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☑ Additional comments / Commentaires supplémentaires: Continuous pagination.

DIARY FOR OCTOBER.

6. SUN... *16th Sunday after Trinity.*
7. Mon. .. County Court and Surrogate Court Term begins.
12. Sat ... County Court and Surrogate Court Term ends.
13. SUN... *17th Sunday after Trinity.*
15. Tues... Law of England introduced into Upper Canada, 1792.
18. Friday *St. Luke.*
20. SUN... *18th Sunday after Trinity.*
27. SUN... *19th Sunday after Trinity.*
28. Mon... *St. Simon and St. Jude.*
30. Wed .. Appeal from Chancery Chambers.
31. Thurs. All Hallow Eve.

THE

Upper Canada Law Journal.

OCTOBER, 1867.

THE MARRIAGE LAWS.—No. II.

The law of marriage introduced into Upper Canada from England, and as modified by local legislation, indicated that the privilege of solemnizing that rite was to be limited to the clergy of the Church of England. But as other religious communities were formed and waxed strong, this was felt to be a hardship, and various enabling statutes were at different times passed—the dates of which serve to indicate the development of ecclesiastical prosperity and activity in the country. Thus by 38 Geo. III. cap. 4 (1798) members of the Church of Scotland, Lutherans and Calvinists could claim the right of being married by ministers of their own denominations, and by 11 Geo. IV. cap. 36 (1830) the same right was extended to Presbyterians, Congregationalists, Baptists, Independents, Methodists, Menonists and Tunkers or Moravians. Then the comprehensive statute 10 & 11 Vict. cap. 18 was passed, whereby was conceded to all clergymen or ministers of "any denomination of Christians whatever," the power of validly celebrating marriage between those who were adherents of their respective churches. The next and final step in progress was made when, ten years afterwards, by 20 Vic. cap. 66, the ministers of "every religious denomination in Upper Canada," were declared to have the right to solemnize matrimony according to the several rites, ceremonies and usages which obtained among them. And thus the law stands as consolidated: Con. Stat. U. C. cap. 72, sec. 1.

It is noticeable, however, that none of these or the other Provincial statutes relating to marriage in any manner touch in express terms upon the Roman Catholic population. If not otherwise provided for, they would of course be embraced under the wide language of 10 & 11 Vict. cap. 18; 20 Vict. cap. 16, and the Consolidated Act.

With regard to all Protestant clergy, the provisions of the statute law are clear that they shall not celebrate the ceremony of marriage, unless there has been either the usual proclamation of banns or the issue of a license authorizing such marriage. The first mention of marriage by *license*, in our statutes, is in 33 Geo. III. cap. 5, sec. 6, (an act applicable to those who were then in the position of Dissenters) which leaves it all uncertain as to the source of authority whence such dispensation issues. The next statute, however, 38 Geo. III. cap. 4, sec. 6 (likewise applicable to the then Dissenters) recognizes that the power to grant such license is vested in the Governor—a right which he exercises as representing the Sovereign and by virtue of the royal instructions: see *Reg.* v. *Roblin*, 21 U. C. Q. B. 357. The regulation in Lord Hardwicke's Act as to license is as follows:—"All marriages solemnized from and after the 25th March, 1754, * * * without publication of banns or *license of marriage from a person or persons having authority to grant the same*, first had and obtained, shall be null and void to all intents and purposes whatsoever." Under the English law at that time, licenses could be granted either by the Sovereign, or the Archbishop of Canterbury, or duly consecrated Bishops of the Church of England, by virtue of and within the territorial limits of their episcopal office, or by certain officers of the Spiritual Courts. But the Pope of Rome had no such power, nor had any ecclesiastical functionary belonging to, or claiming authority under the Church of Rome. See Chitty on the Prerog. pp. 51, 53; *Coh* v. *Bishop of Coventry*, Hob. 148; 25 Hen. VIII. cap. 21; 28 Hen. VIII. cap. 13; 1 Eliz. cap. 1, secs. 8, 10; and 4 Geo. IV. cap. 5. There can be no question that Lord Hardwicke's Act extended to Roman Catholics in England, at the time the English Marriage Law became the Upper Canadian Marriage Law, as appears by the I. S. 31 Geo. III. cap. 32, sec. 12.

By 26 Geo. III. cap. 84, and other statutes, the Archbishop of Canterbury was empowered to consecrate bishops for the colonies, and

though we do not know that the question has been mooted, yet it is very probable that duly consecrated colonial bishops of the English Episcopal Church had the privilege of granting dispensations from banns and directing the issue of marriage licenses, with respect to members of their own church and within the boundaries of their own dioceses, so long as Church and State were united in Upper Canada. But we apprehend that since the time our legislature declared in memorable words the desirableness of removing "all semblance of connection between Church and State" (18 Vic. cap. 2, 1854) and did in fact by that statute abolish such connection, the episcopal power to grant the marriage license reverted to the Governor as representative of the Crown. The Church of England in Upper Canada then became a mere voluntary association, and its bishops were shorn of any spiritual privileges or dispensing powers which otherwise they might have claimed. (See *Re Bishop of Natal*, 11 Jur. N. S. 353; *Murray* v *Burgess*, L. R. 1 P. C. App. 362; *Lyster* v. *Kirkpatrick*, 26 U. C. Q. B. 225.) So that the conclusion is manifest, as to all Protestant bodies, that they come within the marriage act as consolidated, and their members can only properly contract marriage after publication of banns, or, without banns, by Governor's license.

Under Con. Stat. U. C. cap. 72, sec. 2, the celebration of marriage without banns or license, or under banns, where the names of either of the parties were incorrectly stated, would be no more perhaps, than an irregularity; but under Lord Hardwicke's Act, such marriage would be an absolute nullity, both as to the contracting parties and their issue. Neither lapse of time nor mutual consent, however express, can validate what the statute directly avoids. Such a union would be not merely voidable, but void *ab initio;* it would be in the eye of the law, not a matrimonial, but a meretricious union, the issue whereof would be bastardized from their birth. (See *Elliott* v. *Gurr*, 2 Phil. p. 19; *Wright* v. *Elwood*, 1 Curt. p. 670; *Chinham* v. *Preston*, 1 W. Blac. 192; *King* v. *Inhabitants of Tibshelf*, 1 B. & Ad. 190; *Reg.* v. *Chadwick*, 11 Q. B. 173.) And this appears to be our marriage law in Ontario, so far as Protestants are concerned.

The inquiry now presents itself, upon what footing are Roman Catholics in this respect? Is their situation in this status as unsatisfactory as that of the Protestants, or can they claim privileges beyond those of any other religious body in this Province? The consideration of these questions will involve the necessity of going over some portions of the early history of Canada, when that country was passing from under the French to the Eng... dominion.

VENDORS' LIEN.

Is the absence of a receipt endorsed sufficient to put on enquiry?

In *Mackreth* v. *Symmons*, 15 Ves, 329; 1 White & Tud, Lg. Ca. Eq. Lord Eldon thus expresses himself:—

"Where a vendor conveys without more, though the consideration on the face of the instrument is expressed to be paid and also the receipt endorsed, still, if it is the simple case of a conveyance, the money or part not being paid, as between vendor and vendee, and those claiming *as volunteers*, a lien shall prevail." Again, "a person having got the estate of another shall not as between them keep it, and not pay the consideration; and there is no doubt that a third person, having full knowledge, that the other got the estate without payment cannot maintain, that though a Court of Equity will not permit him to keep it, he may give it to another without payment."

What is above laid down applies also when the purchaser has merely constructive notice, or notice of that which is sufficient to put on enquiry. Thus in England it has been so usual to endorse on a conveyance a receipt for purchase money that the absence of it causes suspicion, and is sufficient to put on enquiry as to whether the purchase money in fact has been paid.

The question is, whether this doctrine is as of course applicable in all cases here, even though it should be shown affirmatively that at the period in question it was not usual to endorse receipts, or that at any rate the custom was not so universal as that its non-observance should give rise to suspicion.

We are not aware of any reported case wherein it has been held here that the absence of the receipt is constructive notice, and if it has been so held we do not understand why such a case is not reported; we are told, however, it has been so held. On the other hand we are aware of a decision in the Privy Coun-

cil on appeal from Lower Canada wherein it was shown affirmatively that endorsed receipts were not usual and the following is the judgment of the Court on the point:—

"The objection stated in the opening that there was no endorsement of any receipt for the purchase money was very properly given up in the reply. The receipt is acknowledged in the body of the deed, and it is not the custom in Canada, as it is in England, to have an additional acknowledgment on the back of the deed, and its absence therefore affords no grounds of suspicion."

The above decision (*Barnhart* v. *Greenshields*, 9 Moore Pri. Cl. App. 18) would seem to be conclusive on the matter, and if indeed there be any case here wherein it has been held that the absence of the receipt was constructive notice it was probably a case wherein no evidence was given that frequently (at least until very recently) a receipt is not endorsed. We should have thought however that before it could be said that the non-observance of an alleged custom was a cause of suspicion, that positive evidence should be given that in fact the alleged custom did exist, whereby the burden of proof would be shifted.

It would not only save much trouble and expense in investigations of titles, but be consistent with the intention of the parties, if the absence of a receipt did not let in the vendor's lien. There can be no doubt that when one man sells and conveys to another a piece of land and takes his note for the purchase money and asks for no other security, that both parties look on the transaction in just the same light as if it were a horse or other chattel that was sold and delivered. The last thing that they would suppose as the result of their transaction would be that in fact the vendor had given an equitable mortgage on the property to secure the note, and nothing more astonishes a vendor (not learned in the law) than to be told that his note is in fact secured by a mortgage. Lord Eldon in the case first above cited and other eminent judges have regretted that the doctrine was ever introduced, and that a vendor should have security he did not expressly stipulate for.

We apprehend that the question cannot arise on transactions subsequent to the late Registry Act, sec. 66, under which "no equitable lien, charge or interest affecting land shall be deemed valid in any court in this Province after this act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns."

Assuming this act not to be retrospective, the question above discussed still arises in the absence of a receipt on a conveyance prior to the Act.

SELECTIONS.

AN ESSAY

On the Importance of the Preservation and Amendment of Trial by Jury.

The institution of trial by jury has been ascribed by different authors to various persons and nations. Sir William Blackstone is of opinion that it originated with the Saxon and other northern nations.

"Some authors," writes Sir William, "have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon Colonies, their institution being ascribed by Bishop Nicholson to Woden himself, their great legislator and captain. Hence it is that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, *boni homines*, usually the vassals or tenants of the lord, being the equals or peers of the parties litigant; and, as the lord's vassals judged each other in the lord's courts, so the king's vassals, or the lords themselves, judged each other in the king's court. In England we find actual mention of them so early as the laws of King Ethelred, and that not as a new invention. Stiernhook ascribes the invention of the jury, which in the Teutonic language is denominated *nembda*, to Regner, king of Sweden and Denmark, who was contemporary with our King Egbert. Just as we are apt to impute the invention of this and some other pieces of juridical polity to the superior genius of Alfred the Great; to whom, on account of his having done much, it is usual to attribute everything; and as the tradition of ancient Greece placed to the account of their own Hercules, whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other."

This opinion has been controverted with much learning and ingenuity by Dr. Pettingal in his inquiry into the "Use and Practice of Juries among the Greeks and Romans." Dr. Pettingal deduces the origin of juries from these ancient nations.

"He begins with determining the meaning of the word δικασαι in the Greek, and *judices* in the Roman writers. "The common acceptation of these words (says he), and the idea generally annexed to them, is that of *presidents of courts*, or, as we call them, *judges;* as such they are understood by commentators, and rendered by critics. Dr. Middleton, in his life of Cicero, expressly calls the *judices, judges of the bench;* and Archbishop Potter, and in short all modern writers upon the Greek or Roman orators, or authors in general, express δικασαι and *judices* by such terms as convey the idea of *presidents in courts of justice.* The propriety of this is doubted of, and has given occasion for this enquiry; in which is shown, from the best Greek and Roman authorities, that neither the δικασαι of the Greeks, nor the *judices* of the Romans, ever signified *presidents in courts of judicature*, or judges of the bench; but, on the contrary, they were distinguished from each other, and the difference of their duty and function was carefully and clearly pointed out by the orators in their pleadings, who were the best authorities in those cases in which the question related to forms of law and methods of proceeding in judicial affairs and criminal process.

"The presidents of courts in criminal trials at Athens were the nine archons, or chief magistrates, of which whoever presided was called ηγεμων δικασηρις president of the court. These nine presided in different causes peculiar to each jurisdiction. The archon, properly so called, had belonging to his department all pupillary and heritable cases; the βασιλευς had charge of the public worship, and the conduct of criminal processes; exercised authority over strangers and sojourners, and attended to various other matters; and the *thesmothetai*, the six junior archons, judged causes assigned to no special court, &c. (See *Liddell & Scott.*)

"Wherever then the ανδρες δικασαι, or judicial men, are addressed by the Greek orators in their speeches, they are not to be understood to be the presiding magistrates, but another class of men, who were to inquire into the state of the cause before them, by witnesses heard, to report their opinion and, after inquiry made and witnesses heard, to report their opinion and verdict to the president, who was to declare it.

"The several steps and circumstances attending this judicial proceeding are so similar to the forms observed by our jury, that the reader cannot doubt but that the nature, intent, and proceedings of the δικασηριον among the Greeks were the same with the English jury; namely, for the protection of the lower people from the power and oppression of the great, by administering equal law and justice to all ranks; and therefore when the Greek orators directed their speeches to the ανδρες δικασαι, as we see in Demosthenes, Æschines, and Lysias, we are to understand it in the same sense as when our lawyers at the Bar say, *Gentlemen of the Jury.*

"So likewise among the Romans, the *judices* in their pleadings at the Bar, never signified judges of the bench, or presidents of the court, but a body or order of men, whose office in the courts of judicature was distinct from that of the prætor or judex questionis, which answered to our judge of the bench, and was the same with the archon, or ηγεμων δικασηρις of the Greek; whereas the duty of the judices consisted in being empannelled, as we call it, challenged, and sworn to try uprightly the case before them; and when they had agreed upon their opinion or verdict, to deliver it to the president who was to pronounce it. This kind of judicial process was first introduced into the Athenian polity by Solon, and thence copied into the Roman republic, as probable means of procuring just judgment, and protecting the lower people from the oppression or arbitrary decisions of their superiors.

"When the Romans were settled in Britain as a province, they carried with them their *jura* and *instituta*, their laws and customs, which was a practice essential to all colonies; hence the Britons, and other countries of Germany and Gaul, learned from them the Roman laws and customs, and upon the irruption of the northern nations into the southern kingdoms of Europe, the laws and institutions of the of the Romans remained, when the power that introduced them was withdrawn; and Montesquieu tells us, that under the first race of kings in France about the fifth century, the Romans that remained, and the Burgundians their new masters, lived together under the same Roman laws and police, and particularly the same forms of judicature. How reasonable then is it to conclude, that in the Roman courts of judicature continued among the Burgundians, the form of a jury remained in the same state as it was used at Rome. It is certain, Montesquieu, speaking of those times, mentions the *paires*, or *hommes de fief*, homagers or peers, which in the same chapter he calls *juges, judges*, or jurymen: so that we hence see how at that time the *hommes de fief*, or 'men of the fief,' were called *peers*, and those peers were *juges* or jurymen. These were the same as are called in the laws of the Confessor, *pers de la tenure*' the 'peers of the tenure, or homagers' out of whom the jury of peers were chosen, to try a matter in dispute between the lord and his tenant, or any other point of controversy in the manor. So likewise, in all other parts of Europe, where the Roman colonies had been, the Goths succeeding them, continued to make use of the same laws and institutions, which they found to be established there by the first conquerors. This is a much more natural way of accounting for the origin of a jury in Europe, than having recourse to the fabulous story of Woden and his savage Scythian companions, as the first introducers of so humane and beneficent an institution."

