DIARY FOR MAY.

2. Sat. ..Articles, &c., to be left with Sec. Law Society.
10. SUN..*4th Sunday after Easter.*
13. Wed..Last day for service for County Court.
17. SUN..*5th Sunday after Easter.*
18. Mon..Easter Term begins.
21. Thurs.*Ascension Day.*
22. Frid..Paper Day Q.B. New Trial Day C.P.
23. Sat. ..Paper Day C.P. New Trial Day Q.B. Declare for County Court.
24. SUN..*Sunday after Ascension.* Queen's Birthday.
25. Mon..Paper Day Q.B. New Trial Day C.P. Last day to set down for re-hearing.
26. Tues..Paper Day C.P. New Trial Day Q.B.
27. Wed..Paper Day Q.B. New Trial Day C.P. Appeal from Chancery Cham. Last day for notice of re-hearing.
28. Thurs.Paper Day C.P.
29. Frid..New Trial Day Q.B.
30. Sat. ...Last day Court of Revision finally to revise Assessment Roll.
31. SUN..*Whit Sunday.*

THE

Canada Law Journal.

MAY, 1868.

JUDICIAL CHANGES.

Easter Term opened with the profession looking forward, some with anxiety, and some with curiosity to expected judical changes, bringing honors to the few, and disappointment to the many; and affording a fund upon which those whose business is principally composed of "other peoples business," could draw largely and descant upon wisely or foolishly as the case might be.

The rumours that have been circulated are numerous, and all hinging upon an event which, when it takes place, must bring deep sorrow to all; namely, that the Chief Justice of Upper Canada, has resigned his seat on the bench, or is about to do so. He is speaking of him as one of a class, "the last of his race," and we do not fear the ill-will of any one, when we say that there is no one to fill his seat when he leaves it. It is still, however, satisfactory to have (we hope we may say) the assurance that his dignity and learning will not thereby be lost to the country, in that he will probably be selected to preside in that Court of Appeal for the whole Dominion, which we hope soon to see established.

This removal to a more exalted position—for as such we prefer to speak of it,—would leave a vacancy that it is said will create not one, but several difficulties. The name most commonly spoken of as a possible Chief, is the present Chancellor, an appointment that would we think give entire satisfaction to the profession. His unquestioned ability and judicial capacity point him out as a most likely man for the place, and there are reasons why he would be even more useful on the Common Law bench, than as a judge in Chancery. As a mere matter of promotion he is now next in point of precedence to the Chief Justice, though it may seem somewhat anomalous to change an Equity judge to the Common Law bench.

The principal difficulty then would seem to be, to find a suitable successor for him. Many chancery men would dislike to see such a faithful servant of the public as Mr. Spragge, passed over. But as to this, it is just as well that it should be distinctly understood, tha puisne judges, either Equity or Common Law, have no claim of right to expect promotion as such. It has always been the rule in England, that the appointment of all the presiding judges in the Superior Courts is a matter wholly in the discretion of the government of the day, unfettered by pretence of right of the puisne judges to promotion, and the appointments have generally been political, or for state reasons, the selection being made from the ranks of the bar, and not from those already holding seats on the bench, the Attorney General having the right, if he pleases, to take the position himself.

It is undoubtedly true as a matter of fact, that the majority of our Chief Justices have risen step by step to that position; but that proves nothing, except that special reasons at the time rendered it advisable so to promote them, but this promotion was not by seniority; and both Mr. ex-Chancellor Blake and the present Chancellor were members of the government, immediately before they were appointed. Whatever appearance of unfairness there may be in this rule, there is, in reality, none, and it has been found to work well, both here and in England.

Looking then at those who are in political life and otherwise qualified for the office, Mr. Edward Blake's name has been mentioned in connection with the office, but we question whether it would be offered to him. His legal knowledge has proved of great use in the Legislature, and there does not appear to be any political reason, so far as we have heard, why he should be requested to shelve himself. It is even more questionable, whether he would accept the offer, even if made. His present

position is such, that it would seem unlikely that he would accept it. He is young, full of strength and energy, ambitious, in receipt of a large income from his profession, much larger we doubt not than the salary of office would be; he is on the threshold of political life, a rising and successful counsel with no equal at the Chancery bar, with the single exception of Mr. Strong (who is said to be in some respects even his superior, but has no claim on political grounds), and altogether with such prospects before him, that it is difficult to believe that he would be content to give up the excitement of political life at this early period of his career.

Others there are who would have a claim upon the government for the seat, and could command strong political interest, and perhaps fill the office fairly and respectably; but there is no one "head and shoulders" over his fellows, that the profession can look to as a likely man. Failing then an outsider, Mr. Vice-Chancellor Spragge's name comes up again, and his appointment would create an opening for a new Vice-Chancellor which could more easily be filled; and Mr. Gwynne's name suggests itself. He has already shewn himself a capable man for the bench, so far, at least, as we may judge from experience in presiding occasionally at Nisi Prius. There are, however, others from whom a desirable selection might be made for Vice-Chancellor.

But if the Chancellor be not appointed to the Chief Justiceship, where are we to look for a Chief. The qualities necessary to fill the position with comfort to himself, pleasure to the profession, and advantage to the country, are such that it is not to be wondered at that there is so much difficulty in finding the right person for the position. Even from the physical strength and endurance required to perform the duties satisfactorily, it is difficult to obtain with the other requisites; and in speaking of this last requisite it is said that the senior judge of the Court of Queen's Bench, so thoroughly qualified for such an important position in point of learning and ability, does not possess the health or strength which has been spoken of as essential.

It is very much to be regretted that the Treasurer of the Law Society could not be induced to accept the Chief Justiceship, which it is said has been offered to him, but declined. His capabilities are so patent, and his public services of such long standing, and his efforts on behalf of the profession so great and so well appreciated, that his appointment would be looked upon by the profession as a deserved compliment to the bar in general. We are sure that nothing but the impossibility of giving up his numerous business engagements at such short notice, would prevent him from accepting an appointment that would redound as much to the credit of the Government as it would, under other circumstances, be in accordance with his own professional aspirations.

Whatever the appointments are to be, we hope there will be no delay in making them. It does not at present seem likely that either the Attorney-General for the Dominion, or for Ontario will take advantage of the privilege possessed by one or other of them; nor is there any member of the Government that would be likely to be appointed; and if so, there need, and ought not to be much delay.

Rumours of course are numerous, and one is, that failing the appointment of the Chancellor to the Chief Justiceship, the Chief Justice of the Court of Common Pleas would take that position, taking with him to the Court of Queen's Bench Mr. Adam Wilson, and that Mr. Hagarty would then be appointed Chief of the Pleas, with probably Mr. Gwynne as his Junior Puisne in that Court.

We think, however, we are correct in stating, that as yet no appointments have been made.

LORD BROUGHAM.

Recent despatches from England bring us news of the death of Henry Brougham, Baron Brougham and Vaux, in his ninetieth year, at his residence near Cannes, in France.

He was born in Edinburgh, on the 19th September, 1779, and was educated at the High School and University of Edinburgh, where he was laborious and successful. He became an advocate at the Scottish bar, in 1800, and about two years afterwards commenced his connection with the *Edinburgh Review*, to which he was for several years one of the most constant and eminent contributors. In 1807, he removed to London, and the year afterwards was called to the bar at Lincoln's Inn, where his great ablities and untiring energy made his success as certain and more brilliant than it could have been in the more limited sphere north of the Tweed.

Though his star was in the ascendant, both as a writer, an advocate, and as a outspoken, fearless statesman, the celeberity he acquired by his defence of Queen Caroline, brought him most prominently before the public, and made him for years one of the idols of the English nation. This masterly effort, and his speech on the Reform bill, were the oratorial efforts by which he was best known to fame, professionally and politically. He is, however, best known to those of the present day, as the greatest reformer, and particularly law reformer, of his day.

Mr. Brougham was appointed Lord Chancellor during Lord Grey's administration, and though not attaining to the eminence on the bench that he did at the bar, his energy was the same, and his zeal as untiring as before.

His powers of work were almost superhuman. Such an intellect, combined with such physical endurance, and such a determined, dauntless spirit knew nothing of failure, until he had risen from an obscure position to the highest honours which his country could restore. He has left a name without which many pages of English history would be a blank, and his memory will ever remain as a beacon of encouragement to the industrious student, ambitious of success. Their motto should be what his proved to be, "Whatsoever thy hand findeth to do, do it with thy might."

LAW SOCIETY, EASTER TERM, 1868.

The following statement shows the result of the examinations for call to the Bar and for admission as Attorneys during this Term, in the order in which they passed.

For Call:

Maximum number of Marks, 350.

1. Mr. Mulock, ...307 marks;
2. " Moore, ...305 "
3. " Lash, ...304 "

who were admitted without oral examination.

4. Mr. Harman,
5. " Sparks,
6. " Fraleck,
7. " Dingwall,
8. " W. Bell,
9. Mr. Hall,
10. " Goforth,
11. " McMurrich,
12. " Barrett,

Nine gentlemen were rejected.

For Admission:

Maximum number of Marks, 300.

1. Mr. Garrow, ...271 marks;
2. " Lash, ...259 "
3. " A. Bell, ...254 "

who were admitted without oral examination.

4. Mr. Douglas,
5. " McMartin,
6. " Scott,
7. " White,
8. " Chamberlain,
9. " Boggs,
10. " French,
11. " Donaldson,
12. " Gibson,
13. " Berford,
14. " McDowell,
15. " Harman,
16. " Robinson,
17. " Elliott,
18. Mr. Dingwall,
19. " Duggan,
20. " Lillie,
21. " Capreol,
22. " Green,
23. " Greig,
24. " Beatty,
25. " Sewell,
26. " O'Leary,
27. " Bethune,
28. " Smith,
29. " Leet,
30. " Gray.

Four gentlemen were rejected.

SELECTIONS.

WHAT SHOULD BE A QUORUM OF JUDGES.

The recent change in the constitution of the Court of Appeal in Chancery, and the various plans which have been lately put forward, and are now under consideration, for reforming the law courts, suggest the consideration of the question.—What number of judges sitting together forms the best tribunal?

An independent observer of our judicial system must at first sight be greatly struck with the curious difference between the accustomed number at common law and in chancery. He would also, at all events until within the last few years, if he consulted members of both branches of the bar, have been struck with the uniformity with which they each preferred their own system. Members of the chancery bar have seldom been found to recognize the advantage of four judges sitting *in banco*, and common law barristers, for the most part, wonder how it is that suitors and the profession are satisfied with the decisions of a single judge in equity. These opinions are, doubtless, in a great degree, the result of the force of habit and of the conservation which has habitually pervade the profession. We cannot, however, think that such opinions are entirely without foundation in reason; still less that they were so formerly, when they were more universally entertained than they are now. The tendency of all recent legislation has been largely to increase what we may call the concurrent jurisdiction of the common law and equity courts. With this increase has grown up a feeling that the composition of the tribunals might, with advantage, be more nearly assimilated. Notwithstanding this, we think there may still be recognized a difference in the general nature of the questions which come before a common law court *in banco*, and before the Vice-Chancellors, and that this difference is of a character which makes it desirable that the decisions of the one tribunal should be based on collective opinion, while those of the other may be may be satisfactory, though only the expressions of invi-

dual opinion. Where arrived at merely by the exercise of powers of the intellect, the strength of a tribunal must be measured by that of its most gifted member. It may be weakened, but can scarcely be strengthened, by adding the judgment of an inferior mind to that of a superior. For a tribunal which has to decide such questions therefore, there can be but one reason—and that but a poor one—for having more than one judge, namely, the difficulty of selecting the best man. When, however, the questions depend upon practical judgment and experience of men and things, the case is very different. In such a case the greater aggregate amount of experience which is brought to bear upon any disputed point, the more satisfactory will be the decision.

Now, we think that the cases which come before the equity courts can more often be decided by the application of abstract principles, than those which the common law courts have to deal with. Such a distinction may be thought by some rather fanciful, and undoubtedly the rule, if it is one, is qualified by many exceptions. There is, however, one practical distinction between the business of the common law courts *in banco* and the Vice-Chancellors' courts, which is most important as regards the number of judges required—that is, that the business of the former is principally of an appellate character. We refer, of course, to the New Trial paper, which occupies by far the greater portion of the time during which the courts sit *in banco*. In a considerable number of these cases the decisions of the jury upon the evidence is reviewed by the court. The power of the court, while it is one which every one, experienced in the occasional results of trial by jury, admits ought to be possessed by the court, is yet one which all will agree ought not to be exercised by one, or even two judges. Indeed it is now a common cause of complaint, that the opinion of the one judge who tried the case, is allowed by the other members of the court to have too much weight with them, to the exclusion of their own judgment. Other cases again, in the new trial paper, involve the question of misdirection, which is a direct appeal from one judge to the court on a matter of law. In others, where the point has been reserved, the appeal is often from a merely formal decision of the judge, given for the purpose of bringing the point under consideration of the full court. Here, therefore, we have at all events the deliberate opinion of a judge that the point is one worth discussing, and as to which he does not care to rely on his own unassisted judgment. This may be thought not an insufficient reason why the tribunal to decide the point should be composed of several, and not of a single judge. Besides the new trial paper, the courts *in banco* are occupied with motions, the special paper, and in the case of the Court of Queen's Bench with the Crown paper. Now, many of the motions are for new trials, and to these of course the remarks made upon cases in the new trial paper apply. Others are appeals from judges at chambers, which seem to us to require a full bench of judges. Others, again, are applications for the exercise of the discretion of the court in various matters, upon which the decisions of a bench are more likely to be satisfactory, because less likely to be arbitrary, than those of an individual judge. Some few motions, doubtless, are made to the court principally on matters of practice, which might well be disposed of by a single judge, but these occupy but a very small portion of time, and, although they might with advantage be heard, together with the chamber business of the judges under the new rules, before a practice court, we think they do not afford any argument for materially reducing the number of judges sitting *in banco*. As to the special paper it consists of demurrers and special cases. Here, the law has to be applied to admitted or agreed states of facts. As regards special cases, however, it has become a common practice to state certain facts, leaving the court to draw the same inferences that a jury might have done as to other facts which may be material to ascertain the rights of the parties. In these cases the judges really act as jurymen, and the number of independent judgments may be of importance. In other cases, in the special paper, there can be no doubt that the weight and authority of any decision will depend more upon the reputation of the judges who gave it for legal knowledge, than upon their mere number. Here, therefore, if the selection of the judges on the ground of their legal knowledge could be guaranteed, the tribunal might consist of a less number of judges than at present, and even of a single judge. With regard to the Queen's Bench Crown paper, a few of the cases are appeals from magistrates and the like, and of considerable practical importance; but as Chief Justice Cockburn lately remarked, most of the Crown paper days are occupied by the court in trying to make sense of other people's nonsense. Either some hopelessly inconsistent sections of Rating or Public Health Acts have to be reconciled and applied by a kind of *cy pres* process, or else the meaning of the Legislature has to be discovered in one of those cases where the only thing that is clear, is, that the point was never foreseen, and that the Legislature had no meaning at all with reference to it. Until the judges are relieved by better workmanship in law-making, from this distressing and useless kind of employment, it would perhaps be better for the public, though rather hard upon the judge, to confide it to one than to several. On the whole therefore, looking at the character of the work done by the common law courts *in banco*, we think there are good grounds for continuing to have a bench of judges and not a single judge. In addition to the reasons arising out of the character of the work, it must be remembered, that judges are in practice, though not of coursein

theory, appointed for reasons other than the probable amount of their judicial faculties; and even where this is not the case, the faculty which justifies the appointment may be rather a capacity to assist juries in dealing with facts, and in other respects to preside with efficiency at *nisi prius* and in criminal trials. This faculty by no means always accompanies the legal learning required *in banco*, and yet it is obviously convenient not to have special judges for the different departments. As regards the actual number required, however, we certainly incline to the opinion that three is as good as four, and much better than four, three or two, according to chance, as we have now. Of course it would be foolish so to fetter the discretion of the judges as to interfere with the dispatch of business, when accident prevented the formation of a full court, but if the number to sit is reduced to three, it ought to be understood that it is not meant that two should sit as often as three do now. Three is a good number, because there must always be a majority, and also because the judges can consult together on the bench more easily than if there are four.

