DIARY FOR SEPTEMBER.

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

The Local Courts'

AND

MUNICIPAL GAZETTE.

SEPTEMBER, 1871.

LAW REFORM COMMISSION.

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

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

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

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

JUDGMENT SUMMONS.

We are not in the habit of hearing much in this couutry about the oppression of the system which is said to allow a debtor to be imprisoned for non-payment of his debts. But when we do, it very often turns out that the imprisonment is more in the nature of a punishment for contempt of Court, or for fraud on the part of the debtor. The following remarks from a legal periodical in England shew that a good deal of virtuous indignation is felt there, as was the case in this country when the subject was before the House of Assembly last session. The *Solicitors' Journal* says:

"Several newspapers have been during the last few days indulging in some choice vituperation against the judge of the Lambeth County Court for having committed a debtor to prison for forty days for non-payment of a debt of a few shillings, the costs being represented as considerably more than the debt. The case is put forward as one of an oppressive landlord using the machinery of the county court for the purpose of punishing an innocent man, and the judge lending his authority to the rich man to enable him to gratify his vindictiveness against a tenant who was too poor to raise a few shillings. The improbabilities of the case thus stated seemed so great, that we have caused inquiries to be made into the exact facts, and we find that they are as follows:—The case was that of *House* v. *Pike*, heard in the Lambeth Court on the 22nd of December, 1869. The parties are in the same position in life, earning, as labourers, from £1 to £1 4s. per week. The plaintiff had let a room to the defendant, and the action was brought for 12s. 3d. rent in arrear when the defendant gave up possession. The defendant appeared and pleaded that he had received notice to quit, and he was not liable for rent after that notice, although he occupied more than a fortnight afterwards. The judge told him that was all nonsense, he must pay rent for the whole of the time, and then, after inquiring about his means to pay, made an order for payment at 4s. per month. The defendant declared that he only owed six or seven shillings, and would pay no more. In March, June and July in the following year, judgment summonses were issued, none of which the plaintiff was able to serve, and the plaintiff had to lose the costs in each case. Ultimately in April this year a judgment summons was served, and came on for hearing on March 8, when the defendant not appearing, the plaintiff's wife gave evidence as to defendant's means of payment. The judge said it was quite clear he could have paid the sum of 15s. 3d., the original debt and costs, in a period of nearly a year and a half. It was a case of mere obstinacy, apparently because the defendant was not allowed to be judge in his own case, and he should mark his sense of the defendant's conduct by committing him for forty days. Probably most readers will think that considerable ingenuity was required to make out of these facts a case of 'landlord's oppression' and 'county court tyranny.'"

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

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

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

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

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

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

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

LORD JUSTICE MELLISH has intimated a strong opinion that a letter written "without prejudice" cannot be a sufficient acknowledgment to take a claim out of the Statute of Limitations.—*Law Times.*

SELECTIONS.

NEGLIGENCE — TRESPASS — LANDLORD — TENANTS.

Carstairs v, *Taylor*, Ex., 19 W. R. 723.