Such are the opinions of eminent writers, but, as will be seen, we do not entirely agree with them.

Without pretending to decide this question, which has been keenly debated by various authors, we shall merely observe that in our opinion, no particular nation, people, or individual can exlusively claim the merit of having originated the general principle of "trial by jury." We suspect that no one would go the length of affirming that the system of mere trial itself, (setting aside the consideration of the particular form of trial by jury) was invented by a certain nation or person. Who originated trials, according to law or to some custom? It is evident that the idea of deciding certain questions affecting life or death, and to some extent other matters occurred to various peoples that had little or no communication with each other. There is no proof that they borrowed the idea of settling any disputed question by trial, any more than there is proof that they borrowed the idea of settling their quarrels by fighting. It is reasonable to suppose that certain ideas are common property among mankind, and are derived from our common ancestors, the patriarchs. In proof of our assertion we need only mention the custom of some, if not of all the tribes of the North American Indians, to try certain questions of life and death, as well as some other matters, by a tribe in council, in reality, we may say, by a jury.

Describing the trial of a young American Indian warrior by his tribe for the crime of cowardice, an American author writes:—The more aged chiefs in the centre communed with each other in short and broken sentences. Not a word was uttered that did not convey the meaning of the speaker in the simplest and most energetic form. Again, a long and deeply solemn pause took place. It was known by all present to be the grave precursor of a weighty and important judgment."

It is true that this is but a rude and imperfect form of trial by jury, since the accused does not seem to be allowed to speak for himself, and the witnesses are not subjected to regular cross-examination, but still the fate of the prisoner is decided by a jury of his own tribe; in a word, by his peers, and not by any single chief who acts as a judge. How, then, can it be alleged that Woden, the Saxons, the Scandinavians, the Greeks, the Romans, or any other particular people or tribe originated the system of trial by jury, since traces of the custom are to be found among savages in North America? They had not borrowed the form of trial by jury from Europe. We suspect that the germ of the system existed, during the early ages, among many races of mankind, and that it grew into a better regulated and more systematic law among those that made in times past advances in Christianity and its accompanying enlightenment.

Of the judicatures for hearing civil causes among the Athenians, the court called Heliæa was the greatest. All the Athenians who were free citizens were allowed by law to sit in this court; but before they took their seats, were sworn by Apollo Patris, Ceres, and Jupiter, the king, that they would decide all things righteously and according to law, where there was any law to guide them, and by the rules of natural equity, where there was none. This court consisted at least of fifty, but its usual number was five hundred judges. When causes of very great consequence were to be tried, one thousand sat therein; and now and then the judges were increased to fifteen hundred, and even to two thousand. It will be perceived that these courts were in reality composed of jurymen, every free citizen being allowed to sit in them.

A popular form of trial was not unknowm among the Jews. Moses set up two courts in all the cities; one consisting of priests and Levites to determine points concerning the law and religion, the other consisting of *heads* of families to decide civil matters.

After having thus alluded to the probable origin of trial by jury, we must now briefly state what a jury is.

A jury consists of a certain number of men sworn to inquire into and try a matter of fact, and to declare the truth upon such evidence as shall appear before them. Juries are in Great Britain, &c., (Scotland, in some degree excepted) the supreme judges in all courts, and in all causes in which the life and, and in some cases, in which the property or the reputation of any man is concerned.* This is the distinguishing privilege of every Briton, and one of the most glorious advantages of our constitution; for, as every one is tried by his peers (or equals), the meanest subject is as safe and as free as the greatest.

A juror or jurymen, in a legal sense, is one of those twenty-four or twelve men who are sworn to deliver truth upon such evidence as shall be given them touching any matter in question.

The punishment for perjury or fraud committed by a jury for bringing a false verdict was called an "attaint,"—a writ that lay after judgment against a jury of twelve men that had given a false verdict in any court of record, in an action real or personal in which the debt or damages amounted to above forty shillings. The jury that had to try this false verdict consisted of twenty-four, and was called the grand jury. The practice of setting aside verdicts upon motion and of granting new trials, has so superseded the use of "attaints" that there is scarcely an instance of an attaint later than the sixteenth century.

The duty of a jury is to decide the facts of a cause tried by them. The duty of a judge is to decide what is the law respecting these facts. It has been truly said: "If it be demanded, what is the fact? the judge cannot answer it; if it be asked what is law? the jury cannot answer it. * * * * * * The fact is to be tried, that is, as it is intended,

* County and other courts now limit the extent of the remarks made on this subject by various writers.

by the verdict of twelve men. That is called in law a *trial*."

"The principal of trial by jury is," says a learned and eloquent writer on "Trial by Jury," "that questions of fact, involving the rights of the people, shall be determined by the people themselves, in contradistinction to the decision of those facts by fixed and salaried judges, appointed by and dependant upon the sovereign power in the state." *

The assembling of a jury to try a cause is so managed that protection is afforded to both sides in an action, in order that fair play shall be observed. When a jury is demanded to try a cause, it is asked, "And this the said A. prays may be enquired of by the country;" or, "And of this he puts himself upon the country, and the said B. does the like." The court then commands the sheriff, "that he cause to come here, on such a day, twelve free and lawful men, of the body of his country, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A nor the aforesaid B, to recognize the truth of the issue between the said parties." The sheriff returns the names of the jurors in a panel (a little pane or oblong piece of parchment) annexed to the writ. After a certain delay and some forms have been gone through, the jury is assembled to hear the cause.

"Let us observe (with Sir Matthew Hale) in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth beyond any other method of trial in the world. For, first, the person returning the jurors is a man of some fortune and consequence; so that he may be not only the less tempted to commit wilful errors, but likewise be responsible for the faults either of himself or his officers; and he is also bound by the obligation of an oath faithfully to execute his duty. Next as to the time of their return; the panel is returned to the court upon the original *venire*, and the jurors are to be summoned and brought in many weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, so that they may be challenged upon just cause; while, at the same time, by means of the compulsory process (of *distringas* or *habeas corpora*) the cause is not likely to be retarded through defect of jurors. Thirdly, as to the place of their appearance there is a provision most excellently calculated for the saving of expense to the parties. The troublesome and most expensive attendance is that of jurors and witnesses at the trial; which therefore is brought home to them, in the county where most of them inhabit. Fourthly, the persons before whom they are to appear, and before whom the trial is to be held, are the judges, persons whose learning and dignity secure their jurisdiction from contempt. The very point of their being strangers in the county is of infinite service in preventing those factions and parties which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of the peace, and the like.

"The jurors contained in the panel alluded to before, are either special or common jurors. Special juries were originally introduced in trials at Bar, when the causes were of too great a nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him."—*Blackstone.*

In the present day, juries in civil causes procure refreshments when the judge takes his, but the custom of the jury being kept without meat, drink, fire, or candle, unless by permission of the judge, till they are unanimously agreed, is a method of accelerating unanimity which was not unknown in other constitutions of Europe, and in matters of greater concern. For by the golden bull of the empire, if, after the congress was opened, the electors delayed the election of a king of the Romans for thirty days, they were fed only with bread and water till the same was accomplished. In England, it has been said, that if the jurors do not agree in their verdict before the judges are about to leave the town, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. The modern custom seems to be for the judge to discharge the jury; and a recent case, (that of a woman who was tried for murder, and who, after the jury had been discharged by the judge because they could not agree in their verdict, contended that the judge had acted illegally,) appears to have determined the question that a judge has the power.

The necessity for unanimity in the verdict of a jury, seems to be almost peculiar to the English constitution; at least, in the *nembda* or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the major part, and in case of equality, the defendant was held to be acquitted.

In Scotland, the ordinary jury, consisting of fifteen, give their verdict by a majority. Trial by jury, in civil causes, is only partially adopted. It was not, until lately, added to the jurisdiction of the supreme civil tribunal, denominated the Court of Session. Trial by jury in Scotland is limited to certain descriptions of cases, and is not popular; in this respect there is a great difference between English and Scotch law.

In England and Ireland, where the principle of the criminal law requires the injured party or his representative to prosecute, he can only do so by permission of a jury of accusation, called the grand jury, which consists, ordinarily, of twenty-four men. To find a bill, there must, at least, twelve of the jury agree. Another jury, which consists in England and Ireland of twelve men (the petty jury), sits for

* Trial by Jury, the Birthright of the People of England. p. 14. London; Hardwicke, 192, Piccadilly. One Shilling.

the purpose of deciding if the evidence against the accused (if he plead not guilty) has established his guilt.

A coroner's jury inquires into the facts of a case, when any person is slain, or dies suddenly, or in prison, or under suspicious circumstances. In Scotland there is no coroner's jury or inquest. The state of the Scotch law in this respect seems to be very unsatisfactory.

The limits of this essay do not permit us to mention other descriptions of juries, but they are all founded upon the grand principle of the trial of facts by the country, or in other words, by the people themselves.

As we have stated, the common law of England is involved in deep obscurity. The reader must understand that the reason why so much value is attached to the common law is, because trial by jury is one of its principles. In the time of Alfred the Great, the local customs of the several provinces of the kingdom had grown so various, that he found it expedient to compile his dome-book, or *liber judicialis*, for the general use of the whole kingdom. This book is said to have been extant so late as the reign of Edward IV., but is now unfortunately lost.

The irruption and establishment of the Danes in England, introduced new customs. The code of Alfred the Great fell into disuse or was mixed with other laws in many provinces, so that about the beginning of the 11th century there were three principal systems of laws prevailing in different districts. Out of these three laws, King Edward the Confessor, it is said, extracted one uniform law, or digest of laws, to be observed throughout the whole kingdom, and it seems to have been no more than a new edition, or fresh promulgation of Alfred's code or dome-book, with such editions and improvements as the experience of a century and a half had suggested. It is recorded in history that Edward framed equitable laws; for we find that when the people complained of the oppression of the Norman Kings, they demanded "the good old laws of Edward the Confessor."

It would be difficult to determine even from these codes of the laws of the Anglo-Saxons, whether trial by jury entirely originated in England from these laws. "It is a point of curious inquiry, not yet, so far as we know, fully discussed," observes a writer, "to ascertain how far the Saxons, on their invasion of the island, moulded, or adapted their political institutions to those which they found existing in Roman-Britain. The Saxons, we know, ultimately possessed themselves of all the Roman walled cities, of which they formed their boroughs; and it is hardly conceivable that a comparatively small body of invaders would completely overturn all those municipal institutions, which, though less free than their own, would present them, so far as administration was concerned, with useful means for securing and consolidating their acquisitions. The principal Saxon boroughs existing at the period of the Norman conquest, were the towns girt by the walls and towers erected under the Roman regime."

The laws of Edward the Confessor were those which our ancestors struggled so hardly to maintain under the first princes of the Norman line, and which princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by emergencies or domestic discontents. In England, the progress of liberty has been in a great measure attributed to the division of interests in the country. The great nobility had an interest in checking the power of the Crown, and the Crown had an interest in checking the nobles. Each party in turn courted the aid, both personal and pecuniary, of the commons. Hence the active part which the people, especially of London and of the large towns, took with the barons in enforcing the solemn settlement of the limits of the royal prerogative, which was embodied in "the Great Charter, or Magna Charta" conceded by King John on 15th June, 1215, wherein it is distinctly expressed that all cities, boroughs, and ports shall have "their liberties and free customs." The famous clause which has attracted chief interest, is that which enacts that no freeman shall be affected in his person or property, save by the legal judgment of his peers, or by the law of the land. The judgment by his peers, is held to refer to trial by jury. Legal writers have found a stately tree of liberty growing out of the seed planted by this simple sentence. They see in it the origin of judicial strictness, which has kept the English judges so closely to the rules laid down for them in the books and decisions of their predecessors. There was a further leaning on the part of the barons to the popular system of the common law, from the circumstance that attempts were made to introduce the doctrines of the civil (Roman) and canon laws, which are inimical to trial by jury. The Great Charter has always been a great object of veneration with the English nation, and Sir Edward Coke reckons thirty different occasions on which it was ratified.

On the other hand, the kings of England frequently sought to obtain the co-operation of the people to limit the power of the nobles. The Crusaders were the means of promoting the establishment of the common law, and consequently of trial by jury, upon a firmer basis. The absence of so many barons, during the time of the Crusades, was a means of enabling the common people, that had hitherto lived in feudal subjection to the nobility, to raise themselves in public standing and estimation; while the possessions of many of these barons by sales, or by the deaths of their owners, without heirs reverted to the sovereigns. In this way the power of the people and of the Crown advanced together, and both at the expense of the class of nobility. The people were not unwilling to exchange the mastery of the barons, for that of the monarch, and the kings on their part looked on this rising power of the people with satisfaction,

as it created a class of men that might protect them from the ambition and supremacy of the nobles. In these circumstances, boroughs began to resume their ancient importance, such as they had enjoyed in the times of the Saxons. Men who had hitherto lived on the land belonging to the lords of the castles, and had sacrificed many of their liberties for bread and protection from the warlike barons, for whom they had been called upon to fight, now found that by union among themselves in the boroughs, they might secure bread by industry, and protection and liberty by mutual aid. Multitudes, therefore, forsook their feudal subservience to enjoy almost independent citizenship. *Villeins*, (bondmen) joyfully escaped to take their place on a footing of equality with freemen, and in the reign of Henry II., if a bondman or servant remained in a borough a year and a day he was by this residence made a free man.* It must be borne in mind that among our Saxon and Norman ancestors, places which were called boroughs at this period, were fenced or fortified. It is evident that the increase of popular liberty and social progress in these boroughs must have been favourable to the developing of the fundamental principle of trial by jury, and that the determination of questions of fact by the people themselves, could be more impartially and thoroughly carried out, in places where the people were protected from the violence of the powerful barons, who lorded it over the country districts. Then again, trial by jury, by the security it afforded against wrong, promoted in its turn the growth of freedom and wealth in the boroughs, and from them a civilizing influence continued to spread over the country. The minds of men becoming more enlightened, the truth of a reasonable method of deciding legal questions was enabled to triumph over barbarous customs among the people themselves. The several methods of trial and conviction of offenders, established by the laws of England, were formerly more numerous than at present, through the superstitions of our ancestors, who, therefore, invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses. They had a notion that God would always interpose miraculously to vindicate the guiltless. 1. By ordeal; 2. by corsend; 3. by battle. Now-a-days, people may laugh at the idea of suitors, for instance, fighting in a mortal combat sanctioned by law; but one of the laws of William the Conqueror forbid the clergy to fight in judicial combats, without the previous permission of their bishop. To show how deeply rooted the law was at one time in England, it was not, although it had fallen into disuetude, repealed until about 1818. In 1817, a young woman, Mary Ashford, was believed to have been ill-used and murdered by Abraham Thornton, who, in an appeal, claimed his right by his wager of battle, which the court allowed; but the appellant (the brother of the girl) refused the challenge, and the accused escaped, being ordered "to go without day" 16 April, 1818. If such events took place in 1818, what does the reader suppose must have been the state of things in the Middle Ages. To remedy the evil of suitors fighting out their lawsuits, the trial by the grand assize is said to have been devised by Chief Justice Glanville, in the reign of Henry II., and it was a great improvement upon the trial by judicial combat. Instead of being left to the senseless and barbarous determination by battle, which had previously been the only mode of deciding a writ of right, the alternative of a trial by jury was offered. But the *present* judges of assize and *nisi prius* for administering civil and criminal justice are more immediately derived from the statute of Westminster, in the reign of Edward I.* These came instead of the ancient justices in Eyre, *justiciarii in itinere*, that had been regularly appointed in 1176 by Henry II. to make their circuits once in seven years for the purpose of trying causes. The establishing of the assize, began a new era in the legal history of England. From this date commenced the real permanent foundation of trial by *judge and jury* throughout the country —the judge to decide the law, the jury the facts. The record of the struggle of the system against its foes would fill a volume The institution triumphed in the end. In an interesting summary of this subject, a recent writer observes :—

"In the time of the Anglo-Saxons a man who sued in the King's Court for lands, refused to be bound by the sentence until his 'peers' had decided his right, and summary justice was visited on those in authority who tried cases contrary to the 'custom,' even then *ancient*. In the days of William the Conqueror, even a bondman, when he claimed freedom, was entitled to a trial by the 'country,' and its refusal to a suppliant implied that he was under the ban of 'outlawry.' Trial by jury was secured to every heir-at-law by Henry II., and extended to every person, without distinction, shortly afterwards. In every suit touching inheritance between Crown and subject, it has always been an imperative right, and the attempt to render its attainment difficult, by delay, denial, or sale,' led to the most emphatic passages in Magna Charta. In the days of Edward IV., when a subject had been deprived of a jury by Act of Parliament, the very statute was repealed and the judgment pronounced under it declared void; this being effected under the express provisions of those Acts which 'confirm to the people of England the great Charter of their liberties for evermore,' and which ordain that 'every judgment and every statute contrary thereto, shall be holden for nought.' In the reign of Henry VII., the Acts which gave certain judges statutory permission to try causes without juries, 'at their discretion,' were set aside—'a warning to all future Parliaments, judges, and others, that they deprive no man of the precious trial by writ of right, or the verdict of twelve men.' In 1620,

* Chambers.

