founded on other cases. Provided the testator acknowledges the paper to be his will, and his signature is there at the time, it is sufficient." That is the manner in which the court has hitherto dealt with questions of this kind, but in the case of *In the Goods of Thompson*, I find the following expressions in the judgment of Sir Herbert Jenner Fust:—"It is clear that the codicil was not signed by the testator in the presence of both the witnesses whose names are subscribed to it, and there was no express acknowledgment of his signature by him in their presence; the question is, whether, according to the construction of the statute, there was a sufficient acknowledgment in the presence of the two attesting witnesses. Now the court has been obliged in many cases to put a construction upon the clause of the statute respecting the execution of wills, and it has held that an express acknowledgment is not necessary; that when a paper is produced by a testator to witnesses with his name signed thereto, and they have an opportunity of seeing his name, and they attest the same by subscribing the paper, they being present at the same time, this is a sufficient acknowledgment of his signature by the testator, though the signature was not actually made in their presence or expressly acknowledged." Now if that doctrine be correct, and its terms should be adhered to, it undoubtedly goes beyond the other cases to which I have referred, because it only requires for a sufficient acknowledgment, that the name of the testator should be upon the paper at the time of the attestation, and that the witnesses should merely be asked to sign their names without any statement by the testator that the paper was his will, or of what nature it might be. It was that case which induced me to review the decisions on the point; in so doing one of the decisions I came upon was that in *Ilott* v. *Genge*, 3 Curt. 160, which was delivered by Sir Herbert Jenner Fust in the Prerogative Court of Canterbury. The learned judge said: "Under the present statute, the testator must acknowledge his signature, not his will merely, and there is no proof in this case to satisfy my mind that the will was signed before it was produced to the witnesses. It is not sufficient, in my opinion, merely to produce the paper to the witnesses, when it does not appear that the signature of the testator was affixed to it at the time, and this it is which distinguishes this case from those under the Statute of Frauds, as in all those cases, with the exception, perhaps, of *Peate* v. *Ongley*, Com. 196, the will was proved to have been signed

before it was produced to the witnesses." That case went on appeal before the Privy Council, 4 Moo. P. C. C. 265. The judgment given is one of a court deserving the highest possible consideration, for it was composed of the Lord Chancellor (Lord Lyndhurst), Lord Brougham, Lord Denman, Lord Abinger, Lord Campbell, Mr. Baron Parke, the Vice-Chancellor Knight-Bruce, and Dr. Lushington. As the judgment is short, I will read it in its entirety: "In this case we do not think it necessary to decide the question as to whether or not the instrument was signed before the witnesses were called in; but, assuming that it was signed by deceased before the witnesses were called in, we are of opinion that the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of the signature by a testator We are all of opinion that the instrument was not signed in the presence of the witnesses. The cases which have been referred to under the old law, we think do not apply. We affirm the sentence of the court below, and give costs, both here and below, out of the estate." That decision seems to set at rest any doubts which might have arisen in consequence of the judgment in the case of *In the Goods of Thompson*; it was the decision of a court of appeal in 1844, and this court is bound by it.

In the present case there was no evidence whatever as to whether the signature of the testator was on the paper at the time of the attestation, and even had it been there, the fact that the witnesses were merely called in to make their marks without any explanation being given of the nature of the document, is sufficient, according to the judgment of the Privy Council in *Ilott* v *Genge*, to show that there was not a due acknowledgment of his signature by the testator.

I must, therefore, hold that the will was not duly executed.

UNITED STATES REPORTS.

COURT OF APPEALS, NEW YORK.

Anna Eckert, Administratrix, &c., v. The Long Island R. R. Co.

What would be negligence for the purpose of saving property would not be for the purpose of saving human life.

1. *Held*, that a person voluntarily placing himself, for the protection of property merely, in a position of danger, is negligent, so as to preclude his recovery for any injury so received, but that it is otherwise when such an exposure is for the purpose of saving human life, and it is for the jury to say in such cases whether the conduct of the party injured is to be deemed rash and reckless.
2. The plaintiff's intestate seeing a small child on the track of the defendants' railroad, and a train swiftly approaching, so that the child would be almost instantly crushed, unless an immediate effort was made to save it, and in the sudden exigency of the occasion, wishing to save the child, and succeeding, lost his own life by being run over by the train.