With regard to the equity courts of first instance, we know of no desire on the part of the profession or of suitors, at all events until they have lost their cause, to be heard before more than one judge. This, however, does not apply to courts of appeal. We have before expressed our opinion of the bad policy of the recent change. It is not too much to say that there has been no court in the kingdom which has worked so well and given so much satisfaction generally as the Lords Justices Court as recently constituted. It is perhaps needless to say we are not, in speaking of the constitution of the court, referring to the individuals who compose it. Indeed, we are almost afraid that Lord Cairns and Sir John Rolt, may do their work when sitting singly too well, so that it may become so much the practice for them to sit alone, that in future, when men less competent to review the decisions of other judges may fill their places, it may be difficult not to follow the usual course. We think the Act introduced a foolish and unnecessary change. We believe it was done in order to remedy an accidental inconvenience from the illness of one of the judges. It would surely have been much better to have given to some one, either the Lord Chancellor alone or in conjunction with one of the Lord Justices, a power to appoint a deputy for a limited time. The change is sometimes justified by saying, that there is even less security that the Lord Chancellor will always be a good equity judge, and that he has always had power and been in the habit of sitting alone, although he has now power to call in assistance. This seems to us a far better reason for appointing a third Lord Justice to assist the Lord Chancellor, than for interfering with, perhaps, the best court in the kingdom. The subject of the Court of Exchequer Chambers is a difficult one; several plans may be suggested for preventing a minority of judges overruling a majority, as now happens occasionally. This might be effected by counting in the judgments of the judges below, where there was a difference amongst the judges above, by which method, however, the possibility of a change of opinion upon re-argument is not provided for. Perhaps as simple and practicable a plan as any would be to require for the reversal of a decision of the court below a minimum number of six judges and a majority of two to one in favour of reversing the decision. Under this plan, assuming the number of judges below to be reduced to three, there would only be one possible case in which a minority could overrule a majority, viz., four against five. There would not be much practical harm in this, as the opinion of the judges below are clearly not of equal value with those of the judges above, who are able to weigh the reasons given in the judgments below, and also have the advantage of another argument often by different counsel.—*Solicitors' Journal.*

ON THE UTILITY OF OATHS.

(By Edward Gardner, L.L.B.)

The subject of oaths and declarations taken in various departments of the State has latterly attracted the attention of Parliament; and during the session 1865–66 a Commission was held to inquire what oaths, affirmations, and declarations are required to be taken or made by any of Her Majesty's subjects in the United Kingdom other than those taken or made by members of either House of Parliament, or by prelates or clergy of the Established Church, or by any person examined as a witness in a court of justice, and to report their opinion as to the dispensing with or retaining and altering such oaths, affirmations, and declarations. To the report made by the Commission, are appended 300 closely-printed pages of oaths and declarations taken by the holders of different offices on their appointment to them, and to these many others might be added which the Commissioners seem to have missed. Passing over the report itself, which appears to be fully concurred in by one only of the five Commissioners who sign it, we come to the dissent of Commissioners Lyveden, Bouverie, Lowe, Maxwell, and Milman, who seem to have brought their great intellects to the examination of a question in a truly philosophic spirit. They come to the conclusion that by far the greater number of the oaths into which they had examined, ought to be abolished, and the rest changed into some convenient and distinct form of declaration:—

"The imprecatory forms of oath in common use," they say, "appear open to very grave objections. Such oaths seem to assume that God's vengeance may be successfully invoked, and God's help declined or accepted by frail and fallible man, or made conditional on the truth of his assertions or the fulfilment of his promises—notions

which seem inconsistent with the teachings of religion and of reason."

The limits of this article do not admit of detailing the arguments of these five dissentients. To those who would wish to pursue further the study of the subject opened up by the Commission, and who may not be inclined to adopt the views set forward in this paper, a careful perusal of the dissent referred to is earnestly recommended.

A glance at three hundred closely printed octavo pages of oaths and declarations taken by members of Her Majesty's household, officers of public departments, of courts of justice, by soldiers, sailors, and volunteers, by county, borough, and parochial officers, by recipients of the different orders of knighthood, by members of universities, colleges, and schools, of traders' guilds, of various incorporated societies; a glance at these is surely enough to set us thinking on the wholesale swearing that seems to be required in almost all the public relations of life; and to the catalogue are to be added several oaths and declarations that have been omitted, also those taken by members of both Houses of the Legislature, by the prelates and clergy of the Established Church, and by jurors and witnesses in courts of justice.

History tells us that oaths were taken in the earliest ages of which we have any records; and the compilers of legal history, wholesomely impressed by precedent, assert that, "however absurd or perverted by ignorance and superstition, an oath in every age has been found to supply the strongest hold on the consciences of men, either as a pledge of future conduct, or as a guarantee for the veracity of narration."* Under some of the deductions from and abuses of the civil law, of which the middle ages were fruitful, heathens, Jews, and other persons, whose opinions ex-cathedra fulminations then stigmatized infidel, were declared incompetent to be witnesses in courts of justice. The giving of evidence the old lawyers considered rather a right than a duty, and consequently incompetency was a fitting punishment on the holders of obnoxious opinion—a punishment in which frequently the innocent Christian was included, who, having a suit to maintain, happened to have only the evidence of rejected witnesses on which to rely. And Sir. Edward Coke, not free from the bigotry of his time, is found to declare that an infidel (*i.e.*, any one who was not a Christian) could not be a witness: "All infidels," he says, "are in law, perpetual enemies, for between them as with the devils, whose subjects they be, and the Christian there is perpetual hostility and can be no peace.' About the year 1745, a better spirit seems to have dawned upon our tribunals, and in a celebrated case† then argued, it was decided that the words "so help you God" are the only material part of the oath, which any heathen who believes in a God might take as well as a Christian. Consequently, the kissing the Evangelists—with or without a cross on the cover—in England and Ireland; the uplifted hand in Scotland, the touching the Brahmin's hand and foot in India, the placing the forehead on the Koran in Constantinople, and the breaking of a saucer in China, are all mere forms surrounding the great substance "so help you God." But our cousins on the other side of the Atlantic seem to be wandering away from what we may call the imprecatory sanction of the oath, for their books say that witnesses are not allowed to be questioned as to their religious belief—not because it tends to disgrace them, but because it would be a personal scrutiny into the state of their faith and conscience foreign to the spirit of free institutions, which oblige no man to avow his belief.* With them the curious anomaly could not have happened, which was made patent to the British public a few years since, in a case brought by a man called Maden, in an English County Court.† His only witness was his wife, who, on being examined on the *voir-dire*, stated that she did not believe in a God or in a future state of rewards and punishments. Her evidence was rejected because she dared to speak the truth; had she lied and professed the necessary belief, her testimony must have been received. The Judge had no sympathy with the witness, but, assuming to be an authority in religion as well as law, he told her that she must take the consequences of her disbelief in the loss of her property, the subject matter of the suit.‡ Happily, Atheists are rare; were they however more numerous, the interests of justice must long since have demanded the admission of their evidence. Truth is what a court of justice desires; the exclusion of the honest infidel will not secure it, and the dishonest will not hesitate to profess the necessary qualifications for giving evidence.

Having taken this hasty glance at the history and nature of oaths, let us for convenience divide them into the same classes as those adopted by the five dissentient Commissioners whom I have already named. We have then:—

1. Oaths. to the breaking of which no penalties are attached by law, and

2. Oaths, to the breaking of which the law does attach a penalty.

1. Of the first class are (1.) oaths of allegiance, and (2.) oaths of fidelity in the discharge of duties.

(1.) As to the oaths of allegiance the dissentients with significant brevity state, that—

"In peaceful and prosperous times they are not needed; in times of difficulty and danger they are not observed. Contemporary history affords

*Best Ev. § 56.
† *Omichund* v. *Barker*.

*Greenleaf Ev. § 370.
† Rochdale Co. Ct., Feb. 1861.
‡ Her mother was the defendant; she had neglected the religious instruction of her daughter, and thus took advantage of her own wrong.

abundant proof of the inefficiency of political oaths, whether taken by the people to their rulers or by the rulers to the people."

It is the duty of all subjects to bear allegiance to their rulers, and the anomaly is a curious one, discoverable no doubt in all societies, of requiring a man to swear to perform that duty, which he not only ought to be presumed, but which the very fact of his being a subject compels him, to observe to his Sovereign. Somewhat similar is the peculiarity remarked by a surprised Frenchman of certain of our Irish brethren joining together and agreeing to be loyal; agreeing to be what they ought to be, agreeing to do their duty, and therefore considering themselves worthy of all praise, as faithful observers of political morality. Ordinary civilians are not called on to take the oath of allegiance, yet it behoves them to be equally as loyal as the soldiers who swear an oath, which even when they hear they hardly understand.

(2.) Then as to the oaths of fidelity in the discharge of public duties, they have never stopped the unworthy at the threshold, and the worthy did not require them to quicken their sense of duty. Such oaths seem to be in the nature of contracts, which might be entered into in a manner much more satisfactory than by embodying them in their present form. With a writer of the year 1834, quoted by the Commissioners, it is only common sense to hold that—

"No man should ever be called on to promise to do what he is bound by the duties of his office to perform, on the contrary, it should, in every way, be declared that every man has already promised to do his duty by the very act of accepting office." *

There are two motives, or, to use a perhaps more correct phrase, two sanctions for the observance of the class of oaths we are now considering, namely, the sanction of interest and the sanction of religion. Now, if an enlightened self interest does not impel to honesty in the discharge of a duty, it is very questionable whether the religious sanction will secure faithfulness in the office. The oath will not generate a conscience, and, where this is wanting, happiness here or hereafter ceases to persuade, and Hell offers no terrors. Even a tendency to superstition, which we too often shamelessly encourage, can have no place in one devoid of the moral sense. Worldly gain, present or prospective, is the sure reward of faithfulness. But, it may be said, a little wrong, scarcely possible of detection, may be done with advantage to the wrong-doer, and in such case self-interest inclines to the doing of it. The proposition may be questioned; but admitting the force contended for, the moral sense of right and wrong should be potent to resist the temptation, and, if it be not so, an oath cannot strengthen the weak conscience. As to the sanctity of the oath (a phrase which is scarcely intelligible) in what does it consist, since the practice is recognized of taking the oath as a matter of form, and disregarding its whole spirit? Oaths and declarations taken by officers of the army against the payment of money for commissions may be mentioned; these, however, common decency abolished some years ago, and the Report points out some other oaths which were, and are, taken not to be observed. Examined from whatever point of view, an oath must be found not to possess in itself any sanction whatever for the due observance of the duty sworn to be faithfully performed.

2. Passing away from oaths of office we come prepared in some degree for an examination of judicial oaths, or that class of oaths to the breaking of which penalties are attached by law.* A witness is sworn in a Court of Justice to tell the whole truth; should he lie, a temporal punishment is imposed on his being found guilty of the offence, and further, say the clergy, he has earned punishment hereafter for having laid perjury to his soul. We shall not stop to examine the feeling of certainty or uncertainty as to this latter reward, that may be present to the mind of him who swears falsely; the question is not one of any importance to the object aimed at in this paper.

Stripped of the legal sanction, this class of oaths is very similar to that we have been considering. It is every one's real interest to speak the truth,† and should any motive induce one to swerve from it the oath has no charm to prevent if conscience be dead to the sacred character of truth itself. If motive and conscience be acting in contrary directions the repetition of no formula can give power to the latter. A lie is a lie on the street or on "Change, as much as in a Court of Justice, and why should its utterance be considered more heinous in the one place than the other? As great interests depend on the honest dealing of man with man as on speaking truly before a judge and jury. But if we exalt truth in the one case by investing it with a sort of specially made garment, of necessity its position in the other case is altered, and it becomes a less crime to tell your neighbour such a lie as may enrich you and impoverish him than to swear falsely to some insignificant fact in a Court of Justice. A lie, we are in effect told, is not so bad a thing in our every day contracts, but in a Court of Justice is something awfully wicked. Yet wherein does the difference consist? A lie has been told in the presence of God as deliberately in the one case as in the other. But truth has received in a Court of Justice a fictitious importance,

* J. Endell Tyler, "Oaths," p. 68.

* With this class the Commission was not concerned.

† It being more easy to tell the truth than a lie, some writers speak of a natural sanction for truth, meaning that it is more natural or easy to draw upon the memory, than the imagination.

"From the mouth of the most egregious liar," says Bentham, "truth must have issued at least one hundred times for once that wilful falsehood has taken its place." (Ev 82.)

and the tendency outside is not to stamp a lie with the severe condemnation which it merits. In the desire to secure veracity in our tribunals the interests of truth generally have been overlooked, they have been completely lost sight of, and society suffers in all its dealings in order that a result might ensue, which deeper investigation into the subject must prove to be not obtained. In ordinary dealings, and in ordinary conversation, we frequently find individuals not only pledging their honours, but willing to give their oaths as guarantees of the correctness of their assertions, and our common experience teaches us that when such guarantees are offered those individuals are lying most. A show of candour too frequently indicates its complete absence; and when we hear a man prefacing his statements with the phrase "to tell you the truth" as a sort of advance guard we may look out for being deceived in someway or other. Assuredly the injunction "swear not all" possesses more meaning than the heated controversies of sects have allowed us to perceive. A keen observation of human nature on the part of the Founder of Christianity, which is manifested again and again in other philosophic reflections, prompted these words; and the attempt of Paley* to show that they were inapplicable to judical oaths entirely fails principally because he misprehended their meaning. "Let your communications be yea and nay, for whatsoever is more than these cometh of evil," these words show the idea present to the mind of the speaker that the truth is deserved by the addition of an oath. Were truth sacred in the market place, its character would not, and could not, suffer when uttered in a Court of Justice. Rid truth in the latter case of its unwholesome surroundings, let it stand out in its own abstract greatness and importance, and we shall be sure of truth being spoken in the street, and consequently more sure than at present of securing it in our tribunals.

