DIARY FOR AUGUST.

1. Wed..Abolition of slavery in British Empire, 1834.
5. SUN..*10th Sunday after Trinity.*
12. SUN..*11th Sunday after Trinity.* Disraeli made a peer, 1876.
13. Mon..Sir Peregrine Maitland, Lieut.-Governor, '18.
14. Tues..Law Society Primary examination
17. Fri....General Hunter, Lieut.-Governor.
19. SUN..*12th Sunday after Trinity.*
21. Tues..Long vacation ends. First intermediate examination.
22. Wed..Second intermediate examination.
23. Thur..Attorneys examination.
24. Fri...Examination for call.
25. Sat....Examination for call with honour.
26. SUN..*13th Sunday after Trinity.*
27. Mon..Trinity term. Law Society Convocation meets
28. Tues..Law Society Convocation meets.
30. Rehearing term in Chancery.

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THE
Canada Law Journal.

Toronto, August, 1877.

It is only under very peculiar circumstances, and when public interests require it that the lay press should bring before the public for discussion the conduct of the Judges of the land. It was therefore with much regret that we read recently some uncalled for observations in a daily newspaper published in Toronto, alleging a breach of one of the provisions of the Dunkin Act, by a learned Vice-Chancellor. It is almost needless to say that the information on which the articles were founded did not shew that there had been any infraction of the law. The learned and hospitable Judge is not therefore in any way called upon to take any notice of the matter, even should he under any circumstances think proper to answer the charge. We only now allude to it to protest against the too common practice of dragging the judiciary before the public to try and make some point in some disputed question of political or public interest, thereby doing an immense harm to all and good to none.

CURIOSITIES AND LAW OF WILLS.

(*Continued from page 186.*)

Some judges, however, think that any stipulation in restraint of marriage is an unwarrantable interference with personal liberty. Hear what one in Pennsylvania says, "the principle of reproduction stands next in importance to its elder-born co-relative, self-preservation, and is equally a fundamental law of existence. Not man alone, but the whole animal and vegetable kingdoms, are under an imperious necessity to obey its mandates; from the lord of the

forest to the monster of the deep, from the subtlety of the serpent to the innocency of the dove, from the celastic embrace of the mountain kalmia to the descending fructification of the lily of the plain; all nature bows submissively to this primeval law; even the flowers which perfume the air with their fragrance, and decorate the forests and fields with their hues are but curtains to the nuptial bed. The principles of morality, the policy of the nation, the doctrines of the common law, the law of nature and the law of God unite in condemning it, and the condition attempted to be imposed by this testator upon his widow:" *Commonwealth* v. *Stauffer*, 10 Penn. 350.

Mr. James Robbins and Mr. Edward Concanen, both of whom died in London in the last decade, held very opposite views as to the proper dress for their widows; the former by his will directed "that in the event of my dear wife not complying with my request to wear a widows' cap after my decease, and in the event of her marrying again, that then, and in both cases, the annuity payable to her shall be £20 per annum and not £30." Mr. Concanen on the other hand, says, "And I do hereby bind my wife that she do not after my decease offend artistic taste, or blazon the sacred feelings of her most sweet and gentle nature by the exhibition of a widows' cap."

A legatee in New York, and some of the other states, has the happiness of being able to demand payment of his legacy before the expiration of the year upon giving the executors a bond with two securities to refund in case of deficiency.

An interesting account is given of a bequest made in 1736 by one Henry Ranie, a London brewer, to provide for the marriage of poor maids; through its instrumentality some three hundred girls have received marriage portions. Commodore Uriah P. Levy, who left a large estate, real and personal to the people of the U. S., or such persons as Congress should appoint to receive it, in trust for for the establishment and support of an agricultural school, directed by his will "that no professorships be established in said school, or professors employed in the institution, for in proportion to the smallness of the number of the teachers so will industry prevail." The courts, however, held that the people of the United States could not take as trustees, that such indefinite trusts were invalid, and that the English law on such points was not the law of the State of New York (34 N. Y. 584). Strange as it may appear the judicary of New York seems unwilling to allow the commonwealth to obtain any of these rich prizes, for lately when a man made a demise "to the Government of the United States, at Washington, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States," the judges frustrated the patriotic intention by declaring that the the government had no power to take: *People* v. *Fox*, 52 N. Y. 530. Mr. Proffat, however, tells us that the law as decided in New York is not in harmony with the decisions in a large majority of States.

The particulars of the celebrated Thelluson devise are recounted. It was calculated at the time, that when the day came for the division of this fund there would be an income of nearly two millions sterling; the information that the expenses of management for seventeen years exceeded $613,500 leads us to wish devoutly that we had been and still were the solicitors and managers of the estate. We are surprised to see it asserted that when the name of a child is omitted in a will the law presumes that the name of that child has been overlooked by the testator, and the court exercising its equit-

able powers, interferes on behalf of the child to see that it gets its due share of the property; but where the intention is expressed, and much more when a reason is given for cutting off a child, the courts cannot interfere on its behalf, unless on some imputation of insanity or undue influence. We wish our author had given us some authority for this statement. If he had had an opportunity of reading the case of *Sugden* v. *Lord St. Leonards* L. R. 1 P. D. 154, Mr. Proffatt probably would not have said that the English courts do not admit lost wills to probate (p. 161) as the Americans universally do.

Under the head of "Revocation of Wills," there is a decided case given to the effect that a will is not revoked by its being gnawed to pieces by rats, the fragments being pieced together afterwards *Etheringham* v. *Etheringham*, Aleyn 2.) Where a sick man in bed asked for his will that he might destroy it, and an old letter was handed to him which he tore up, supposing it to be the will, it was held that this was a good revocation: *Pryor* v. *Coggin*, 17 Ga. 444. *Smiley* v. *Gambell*, 2 Head. 164.

The way in which wills are affected by the domicile of the testator was most carefully discussed in the interesting case of he will of Koscius, the celebrated Polish General. "Warsaw's last champion," at whose fall "Freedom shrieked," and "Hope, for a season, bade the world farewell" was possessed of a considerable sum of money in the United States, the arrearages of his pay as an officer of the army during the Revolution. Although the gallant patriot left four wills it was held that as to his American property he died intestate, and that the same should be distributed according to the law of France, where Koscius was domiciled at the time of his death: *Ennis* v. *Smith*, 14 Hon. 400.

The concluding chapter "on the construction of wills" reminds one too strongly of Jarman's disquisitions to make the consideration of it very delightful work during the long vacation, although if we had to ponder the question at all we would greatly prefer peering into the pages under review to wading through those of Jarman or Theobald.

We close the book with feelings of gratitude to the author who has enabled us to refresh our memory so easily and pleasantly; with a faint pang of regret that all our examinations are over, (this would be such a delightful book to get up); and with the idea that students will find it a useful primer from which to obtain their first ideas on this important branch of the law, and practitioners in Canada, an equally useful book because of the numerous American decisions cited and remarked upon, and the old English acquaintances so pleasantly recalled to mind. We trust that Mr. Proffatt will soon take up his pen again; one who can thus rapidly combine the *utile et dulce* should not be allowed to remain idle.

LORD ABINGER AND THE NORTHERN CIRCUIT.

Under this heading the July number of *Blackwood* treats us to a most interesting sketch of the life of this well-known Chief Baron, better known to the public, as Sir James Scarlett. Want of space forbids our republishing the article in full. Those who wish to spend a half-hour in vacation time, cannot do better than read it in full in the pages of that prince of magazines, that now lies before us.

Scarlett was, as is well-known, one of the most, if not the most successful advocate that ever addressed a British jury. And one of the funniest evidences of this fact, if not the most conclusive, is the following anecodote of a Lancashire labourer, who had frequently witnessed the forensic contests at the

assizes between Scarlett and Brougham. He said, "I think nowt o' that chap Scarlett, for he has always got the right and easiest case; but Brougham is the man for me, for he has always a wrong case and fights it like a man."

Lord Brougham was for years his principal opponent on circuit, and it was to these two leaders that Mr. Warren was indebted for the characters of Mr. Quicksilver and Mr. Subtle in his famous novel of "Ten Thousand a Year;" Brougham being the former, and Scarlett the latter. We cannot, however, reproduce all the good things in this sketch, and must content ourselves with republishing that portion which "unfolds some of the hidden mysteries of circuit life, and lift the vail that shrouds the jovial doings of the Grand Court;" which is thus referred to by Lord Abinger himself in his autobiography: "On the Northern Circuit at certain periods there used to be a grand supper, at which all the members were assembled, and the expenses of which were paid by fines and congratulations that resulted in contributions to which the principal leaders were subject. These were introduced in general in a ceremonious speech by one of the body, who bore the office of Attorney-General of the Circuit."

The writer of the article in *Blackwood*, who seems to have been on the same Circuit, and personally familiar with most of the incidents referred to in connection with the professional career of Lord Abinger, thus proceeds:

"On one occasion when the late Chief Justice Tindall was Attorney-General, he presented the name of Mr. Scarlett for congratulation (that is a fine) as the inventor of a machine that had the effect of making the judges head move in a direction angular to the horizon, which signified a nod of approbation. But there was another leader of the circuit, whom Lord Abinger does not name, but says that he "was a gentleman of more popular and of much higher reputation than myself"—meaning of course Brougham—who was also present, as the inventor of a rival machine to operate upon the head of the judge; but it had the effect of producing a motion parallel to the horizon—that is, of signifying dissent. This is not a bad counterpart of the story we have already told of the Lancashire rustic. On another occasion, after Scarlett had left the circuit, Pollock, who was the leader, was crowned with an empty punch-bowl. In fact there was hardly any limit to the fun and nonsense that ran riot at the Grand Court. And it was treason to the circuit to absent one's self from it. If any members had not joined it at the assize town, their names were called three times—each time with some ludicrous prefix, which was supposed to hit off the foible or foibles of the man and—stinging truths were often told in the selection of the epithets. We know no occas- when the lines of Burns were more strictly applicable—

> "If there's a hole in a' your coats,
> I rede ye tent it;
> A chiel's amang ye takin' notes,
> And, faith, he'll prent it!"

But no excuse but that of positive illness was allowed to prevail. If the absent barrister was in the circuit town, he was sent for by the officers of the court, who were sworn to do their duty on a bottle of port wine, and he was fetched *nolens volens* into court. Once a friend of ours had quietly slipped away, to attend, we believe, a marriage on the following day; but he was pursued by Hildyard, late M.P. for Whitehaven, and another—we think it was Cresswell—who were the messengers at the time, and being found at an inn in the neighborhood of York, he was literally handcuffed, and brought in that state to the circuit mess. All this was borne with perfect good-humour. The only thing with which we can compare these saturnalia of the bar—

> "Si parva licet componere magnis"—

are the proceedings of the Abbot of Unreason, as described by Sir Walter Scott in one of his novels, when the motly crowd that followed in his train shouted out "A Hall! a hall! for the venerable Father Howleglas, the learned monk of Misrule, and the Right Reverend Abbot of Unreason!" and we must not forget the scene in 'Guy Mannering,' where Counsellor Pleydell is represented, in the midst of his frolicsome companions, engaged in the pastime of High Jinks, "enthroned as a monarch in an elbow chair, placed on the dining-table, his scratch-wig on one side, his head crowned with a bottle-slider, his eye leering with an expression betwixt fun and the effects of wine."

LORD ABINGER AND THE NORTHERN CIRCUIT.

We don't know whether the same practice prevailed on all the other circuits, but it certainly did and still does in some; and records of the proceedings are carefully kept and jealously guarded by the "Attorney-General" of the year. We remember once looking at the records of the Midland Circuit, and the first entry that caught our eye was the following: "Mr. Wallace bets Sergeant So-and-so a dozen bottles of port that the words, *Audaces fortuna juvat*, are not in Virgil;" and then comes an entry, which tells that the Sergeant lost the bet, and the wine was confiscated to the use of circuit mess.