In this case the attempt was made to push the rule laid down in *Rylands* v. *Fletcher* (14 W. R. 799, L. R. 3 H. L. 330) to an unwarrantable length. The plaintiff had hired of the defendant the ground-floor of a warehouse, the defendant himself occupying the upper part of the premises. A rat gnawed a hole in a box, into which the gutters of the roof collected the rainwater, and from which it was discharged into the drains; and through this hole the rainwater entered the warehouse, and penetrated to and damaged the plaintiff's goods. The contention that there was any obligation on the defendant, as landlord, to keep the premises water-tight in all events, was not very strenuously urged, and there was no ground to impute negligence; but the principal argument used for the plaintiff was that the defendant had collected the water in an artificial mode, and that it was by reason of his so collecting it that the mischief had happened. It was in this way that the plaintiff sought to take advantage of *Rylands* v. *Fletcher;* but an obvious distinction was pointed out by Bramwell, B., namely, that in that case the defendants had done what they did for their own purposes entirely, whereas here the collection of the rainwater by the customary apparatus was for the benefit of the plaintiff as much as of the defendant. Much reliance was placed on *Bell* v. *Twentyman* (1 Q. B. 766), and particularly on some expressions used by the court in delivering judgment. But it seems not to have been noticed that in that case the declaration averred, and the plea did not deny, the existence of a duty on the defendant to cleanse the watercourse, the obstruction of which was complained of, and this was the basis of the whole of the plaintiff's argument. The only point for the decision of the court (besides one which does not concern us) was, whether the allegation in the plea that defendant cleansed within a reasonable time after notice was an answer. The court would have been going very much out of their way if they had considered and decided the question of whether the alleged duty did or did not exist; indeed there were no materials before them for doing so. Yet this is what they are supposed to have done at p. 774. If, however, the passage about the middle of that page is examined, it will, we think, be evident that the whole difficulty arises from an error of punctuation. The court having disposed of an argument by which the defendant atempted to throw the burden of the obstruction upon the plaintiff, and so escape from the liability which the admitted duty would have cast upon him, said, "If the defendant was liable, on general principles he was bound to cleanse and keep open the watercourse at all events." By the omission of the comma after "liable" and its insertion after "principles," the court is made by the report to intimate an opinion that the owner of a watercourse is at common law bound to keep it clear at all events; a proposition clearly untrue, and so startling that it ought at once to excite suspicion.

LOCAL BOARD. — LIABILITY FOR NEGLIGENCE.

Foreman and Wife v. *Mayor of Canterbury*, Q. B. 19 W. R. 719.

The plaintiffs sued the defendants in respect of injuries sustained by them through the overturning of their car by a heap of stones, left at night on the road, unguarded and unlighted, by men employed by the defendants, (acting as a Local Board of Health) to repair the road. Since the decision in the *Mersey Docks* v. *Gibbs*, (14 W. R. 872, L. R. 1 H. L. 93), it would seem that the liability of the defendants was clear; and in fact the only point raised was, that the defendants must be taken to have acted not as a Local Board, but as surveyors under s. 117 of the Public Health Act, 1848, and as such they were not liable. This was a transparent absurdity; and the case of *Young* v. *Daviest* (10 W. R. 524), which was cited in support of it, was wholly inapplicable, for it decided nothing but that a surveyor was not liable to an action for damage caused by non-repair. No one ever suggested, and certainly no case has decided. that if a surveyor himself employed servants to do work, whether on a public road or elsewhere, he could not be liable for their negligent acts. The utility of the present case is perhaps confined to the express discrediting of the decision in *Holliday* v. *St. Leonard's*, *Shoreditch* (9 W. R. 694); there could be no doubt that that case was in effect overturned by *Mersey Docks* v. *Gibbs*, but so apt are lawyers to cite cases already dead and twice killed, that it is useful to have the distinct declaration of an authoritative tribunal upon any such case, that it is dead indeed.—*Solicitors' Journal.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

STATUTE OF LIMITATIONS.—A person who has been in possession of lands for upwards of 20 years wrote to the heir of the true owner, acknowledging his title as such heir:

Held, that such acknowledgment having been made after the title by possession was complete, did not take away the statutory right which possession gave.

An acknowledgment to a party's trustee is sufficient to take a case out of the Statute of Limitations.

P, being in possession of land of which he was not the owner, made a verbal gift of the land to C, but afterwards ejected him. C then obtained a conveyance from the owner. More than 20 years had elapsed from the time that the Statute of Limitations began to run in favor of P against the true owner:

Held, that C's possession did not interrupt in C's favour the running of the Statute; that the owner being barred, C, his grantee, was barred also.—*McIntyre* v. *The Canada Co.*, 18 Grant, 367.

DOWER IN RESPECT OF TIMBER CUT—COSTS OF INJUNCTION SUIT.—In case of land of which a widow is dowable, but in which her dower has not been set out, if the timber is cut down she is entitled to the income arising from one-third of the amount produced.