Supposing, however, the proposition incapable of proof that truth suffers by being considered something higher when uttered before a wig and gown than it is when spoken in other relations of life, still the taking of an oath can only be justified on grounds of expediency. It must be shown, first, that the religious sanction is of avail where simple and unaided conscience would be weak and insufficient, and, secondly, that our lives and properties are really protected by the notions which people are supposed to entertain upon being put through the oath formula. Parenthetically it may be observed that with the legal sanction we are not at present concerned; that in some shape must always be maintained. The history of the law of evidence would furnish us with curious information on this subject, but to one only of its chapters need reference now be made, namely, to that which tells of the times when men, so far mistrusting each other, feared to examine parties in a cause, or even any persons interested, however remotely, in the result; and when justice was but too often defeated from the absence of any one who could testify to the matter in dispute save the plaintiff or defendant, and neither could be a witness. "*Nemo in propriâ causâ testis esse debet*" we borrowed from the civil law. "If the rules of exclusion," says Taylor, "had been really founded, as they purported to be, on public experience, they would have furnished a most revolting picture of the ignorance and depravity of human nature." At the commencement of the present century, Jeremy Bentham called attention to the absurdities of our system of evidence, and but 16 years have passed since complete justice in this respect has been done to that shrewdest of jurists. In 1833 interest ceased to be an objection to a witness; ten years later the person who had committed a crime was no longer excluded from the witness-box. In 1846 the English County Courts began to experiment on the evidence of plaintiffs and defendants and their wives, but it was not till 1851 that, the experiment having proved successful, Lord Brougham was able to induce Parliament to let in such evidence in almost all cases. Nor is the day now far distant when the mouth of a prisoner can any longer be kept closed. Yet, when Bentham's views began to be accepted, there were not wanting false prophets in abundance, who foretold the commital of the most dreadful perjuries.

Without entering into the various views as to what constitutes the essence of an oath, its supposed advantages cannot be more strongly stated than in the words of John Pitt Taylor. He says:—

"The wisdom of enforcing the rule, which requires witnesses to be sworn, cannot well be disputed; for although the ordinary definition of an oath—viz. 'a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth' may be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man to God; not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so, still it must be admitted that by thus laying hold of the conscience of the witness the law best ensures the utterance of truth." (§ 1247.)

Again we are brought back to conscience as the something which is to be laid hold of for securing truth; it is the witness' conscience which is to be affected, and hence the meaning of the question—"Do you believe that oath binding on your conscience." We have seen, however, that the moral faculty is not supplied with new strength by the administration of an oath. It is our common experience that the religious sanction of the oath does not deter a dishonest witness, though the legal penalties for perjury undoubtedly frequently do. It is but seldom, too, that the witness pays any heed to the officer of the court who performs the

*M. & P. Philosophy Bk. JJI, p. 11, c. 61.

duty of swearing the witnesses; his mind is full of other thoughts, and if perchance he should give marked attention to the hurried words spoken by the officer, the jury receives his evidence with caution. A witness is never shaken by being reminded that he is on his oath, nor does the question—the resort of the "powerful feebles"—"by the virtue of your sacred oath do you swear so and so?" at all frighten him. Litigants frequently know, frequently imagine, that certain witnesses could, if they would, give certain evidence; they have been unable in conversation to get the desired admissions, but they seem to think that the swearing book has a magic spell. Despite the advice to the contrary of their lawyers, they have these persons placed in the witness-box, and the result is the usual one. A too frequently recurring illustration of this is in the examination of defendants to prove shop-debts due by them to the representatives of deceased traders, where the deceased was the only other person who could have given evidence.

That it is the regard for truth itself, uncloth-ed with mystic rites, which secures reliable evidence in our tribunals, receives additional corroboration by resort to negative proof. For instance, we are often informed that the Judges of courts established by the British rule in various countries over the earth are continually puzzled to discover in those localities, where mendacity is the normal condition of the people, the real facts of the cases they are called upon to decide. Before a class-fellow from the halls of this college,* now a Judge in India, the following case was presented:—The plaintiff, a money-lender, complained that he had agreed with the defendant to lend him 100 rupees, that he had given him 20 on account, and that the remaining 80 were to be given on his coming and executing the bond for repayment, but the defendant never returned to execute the bond, and he refused to pay back the 20 rupees advanced. The defendant replied that he had required a loan for a few days, that he had signed a bond to the plaintiff for 100 rupees, but only received 20 on account, the plaintiff saying that he would give him the remainder on the following day, but, in the meantime, defendant discovered he could do without the loan, so he repaid the plaintiff the 20 rupees lent, and got back his bond, which he produced. Each party set forward witness after witness in support of his case, the Judge adjourned again and again, and, at the time I heard the story, was unable to come to any decision. Olden times would have suggested "wager of law," some ordeal, or the "decisory oath," and the Judge under the civil law would have exercised his discretion, and administered the "suppletory oath."*

But who shall say that truth would any the more have been discovered? It is not a little remarkable that the great foreign jurist Pothier, in speaking of these additional oaths, said:—

"I would advise the Judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath to prevent his demanding what is not due to him, or disreputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred, and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted."†

Had it occurred to that great jurist, when he used these words, that oaths in general might be dispensed with altogether, the very same view he must have applied to the entire class, which he held with reference to the limited and extraordinary class then under his consideration. Perhaps, too, the earnest student of our great English jurist would discover that he questioned the utility of all oaths.‡

The opinions, however, of great jurists need hardly be quoted for judges and juries who are supposed, next after the witness, to be impressed with the oath taken by him, throw aside altogether the consideration that the evidence has been sworn to; and in their decisions they are wholly guided by the credibility of the facts, which, in their eyes, receive no additional confirmation from the oath, nor does the oath, on the other side, lend to the opposing statements any strength whatever. And this seems to have been always the case, for we find one of our oldest law books in ordinary use, speaking of the "demeanor of a witness and his manner of giving evidence as oftentimes not less material than the testimony itself."*

Our lives and properties are not protected by the oath, nor does its imposition affect the conscience; on grounds of expediency therefore it fails to be serviceable. Moreover, we have seen that the interests of truth generally are prejudiced by the fictitious importance attached to an oath. On an examination of the question, then, both negatively and positively, the conclusion is forced upon us that public policy demands an alteration in the swearing laws. There is hardly a sin against society which is not referable to a disregard of truth; society may make laws to punish and deter, but the root of the evil remains untouched; we lop off branches and hope to preserve the dying tree; it is useless, the old story repeats itself. Let us follow however in the footsteps of an enlightened religion, and proclaim the securing of truth to be the great object of earthly laws. By truth we do not mean the metaphysical mirage often discoursed

* Queen's College, Belfast.

* The civil law permitted litigants to tender the "decisory oath," the one to the other, he who refused it lost his cause. It was the Judge's privilage in doubtful cases to administer the "suppletory oath" to either party.

† Obligations, by Evans, s. 831.

‡ Bentham, Evidence, bk. 2, c. 6.

* Starkie, Ev. 547, 822, 4th ed.

upon, but real, earnest, substantial truth, that we can lay hold of, and assure ourselves that this fact is real and that one indisputable, that this man's word is his bond and that man's honour unimpeachable, Let it be our object to secure truth in all relations of life, and then will be attained the end of all laws—that men should live happily together.—*Law Mag.*

PRESENTATION TO PROF. SHARSWOOD.

On Thursday afternoon, on the occasion of the retirement of the Hon. George Sharswood from the post he has long filled with such distinguished ability in the Law Department of the University of Pennsylvania, the gentlemen of the class presented him with a handsome piece of silver plate, as an evidence of their affectionate regard. The presentation was made by Samuel B. Huey, Esq., on behalf of the class, and was responded to by the professor in a feeling manner. His resignation is necessitated by the recent elevation of his Honor to the bench of the Supreme Court, the duties of which require his whole time and attention. It will be difficult to supply the place thus made vacant.—*Phil. Legal Intell.*

ONTARIO REPORTS.

ELECTION CASES.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

Reg. ex rel. Walker v. Mitchell et al.

Municipal election—Name of candidate omitted from list—Effect on result of election.

In the list of candidates for the office of township councillors given to one returning officer, out of five for the township, previous to the election, the name of Alex. Henry, one of the candidates, and who had been duly nominated for the office of councillor, was accidentally omitted from, and was not placed upon the list of candidates until half-past one o'clock of the first day of the polling, whereby Henry certainly lost six votes and possibly more. The relator and one Stubbs having an equality of votes, the returning officer voted for Stubbs, who, with two other candidates, having a larger number of votes, were declared elected as the three councillors for the township. The relator and Alex. Henry protested against the election, contending that the whole result of the election had been affected injuriously to one or both of them by the omission of the name.

Upon an application to set aside the election it was

Held, that it is not every irregularity that will vitiate an election, and that in this case the question to be decided was not as to the mere abstract ground of the omission of the name, but only what effect it had had upon the final result of the election; and that, as it did not appear that the result would have been different if the name of Alex. Henry had been properly entered on the list, the election should not be set aside.

Quære as to the right of the returning officer to add the omitted name to the list of candidates.

[Common Law Chambers, March 5, 1868.]

This was a *quo warranto* summons respecting the office of councillor of the Township of Caledon

The statement set forth that there were ten candidates nominated on the last Monday but one in December for the office of councillor to which three persons were to be elected, beside the reeve and deputy reeve, the names being Alexander Mitchell, George Atkinson, Samuel Stubbs, Justus Lemon, John Smith, Jacob Carrington, Nathaniel Patterson, Alex. Henry, Thomas Bell, and William Wilson Walker, the relator, and that a poll was demanded.

That the clerk should have provided the returning officers of the five electoral divisions into which the township is divided each with a certified list of such candidates; but the clerk did not provide the returning officer of No. 2 electoral division with such certified list, there being omitted from the list furnished to such returning officer the name of Alexander Henry, who had been duly proposed, and who was then and until the close of the election a candidate for the office of councillor of the township.

That the returning officer did not, nor did his poll clerk for No. 2 electoral division, enter in his poll book at the opening of the Poll, nor for several hours afterwards, the names of all the candidates, but omitted the name of Alexander Henry until a late hour of the day of election, whereby no vote was taken in his favour until about 2 o'clock in the afternoon, although there were electors present who would have voted for Alexander Henry if his name had not been improperly omitted as aforesaid; and whereby it became rumoured through the said division and other parts of the township that Alexander Henry was not a candidate, and in consequence many electors refrained from voting or voted for other candidates.

That the returning officer had no proper authority for entering the name of Alexander Henry upon the poll book in the afternoon of the 6th day of January.

That at the time of the declaration the relator, by reason of these and the other grounds mentioned in the statement, entered a written protest against the election of the three councillors returned as elected.

The affidavit of Wm. McBride, the returning officer for this division, stated the fact of the omission of Alex. Henry's name from the certified list of the candidates names furnished by the clerk of the township, and that his name was not entered as a candidate in the poll book till about half past one in the afternoon of the following day, and not until a number of electors had tendered their votes for him, and whose votes were refused in consequence of his name not having been on the list furnished by the clerk.

That at least six electors tendered their votes for Alexander Henry, which votes were rejected, and there may have been many others present who did not go through that formality, before the returning officer put his name on the poll book and ten votes were taken for him after his name was entered; and the general impression among the electors present was, that in consequence of the omission there would be a new election if the one then being held was protested against.

Alexander Henry stated, after mentioning the circumstances in general above referred to, that in consequence of the omission he believes the whole election for said office was disturbed, because he believes it was the general desire of the electors of the east side of the township that

the councillors should be elected from different parts of the township, so that all localities would be represented in the council. That he resides in the east side of the township, and he believes he would have received a large vote in the said division which is situate on the east side of the township if his name had not been omitted.

That the impression that he was not a candidate had become too general when his name was put on the poll book to enable him to regain what he had lost by such omission in the former part of the day.

That on the day of the close of the election he protested against the whole election.

George Dodds, the township clerk, stated that he sent word to the returning officer to insert the name of Alexander Henry in the poll book as soon as he became aware of the omission.

Joseph Dodds stated that he has reason to believe from his knowledge of the township and otherwise, that if Henry's name had not been omitted from the poll book he would have been elected; and in consequence of such omission several of the electors voted for candidates for whom they would not have voted, and the whole complexion of the election was changed by such omission.

The relator stated that the clerk declared the poll for the different candidates as follows:

John Smith	19	votes.
Justus Lemon	136	"
Jacob Carrington	101	"
Nathaniel Paterson	147	"
Alexander Henry	145	"
Thomas Bell	104	"
Alexander Mitchell	192	"
George Atkinson	244	"
Samuel Stubbs	187	"
Wm. Wilson Walker	187	"

That the clerk, in consequence of the tie between Stubbs and the relator, voted for Stubbs, and declared Atkinson, Mitchell and Stubbs the three duly elected councillors.

That on the day of and before the declaration he protested against the election on the ground of Alexander Henry's name having been omitted from the poll book of one of the divisions, and in consequence the whole result of the election as he believes was changed, and on other grounds.

That Henry's election was injured in other parts of the township as well as in No. 2 division, and that the electors finding they could not vote for him voted very many of them for others for whom they would not have voted if the omission had not been made, and he believes if there had not been such an omission, he the deponent, who is also the relator, would have been elected to the said office.

Several affidavits were filed by the defendants, and amongst them two made by Samuel Stubbs and Alexander Mitchell.

Samuel Stubbs stated, that none of the persons, five in number, who are mentioned in the affidavits of the relator as persons who would have voted for Alexander Henry if his name had not been omitted, voted for the deponent Stubbs, who would not have done so had Henry's name been on the poll book from the first: that the omission did not increase the deponent's votes by a single vote; on the contrary, he would have had one more vote if Henry's name had been on the book.

Alexander Mitchell stated, that Walker had a vote from John White, whose name was not on the voter's list, and that the deputy returning officer for the said division also voted for Walker, and neither of them voted for Stubbs, and other persons voted for Walker who had not a sufficient property qualification: that only six votes were tendered for Henry before his name was put on the book, and ten votes given for him after it; and that deponent believes Henry would not have had more than from sixteen to eighteen votes if his name had been entered in the book from the first.

All of the defendants denied having had anything to do with the omission of Henry's name, and Henry's name was on the poll books for the other divisions of the township.

McMichael showed cause. Whether this proceeding be considered as taken against the defendants separately, or as impeaching the whole election, the relator must show that what he complains of has caused a different result than there would have been if there had been no irregularity. The relator does not show that the result would have been different from what it is. He cannot claim the benefit of those votes that were rejected for Henry. He cannot be allowed to say that some one else has got them who would not have got them if Henry had been voted for, and so the result of the election would have been different.