We have been permitted to have access to the records of the Northern Circuit kept during the time that Scarlett was a member of it, and a few extracts from them may amuse our readers.

Scarlett joined the circuit at the summer assizes at York in August 1791, and filled the office of junior. This office, although held by the youngest member of the bar on circuit, confers some dignity and considerable power. The object is to initiate the last comer in all the mysteries of circuit life; and the voice of the new-fledged barrister is as potent in determining questions of professional etiquette as that of the most smoke-dried and venerable leader. Heywood was then "Attorney-General;" and we find that at the Grand Court held at York, Mr. Law (afterwards Lord Ellenborough) and Mr. John Cockell were indicted "for that they had wilfully and maliciously hired a mob to attend a trial of a certain cause, and applaud the speech of Mr. Law with loud noises and shoutings." Law pleaded guilty as to the hiring; and Mr. Chambre being called as a witness, proved that Mr. Law had been offered twenty-five guineas for a copy of his speech at the said trial; and this being thought "relevant evidence," Mr. Law was fined two gallons for the said offence. At the Lancaster summer assizes in 1797, Mr. Topping was congratulated in two gallons for his lucky "miscarriage" in throwing himself out of his gig; and on the same occasion, Mr. Scarlett was congratulated in two bottles "for having argued a demurrer extremely well in court this morning."

At the Grand Court held at York in March 1812, the "Attorney-General" of the year produced the manuscript copy of a London Gazette which had been accidently dropped by Lord Grey, and which "ought to have been published" if Lord Grey had not lost it. It purported to contain several appointments of members of the circuit to important offices; "but," said the Attorney-General, "Mr. Scarlett you perceive, was not included in the Gazette, and he showed the most sensible disappointment, that being his only hope of getting into business at all. So at Guildhall he proclaimed himself a junior at the bar, hoping that by his modesty some good-natured soul would give him something to do. . . . He has been canvassing with great zeal, and says that owing to his likeness to Bonaparte he doesn't now care a farthing about the bar or business, but will ship himself privately in a smuggler and go over to the Continent. He knows a secure way of taking Bonaparte off; and as he is so like him, the French won't know the difference, and he'll have have himself proclaimed Emperor instead. I move that he be proclaimed Emperor, and congratulated accordingly." Mr. William Wypeng, however, proposed that he should be proclaimed "the Scarlet whore of Babylon," which was negatived; and it was declared that his title should be "simply and supremely Emperor." He was then congratulated in two guineas "amid peals of applause."

At the summer assizes at Lancaster, in August 1815, Scarlet held the office of "Attorney-General," and presented for congratulation the name of James Allan Park, on account of a gallant exploit he had just performed. He had gone to Rochefort and challenged Bonaparte in single combat; but "after much shuffling," Bonaparte declined to meet him, but consented to become his prisoner; and Mr. Park "has returned amongst us after delivering up his prisoner to Captain Maitland, to be safely and securely kept without bail or mainprise." He moved that Mr. Park should be congratulated in two gallons. At the same Grand Court Mr. Paine was fined one gallon "for a most fulsome compliment he had paid in open court at the late assizes to an attorney;" and Mr. James Parke (afterwards Lord Wensleydale) was also fined one bottle for the paltry offence of "puffing himself" in an article published in the 'Pilot' newspaper. A similar fine was imposed on Alderson (the well-known Baron of the Exchequer) for the like offence. Scarlett then made a short address, and craved leave to retire from public life and lay down his office of Attorney-General.

At Lancaster summer assizes in 1816, the Attorney-General of the circuit produced a copy of the 'Sunday News,' and called attention to a column headed *Multum in parvo*, which contained amongst other items the following, "Another letter on the subject of Junius. At Scackleton, near York, a goose lately produced two goslings from one egg. A steamboat has

lately crossed the English Channel and ascended the Seine to Paris. The Prince Regent now walks without the aid of a walking-stick. Mr. Scarlett had 82 briefs at Lancaster, in 78 of which he succeeded." The Attorney-General moved that the circuit should determine how many gallons, "not exceeding the number of his successful briefs," Mr. Scarlet should be fined for inserting this paragraph. Mr. Scar-pleaded in mitigation that he had derived no benefit from the artifice he had recourse to, and he was fined five gallons. But as at the present assizes at Lancaster, the 78 successful verdicts of the last assizes had already dwindled down to 50, with small prospect of any increase, Mr. Scarlett was further condoled with in four gallons. At the same Grand Court Mr. Richardson was congratulated in three gallons on his equestrian skill in contriving to throw himself from his horse and "give himself so many beautiful marks on the face."

At the York assizes in 1821, Mr. Scarlett was fined for flattering himself that he had made a good speech for Sir Francis Burdett, whereas the whole merit of the speech belonged to Mr. Blackburn, who, "by his vigour, force and energy, reduced the judges to a perfect state of nonetity. He thundered, lightened, stamped, and roared in such a manner that every one thought that the devil or the Bonassus had broken loose." Mr. Williams (afterwards a Judge of the Court of King's Bench) was condoled with in for not having a nose for snuff, in consequence of which the Corporation of London had not presented him with a box; although, by way of compensation, the electors of Preston, in pure admiration of his talents, had sent him a warming-pan. At a subsequent court, Littledale was fined for having drawn an indictment with one hundred and twenty counts, "not one of which was applicable to the case;" and a quadrille got up in which Alderson, Tindal, Sergeant Cross, and others, danced to the tune of "Fol de rol rol;" "but Alderson setting off wrong, put the rest out, and the whole was soon a scene of confusion."

We must now, however, pass on to a more distinguished name, and introduce Brougham upon the stage. It is well-known that he is the Mr. Quicksilver, and Mr. Scarlett, the Mr. Subtle, in Mr. Warren's famous novel of 'Ten Thousand a-Year,' which first appeared in the pages of The Magazine—and no name could have been more happily devised. It is unnecessary to speak of the prodigious acquirements of Brougham, which are known to everybody; but we doubt whether the public are generally aware of the extraordinary versatility of his powers. We know writings of his, which he published anonymously, full of wit and fun, but of which he has never been suspected to be the author. His greatest speeches, both at the bar and in Parliament, have been collected, and are familiar to us all; but some of his admirable addresses to juries, both on circuit and in London, have not been reported, or can only be found in out-of-the-way corners, and by considerable research.

At the York Lent assizes in March 1822, Brougham was "Solicitor-General." The "Attorney-General" was Courtenay, who brought under the notice of the Grand Court an article in the Edinburgh Magazine which thus spoke of Mr. Scarlett: "He has the manners of a finished and perfect gentleman, and the air of a man of the world. . . . His person is stately and symmetrical, and his physiognomy almost too good for a man." He proposed, therefore, that Mr. Scarlett should take off his coat and show his symmetrical form that he might be congratulated upon it.

"I come next," he said, "to my friend Mr. Brougham, who is thus puffed in the Magazine," alluding to a breach of promise of marriage case—*Thompson* v. *Blamire*—in which Brougham, had been counsel for the plaintiff, "and kept the Court in convulsions of laughter for an hour and a half. Never was poor sinner rendered so unmercifully ridiculous as Blamire, the treacherous lover of the forsaken Sarah. Judge jury, bar, ladies, gentlemen, and 'swinish multitude,' were all equally acted on by the irresistible drollery and comic humour of this wonderful man." The Attorney-General proceeded:—

"Sir, I recollect the case, and it did produce immoderate laughter, but it was at the expense of our friend's own client. He did, however, get a paltry verdict of £100. I recollect a good story about Brougham's features. He stood for Westmoreland, and by means of the grossest bribery contrived to get a few votes. The bribe was a five-guinea piece, covered with pewter, with a likeness of Brougham on it. One voter, showing his piece to a friend, the other said, 'It is not like him!' 'Oh," says the first, 'you miss the twitch in his face, but you cannot get that in pewter.'" Mr. Brougham was then congratulated in two guineas on his "change of features."

In the record of one of the Grand Courts we find competitive translations of the line—

"Flectere si nequeo superos, Acheronta movebo"—

assigned to different leaders of the circuit. One of them, "by Mr. Brougham," is—

"The case, my lords, is closed but ponder well—
For, if you don't, I'll pitch you all to h—l."

Another "by Mr. Holt," is—

"The gods decide against me—stupid boobies!
I'll have a writ of error *coram nobis*."

A capital eclogue, written by the late John Leycester Adolphus, was read out by the Attorney-General at Liverpool in 1839. It was assumed to have been spoken by Sir Gregory Lewin and Joseph Addison, both well-known members of the circuit. The scene is the banks of Windermere, and the time sunset. We have only space for a few couplets—

ADDISON.

How sweet, fair Windermere, thy waveless coast!
'Tis like a goodly issue well engrossed.

LEWIN.

How sweet this harmony of earth and sky!
'Tis like a well concerted *alibi*.

ADDISON.

Pleas of the court are coarse and spoil one's tact,
Barren of fees and savouring of fact.

LEWIN.

Your pleas are cobwebs, narrower or wider.
That sometimes catch the fly, sometimes the spider.

ADDISON.

Thoughts much too deep for tears subdue the court,
When I *assumpsit* bring, and godlike waive the *tort*.

LEWIN.

Tell me the difference first—'tis thought immense—
Betwixt a naked lie and false pretence

ADDISON.

Change we the venue, Knight—your tones bewitch;
But too much pudding chokes, however rich.
Enough! enough! and surplusage the rest:
The sun no more "gives colour" to the west.
And one by one the pleasure-boats forsake
Yon land with water covered called a lake.
'Tis supper-time—the fun is somewhat far'
Dense are the dews, though bright the evening star,
And wightman might drop in, and eat our char.

The two swains were congratulated in one guinea each on their success in bucolic poetry.

At the grand Court at York, held in March 1849, the theme of the Attorney-General's wit was the difficulty felt by the Lord Chancellor in deciding upon the numerous claims for a silk gown made by leaders of the Northern Circuit. Some, of course, were disappointed, and amongst others, Ingham, who was said to have suddenly disappeared; and on the door of his chambers in the temple was found, written in chalk, the following epitaph :—

"The Chancellor he did me bilk;
He said, 'No!' when I asked for silk.
Enquire within for Robert Ingham,
Who lies interred in stuff and gingham."

SELECTIONS.

CURIOSITIES OF ENGLISH LAW.

RELIEF AGAINST PENALTIES AND FORFEITURES.

If Sir Samuel Romilly had lived in these days he might perhaps have modified the contemptuous opinion he held of the capacity of Lord Chancellors in the matter of Law Reform. Law Reform has of late been in the ascendant. To have "views" on that subject has now become a necessary constituent element of the complete lawyer. Even those treatises which only profess to impart the rudiments of legal knowledge to the youthful student, endeavour, with a courageous disregard of the mere exigencies of examinations, to instil some notion of the law not only as it is, but as it ought to be. We all dabble in Law Reform, from the Lord Chancellor to the Law Student. Whether even in these days the highest legal dignitaries are the most efficient law reformers is a question that may perhaps admit of doubt, but there can be no doubt whatever that Lords Westbury, Cairns, Hatherley, and Selborne, and above all, Lord Justice James, have displayed much zeal in the cause of Law Reform. There is indeed some difference of opinion as to whether the latest manifestations of judicial zeal in that direction have been altogether well considered, but no one can deny that the late sweeping enactments betoken a stirring of ideas in high places that to Lord Eldon and the worthies of fifty years ago would have seemed nothing less than portentous. While the Judicature Acts have effected a great revolution in matters of practice, the changes in substantive law have been few and comparatively unimportant. This is a somewhat anomalous state of things. Much remains to be done in the latter department of Law Reform, and the spirit of the time would seem to afford a favorable opportunity for the discussion of certain doctrines which, although established on what was once considered the firm basis of a long line of decisions, have, as we venture to think, very little except their antiquity to recommend them.