* Statute, West, 2, 13, Edw. I., c 30.

the *judges themselves* when called on to plead before a tribunal where disputed facts would have been decided without a jury, refused to appear, claiming 'the benefit of Magna Charta, as free Englishmen.' When the Star Chamber tried to overrule and stultify the verdicts of juries, the attempt led to the Petition of Right—that second Magna Charta; and the blow aimed at trial by jury in arbitrary imprisonment and confiscation of property and of civil rights, without that mode of trial, led to revolutions which shook the kingdom to its centre, while all the cruel acts of Jeffreys and other corrupt judges, were followed by reversal of their decrees and the rehabilitation of the families of those whom they had judicially murdered. When the verdicts of juries were perverted, so as to carry consequences which the jurors did not intend, the legislature at length stepped in and placed the law beyond the possibility of future cavil and misconstruction."—*Trial by Jury, the Birthright of the People, &c.*, p. 163.

The reader will thus perceive that the common law is grounded on the general customs of the realm. "Indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom, which carries with it this internal evidence of freedom," writes Blackstone, "that it was introduced by the consent of the people, and has been jealously preserved by them." The common law is the result of long study, observation, and experience; and it has been refined by learned men in all ages. It overrides the canon law, and the civil law, where they go beyond it, or are inconsistent with it. The principle of trial by jury, without alluding to previous compacts, was confirmed by the Act of Settlement (1 William & Mary, c. 2), and declared to be the birthright of the people of England.*

(To be continued.)

RECENT DECISIONS.

Railway Companies

Walker v. *The Great Western Railway Co.*, 15 W. R., Ex., 769.

This very short case decides that the general manager of a railway company has authority to contract for medical attendance upon a person injured upon the company's line so as to bind the company. The plaintiff was a surgeon, and was called in by the direction of the defendants' general manager, to attend a man who had been hurt in an accident on the company's railway. The plaintiff brought his action against the defendants for remuneration for his services, and the defence was that the general manager had no authority to pledge the credit of the defendants by such a contract. It would seem pretty clear, according to the ordinary rules, that the defendants would be bound by a contract of this kind made by their general manager. There was, however, one case, *Cox* v. *The Midland Railway Co.* (3 Ex. 268) which certainly gave some colour to the defendants' contention. It was held in that case that a station master of a railway company had no authority to bind the company by contracting for medical attendance to be supplied to a passenger injured in an accident. The defendants relied upon this decision. The court held that the defendants were liable on the contract of their general manager, and refused to grant even a rule *nisi* for the purpose of having the question argued. Besides the point actually decided, which is not perhaps of very much importance, this case may also be taken as an example to show that companies have practically greater freedom to contract by agreements not under seal than they had when *Cox* v. *The Midland Railway Company* was decided. It was then thought that a company could, with some few exceptions, only contract under seal, but since then much greater latitude has been allowed them in this respect, and *Walker* v. *The Great Western Railway Company* is an illustration of this gradual change in the law.

Notice of Trial after Postponement.

Claudet v. *Prince*, 15 W. R. B. C. 794.

In this case a point of practice arose, and the decision is of the more importance inasmuch as it completely overrules what appears to have been the old practice.

The question was simply whether, if the trial of a cause for which one notice of trial for London has been given is postponed to the next sittings in London by a judge's order obtained by the plaintiff, it is necessary for the plaintiff to give a new notice of trial. It is clear that a fresh notice of trial is not necessary where a cause is made a remanet in consequence of its not being reached, or if a cause is postponed by a judge's order made at *nisi prius*: *Shepherd* v. *Butler*, 1 D. & R. 15. So also if an injunction is granted by the Court of Chancery to restrain the plaintiff from proceeding with an action, no new notice is necessary when that injunction is dissolved; *Stockton and Darlington Railway Company* v. *Fox*, 6 Ex. 127. Upon principle the same rule ought to apply where a cause has been postponed by a judge's order made at chambers. There were, however, two old cases and one new one, which were authorities to show that a fresh notice was absolutely necessary. The court held, notwithstanding these cases, that a fresh notice was not necessary, and laid down the rule which had before been applied in the case of injuctions; that it was not necessary for the plaintiff to give notice of trial again, as all parties were *in statu quo* when the cause came on for trial at the appointed time. This is far the most reasonable rule which could have been laid down, and it is well that the court did not allow the authority of the old cases to govern their decision.

* As our Essay is but an outline of the subject, we refer the reader to several learned works for full details respecting Trial by Jury, by Mr. Forsyth, Q.C., Mr. Serjeant Pulling, and Mr. Erle; also to "Hallam's Middle Ages," vol. ii., chap. viii., and to the able treatise entitled "Trial by Jury, the birthright of the people of England."

UPPER CANADA REPORTS.

COMMON LAW CHAMBERS.

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

Gleason v. Gleason et al.

29 & 30 *Vic. cap.* 42, *sec.* 6—*Several fi. fa. goods in sheriff's hands—Return of a subsequent before a prior writ.*

A. and then B. placed writs of *fi. fa.* in the hands of a sheriff, against the goods of C. Notwithstanding that the goods were apparently exhausted, A. refused to withdraw his writ or take a return of *nulla bona*, whereby B. was prevented, by the operation of 29 & 30 Vic. cap. 42, sec. 6, from proceeding against lands; and the sheriff, feeling bound by that Act, declined to return the second writ as long as the first remained in his hands.

Under these circumstances an order was made on the application of B directing the sheriff to return the second writ "*nulla bona*."

Semble, that the first execution creditor should have notice of such an application.

Remarks upon the embarrassment resulting from the operation of the above statute.

[Chambers, June 1, 1867.]

A summons was obtained calling on the sheriff of the County of York to shew cause why an attachment should not issue against him for not returning the *fi fa.* against goods in this cause

It appeared that this writ was delivered to the sheriff on the 3rd of December last, at which time there was another *fi fa.* against the goods of these defendants, at the suit of one Reed, in the sheriff's hands.

It was not a year since the first writ was given to the sheriff—both of these writs were therefore still in full force.

It was admitted that the defendants had no goods or chattels, and that Gleason, the second execution creditor, desired to have his writ returned "no goods," so that he might proceed by execution against the lands of the defendants

The sheriff declined to return this second execution, because the 29 & 30 Vic. cap. 42, sec. 6, enacts that "No sheriff shall make any return of *nulla bona* either in whole or in part to any writ against goods, until the whole of the goods of the execution debtor in his county have been exhausted, and then such return shall be made only in the order of priority in which the writs have come into his hands"—and the first execution creditor refused to withdraw his writ from the sheriff's hands or to take a return of *nulla bona*, "as he believes by keeping it in force in the sheriff's hands, he will get the whole amount of the execution."

Leith shewed cause for the sheriff, referring to the section of the act above quoted, and (the learned judge having on the argument expressed an opinion that the first execution creditor should be a party to or have some notice of the application) he filed the refusal of the first execution creditor to withdraw his writ or to take a return of *nulla bona*.

Ferguson, contra.

Adam Wilson, J.—This section of the act is calculated to give great embarrassment to sheriffs and to create great difficulty to execution creditors.

A first execution creditor determined to protect the debtor, might, under various pretexts, retain his writ by renewals in the sheriff's hands for years, and hamper all subsequent creditors in proceeding against lands, although it was notorious there were either no goods or but an insignificant amount of goods to be seized upon the first writ, and that none of the subsequent creditors would get a farthing from the personal estate of the debtor. Yet because the first creditor must have his writ first returned and so come in first upon the lands, all the others must wait just as long as he could contrive to baffle them, although it was also notorious that there were lands sufficient to satisfy all the creditors together.

It is an inconvenient method of securing to the creditor, first against goods, the like rank against lands to which he is plainly entitled, and from which rank he was so often excluded, because there happened to be some trifle of goods to apply on his writ and on his writ alone In consequence of which, while his writ was prevented from being returned, all the writs after his were at once returned "no goods," and the subsequent creditors were enabled to issue writs against lands and displace the first creditor from his just priority.

A simpler way would have been to have authorised the *fi. fa.* to issue against both goods and lands at once, with a stay of proceedings against lands till the goods were exhausted—in which case no difficulty of any kind would ever arise, and one execution would answer in every case instead of two.

In this instance, I think it appears that the goods of the debtor in the county of York have been exhausted, and therefore I think I should order the writ of this plaintiff to be returned, because, notwithstanding this exhaustion, the first execution creditor refuses to withdraw his writ or to take a return of *nulla bona*, and it is quite plain his conduct should not be allowed to delay this plaintiff.

I am inclined to think that though the sheriff may be prevented by this provision from returning, of his own mere motion, a second or subsequent writ, in cases within the act, until he returns the first writ, the court is not necessarily excluded from directing or controlling its own process, as in *Omealy* v. *Newell*, 8 East. 364, where it was held that though the plaintiffs were prohibited since the 12 Geo I. cap. 29, from arresting defendants without an affidavit of debt first made, this did not prevent the court or judge from making an order to hold to bail, "without the affidavit and other requisites which are prescribed in respect to arrest by the mere act of the plaintiff himself."

This plaintiff has served a notice on the sheriff to return his writ, then a rule to return it, and now a summons calling upon him to shew cause why he should not be attached for not doing so, and he has been engaged in this business for the last four weeks; yet I am not able to give him costs, for I cannot say the sheriff is to blame in requiring the aid of the court or a judge to interpret this clause, nor can I say that he could have acted at all without the direct order of the court or judge to do so, nor can I give the sheriff his costs for appearing here and explaining the case, nor can I give them to the first execution creditor who has also been affected by this proceeding in which he may or may not take any concern.

I must also add I am not quite satisfied with my own part in this curious proceeding. But according to the best judgment I can form, I shall order the sheriff to return the writ in question, "no goods." (although Reed's writ is still in his hands, because the goods of the defendants have, as I think, been exhausted, and because Reed will not withdraw his writ nor take a return of "no goods" under these circumstances) and if such return be made, the summons will be discharged. But if the sheriff do not make such return in four days, the order will go for an attachment for his contempt in not returning the writ.

Herr v. Douglass.

Examination of plaintiff on judgment against him for costs —27, 28 Vic. cap. 25.

Held, that a defendant cannot, notwithstanding 27, 28 Vic. cap. 25, on a judgment obtained against a plaintiff in an action of ejectment, obtain an order to examine the plaintiff as to his estate and effects, &c.

[Chambers, July 20, 1867.]

A summons was obtained on behalf of the defendant, calling on the plaintiff to shew cause why he should not attend before a Deputy Clerk of the Crown, and submit to be examined as to estate and effects, &c., on a judgment recovered against him for the costs of the defendant in an action of ejectment.

Osler, shewed cause. There is nothing to authorise the order asked for here: *Hawkins* v. *Paterson et. al.*, 23 U. C. Q B 197; 1b., 9 U. C. L. J. 275. The late Act of 27 & 28 Vic. cap. 25, which is relied upon by the defendant does not give the power, whatever the intention may have been.

Morrison, J.—I do not think the Act referred to has the effect contended for by the defendant particularly in an action of ejectment as this was. I must therefore discharge the summons, but it will be without costs.

Summons discharged without costs.

Townsend v. Sterling.

Costs—C. L. P. Act, sec. 324—Verdict in seduction for 5s.—Damages on demurrer remitted.

A declaration contained two counts, one for seduction of the plaintiff's daughter, and the other for necessaries supplied for the child. Plea of not guilty to first count, demurrer to second. This issue in fact was tried first and verdict for plaintiff for five shillings. Judgment was afterwards given for plaintiff on the demurrer, whereupon plaintiff remitted on the roll all damages, without excepting costs, under the second count, and signed judgment for the 5s. and full costs taxed. On a summons for a revision of the taxation, &c., it was *held* that:—

1. The plaintiff was entitled to the costs of the demurrer to the second count, although it would have been the more correct form to have excepted the costs in the remittitur.
2. An action of seduction may, under some circumstances, be brought "to try a right," or the grievance therein complained of, may be "wilful and malicious," and therefore as the verdict was under $8, and the judge did not certify, the plaintiff was not entitled under C L P. Act, sec. 324, to any costs whatever, but
3. As the statute is confined to a *verdict* or *assessment* the plaintiff was entitled to full costs of the demurrer.

[Chambers, Aug. 7, 1867.]

In this case the declaration contained two counts; the first for the seduction of the plaintiff's daughter; the second for clothing and necessaries furnished for the child of the defendant, born of the plaintiff's daughter.

The pleas were, not guilty to the first count, and a demurrer to the second count.

The issue in fact was tried first. The award of process was as well to try the issue in fact as to assess the damages in the issue in law. The verdict was that the defendant was guilty on the first count, and damages were assessed on that count over and above the costs of suit, at five shillings.

Judgment was afterwards given for the plaintiff upon demurrer to the second count, and then the plaintiff by the roll remitted to the defendant all damages sustained by him on occasion of the premises in the second count, and prayed judgment and his damages sustained on occasion of the premises in the first count, and judgment was then given for the plaintiff "for the said moneys by the jurors aforesaid assessed, and for the sum of £27 19s. 9d., for his costs of suit, by the court here adjudged of increase to the plaintiff; which damages and costs on the whole, amount to £28 4s. 9d."

McMichael, obtained a summons calling on the plaintiff to shew cause why the taxation of costs in this cause should not be set aside, and the master be ordered to revise the same, on the ground that full costs of suit had been allowed when the verdict rendered was for five shillings only, and the plaintiff should have had no more costs than damages, and on the ground that the master had taxed costs on the second count, of the declaration and the demurrer thereto, no damages having been assessed on that count, and judgment is entered only on the second count, no judgment is entered (*sic*) no damages awarded, but all damages on the same are remitted on the judgment roll; and why the writ of *fieri facias* should not be set aside or amended, so as to reduce the levy to the amount of damages assessed, and the sheriff be ordered to withdraw from the seizure of the goods of the defendant.

The case was argued before A. Wilson, J., before the vacation.

J. A. Boyd, shewed cause.

This application is made under the statute 22 & 23 Car. II., that there should have been no more costs than damages; but that statute does not apply to an action for seduction, which this is. *Batchelor* v. *Bigg*, 3 Wils. 319; S. C. 2 W. Bl. 855; *Peddle* v. *Kiddle*, 7 T. R. 660.

The statute of Charles is not now in force in England, though it is in force here, and therefore section 324 of the C. L. P. Act should be construed in *pari materia*. *Pedder* v. *Moore*, 1 Prac. Rep. 117.