Held that his voluntarily exposing himself to the danger for the purpose of saving the child's life was not, as a matter of law, negligence on his part, precluding a recovery.

[*Chicago Legal News*, Sept. 9th, 1871.]

Appeal from the judgment of the late general term of the Supreme Court, in the second judicial district, affirming a judgment for the plaintiff in the city court of Brooklyn, upon a verdict of a jury. Action in the city court of Brooklyn, by the plaintiff, as administratrix of her husband, Henry Eckert, deceased, to recover damages for the death of the intestate, caused as alleged by the negligence of the defendants, their servants and agents, in the conduct and running of a train of cars over their road. The case, as made by the plaintiff, was that the deceased received an injury from a locomotive engine of the defendants, which resulted in his death, on the 26th day of November, 1867, under the following circumstances:

He was standing in the afternoon of the day named, in conversation with another person, about fifty feet from the defendants' track, in East New York, as as train of cars was coming in from Jamaica, at a rate of speed estimated by the plaintiff's witnesses at from twelve to twenty miles per hour. The plaintiff's witnesses heard no signal either from the whistle or the bell upon the engine. The engine was constructed to run either way without turning, and it was then running backward, with the cow-catcher next the train it was drawing, and nothing in front to remove obstacles from the track. The claim of the plaintiff was that the evidence authorized the jury to find that the speed of the train was improper and negligent in that particular place, it being a thickly populated neighborhood, and one of the stations of the road.

The evidence on the part of the plaintiff also showed that a child three or four years old was sitting or standing upon the track of the defendants' road as the train of cars was approaching, and was liable to be run over if not removed, and the deceased, seeing the danger of the child, ran to it, and, seizing it, threw it clear of the track on the side opposite to that from which he came; but continuing across the track himself was struck by the step or some part of the locomotive or tender, thrown down, and received injuries from which he died the same night.

The evidence on the part of the defendant tended to prove that the cars were being run at a very moderate speed, not over seven or eight miles per hour, that the signals required by law were given, and that the child was not on the track over which the cars were passing, but on a side track near the main track.

So far as there was any conflict of evidence or question of fact, the questions were submitted to the jury. At the close of the plaintiff's case, the counsel for the defendants moved for a nonsuit, upon the ground that it appeared that the negligence of the deceased had contributed to the injury, the motion was denied and an exception taken. After the evidence was all in, the judge was requested by the counsel for the defendants to charge the jury, in different forms, that if the deceased voluntarily placed himself in peril from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover. All the requests were refused and exceptions taken, and the question whether the negligence of the intestate contributed to the accident was submitted to the jury. The jury found a verdict for the plaintiff,

and judgment entered thereon was affirmed, on appeal, by the Supreme Court, and from the latter judgment the defendant has appealed to this court.

Aaron J. Vanderpoel for appellant.

George G. Reynolds for respondent.

Grover, J.—The important question in this cases arises upon the exception taken by the defendants' counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fall and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore properly denied. That the jury was warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed with costs.

Church, C. J., Peckham and Rapallo, JJ., concurred.

CORRESPONDENCE.

Some recent Division Court Decisions.

To the Editors of the Law Journal.

Gentlemen,—The following cases were decided before Judge Dennistoun in the Division Court at Peterboro':

Defendant had been tenant to plaintiff under a lease under seal. One of his covenants was "to pay, satisfy and discharge all rates, taxes and assessments which shall or may be levied, rated or assessed in or upon the said demised premises during the said demised term." The tenancy commenced on the 20th February, before assessment made, and was to continue for five years. Before the expiry of the term, defendant, becoming embarrassed, requested plaintiff to take the premises off his hands, which he did on the 25th July, after the assessment had been made, taking from defendant a reconveyance under seal, which reconveyance contained this proviso—"Reserving always to plaintiff all his rights and remedies under the said lease and the covenants thereof."