In such a case the widow had reason to apprehend that the owner intended to fell the whole of the wood; it was shewn that in fact he had no such intention; but he had an opportunity of undeceiving her, and did not avail himself of it:

Held, that proof that he had not the intention imputed to him, did not exempt him from liability to the costs.—*Farley* v. *Starling*, 18 Grant, 378.

CHARITABLE BEQUESTS—SUPERSTITIOUS USES.—A testator bequeathed £100 to the Society of St. Vincent de Paul, and directed the residue of his estate to be converted into cash, and paid to the House of Providence. These were voluntary unincorporated associations.

Held, that so far as they could be paid out of personalty these legacies were good, and should be paid over to the persons having the management of the pecuniary affairs of the institutions named.

A bequest by a member of the Roman Catholic Church of a sum of money for the purpose of of paying for masses for his soul, is not void in this Province.—*Elmsley* v. *Madden*, 13 Grant, 386.

BUILDING SOCIETIES—USURY LAWS.—Building Societies are virtually exempted from the operation of the usury laws.

In mortgages taken by a building society for advances of borrowing members, it is not necessary to express in the instruments how much of the interest reserved is a bonus in respect of the sum advanced, and how much for interest.—*The Freehold Permanent Building and Saving Society* v. *Choate*, 18 Grant, 412.

INDICTMENT FOR BIGAMY.—*Held*: 1st. That it is incumbent upon the Crown under 4 & 5 Vic. ch. 27, sec. 22, (ch. 91, sec. 29, 30, C. S. C.) to prove that a person marrying a second time, whose husband or wife had been continually absent from such person for seven years then before, knew such person to be living within that time.

Semble—1st:—That the same rule would apply to 32 & 33 Vic. ch. 20, sec. 58, Criminal Act of 1869.

2nd. That the first wife cannot under any circumstances be a witness for or against the prisoner.

3rd. That the jury will be directed to acquit the accused, the Crown failing to make such evidence of knowledge of the prisoner.—*Regina* v. *Amedée Fontaine* dit *Bievenue*, 15 L. C. Jurist, 141.

INSOLVENT ACT.—*Held*: 1. That no Judge in the Province of Quebec has a right to interfere with insolvency matters originated in Ontario where the insolvent has his domicile, even though the assignee reside in the Province of Quebec, and the affairs of the estate be conducted in Montreal.

2. That the "Judge" having jurisdiction is the Judge of the domicile of the insolvent.

3. That one Judge in insolvency matters has power to set aside and vacate an order made by another Judge in Chambers.—*In re McDonnell, an insolvent*: 15 L.C Jurist, 145.

INSOLVENT ACT.—*Held*:—Where a trading partnership obtainad advances from a bank under an agreement that the proceeds of sale of hemlock bark extract manufactured by the partnership should be paid in to the Bank in repayment of the advances, and the partnership, while in a state of insolvency and largely indebted to the Bank, contrary to the agreement, applied the proceeds of 174 barrels of bark extract to the general purposes of the business without the knowledge or consent of the Bank; that such act (even in connection with evidence that the acts of the partnership as regarded the Bank, were from first to last akin to fraud,) did not amount to secretion with intent to defraud, sufficient to sustain an attachment before judgment.—(On Appeal)—*The Quebec Bank* v. *Thomas Steers et al.*, 15 L. C. Jurist 155.

ONTARIO REPORTS.

CHANCERY.

The Bank of Toronto v. Fanning.

Tax Titles.

The Statute 27 Vic. chap. 19 sec. 4, cures all errors as regards the purchaser at a tax sale, if any taxes in respect of the land sold had been in arrear for five years; this rule applies where an occupied lot has been assessed as unoccupied.

In a suit to impeach a sale of land for taxes, it appeared that about 20 or 30 acres of the lot were cleared and fenced, and a barn was erected thereon, into which hay made on these twenty acres was stored in winter, by the person occupying the adjoining lot under the authority of the proprietor; no one resided on the 20 acres; the owner was resident out of the country and had not given notice to the assessor of the township to have his name inserted on the roll of the township:

Semble, that the lot should have been assessed as occupied.