The plaintiff had the right to apportion his verdict and remit nominal damages on the second count. *Burton* v. *Law*, 16 L. T. N. S. 385; *Preston* v *Pecke*, E. B. & E. 336.

The plaintiff is entitled to full costs on the demurrer, under sec 316 of the C. L. P. Act. *Kinloch* v. *Hall*, 26 U. C. Q B. 134; *McMartin* v. *Thompson*, *Ib* 334; *Taylor* v. *Rolfe*, 5 Q. B. 337; *Bentley* v. *Dawes*, 10 Exch. 347; Arch. Prac. 12th edition, 935.

There having been an *assessment* of damages, there should be full costs under sec. 328 of the C. L. P. Act, on the second count. *Jones* v. *Wing*, 3 O. S. 37; *Kilborn* v *Wallace*, 3 O. S. 17; *Ferrier* v. *Young*, *Ib.* 140; *Mahoney* v. *Zwich*, 4 O. S. 99.

Such an action as this cannot be brought in the Division Court: Con. Stats. U C. cap. 19, sec. 54; nor in the County Court: *Ib.* cap 15, sec. 16. If the judgment roll be wrong, it may be amended.

McMichael supported the application. On arrest of judgment the plaintiff is not entitled to costs of those issues which have been found for him. *Prew* v. *Squire*, 20 L. J. C. P. 175; 10 C. B. 912; *Abley* v. *Dale*, 21 L. J. C. P. 104; 11 C. B. 378. Costs are in reality considered as damages. *Giles* v *Hart*, 2 Salk. 622; *Marriott* v. *Stanley*, 9 Dowl 59, 2 Sc. N. R 60; for if a statute give double or treble damages, the costs as part of the damages should also be doubled or trebled: Tidd's Prac 957, 962; 2 Inst. 289. The statute in question applies to all actions of trespass and on the case: *Morrison* v. *Salmon*, 9 Dowl. 387; 2 Sc. N. R. 60; *Gillett* v. *Green*, 9 Dowl. 219; 7 M. & W. 347.

Adam Wilson, J.—It appears on this record that the jury gave the five shillings damages on the first count only, and that they assessed no damages on the second count, although they were summoned to do so. Yet when summoned they were sworn merely "to try the matters in question between the parties, as to the issue within joined to be tried by the country," that is, to try the issue on the first count.

The provision as to costs upon demurrer is, that "the party in whose favour the judgment is given, shall also have judgment to recover his costs in that behalf:" C. L. P. Act, sec. 316; and a judgment on demurrer is erroneous which does not award the costs of it. *Greyory* v. *The Duke of Brunswick*, 3 C. B. 481.

The judgment on demurrer is final or interlocutory, in the same manner and in the same cases as a judgment by default. The plaintiff therefore on getting judgment in his favour on demurrer before the assessment of damages upon it, has only an interlocutory judgment; he cannot have final judgment till after an assessment has been had, or until he by some entry on the record shews that he does not desire to prosecute his case further.

Whenever final judgment is given on the record these costs become taxable. If the plaintiff have damages assessed to him, he will get the costs of demurrer as of course. So if he enable the final judgment to be given by entering a *nolle prosequi*, he will be entitled also to the costs of the demurrer. *Williams* v. *Vines*, 9 Jur. 809; or on a discontinuance. *Mayor of Macclesfield* v. *Gee*, 13 M. & W. 470. The plaintiff might have entered a *nolle prosequi* as to the second count, excepting as to the costs of the demurrer, and then he would recover his costs of the demurrer, as in *Williams* v. *Vines*, just referred to. In this case he has not done so—he has remitted all damages sustained by him on occasion of the premises in the second count—but still I see no objection to this mode of determining his claim upon the second count; he might have declared that he would not further prosecute his suit against the defendant on this count, except as to these costs which it seems to me would be the more correct form; but when he says he remits all damages to the defendant, in respect of it, he does in effect the same thing A *remittitur* is entered in many cases before damages have been actually given. It appears to me then that the plaintiff had the right to dispose of the second count in the way he has done, and that the effect of it is to entitle him to the costs of the demurrer awarded to him by the judgment of the court in respect of it.

The question then is as to the *quantum* of costs that should have been taxed. The master has allowed full costs of suit. The defendant's summons asserts that the plaintiff should have no more costs than damages, and this Mr. Boyd argued, means that the defendant puts his case for relief upon the statute of Charles, and if this particular case be not within the provisions of that statute, the plaintiff must recover his full costs, although by some other statute the plaintiff is not in strictness entitled to any costs at all, merely because the defendant has not laid his case as within that statute.

The 324th sec. of the Common Law Procedure Act enacts that "if the plaintiff in any action of trespass or trespass in the case, recovers by the verdict of a jury less damages than eight dollars, he shall not be entitled to recover in respect of such verdict, any costs whatever, whether the verdict be given on an issue tried, or judgment has passed by default, unless the judge or presiding officer before whom such verdict is obtained, immediately afterwards certifies on the back of the record, that the action has really been brought to try a right besides the right to recover damages for the trespass or grievance complained of, or that the trespass or grievance was wilful and malicious." This sections deprives the plaintiff of all costs whatsoever, unless the judge shall certify for them.

The plaintiff before me contended that this kind of action was not within the statute at all, for the statute was applicable only in cases in which the judge could certify that the action had really been brought to try a right besides the right to recover damages, or that the trespass or grievance was wilful and malicious.

The statute of Charles was held not to be applicable to "other personal actions," though these very words were contained in the act, but was confined to cases of assault and battery and to trespass to land, because the judge had power to certify only in cases of assault and battery, and where the title to land came in question; having power therefore to certify in no other cases, it was considered that in no other case should the plaintiff be deprived of his costs. It is quite a proper construction to give to an act of this kind to hold it as confined to these cases only in which a certificate can be given.

An action for slander, imputing felony to the plaintiff, is a case under the Imperial Stat. 3 & 4 Vic. cap. 24, sec. 2, the same as our 324th section before quoted, in which the judge may certify; for an action for slander might be brought to try a right, or it might be wilful and malicious. *Evans* v. *Rees*, 9 C. B. N. S. 391.

There may be great difficulty in a judge attempting to certify that an action for criminal conversation, which may still be brought in this

country, was brought either to try a right or was wilful and malicious. Perhaps in no case properly could the action be brought merely to try a right, for although a plaintiff, might wish to establish that the woman in question was his wife. it would scarcely be allowed that this form of action, although it would settle that right or question, should be made use of for such a purpose. A judge might, however, certify that such a cause of action was wilful and malicious, for it cannot be universally true in fact that every charge of this nature is wilful and malicious, although the presumption perhaps is that it is so. If, for instance, a married woman were to carry on an intrigue with a man under pretence of being an unmarried woman, and more particularly if she had led a somewhat free life before, or if her husband had been careless as to how she conducted herself, it might fairly be said that the defendant's conduct was not wilful and malicious. If so, then I think a judge could, within the language of this statute, certify under proper facts, even in such an action, that the trespass or grievance was wilful and malicious, in case the damages given were under the amount of eight dollars; for if there can be a negation of wilful and malicious conduct, there may be cases in which the contrary may be affirmed.

So in an action for seduction, a right might possibly be tried whether the defendant was or was not married to the woman in question, and the charge might also be or not be wilful and malicious, according to circumstances somewhat analogous to those which have been referred to with respect to the action for criminal conversation.

In cases of this kind, where more than eight dollars damages are not recovered, it is pretty strong proof that the action should not have been brought at all, and I am not inclined to except such actions out of the very large terms of this statute, "if the plaintiff *in any action* of trespass, or on the case recovers," &c., when I do not see that it is impossible for the judge to certify in these cases.

I am of opinion, therefore, that the plaintiff in this case was not, upon the *verdict*, according to the statute, entitled to "any costs whatever." But as the statute is confined to a verdict or assessment, I think the plaintiff is entitled to recover his full costs of the demurrer, because he became entitled to them by the separate judgment of the court, and not "in respect of such verdict."

The cases referred to by the plaintiff show this conclusion to have been arrived at, but those referred to by the defendant, though on a different statute, cast some doubt on them. The cases that were cited by the defendant, of *Prew* v. *Squire*, and *Abley* v. *Dale*, to which may be added *Dunston* v. *Paterson*, 5 C. B. N. S. 279, are not applicable here, for the 324th section of the C. L. P. Act, refers only to costs in respect of the verdict, while the statutes on which these decisions were made deprived the plaintiff of *all* costs in the cause whatever.

I shall follow, of course, the decisions in our own Court of Queen's Bench, and if the defendant desire it he can re-open the matter there, as the cause is in that court. I shall make the order that the costs be revised by the Master, and that on such revision the Master shall not allow to the plaintiff, in respect of his verdict, any costs whatever, but that he shall tax to the plaintiff his full costs in respect of the demurrer and the judgment thereon, and that the judgment roll and writ of *fieri facias* be amended according to the result of such taxation, and as the defendant has not altogether succeeded in his application the order will go without costs.

Order accordingly.

Neil v. McMillan.

Entering judgment nunc pro tunc—Delay, when arising from act of Court—Excuse.

Verdict for plaintiff on 22nd March, 1866. In Easter Term following, rule *nisi* for new trial, enlarged till Trinity Term, and judgment given on 24th September. Plaintiff died 26th June. On 4th October taxation of costs, but not concluded, as Master refused to tax full costs without certificate. In November, application was made for certificate; not heard, however, till February, 1867, owing to the judge who tried the case, refusing to hear it until he should sit in Chambers, and upon notice to opposite party. In April following, application was made for leave to enter judgment *nunc pro tunc*, but refused, as administration not taken out, which was done in August following, and on the 24th August the present application was made to enter judgment *nunc pro tunc*, and to enter a suggestion of plaintiff's death, and that one Cross (who became assignee of the verdict in April, 1866) had been appointed administrator. *Held*, that the application must be refused, as the delay had been too great.

[Chambers, Sept. 30, 1867.]

On the 24th August last, a summons was obtained on behalf of James Fletcher Cross, administrator of the estate of the plaintiff, calling upon the defendant, his attorney or agent, to show cause why judgment herein should not be entered *nunc pro tunc*, and why said Cross should not be at liberty to enter a suggestion of the death of the said James Neil, the plaintiff herein, and that the said James F. Cross is the administrator of his personal estate and effects, pursuant to the Common Law Procedure Act.

The verdict in this cause was rendered on the 22nd March, 1866. The defendant obtained a rule *nisi* in Easter Term, in May following, for a new trial or nonsuit. This rule was enlarged till Trinity Term following.

The plaintiff died on or about the 26th June.

Judgment was given on the rule on the 24th September, as of Trinity Term.

On or about the 4th October, notice of taxation of costs was given to the defendant's attorney, on which he attended; and on the Master refusing to allow full costs without a certificate, the taxation stood over by consent till the certificate could be obtained.

After this, and before the first week in November, the plaintiff's attorney applied to the judge who tried the cause for a certificate for full costs; but he refused to entertain the application, until notice had been given to the defendant's attorney to attend before him, and until he was in Chambers.

The Chief Justice of the Common Pleas, who tried the cause, did not sit in Chambers till the end of January, 1867; and notice was given to the defendant's attorney to attend before the Chief Justice in Chambers, on or about the first week of February, and a certificate was given for full costs by the Chief Justice.

In April, 1867, an application was made in Chambers for leave to enter judgment *nunc pro*

tunc, which was refused, because no administration had been taken out to the plaintiff's estate.

Measures were immediately taken for that purpose, and administration was granted to the plaintiff's attorney, Mr. Cross, in August, 1867.

Mr. Cross stated that he became the assignee of the verdict in April, 1866; the consideration for this, as stated in the copy of the assignment, being $5, paid to the plaintiff; and that he was the person solely entitled to the verdict, and to the costs of the action.

J. B. Read showed cause.

Adam Wilson, J.—The judgment should have been entered within two terms after the verdict. When that time has elapsed, and the delay has arisen from the act of the court, leave will be given to enter judgment *nunc pro tunc*.

There is a good excuse for not proceeding till the defendant's rule *nisi* was disposed of on the 24th September.

I am not quite sure that the delay from that time till the Chief Justice gave his certificate in February afterwards, affords a sufficient excuse for not proceeding to enter judgment by applying for leave to enter it *nunc pro tunc;* but, giving the applicant the benefit of that period, there is the further period of delay, from February till April, when application was made for leave to enter judgment. This was refused, because no personal representative had been appointed to the plaintiff's estate.

The next application for leave to enter judgment was made on the 24th August last.

I fear there is too much delay from February till August, to justify me in making the order to enter judgment.

If the delay arose from the want of administration, that has been held to be no excuse, even although such delay was occasioned in part by the defendant filing a caveat. *Freeman* v. *Tranah* or *Tranch*, 12 C. B. 406; 21 L. J. C. P. 214.

I must discharge the summons, and leave the party to renew his motion in the next term.

Summons discharged.

ENGLISH REPORTS.

CHANCERY.

(*From the Weekly Reporter.*)

Seagram v. Knight.

Timber—Tenant for life—Statute of Limitations.

Where timber admittedly "ripe for felling," had been cut by a tenant for life,

Held, that it could by no means be presumed that the timber was such as the Court would, if applied to, have ordered to be cut; that the cutting and selling the timber by the tenant for life was consequently a tortious act, and therefore that in respect of the moneys so realised the Statute of Limitations began to run immediately.

Semble, the Court will not, on application, order timber to be cut merely because it may "be ripe for felling;" but requires further, that the timber should be in such a state as to require cutting, or that it be shown that the felling will be a benefit to the remainderman.

After the Statute of Limitations has begun to run its operation may be suspended.

A. committed a tortious act by felling and selling timber on land limited to him for life, with remainder to B. and his heirs. Before the Statute of Limitations had run out as against B., B. died, and A. took out administration to his estate.

Held in favour of B.'s heir, that the operation of the statute was thereby suspended until the death of A.

Where timber has been felled by a tenant for life, and the proceeds converted to his own use tortiously, the Court will, after a long lapse of time, presume a settlement of accounts between him and the remainderman.

[July 12, 13—15 W. R. 1152.]

This was an appeal from a decree of the Master of the Rolls; the bill prayed an account of the proceeds of timber felled and sold by a tenant for life.

Under a certain will William Frowd Seagram was tenant for life impeachable for waste of the land on which the timber grew, with remainder to his son in fee.

His eldest son, William Lye Seagram, came of age in 1834, and died in 1844, intestate, leaving the plaintiff, then an infant, his heir-at-law. William Frowd Seagram obtained letters of administration to William Lye Seagram's estate, and became his legal personal representative.

William Froyd Seagram died in 1864, having by his will appointed the defendant his sole executor.

In 1831, while William Lye Seagram the then remainderman, was still an infant, William Froyd Seagram felled and sold timber to the value of £521 net, and treated the money as his own. In 1842 he felled and sold timber to the value of £127, and smaller cuttings took place in subsequent years.

The plaintiff came of age in 1865, and the bill in the suit was then filed, praying as against his grandfather's estate an account of the timber felled and sold by him.

It was alleged by the bill, and admitted by the defendant's answer, that the timber cut was "ripe for felling, and such as the Court, if applied to for that purpose, would have ordered to be cut." The defendant contended that the plaintiff's claim was barred by the Statute of Limitations.

The Master of the Rolls decreed an account of all cuttings subsequent to March, 1844, the date of the death of William Lye Seagram; but as to the prior cuttings, held that the plaintiff was not entitled to an account, and based this latter distinction, not upon the Statute of Limitations, but upon a presumption that the claim had been settled between William Lye Seagram and William Frowd Seagram.

The plaintiff appealed.