Subsequently to this, plaintiff sued defendant for an account, including a balance of this rent, to which defendant made a set-off of so much of the taxes for that year as accrued after the reconveyance aforesaid, which set-off the learned Judge allowed, holding that as the proviso in the reconveyance did not express the word "taxes," plaintiff could not recover. It will be noted that the proviso expressly reserved to plaintiff all defendant's covenants in the lease, *one of which was to pay these taxes.*

Plaintiff sued defendant for rent due under a lease under seal. Defendant was called to prove the execution of the lease. While plaintiff's examination of defendant was going on, the learned Judge told defendant that he might or might not answer plaintiff's questions, as he pleased. After plaintiff's examination had closed, which was confined to the proving the execution of the lease, defendant volunteered evidence on his own behalf to the effect that the rent ought to be less than that stated in the lease. In vain plaintiff argued that such evidence was not admissible; that defendant could not thus, by his own *parol* evidence, impeach his own solemn deed. Nevertheless the learned Judge held otherwise, and made the reduction accordingly.

In *Shannon* v. *Varsil*, 18 Grant, 10, Spragge, Ch., said: "A. agrees to sell B. certain land for $1,200. B. could not prove *by parol* that A. agreed subsequently to reduce the purchase-money to $800." This decision is now, I suppose, overruled by that of Judge Dennistoun above.

Again: A Municipal Corporation sued an innkeeper for the price of a license to sell spirituous liquors, according to the terms of a By-law made before the passing of the last Municipal Act. The defendant set up that the new Municipal Act had repealed the former By-law, and that, as the Council had not made a new By-law, plaintiffs could not recover, and the learned Judge ruled accordingly. This ruling, however, is in direct opposition to the judgment of the Common Pleas in *Reg.* v. *Strachan*, 6 U. C. C. P., 191. I suppose this judgment may be considered as now overruled.

Again: The sheriff applied for an interpleader order in the County Court under a *fi. fa.* goods. The parties consented to the trial before the above learned Judge. On the opening of the case the execution creditor called upon the claimant to prove his claim. The claimant objected, and the learned Judge ruled that the execution creditor must shew that the claimant had no title. The effect of this ruling was to place the creditor completely in the claimant's hands, and virtually to put him out of Court. The learned Judge thus decided that the creditor was to prove a negative.

Reports of legal decisions are, or should be, valuable and instructive. Other cases will be furnished you hereafter, this communication being already too long.

A Suitor.

Peterboro', September, 1871.

[Without entering into any discussion of these decisions, we certainly do not recommend that they should be followed, assuming, of course, that the report is complete and accurate.—Eds. L. J.]

Evidence Act.

To the Editors of the Law Journal.

The 2nd section of the 33rd Vic., cap. 13 Ont. provides that defendants can give evidence in cases before Justices of the Peace. Will you in your next Journal be kind enough to say to what extent they are admissible in their own cases, for instance, breach of by-laws, petty trespass, master and servant, &c.

Yours truly,

Nelson Dodge, J.P.

Milford, 2nd August, 1871.

[This evidence is as admissible as that of a witness other than a party interested would have been before the Evidence Act. The Act applies solely to proceedings in civil cases, evidence in criminal prosecutions not being affected by it.—Eds. L. J.]

REVIEWS.

A Guide to the Law of Elections. As regulated by 32 Vic. c. 21 and 34 Vic. c. 3. By Charles Allan Brough, Barrister-at-law. Toronto: Henry Rowsell, 1871.

This useful little pamphlet was written at the suggestion of Mr. Vice-Chancellor Mowat, and is dedicated by permission to the judges on the rota for trial of election petitions. It has been very favourably received by them, and by those of the profession who have had occasion to refer to it.

The necessity for some knowledge of the law bearing on contested parliamentary elections came upon the profession here rather suddenly, and naturally found them, in general, unprepared; nor could the necessary books (except a few copies) be obtained here; so that any assistance that could be gained from the sources at command was eagerly sought; and very shortly after this Manual appeared, and though it did not of course pretend a thorough knowledge of the law on the subject, it has proved very useful, in presenting in a compact shape the pith of the leading decisions in England on the analogous enactments, and the opinions of our own judges in the few cases that had come before them at the time it was published.

The Editor, first gives a table shewing the corresponding English and Ontario enactments, which will be of much service when reading the English cases. Before proceeding to discuss the statutes relating to elections, he gives a collection of authorities on the difficult subject of agency as applicable to parliamentary elections, which by the way lead to the irresistible conclusion, that it is much easier for

a candidate to appoint an agent, than to prevent all his friends being his agents against his will.