[In Appeal*—18 Grant, 391.]

An appeal by the plaintiffs from the decree reported 17 Grant, 514.

J. Hillyard Cameron, Q. C., and *Snelling*, for the appeal.

Moss, and *Morrison*, (of Owen Sound), contra.

Wilson, J.—The land was sold for taxes alleged to have been due and in arrear for the years 1857, 1860, 1861, 1863, and 1864.

The sale was on the 1st of November, 1865, under a warrant, the precise date of which is not given, but which it must be presumed was issued more than three months before the sale, according to the Consolidated Statute of Upper Canada, chap 55 sec. 130, under which statute the sale was made; the warrant would therefore bear date sometime before the 1st of August, 1865.

Leaving the year 1857 out of consideration for the present, there would not have been a portion of taxes due for five years† (s. 123) at the time when the warrant was delivered to the sheriff.

The 29 & 30 Vic. chap. 53 sec 156, or the 32 Vic. chap. 36 sec. 155, does not apply, as the bill was filed on the 22nd of September, 1868, before the period of limitation therein mentioned had expired.

The sale then, in my opinion, cannot be supported, unless the taxes for the year 1857 can be considered as taxes due and in arrear at the time of the sale.

The taxes for that year were not paid, and they were rated in fact upon the land, but upon the land as vacant or non-resident, instead of as occupied and resident land, as it is contended should have been done.

The 27 Vic. chap. 19 sec. 4, provides that if any taxes in respect of any lands sold by the sheriff after the passing of that Act shall have been in arrear for five years preceding the first day of January in the year in which the sheriff shall sell the said land, and the same shall not be redeemed in one year after the said sale, such sale and the sheriff's deed to the purchaser of any such lands, (provided the sales shall be openly and fairly conducted), shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through or under them. The object of the statute was to make the sale valid, although the assessment may not have been quite regularly made, or although there were some other informality or irregularity in the way of the sale being such as would otherwise be a perfectly legal sale, so long as any taxes were in arrear for five years, and the land had not been redeemed. The re-enactment of this clause by the 29 & 30 Vic. chap. 53 sec. 131, and by the 32 Vic. chap. 36 sec 130, with the addition to it, "it being intended by this Act that all owners of land shall be required to pay the arrears of taxes due thereon within the period of five years," "(three years 'by the last Act),' or redeem the same within one year after the treasurer's sale thereof," is very conclusive on this point.

In my opinion the irregular or wrongful assessment of this lot in 1857 as an unoccupied or non-resident lot, instead of its having been rated as an occupied or resident lot, cannot now be impeached.

There was in fact a portion of taxes due upon the lot for five years, and as the sale was made after the passing of the 27 Vic. chap. 19, that statute has given validity to the title, which in my opinion, might otherwise have been invalid. It is not necessary to say what would, or will, or may constitute an occupant or an occupation, as I am assuming for the purposes of my opinion that the land was occupied in 1857, and was improperly assessed as an unoccupied lot.

If I had been obliged to do so, it is probable my opinion would have been upon this evidence that the land was not vacant or unoccupied property.

Mowat, V. C.—During the years that the lot in question was returned as unoccupied, twenty or thirty acres of it were cleared land, and this clearing was fenced; there was on the place a barn, which, though out of repair, was capable of being used as a barn, and was from year to year used for storing the hay cut on this lot and on the adjoining lot, by the person who was owner or tenant of the latter, and who cut the hay and used the barn on the lot in question under the authority of its proprietor. I feel great difficulty in saying that this use of the lot did not constitute a sufficient occupation of the lot to make it improper and illegal for the assessor to return the lot as unoccupied; even though when the assessor visited the lot in February or March, there may have been no hay in the barn. There are thousands of parcels throughout the country which belong to persons actually residing on adjoining parcels, and which it would surely be against the intention of the law for the assessor indolently to return as unoccupied, though the visible occupation of them in February or March is not greater than that of this parcel was. The analogous cases which were cited to us from the American and English reports, as well as the reason of the thing, seem to me to support the contention of the appellants on this point. Land which is in use during the season seems to me to be occupied within the meaning of the Act, though in winter there is no produce in the barn, and no person to be seen in the fields. The 19th section of the Assessment Act* required the assessors to make "diligent inquiry;" and an inquiry which does not extend to the occupiers of the adjoining lots is certainly the reverse of diligent.