Selwyn, Q. C., and *Wickens*, for the appellant. The cutting of the timber was under the circumstances an act which the Court of Chancery would have allowed, it is not therefore to be regarded as having been a tortious act, but as if it had been done under the direction of the Court. There was therefore a resulting trust in favour of the remainderman of the proceeds which were received by the tenant for life, and consequently the Statute of Limitations did not begin to run until the death of William Frowd Seagram in 1864; *Harcourt* v. *White*, 8 W. R. 715; 28 Beav. 303; *Bagot* v. *Bagot*, 12 W. R. 36; 32 Beav. 509; *Waldo* v. *Waldo*, 12 Sim. 107. But even if this be assumed against us, and the case regarded as one in which the Statute of Limitations ran at once against the remainderman, even on that hypothesis, the operation of the statute was suspended after it had begun to run. [The Lord Chancellor.—Can the operation of the statute be suspended after it has once begun to run?] It was suspended when William Frowd Seagram, the tenant for life, and the

person who was liable to account to the remainderman for what he had done, became the legal personal representative of William Lye Seagram; the person to pay and the person to receive being thus the same, the money had got home, and therefore the statute stopped running. Moreover, the timber being rightly felled became part of the inheritance, and therefore in order to bring the plaintiff's remedy the statute would have to run twenty and not merely six years.

Southgate, Q. C., and *W. W. Cooper*, for the respondents, cited *Ferrand* v. *Wilson*, 4 Ha. 344, 381, but were stopped by the Court.

Lord Chelmsford, C., after stating the facts. It is contended, on the part of the plaintiff, that the tenant for life having merely done what the Court upon application would have sanctioned, the case must be considered as if every thing had been done under the authority of the Court, and as if the money produced by the sale of the timber had been invested, and the interest received by the tenant for life, the right of the reversioner to the principal not accruing till the death of the tenant for life. There can be no doubt, as the counsel for the plaintiff said, that what a trustee would be ordered by the Court to do is valid if done by him without the previous authority of the Court; but I do not see how that rule of a court of equity can apply to a case where the act when done was wrongful, and where the tenant for life had no right to assume when he did it that the Court, if applied to, would have sanctioned it. I am strongly of opinion that if an application had been made to the Court, it would not under the circumstances have allowed the timber to be cut. It is said, indeed, that "it was ripe for felling when so cut," but not that it was necessary to be cut, either on account of decay or because of overcrowding; and the remainderman in fee being at the time of the first cutting under age, I do not think that the Court would have been justified in ordering the timber to be cut upon the application of the tenant for life, merely because it was ripe for cutting. In *Hussey* v. *Hussey*, 5 Mad. 44, it was said by Sir John Leach that where there is a tenant for life impeachable for waste, the Court can only authorise the cutting of such timber as is decaying or which it is beneficial to cut by reason that it injures the growth of other trees. This was Lord Hardwicke's opinion in *Bewick* v. *Whitfield*, 3 P. Wms. 267, where he said, "With regard to timber plainly decaying, it is for the benefit of the inheritance that it should be cut down, otherwise it would become of no value." If the tenant for life in this case had applied to the Court for leave to cut the timber, he must have shown that it would be for the benefit of the person in remainder that the timber should be cut, and therefore it is incorrect to assume, as is done both in the bill and answer, that nothing more being stated than that the timber was ripe for felling, the Court, if applied to for that purpose, would have ordered it to be cut. It is said that where there is a tenant for life impeachable for waste, he is entitled for his life to the interest of the money produced from the sale of timber cut down and sold under the authority of the Court, in the same manner as a tenant for life without impeachment of waste, and the Vice-Chancellor Wood, in *Gent* v. *Harrison*, 8 W. R. 57, Johns. 517, expressed this opinion in a case where the timber was rightfully cut. The case of *Waldo* v. *Waldo*, 8 Sim. 261, hardly reaches to the full extent of the proposition, because there the tenant for life had an interest in the timber, beyond her right in it while standing, being entitled to cut it down for repair. Of this right she was deprived, although it appeared that there remained standing on the estate many more trees than were sufficient for future repairs. But whatever may be the course adopted by the Court, where a tenant for life impeachable for waste obtains its leave to cut down timber, I entertain no doubt that if he takes upon himself to cut and sell the timber without the authority of the Court, he does it at his peril, and he never can be permitted to derive any advantage from his wrongful act. There is abundant authority for this, but I need only mention the case of *Williams* v. *The Duke of Bolton*, 1 Cox, 72, and *Lushington* v. *Boldero*, 15 Beav. 1. The act of the tenant for life being therefore a tortious act, the remainderman might either have brought an action of trover for the trees, which became his property from the moment they were felled, or an action for the money had and received for the produce of the sale. He might also have executed a suit in equity, for, as Lord Hardwicke said in *Whitfield* v. *Bewick* (*ubi. sup.*), *it* may be very necessary for the party who has the inheritance to bring his bill in this Court, because it may be impossible for him to discover the value of the timber, it being in the possession of, and cut down by, the tenant for life. But if the Statute of Limitations had run against his remedy at law, it would be too late to institute a suit in equity for an account of moneys received in respect of the timber that was cut and sold.

At the time of the first cutting in 1831, William Lye Seagram was under age, but he attained his majority in 1834; from that time the statute began to run, and in respect of the first cutting the remedy of William Lye Seagram was barred at his death in 1844. The next cutting which took place during the life of William Lye Seagram was in 1842. Of course, as in the former instance, the act being wrongful, the statute began to run immediately, but, upon the death of William Lye Seagram, his father, the tenant for life, took out letters of administration and became the person entitled to receive as well as liable to pay for the wrong done to the remainderman. It occurred to me, at this part of the case, to express a doubt whether the Statute of Limitations, if it ever did run, could ever be stopped; but, upon an examination of the authorities, I am disposed to think my suggestion was not well founded. It appears from *Needham's case*, 8 Coke, 135, and *Wankford* v. *Wankford*, 1 Salk. 299, that where administration of the goods of a creditor is committed to a debtor, this is not an extinction of the debt, but a suspension of the remedy. As, therefore, during the life of William Frowd Seagram, there could be no action brought, the running of the statute was stopped until his death in 1864; the bill was filed upon the 26th of March, 1866.

As far as the case rests upon the statute, I think that the plaintiff is entitled to an account

of the timber cut in 184?, and in the following years during the lifetime of William Lye Seagram, as well as that which was cut after the 1st of April, 1844.

If it had been necessary to consider the case apart from the statute, it might in my opinion be fairly presumed from length of time that the parties had either settled accounts or that the plaintiff's father had waived his claim in respect of the timber cut in 1831. But I do not see my way clearly to such a presumption as to the cuttings in 1842, 1843, and March, 1844.

The plaintiff's right to an account of the timber cut during these periods not being barred by the Statute of Limitations, and there being no sufficient grounds to raise the presumption of a settlement of his claim, I think that under the circumstances, so far as the decree of the Master of the Rolls refuses an account of the timber which was cut prior to the 1st of April, 1844, it must be varied in that respect, and that the account should be carried back so as to embrace the timber which was cut in 1842, 1843, and March, 1844, and that in all other respects it must be affirmed. In fact the account must be carried back six years from the death of William Lye Seagram.

Southgate, Q. C.—In *Rhodes* v. *Smethurst*, 4 M. & W. 42, 6 ib. 351, there are some observations by Lord Abinger which militate against your Lordship's view respecting the suspension of the statute. [The case was then handed up to the Lord Chancellor, who perused the passage.]

Lord Chelmsford, C.—It was not the question in that case. I can only say that looking to those old cases which I have already mentioned, it appears to me that if the remedy is suspended, the statute cannot possibly run during that period. I still entertain that opinion.* Perhaps it is not so strong after the *obiter dictum* of Lord Abinger in this case; at the same time I feel it very strongly.

W. W Cooper, with *Southgate*, Q. C., then cited *Tullit* v. *Tullit*, 1 Amb. 370, 1 Dick, 322, and contended that the heir and not the administrator would be entitled to the money arising from the timber, and therefore the question about the suspension of the statute did not arise.

Lord Chelmsford, C.—Could the remainderman have maintained trover?

W. W. Cooper.—No doubt.

Lord Chelmsford.—Would not that be the test.† I am not at present shaken in my opinion.

Re Newman.

Solicitor's bill of costs—Taxation after payment—Payment by party not chargeable—6 & 7 Vic, c. 23, s. 38.

There is no general rule as to how much pressure will entitle a party to have a solicitor's bill taxed after payment. But if reasonable facilities for taxation have been refused at the last moment, when it has become imperative to the party to obtain immediately the papers to which the solicitor's lien applied, and the party has consequently paid the bill, that is a special circumtance which, coupled with items of apparent overcharge, will justify the Court in directing taxation after payment.

It is no argument against taxation in such a case that the effect produced upon the party by the pressure arises out of his own conduct or private affairs.

Where one party is chargeable with a solicitor's bill, and another party, for reasons of his own, pays the bill, the party paying the bill has, under section 38, of 6 & 7 Vic., c. 33, the same right to taxation which the party originally chargeable would otherwise have had; and this right of taxation is not limited to any transaction which may have occured in the premises between himself and the solicitor; but the bill which he has paid is the bill which he has a right to have taxed.

[15 W. R., 1189. July 30.]

This was an appeal from a decision of the Master of the Rolls upon an adjourned summons for taxation of a bill of costs of Messrs. Newman, solicitors, of Barnsley. The Master of the Rolls ordered the bill of costs to be taxed, the costs of the application to be paid by the solicitors. The Messrs. Newman appealed.

The facts are more fully stated at p. 630 of the *Weekly Reporter*.

Solicitor-General (*Selwyn*, Q.C.), and *C. T. Simpson*, for the appellants, cited *Re Fyson*, 9 Beav. 117; *Re Massey*, 13 W. R. 797, 34 Beav. 463; *Re Forsyth*, 13 W. R 307, 932, 34 Beav. 140, 2 D. J. & S. 509; *Wakefield* v. *Newbon*, 6 Q B 276, and contended as follows:—All cases of "pressure" have been cases in which there has been something to raise a presumption that the bill had been kept back. The order should have made no reference to the agreement of the 31st of May, 1865, because this amounts to referring it to the taxing-master to decide, and to decide in the absence of the other party, what is the true construction of that agreement: *Re Barton*, 4 D. M. & G. 108. We submit (1) that the bill should not be taxed at all. (2) That if taxed all reference to the agreement of the 31st of May, 1865, should be omitted, and that it should be taxed as between the solicitors and their own clients. (3) That the solicitors should not be ordered to pay the costs.

Rolt, L.J., called upon the respondent's counsel with reference to the two latter contentions only.

Jessel, Q C, and *Ince*, for the respondents.—Although a slight overcharge alone might not be an adequate ground for taxation, yet slight overcharge, combined with slight pressure is enough: *vide* Morgan & Davies's costs in Chancery, 323 S. The rule is—tax the bill I am liable to pay, as between solicitor and client, as if I myself had been the client. We need cite no authority to show that the lien of a solicitor cannot be higher than that of his client. [Rolt, L J,—Still I should like to hear some applicable to this case.] This is not asking the taxing-master to construe the agreement of the 31st May, 1865, in the absence of Messrs Gray & Tabart, otherwise than he may legitimately may: *Re Lett*, 11 W. R. 15, 31 Beav. 488 In *Ex parte Wilkinson*, 2 Coll. 92; *Re Brown*, 1 D. M & G. 322, and *Re Strother*, 3 K. & J. 527, 5 W. R. 795, pressure only was shown. The first case in which overcharge seems to have been required to be shown is *Edwards* v. *Grove*, 2 D F. & J. 217. In *Re Pugh*, 11 W. R 762; 32 Beav. 173, there is nothing about pressure.

C. T Simpson, in reply, cited *Re Massey*, (*ubi sup*); *Re Harrison*, 10 Beav. 57. The argument that slight pressure *plus* slight overcharge is sufficient is answered by *Re Elmslie*, 12 Beav 538. It is a great hardship to Messrs. Grey & Tabart to have, under pain of costs, to construe this agreement, to which they are not parties. The

* This opinion of the Lord Chancellor has met with strong remonstrances from the profession in England—Eds U.C L J.

† See *Byer* v. *Dyer*, 13 W. R. 732.—Ed W. R.

solicitors should not be saddled with costs of this application; *Re Abbot*, 18 Beav. 393.

Rolt, L.J.—I entirely agree with the Master of the Rolls on the main point determined in the case, namely, that Colonel West is entitled to have Messrs. Newman's bill of costs taxed. But before I give my reasons for that, I will examine one or two other points on which I somewhat differ from the conclusion at which he has arrived.

I will take first the question as to the form of the order for taxation and the reference which the order contains to the agreement entered into between Messrs. Gray & Tabart and Colonel West as to the costs which, as between them, Colonel West was to pay. They are referred to and made the rule for the order which the taxing-master is to act upon in the order of reference for taxation. Now the 38th section of the Act appears to me to be very clear. [His Lordship reads the section.] If a person who is not chargeable with the bill thinks fit to pay the bill, it is open to him to do so, and if he does so he shall be entitled to have that bill, which he was not bound to pay, but which he thought right for reasons of his own to pay, taxed as the party chargeable himself might. That appears to govern this case. Colonel West thought fit to pay this bill, and it is said by the counsel for Colonel West that Messrs. Newman could have no lien upon the lease and counterpart, other than that which Messrs Gray & Tabart could have had, and that therefore you have only to ascertain what lien Messrs. Gray & Tabart could have had upon the lease and counterpart, and upon that being examined, Messrs. Gray & Tabart would have had a right to payment before the lease and counterpart were delivered over, and Messrs Newman could have no more. It appears to me that Mr. Simpson's answer to that is complete. The answer is this:—Not only was there, in Messrs. Gray & Tabart, no lien upon these title-deeds as against Colonel West, except according to the terms of the agreement, but there was no privity whatever between Colonel West and Messrs. Newman. Colonel West thought it right for purposes of his own, to pay the bill of costs due from Messrs Gray & Tabart to Messrs. Newman, and then the Act steps in and says—"Under these circumstances you, though not chargeable, have thought fit to pay, and shall have the right of taxation which the person who was chargeable would have had; you must, therefore, ascertain what is the bill to be taxed,"—and this is the bill which he paid. I think the construction of the 38th section would not justify the Court in limiting the bill which Colonel West is to have taxed to that which would be the proper bill, as between Messrs. Gray & Tabart and Colonel West, but that it is the bill which he paid. He chose to pay it, he has paid it, and that is the measure of the rights between the parties.

The summons was also referred to in support of the same argument. I do not think that can successfully relied on; and I place no stress at all upon because the terms of the summons are these: It is a summons, "to shew cause why the bill of costs of the said Charles Newman and Thomas James Newman, against the lessors of the said John Temple West, and payable and paid by" West. Therefore the summons taken out was a summons for that which payable to Colonel West. As he has thought fit to pay this bill in particular, his right is to have this bill taxed,—and on the same terms, as Messrs Gray & Tabart could have had it taxed.

I am not sure that it would have made any great difference, even if I had made the terms of the agreement the standard by which the taxing master was to tax the bill, for the words of the agreement are not introduced into the order for taxation. The terms of the agreement will be found to be these—"the costs of Messrs. Gray & Tabart of this agreement and incidental thereto"—that is, incidental alike to the agreement and the lease and counterpart; and on that construction I think it by no means clear that there will be anything thrown out from this bill. But I do not decide upon that. If I had felt bound by that I should have felt it necessary to alter the words. I think it clear, however, that the bill to be taxed is the bill which Colonel West paid.

We come next to the reasons which induce me to think that the Master of the Rolls was entirely right in directing that this bill shall be taxed.

It is clear that the statute does not point out the special circumstances which shall in any case authorize the Court to direct taxation after payment; they are to be special circumstances which shall satisfy the Court as being sufficient to the purpose. I do not think that any of the decisions have laid down, and it is scarcely possible to lay down a general rule that great pressure or slight pressure will do. It is impossible to deal with special circumstances, and, by reference to authorities, to lay down a rule for other cases. My view of it is this:—If at the last moment reasonable facility for taxation is refused after an opportunity for taxation is asked, and if when you look at the bill there appears to be a substantial ground for taxation—something that appears to reasonably require taxation; if there are those circumstances combined, I think the taxation after payment ought to be allowed.