There are many instances where votes may be considered as abstracted from certain candidates, and yet they cannot claim the benefit of them, because they have not been effectually given.

If a disqualified person were a candidate all his votes may be lost, yet another candidate who is in the minority cannot defeat the whole election, or claim any benefit to himself on the assumption that if these votes had not been lost the result of the contest would have been different. So a candidate may, after receiving a certain number of votes, retire from the contest, yet the other candidates have nothing to do with his votes, nor are they allowed to consider how these votes would have influenced the position of the other candidates if they had not been thus thrown away.

So it might be reported wrongly that a candidate had retired, and votes might thus be given to others who would not have got them; yet another candidate, not even the one injured, could complain of this for the purpose of defeating the election.

Harrison, Q. C., supported the application. The statute is imperative that the clerk shall provide the returning officer with a certified list of the names of the candidates.

The present relator can complain of these proceedings in like manner as Henry might have done. The alteration of the poll book was an unauthorized proceeding, for it did not then correspond with the clerk's certified list: *In re Charles* v. *Lewis*, 2 U. C. Cham. Rep. 171; *In re Hartley*, 25 U. C. Q. B. 2; *In re Coe*, 24 U. C. Q. B. 439; *In re Blaisdell* v. *Rochester*, 7 U. C. L. J. 101; 29 & 30 Vic. c. 52, sec. 160, and subsections.

Adam Wilson, J.—I do not think I am obliged to hold that every irregularity shall defeat an election. The present case shows that it would be a harsh application of the law if it were made as it is claimed.

The clerk of the township in making out five certified lists of the candidates names for the offices of councillors omitted one of the ten names from one of the lists, so that the list for division No. 2 did not contain the name of Alex. Henry as a candidate, though the other four lists contained all the names correctly.

The affidavits show that six votes in No. 2 division were thus lost to Henry, and none were lost to him, as appears in the other divisions that I can make out, though something of the kind is suggested.

These six votes would have made no difference in the result of the contest so far as he is concerned, for they would, if added on to the 145 votes, give him only 151, whereas there were other two persons, Stubbs and the relator, who had 187 votes, and, unless their standing can be impeached, the additional votes if allowed to Henry cannot at all serve him.

But Walker, the relator, argues that they might have served *him*, and as there was an equality between Stubbs and himself, he might have had some additional vote or Stubbs might have had some vote less, and so he would have been returned; but this is a speculative view of his case and rights, and the result might have been just the other way.

If the omission of one of the candidates names from the list out of ten candidates must necessarily defeat the whole election, independently of any effect which that omission had or could have had upon the results of the election, I do not see why the omission of a single voters name from the book delivered to the returning officer should not as an abstract proposition produce the like consequences.

I think this must be determined by what effect the omission of the name has had or might reasonably be considered to have had upon the final result of the election, and not on the mere abstract ground of an omission; and viewing the case in this manner I do not see that the omission complained of did produce, or can be presumed to have produced any material change in the voting, and certainly none in the persons who have been seated as the elected members.

When bad votes are given an election is not interfered with unless those votes, if struck out, would put the candidate for whom they were given in a minority: *Reg.* v. *Thwaites*, 1 E. & B. 704.

This is the rule in every case of parliamentary scrutiny, for the enquiry is, which member has the majority.

In the election of mayor where a councillor was excluded from voting, and his vote in consequence of an equality would have elected a different person, the election was set aside: *The Queen* v. *Coaks*, 3 E. & B. 249.

In *The Queen* v. *Mayor of Leeds*, 11 A. & E. 512, the list of the councillors elected containing the name of P. as one of the number, was published by the particular time named in the statute. After the expiry of this time, and on discovering a supposed error, the mayor and assessors published another list containing the name of R. instead of P. The court held that P. having made the necessary declarations was the councillor *de facto*, and that all that was done in correcting the list after the hour fixed by statute was void.

Voting papers not signed and not shewing the situation of the property for which the voter was rated on the burgess roll were held to be bad. The object of the statute being to prevent personation as much as possible: *Reg.* v. *Tart*, 5 Jur. N. S. 679.

In *Seale* v. *The Queen*, 8 E. & B. 22, the mayor and assessors at the revision of the burgess list erroneously treated the burgess list *de facto* made out for one of the parishes as a nullity, and made out a fresh list for that parish, and inserted in it the name of a person in the original parish list who proved his title to their satisfaction, and the name thus inserted was transferred to the burgess roll. It was held that such person, though qualified in all respects to be on the list acquired by the act of the mayor and assessors, no title to be a burgess The lists sent in were valid, and the mayor and assessors had no power to do anything else, than to act on the lists sent in, by inserting or expunging names on these lists to ignore the list sent in, and to substitute a fresh one was wholly illegal,—the plaintiff in error was charged with usurping the office of burgess.

Brumfitt, appellant v. *Bremner, respondent*. 9 C. B. N. S. 1, shews also a case of alteration of a list to cure a mistake by which a name was supposed to have been erased which was not erased, and the correction was maintained.

It is certain that Henry could not maintain an action against the returning officer for refusing to allow him to be voted for until his name was put in the poll book, because in such an action malice must be alleged and proved, and as the candidates name was not on the certified list of the clerk, malice could not be presumed against the returning officer: *Tozer* v. *Child*, 7 E. & B. 377.

The clerk on the day after the nomination is to post up in his office the names of the persons proposed for the respective offices. This I should think was directory only, and if he did it the second day after the nomination, an election had upon it would not be avoided.

The clerk is also to provide the returning officer of each division with a certified list of the names of such candidates, specifying the offices for which they are respectively candidates. No time is named when these certified lists are to be provided. No doubt it must be sometime before the polling day, for the clerk is also to provide the returning officer with a poll book, and he or his clerk shall enter therein in separate columns the names of the candidates proposed and seconded at the nomination; all of which must be done of course before the voting begins.

It may be presumed the returning officer is to take his information from the certified list of the clerk as to the persons who were the candidates that were proposed and seconded at the nomination. But the act does not say so. I should think the returning officer could not properly insert any name on the clerk's list of his own authority, or any name

in the poll book which was not in the certified list, but perhaps if he had no certified list at all he might insert the candidates names in his poll book notwithstanding the clerk's neglect; *Seale* v. *The Queen*, 8 E. & B. 22.

What the returning officer did in this case he may be presumed, from the affidavits, to have done with the clerk's assent, and I think the clerk could then have corrected his certified list.

While I think the election should not be avoided, I do not think the proceedings have been taken without just and reasonable cause for contesting the legality of the proceedings, and although I give judgment against the relator it must be without costs.

Summons discharged without costs.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

Conroy v. Pearson.

A writ of summons is returnable on the day of its service.

[Chambers, February 20, 1868.]

This was a summons to set aside a declaration with costs, on the ground that the plaintiff did not declare within one year after the writ of summons was returnable.

The writ of summons issued 8th February, 1867, and served 12th February, 1867: appearance entered 20th February, 1867: declaration dated and filed 8th February, 1868, and served 13th February, 1868.

Osler showed cause, and contended that the writ must be considered as returnable when the time for appearance expired, namely, the 22nd February, 1867; and, if so, the declaration was filed and served within the year: *Hodgson* v. *Mee*, 3 A. & E. 765; *Barnes* v. *Jackson*, 1 B. N. C. 545; Tidd's Prac. 166; Harrison's C. L. P. Act, 132.

C. W. Paterson contra. The writ was returnable on the 12th February, 1867, the day of its service: *Eadon* v. *Roberts*, 9 Exch. 227; *Patterson* v. *McCollum*, 2 U. C. L. J. N. S. 70; *Wallace* v. *Frazer*, 2 U. C. L. J 184; *Tyson* v. *McLean*, 1 U. C. Prac. Rep. 339; *Swift* v. *Williams*, 5 U. C. L. J. 252; Arch. Prac. 11th edn. 157–187; Lush's Prac. 399.

Adam Wilson, J.—In a matter of this kind, it is of no consequence what the decision may be, so long as it is settled for guidance in future cases. In Arch. Prac. 157, it is said, "The writ of summons does not specify any particular return day, and the return day is now considered the day of the service of the writ on the defendant."

The C. L. P. Act, sec. 81 declares that "a plaintiff shall be deemed out of Court unless he declares within one year after the writ of summons or capias is returnable."

The summons was returnable in my opinion on the day of its service, the 12th February, 1867. The plaintiff should have filed *and served* his declaration therefore on the 11th February, 1868, (See C. L. P. Act Sec. 342). Instead of doing so, he did not completely declare till the 13th of February, when he served his declaration.

The order must go. *Summons absolute.*

Watson et al v. Brewer.

Ejectment—Particulars of claim—At what stage.

A defendant is entitled to particulars of a plaintiff's claim in an action of ejectment after appearance, or at any other stage, if it appear proper to a judge that he should have them.

[Chambers, Feb. 20, 1868.]

In an action of ejectment, the notice claimed title by reason of the forfeiture by non-observance of the covenants on the part of defendant, contained in a lease of the land from plaintiff to defendant.

The defendant appeared, and denied the plaintiff's title to eject him from the lands by reason of such forfeiture, and he asserted title in himself by virtue of such lease.

The defendant then applied for particulars of the alleged forfeiture, which was opposed on the ground that it was too late for him to ask for particulars of his appearance.

Adam Wilson, J.—The question is whether the defendant should or could have applied for particulars before appearance, and whether he is still in time in his application.

In Arch. Pr. 11th ed. 1039, it is said, "where the ejectment is brought for a forfeiture by breaches of covenants, &c., a judge upon summons, will order the plaintiff to give the defendant, after appearance entered, a forfeiture of the covenants and breaches, &c., on which the forfeiture is founded."

As a general rule, the defendant cannot take any step in the action without entering an appearance, Arch. Pr. 11th ed. 216. But by our rule, No. 21, following the English rule, particulars may be ordered before appearance. It is also laid down in Arch. Pr. 1441, that it is discretionary with the judges, to make an order for particulars at any time before trial. In the Queen's Bench, the old practice was to give particulars before appearance, not so in the Common Pleas; but the latter court afterwards adopted the practice of the former: Tidds Pr. 9th ed. 596.

It is said to be laid down in Arch. Prac, 12th ed., 1554, that particulars of breaches in ejectment, cannot be given after appearance. (I have not seen this edition, as it has been abstracted from the Osgoode Hall library, as many others of the new editions of such useful practical works have been, by those who are obliged to be trusted with them. This conduct has been pursued so systematically for many years past, and always upon the latest and best editions, that the taking cannot be supposed to be from mere forgetfulness. The concern is whether it is by any of those who are qualifying for the practice of the law, or, of those who are practising it. The habit is so persistent and notorious, that it is felt to be a scandal in the profession.)

I do not think a defendant can be prevented from getting particulars because he has appeared in ejectment, more than in other actions; nor do I think a judge might not order them at any time, if it appeared to be proper that the defendant should have them. The defendant swears that "he does not know upon what grounds the plaintiffs claim to eject him from the land in question."

The order must be granted.

Order accordingly.

In re Trueman B. Smith.

Extradition—Counterfeiting—Forgery.

A prisoner was arrested in Upper Canada for having committed in the United States "the crime of forgery, by forging, coining, &c,, spurious silver coin," &c.

Held, 1. That the offence as above charged does not constitute the crime of "forgery" within the meaning of the Extradition Treaty or Act.

2. That it certainly is not the crime of forgery under our law, and therefore the prisoner could not be extradited.

Definition of the term "forgery" considered.

[Chambers, March 3, 1868.]

This was an application by a prisoner to be discharged on a writ of *habeas corpus*, on the ground that the charge under which he was in custody was not within the Extradition Treaty or the Act of Canada giving it effect.

The charge or complaint was, that "Smith at the Town of Toledo, —— County, State of Iowa, on or about the 21st March, 1867, did commit the crime of forgery by forging, coining, counterfeiting, and making spurious silver coin of the stamp and imitation of the silver coin of the United States of America of the denomination of 5 and 10 cent pieces, with implements and materials which he produced for the purpose of carrying on the business of coining such spurious money."

Jas. Patterson showed cause for the Crown, referring to Con. Stat. Can. cap. 89; 2 *Bishops* Criminal Law, secs. 432, 434, 435 and 451; 5th Rep. Crim Law Com., A.D. 1840, p. 69; 3 Inst. 169 (*per* Lord Coke); 2 Bl. Com. 247; 2 East P. C. 852; *Rex.* v. *Coogan*, 2 East P. C. 853; *Rex.* v. *Jones*, 1 Leach, 4th ed. 775, 785; *Reg.* v. *Anderson*, 20 U. C. Q. B. 124; *In re Windsor*, 6 New Rep. 96.

Curran, contra, for the prisoner. By Con. Stat. Can. cap. 89, the crime charged must be a crime by the law of the country where prisoner arrested, and this prisoner was arrested in Upper Canada (see also *Re Windsor*, 34 L. J. N. S. 163). As to the meaning of forgery, and that it does not cover cases of coining, see 4 Com. Dig. 406 *et seq*., and Tomlin's Law Dict.

Adam Wilson, J.—The Statute of Canada (cap. 89) applies to the crimes of murder, or assault to commit murder, piracy, arson, robbery, *forgery, or the utterance of forged paper*, committed within the jurisdiction of the United States (see also 24 Vic. c. 6); and the question is, whether the charge above stated as explained of forging and counterfeiting spurious silver coin, &c., constitutes the offence of forgery within the meaning of the treaty and statute?

I am of opinion it does not; it is unquestionably not forgery by our law here; nor from the evidence given can I assume it to be forgery according to the law of the State of Iowa, or of the United States of America, if that would make any difference. The statute declares that the offence charged must be such as would, according to the laws of this Province, justify the apprehension and committal for trial of the person accused, if the crime charged had been committed here; so that if not an offence of the character charged according to our law, the person is not to be apprehended, committed or delivered over to the foreign government; no comity shall prevail in such a case: *In re Windsor*, 6 New Rep. 96; 10 Cox. C. C. 118; 11 Jur. N S. 807.

Forgery is defined in 4 Bl. Com 247, to be "the fraudulent making or alteration of a writing to the prejudice of another man's right;" and this is substantially the definition accepted and approved of in *Reg.* v. *Smith*, 1 Dearsley & Bell, 566, in which counsel have arrayed the definitions of different authors of this offence, to which may be added, Bac. Abr. "Forgery."

Hawk. P. C., in Book 1, c. 70, sec. 1, it is described to be "an offence in falsely and fraudulently making or altering any matter of record or any other authentic matter of a public nature, as a parish register or any deed or will"

In *Reg.* v. *Closs*, 1 Dearsley & Bell, 460, Cockburn, C. J, said, "a forgery must be of some document or writing," and therefore putting an artists name on the corner of a picture in order to pass it off as an original picture by that artist was held not to be forgery.

There is no case where the making of false coin has been determined to be forgery, and it is not so by our statute.

Such an offence is here a misdemeanour for the first act and a felony for the second, but it is not the offence of forgery at all.