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* *Present*—Draper, C. J.; Richards, C. J.; Hagarty, C. J.; Wilson, J.; Mowat, V. C.; Gwynne, J.; Galt, J., and Strong, V. C.

† *Ford* v. *Proudfoot*, 9 Grant 478; *Kelly* v. *Macklem*, 14 Grant 29; *Bell* v. *McLean*, 18 U. C. C. P. 416; 27 Vic. chap. 19, secs. 1, 4.

* Con. Stat. U. C. chap. 55.

But I think that the Act 27 Vic. chap. 19, sec. 4, cures the error as regards the purchaser at the tax sale. That Act confirms the sale if any taxes in respect of the land sold had been "in arrear" for five years. Now this land was liable to taxes whether the proceedings of the assessor had been correct or not; for by the 116th section of the Consolidated Act even the omission of the lot from his roll would not exempt the land from taxation. That section provides that in case of such omission, the clerk is in the following year to enter the lot on the collector's roll "as well for the arrears omitted, as for the tax of that year." Therefore the taxes may be in "arrear," according to the legislative use of the term, though the lot had been wholly omitted by the assessor; and if so, they are certainly not less in "arrear" where the lot has been assessed and entered on the assessment roll, though under an irregular designation. I am of opinion that on this ground the decree should be affirmed and the appeal dismissed.

The other members of the Court concurring in the views expressed in these judgments,

Appeal dismissed with costs.

COMMON LAW CHAMBERS.

In re Roberts and Holland.

Fence-viewers—Watercourses—Contiguous lots.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*But see *Re Cameron & Kerr*, 23 U. C. Q. B. 533; *Re McDonald & Cattanach*, 5 Prac. Rep. 288; 30 U. C. Q. B. 432.—Eds. L. J.

of a ditch running on their lot, awarded by the said three fence-viewers on the 14th June, 1870.

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

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

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

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

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

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

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

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

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

Charles Holland confirmed Patrick's affidavit.

G. D Boulton showed cause.

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

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

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

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

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

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

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

Sec. 7. "Where it is the joint interest of parties resident to open a ditch or watercourse for the purpose of letting off surplus water from

swamps or low miry lands, in order to enable the owners or occupiers thereof to cultivate or improve the same, such several parties shall open a just and fair proportion of such ditch or watercourse according their several interests."

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

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

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

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

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

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

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

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

That disposes of the first objection

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

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

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

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

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

I cannot interfere on this ground.

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

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

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

I do not think I should, if I was quite certain of possessing the power, stay all proceedings because the demand had not been *in writing*, or even if no demand at all had been made on Patrick Holland to do the work, when it appeared

he saw it done and gave directions for the doing of it, without any objection at that time. I do not interfere, then, on that ground.

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

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

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

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

This last objection fails also.

I must therefore discharge the summons with costs. *Summons discharged with costs.*

ENGLISH REPORTS.

EXCHEQUER.

ROBINSON v. DAVISON.

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

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

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

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

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

[19 W. R. 1036, Exch.]

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

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

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

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

His claim in this action was for £70. of which £30 was for the expense of hiring a room, advertising, &c., and £40 the profit he reckoned he would have cleared if the concert had taken place