In this case it is contended by the appellants, that even taking that to be the rule, it hardly applies in the present case, because before the Master of the Rolls it was said that the pressure upon Colonel West to pay was caused by his own conduct. A singular sort of argument, for which I think there is no foundation. There was a great deal of courtesy shown before the 31st of December by Messrs. Newman and their London agents to Colonel West, and during that time the delay was no doubt the delay of Colonel West, and not of Messss Newman or Gray & Tabart The question is, what took place after the 31st of December? You cannot set off, if I may use the expression, the courtesies and facilities of expediting the matter which might have existed *before* the close of the tranasaction, against the conduct at the close of the transaction. It does appear to me that at that time there was a reasonable request that an opportunity of taxing should be given. I think, the communications in these cases between solicitors of respectability, as these are, and their clients, should be of such a nature as the earlier communications between these parties evidently were; that as soon as one solicitor is told, "I should like your bill to be

taxed," every facility should be offered. On the 4th of January it is said, "I will pay you the full amount if you like, but let us have taxation." When the matter comes to a close within a few days, and the party who is liable to pay is willing to pay the whole amount at once, provided the right of taxation be reserved, I think it is a special circumstance which would justify the Court in directing taxation, if when on looking at the bill of costs it substantially requires it. [His Lordship then mentioned a single item of charge, and said that without imputing any improper conduct, he should say it was a matter which justified taxation.]

As to costs, there was the right to taxation, but there was an objection taken, and if the objection taken, and if the objection be not absolutely frivolous, the rule is to let the costs of the hearing abide the result of the taxation. There is no rule that the costs shall abide the result of the taxation, where overcharge is the only ground of complaint. I think here there was mistake on the one side as to the right to tax, and that there was more required on the other than could be sustained. Upon the whole, I think justice will be done by letting the whole costs abide the result of the taxation in the usual manner. As to the costs of the appeal, considering that the main point brought from the Master of the Rolls is the question whether there should be taxation or not, I think it will not be unjust to let the costs of the appeal also abide the result of the taxation. Except in these particulars the order will be made by the Master of the Rolls.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR THE MONTHS OF FEBRUARY, MARCH AND APRIL, 1867.

(*Continued from page* 251.)

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

Administration.

1. If one of the next of kin has received his share of his intestate's estate, the others cannot call on him to refund, if the estate is subsequently wasted; and the burden of proof lies on those calling on him to refund, to show that the wasting took place before the share was paid.—*Peterson* v. *Peterson*, Law Rep. 3 Eq. 111.

2. Administration was granted to a creditor, though his right of action was barred by the Statute of Limitations, on condition that he gave a bond to distribute the assets *pro rata* among all the creditors.—*Coombs* v. *Coombs*, Law Rep. 1 P. & D. 288.

3. A married woman, separated from her husband, and having obtained a protection order, died, leaving him a minor son. Administration was granted to a guardian elected by the son, security being given, without citing the father.—*Goods of Stephenson*, Law Rep. 1 P. & D. 287.

4. The consent of next of kin, who are minors, and some of tender years, does not justify making a joint grant of administration, in the absence of special circumstances.—*Goods of Newbold*, Law Rep. 1 P. & D. 285.

See Executor; Probate Practice.

Agent.—*See* Principal and Agent.

Agreement.—*See* Contract.

Ancient Light.—*See* Light.

Annuity.—*See* Will, 5.

Appeal.

1. If an appeal has not been taken within the prescribed time, the court will be guided in the exercise of its discretion, in allowing or refusing the appeal, by the special circumstances of each case.—*Kelner* v. *Baxter*, Law Rep. 2 C. P. 174.

2. Under the 21 & 22 Vic. c. 27, § 3, an order by the Lord Chancellor, confirming an order of a vice chancellor, on his own findings, upon a trial without a jury, is the subject of appeal to the House of Lords.—*Curtis* v. *Platt*, Law Rep. 1 H. L. 337.

3. If the court of appeal reverses the decree of the court below, and dismisses the bill with costs, the costs of the appeal will generally be given.—*Phillips* v. *Hudson*, Law R. 2 Ch. 243.

See New Trial, 1, 3; Rehearing.

Apprentice.

A deed of apprenticeship provided, that, if the apprentice's health should fail before the 1st of August, 1866, the master should refund to the father £50 of the premium, and that a medical certificate should be conclusive evidence of the failure of health. The health of the apprentice failed, and he died in August, 1865. In March, 1866, a proper medical certificate was sent to the master, dated March 24, 1866, but referring to the health of the apprentice in June, 1865. *Held*, a sufficient compliance with the condition.—*Derby* v. *Humber*, Law Rep. 2 C. P. 247.

Arbitrator.—*See* Award.

Assignee.—*See* Lease, 7.

Attorney,—*See* Solicitor.

Award.

1. Arbitrators appointed under a submission, which was made a rule of the court of Chancery, having made their award after the time specified, that court, under 3 & 4 Wm. IV. c. 42, § 39, and the Common Law Procedure Act 1854, § 8, may enlarge the time, and remit the matter back to the arbitrators.—*In re Warner & Powell's Arbitration*, Law Rep. 3 Eq. 261.

2. A testator gave his children in succession an option to purchase a certain estate, at a price to be fixed by an award of arbitrators; the time for exercising the option was two months, within which time the child purchasing was to make such an agreement for completion as the arbitrators should approve. The award was left, on May 5, in the office of the solicitor of the testator's family, who also acted for the eldest son. The solicitor, on May 7, informed the eldest son of the price. The son, on June 16, wrote that he elected to take the estate, and, on July 6, signed an agreement, approved by the arbitrators, and shortly after completed the purchase. The son having sold the estate, and filed a bill for specific performance, *held*, that the title was marketable, because the formal agreement was signed within two months after the award was communicated to the son by the solicitor, before which time the son was not to be deemed to have had knowledge of it. *Semble*, also that the option was effectually exercised by the letter of June 16.—*Austin* v. *Tawney*, Law Rep. 2 Ch. 143.

See Vendor and Purchaser, 3.

Bill of Lading.—*See* Ship, 4.

Bills and Notes.

In an action by the indorsee of a bill against the acceptor, a plea that the bill has been satisfied by the drawer is not good, unless it shows that the plaintiff is not the lawful holder of the bill. In such an action, a plea that the bill was given for goods to be supplied by the drawer, that only part of the goods were supplied, of which the defendant accepted a part, and that, by the non-completion of the contract, the part supplied became valueless to the defendant, and also that the plaintiff is not a holder for value, is good, provided the value of the goods accepted is shown to be a definite sum.—*Agra & Masterman's Bank* v. *Leighton*, L. Rep. 2 Ex. 56.

Carrier.—*See* Ship, 4.

Charter-party.—*See* Freight, 1; Ship, 4.

Cheque.—*See* Solicitor, 2.

Common Carrier.—*See* Carrier.

Company.

1. A. gave money to directors as deposit money for shares in their proposed company: they formed the company for more extensive purposes than those proposed, and A. had on that ground obtained from the court an order that he should be struck off the list of shareholders. *Held*, that he could maintain a bill in equity (not alleging fraud) for the deposit money, neither against the company, nor the directors: not against the company, because the money in their hands was not impressed with a trust; not against the directors, because relief in such a case of excess of authority must be at law.—*Stewart* v. *Austin*, Law Rep. 3 Eq. 299.

2. A subscriber for shares in a company cannot be relieved from his contract, because, after his application, and before allotment, a change has taken place in the direction not communicated to him.—*Hallows* v. *Fernie*, Law Rep. 3 Eq. 520.

3. After appointment of a receiver of a railway, made in a suit on behalf of debenture holders, a debenture holder recovered judgment, and petitioned for leave to issue execution. *Held*, that he was not entitled to execution otherwise than as trustee for all debenture holders entitled to be paid *pari passu* with himself; but an inquiry was directed whether it would be for the benefit of the debenture holders that the receiver should take any proceedings to make the judgment available for them.—*Bowen* v. *Brecon Railway Co.*, Law Rep. 3 Eq. 541.

See Directors; Injunction, 1; Principal and Agent, 2, 6; Railway; Specific Performance, 4; Witness, 2.

Condition precedent.—*See* Lease, 2.

Confidential Relation.

A., a nephew of a former trustee of B., being sent by his uncle to advise B., who was twenty-three years old, and of extravagant habits, on the settlement of his debts, and to advance him money for that purpose, offered to give him £7,000 for his estate, under which there were coal mines. Pending the negotiations, in which a separate solicitor was employed for B., A. obtained from C., a mining engineer, a valuation of the minerals under the estate at £10,000, which he did not communicate to B.; nor did he suggest to B. to consult a mineral surveyor. B. accepted A.'s offer, and died before conveyance. *Held*, on a bill by B.'s administrator, that the sale to A. should be set aside.—*Tate* v. *Williamson*, Law Rep. 2 Ch. 55.

Conflict of Laws.—*See* Foreign Court.

Consideration.—*See* Bills and Notes; Contract.

Contempt.

1. A colonial house of assembly has not, by analogy to the houses of parliament in England, or to a court of justice, which is a court of record, any power to punish a contempt, though committed in its presence and by one of its members; and a member imprisoned for such contempt has his action against the speaker and members of the house for false imprisonment.—*Doyle* v. *Falconer*, Law Rep. 1 P. C. 328.

2. A., being an attorney and barrister of the supreme court of Nova Scotia, addressed a letter to the chief justice, reflecting on the administration of justice by the court. The letter was written by A. in his private capacity as a suitor, in respect of a supposed grievance as a suitor, and had no connection with anything done by him professionally. The court ordered A. to be suspended from practising in the court. *Held*, that, though the letter was a contempt of court, and punishable by fine and imprisonment, yet that the court could not inflict a professional punishment of indefinite suspension for an act not done professionally, and which, *per se*, did not render A. unfit to remain a practitioner of the court.—*In re Wallace*, Law Rep. 1 P. C. 283.

Contract.

1. A promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's credit, is not a good consideration for a contract.—*Bracewell* v. *Williams*, Law Rep. 2 C. P. 196.

2. A promise not to apply for costs under the Bankruptcy Act, 1849, § 85, is a sufficient consideration to support a contract to pay the amount of such costs.—*Bracewell* v. *Williams*, Law Rep. 2 C. P. 196.

3. A. died in 1831, owning estates of socage and borough English tenure, and also personal property, and leaving a wife and two sons. He made an incomplete will, leaving his property to his sons equally. Soon after the will had been refused probate, the elder brother declared that the invalidity of the will should make no difference, and that the property should be "not mine or thine, but ours." No written agreement was made, but the widow never insisted on her rights, and the two sons dealt with the whole property as if it belonged to them equally, till 1851, when their partnership was dissolved; the younger brother having died, and a bill having been filed by his representatives for an equal division of the property. *Held*, that there was sufficient evidence of a family arrangement, which the court would uphold, though there was no formal contract, and no rights in dispute, and that, sufficient motive being proved, the court would not consider the amount of consideration.—*Williams* v. *Williams*, Law Rep. 2 Ch. 294.

See Bills and Notes; Conversion; Directors, 2; Frauds, Statute of; Principal and Agent, 1, 2, 6, 7; Sale; Specific Performance.

Conversion.

A. contracted with a builder to erect a house on A.'s land, and died intestate before the house was finished. *Held*, that A.'s heir was entitled to have the house finished at the expense of the personal estate.—*Cooper* v. *Jarman*, Law Rep. 3 Eq. 98.

Copyright.

H., in 1863, registered an intended new magazine, to be called "Belgravia." In 1866, M., not knowing this, projected a magazine with the same name, and incurred expense in preparing and advertising it as about to appear in October. H., knowing of this, made hasty preparations to bring out his own magazine before M.'s could appear, and in the mean time accepted an order from M. for advertising M.'s magazine in his own publications. On September 25, the first number of H.'s magazine appeared, and on that day he first informed M. that he objected to his publishing a magazine under that name. M.'s magazine appeared in October. H. and M. each filed a bill to restrain the other from using the name. *Held*, that neither bill could be maintained.—*Maxwell* v. *Hogg*, Law Rep. 2 Ch. 307.

Costs.—*See* Appeal, 3; Contract, 2; Equity Pleading and Practice, 6, 7; Execution; Set-off; Vexatious Action.

Covenant.

1. A covenant against building, entered into by a purchaser of land with the vendor (the owner of adjoining lands), for the benefit of said adjoining lands, binds in equity those taking under such purchaser with notice, and may be enforced by a subsequent purchaser of part of such adjoining lands, who would be damaged by its breach, though he has overlooked small breaches of similar covenants by other owners, and has himself committed a small breach of a similar covenant, and though all persons entitled to the benefit of the covenant are not joined as parties: whether the covenant runs with the land, *quære*.—*Western* v. *Macdermott*, Law Rep. 2 Ch. 72.

2. A vendor having taken from each of several purchasers of land, formerly the same estate, a covenant to build only in a certain manner, permitted material breaches of the covenant by some of the purchasers. *Held*, that he could not have an injunction to compel another purchaser to observe the same covenant, though the covenant was not only by the defendant with the vendor, but also by the defendant with all the other purchasers, and though the breaches had been committed before the defendant purchased or made his covenant.—*Peek* v. *Matthews*, Law Rep. 3 Eq. 515.

3. A. demised the exclusive right to take game on certain land, with the use of a cottage,

to B. for a term; and B. covenanted to leave the land, at the end of the term, as well stocked with game as at the time of the demise. *Held*, that the right to sue on this covenant passed, by 32 Hen. VIII. c. 34, to the assignee of A.'s reversion.—*Hooper* v. *Clark*, Law Rep. 2 Q. B. 200.

4. A. covenanted that he, in his lifetime, or his heirs, executors or administrators, within three months after his death, would pay a certain sum. He died, having devised real estate to trustees, who refused to accept the devise, and, under order of the court, conveyed the estate to new trustees. *Held*, that an action of debt would lie against the trustees under the will and the heir, by the statute against fraudulent devises, 3 W. & M. c. 14, § 3; and execution would thus be obtained against the land, and the conveyance to new trustees was not such an alienation as would prevent the action. —*Coope* v. *Creswell*, Law Rep. 2 Ch. 112.

See ELECTION, 2; LEASE, 1-5.

CRIMINAL LAW.—*See* EXTRADITION; FALSE PRETENCE; LARCENY.

CURTESY.—*See* HUSBAND AND WIFE, 1.

CUSTOM.

A custom for inhabitants of a parish to exercise horses at all seasonable times, in a place beyond the limits of the parish, is bad.—*Sowerby* v. *Coleman*, Law Rep. 2 Ex. 96.

See FREIGHT, 1; PRINCIPAL AND AGENT, 1, 4, 5.

DAMAGES.—*See* LEASE, 3; LIGHT, 2; PATENT, 6; SET-OFF; SPECIFIC PERFORMANCE, 4.

DEPOSITION.—*See* EXTRADITION.

DEVISE.—*See* COVENANT, 4; ELECTION; WILL.

DIRECTORS.

1. On a bill filed by the official liquidator of a company against its late directors, alleging that a transaction by them was *ultra vires* of the company, and had been concealed by false descriptions in the company's books, *held*, on demurrer, that whether the transaction was *ultra vires* or not, the charges as to concealment must be answered.—*Joint Stock Discount Co.* v. *Brown*, Law Rep. 3 Eq 139.

2. The prescribed quorum of directors in a company being three, the secretary affixed the company's seal to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third to sign the authority. *Held*, that directors acting under 8 Vic. c. 16, must act together and as a board; that the seal was affixed without authority, and the company was not liable on the bond.—*D'Arcy* v. *Tamar, Kit Hill & Callington Railway Co.*, Law Rep. 2 Ex. 158.