The decision of *Re Dubois, otherwise Coppin*, 12 Jur. N. S. 867, shews that this is the mode in which the treaty and statute are to be interpreted, and our own statute reciting the treaty is almost conclusive evidence that the "forgery" referred to is the offence of that name well understood in the United States and in this Province, and, to make it plainer, it relates also to "the utterance of forged paper"

The prisoner must be discharged.

Prisoner discharged.

ENGLISH REPORTS.

COMMON PLEAS.

Nosotti v. Hudson.

Practice—Extension of time for setting down cause—15 & 16 *Vict. c.* 76, *s.* 101.

By the 101st section of the Common Law Procedure Act, 1852, a judge may extend the time for proceeding to trial. This power is discretionary with him, and he may exercise it after the twenty days' notice given by the defendant, under the same section, to bring the issue on for trial has expired.

[16 W. R. 315, Jan. 17 1868.]

This was an action for dilapidation, in which notice of trial at the next Westminster sittings was originally given by the plaintiff on the 6th of April, 1867. This notice was, however, countermanded and continued from time to time; and as the plaintiff failed to bring on the issue to be tried, the defendant, on the 23rd of November last, gave the plaintiff the twenty days' notice required by the 101st section of the Common Law Procedure Act, 1852, for bringing the issue on at the next sittings, after the expiration of such notice. On the 3rd of January the plaintiff gave the ordinary 10 days' notice of trial for the first sittings this term, but on the 13th of January the cause had not been set down. Thereupon the plaintiff took out a summons for leave to set down the cause, and on the 14th of January, Byles J., holding that his power to extend the time for proceeding to trial had not run out, made on order that the plaintiff should be at liberty to set down the cause.

Littler now moved to set this order aside.—The question turns on the proviso at the end of the

101st section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which provides "that the Court or a judge shall have power to extend the time for proceeding to trial with or without terms." But the application was not made within the twenty days given by the defendants notice for bringing on the issue to be tried, and the learned judge therefore could not extend that which did not exist. Martin, B., expressly held so at chambers, after taking time to consider: *Horner* v. *Spencer*, 1 F. & F. 412; and that is the only decision on the point. In *Lord Ward* v. *Lumley*, 5 H. & N. 656, the Court of Exchequer allowed further time in an appeal under the 37th section of the Common Law Procedure Act, 1854, though the application was made after the four days limited for the notice of appeal had expired; and the Court of Queen's Bench, in *Wishart* v. *Fowler*, 4 B. & Sm. 674, held that the Court of Bankruptcy had power under the 194th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), to allow further time for registration of an arrangement deed, though the twenty-eight days limited for registration had elapsed; and there are decisions to the like effect on 3 & 4 Will. 4, c. 42. s. 39, enabling the Courts to enlarge the the time for making awards: but in all those cases the words of the Acts are different from those in the present case; they none of them have the word "extend."

Bovill, C. J.—I should be sorry to throw any doubt on the power of the judge to extend the time for proceeding to trial. Mr. Littler's observations would apply to the word "enlarge" as much as to the word "extend," and it has been expressly held that though an arbitrator cannot "enlarge" the time for his award after the expiration of the original time, the Court, under 3 & 4 Will. 4, c. 42, s. 39, may do so. The word "extend" I should think more extensive than "enlarge." As to *Horner* v. *Spencer*, a suggestion had been actually entered and judgment signed thereon: the report only states that the application should have been made within the twenty days, but as it does not set out the circumstances it is consistent with all that appears that my brother Martin may have only thought that under the circumstances the time should not be extended. Here my brother Byles no doubt acted with reference to the circumstances, and he had a discretion to do so.

Willes, J.—It is quite for the discretion of the judge, and we do not at all overrule my brother Martin

Keating and Montagu Smith, JJ., concurred.

Rule refused.

IRISH REPORTS.

COMMON PLEAS.

Jack v. Burne.

Practice—Garnishee—Order for payment in interpleader suit.

An order made in an interpleader suit, and entered as of record, according to the provisions of the 9 & 10 Vict. c. 64, s. 7, is a judgment within the meaning of the Common Law Procedure Act (Ireland) 1856, s. 63.

[C. P. (Ir.)—16 W. R. 367.]

This was an application on behalf of Joseph Kirkman and John Wilson, assignees for the benefit of certain creditors of the defendant Walter Burns, for a garnishee order to attach a debt due by him to David Jack and Thomas McFarlane, two creditors for whose benefit Kirkman and Wilson were not assignees. From the affidavits filed on behalf of the applicants, it appeared that David Jack and Thomas McFarland had obtained judgment in this cause for a sum amounting, together with costs, to about £30, which was still unsatisfied. Subsequently the defendant Walter Burne assigned all his estate and effects to Joseph Kirkman and John Wilson, for the benefit of his creditors; notwithstanding which, however, the plaintiffs, David Jack and Thomas McFarland, caused an execution to be issued, under which the goods of the defendant Walter Burne were sold by sheriff of the county of Down. In consequence of a claim having been put in on behalf of the creditors by Joseph Kirkman and John Wilson, the sheriff applied for and obtained an interpleader order, whereby an issue was directed to be tried, wherein Joseph Kirkman and John Wilson were plaintiffs, and David Jack and Thomas McFarland were defendants; and on the trial of the issue a verdict was had for the plaintiffs. An order was then obtained from Mr Justice Keogh, sitting in chambers, directing the sheriff to pay over the sum of £15, being the balance remaining in his hands out of the produce of the seizure and sale under the execution, to Joseph Kirkman and John Wilson, and the defendants David Jack and Thomas McFarland to pay to them their costs of the interpleader motion, and proceedings under the order thereon.

Weir in support of the application.—By the 9 & 10 Vict. c. 64, s. 7,* it is enacted that orders made in pursuance of the act may be entered of record "to the end that the same may be evidence in future times if required, and to secure and enforce the payment of costs by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment." It is submitted that the order in this case, which was entered of record as directed by the above enactment, is a judgment within the meaning of the 63rd section of the Common Law Procedure Act (Ireland), 1856.

Morris, J., on the case being mentioned on a previous day, directed the motion to stand until he should have had an opportunity of conferring with the other members of the court. On the application being renewed, the order was made.

UNITED STATES REPORTS.

SUPREME COURT.

Watson v. Muirhead.

A conveyancer, using ordinary diligence in examining and passing title, is not liable for want of skill.

Error to the District Court for the city and county of Philadelphia.

Opinion by Sharswood, J.

The business of a conveyancer is one of great importance and responsibility. It requires an

* Corresponding to 1 & 2 Will. 4, c. 58, English, and compare our Con. Stat. U. C. cap. 30 sec. 14.—Eds. L. J.

acquaintance with the general principles of the law of real property and a large amount of practical knowledge, which can only be derived from experience In England it has been pursued by lawyers of the greatest eminence. As our titles become more complex, with the increase of wealth, and the desires which always accompany it to continue it in our name and family as long as the law will permit, it will become more and more necessary that gentleman prepared by a course of liberal education and previous study should devote themselves to it. There have been and still are such among us. The rule of liability for errors of judgment as applied to them ought to be the same as in the case of gentlemen in the practice of law or medicine. It is not a mere art but a science. "That part of the profession," said Lord Mansfield, "which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected when they act to the best of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake. * * * * * A counsel may mistake as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged. * * * Not only counsel but judges may differ, or doubt, or take time to consider. Therefore, an attorney ought not to be liable in case of a reasonable doubt." *Pitt* v. *Yalden*, 4 Burr. 2060. The rule declared by Lord Mansfield has been followed in all the subsequent cases. "No attorney," said C. J. Abbott, "is bound to know all the law; God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into." *Montriou* v. *Jeffreys*, 2 C. & P. 113, and see *Godefroy* v. *Dalton*, 6 Bing. 460; *Kemp* v. *Burt*, 4 B. & Ad. 424; *Gilbert* v. *Williams*, 8 Mass. 51.

If the defendant had undertaken to act upon his own opinion that the judgment, which appeared on the searches, was not a final one, and, therefore, not a lien upon the ground rent, the title of which it was his duty to examine, could we say that, before the decision of this court in *Sellers* v. *Burk*, 11 Wright, 334, the mistake was one, which could only result from the want of ordinary knowledge and skill or the failure to exercise due caution? But when in addition it appears that having been previously employed to investigate the same title, he had submitted it to eminent counsel, who had given a written opinion in its favour without even expressing a doubt as to the judgment in question, to hold him responsible would be to establish a rule, the direct effect of which would be to deter all prudent and responsible men from pursuing a vocation environed with such perils. We think the court below was right in refusing to charge as requested in the plaintiffs's points; all of which assume as matter of law that to pass the title with such an incumbrance upon it was evidence of want of ordinary knowledge and skill and of due caution. We see therefore no error for which we ought to reverse.

Judgment affirmed.

—*Philadelphia Legal Intelligencer.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR THE MONTHS OF AUGUST, SEPT. & OCT. 1867.

(*Continued from page 20, Vol. IV. N.S.*)

Action.—*See* Contract, 1; Directors, 1; Highway, 2.

Admiralty.

1. By 24 Vic. c. 10, s. 4, the Admiralty has jurisdiction over any claim for building a ship, if, at the time of the institution of the cause, the ship is under arrest of the court. After the building, but before the arrest, of a ship, the plaintiffs, the builders, assigned their claim to A.; they afterwards executed a composition deed for the benefit of their creditors. The ship having been arrested, it was *held*, that the plaintiffs could sue, as trustees for A., notwithstanding the composition deed; since the assignment to him carried with it all rights of action, which, though inchoate at the time, might subsequently become complete. — *The Wasp*, Law Rep. 1 Adm. & Ecc. 367.

2. Plaintiffs beyond the jurisdiction of the court, in a cause of possession, though liable to give security for costs, will not be required, as a general rule, to give security for damages.—*The Mary or Alexandra*, Law Rep. 1 Adm. & Ecc. 335.

See Collision; Priority, 2, 3; Ship, 1.

Adultery.—*See* Marriage.

Agent.—*See* Principal and Agent.

Agreement.—*See* Contract.

Appeal.—*See* Equity Pleading and Practice, 3.

Arbitration.—*See* Award.

Assignment.—*See* Admiralty, 1.

Attachment.—*See* Foreign Attachment.

Award.

A statute directs that an arbitrator shall make his award within a certain time after he "shall have entered on the reference." *Held*, that an arbitrator enters on a reference, not when he accepts the office, or gives notice of his intention to proceed, but when he enters into the matter of the reference, either with parties before him or *ex parte*.—*Baker* v. *Stephens*, Law Rep. 2 Q. B. 523.

Bankruptcy.

1. *Semble*, That the rule that securities held by a banker against his acceptances are available to the bill-holders, if both acceptor and drawer are insolvent, does not apply where the drawers owe the acceptors more than the

amount of the bills, at least if the acceptors have a general lien on securities deposited with them.—*Hickie & Co.'s case,* Law Rep. 4 Eq. 226.

2. A trader, being indebted to the defendant, gave him his acceptance for the amount due. Three days before the acceptance was due, he agreed to give the defendant a bill of sale of all his goods, in consideration of the defendant taking up the acceptance, and in order to cover any further advance by the defendant. The defendant took up the acceptance, and afterwards advanced the trader a further sum. The bill of sale was subsequently executed, whereby all the personal estate of which the trader was or should in future become possessed was assigned to the defendant as security. Less than a year after the date of this bill of sale, but more than a year after the date of the agreement to give it, the trader was adjudicated bankrupt. In trover for the goods by the assignee: *Held,* that the bill of sale gave the defendant a good title as against the plaintiff, both as to the goods acquired before and after the date of the agreement.—*Mercer* v. *Peterson,* Law Rep. 2 Ex. 304.

3. A. delivered to B. a policy of insurance on his own life, as a security for a loan, intending to give B. an interest in the sum insured. No notice of the transaction was given to the insurance office. *Held,* that the policy remained in the order and disposition of A., and that on his bankruptcy his assignee could recover it from B.—*Green* v. *Ingham,* Law Rep. 2 C. P. 525.

4. A. transferred to B., as security for a debt, certain shares in a mine, and covenanted to indemnify B. from all liabilities that might accrue in respect of the shares. A. became bankrupt, and B. was compelled, as shareholder, to pay debts of the company which had accrued before A.'s bankruptcy. *Held,* that B. was not a "surety, or liable for any debt of the bankrupt," nor was A.'s liability under the covenant "a liability to pay money on a contingency" within the 12 & 13 Vic. c. 106, ss. 173, 178; and that therefore A.'s liability on the covenant was not barred by his discharge in bankruptcy.—*Betteley* v. *Stainsby,* Law Rep. 2 C. P. 568.

See Partnership; Priority, 1.

Bastardy.

A dismissal of a bastardy summons on the merits is no bar to a second application, if the dismissal was obtained on false evidence.—*The Queen* v. *Gaunt,* Law Rep. 2 Q. B. 466.

Bill of Lading.

A *bona fide* assignee for value of a bill of lading is entitled to the goods named therein, if he had no notice of fraud or insolvency in the person assigning to him, and if such person had authority to transfer the bill of lading.—*The Argentina,* Law Rep. 1 Adm. & Ecc. 370.

Bills and Notes.

Declaration on the common counts. Plea, that the defendant, with the plaintiffs' consent, had delivered a note on account of the debt to C., who still held it. Replication, on equitable grounds, that C., at the time of the delivery, had been and still was a trustee of the plaintiffs, who were alone beneficially interested in the note, of which the defendant had notice and that the note was overdue and unpaid. *Held,* a good replication. — *National Savings Bank* v. *Tranah,* Law Rep. 2 C. P. 556.

See Bankruptcy, 1; Company, 2.

Bond.—*See* Principal and Surety; Priority, 3.

Bottomry Bond.—*See* Priority, 3.

Charity.—*See* Mortmain.

Charter Party.

1. A charter party provided that the ship should proceed to Sulinah, and there load a full cargo of grain; the cargo to be brought alongside the ship at the charterers' expense and risk; thirty days to be allowed for loading and unloading; detention by ice not to be reckoned as laying days. There are no storehouses at Sulinah; but the grain shipped there is kept at places higher up the Danube, is brought by lighters down the river, and is unloaded into the ships. Six days after the charterer had notice that the ship was ready to load, but before any cargo had been supplied, the river immediately above Sulinah became frozen over, and so remained for two months, the port itself remaining open. *Held,* that as from the circumstances of the port the cargo had to be brought down the river after the arrival of the ship, "detention by ice" extended to detention of the lighters in the river, and the shipowner could not recover damages for the time the river above Sulinah was frozen. *Held,* also, that the shipowner's ignorance of the circumstances of the port did not affect the question, nor did the fact that the charterer by greater diligence might have loaded the ship before the river was frozen, as he was entitled to all the laying days.—*Hudson* v. *Ede,* Law Rep. 2 Q. B. 566.