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

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

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

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

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

Kelly, C.B.—This case no doubt raises a highly important question. It appears that it was agreed that in consideration of a sum certain, the defendant's wife should be present on the 14th of January at Brigg, in Lincolnshire, to play the piano at a concert, of which the proceeds were to belong to the plaintiff; she was prevented by illness from fulfilling her engagement, the consequence of which was that the concert did not take place, and in answer to an alleged breach of the contract, it is pleaded that it was a condition of the contract that the defendant should be exonerated therefrom if his wife was prevented by illness from performing it, and that such, in fact, was the cause of her not performing it, and the question is, whether that is a lawful and sufficient defence. In my opinion it is. The contract is not merely for personal services, but it is one that could not have been performed by any other person, and the law applicable to such a case is laid down most clearly and accurately by Pollock, C.B., in *Hall* v. *Wright*, 8 W. R. 160, E. B & E. 746, in these terms, "It must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. . . . . A contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would, in my judgment, be subject to the condition that, if the author became insane or the painter paralytic and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be liable if he had been removed by death." The law thus stated clearly applies to this case, which is that of an artiste who having contracted to play is prevented from so doing by illness, and it follows that in such a case the non-performance of the contract is excused. And the passage cited in the course of the argument from the judgment of the Court of Queen's Bench in *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B & S 826, when construed with reference to the illness of a player on the pianoforte, is a strong authority in favour of the construction put upon this contract by the defendant. Indeed *Boast* v. *Firth*, 17 W. R. 29, L. R. 4 C. P. 1, and other cases all go to establish that non-performance of a contract for personal services is excused, if it is owing to a disability caused by the act of God or of the other contracting party. Some question has been raised as to the degree of illness which will excuse the performance of a contract of this kind, but if the party is unable to carry out the contract according to the real intention of the parties, that inability is an excuse for non-performance.

Then comes a further question: the plaintiff contends that if non-performance of the contract

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

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

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

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

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

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

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

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

*Rule discharged.**

CHANCERY.

NEWILL v. NEWILL.

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

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

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

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

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

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

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

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

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

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

* Leave to appeal was refused.

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

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

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

UXBRIDGE COUNTY COURT.

(Before JAMES WHIGHAM, Esq., Judge.)

FLETCHER v. WATTS.

Debtor's Act 1869 (32 & 33 Vic. c. 62) ss. 4 and 5—Bankruptcy Repeal Act 1869 (32 & 33 Vic. c. 83), s. 20, and Schedule of Enactments Repealed (9 & 10 Vic. c. 95, s. 103. 103.

Commitment order refused on the ground that the judgment debtor had before been imprisoned for same default.

[*Law Times*, June 3, 1871.]

HIS HONOUR delivered judgment in this case, which raised a question of considerable general interest, viz., whether there can be a second or subsequent commitment for the same default. The judgment in *Fletcher* v. *Watts* was of the 17th July, 1868, to pay a certain sum by monthly instalments. The present proceeding was a summons under the Debtors' Act of 1869, an enactment which came into operation on the 1st. Jan. 1870. The summons recited the judgment, the sums paid upon it, the residue remaining unpaid, the default of the defendant to pay residue, and required the defendant to appear on the court day to be examined touching his present and past means of satisfying the judgment, and to show cause why he should not be committed for his default. The defendant did not appear. The plaintiff appeared, and gave evidence of the defendant's ability to pay. In the course of the inquiry it transpired that the defendant had already been once imprisoned for the same default.

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

His Honour referred to the statutes in force on the subject of commitments by the County Courts. The first requiring present notice is the Act of 1846 (9 & 10 Vic. c. 95). Certain sections in it relating to commitment are repealed by the Bankruptcy Repeal Act 1869 (32 & 33 Vic. c. 83, s. 20, and schedule, viz., ss. 98 to 101, both inclusive). The Debtors Act 1869 (32 & 33 Vic. cap 62 s. 5) (a long and much sub-divided section) enacts that "this section, so far as it relates to any County Court, shall be deemed to be substituted for sections 98 and 99 of the Act of 1846, and that Act (the Act of 1846) and the Acts amending the same shall be construed accordingly, and shall extend to orders to be made by the County Courts with respect to sums due in pursuance of orders or judgments of any other court, that is the Superior Courts, in respect of a judgment for a sum not exceeding 50*l*." Though this 5th section of the Debtors' Act of 1869 is, by express direction of the statute, to be construed as substituted for sections 98 and 99 of the Act of 1846, these sections 98 and 99 do not directly relate to the most important matter dealt with by the material part of the substituted section in the Debtors' Act of 1869, namely, the effect of an imprisonment of the judgment debtor not operating as a satisfaction or extinguishment of the judgmentdebt.