There is, perhaps, no part of our judicial system which has been more often made the subject of panegyric than the

jurisdiction assumed by Equity to relieve against penalties and forfeitures. If good intentions are the only test of desert, the heroic expedients resorted to by Equity in its endeavours to enforce fair dealing between man and man cannot be too highly praised. These expedients have, however, been attended with untoward results, and we hope to show that the Legislature would act wisely in abrogating the rule of Law, which (among other evils) in many cases hinders a person from enforcing a penalty he has bargained for on the breach of a contract. It is well known that contracts are often enforced by the sanction of a penalty disguised under the name of "liquidated damages," but (as will be shown) it is only a certain class of contracts which is in practice capable of being so enforced, and the Courts might well be constrained to forego the perplexing distinction which at present obtains between penalties and liquidated damages, and to admit the broad principle that contracts may be legally enforced by the sanction of a penalty on non-performance. It may be observed that the Legislature is in the habit of enforcing obedience to Acts of Parliament through the medium of penalties, and if a person may be called upon to pay a penalty for the commission of an act of the illegality of which he may be ignorant, it is surely no greater hardship, at all events in the absence of special circumstances, that he should be called upon to pay a penalty to which he has purported to subject himself by express contract. The decisions by which the law has been settled, when taken separately, are, it is true, sufficiently plausible, but they are not easily reconcilable. The judicial instinct has contrived, under great difficulties, to preserve a certain semblance of justice, a semblance owing its existence not to steady adherence to the dictates of an inexorable logic, but on the contrary, to the bold disregard of logic which has enabled the Judges to stop short in the middle of any syllogism threatening to lead to an inconvenient conclusion.

There is one familiar and very instructive instance of a decision that would otherwise have worked great injustice, having been rendered innocuous by means of a purely imaginary distinction, namely, the provision for enforcing punctual payment of interest on mortgages. The law on this subject is stated for the edification of Law Students by Mr. Joshua Williams, in his text-book on "Real Property," as follows:—"A curious illustration of the anxiety of the Court of Chancery to prevent any imposition being practiced by the mortgagee upon the mortgagor occurs in the following doctrine: that, if money be lent at a given rate of interest, with a stipulation that, on failure of punctual payment, such rate shall be increased, this stipulation is held to be void as too great a hardship on the mortgagor, whereas the very same effect may be effectually accomplished by other words. If the stipulation be that the higher rate shall be paid, but on punctual payment a lower rate of interest shall be accepted, such a stipulation being for the benefit of the mortgagor is valid, and will be allowed to be enforced."*

It may we think, be gathered from the above quotation that Mr. Joshua Williams does not regard this distinction with any favour, and probably respect for the Bench would not have deterred him from expressing a decided opinion on the matter had he not felt convinced that any comment would be superfluous.

We now propose to take a comprehensive view of the equitable doctrines of Relief against Penalties and Forfeitures, and in the course of the survey we shall point out some other legal "curiosities" not unworthy of comment.

Perhaps the most astonishing "curiosity" connected with this doctrine is the circumstance that first led to the interference of Equity.

One of the grounds on which Equity professes to exercise its jurisdiction (notably in the case of bonds and mortgages) rests on the assumption, which, if it were not true, would be utterly incredible, that persons are in the habit of putting their hands to documents which do not express their real intention. Equity claims to construe written agreements not according to the plain meaning of the words, but according to what it conceives ought to have been the intention of the parties. The respective parties may have declared their meaning in writing as distinctly as possible, but nevertheless Equity, in the

* Lord Northington, in *Stanhope* v. *Manners*, 2 Eden, 199, says: "I never heard or could myself discover the sense of this distinction."

exercise of its discretion, will not only declare that the parties must have meant something quite different, but will carry its declaration into effect by obliging them to act as if they had, in fact, put their hands to such an agreement as it considers they ought to have entered into. This is the Equitable doctrine with regard to mortgages. A mortgage is a document in which an agreement is purported to be entered into between mortgagor and mortgagee, which neither of them intends shall be carried into effect. In this state of things Equity steps in and says to them, "It is clear neither of you intended to enter into any such agreement as is expressed in this document; you meant to enter into quite a different agreement, and you shall be held to have executed that agreement instead of the one you did in fact execute." In the case of mortgages the assumption of Equity was no more than the truth. It is notoriously the fact that in every mortgage the parties purport to enter into an agreement different from the one they intend to be bound by, and such being the case, Equity had a good excuse for coming to the rescue. The assumption of a power to override the express provisions of written documents, and of the faculty of arriving at the real intention of contracting parties not by a perusal of their written declarations, but by the exercise of a refined instinct of justice, was, however, fraught with much danger; and the success of the experiment as to one class of contracts provided a precedent that led to serious difficulty. It is true that the Judges have from time to time, under the pressure of circumstances, given various reasons for relief against penalties; but according to Lord Macclesfield, "the true ground of relief is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired," and this view of the law, transmitted in Tudor's Leading Cases, continues to be put forward as the pretext for interference, though it has not escaped severe judicial criticism.

The absurdity of the proposition that where a person bargains for a penalty on the non-payment of a stipulated sum at a stipulated time he gets all that he expected or desired, if after an indefinite lapse of time he obtains the sum without the penalty, has been more than once forcibly exposed by Lord Eldon. In *Hill* v. *Barclay* (18 Ves. 60) he says: "The Court has certainly affected to justify that right which it has assumed to set aside the legal contracts of men, dispensing with the actual specific performance upon the notion that it places them, as near as can be, in the same situation as if the contract had been with the utmost precision specifically performed; yet the result of experience is that where a man, having contracted to sell his estate, is placed in this situation, *that he cannot know when he is to receive the price when it ought to be paid*, the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the Court can offer as compensation." Here Lord Eldon puts the matter in its true light; the real reason why indiscriminate relief should not be granted against penalties for the non-payment of money at a stipulated time is that by relieving against the penalty you take away all inducement to punctual payment, so that if the principle enunciated by Lord Macclesfield were to be carried out to its logical conclusion, no one would know when he could get in his debts, and all credit would be destroyed. Just as we hang a murderer, not because he has committed a murder, but in order that murders may not in future be committed, in the same way penalties should be enforced, not in order to wreak vengeance on the defaulter, but in order to deter others from making default.

Although the Chancery Judges did not entertain so great a regard for logic as to feel compelled to make it their business to see that no one was obliged to pay his debts till it should be quite convenient for him to do so, still they carried their benevolence with regard to debtors to such an inconvenient extent in decreeing relief against forfeitures of leases for non-payment of rent at any indefinite time after the rent had become payable, that the Legislature had to interfere and obviate what was acknowledged to be a palpable injustice by putting a limit to the time within which relief might be claimed. The admission that a palpable injustice had been inflicted by following out the proposition laid down by Lord Maccles-

field, that a contract to pay a certain sum on a certain day was sufficiently performed "according to the original intent of the case" by paying the money with interest at any future time, ought in common sense to have resulted in the overthrow of the proposition. As a matter of fact, although "the original intent of the case" may at first have furnished the only pretext for interference, for a long time past this ground of jurisdiction has exercised little, if any, effect on the decisions. It should be borne in mind that Lord Macclesfield, in the leading case of *Peachy* v. *Duke of Somerset* (1 Stra. 447), expressly limited the right to relief in Equity to those cases "where the penalty is designed only to secure money;" but in course of time this limitation came to be disregarded, and relief was given not only where the penalty was designed to secure money, but also where it was designed to secure the performance of any contract for the non-performance of which pecuniary compensation could be made, the penalty being in Equity regarded merely as a security for the damage really incurred.

The argument for this extension of jurisdiction would seem to run thus: Where a penalty is designed only to secure money, Equity relieves; damages for the non-performance of a contract, for which pecuniary compensation can be made, may be reduced to a sum of money; Equity regards a penalty for the non-performance of such a contract as designed merely to secure that some of money; therefore, the penalty being, if you look into it, designed in point of fact only to secure money, will be relieved against. Once grant the premises, and it is not easy to avoid the conclusion. It does not at present concern us to inquire into the abstract merits of this extension of Equitable jurisdiction. Let it be granted that there are grounds on which it may be justified, but if the "original intent of the case" is all that is to be looked to, it is surely carrying astuteness to the verge of absurdity for the Court to discover within the four corners of a document whereby A. agrees to buy B.'s house for £1,000, on pain of forfeiting £100 to B. if he fails to carry the agreement into effect, that the real intention of the parties was not that A., on refusing to complete his purchase, should pay B. £100, but that B. should merely have the right to recover from A. such damages for breach of contract as the Court or a jury might be disposed to award; a right which B. would have enjoyed none the less if no penalty had been stipulated for, though in that case he might have run more risk of not getting his money. But we are by no means prepared to assert with confidence that such a construction would not recommend itself to the Judicial intellect. Indeed, it would appear from the Reports that long after the full-blown doctrine came into operation the Judges continued to "lay the flattering unction to their souls" that they were effectuating the true intention of the parties.

That this should be so is, after all, scarcely a matter for surprise, for when we reflect on the somewhat analogous doctrine of conditions *in terrorem*, we appreciate the difficulty of assigning any limit whatever to the ingenuity of the Judges in the construction of the English language, Persons capable of deciding that a testator who gives £100 a-year to his widow, to cease on her marriage, does not really mean the annuity to cease, but only that his widow should think so, and thereby be intimidated into remaining faithful to his memory, clearly do not hold themselves bound by any of the ordinary canons of construction; and surely it by no means exceeds the bounds of possibility that such persons should hold the insertion of a penalty for the non-performance of a contract to be intended merely as a means of frightening a contracting party into performing his agreement, on the chance that he might suppose (contrary to the fact) that it was really intended to enforce the penalty in the event of his failing to fulfil his obligation.

But whatever the precise line of argument may have been by which the Judges justified themselves in supposing that they were carrying the intention of the parties into effect by decreeing that penalties ought to be considered merely in the light of a security for the payment of any damages that might be assessed, it is abundantly clear that the doctrine professed to be based exclusively on the "original intent of the case;" and, as we have seen, that continues, according to the best authorities, as expounded in Tudor's Leading Cases, to be the only osten-

sible ground on which relief is given. Nevertheless, of late years it has been repeatedly held that the only question to be decided is whether the sum to be paid on the non-performance of an agreement can, in point of fact, be regarded as liquidated damages, or whether it comes under the head of a penalty, and if the latter construction is adopted relief is given as a matter of course, so that in effect the Judges now act on the principle that relief against penalties will always be given. Now the bare proposition that Equity relieves against penalties is somewhat broader than that laid down by Lord Macclesfield; his proposition is that Equity relieves against penalties *which were not originally intended to be enforced*, an important qualification, of late entirely ignored. If relief against penalties is not given on grounds of public policy, but only because of the assumed intention of the parties, there can be no reason why the parties should not declare how their contract should be read, and if they choose to declare that what the Court would otherwise deem to be a penalty shall be considered as liquidated damages agreed upon between them, then, according to Lord Macclesfield and the earlier cases, Equity would have no ground for interference. This would seem to be the view taken by Lord Eldon, who says (*Shackle* v. *Baker*, 14 Ves. 469) that under a covenant upon sale of good-will not to carry on the same business as the purchaser, the parties may proceed to ascertain for themselves what shall be the damages for the breach of it, "and unless they are so awkward as to put that in the shape of penalty instead of liquidated damages, there is a perfect and absolute remedy." Still more to the point are the observations of Chief Justice Gibbs in *Barton* v. *Glover* Holt, N. P. 43), who, after observing that in *Astley* v. *Weldon*, 2 B. and P. 346, (sometimes cited in favour of the view that declarations of intention are not conclusive), there was no stipulation that the damages should be liquidated, said with regard to a clause providing that a sum named to be paid on breach of covenant should be considered as liquidated damages, "In the present case, unless the damages are to be considered as liquidated, and definitely ascertained by the parties themselves, the clause in the agreement means nothing."