2. By a charter party for a voyage the cargo was to be loaded and discharged with all dispatch, and freight to be paid on delivery; "the charterer's liability to cease when the cargo is shipped, if the same is worth the freight on arrival at the port of discharge; the captain

having an absolute lien on it for freight, dead-freight, and demurrage, which he, or owner, shall be bound to exercise." The cargo was shipped, and was worth the freight on arrival at the port of discharge. *Held*, that the charterer was not liable to the shipowner for delay in loading the vessel.—*Bannister* v. *Breslauer*, Law Rep. 2 C. P. 497.

3. The defendant chartered a ship to proceed to P., and there load "a full and complete cargo," "fire, &c.," as usual, excepted. After part of the cargo was on board, and while a part of the residue was lying alongside, the ship caught fire, the fire was put out by scuttling the ship, and the damaged cargo was necessarily sold by the master, who also forwarded by another ship the portion then lying alongside. After the ship had been repaired, she was tendered to the defendant, but he refused to load any more cargo. *Held*, that he was not exonerated from his obligation to load a full cargo.—*Jones* v. *Holm*, Law Rep. 2 Ex. 335.

See Freight.

Codicil.—*See* Will, 4.

Collision.

1. When a collision takes place in which both vessels are to blame, the master and crew of one cannot sue for salvage for having saved the cargo of the other from the perils resulting from the collision.—*Cargo ex Capella*, Law Rep. 1 Adm. & Ecc. 356.

2. If the crew of a ship have contributed to a collision by not keeping a sufficient lookout, though the pilot is also to blame, yet the owners are liable.—*The Velasquez*, Law Rep. 1 P. C. 494.

3. If a ship, bound to keep her course under the 18th sailing rule, justifies her departure under the 19th rule, she must show not only that her departure was necessary to avoid immediate danger, but that the course adopted by her was reasonably calculated to avoid that danger.—*The Agra and Elizabeth Jenkins*, Law Rep. 1 P. C. 501.

Company.

1. If an injury to an individual, caused by the act of a company, would not have been a ground for damages before the company obtained statutory powers to do what caused the injury, it cannot (except expressly so provided) be a ground for compensation when caused by something done in the exercise of those powers. R. was the occupier of a public house on a public footpath. A railway company, under its statutory powers, temporarily obstructed streets leading to the footpath, so as to make access to the house inconvenient. The jury found that R. had sustained damage by the interruption to his business. *Held* (per Lord Chelmsford, C.; and Lord Cranworth), that R. was not entitled to compensation.

Per Lord Westbury (dissenting).—The words of the statute, "injuriously affected," do not mean wrongfully in the sense of unlawfully, but "damnously," that is, injuriously, affected in the ordinary sense of the word; and trade carried on in particular premises is included in the "interest" of the occupier, and if injuriously affected is a subject of compensation.—*Ricket* v. *Metropolitan Railway Co.*, Law Rep. 2 H. L. 175.

2. A company was formed for the purpose of buying the right to make a foreign railway, and of forming a *société anonyme* to construct it. The memorandum and articles stated that the company might do whatever they thought incidental or conducive to the main object, and that the directors might do all things and make all contracts which, in their judgment, were necessary and proper to effect it. *Held*, that the right to issue negotiable paper, though not to be inferred from the nature of the company's business, was yet conferred by the general words in the memorandum and articles.—*Peruvian Railways Co.* v. *Thames and Mersey Marine Ins. Co.*, Law Rep. 2 Ch. 617.

See Contract, 2; Directors; Principal and Agent; Ultra Vires.

Composition Deed.—*See* Admiralty, 1.

Concealment.—*See* Insurance, 3, 4.

Condition.—*See* Sale.

Consideration.—*See* Contract, 2.

Contract.

1. Though a contract involving persona confidence is ended by the death of the party confided in, it is not so rescinded as to take away a right of action for instalments of pay already vested.—*Stubbs* v. *Holywell Railway Co.* Law Rep. 2 Ex. 311.

2. A company, already carrying the mails under contracts with the government of New Zealand, issued a prospectus, offering to issue "new shares, in order to enable the company to perform the contract recently entered into with the government of New Zealand for a monthly mail service." K., induced by this statement, took some of the new shares. The contract alluded to in the prospectus had been made with the agent of the New Zealand government, both the company and the agent believed he had authority to make it; but it turned out that he had not, and the government repudiated it. *Held*, that as the misre-

presentation was innocent, it did not entitle K. to rescind his contract for shares, since it did not affect the substance of the matter, K. having got shares in the very company in which he had applied for them, and which shares were of considerable value. — *Kennedy* v. *Panama, &c., Mail Co.*, Law Rep. 2 Q. B. 580.

See Charter Party; Directors, 1; Sale; Ship, 2; Ultra Vires.

Corporation.—*See* Company.

Costs.—*See* Admiralty, 2; Equity Pleading and Practice, 3; Will, 2.

Covenant.—*See* Bankruptcy, 4; Ultra Vires.

Custom.

The owners of a fishery, had, since the reign of Elizabeth, granted for a reasonable fee licenses to fish, to all inhabitants of certain parishes who had served seven years' apprenticeship. In an action by one so qualified against the owners for not granting him a license on payment of the usual fee, *held*, that as every act of fishing had been by license, there had been no enjoyment as of right so as to give rise to a custom. *Semble*, that it is no objection to a custom that it requires a reasonable fee, and not a fee of fixed amount.—*Mills* v. *Mayor, &c., of Colchester*, Law Rep. 2 C. P. 476.

Damages.—*See* Admiralty, 2; Charty Party, 1; Company, 1; Highway, 2; Ship, 2; Slander.

Dedication.—*See* Highway, 1.

Deed.

A., owning an undivided moiety of a messuage in R. Street, in fee, and having a lease of the other moiety with a covenant not to assign without license, by deed, reciting that he was seized in fee of the messuage in R. Street, and was also possessed of two leaseholds, one in N. Street, the other in C. Street, mortgaged in fee all his estate and interest in the messuage in R. Street, in the most general words, and also granted to B. an underlease of the premises in C. Street, and covenanted to assign to B. the premises in N. Street, as security for a debt. *Held*, that the undivided moiety in fee which A. had in the messuage in R. Street alone passed by the deed, and not his leasehold interest in the other moiety.—*Francis* v. *Minton*, Law Rep. 2 C. P. 543.

See Insurance, 1.

Devise.

1. If an estate is given to A. for life, and the remainder to the "issue" is accompanied by words of distribution, and by words which would give an estate in fee or tail to the issue, A. has only a life estate, and this whether the estate in fee or tail to the issue is given expressly or by implication.

By will made in 1806, the testator gave lands to A. for life, and after his death "to the use of all and every the issue, child, or children of A., in such shares, manner, and form as A. shall appoint;" and "in default of such issue" over. *Held*, that as A. had power to appoint to his children in fee, they would take by implication, in default of appointment, an estate in fee, and that therefore A. had a life estate only.—*Bradley* v. *Cartwright*, Law Rep. 2 C. P. 511.

2. Devise of house to my nieces, L. and E., and to their children, and, if they have none, to W. and his children, "the furniture to go with the house." Neither of the nieces had any children at the date of the will. *Held*, that the gift of the furniture was a sufficient reason for not vesting estates tail in the nieces, and that they took the house and furniture for their lives, with immediate remainders to the children of each. — *Grieve* v. *Grieve*, Law Rep. 4 Eq. 180.

See Legacy; Trust, 1; Will, 4.

Directors.

1. Where a person who has been drawn into a contract to purchase shares by the fraudulent misrepresentation of directors, brings a suit to rescind the contract, the misrepresentations are imputable to the company. But if such person, instead of seeking to set aside the contract, sues for damages for deceit, he can maintain such action only against the directors, and not against the company. —*Western Bank of Scotland* v. *Addie*, Law Rep. 1 H. L. Sc. 145.

2. If the articles of a company do not prescribe how many directors shall be a quorum, the number who usually act in conducting the business will be a quorum. A forfeiture of shares by two out of six directors held valid.—*Lyster's case*, Law Rep. 4 Eq. 233.

Discovery.—*See* Production of Documents.

Distress.—*See* Landlord and Tenant, 1.

Divorce.—*See* Husband and Wife.

Domicil.—*See* Residence.

Easement.—*See* Way.

Ecclesiastical Law.

The consecration of a church extends to the vaults beneath. The officiating clergyman need not stand on consecrated ground while performing the burial service.—*Rugg* v. *Kingsmill*, Law Rep. 1 Adm. & Ecc. 343.

Entry.—*See* Landlord and Tenant, 1.

Equity.—*See* Injunction.

Digest of English Law Reports.

Equity Pleading and Practice.

1. The United States of America can sue in that name in the English chancery without putting forward any public officer who could be called on to give discovery on a cross-bill. — *United States of America* v. *Wagner*, Law Rep. 2 Ch. 582.

2. An order of revivor, obtained by one defendant after the death of another defendant subsequently to decree, is irregular, unless notice has been given to the plaintiff, even though the plaintiff is a trustee having no substantial interest in the suit.—*Stratford* v. *Baker*, Law Rep. 4 Eq. 256.

3. The court of appeal in chancery agreeing with the conclusion of the court below, but disagreeing with the reasons given for it, the appeal was dismissed without costs.—*Peruvian Railways Co.* v. *Thames and Mersey Marine Ins. Co.*, Law Rep. 2 Ch. 617.

Estate Tail.—*See* Devise.

Estoppel.—*See* Bastardy; Landlord & Tenant, 2.

Evidence.

When a deceased person is proved to have stated that A. was her sister, she is to be presumed to have meant that A. was her legitimate sister, unless something appears to the contrary.—*Smith* v. *Tebbitt*, Law Rep. 1 P. & D. 354.

See Highway, 1; Marriage; Production of Documents; Will, 1.

Foreign Attachment.

Foreign attachment cannot be maintained in the Lord Mayor's court, where no one of the parties is a citizen or a resident in London, and where neither the debt of the original debtor nor that of the garnishee arose in the city.—*Mayor, &c., of London* v. *Cox*, Law Rep. 2 H. L. 239.

Foreign State.—*See* Equity Pleading and Practice, 1.

Forfeiture.

A testator appointed some and devised other real estate to his wife for life, and immediately after her death to his son, with a proviso that, if his wife should do any thing whereby she should be deprived of the control over the rents and profits, so that her receipt alone should not be a sufficient discharge for the same, her estate should determine as effectually as it would by her actual decease. The widow married again, without making any settlement. *Held*, that her interest was forfeited, and that the remainder in the appointed as well as in the devised estates was accelerated.—*Craven* v. *Brady*, Law Rep. 4 Eq. 209.

Freight.

1. A. chartered a ship from a foreign port home with a full cargo, but, he not being able to supply the cargo, the owners agreed to cancel the charter party and seek another cargo, on A. guaranteeing a "sum of £900 gross freight home." The owners procured a cargo whose estimated freight would have been £556, but the ship was lost on the voyage. *Held*, that the owners could recover from A. the difference between the estimated and guaranteed freights. — *Carr* v. *Wallachian Petroleum Co.*, (Exch. Ch.), Law Rep. 2 C. P. 468.

2. By a charter party it was agreed that a ship should sail to B., there load a full cargo of cotton, proceed with it to L., and deliver the same, on being paid freight at "75s. per ton of 50 cubic feet delivered, the freight to be paid on delivery." The ship received at B., and carried to L, a full cargo of cotton, which was packed, as is customary, in compressed bales, and expanded greatly on being unloaded. *Held*, that freight was payable on the measurement when shipped (Exch. Ch.). — *Buckle* v. *Knoop*, Law Rep. 2 Ex. 333.

Garnishee.—*See* Foreign Attachment.

General Words.—*See* Company, 2; Deed.

Gift.—*See* Trust, 2.

Guaranty.—*See* Freight, 1.

Highway.

1. To prove that a way was public, evidence was given of acts of user extending over seventy years, but all the time the land crossed had been on lease. The judge told the jury that they might, if they thought proper, presume from these acts a dedication by the defendant or his ancestor at a time prior to the lease. *Held*, no misdirection.—*Winterbottom* v. *Lord Derby*, Law Rep. 2 Ex. 316.

2. In an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed several times in passing along it, and being obliged, in common with every one else attempting to use it, either to go by a less direct way or to remove the obstructions. *Held*, that he could not maintain the action.—*Ib.*

Husband and Wife.

At the date of a decree of dissolution of marriage, the wife was entitled to a reversionary interest in a sum of stock, which had been the subject of a post-nuptial settlement. Afterwards the fund fell into possession; but before the divorced wife actually recovered it, she died. *Held*, that the rights of the husband depending on the marriage contract, ceased at the date of decree, and that the executors of the divorced

wife were entitled to the fund.—*Wilkinson* v. *Gibson*, Law Rep. 4 Eq 162.

See Forfeiture; Marriage; Trust, 2; Will, 5.

Injunction.

A bill was filed to restrain a railway company from placing an obstruction, partly on a public way and partly on the land of the plaintiffs, a rival railway company, so as to block up the access to a station of the plaintiffs, and alleged that the injury caused by the continuance of the obstruction would be irreparable, and that the act was done without any color of title. On demurrer, *held*, that this was a case in which the court would enjoin trespass by a stranger.—*London & N. W. Railway Co.* v. *Lancashire & Yorkshire Railway Co.*, Law Rep. 4 Eq. 174.

Insurance.

1. A policy, purporting to be "*signed*, sealed and delivered," binds the insurers, though it remains in their possession. The insured need not formally accept or take it away, if nothing else remains to be done by him. So, *held*, by the House of Lords (Lord Chelmsford, C.; and Lord Cranworth), reversing the decision of the Courts of Exchequer Chamber and Common Pleas.—*Xenos* v. *Wickham*, Law Rep. 2 H. L. 296.

2. An insurance broker, employed to procure a policy, has no implied authority to direct the insurers to cancel it.—*Ib.*

3. The plaintiff in Liverpool employed an agent in Smyrna to buy and ship goods. The agent shipped goods on a vessel which sailed January 23, but was stranded the same day. The cargo became a total loss. The agent learned the loss on January 24, and on the next post day informed the plaintiff of it by letter, but purposely abstained from telegraphing, in order that the plaintiff might not be prevented from insuring. The plaintiff, on January 31, without any knowledge of the loss, effected an insurance. *Held*, that he could not recover against the underwriters.—*Proudfoot* v. *Montefiore*, Law Rep. 2 Q. B. 511.

4. In May, 1864, the Confederate cruiser, the Georgia, put into Liverpool, where she was dismantled; this fact was then known to the defendant, an underwriter at London. At Liverpool she was bought by the plaintiff, and converted into a merchant vessel. In August, 1864, the plaintiff, through a broker, insured the vessel with the defendant. The particulars furnished by the plaintiff were: Georgia, SS., chartered on a voyage from Liverpool to Lisbon and back. The vessel sailed, and was immediately captured by a United States frigate. In an action on the policy, the defendant set up the concealment of the fact that the Georgia was the late confederate cruiser, and therefore liable to capture. The jury found that the defendant did not know that the Georgia, which he was insuring, was the Confederate cruiser; but that he had, at the time of insuring, abundant means of identifying the ship from his previous knowledge, coupled with the particulars given by the plaintiff. *Held*, that the defendant was entitled to a verdict.—*Bates* v. *Hewitt*, Law Rep. 2 Q. B. 595.