DOMICIL.—*See* FOREIGN COURT.

EASEMENT.—*See* WATERCOURSE.

ELECTION.

1. A testator, after reciting that his two daughters, A. and B., would be entitled to property under a settlement, and that therefore he had not devised them so large a share as he otherwise should have done, devised to A. and B. certain estates, and to his two other daughters, C. and D., estates of much more value. In fact, the four daughters were entitled equally under the settlement. *Held*, that as the will did not purport to dispose of the settled property, and was only made under a mistaken impression, C. and D. were not put to their election.—*Box* v. *Barrett*, Law Rep. 3 Eq. 244.

2. A father, on his son's marriage, covenanted that he would, by will or in his lifetime, give one-fifth of the estate, to which he might be entitled at his death (subject to the payment of one-fifth of his debts), to trustees, on trust to pay the income to the son, till some event should occur whereby the income would (if the same were payable to the son absolutely) become vested in some other person; and then on trust for the son's wife and children, with a discretionary trust for the benefit of the son after his wife's death. By will the father charged his estate with his debts, and gave his estate to all his children who should be living at his death. He died, leaving five children. *Held*, that the gift in the will was not a satisfaction of the covenant so far as the wife and children were concerned, but was a satisfaction of the son's interest thereunder; and that the son must therefore elect between his life interest under the settlement, and one-fifth of the residue which would remain after satisfaction of the covenant. And the son having elected to take under the will, *held* further, that his life interest under the settlement was determined, and the income was payable to his wife.—*McCarogher* v. *Whieldon*, Law Rep. 3 Eq. 236.

See LEASE, 7.

EQUITY.

1. A tenant in tail contracted to sell his estates for value, and in order to convey them suffered a recovery, which turned out to be technically defective at law. *Held*, that a court of equity would not allow persons claiming under him to take advantage of the flaw.—*Howard* v. *Earl of Shrewsbury*, Law Rep. 3 Eq. 218.

2. G. let land to H., on a lease renewable for ever. L. and N., and several other persons, held under H., on the same terms. L. charged his holding with a jointure in favor of his wife

afterwards, L. owing money to N., N. obtained from him possession of his land, though on what terms did not appear, and then granted him a lease for a year of it. H. was in arrear with G., and H.'s tenants were in arrear with him. N. purchased G.'s interest in all the lands, and gave notice to the tenants to pay arrears, and take out renewal leases: this not being done, N. brought ejectment, and recovered possession. *Held*, that the circumstances did not raise an equity in favor of L.'s widow to have her jointure declared a charge on the lands.—*Hickson* v. *Lombard*, Law Rep. 1 H. L. 324.

3. The court of chancery, and not a court of law, is the proper tribunal to determine a question of title depending on the validity of its own orders.—*Howard* v. *Earl of Shrewsbury*, Law Rep. 3 Eq., 218.

See Company, 1.

Equity Pleading and Practice.

1. A bill to perpetuate testimony relating to a matter, the subject of an existing suit against the plaintiff, is demurrable, though the plaintiff could not himself have made such a matter the subject of present judicial investigation.—*Earl Spencer* v. *Peek*, Law Rep. 3 Eq. 315.

2. In a case where, under the old practice, the court would have directed, at the hearing, an inquiry on a question of fact, it may now examine a party or a witness *viva voce* under 15 & 16 Vic. c. 86, § 39.—*Ferguson* v. *Wilson*, Law Rep 2 Ch. 77.

3. A plaintiff cannot open a settled account, unless his bill states specific errors in the account.—*Parkinson* v. *Hanbury*, Law Rep. 2 H. L. 1.

4. Under 15 & 16 Vic. c. 86, § 55, the court can order a sale before the hearing of a suit, if it is for the benefit of the property.—*Tulloch* v. *Tulloch*, Law Rep. 3 Eq. 574.

5. The court of chancery will not set aside an order not appealed against, provided the facts were duly before the court when the order was made, except when there is such broad and palpable error that it is plain the court must have miscarried.—*Howard* v. *Earl of Shrewsbury*, Law Rep. 3 Eq. 218.

6. A defendant having several times obtained an extension of time to answer, filed at last a document stating that he could not answer in the absence of information, for which he had sent to the continent, but which he had been unable to obtain. On motion, the document was ordered to be taken off the file, and the defendant ordered to pay the costs of the motion, and all other costs occasioned by filing such answer.—*Financial Corporation* v. *Bristol and N. Somerset Railway Co.*, Law Rep. 3 Eq. 422.

7. In a foreclosure suit, a defendant, having been served with the bill and interrogatories, wrote to the plaintiff that he claimed no interest in the subject matter of the suit, and that, if an answer was insisted on, he should apply for costs. The interrogatories not having been withdrawn, he put in an answer and disclaimer, and at the hearing applied for costs. *Held*, that as he had not simply disclaimed, but had answered and appeared for the purpose of claiming his costs, he was not entitled to any costs.—*Maxwell* v. *Wightwick*, Law Rep. 3 Eq. 210.

See Appeal, 2, 3; Injunction; New Trial; Service of Process; Specific Performance, 2; Tenant for Life and Remainder Man, 3.

Error.—*See* Jury.

Estate Tail.—*See* Tenant in Tail.

Estoppel.—*See* Equity, 1; Lease, 3.

Evidence.—*See* Administration, 1; Equity Pleading and Practice, 1, 2; Extradition; Marriage; Principal and Agent, 1, 2; Will, 10; Witness, 1.

Execution.

A sheriff's officer went to the defendant's premises to levy under a *fi. fa.*, and, without doing or saying anything more, produced his warrant, and demanded the debt and costs, together with poundage and expenses of levy. The money was paid under protest. *Held*, that this was not a levy, so as to entitle the sheriff to poundage, or the officer to fees.—*Nash* v. *Dickenson*, Law Rep. 2 C. P. 252.

Executor.

1. In an action against the executor of A., the declaration alleged that the plaintiff had recovered judgment against A., executor of B., and that A. had been guilty of a *devastavit*. The defendant pleaded that B. appointed A. and B. his executors; that B. was still living; that A. at his death, and after his death B., had effects of B. sufficient to satisfy the judgment and that the defendant never had in his hands any effects of B. as executor. *Held*, that the plea was bad, as, by the 30 Car. II., c. 7, the defendant was responsible as executor for A.'s *devastavit*, which the plea admitted.—*Coward* v. *Gregory*, Law Rep. 2 C. P. 153.

2. A. was entitled to a life income from her husband's estate, and died in 1861. A bill was filed by her executor, in 1862, against her husband's executor, for an account of income due her estate. In 1863 accounts were directed. In 1866 a certificate was made, finding a large sum due from the husband's executor. *Held*,

that he was not chargeable with interest before the date of the certificate.—*Blogg* v. *Johnson*, Law Rep. 2 Ch. 225.

3. An executor who has distributed his testator's assets under the Act 22 & 23 Vic. c. 35, will have the same protection as if he had administered the estate under a decree of the court of chancery; and a bill against him as executor will be dismissed, though he has retained legacies as trustee, after appropriating them for the benefit of his *cestuis que trust*.—*Clegg* v. *Rowland*, Law Rep. 3 Eq. 368.

See ADMINISTRATION, 1; CONVERSION; LIMITATIONS, STATUTE OF, 1.

EXTRADITION.

In proceeding under the Extradition Acts, *held* (1), that original depositions taken before the Act 29 & 30 Vic. c. 121, if authenticated as that act requires, are admissible in evidence; (2) that the French warrant for the apprehension of an accused person need not be signed by a magistrate; and (3) that one condemned *par contumace* in France continues to be an accused person, and liable to be given up to the French government.—*In re Coppin*, Law Rep. 2 Ch. 47.

FALSE PRETENCES.

A conviction for obtaining a chattel by false pretences is good, though the chattel is not in existence when the pretence is made, if its subsequent delivery is directly connected with the false pretence; and whether there is such direct connection is for the jury.—*The Queen* v. *Martin*, Law Rep. 1 C. C. 56.

FAMILY ARRANGEMENT.—*See* CONTRACT, 3.

FI. FA.—*See* EXECUTION.

FIXTURES.

1. Trade fixtures affixed to freehold premises, after a mortgage, by the mortgagor and his partner, occupying the premises for the purposes of their trade, pass to the mortgagee.—*Cullwick* v. *Swindell*, Law Rep. 3 Eq. 249.

2. A testator, who was tenant for life of an estate, on which he had built and furnished a house (an old one having fallen into decay), bequeathed all the tapestry, marbles, statues, pictures with their frames and glasses, which should be in or about the house at his death, and of which he had power to dispose, to A., the remainder-man, for life, and then to B. after A.'s death. *Held*, that tapestry, pictures in panels, frames filled with satin and attached to the walls, and also statues, vases, and stone garden seats, essentially part of the architectural design, however fastened, were fixtures, and could not be removed; but that glasses and pictures, not in panels, passed under the will to B. *Held*, further, that articles bought by the testator, but fixed by A. after his death, passed under the will.—*D'Eyncourt* v. *Gregory*, Law Rep. 3 Eq. 382.

FOREIGN COURT.

The court of a foreign country, in which a person died domiciled, decided that A. was entitled to inherit the deceased's personal property. *Held*, that the probate court was bound by this judgment as to the *status* of A., and therefore had rightly admitted him to contest a will, set up as made by the deceased, disposing of property in England.—*Doglioni* v. *Crispin*, Law Rep. 1 H. L. 301.

FORFEITURE.

A. was entitled to a life interest in an annuity, subject to forfeiture if he should compound with his creditors, or charge, assign, or by way of anticipation dispose of, the annuity, or till anything should happen whereby it should vest or become liable to be vested in another. A., being indebted to B., in pursuance of an agreement with B., gave a written order to the trustees to pay the annuity, as it should become due, to B., who was to apply it partly in payment of interest and of reduction of the debt. *Held*, that, though an agreement with B. that the order should be revokable was alleged, yet that A.'s interest was forfeited.—*Oldham* v. *Oldham*, Law Rep. 3 Eq. 404.

See LEASE, 4.

FRAUDS, STATUTE OF.

A written contract was made for the sale of goods, to be delivered within a specified time. Before the time for delivery, the parties agreed orally to extend the time for delivery. *Held*, that the oral agreement was not good, under § 17 of the Statute of Frauds, and could not operate as a rescission of the written contract, which might therefore be enforced.—*Noble* v. *Ward*, Law Rep. 2 Ex. 135.

FREIGHT.

By a charter party it was agreed that a ship should sail to B., load a cargo of cotton, proceed with it to L., and "deliver the same" on being paid freight at "17*s.* per ton of 50 cubic feet delivered, the freight to be paid on delivery." The ship took at B. a cargo of cotton, which, previously to being loaded, had, as usual, been subjected to high pressure. On being taken from the ship, the cotton naturally expanded considerably; and the shipper brought an action, claiming freight on the measurement of the cotton when delivered. At the trial, a custom of the B. trade was proved to pay freight for cotton under such a charter party on its measurement when shipped. There

was no evidence that the plaintiff had actual notice of the custom. *Held* (1), that, apart from the custom, the freight was payable on the measurement when shipped; (2) that evidence of the custom was properly admitted.—*Buckle* v. *Knoop*, Law Rep. 2 Ex. 125.

General Average.—*See* Ship, 5.

Guaranty.

A.'s son being indebted to B. & Co. for coals supplied on credit, and B. & Co. refusing to continue the supply unless guaranteed, A. gave this guaranty: "In consideration of the credit given by B. & Co. to my son, for coal supplied to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*; and in default of his payment of any accounts due, I bind myself by this note to pay to B. & Co. whatever may be owing, to an amount not exceeding the sum of 100*l.*" *Held*, a continuing guaranty (Mattin, B., *dubitante*).—*Wood* v. *Priestner*, Law Rep. 2 Ex. 66.

Guardian.—*See* Administration, 3.

Husband and Wife.

1. If real estate is limited to the use of a woman, independently of her husband, and to be disposed of by deed or will as she may think fit, her husband cannot be tenant by the curtesy.—*Moore* v. *Webster*, Law Rep. 3 Eq. 267.

2. A married woman, sued as a *feme sole*, pleaded coverture; but, no evidence being given in support of the plea, a verdict was found against her, and she was arrested on a *ca. sa.* *Held*, that she was not entitled to her discharge.—*Poole* v. *Canning*, Law Rep. 2 C. P. 241.

See Administration, 3; Limitations, Statute of, 3.

Income.—*See* Will, 13.

Indictment.—*See* Larceny.

Infant.—*See* Administration, 3, 4.

Injunction.

1. A railway company agreed to buy land, and had a clause to that effect inserted in their act; whereupon the landowner withdrew his opposition to the act. They afterwards applied for an act to enable them to abandon the branch which affected the land, and to repeal that clause. *Held*, that though the court had power to restrain an application to parliament, it was difficult to conceive a case in which it would do so, and that it would not in the present case.—*Steele* v. *North Metropolitan Railway Co.*, Law Rep. 2 Ch. 237.

2. Where, during the litigation, the defendant had continued the building complained of, a mandatory injunction was granted on motion.—*Beadel* v. *Perry*, Law Rep. 3 Eq. 465.

See Copyright; Covenant, 1, 2; Light, 1, 2; New Trial, 3; Nuisance, 2; Patent, 5; Railway, 2; Specific Performance, 3; Watercourse, 2.

Insurance.

1. To ascertain whether there is a constructive total loss of goods lying at a place of distress, the jury must determine whether to carry them on will cost more than their value; and, in determining this, they must not consider the whole cost of transit, but only the excess of cost over what would have been incurred had no peril intervened.—*Farnworth* v. *Hyde*, Law Rep. 2 C. P. 204.

2. A shareholder in the Atlantic Telegraph Company was insured by a policy, written on the common form of a marine policy, and containing the following words: "At and from I. to N., the risk to commence at the lading of the cable on board, and to continue until it be laid in one continuous length between I. and N., and until one hundred words shall have been transmitted each way. The ship, &c., goods &c., shall be valued at 200*l.* on the Atlantic cable, value, say on twenty shares, at 10*l.* per share;" and also, "it is agreed that this policy in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable." The attempt to lay the cable failed, through its breaking while being hauled in to remedy a defect in insulation; but half the cable was saved. *Held*, that the policy was not on the cable, but on the insured's interest in the adventure; that such interest was insurable; that the loss was by perils insured against; and that the loss was total.—*Wilson* v. *Jones*, Law Rep. 2 Ex. 139.

3. In a policy issued by a mutual insurance society, the amount of premium paid and the rate per cent. were left blank; but in place of the latter, "20 pounds per centum" were added in a separate line. The rules of the society contained nothing limiting the liability of the insurers, but provided that they should make good all losses according to the proportion of their premiums. In an action by the managers for a call against the holder of the policy, *held*, that whatever the words "20 pounds per centum" might mean, they did not limit the amount for which each member was liable to 20 per cent. on the sum insured by him (Byles, J., *dubitante*).—*Gray* v. *Gibson*, Law Rep. 2 C. P. 120.

Interest.—*See* Executor, 2; Limitations, Statute of, 3; Mortgage, 3; Partnership.

Digest of English Law Reports.

Jurisdiction.

In a proceeding to recover possession of a house belonging to a parish under 59 Geo. III. c. 12, § 24, the jurisdiction of justices is not ousted by a claim of title, as the question of title is necessarily involved in the matter to be determined.—*Ex parte Vaughan*, Law Rep. 2 Q. B. 114.

See Equity; Injunction, 1; Service of Process.

Jury.

It is no ground for error, either in fact or law, that the whole of the special jurors struck were not summoned, or that the special jury panel was called over, a *tales* prayed, and two talesmen sworn on the jury before 10 A.M., the time for which the special jury was summoned. —*Irwin* v. *Grey*, Law Rep. 2 H. L. 20.

Laches.—*See* Light, 2.