It would appear then that in the year 1816, when this judgment was pronounced, the authorities favoured the view that although, in the absence of any express declaration by the parties, the Court would look at the whole agreement and collect therefrom whether a sum to be paid on the non-performance of it should be regarded as a penalty or as liquidated damages, nevertheless the express declaration of the parties should always be conclusive. If the "original intent of the case" is all that is to be looked to, surely it follows, as a matter of course, that this should be so. What the Judges have to decide, according to their own showing, is not whether a certain sum which A. has engaged in certain events to pay to B. is or is not, as a matter of fact, in the nature of a penalty, but whether A. and B. really intended payment of it to be enforced, and an express declaration by them that the sum in question shall be considered as liquidated damages is surely quite conclusive on this head, whatever in point of fact may be the real nature of the payment. The only possible object of christening a penal sum by the name of liquidated damages is to rebut the assumption on the part of the Court of Chancery that penalties are not intended to be enforced. A. and B. enter into an agreement; neither Law nor Equity forbid them from putting any price they please on the non-observance of any part of it, although the price agreed upon may be clearly in the nature of a penalty (*e.g.*, where it is agreed to pay hundreds of pounds in case of a breach that a few shillings would put to rights), provided only that they succeed in making their intention sufficiently plain. Since Equity assumes that penalties are not intended to be enforced, clearly the only way of expressing that Equity is in their case mistaken in its assumption, is to call what is, in fact, a penalty by the name of liquidated damages, and, in accordance with this view, the Judges have over and over again declared that where the parties have put their own price upon *any particular breach* of any agreement, the whole amount may be recovered as liquidated damages, notwithstanding that the breach might be set right by the payment of a much smaller sum, except, perhaps, where it consists merely in the non-payment of a definite

sum of money (see *Kemble* v. *Farren*, 6 Bing. 141) so as to bring the case within the statute of Anne against enforcing the penalty on money bonds.

To any but a lawyer it must seem a strange thing that two persons wishing to bind one another to a perfectly legal agreement should have no other way of carrying their wishes into effect except to declare that they desire the Court to put an unreasonable construction on their agreement. If, however, by any contrivance, no matter how childish, it were possible for persons to reckon with reasonable certainty on being able to frame a perfectly legal agreement so that it could be enforced, there would be comparatively little to complain of. If the Judges had had the courage to adhere without flinching to the rule that whenever the contracting parties called a penalty by the name of liquidated damages, it should be deemed that they intended that penalty to be enforced, then a clear and definite rule would have been established, so that persons, with the aid of a competent lawyer, might effectually have prevented the Court from interfering with their wishes.

Unfortunately, the Judges, while still professing to be guided by the intention of the parties, and recognizing in many cases the abstract right to recover penalties however extortionate, provided only they are called liquidated damages, have adopted a course which often amounts in practice to a denial of that right of free contract which in theory they profess to respect. Where an agreement is capable of several breaches of different degrees of magnitude, it is practically impossible to frame a clause of forfeiture which can be enforced. It will not do to stipulate that if the agreement is infringed *in any particular* a specified sum shall be payable as liquidated damages, "for," as Baron Parke observed in *Homer* v. *Flintoff* (9 M. and W. 678), "where parties say that the same ascertained sum shall be paid for the breach of every article of an agreement, however minute and unimportant, they must be considered as not meaning exactly what they say;" * so that what has been declared to be liquidated damages will be construed as a penalty, which will not be enforced, no matter how gross the breach may have been. The Law on this subject has been stated by the Privy Council (*Dimech* v. *Corlett*, 12 Moo. P.C., p. 229) as follows :—"The Law of this country on the question of penalty, or liquidated damages, may be considered, after a great number of decisions—not, perhaps, all of them strictly reconcilable with each other—to be, however, at length satisfactorily settled, and the hinge on which the decision in every particular case turns, is the intention of the parties, to be collected from the language they have used. The mere use of the term 'penalty,' or the term 'liquidated damages,' does not determine that intention, but like any other question of construction, it is to be determined from the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards the arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to the breach of all, or any of them, was intended to be a penalty, and not in the way of liquidated damages."

Baron Alderson, indeed, in the above-mentioned case of *Horner* v. *Flintoff*, suggests that "where some breaches relate to important, and others to unimportant, matters, parties ought to annex a specific penalty to each breach." This suggestion clearly fails to meet the difficulty, and its inadequacy is well illustrated by the very agreement that called it forth.

By that agreement the Defendant promised to buy the good-will, stock-in-trade, and tenant-right of the Plaintiff, who was an innkeeper and farmer. The Plaintiff promised to give the Defendant possession of certain premises together with furniture, farming stock, etc., and in the meantime to pay rates, taxes, etc., and indemnify the Defendant from all costs and expenses by reason of the non-payment of the same. The Defendant promised to pay £100 for the tenant-right, to take the furniture, plate, etc., and to pay the amount of the valuation, and all rents, rates, and taxes, and to indemnify the Plaintiff from the same. Surely, it would have puzzled the learned Baron himself to draw a schedule of liquidated damages

* Really, one would think the Judges had never heard of such a thing as a fiction before.

for every possible infringement of an agreement like this. If any such attempt should ever be made there will indeed be plenty of work for the lawyers. What delightfully perplexing questions might arise out of every item in such a schedule! Testators who make their own wills (including even ex-Chancellors) are well known to be a godsend to the lawyers; how much more the parties who should endeavour to schedule every possible infringement of their agreement. Practically, then, the performance of agreements, of which there may be many breaches, cannot be secured by means of penalties, nor even can moderate damages for the breach of such agreements be settled by contract between the parties, except, perhaps, to a very limited extent, for certain specified breaches capable of being accurately defined. For this unsatisfactory result, which has, of late years, not escaped severe judicial comment, it is difficult to say whether Law or Equity is most to blame.

The cases limiting the right of persons to have their intentions carried into effect by calling penalties by the name of liquidated damages were all of them decided at Common Law, nominally under a Statute of William III., instead of under the Rule of Equity as enunciated, though not apparently for the first time, by Lord Macclesfield; but as it is the unanimous opinion of all the Judges who have ever discussed the point that the Statute was only passed in order to import the Equitable Rule into the Courts of Law, and thereby do away with the necessity of going into Equity for relief, and that the same rule does and ought to obtain in both *Courts*, or, as we now say, *Divisions*, it would seem that Equity is the original offender. But then we must recollect that Equity had, in some cases, a good excuse for interference, owing to the very singular circumstance that persons were in the habit of putting their hands to agreements which did not in fact express their real meaning, a state of things for which the technicalities of the Law were presumably responsible.

There is another doctrine connected with the law of penalties which adds to the difficulty of extracting any intelligible principle from the cases. It has been shown that in the case of a complicated agreement involving many possible breaches, a penalty extending to every breach cannot be made enforceable under the name of liquidated damages, and it has frequently been held that an agreement to buy a public-house, even where the agreement contains no complicated stipulations as to indemnity, valuation, &c., comes within the category of agreements to which no enforceable penalty can be attached. Oddly enough, however, though no penalty, either *eo nomine* or under the guise of liquidated damages, can be stipulated for, yet it is perfectly lawful to stipulate that the intending buyer shall, on signing the contract of purchase, pay a deposit, and that in the event of his declining to complete the sale that deposit shall be *forfeited*. It has lately even been held (*Hinton* v. *Sparkes*, L. R. 3 C. P. 161) that under such a clause of forfeiture an action may be brought on an I.O.U. which has been accepted as a deposit instead of a cash payment.

It is difficult to see on what principle the mere fact of an intending buyer having paid, or promised to pay, a deposit on the purchase-money, should render him liable to a penalty for the non-completion of his purchase, which, but for such payment or promise to pay, could not have been enforced.

The fact is that the assumption of the Court of Chancery, ratified to some extent by statute, of the power of construing written agreements, not according to the plain meaning expressed by the parties, but according to what the Court may consider ought to have been their meaning, has resulted, and could not but result, in numerous contradictions and absurdities. It is often difficult enough to put a satisfactory construction on written agreements, even starting with the assumption that the intention of the parties was to express within the four corners of the agreement what they really meant; but if we start with the contrary assumption, that the parties do not mean what they have said, but something else which the Court is of the opinion, under the circumstances, they ought to have meant, we have clearly constructed for ourselves a very pretty puzzle indeed.

We have already observed that we are willing to give Equity the credit of having been actuated by the best of motives

in tampering with the plain meaning of written agreements, but the policy of the Court, though doubtless well intentioned, was, we cannot help thinking, a mistaken one. The doctrine of relief against penalties, if it is to be justified at all, must be justified on very different grounds from those hitherto assigned, and restrained within very narrow limits. We are aware that, from time immemorial, it has been, and still is, the invariable practice to instance the interference of Equity on behalf of the oppressed mortgagor as an ever memorable example of the courage and dexterity with which the Chancellors frustrated the iniquities of the Law, and contrived to do complete justice between man and man. At first sight this view of the case, no doubt, seems plausible enough. It is certain that the legal position of a mortgagor is one of intolerable hardship, and it is equally certain that although the law of mortgages is by no means free from doubt and difficulty, an ordinary mortgage deed does, owing to the intervention of Equity, work substantial justice between borrower and lender. Equity, then, has provided an efficacious remedy against a particular form of injustice, and is, so far, *prima facie* entitled to our thanks; but before entering final judgment various considerations must be taken into account which, unless we are very much mistaken, will be found quite sufficient to make us pause, and feel uncomfortable doubts as to whether it was altogether politic to lay down the rule that the intention of the parties to an agreement is not always to be deduced from the plain meaning of the document they have subscribed, and to invest the Court with full power and authority to bind persons to the observance of a contract very different from the one which they had in fact executed. In estimating the services rendered by Equity to impecunious mortgagors it would seem to be taken for granted that, but for the intervention of Equity, they would constantly be obliged to submit to the grossest injustice under sanction of the Law. The form of mortgage deed at present in use has, with a few variations, served for so many generations the turn of thriftless landlords and thrifty capitalists, that, at last, it has become impossible for the legal mind to conceive the notion of land being made available for purposes of borrowing, except through the instrumentality of a document drawn up in accordance with the precedents of Bythewood or Davidson. In making this assumption the profession have greatly underrated both the common sense of mankind and their own integrity. It appears to us very certain that if Equity had not interfered the result would have been, not the wholesale and continuous ejection of landlords from their ancestral tenements (which is the view of the case always presented to the law student), but the overthrow of the present absurd form of mortgage, and the substitution of another expressing, in clear and distinct terms, the real agreement between the parties. Equity, by the very process of healing over the surface, has perpetuated. instead of extirpating, the disease it professed to doctor, and, to our thinking, the last state of the patient is worse than the first.