See Bankruptcy, 3; Stamp, 1.

Interest.—*See* Vendor and Purchaser of Real Estate.

Joint Tenancy.—*See* Will, 3.

Jurisdiction.—*See* Foreign Attachment; Prohibition.

Landlord and Tenant.

1. An entry to distrain by opening a window which is shut but not fastened, is illegal. A., the landlord's agent, went with a warrant of distress to the demised premises, the front door of which he found fastened. Later in the day, a man in the employ of the landlord was allowed by the tenant to enter at the front door, and go through another door into the area, in order to repair the grating over the area, which was in a dangerous state. While the repairs were going on, the tenant left the house, having fastened both doors, and the man could not get out of the area. A. suggested to him to try a closed window which opened on the area. The window was unfastened; the man pulled down the sash, got into the house, and unfastened the door from the inside. A. then entered and distrained. *Held*, that it was one transaction, and the distress was unlawful.—*Nash* v. *Lucas*, Law Rep. 2 Q. B. 590.

2. A. let land to B. as tenant from year to year. B. continued to hold for several years after A.'s title had determined, paying rent to A., and at length gave up possession on notice to quit from A. After the determination of A.'s title, but before B. had given up possession, B. underlet to C. C. paid rent to B. as long as B. held, but afterwards paid rent to no one. In ejectment by A. against C., after B. had given up possession, *held*, that it might be presumed, as matter of fact, that a new tenancy from year to year had been commenced by B. after A.'s title had ceased, and that C., therefore, could not dispute A.'s title.—*London and N. W. Railway Co.* v. *West*, Law Rep. 2 C. P. 553.

Digest of English Law Reports.

Lease.—*See* Landlord and Tenant, 2; Mortmain, 2; Watercourse.

Legacy.

1. A testatrix by will appointed her real and personal estate to trustees on trust to sell part, and hold the proceeds and all the trust moneys and personal estate on trust to pay the legacies thereinafter given; and after payment thereof, to pay an annuity to P. for life, unless he should become entitled to the legacy thereinafter mentioned, and subject thereto in trust for H. for life, and after her death in trust for her children, and if no chidren, in trust, to sell the estates not already sold, and out of the proceeds to pay to P., his executors, administrators and assigns, the sum of £20,000 in lieu of the annuity, and hold the residue in trust for the children of G. P. died before H., and on H.'s death the real estate then remaining unsold was insufficient to raise £20,000. *Held* (1), that the legacy was payable to P.'s representative; (2) that it was a demonstrative legacy, and payable out of the general estate.—*Hodges* v. *Grant*, Law Rep. 4 Eq. 140.

2. Testator, after giving several sevenths of his personal estate to his living brothers and sisters "and their heirs and assigns" respectively, gave another seventh "to the heirs and assigns of my late sister D., now deceased." *Held*, that the persons entitled to this last seventh were the statutory next of kin of D. at her death.—*Newton's Trusts*, Law Rep. 4 Eq. 171.

See Devise, 2; Mortmain; Trust, 1; Will, 3, 4.

Libel.—*See* Slander.

License.—*See* Custom.

Marriage.

In Scotland, a connection commencing in adultery may become, on the parties becoming at liberty to marry, matrimonial by consent, and habit and repute are evidence of such consent.—*The Breadalbane Case*, Law Rep. 1 H. L. Sc. 182.

See Forfeiture.

Married Woman.—*See* Husband and Wife.

Marshalling of Assets.—*See* Priority, 3.

Master.—*See* Priority, 3.

Master and Servant.—*See* Principal and Agent.

Misrepresentation. — *See* Contract, 2; Directors, 1; Insurance, 3, 4.

Mortgage.—*See* Priority, 2.

Mortmain.

1. A legacy charged on land, while unpaid, is within the Statute of Mortmain, and cannot be bequeathed by the legatee to a charity.—*Brook* v. *Badley*, Law Rep. 4 Eq. 106.

2. A. demised the minerals under certain lands in consideration of a surface rent and of a fixed sum, payable in half-yearly instalments till the whole was paid, with powers of distress and re-entry in default of payment. At A.'s death one instalment was due and unpaid. *Held*, that it was in the nature of rent, and not of unpaid purchase money, and could therefore be bequeathed by A. to a charity.—*Ib.*

Negligence.—*See* Collision, 2.

Notice.—*See* Priority, 1.

Nuisance.—*See* Highway, 2.

Parties.—*See* Equity Pleading and Practice, 1.

Partnership.

1. B., a banker, formed a partnership with M. and P., merchants, under the firm of M. & Co.; and by the partnership deed B. and M. mutually covenanted to bring £6,500 each into the business. There was a subsidiary agreement that B. should accept bills for the firm at a commission, and that the firm should negotiate them and keep B. in funds to meet the acceptances. B., M. and P. all became insolvent. M., on behalf of M. & Co., claimed to prove against B.'s estate for £5,000 due to the firm on their current account, and for £2,700 due to M. on the covenant in the deed for capital not brought in by B. *Held* (1) that the dealing between B. and M. & Co., was not such a separate trade as to allow the firm to prove against a partner's estate, and that the fact that all the partners were insolvent, and therefore had no personal interest, made no difference; (2) that the sum due on the covenant being due on account of the partnership, could not be proved by one partner against the estate of another, at least till the taking of the partnership accounts.—*Ex parte Maude*, Law Rep. 2 Ch. 550.

2. When one partner allows the other *bona fide* to carry on the business ostensibly as his own, on the bankruptcy of the latter, the dormant partner's share in the partnership stock in trade does not pass to the bankrupt's assignees, as in the possession, order or disposition of the bankrupt, as reputed owner, with consent of the true owner (Exch. Ch.).—*Reynolds* v. *Bowley*, Law Rep. 2 Q. B. 474.

See Stamp, 2.

Patent.

1. If the utility of a patent has not been tested by actual employment during fourteen years, a very strong presumption is raised against its utility, which can only be rebutted

by the very strongest evidence.—*In re Allan's Patent*, Law Rep. 1 P. C. 507.

2. A patentee, residing in America, gave his agent in England half the royalties. On an application for extension of the term of the patent, *held*, that in estimating the patentee's profits, such half was to be deducted.—*In re Poole's Patent*, Law Rep. 1 P. C. 514.

3. Under the 15 & 16 Vic. c. 83, s. 25, an extension may be granted of the term of a patent taken out first in England, though a patent has been obtained for the same invention in a foreign state, which would expire before the end of the extended term. *Secus*, if the patent was first obtained abroad by a foreign subject, and afterwards taken out in England.—*Ib.*

Payment.—*See* Bills and Notes.

Penalty.—*See* Vendor and Purchaser of Real Estate.

Pilot.—*See* Collision, 2; Ship, 1.

Pleading.—*See* Bills and Notes; Equity Pleading and Practice, 1, 2; Principal and Surety.

Power.—*See* Devise, 1; Forfeiture; Trust, 2.

Practice.—*See* Admiralty, 2; Equity Pleading and Practice; Prohibition; Probate Practice.

Precatory Words.—*See* Trust, 1.

Prescription.—*See* Way.

Presumption.—*See* Highway, 1; Landlord and Tenant, 2.

Principal and Agent.

1. A railway company agreed to carry A.'s horse free of charge. At the end of the journey, the station-master demanded payment for the horse, and on A.'s refusal gave A. in custody to the police, till it was ascertained that all was right. In an action by A. against the company for false imprisonment, *held*, that as the company would have had no power to detain A., even had he wrongly taken the horse on the train without paying, there was no implied authority from them to the station-master to do so, and that they were not liable.—*Poulton* v. *London and S. W. Railway Co.*, Law Rep. 2 Q. B. 534.

2. The defendant, with W. and others, undertook to form a company. At a meeting of the projectors, of which the defendant was chairman, it was resolved "that the prospectus, as marked with the chairman's initials, be approved, and be printed for circulation, at the discretion of W., as early as possible." W. employed the plaintiffs to print the prospectus, showing them the initialed copy, and saying he was authorized by the defendant to get it printed. The prospectus, when printed, was circulated by the defendant. There was an agreement, unknown to the plaintiffs, between the defendant and W., that W. should bear all expenses of forming the company. *Held*, that there was evidence from which a jury might infer that W. had authority to pledge the defendant's credit for the printing.—*Riley* v. *Packington*, Law Rep. 2 C. P. 536.

3. In an action by a bank against their late manager for improperly discounting bills for his own advantage, for the benefit of companies in which he was interested, it appeared that the transactions were in the ordinary course of business, that the manager had not exceeded his authority, and that no case of bad faith was proved against him. *Held*, that the action could not be maintained.—*Bank of Upper Canada* v. *Bradshaw*, Law Rep. 1 P. C. 479.

See Directors, 1; Insurance, 2, 3.

Principal and Surety.

To an action against sureties on a bond conditioned for the due performance by A. of his duties as collector of poor rates and of sewer rates for the parish of S., the bond to continue in force if A. held either office separately, the breach assigned being that A. had not paid over money received in each capacity, the defendants pleaded that before breach an act was passed increasing A.'s duties as collector of sewer rates, and under which he was also appointed collector of main drainage rates, by those from whom he held his other appointments. The act increased the proportion of sewer rates payable by S., and also imposed on the sewer rates some new small charges. *Held* (1), that A.'s appointment as collector of main drainage rates did not avoid the bond; (2) that the changes made by the acts did not amount to an alteration of the office of collector of sewer rates, and therefore did not avoid the bond; (3) that the plea was bad, as not affording an answer to the liability for A.'s breach of duty as collector of poor rates (Exc. Ch.).—*Skillett* v. *Fletcher*, Law Rep. 2 C. P. 469.

Priority.

1. A trustee learned the insolvency of his *cestui que trust* by reading in a newspaper an advertisement of a petition in insolvency, and he believed the advertisement to be true. The assignee gave no formal notice to the trustee till after A., who had taken a mortgage of the *cestui que trust*'s interest, subsequently to the insolvency, had given formal notice to the trustee. *Held*, that A. was entitled to priority over the assignee in insolvency.—*Lloyd* v. *Banks*, Law Rep. 4 Eq. 222.

2. Mortgagees are to be paid in priority to material men who, at the time of supplying materials, are not in such actual possession of the ship as to give them a possessory lien.—*The Scio*, Law Rep. 1 Adm. & Ecc. 353.

3. A master gave a bottomry bond on ship, freight, and cargo, binding himself. The proceeds of the ship, which had been sold, and the freight were not sufficient to pay both the master's claim for wages and disbursements and the bondholder. The ship, freight, and cargo, were sufficient. The master had no lien on the cargo. *Held*, the owner of the cargo opposing, that, there being sufficient to pay the bondholder, the master's claim should have priority over the claim of the bondholder, thus marshalling the assets between them.—*The Edward Oliver*, Law Rep. 1 Adm. & Ecc. 379.

Probate Practice.—*See* Will, 1, 2.

Production of Documents.

A defendant cannot be required to produce documents relating to the compromise of a dispute between himself and one not a party to the suit.—*Warwick* v. *Queen's College, Oxford* (No. 2), Law Rep. 4 Eq. 254.

Prohibition.

One who is sued in an inferior court can bring an action of prohibition, before pleading in the inferior court, if the prohibition be sought on the ground of an absolute lack of jurisdiction in the inferior court.—*Mayor, &c., of London* v. *Cox*, Law Rep. 2 H. L. 239.

Promissory Note.—*See* Bills and Notes; Company, 2.

Railway.—*See* Company; Principal and Agent, 1; Ultra Vires.

Rent.—*See* Mortmain, 2.

Res Adjudicata.—*See* Bastardy.

Residence.

A surgeon in a lunatic asylum in the parish of N. married, and being required to live at the asylum, took lodgings for his wife in the parish of P.; he was in the habit of visiting her nearly weekly, staying from Saturday evening to Monday morning. *Held*, that he was resident in N. not in P.—*The Queen* v. *Norwood*, Law Rep. 2 Q. B. 457.

Reversion, Sale of.—*See* Vendor and Purchaser of Real Estate.

Revocation of Will.—*See* Will, 4.

Sale.

The defendant bought of the plaintiffs, at a certain price, "413 bales of wool, to arrive *ex Sfige*, or any vessel they may be transhipped in, and subject to the wool not being sold in New York. The wool to be guaranteed about similar to samples in the broker's possession, and any dispute shall be decided by the brokers' whose decision shall be final." The wool turned out not about similar to sample, and the brokers, after protest from the defendant, awarded that the defendant should take it at a certain abatement. *Held*, that, as the contract was for the sale of specific goods, the guarantee was not a condition but only a warranty, that the brokers had power to award as they had, and the defendant was bound to take the wool accordingly.—*Heyworth* v. *Hutchinson*, Law Rep. 2 Q. B. 447.

Sale of Reversion.—*See* Vendor and Purchaser of Real Estate.

Salvage.—*See* Collision, 1.

Shelley's Case, Rule in.—*See* Devise, 1.

Ship.

1. The employment of a pilot is not compulsory on a vessel being towed from one dock to another in the port of Hull, as the vessel is neither passing "into or out" of the port, nor "bound to or from" the port within the Hull Pilot Act.—*The Maria*, Law Rep. 1 Adm. & Ecc. 358.

2. A. agreed with the master of a ship to serve as a sailor for twelve months. The ship was destined for the service of the Peruvian government. At Rio it became known that hostilities had broken out between Spain and Peru. The master was then acting under orders of a Peruvian agent on board, who received instructions from the commanders of two Peruvian war steamers, which had joined the ship on the voyage, and to which from time to time she had supplied coal and ammunition. A. objected to serve any longer, on the ground that the voyage had become illegal, and involved greater dangers than he had contracted to undergo. He accordingly left the ship, and sued the master for breach of contract. *Held* (per Kelly, C. B., and Martin and Pigott, B.B.; Bramwell, B., *dubitante*), that it was a breach of contract to employ A. on a voyage which would expose him to greater danger than he originally had reason to anticipate.

A., after leaving the ship, was imprisoned at Rio for some days as a Peruvian deserter; when released, the ship had gone, carrying off some of his clothes. *Held* (per Martin, Bramwell, and Channell, B.B.; Kelly, C. B., *dissentiente*), that damages for the imprisonment and loss of clothes were too remote to be recoverable.—*Burton* v. *Pinkerton*, Law Rep. 2 Ex. 340.

See Admiralty; Charter Party; Collision; Freight; Insurance, 3, 4; Priority, 2, 3.

Slander.