The statutes governing parliamentary elections in this Province are given in full, with appropriate explanatory notes; and we notice with approbation, that wherever he can, the editor has given the language of the judges as found in the reports, instead of merely stating the supposed effect of their decisions; and this, a sensible thing to do in any case, is especially so when the reports are difficult of access to the many.

The Editor, as he explains in his preface, has omitted all preliminary questions connected with the presentation of the petition, confining his attention to those which may arise upon or subsequent to the hearing. This is rather a pity as it would have been convenient to have had as much information as possible under one cover, but we trust that Mr. Brough will do this on a future occasion, when the law is a little better understood, and some doubtful points cleared up, and after any amendments in the law that would seem to be necessary have been made by the legislature. At present an interested reader should, in addition to this pamphlet and the authorities there cited, refer to the rules of court, the report of the Stormont Case published in this Journal, and our remarks on p. 201.

To conclude: though there are a few faults in arrangement and otherwise, we do not care to inspect them too closely, Mr. Brough having done wonders in the few weeks he had at command, and having produced a really useful little book, much wanted at the time, and capable of extension hereafter.

Some startling statements respecting the *Tichborne* case seem to have reached America. The *Albany Law Journal* commends to our consideration some glaring improprieties: (1) That the jury privately informed the Lord Chief Justice that they were satisfied from the evidence of the claimant himself that he was an impostor; (2) that the jury, having been allowed to return to their homes, have been subjected to influences not calculated to aid in the administration of justice; and (3) that the Chief Justice himself has stated that he expected to see the claimant transferred from the witness box to the dock. The amiability for which our contemporary gives us credit might well be disturbed at discovering such absurd credulity in a sensible periodical as belief in these rumours indicates. (1.) Before separating, the jury distinctly informed the Judge that they had formed no opinion one way or the other; (2.) No single complaint has been made of any influence whatever having been used with the jury; and (3) Whilst we should be sorry to affirm positively that the Chief Justice has not said anything which he may be rumoured to have said, we can say that no such expression of expectation as alleged escaped his Lordship in open court. But possibly our contemporary is trying to be witty. We hope not. The purity and impartiality of English justice are our pride and boast, and when we see how much of both is sacrificed in America, we are not likely to lose an atom of what we possess without a struggle. And, in justice to the jury in the *Tichborne* case, we may say that never were men assembled in a jury box more high-minded and able, and less open to the operation of improper influences. We doubt whether an American could understand what an amount of integrity is represented by a Middlesex special jury * * * The American legal journal which we have quoted above, expresses surprise that the public press in England has refrained from commenting upon the *Tichborne case*. It says, "Had the case been on trial in this country, every newspaper from Maine to Georgia would have resolved itself into a tribunal for a summary disposal of it on the merits. The rule that it is a contempt of court for a newspaper to discuss the merits of a case *sub judice*, has so long remained in abeyance among us that the press have come to regard themselves as infallible arbiters in every case, civil or criminal, worthy of their notice. This is an evil that we presume that there is little hope of escaping so long as our judges depend for a renewal of their terms of office on popular sufferage and newspaper influence."—*Law Times.*

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1. It is no reason for a new trial in a case of felony that the reasons of the absence of a witness, who should have been present, were investigated while the jurors who were to try the case were in the court room.

2. Where the defence challenges jurors as they are called, and before going into the box, the commonwealth's attorney may reserve his challenges until those of the defence are exhausted.

3. Where two are indicted for procuring an abortion, and one of the defendants just before the trial married the woman on whom it was alleged the abortion had been produced, and then demanded a separate trial, which was granted: *Held*, that the wife was a competent witness against the other defendant.

4. Altho' the general rule is that either the husband or wife is not a competent witness against the other, yet the exceptions are where the witness is called in a collateral case, where the evidence cannot be used in a suit or prosecution against the other, or where there is a separate trial of two defendants for an offence not joint, or where called to testify to personal injuries received from the other.

5. In the second case, the witness has the privilege of declining to answer such questions as will tend to criminate his or her wife or husband. — *Commonwealth* v. *Reid.* — *United States Reports.*