If the only result of patching up the relations between mortgagor and mortgagee had been to perpetuate a form of mortgage purporting to bind persons to stipulations they never intend shall be carried into effect, that of itself would be no inconsiderable evil, for it is quite unworthy of a civilized people that one of the commonest forms of contract should be drawn up in such a way as to require the interposition of the Court of Equity to prevent the perpetration of a gross injustice. Such a clumsy method of doing justice between man and man might recommend itself in an archaic state of society, which delights in tricks and fictions, but is quite out of place in a nation that has deliberately done away with Messrs. John Doe and Richard Roe, Fairtitle and Goodright, and is laying to heart the important lesson that justice ought to be dealt out in a straightforward and intelligible manner. Unfortunately, the heroic remedy adopted for the relief of mortgagors has, as we have seen, led to other results more serious than the retention of an absurd form of mortgage deed. The refined instinct, by virtue of which the Equity Judges felt themselves competent to discover the real intention of the parties to a mortgage, without any other evidence than that afforded by a deed, in which a very different intention had been expressed, was soon brought to bear upon other contracts besides mortgages, to the great gain of the profession and the con-

sternation of contracting parties, who found their agreements construed for them by the light of rules which to the minor disadvantage of entirely defeating the obvious intent of the contract, added the more serious evil of practically curtailing the acknowledged rights of contracting parties and of being uncertain in their application. Nominally it is perfectly lawful to enforce the performance of an agreement through the medium of liquidated damages, but the result of the decisions is, as we have pointed out, to render it impossible to frame a certain class of agreements so as to enforce payment of the damages stipulated for, while on the other hand some arguments may be easily expressed in such a way as to render them enforceable under the sanction of what is, in point of fact, a penalty.

In allowing parties to name their own liquidated damages, the principle of enforcing agreements through the medium of penalties was admitted; surely then it would be wiser to do away with the vexatious and uncertain restrictions encumbering the exercise of a right which is admitted in all but the name, particularly as these restrictions profess, as we have seen, to be grounded not upon motives of public policy, but only upon a notoriously false presumption as to the intention of the contracting parties. This presumption has now afforded work for the Bar, perplexed the Bench, and exasperated suitors, for two hundred years—a sufficiently long trial in all conscience. In venturing, as we have done, to suggest that written agreements should for the future be construed according to the plain meaning of their contents, we cannot do better than shelter ourselves under the authority of Barons Martin and Bramwell. The former learned Judge, while feeling himself bound by the cases to decide against enforcing a penalty for the breach of the agreement before the Court, observed (*Betts* v. *Burch*, 28 L. J. Ex. 269) that in his opinion "persons being at liberty to enter into any bargains they think fit, the proper mode of ascertaining what the bargain is, if it be in writing, is to ascertain what the expressed meaning is, and carry out that meaning. If a person has made an improper bargain, it would be a warning to others not to enter into such bargains. A great deal of the difficulty in the administration of the law arises from the having to ascertain what is the meaning of agreements that parties have made; but if the Court of Law were simply to ascertain what the parties have expressed, and carry those expressed bargains out, much of the difficulty would be removed. I consider, however, that I am not at liberty to act upon that view with respect to that question." Mr. Baron Bramwell said, "I quite agree with my Brother Martin in thinking the best possible thing would be to let people make agreements and keep to them, according to their words, till they are tired of it, and then you will find out that this little piece of paternal legislation—[*i.e.*, the Act of Will. III., above referred to]—has introduced a great deal of mischief because it has introduced a great deal of litigation."—*Law Magazine.*

CANADA REPORTS.

ONTARIO.

(Reported for the *Law Journal* by H. T. Beck, M.A. Student-at-Law.)

COMMON LAW CHAMBERS.

Snow v. Cole.

Judgment, setting aside—Alien—Service—Special endorsement.

When a specially endorsed writ was served in Ontario on the defendant who was described as "of the city of Detroit, in the State of Michigan, one of the United States of America,

Held, that final judgment in default of appearance was irregular, and was accordingly set aside.

[May 19.—Mr. Dalton.]

This was a motion to set aside a final judgment as irregularly signed the defendant being described in the writ as residing in the United States, but having been served in Ontario.

Osler showed cause. The form under C.S. U.C. cap. 22, sec. 15, expresses the writ to be for service in Ontario. Form A, No. 3, at the end of the act is expressed to be for service beyond the jurisdiction. The first irregularity should have been attacked, and the writ could have been amended if necessary. The defendant was temporarily in Ontario, and might have been described as of the place when served. This is the only irregularity, if any, in the proceedings: *Jackson* v. *Spittall,*

L. R. 5 C. P. 542; *Covert* v. *Robertson*, 31 U.C. Q. B. 256; *Herr* v. *Douglas*, 4 Prac. R. 102.

H. J. Scott in support of the motion. This is not such a writ as can be especially endorsed. It is not alleged that the defendant was even a British subject, and the writ described him as without the jurisdiction. If a foreigner, he could not have been served at all: C.S. U.C. cap. 22, sec. 45. Form A No. 1, and A No. 3, are expressed to be for use according to the defendant "*resides* within the jurisdiction," or "*resides* out of Upper Canada." It is not necessary for the defendant to attack the writ: *Hesketh* v. *Fleming*, 24 L. J. N.S. Q.B. 255.

Mr. Dalton thought that the signing final judgment under such circumstances was irregular, and set aside the judgment.*

Ballantyne v. Campbell – Ballantyne v. Martin.

Held, that under sec. 35, Con. Stat. U.C. cap. 22, read with sec. 37, if the bail render their principle to the sheriff of the county in which the action is brought they are entitled to have an *exoneretur* entered on the bail piece, and it is immaterial whether the render be before or after judgment.

[June 21.—Mr. Dalton].

This was an application to stay proceedings in the first suit which was against the sureties in a bail bond, and to enter an exoneretur on the bail bond in the second suit.

The principal had been rendered to the sheriff of the county in which the action had been brought, and the sheriff to whom the writ was directed in consequence returned the writ *non est inventus* before the return day. Judgment was entered against the principal, and the sureties sued before the time limited for returning the writ.

S. Smith shewed cause. After judgment C. L. P. Act sec. 37, should be complied with, and the render should be to the sheriff to whom the writ was directed, and the defendant should have pleaded the render and not have applied in a summary way.

Osler in support of the summons. Sec. 35 and 37 should be read together. The render can be to either sheriff. The writ was returned too soon, and the action commenced before the return day.

Mr. Dalton thought that the render might be made either to the sheriff of the county in which the action was brought, or to the sheriff to whom the writ was directed, and that the action on the bond was brought too soon. An order was made to stay proceedings in the first case and to enter an exoneretur on the bail bond in the second case.

Mitchell v. Mulholland.

Prohibition—Division Courts.

Held, that Con. Stat. U.C. cap. 19, sec. 117, giving the judge power to grant a new trial within fourteen days is only directory, the Court having an inherent power to grant a new trial at any time.

[June 29.—Morrison, J.]

This was an application for a writ of prohibition directed to the Junior Judge of the county of York, and the opposite parties in a Division Court suit, restraining them from proceeding to trial under an order for a new trial made by the Judge, the application having been made after the expiration of fourteen days from the former trial.

D. B. Read, Q.C., supported the summons.

Morrison, J. thought that the section was only directory, and that the judge had power to grant a new trial at any time.

Summons discharged.

CHANCERY CHAMBERS.

Alexander v. Watson.

Notice of motion—Admission of service—Time.

Where a notice of motion was served after four o'clock and service was admitted as of that day, no objection having been taken until the motion was moved in Chambers,

Held, that the admission of service precluded the party served from raising the objection.

Held also, that when the motion is for a better affidavit on production, two days notice is sufficient.

[May 9.—Mr. Stephens].

Motion for a better affidavit on production.

D. Black objected that a four days notice of motion was required: *Abel* v. *Hilts*, 6 Chy. Ch. 122. The service was made after four o'clock on Friday, and Sunday does uot count.

D. M. McDonald in support of the motion contended that the objection could not be taken as it had deen waived by the admission of service.

The Referee—I think the admission of service having been given without any objection to the hour at which it was served, and no objection having been afterwards taken until the argument of the motion, it must be held to have been served on the day on which service was admitted. I think also that where

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* This case has been appealed. It was argued before Morrison, J., and stands for judgment.

the motion is for a better affidavit, two days notice is sufficient.

Ray v. Maas.

Service—Delay.

Service of a bill of complaint will be set aside if made after the time limited, unless the delay is clearly and satisfactorily accounted for, and especially where it is shown that the defendant might be prejudiced by the delay.

[May 31.—Mr. Stephens].

This was a motion to set aside the service of a bill of complaint. The service had not been effected within the time limited. The bill was filed in April, 1876, and the defendant was not served until May, 1877.

Howard, for plaintiff, read an affidavit stating that the defendant's residence was for some time unknown, that it had been necessary to amend the bill, and that there was no intention to delay, citing: *Bell* v. *Hastings*, 7 Beav. 592; *Dalton* v. *Hayter*, 7 Beav. 586; *Tugwell* v. *Hooper*, 10 Beav. 19. The defendants desired to compromise, and their last offer was made since the service of the bill.

Hoyles for defendant. The delay has not been sufficiently accounted for. The utmost deligence should be used in such a case. The lands in question are mining lands, and their value fluctuates. Fraud has also been charged.

The Referee.—I think the delay has not been sufficiently accounted for or excused. The residence of the defendant Maas has been known since September last, and the recessity for amendment since the same date, yet nothing was done for months, while the pleadings and examination of the parties show it to be a case where the plaintiff should use more than ordinary diligence rather than less. The order will go setting aside the service.

Seaton v. Fenwick.

Supplemental answer—Amendment—Limitations, Statute of.

The Court will allow a supplemental answer to be filed setting up as a defence the Statute of Limitations.

[June 5.—Mr. Stephens].

This was a motion for leave to file a supplemental answer setting up a previous judgment and the Statute of Limitations.

H. Cassels for plaintiff. A supplemental answer will not be allowed except to state new facts which have come to the knowledge of the defendant since the filing of the answer. The defence must be meritorious. The defendant is too late to be allowed to plead the Statute of Limitations: *Brigham* v. *Smith*, 3 Chy. Chamb. 313; *Percival* v. *Caney*, 14 Jur. 473.

Hoyles for defendant. The cases cited do not now apply. The Statute of Limitations is now considered a meritorious defence: *Manning* v. *Wilson*. (Dec. 22, '74 —V.C. Blake). Amendments are now allowed at any time: *Hamelin* v. *White*, 6 Prac. R. 120.

The Referee thought that the order should go giving the defendant leave to file the supplemental answer on payment of costs.

Olmstead v. Rutherford.

Recision of order—Next friend.

Upon a motion to limit the time for appointing a new next friend, and in default to dismiss the bill, the question as to the necessity of a next friend cannot be discussed; the original order must be first rescinded.

[June 5.—Mr. Stephens].

This was a motion to limit the time for appointing a new next friend, and in default to dismiss the plaintiff's bill.

Macdonell, for plaintiff, submitted that there was no necessity for a next friend, 36 Vict. cap. 16, enabling a married woman to sue alone.

Hoyles for defendant.

The Referee—I think I cannot consider the point on this application. If the plaintiff's contention now is correct, he must take the necessary steps to get rid of the order which before he assented to; the order must go as asked.

Re Warmington.

Executor—Guardian.

The Court will not make an order allowing payment of money by a guardian where the will gives him full power as executor to distribute the estate to the parties entitled, and the money is not in Court

[June 2.—Mr. Stephens].

This was a motion for an order authorising the guardian of one Joseph Warmington, to pay over to him his share of stock, he having come of age.

Hamilton in support of the application.

The Referee—The executor does not require the order of this Court, he has all the necessary authority under the will for payment to the parties entitled, as they attain their majority. The funds are not in Court nor is the estate being administered by the Court. I therefore think the order should not be made.

Thompson v. McCarthy.

Mortgage—Redemption.