Landlord and Tenant.—*See* Lease.

Larceny.

An indictment under 24 & 25 Vic. c. 96, § 27, for stealing a valuable security, must particularize the kind of security, and any material variance is fatal.—*The Queen* v. *Lowrie*, Law Rep. 1 C. C. 61.

Lease.

1. In an action by a lessee, on a covenant in the lease to put in repair, against the assignee of the reversion, the defendant pleaded, that, before the assignment, a reasonable time had elapsed, and all things had happened to entitle the lessee to have the covenant performed by the original lessor. *Held*, a good plea, as there could only be one breach of the covenant to put in repair, and that had occurred before the assignment.—*Coward* v. *Gregory*, Law Rep. 2 C. P. 153.

2. If a lease contain a covenant by a lessor to put in repair, and a covenant by a lessee to keep in repair, the performance of the former is a condition precedent to requiring the performance of the latter.—*Ib.*

3. In an action by a lessee on a covenant to keep in repair, the defendant pleaded that the plaintiff had recovered damages against him for a breach of the same covenant, and that the want of repair complained of was only a continuance of the want of repair for which damages were recovered, and further, that the plaintiff did not expend the damages recovered in putting the premises in repair, and that, had he done so, the want of repair now complained of would not have occurred. *Held*, that the plea was bad, as this was a continuing breach, and the former recovery was no bar, even on equitable grounds, but only went in mitigation of damages.—*Ib.*

4. A lease, with a clause for re-entry, contained a general covenant by the lessee to keep the premises in repair, and a further covenant that he would, within three months after notice given, repair all defects specified in the notice. The premises being out of repair, the landlord gave the lessee notice to repair, "in accordance with the covenants" of the lease. Before the three months were ended, the landlord brought ejectment. *Held*, that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair.—*Few* v. *Perkins*, Law Rep. 2 Ex. 92.

5. A. let a farm for a term of fourteen years, by a lease containing covenants by the lessees not to assign without license, with a proviso for re-entry, and by the lessor, at the end of the tenancy, to pay for certain things at a valuation. At the end of the term, the lessees continued tenants from year to year on the original terms. They afterwards, by deed, assigned their interest, with their right to be paid for the things at a valuation, to B. B. entered, but was never recognized by A. as tenant. A. gave the lessees notice to quit, and B. gave A. a similar notice. *Held*, that B. could not sue A. for the amount of the things at a valuation; on the ground (*per* Meller and Lush, JJ.), that, no new tenancy having been created between B. and A., the mere assignment of the parol tenancy did not pass a right of action on the special stipulation; on the ground (*per* Shee, J.), that, as the lessees could not assign without license, they could not transfer any interest in the premises to B.—*Elliott* v. *Johnson*, Law Rep. 2 Q. B. 120.

6. By an act passed in 1720, certain estates were limited to successive Earls of Shrewsbury, with power for each succeeding tenant in tail to grant leases of certain length. By another act, in 1803, parts of the estates were conveyed to trustees, freed from all the uses, powers, &c. created by the act of 1720 (except leases theretofore granted), on trust to sell, and invest the purchase money in other lands. The lands thus conveyed were not sold; but, in 1838, the then Earl granted a lease of them. *Held*, that this lease did not bind a tenant in tail in remainder.—*Earl of Shrewsbury* v. *Keighley*, Law Rep. 2 C. P. 130.

7. The owner of a long term agreed to let land for three years, and, when called on by the tenant, to grant him a lease for three years, seven years, or the whole term. The tenant held over the three years, and became bankrupt. His assignee sold his interest in the leasehold. *Held*, that the option to take a lease was not gone at the end of the three

years, and that this option passed to the assignee as an agreement for a lease, and through him to the purchaser.—*Buckland* v. *Papillon*, Law Rep. 2 Ch. 67.

Legacy.—*See* Election; Will, 5, 8, 13.

Legislature.—*See* Contempt, 1.

Light.

1. The erection of a building, the height of which above an ancient light is not greater than the distance from the light, will not ordinarily be restrained.—*Beadel* v. *Perry*, Law Rep. 3 Eq. 465.

2. Where the plaintiff, having heard in April of an intended building by the defendants which would obstruct his light and air, did not complain till November, during which time the defendants had laid out large sums; and where the plaintiff had also, since bill filed, offered to take a money compensation for the injury, the court, instead of a mandatory injunction to compel the defendants to take down the buildings, directed an inquiry as to damages, under Sir H. Cairns's Act.—*Senior* v. *Pawson*, Law Rep. 3 Eq. 330.

3. The 18 & 19 Vic. c. 122, § 83, giving a right to raise any party structure, permitted by the act to be raised, on condition of making good all damage occasioned to the adjoining premises, does not authorize the obstruction of ancient lights.—*Crofts* v. *Haldane*, Law Rep. 2 Q. B. 194.

Limitations, Statute of.

1. Testator devised real estate to a trustee in trust for E. for life, with remainders over, and other real estate to the same trustee for payment of debts. The trustee was also the testator's administrator. *Held*, that payment, by the trustee, of interest on a specialty debt did not prevent the Statute of Limitations (3 & 4 Wm. IV. c. 42) from running in favor of E.—*Coope* v. *Creswell*, Law Rep. 2 Ch. 112.

2. After a debt due A. from his son had been barred by the Statute of Limitations, A., his son, and his son's wife, had an interview, at which the interest due was calculated. The son then put his hand into his pocket, as if to get the money to pay it. A. stopped him, and writing a receipt for the interest, gave it to his son's wife, saying he would make her a present of the money, and made an indorsement on the note. No money actually passed. *Held* (Bramwell, B., *dissentiente*), that this was a sufficient payment to take the debt out of the statute.—*Maber* v. *Maber*, Law Rep. 2 Ex. 153.

3. The share of a married woman in a fund arising from moneys the proceeds of lands devised on trust for sale, is "money payable out of land," within 3 & 4 Wm. IV. c. 27; and therefore if such share is mortgaged by her and her husband, by deed acknowledged, the mortgagee cannot recover more than six years' arrears of interest.—*Bowyer* v. *Woodman*, Law Rep. 3 Eq., 313.

See Administration, 2; Tenant for Life and Remainder-man, 2.

REVIEWS.

The Scientific American. A weekly journal of practical information, art, science, mechanics, chemistry, and manufactures. New York. $3 per annum.

It has been well said that "a man cannot be a great lawyer who is nothing else. Exclusive devotion to the study and practice of the law tends to acumen rather than breadth, to subtlety rather than strength .... Some other things are to be studied beside the reports and text books" (*American Law Review*, ii. p. 50), and that which is true as a general principle is true in particular as to the matters treated of in the periodical now before us, and especially so with reference to those of the profession whose lot is cast in the *nisi prius* arena.

We have all occasionally seen in Court the hopeless mess into which a counsel sometimes gets his case, from an utter inability to understand, much less to explain to others, a point arising in the course of a case involving some mechanical or chemical knowledge, and in his flounderings "making confusion more confounded." Now, though we do not prescribe a weekly perusal of the *Scientific American*, as a certain cure for this malady, we are quite sure that an occasional dip into its pages, by way of light reading, or as a change from the more abstruse studies of the profession, would be as pleasant as profitable. For ourselves, we admit a weakness for knowing what is transpiring in the scientific world, and so greet the weekly appearance of our interesting cotemporary with all the more pleasure.

To pretend to give a sketch of the contents of even one number would be beyond our limits. On the first page of Vol. xvii. we see visions of a new photographic apparatus, centrifugal guns, some remarks on the law of trade marks, and at the end of the last number to hand we have an account of the Mont Cenis summit railroad—so our readers will see that they can take their choice of a very considerable variety.

All the most valuable discoveries are delineated and described in its issues, so that, as respects inventions, it may be regarded as an illustrated Repertory, where the inventor may learn what has been done before him in the same field which he is exploring, and where he may bring to the world a knowledge of his own achievements.

The contributors to the *Scientific American* are among the most eminent scientific practical men of the times.

The American Law Review. October, 1867. Boston: Little, Brown & Co.

The last number of this admirable publication has been received. The editorials are: an article on "Liability as Partner" (to be continued)—a masterly review of the English cases on the subject and how they are affected by decisions of the United States Courts; and then an article under the heading, "Railroad Legislation," which appears to be as much in confusion in America as anywhere else, and according to this article in urgent need of reform. We are next given a sketch of Chief Justice Shaw, for thirty years Chief Justice of the State of Massachusetts, whose name was, "taken for all in all, the first in the judicial annals of his State," and if the review of his life and judicial career be faithful, he must in reality have been fully as able and respected as common report has made him. Mr. Jeaffreson's "Book about Lawyers" is given due meed of praise, as we hope will more fully appear hereafter, if we can find space for a transcript of the review of it.

We have also the reports of some important cases, a continuation of the Digest of the English Law Reports (and as to this we again desire to acknowledge the assistance we derive from it); then a selected digest of state reports, containing many cases of especial interest in this country; then book notices, a list of new law books published in England and America since July, 1867; and to conclude, a continuation of the summary of events.

An increased circulation of this Review amongst the profession of the Dominion would testify to their discrimination.

The American Law Register. Philadelphia: $4 per annum.

The leading articles in the October number of this valuable publication are: The Constitutionality of the Exemption clause of the Bankrupt Law, of peculiar interest to United States lawyers: and a very interesting letter from Dr. Francis Lieber to a member of the New York Constitutional Convention, revised, with additions by the author. We notice in a case of *Jackson Insurance Co.* v. *Stewart*, that it is held that statutes of limitation are suspended during a state of war, as to matters in controversy between citizens of the opposing belligerents—a doctrine which could not have helped the Lord Chancellor in the case of *Scagram* v. *Knight* (ante p. 266), in arriving at the opinion he there expresses as to the suspension of the operation of the statute.

We draw largely also from this publication, so that our readers can judge that we at least appreciate its contents, and we hope they do likewise.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Fees to counsel in matters in the Bankrupt Court.

It is a matter of some importance to legal practitioners, to know what counsel fees can or ought to be taxed in matters in the Bankrupt Court. I had occasion not long since to have a bill of costs taxed by the clerk of the County Court of the County of York, in an insolvency matter. I had been acting for an opposing creditor for two years. The opposition was very arduous—the case one of the most complicated in Canada West, and the indebtedness of the insolvent over $200,000. The claim I supported was $16,000. At the final argument, at this final application of the insolvent for a discharge, I occupied parts of several days in arguing the case, and parts of several days in listening to arguments of counsel. One would have supposed that in such a case, if in any, full counsel fees should have been allowed. The case came before the junior judge of the County of York, now acting, to say what counsel fees should be allowed, and whether Superior Court counsel fees or those taxed in the County Court, should be the rule in this and in all similar cases in bankruptcy. The junior judge decided that he must be guided by the County Court tariff of fees to counsel, and that he could not give a counsel fee exceeding $14 for all the arguments I have alluded to, to the creditor's counsel. In other words, that a case involving great research into facts and documents, as well as into law cases, and occupying as much time as several trials at the assizes, requiring comments on evidence taken, must be looked on as one coming within the County Court tariff; and that he had no power to go beyond that tariff. The question is then—is this view of the judge right. I submit with all respect for the judge, that he is wrong.

This decision shows how necessary it is that great care should be taken in these decisions by County Court Judges, and that they should not forget when settling costs that they were once practising lawyers themselves, and that the labourer is worty of his hire, the practitioner quite as much as the judge, and that the amount of that hire should be proportioned

to the labour and skill expended, particularly as in this case he can exercise a discretion. If counsel in important bankrupt cases can only have $14 taxed as the *maximum fee*, it is clear the time they give, and the skill they use, are very poorly paid for.

Now the words of the tariff of fees, when counsel are mentioned, are these:—"Fee on arguments, examinations and advising proceedings, to be allowed and fixed by the judge, as shall appear to him proper under the circumstances."

Looking at this language in connection with the general tenor of the tariff of fees which is evidently framed after the scale of Queen's Bench fees, one cannot see how the judge could come to the conclusion that he was confined to the tariff of an inferior court. He is clearly given a wide discretion in fixing the counsel fees—"He shall fix such fees as seem to him proper under the circumstances" The tariff gives 10s. for instructions, 2s. 6d. for each attendance, and 2s. 6d. for each letter, 5s. for a fee on rules, 5s. for a fee on subpœnas, &c. Just double the sums allowed in the County Courts. The tariff says witnesses are to have the same fees, and sheriffs too, as in the superior courts. The tariff says attorneys are to get $2 for every special attendance on the judge, and for every hour after the first, $1; to be increased by the judge at his discretion. Thus he is clearly given a wide discretion to decide. Yet in the case I speak of, where certainly the highest counsel fees should have been taxed, the paltry sum of $14 for the final arguments, extending over nearly a week in Chambers, was given to the counsel.

The Judge, if governed by the Superior Court tariff, as I contend he should have been—or, using his discretion, could have been—might have given in this case $80, or any sum less, but certainly should have given $30. In the taxation of costs before the Judge there is no appeal: this is the greater reason why counsel should not be put upon the lowest scale of counsel fees.

Toronto, Oct. 10, 1867. C. M. D.

Mr. Jeafferson thinks that there is on the whole a rooted though unreasonable distrust of political lawyers in both Houses of Parliament, but especially in the House of Commons. There seems to be an impression when a lawyer rises to address the speaker "that he is pleading—for place." Many an honorable and able man has been coughed and hemmed down under this unfair and absurd suspicion. Lord Campbell will have it that the Upper House cherish no hostility to lawyers; but that depends on circumstances. They liked Eldon and Lyndhurst; but Brougham, Erskine, and Westbury had scant courtesy from the hereditary legislators; and Thurlow was both feared and detested. He was fully capable, however, of asserting himself. When on one occasion the Duke of Grafton insolently taunted him with his plebeian origin, Thurlow fixed upon him his "terrible black eyes," surveyed him deliberately from head to foot, and, in a grand voice, said, "I am amazed." A fearful pause ensued, during which the unhappy duke shuddered at his own meanness and his antagonist's revenge; and then in a louder tone, Thurlow went on:—"Yes, my lords, I am amazed at his grace's speech. The noble duke cannot look before him, behind him, or on either side of him, without seeing some noble peer who owes his seat in this House to successful exertions in the profession to which I belong. Does he not feel that it is as honorable to owe it to these, as to being the accident of an accident? To all these noble lords the language of the noble duke is as applicable and as insulting as it is to myself. But I don't fear to meet it single and alone. No one venerates the peerage more than I do; but, my lords, I must say that the peerage solicited me, not I the peerage. Nay more, I can and will say that, as a peer of Parliament, as Speaker of this right honorable House, as Keeper of the Great Seal, as Guardian of his Majesty's conscience, as Lord High Chancellor of England—nay, even in that character alone in which the noble duke would think it an affront to be considered, as a man—I am at this moment as respectable—I beg leave to add, I am at this moment as much respected—as the proudest peer I now look down upon."

Sir Thomas More himself was full of quiet humor, and endless good things uttered by him are in vogue. He conveyed this humor with him to the block. "Finding in the craziness of the scaffold a good pretext for leaning in friendly fashion on his jailor's arm, he extended his hand to Sir William Kingston, saying 'Master Lieut. I pray you see me safe up; for my coming down let me shift for myself!' Even to the headsman he gave a gentle pleasantry and a smile from the block itself, as he put aside his beard so that the keen blade should not touch it. "Wait, my good friend, till I have removed my beard,' he said, turning his eyes upward to the official, 'for it has never offended his highness!'"

Hatton once uttered a capital pun:—"In a case concerning the limits of certain land, the counsel on one side having remarked with explanatory emphasis, 'We lie on this side, my lord;' and the counsel on the other side having interposed with equal vehemence, 'We lie on this side, my lord,' the Lord Chancellor leaned backwards, and drily observed 'If you lie on both sides, whom am I to believe?'"