The declaration alleged that it was the duty of the plaintiff, as a gamekeeper, not to kill foxes, that he was employed on the terms of his not doing so, and that a person killing foxes would not be employed as gamekeeper; that the defendant, knowing the premises, falsely and maliciously said of the plaintiff, as such gamekeeper, that he killed foxes; special damage. *Held*, good, on demurrer, even without allegation of special damage.—*Foulger* v. *Newcomb*, Law Rep. 2 Ex. 327.

Stamp.

1. A case was stated on an alleged contract of insurance. It appeared that no stamped policy had been issued, and that the memorandum of insurance was also unstamped. For the purposes of the case, the parties agreed that a valid policy should be deemed to have been issued in accordance with the memorandum. The court ordered the case struck out, as they could not hear it without sanctioning an evasion of the stamp laws.—*Nixon* v. *Albion Marine Ins Co.*, Law Rep. 2 Ex. 338.

2. On a dissolution of partnership, a deed was made by which, after reciting that the share of A., the retiring partner, in the real assets of the firm should be taken by the remaining partners, and that A. should be allowed in account £17,000 as an equivalent for the value of his share. A., in consideration of £17,000, "part of the moneys and assets of the dissolved partnership to A. so allowed in account, appropriated, and paid as aforesaid," conveyed his share of the real assets to the remaining partners. *Held*, that the indenture was liable to an *ad valorem* stamp duty "as a conveyance upon the sale of property."—*Phillips* v. *Commissioners of Inland Revenues*, Law Rep. 2 Ex. 399.

Surety.—*See* Principal and Surety.

Tenancy in Common.—*See* Will, 3.

Trespass.—*See* Injunction.

Trust.

1. Bequest "of all my property to my husband, hoping he will leave it, after his death, to my son, if he is worthy of it," with the following explanation: "My reason for leaving all I have to dispose of to my husband, and in his entire power, is, that my son is already certain of a fortune, and that I cannot now feel any certainty what sort of character he may become. I therefore leave it to my husband, in whose honor, justice, and parental affection, I have the fullest confidence. If my son dies before my husband, though I leave all without reservation to my dear husband to dispose of as he thinks fit, yet should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles, and clear judgment of right and wrong, and his sense of justice." *Held*, not to create a trust. —*Eaton* v. *Watts*, Law Rep. 4 Eq. 151.

2. Certain jewels were given on trust for such person as G. (a married woman) should, by writing, direct or appoint, and, in default of such appointment, on trust for G. during her life for her separate use, and to be at her absolute disposal, and her receipt, or that of the person to whom she should direct the jewels to be delivered, to be a good discharge. *Held*, that G. could pass the absolute property in the jewels by gift and manual delivery without writing.—*Farington* v. *Parker*, Law Rep. 4 Eq 116.

See Priority, 1.

Ultra Vires.

A railway company, being about to apply to the legislature for an act empowering them to extend their line, covenanted with A., that if he would withhold his intended opposition to the act, they would, within three months after the passage of the act, pay him £2,000 for a personal compensation to him for the injury he had sustained, or might sustain, in respect of the preservation of game on his estate, in consequence of the construction of the intended railway. In an action on the covenant, *held*, in the Exchequer Chamber, reversing the decision of the Court of Exchequer (per Keating, Mellor, Montague Smith, and Lush, JJ.), that the covenant being absolute and not dependent on the construction of the railway, and the funds of the company being both by the original and the new act appropriated to special purposes, which did not include the consideration of the covenant, the covenant was *ultra vires*, and did not bind the company; (per Willes and Blackburn, JJ., dissenting), that the contract was not expressly, or by necessary implication, prohibited, and the company was therefore bound.—*Taylor* v. *Chichester and Midhurst Railway Co.*, Law Rep. 2 Ex. 356.

Vendor and Purchaser of Real Estate.

W. was entitled to the income of property subject to the payment of a life annuity to C., and of the interest on mortgages whereby the present income was reduced to a small amount. In consideration of the advance of £1,000, W. assigned the income as security for the payment of £3,800 on the death of C., redeemable on payment of £1,500 at the end of a year. Afterwards, by a memorandum, W. further

agreed to repay £400 and interest at 5 per cent a month, which security was to be tacked to the former security. *Held*, (1) that W.'s interest in the income was *not* a reversion, and therefore the transaction could not be set aside as a sale at an undervalue; (2) that the £500 additional, payable on redemption at the end of a year, was not a penalty; (3) that the security for £400 and interest was valid.—*Webster* v. *Cook*, Law Rep. 2 Ch. 542.

See Mortmain, 2.

Warranty.—*See* Sale.

Watercourse.

A lessor reserved "the free running of water and soil coming from any other buildings and lands contiguous to the demised premises through the sewers and watercourses made through the said premises." *Held*, that the reservation did not extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and therefore did not extend to the refuse of tan pits.—*Chadwick* v. *Marsden*, Law Rep. 2 Ex. 285.

Way.

A., being entitled by prescription to a right of way over B.'s land from field N., and the way to cart from field N. some hay stacked there, but grown partly there and partly on land adjoining. *Held*, that if A. used the way *bona fide* and for the ordinary and reasonable use of field N. as a field, the mere fact that some of the hay had not been grown on field N., did not make the carrying it over R.'s land an excess in the user of the right of way.—*Williams* v. *James*, Law Rep. 2 C. P. 577.

See Highway.

Will.

1. The party propounding a will must call one of the attesting witnesses to prove its due execution.—*Bowman* v. *Hodgson*, Law Rep. 1 P. & D. 362.

2. A testatrix, during her last illness, made a will in favour of two persons, strangers in blood. The instructions for the will were given to these persons, when no one else was present, and it was not read over to her. Her next of kin were denied access to her during her illness. The jury having found that the testatrix knew and approved of the contents, the will was pronounced for, but the costs of the unsuccessful opposition of the next of kin were ordered to be paid out of the estate.—*Goodacre* v. *Smith*, Law Rep. 1 P. & D. 359.

3. Property was given in trust for all the children of G. who should be living at the occurrence of a certain contingency, and the issue of such of the children of G. as should be then dead leaving issue, equally to be divided between such children and issue, but so that the issue of such children should take only such share as their respective parents, if living, would have been entitled to. *Held*, that the issue of deceased children of G. took as tenants in common, and not as joint tenants.—*Hodges* v. *Grant*, Law Rep. 4 Eq. 140.

4. A testator gave his residuary real and personal estate to trustees on trust for his "five sons," A., B., C., D. and E., as tenants in common, and by a codicil "revoked and made void all the trusts, clauses, matters, and things in his will, concerning his residuary estate, so far as the same trusts, &c., related to or affected his son E. or his right thereto or therein;" and "in lieu thereof" he gave £15,000 to the trustees on trust for E., his wife, and children; and if he, E., should have no children, he directed that "the said legacy" should sink into the residue, but so that E., or his representatives, should take no share or interest therein. *Held*, that the testator died intestate as to the trusts of one-fifth share of the residue, and that the £15,000 was not payable out of such share, but was payable before the residue was ascertained.—*Sykes* v. *Sykes*, Law Rep. 4 Eq. 200.

5. A testator directed that his daughters' share should "be settled on themselves strictly." *Held*, that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her without power of anticipation; if she died first, the share to go as she should by will appoint, and, in default of appointment, to her next of kin, exclusively of her husband; and, if she survived, then to her absolutely.—*Loch* v. *Bagley*, Law Rep. 4 Eq. 122.

See Devise; Forfeiture; Legacy; Mortmain; Trust, 1.

Witness.—*See* Will, 1.

Words.

"*Bound to or from.*"—*See* Ship, 1.

"*Heirs and Assigns.*"—*See* Legacy, 2.

"*Injuriously affected.*"—*See* Company, 1.

"*In to or out of.*"—*See* Ship, 1.

"*Issue.*"—*See* Devise, 1.

"*Strictly settled.*"—*See* Will, 5.

"*Water and Soil.*"—*See* Watercourse.

See General Words.

—*American Law Review.*

GENERAL CORRESPONDENCE.

Time for service of notice of trial.

To the Editors of the Canada Law Journal.

Gentlemen,—The present practice in regard to the time for service of notice of trial is to serve it eight days before the commission day. For instance, notice is given on the 8th day of a month for the 16th, the first day being excluded.

My contention is, that service in the above case on the 9th would be a sufficient compliance with the statute, (Common Law Procedure Act, Con. Stat. U. C. sec. 201,) which says, "Eight days notice of trial or of assessment (the first and last days being inclusive) shall be given," &c.

In the Common Law Procedure Act of 1856 the following words were made use of, "Eight days notice of trial or assessment shall be given and shall be sufficient," &c. All the decisions on the point in the Practice Reports are under the old act, namely *Vrooman* v. *Shuert*, *Buffalo and Lake Huron Railway* v. *Brooksbanks*, *Callaghan* v. *Baines*, *Clark* v. *Waddell*, and others, and I find none since the consolidation of the statute in which the above change was made except the case of *Allen* v. *Boice*, 3rd vol. Prac. Rep. 200, where it seems to have been taken as a matter of course by counsel, that service on the 26th of October for November 2nd was too late, and the point was not argued.

Your view of the subject, citing any cases since the Consolidated Statutes, would, I am sure, be very acceptable to the profession generally. Yours truly,

Student-at-Law.

[See *Cuthbert* v. *Street*, 6 U. C. L. J. 20, where it was decided that in computing the eight days required for notice of trial the commission day of the assizes must be excluded. This decision, which we should fancy is pretty well known by this time, has never been overruled to our knowledge.—Eds. L. J.]

The Insolvent Law of 1864—*Assignees.*

To the Editors of the Canada Law Journal.

Sirs,—I have read with much interest the communication of your correspondent "Scarboro'," on pages 47 and 48 of Vol. IV. N. S., and although his statements with regard to assignees in insolvency may be startling, I know, within my own experience, of similar cases, and that he has not at all over-stated or over-colored his case, and that they are true. For instance, in this county a trader largely indebted as a produce dealer absconded from the Province about five years ago, and took with him some thousands of dollars wherewith to commence business in the United States; but finding the people there more acute than himself, he soon became penniless; in this forlorn condition he returned to his former home (a comfortable brick cottage, nice orchard and garden, outbuildings, &c., all of which he had, before leaving Canada, conveniently placed in the keeping of an accommodating brother-in-law); he then went through the form of making an assignment of his estate and effects (?) to one of the assignees in insolvency appointed by a neighbouring board of trade, and struck a bargain with him to put him through for a named sum! The assignee instead of acting under the 10th section of the act, by calling a meeting of the creditors for the public examination of the insolvent, or having him and other persons examined before the judge as he, acting in the interest of the creditors generally, might and ought to have done for the purpose of ascertaining what his assets really were and what had become of the money wherewith he absconded, &c., set to work and solicited, in the interest of the insolvent himself, a release from the requisite number of his creditors, some of whom were told (also in the interest of the insolvent) that it was true "the man had committed a wrong in leaving the country as he had done, and so forth, but there was no use in keeping the poor man under; he was back now and would probably do better for the future," &c. And so the thing was procured through the importunities of the insolvent, aided by the disinterested recommendation of the assignee; the weight of whose position was lent to the procuring of that which under ordinary circumstances could not have been obtained, and which the assignee by all his might and main ought in the interests of truth and honesty, if not in that of the creditors, to have opposed. The result was that the requisite creditors signed the discharge, the notice of its deposit with the clerk of the County Court of the application for its confirmation was given by the assignee, and when the insolvent appeared

his petition for confirmation came up for hearing, all the papers and notices, &c., were found to be the work of the assignee, who had been the paid retainer of the insolvent, instead of the representative of the creditors; no one appeared to oppose the confirmation of the discharge, or to have the insolvent examined under the 3rd sub-section of the 10th section, the assignee did not do so at all events, and if he had acted in a way which comported with his duty in the matter he would have been there to oppose the confirmation of the discharge. Some of the creditors thought it would be useless to attempt to oppose it with the assignee doing all he could to promote it, and so the discharge was confirmed by the judge, and now the insolvent is enjoying the same property that he occupied before he absconded from the Province. It is a singular feature in the character of most of the assignees appointed by the Board of Trade to which I have before alluded, that, up to a very recent date, they were themselves insolvent in circumstances, or, to speak more plainly, they were nearly all insolvent debtors—persons who have not succeeded with their own affairs set to manage the broken down or disordered affairs of other insolvent people; and the assignee whose acts I have hereinbefore particularly alluded to was himself one of the number.

I observe your correspondent, Scarboro', speaks of the assignee's certificate as a prerequisite to a proper discharge of an insolvent by the judge. I should be very thankful if he would mention, for the information of your readers in general, and myself in particular, under what section of the Insolvent Acts of 1864 or 1865 he finds or infers it to be an essential, as I apprehend the authorities he refers to are applicable to the English Bankrupt or Insolvency Acts only.

Had I not already made this communication too long I should give my views upon some of the defects of the insolvency acts alluded to by "Scarboro."

Yours respectfully,

Union, May 1, 1868. Union.

[We shall be glad to have the views of our correspondent on the matters he alludes to.—Eds. L. J.]

REVIEW.

The Solicitors' Journal and Weekly Reporter. Milliken: 59, Carey Street, Lincoln's Inn, W. C. London.

We are in regular receipt of these excellent publications. The former, as its name implies, is devoted to the interests of the legal profession, and the latter gives a series of valuable reports which, despite the attractions of the new system of Law Reports, still seems perfectly capable of holding its ground in the estimation of the public. The liberal use we make of the columns of both publications is the best proof we can give of our opinion of their excellence.

Speaking of this, we are concerned to find that an article taken from the pages of the *Solicitor's Journal* was copied by us and inserted under the head of "Selections," without the usual and proper acknowledgment of its origin. We are the more grieved at this, as it has been the unfortunate cause of leading our generally courteous brother, in a recent number, to indulge in some remarks which we should wish to believe were as foreign to the generous, and thinketh-no-evil spirit of our cotemporary, as they were in themselves unmerited. Such mistakes and such omissions as were complained of have been made before and will doubtless be made to the end of time, both by us and by others (and even our mentor is not quite infallible in this matter), but it is quite out of place and unfair to us, and we would respectfully submit, unbecoming in them, to accuse us of want of "decency in this respect," and "short comings in courtesy," &c.; such remarks would be uncalled for if the offence were twice as great.

It scarcely seems possible that even the "most excruciatingly mean of capacities" could imagine for an instant, certainly none of our readers here would suppose that the article alluded to was anything but a *selected* article, though we confess there was nothing to shew the *particular source* from whence it was taken. We, who are "only colonists", may expect an occasional snubbing from across the water, and it is only because we value the good opinion of our "big brothers," that we feel hurt when they go too far with their strictures; we have occasionally had the pleasure of receiving their praises, and we suppose we must submit to take the "kicks with the halfpence."

In conclusion—we are as jealous of the courtesy due from one journal to another as our English cotemporary; we are sorry that this or any other omission should have occurred, and hope it may not occur again, but if it should, we trust our cotemporary will be as little inclined to impute improper motives to us as we should be to others, if similarly offended against.