The purchaser of an equity of redemption in lands pending foreclosure, who has paid off the plaintiff, is not entitled to the assignment of the mortgage debt; he can only demand a re conveyance of the premises or a discharge of the mortgage.

[June 20.—Mr. Stephens].

This was a motion for an order on plaintiff to assign the mortgage in question to the defendant McCarthy, he having paid the amount due on the mortgage to the plaintiff.

Rye for the plaintiff.

The defendant's can compel a re-conveyance and are not obliged to accept a discharge. The plaintiff's solicitor refused to give anything else: *Finlayson* v. *Mills*, 11 Gr. 218; *Clark* v. *May*, 16 Beav. 273; Leith Real Prop. Stat. 350; Story Eq. sec. 1035; *Stronge* v. *Hawkes*, 2 Jur. N.S. 388.

Mulock for plaintiff. The plaintiff is bound to assign the premises, but not the debt. The defendant having been a purchaser of the equity of redemption, his legal position was that he was bound to pay off the mortgage debt: *McDonald* v. *Reynolds*, 14 Gr. 691. All that the mortgagee is bound to do is to transfer the legal estate: *Dunstan* v. *Patterson*, 2 Philips 341-345; *James* v. *Biou*, 3 Swans. 241; Seaton on Decrees, v. 1, p. 439; Fisher Mort. 979, vol. 2, Ed. 1868; *Smith* v. *Green*, 1 Col. 563.

The Referee refused the application so far as it asked an assignment of the mortgage and mortgage debt, the defendant to have the costs of the motion.

Swan v. Adams.

Dismissing Bill—Security for costs.

Where the plaintiff had parted with his interest in the lands in question, proceedings were stayed until security should be given for the costs, or until the suit was revived.

[June 21.—Mr. Stephens].

H. Cassels moved on behalf of the defendant Wilson for an order to dismiss plaintiff's bill, or for security for costs on the ground that plaintiff had parted with his interest in the property in question.

Appelbe for plaintiff contended that defendant was only entitled to have security for costs if plaintiff were insolvent and carrying on the suit for another's benefit: *Mason* v. *Jeffrey*, 2 Chy. Ch. 15. The defendant should have produced a certified copy of the conveyance: Daniel Prac. 270. The case of *Johnston* v. *Thomas*, 11 Beav. 501, shows that the suit is only defective. The plaintiff has a right to go on for his costs: *Wallace* v. *Ford*, 1 Chy. Ch. 282. The proper course was to give plaintiff notice to revive: *Cameron* v. *Eager*, 6 Prac. R. 117.

Cassels in reply. The Court has a discretion in matters of security: *Hagarth* v. *Wilkinson*, 12 Q.B. 851; *Lindsay* v. *Hurd*, (Blake, V.C.) There is no prayer for damages, and the plaintiff will not be permitted to harass the defendant when his interest has ceased. He can have no costs except the filing of the bill.

The Referee thought that the order should go to stay proceedings until security should be given, or the present defective state of the record cured.

Yourex v. Alcombrack.

Taxes—Rents and profits—Purchase money, interest on—Possession.

When a purchaser had paid school taxes for the year and had paid his purchase money, the plaintiff having received the rents and profits up to a time subsequent to the payment of the money into Court, and subsequent to the end of the year for which the taxes had been paid. Upon an application on behalf of the plaintiff to have the money paid out to him, the purchaser was held entitled to be repaid the taxes and the interest on his purchase money during the time the plaintiff received the rents and profits, the plaintiff to have the excess (if any) of such interest over the rents and profits.

[June 27.—Mr. Stephens].

This was an application for the payment out of Court to the plaintiff in a mortgage suit of the amount found due him. The purchaser asked to be paid the sum of $78, the amount of half year's interest, also school taxes for 1876, and that he should be discharged from paying interest on his purchase money to 8th October, 1876. The purchase money was paid into Court May 22, 1876.

Hoyles for purchaser, relied on *Bank of Montreal* v. *Fox*, 6 Prac. R. 217; *Brady* v. *Keenan*, 6 Prac. R. 262; *Liscombe* v. *Gross*, 6 Prac. R. 271.

Crickmore for plaintiff, contended that the conditions of sale made an express contract to pay interest for three months.

The Referee—The order may go on payment by the purchaser of the difference (if any) between the rents and profits and the interest during the period in dispute.

Jackson v. Robertson.

Amendment.

The plaintiff will be allowed to amend his bill after replication without alleging the truth of the proposed amendment, even when the defendant on her examination denied its truth.

[June 27.—Mr. Stephens].

This was an application by the plaintiff to amend his bill after replication filed. The bill was filed for the specific performance of an alleged agreement by husband and wife for sale of the wife's lands. The wife in her answer denied having signed any such agreement, and, on her examination, denied having given her husband any authority to sell the property in question. It was sought to amend the bill by alleging that the husband had signed the agreement as agent for his wife and by her authority.

Hoyles for defendant, contended that the truth of the proposed amendment should be alleged in plaintiff's affidavit.

Watson for plaintiff. The amendment raises a question of law to be determined on the facts.

The Referee granted the order on payment of costs.

CORRESPONDENCE.

Defective Registration.

Toronto, July 28th, 1877.

To the Editor of the Law Journal:

Sir,—In your issue for this month you mention as the first item of legal intelligence that the Supreme Court of Illinois has lately held that the rights of a mortgagee, whose mortgage has been recorded in the books of registry are not affected by the fact that the mortgage had not been duly indexed, referring to *Mutual Life Ins. Co.* v. *Duke*, 4 Cent. L. J. 340.

You need not go so far for a decision on the point. If you refer to *Lowrie* v. *Rathburn*, 38 U.C. Q.B. 255, you will find the point similarly decided by the Court of Queen's Bench in this Province. Although the case was reversed on another ground—a question of evidence—this point is unaffected, and the case remains a decision on such point.

A Constant Reader.

The Law of Dower.

To the Editor of the Law Journal :

Having perused your valuable remarks in the *Law Journal* of June under the caption of "Law of Dower," I examined to some extent the question whether a widow has any *estate* in lands of her deceased husband out of which she is entitled to Dower before assignment thereof; and I venture with some diffidence to submit the result of my researches.

I venture to think that your conclusion "that it cannot be said that the law on this point is settled," is rather a hasty one. I admit that at first blush the cases do seem to conflict with one another; and that the element of uncertainty does seem to prevail; but upon closer inspection this uncertainty, in a great measure, disappears. One is very apt, from a superficial glance at *Acre* v. *Livingstone*, 26 U. C. Q. B. 282, to carry away the erroneous idea, that the Court was divided on this question. Reasoning from these premises, namely, the supposition that there are conflicting opinions of two very learned and eminent members of the bench on the same point, the conclusion would be correct that the law is unsettled and in an unsatisfactory condition. But, upon a more critical perusal of the case, it will be found, as I shall endeavour to show, that the premises are false; that not only did their Lordships not differ on this question, but that the very foundation of the strong and able dissenting judgment of Hagarty, J., is the assumption that there is no estate in the widow, founded upon or arising out of her right to dower; wherein he agrees with the other members of the Court.

The opinion of such a learned and eminent Judge as the present Mr. Justice Strong, who, when Vice-Chancellor of the Court of Chancery, is reported in *Collyer* v. *Shaw*, 19 Gr. 599, as disavowing his concurrence with the "majority

only of the Judges of the Court" in *Acre* v. *Livingstone*, would have thrown great doubt upon the question, had there been but a majority of the Court in favor of the view which I advocate, and had that point come expressly before him for adjudication. *Collyer* v. *Shaw*, however, was not decided upon this question. That the merest glance was bestowed upon *Acre* v. *Livingstone*, and the other cases cited to the Court, is, I think, evident from the reasons which I shall give. One, and the strongest, is that his Lordship is reported to have disavowed his concurrence with the *majority* of the Court. It will be seen that the Court were not divided upon the question, but were unanimous. His Lordship also said that he, nevertheless, was not at liberty to disregard the cases referred to; and therefore must have attached sufficient weight to them to cause him to abandon this ground, and decide *Collyer* v. *Shaw* on another one. Hence, we can hardly conclude that the opinion of the learned Vice-Chancellor is opposed to, or conflicting with, the principle recognized in *Acre* v. *Livingstone*.

Having thus endeavoured, and I trust not without some success, to clear away the doubt which might be founded on *Collyer* v. *Shaw*, I shall attempt to reconcile the opinions of the members of the Court in *Acre* v. *Livingstone*. His Lordship Chief Justice Draper, relying on the authority of the Touchstone and *Doe McKenny* v. *Johnson*, 4 U. C. Q. B. 508, that the widow, being rightfully in possession at her husband's death, is therefore merely a tenant at sufferance, concludes that the language there used correctly described the position of the widow in this case; and that therefore there was no such *estate* in her as a release would operate upon. It was necessary in this case, first to determine that question, in order to ascertain the effect of a certain deed of release, the construction of which was asked the Court. The only operative words in this deed were, "remised released and forever quit-claimed." The question then arose, how far the words used would serve to cause the deed to take effect as a *grant*. And the words used were *per se*, in his Lordship's opinion, insufficient to *pass an estate*. Morrison, J., was of the same opinion. It was on this latter point that Hagarty, J., dissented from the rest of the Court; namely, the question as to whether the deed, containing the operative words of a release only, while failing to operate *as such*, could be construed as a *grant*. And, before the necessity for even discussing this point arose, the learned Judge must have entertained a serious doubt as to the existence of such an estate in the widow as would give effect to the *release as such*. This doubt, if it did not become a certainty in his Lordship's mind, at any rate assumed such vast proportions, that he abandoned all attempts to make the deed operate as a release, and becomes "astute" in discovering means whereby to make it attain its intended object in some other way. It is plain then that his Lordship, for the purpose of this case at least, instead of dissenting from, entirely concurs with the rest of the Court in the opinion that the widow had *no estate* in the lands; otherwise the release would have been operative as such. It is true that we find his Lordship saying, at p. 294, "I should pause long before holding the deed valueless as a mere release." But it is also true that his Lordship premised this, by saying, "It is not necessary for me to decide finally on its possible operation in the * * * sense" of enlarging the interest of the widow. Probably, the gist of what his Lordship's judgment might have been, had he expressed his opinion decidedly on this point, is foreshadowed by what he says at p. 293; and that it was some interest, analogous to that of a disseisor or tenant at will in possession of the *whole*

lands, and not that of the widow in possession *as such* entitled to and claiming her dower, which his lordship contemplated as existing, in order to make the release effective as such if at all, is, I think plainly indicated by the words above referred to, which are as follows: "A disseisor can take a release, so can a tenant at will. It may, without presumption, be termed a subtlety, however respectable by long descent and universal acquiescence, that the widow here in possession should be in a worse position than either of the others. She is either tortiously keeping the true owner out of possession, or she is holding with his assent." In either of these cases, however, the interest (if an estate at all) is not that of the *widow* entitled to dower: It is that of a stranger in possession—it may be a disseisor—it may be (having the terre-tenant's assent) a tenant at will. Let the widow, however, be out of possession, or let her be in under her right of quarantine, and his lordship's words are bereft of their significance. She then would have no interest other than that of a widow claiming dower; and his lordship's remarks fall far short of showing that that interest or right is an *estate*. Did any doubt, however, still exist as to the effect of what his lordship did say is it not dispelled by his own words at p. 292? "I have arrived at this conclusion regarding the deed as *passing an estate* in possession; *not as enlarging an existing interest* by release of reversion." And this is quite agreeable with the conclusion at which the rest of the Court arrived; and which is expressed by the learned Chief Justice in the following words, at p. 286: "The release can operate only by way enlargement; to which it appears to me to be a conclusive answer, that there was no privity of estate between the parties, and that the widow had *no estate* actually vested in her, which was capable of enlargement." In further support of this view, we have the opinion of that learned and careful Judge—Mr. Justice Wilson. In *Miller* v. *Wiley*, 16 U. C. C. P. 542, he says "it is an interest though not an *estate* in the land," and in *Carrick* v. *Smith*, 34 U.C.Q.B., 377, he expresses himself thus forcibly: "She was entitled to dower, but she had never claimed it, nor had it been assigned to her. She had *no estate* in the land, but a right to have one established for her."

We find the same opinion existing on the Equity side and expressed by Vankoughnet C., in *McAnnany* v. *Turnbull*, 10 Gr. 299. "The widow has no *estate* in the land till her dower is assigned to her. * * Until then the widow really has nothing in the land. She merely has a right to procure something, *i. e.* dower."

So much for our own Courts. Let us now turn our attention for a few moments to those in the mother country, since you have mentioned some cases as unsettling the law there.

It is perhaps strange that a doubt should at this day arise as to the widow's interest in this respect, when we find the following in Cruise's Digest, Title VI., cap. 3, S. 1. "The widow has *no estate* in the lands of her husband till assignment;" and the opinion of Lord Langdale, M.R., in *Brown* v. *Meredith*, 2 Keen 527. "Until the lands to be held in dower are assigned, the widow has *no estate* in the lands of her deceased husband. She has a right to have her dower assigned, but has no estate in the lands." Any doubts that do exist must derive their origin from *Lloyd* v. *Trimleston*, 2 Molloy, 81. I must premise my remarks on this case by saying that the contest here was, it is true, between the widow and the heir-at-law; but the widow was in possession, not *as widow* claiming her dower, but as *devisee* under her late husband's will, claiming an estate in the *whole* land; and the validity of this will was in dispute. So that the point in question did not

come up expressly for adjudication. However, the remarks of Sir Anthony Hart in his judgment, which seem to conflict with the conclusion I have already arrived at, are very general in their terms, and in force of expression are peculiarly gratifying to the Milesian taste. He says p. 83, "on the death of the ancestor, the heir has title to enter and retain possession until the Court interposes. * * But my opinion of the law is this, that the heir has, upon the instant of the death of his ancestor in possession, a right to enter, and to turn out *by the shoulders* any other person *except only the widow*, who has a right to stay *until her dower is assigned to her*." Without now considering the question whether this familiar usage, this gentle violence, is forbidden as to the widow by the laws of gallantry, which have such a marked effect on the Hibernian character, we come to the remarks made upon this case in *Talbot* v. *Scott*, 4 K. & J. 117. Sir W. Page Wood in giving judgment says: "It seems to me that the observations of the Lord Chancellor must have been meant to apply to some case of fraudulent or forcible possession which the law will not recognize." And His Honour confesses that he does not understand the Lord Chancellor's words, unless in some such sense as this. But, it will be argued, the widow is excepted from this broad statement; and, before you can make this strong language apply to her, you must show that she is forcibly or fraudulently in possession, and that the law will not recognize that possession. True! but the exception rests upon the assumption that the widow's possession is rightful; and I think that in some cases this ungallant mode of ejectment may apply to her, and in others, not. It is plain that she is rightfully in possession at her husband's death. The question then suggests itself, How long does this rightful possession last?

Under the title *Quarantine*, in Tomlin's Law Dict., we find the following definition: "A benefit allowed by law to the widow of a man dying seised of lands, whereby she may challenge to continue in his capital messuage or chief mansion-house (not being a castle) by the space of forty days after his decease, *in order to the assignment of dower*. And if the heir or any other eject her, she may bring her writ *de quarentinâ habendâ*." Under the title Dower III., in the same work we find that it was enacted by Magna Charta that "she should remain in her husband's capital mansion house for forty days after his death during which time her dower *should be assigned*." But in case of a widow out of possession at her husband's death "a woman entitled to dower cannot enter till it be assigned to her and set out either by the heir, terre-tenant or sheriff in certainty." If these authorities be read together with the opinion of Sir Anthony Hart, it will be seen that they are not inconsistent. If the learned Judge's remarks, excepting the widow from the broad proposition which he enunciates, explained by the observations of Sir W. Page Wood in *Talbot* v. *Scott*, can be referred to the possession of the widow under her right of quarantine, then the whole difficulty disappears. And I think that we may not only, not unfairly presume that they should so be referred, when we find such a weight of authority bearing in that direction, but that we should endeavour to make them consistent with the *dicta* of other learned Judges, if possible, rather than accept them as a conflicting authority. That this is their meaning may further appear from the following. His Lordship says: "She has a right to stay *until her dower is assigned to her*." In the Law Dictionary, above quoted from, it is said, "she may remain forty days *in order to the assignment of dower*." What more consistent than this! But, is her right of quarantine an *estate*? Manifestly not. It will certainly not

follow as a corollray to the proposition of Sir Anthony Hart. And from what other authority does it appear?

It would appear, from the enactment of Magna Charta, that the heir was bound to assign the dower within the forty days; this time being expressly allowed for the proceedings. But if (from the consent of the widow to a voluntary assignment of the land being withheld, or other obstacles being placed in the way, making it necessary to call in the aid of the sheriff, or if from other causes intervening not chargeable to the heir or terre-tenant), the forty days expire before assignment, then, I apprehend, her right to possession ceased to exist; and Sir Anthony Hart's forcible remarks, as explained by Sir W. Page Wood, would no doubt apply; her possession then being one which the law did not recognize; and eviction *by the shoulders* might be the proper mode of proceeding.

Peculiarly applicable are the remarks of Sir J. B. Robinson, C.J., in *Doe McKenny* v. *Johnson*, 4 U. C. Q. B., 208. She is "entitled as we may assume, to remain on the estate on which her husband died, as his widow, for a limited period under her right of quarantine, but *staying without right* beyond that period, her dower being * * not yet assigned to her."

The weight of authority would then appear to be in favour of the view that she has no *estate* till assignment.

E. D. A.

Toronto, July 1877.

Query for Ontario Law Makers.

TO THE EDITOR OF THE LAW JOURNAL:

The following may be found at page 212 of Dwarris' Treatise on Statutes, with reference to the interpretation of obscure passages:

"But when the intention of a testator "is, as is expressed in one of the old "cases, *cœca et sicca*, and senseless, and "cannot be known, the Courts find out "for him the very last intention he was "likely to have entertained when he sat "down to make a will, viz.: that he "meant to die intestate; and the will is "made void."

Is not this fairly applicable to section 11 of the Public School Amendment Act of Ontario, of last session, as respects Union sections in existence at the time of the passing of the Act?

Yours,

W.

FERGUS, July 12th, 1877.

TO THE EDITOR OF THE LAW JOURNAL:

DEAR SIR,—I send you the enclosed advertisement, clipped from a recent number of the Toronto *Globe*, thinking it sufficiently unique to call your attention to it.

LEGAL PROFESSION.—There is a good opening for a clever lawyer, Sault Ste. Marie, Algoma, as there is no lawyer at said place but the Crown Attorney; must be a Reformer; a bonus will be given the first year. John Kelly, M.D., or to William Turner, Merchant.

The bonus idea is certainly original, but what it is for does not appear with sufficient clearness; is it for the amount of cleverness to be displayed, and is that amount to be in proportion to the bonus, or is it in payment for the Reform principles to be advocated by the acceptor of the advertisers' offer? I do not know whether this advertisement will strike you as it has done me, but it looks as if they wanted law laid on like gas or water; but the intention is clearly good and in strict accord with public policy, being evidently for the purpose of abolishing *a monopoly* in Sault St. Marie

Yours truly,

BARRISTER.

[We have some indistinct remembrance of having passed through the metropolis of Algoma on a fishing expedition last summer. Our attention was drawn to the fact that there was a store there, and possibly William Turner, merchant, was

the happy proprietor. We did not see the M.D. It did occur to us, however, that the Crown Attorney was rather thrown away on such a place. But if the advertisement is successful, things may become a little more lively in the way of litigation, and the evident desire of the "M.D." and the "merchant" each to have a legal backer may be gratified.—Eds. L. J.]

TO CORRESPONDENTS.

Senex.—Communication received, but cannot be published as name of correspondent not given.

REVIEWS.

The English Quarterly Reviews and Blackwood. Leonard Scott Publishing Co., 41 Barclay St., New York.

This is of all others the time of year when the profession can find time to obtain an intelligent understanding of the best literature of the day, enabling them, if they so desire, to add to their libraries such books as they may desire to read at length. But even those who have not time or inclination for this can, without the books, obtain a vast amount of information put in the most readable way. No subject of any importance or interest is left untouched, whilst in Blackwood appear from time to time the best works of fiction of the day.

The International Review. A. S. Barnes & Co., New York & Boston.

The number of this valuable Review for May–June contains the following articles: The New Federal Administration; The Life Insurance Question; Disestablishment of the Church of England; The Philadelphia Exhibition; Tennyson; The American Foreign Service; Recent American and European Books; Art Literature; Contemporary Events.

FLOTSAM AND JETSAM.

The *Central Law Journal* enters an indignant protest against the traditional American style of binding law books in full sheepskin, which it calls "abominable." We agree. If a cheap binding is wanted let it be muslin or paper, if a better, then "half calf," or best of all "full calf."

An Arkansas man, sentenced to be hanged, is in a bad way. The neighbouring carpenters refused to build the gallows, and the sheriff doesn't know how. The prisoner is a carpenter himself, and the sheriff has tried several times to have him build it, but he says he'll be hanged if he will.

Mr. Fry is the first Quaker ever called to the judicial bench, and although I suppose we can hardly expect to see every community represented in a country which, as Voltaire says, has thirty-nine religions and only one sauce, yet we have now had on the bench representative, of all the prominent churches and sects and denominations in the country. The Jews are represented by Sir George Jessel, the Baptists by Justice Lush, the Catholics by Lord O'Hagan, High Church by Lord Coleridge, Low Church by Lord Cairns, Broad Church by Sir Fitzroy Kelly, and the highest form of lay morality (churchwardenship) by Justice Denman. Sir Alexander Cockburn and Baron Bramwell, it is said, keep their religious views very much to themselves.—*Mayfair*.

An Eccentric Judge.—The following sketch of Lord Justice Christian, of the Irish Court of Appeal, is a good description of a very peculiar judge: The duties of his office occupy about 100 days per annum. His leisure is, therefore, more than considerable. How do you think he employs his time? This cross, cranky, jealous potentate reads novels from morning till night. He sees no company, and accepts no invitations. He is married, and has a family. He allows his wife, who is a very pleasant lady, and apparently a very happy woman, to entertain as she pleases up to 6 o'clock in the evening. Then all the guests must go. He never appears until then, and he sits down to dinner in silence. He takes breakfast in his study alone, and after a certain hour in the morning no servant dare come to his level of the hall on pain of instant dismissal. In fact, he must not be encountered on the steps. Sometimes he never leaves the house for weeks together, and then he drives out in a carriage and pair, and, flying through the streets, strikes terror to his species. He once nearly broke down, and, addressing the nearest thing to a friend, said:

"If I ever invited any man to my house, I would invite you." And then he stopped. In contradistinction to his marvelous knowledge of law, he is reputed to be the best Shakspearean student alive in the three kingdoms. It is said he can repeat the plays verbatim. So that between the novels and the play, the law and his own sweet temper, Jonathan Christian is by no means an ordinary person. Spiteful people say he is mad; but no signs of failure have shown themselves as yet, and he is now well over sixty years of age.

The Honor of a Thief.—Mr. Serjeant Cox, in his book on the Principles of Punishment, relates the following anecdote: The honor of a thief is not always confined to his fellows: A striking instance of this occured once to myself. A man had been tried, convicted, and sentenced to six months' imprisonment for larceny. As he was leaving the dock a person spoke to him from the floor of the court, and he broke into a flood of tears. Seeing this, I called him back and inquired what it was grieved him. "Oh my lord!" he said, "I am told that my poor wife died in childbed last night from sorrow for me, and that I was not there to close her eyes." At once I resolved to trust him. "If you will give me your word that you will come here on the first day of next sessions to receive your punishment you shall go and bury your wife." Those about me were sure I should never see him again. "I put you upon your honor," I repeated, "I trust you." The promise was given. With expressions of extreme gratitude he left the court. At the next sessions great curiosity was felt as to the result of so uncommon, and as some thought unjustifiable experiment. But when the court met the convict appeared as he had promised, in mourning, saying, "I am come, as I promised, to take my sentence." After a moment's reflection I said, "You have behaved well—and so well that I shall not inflict upon you that sentence I had intended. In the hope that you will repent the past and be honest for the future, I will give you a chance to retrieve the character you have lost. You shall go on your own recognizance to come up for judgment when called on." I have been informed that he has profited by the lesson, and has since preserved an excellent character for honesty and industry.—*Ex.*

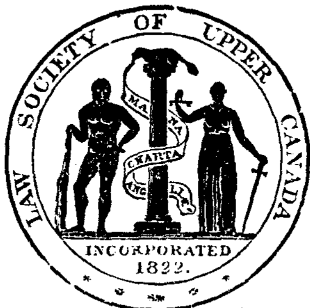
The Abolition of Capital Punishment in Maine.—The results of a year's experience of the abolition of the death penalty in Maine are not such as to give the opponents of capital punishment very much ground on which to found an argument in support of their ideas. A correspondent of the New York *Nation*, writing from that State, gives some facts in relation to the abolishment of hanging which are calculated to strengthen the opinion that the fear of a criminal for his own life is the most deterring influence in preventing his taking the life of another. Maine was admitted into the the Union in 1820, and began its existence as a State with a capital-punishment law. In 1873 this law was amended, so as to leave its execution optional with the governor. The governor very rarely awarded the extreme penalty, and, as a consequence, murders increased to such an extent that "in 1860 Maine had become notorious for its murders." Nevertheless, from 1834 to 1864, a period of thirty years, not an execution took place in that State. "At length," says the writer, "a State-prison convict murdered his warden, and for this act, singularly enough, he was hung by Gov. Corry, as if the slaying of a prisoner's natural enemy were a more atrocious crime than the murdering of a wife or a friend. So illogical an enforcement of the capital law, of course, produced little effect, and murdering went on, until, in 1869, Gov. Chamberlain executed Harris, a negro, for the murder and rape of two old women. But his successor, Gov. Perham, refused to enforce the law, and capital crime soon proceeded more rapidly than ever, until, in 1875, the legislature passed an honest law, restoring the death-penalty without evasion, and in June of that year Wagner and Gordon were hung for the murder of five or six victims—men, women, and children." The effect of the new law and its strict enforcement is very striking. During the entire year following its passage, only one homicide occurred in Maine, and in that case the murderer committed suicide immediately after the commission of his crime. Yet, in the face of this, the legislature of 1876 abolished capital punishment, and the result of one year of the law of 1876 is even more striking than the effect of the passage of the law of 1875. Barely a year has elapsed since the last law was adopted, and, in that time, no less than eleven cruel and unnatural murders have been committed in the State. In addition to this, says the writer, "another alarming result of the abolition of the death-penalty has been a startling increase of high crimes not capital. During the year 1876, the number of our State-prison convicts has risen from 148 to 171, a gain of nearly 16 per cent.; and the last legislature, in February, was obliged to appro-

priate $15,000 towards an enlargement of the prison, although sixty-eight convicts had been removed from it to fill gaol workshops, built within the past three or four years, at a cost of over $60,000, to accommodate prisoners sentenced for not more than three years." Facts like these should be carefully studied by our legislators. They are of more value in the consideration of the advisability of capital punishment than any amount of false sentimentality or dangerous lenity, and point to the conclusion that the gallows cannot be abolished with safety to society.—*The Central Law Journal.*

The English Council of Law Reporting has issued a report for the past year, which shows results highly satisfactory, especially to the reporters, who get a bonus, in addition to their salaries, amounting to £959. The Digest positively realized the sum of £4,395 13s.! The profit on the whole year amounted to £5,768 2s. 2d. The reserve fund for "future contingencies" is now raised to £5,000. The *Law Times* says: "What these contingencies are we do not quite understand; and when the reporters have had a few more bonuses perhaps the council will think of the profession and reduce the annual subscription."—The *New Zealand Jurist* says that the first agreement for partition on record will be found in the 13th chapter of Genesis, where Abraham and Lot, being jointly seized in fee simple of the land round about Bethel, agreed to take certain portions of the country in severalty—Lot going one way and Abraham the other Supposing that they had taken the land as devisees with a right of survivorship, would it be possible to doubt that they intended to dispose of the contingent interest?

Crown Windfalls.—The following are extracts from a Blue-book (recently issued by a departmental committee of the Government, called the Legal Business Committee) which contains some interesting information on a subject of special moment to a good many people—viz., what becomes of the estates of intestates dying without known next of kin. Mr. F. Hart Dyke, the late Queen's Proctor, whose duties have recently been transferred to the Solicitor of the Treasury, when examined before the committee, deposed as follows:—I take out letters of administration, and get in all the money for the Government in connection with the estates of intestate bastards and *bona vacantia*. . . . I recommend the Lords of the Treasury as to the disposition of the balance of the effects. . . . The Solicitor to the Treasury is appointed administrator . . . I am known all over the world, and I correspond with solicitors and the people interested before they come to the Treasury. . . . I ascertain what the effects are either at the Bank of England or with various public bodies. . . . Mr. Stephenson gets in the effects. . . . Sometimes there are large and heavy pedigree cases. . . . In a heavy case, a short time ago, I fancied it was rather a fraudulent case on the part of the party who set up the claim. I got the facts together and took counsel's opinion. . . . I went on and won the case, and a large sum was recovered. . . I have a lot of administrations going in shortly, and among there is one estate worth about 35,000*l.* Occasionally I have much heavier amounts even than that. . . . All these estates are vested in the Crown; they belong to Her Majesty in right of her royal prerogative. . . . There are doubts in some cases as to whether we should oppose a will or not . . . When bastards die there are always plenty of people only too ready to seize hold of their property and get wills made. Not very long ago I had two cases of this kind, but the law officers advised there was not sufficient evidence to justify proceedings. . . . In one case there was a commission to America. . . . It was an estate worth 70,000*l.*, I think. . . . In ordinary cases the course of procedure is this: I receive a letter stating A. B. is dead; that he had such and such property; that he was a bastard, or has left none but illegitimate relatives. Thereupon, I write a letter requesting further facts and particulars as to where the property is situated, what it amounts to, and so forth. . . . I find out who the next of kin are, or the persons to whom the Crown should make grants, and I recommend accordingly. . . . I do not know much about the real estate, because I have nothing to do with it. But, as regards the personal estate, the difficulty is to find out who are the next of kin. . . . In one special case I recommended the Government to sell the estates. . . . There were three or four farms in Hampshire worth 25,000*l.* or 30,000*l.* . . . I have got the money, and the residue will soon be divided. There was a very nice place down in the Isle of Wight. . . . I take out from forty to fifty administrations in a year. . . . Some are large amounts. . . . 120,000*l.* and sums of that sort. . . .

A perusal of the foregoing will show that it is possible for a good many wealthy people to pass out of existence *sans* known relatives. Three recent large 'Crown windfalls' occur to me: 250,000*l.*, Mrs. Mangin Brown, Chancery proceedings pending; 140,000*l.*, Mrs. Helen Blake, Chancery proceedings also pending; 40,000*l.*, Mr. Paterson, of Kilmarnock, as to whose estates a discussion has recently taken place in the House of Commons.—*English Law Journal.*



LAW SOCIETY OF UPPER CANADA.

OSGOODE HALL, HILARY TERM, 40TH VICTORIA.

DURING this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

ALBERT CLEMENTS KILLAM.
THOMAS HODGKIN.
CORNELIUS J. O'NEIL.
FRANCIS BEVERLEY ROBERTSON.
HENRY ERNEST HENDERSON.
HAMILTON CASSELS.
FRANCIS LOVE.
WILLIAM WYLD.
THOMAS CASWELL.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

GEORGE EDMINSON.
FREDERICK W. COLQUHOUN.
EDWARD O'CONNOR.
JOHN BERGIN.

The following gentlemen received Certificates of Fitness:

J. H. MADDEN.
H. CASSELS.
J. W. GORDON.
J. DOWDALL.
C. J. O'NEIL.
T. M. CARTHEW.
T. J. DECATUR.
T. D. COWPER.
A. W. KINSMAN.
C. MCK. MORRISON.
C. GORDON.
F. S. O'CONNOR.
G. S. HALLEN.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

CHARLES AUGUSTUS KINGSTON.
JOHN HENRY LONG.
JAMES J. CRAIG.
WILLIAM FLETCHER.
LEONARD HARSTONE.
PATRICK ANDERSON MACDONALD.

Junior Class.

BENJAMIN FRANKLIN JUSTIN.
JOHN F. QUINLAN.
JOHN WILLIAMS.
JOSEPH WILLIAM MACDOWELL.
PHILLIP HENRY DRAYTON.
THOMAS A. GORHAM.
JAMES R. BROWN.
GEORGE J. SHERRY.
HECTOR MCKAY.
D. HENDERSON.
ALEXANDER CARPENTER BEAZELEY.
JOHN BERTRAM HUMPHRIES.
LAUREN G. DREW.
HERMAN JOSEPH EBERTS.
SOLOMON GEORGE MCGILL.
DAVID JOHNSON LYNCH.
THOMAS HENRY LOSCOMBE.
JOHN VASHON MAY.
GEORGE MOIR.
J. H. MACALLUM.
HUGO SCHLIEFER.
DAVID ROBERTSON.
ANGUS MCB. MCKAY.
CHARLES RANKIN GOULD.
WILLIAM JAMES COOPER.
EDWARD STEWART TISDALE.
FRANCIS MELVILLE WAKEFIELD.
ALEXANDER STEWART.
THOMAS MILLER WHITE.
JOHN ARTHUR MOWAT.
HENRY BOGART DEAN.
GEORGE ROBERT KNIGHT.
HUMPHREY ALBERT L. WHITE.
JOHN WOOD.
GEORGE BENJAMIN DOUGLAS.
ALEXANDER HUMPHREY MACADAM.
HUGH BOULTON MORPHY.
WILLIAM HENRY BROUSE.
GEORGE J. GIBB.
FREDERICK E. REDICK.
WILLIAM MASSON.
EDWARD GUSS PORTER.
THOMAS ROBERT FOY.
HENRY ALBERT ROWE.
THOMAS H. STINSON.
STEWART MASSON.
FRANCIS EVANS CURTIS.
WILLIAM STEERS.
ROBERT TAYLOR.
HENRY M. EAST
ARMOUR WILLIAM FORD.

LAW SOCIETY, HILARY TERM.

Wm. Martin McDermott.
Charles W. Phillips.
Wellington Smaill.
John Clyde Grant.
George Merrick Sinclair.
George Walker Marsh.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Sensmith.
John Baldwin Hand.
James Barrie.
George Frederick Jelfs.

Articled Clerks.

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.
J. A. Lougheed.

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

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

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

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

MATHEMATICS.

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

ENGLISH.

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

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:

FRENCH.

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

or GERMAN.

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

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

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

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

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

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.