The material clause on that subject is section 103 of the Act of 1846, which is not repealed, and so far as it is not inconsistent with the more recent enactments is still in full force and effect. It may be mentioned (though the statute is repealed) that 22 & 23 Vic. cap. 57 limited the power of imprisonment to be exercised by the County Court judges, but as it is not now in force it no longer affects the subject. The 103rd section (9 & 10 Vic. c. 95) enacts that no imprisonment under this Act shall in anywise operate as a satisfaction or extinguishment of the debt or other cause of action in which a judgment has been obtained, or protect the defendant from being anew summoned and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this Act, or deprive the plaintiff of any right to take out execution against the goods and chattels of the defendant in the same manner as if the imprisonment had not taken place." The enactment in section 5 of the Debtors' Act 1869, given as in substitution of sections 98 and 99 of the Act of 1846, may possibly have been intended to be in substitution for the 103rd section of the Act of 1846. It relates to the same subject, and enacts thus (32 & 33 Vic c. 62, s. 5): "Subject to the provisions hereinafter mentioned and to the prescribed rules, County Courts may commit to prison for six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment due from him in pursuance of any order or judgment of that or any other competent court, provided, (1), that the jurisdiction to imprison shall, in case of any court other than the Superior Courts be exercised only subject to the following restrictions:—*a* To be made in open court. *b*. Wherein it relates to a judgment of a Superior Court only when the amount does not exceed £50. *c*. As to County Courts, only by judge or deputy, no other officer. (2) That such jurisdiction shall only be exercised when it is proved to the satisfaction of the court that the person making the default either

has or has had, since the date of the order or judgment, the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same." Then follows the part of this section 5 (as before adverted to) enacting, so far as County Courts are concerned, that section 5 is to be deemed to be substituted for sections 98 and 99 of the County Court Act of 1846, and it enacts that "No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned in the same manner as if such imprisonment had not taken place" If the enactment were declared to be in substitution of section 103 (Act of 1846), or if these two sections (sections 5 & 103) cannot be reconciled, it seems to me that the more recent shall prevail over the earlier enactment; consequently, that section 5 of the Debtors' Act 1869, is the enactment to be followed in the case under consideration. Section 4 of the Debtors' Act 1869, enacts that, "with the exceptions hereinafter mentioned," and none of these exceptions affect the present subject, "no person shall, after the commencement of this Act" (1st Jan. 1870), "be arrested or imprisoned for making default in payment of a sum of money" It might be urged in support of plaintiff's present application for the commitment order, that as the former imprisonment of the defendant, "is in nowise a satisfaction of the debt;" but in the nature of a punishment for a contempt of court, each succeeding day wherein, having the means, the defendant witholds payment, he makes another substantive default, rendering himself liable to be anew summoned and imprisoned for his neglect or refusal to pay all arrears unsatisfied. Or it might also be proposed for the plaintiff to attain the same end (the commitment of the defendant) by rescinding the original order, and varying the instalments pursuant to the authority given in the Debtors' Act 1869 (sec 5, proviso 2, sub-sec. 4). But I think that in cases like the present, where there has been an imprisonment of the defendant covering the default for the entire residue unpaid, the remedy for further imprisonment is gone. Indeed it seems to me doubtful if, since the statute 32 & 33 Vic. c. 62, part 2 (For the punishment of Fraudulent Debtors), where each offence is clearly defined, the resort to what might be called the fiction of a contempt of court is any longer available. A careful consideration of the expressions used in section 103. (1846.) and section 5 Debtors' Act (1867,) leads to the conclusion that it was never intended, and that it is not intended that there should be a second imprisonment for one and the same default. The two enactments are in nearly the same words, and limit the plaintiff's ultimate remedy for the recovery of his debt (after defendant has before been imprisoned) to the right to take out execution against the property of the person before imprisoned in the same manner as if such imprisonment had not taken place. The enactments of the statute law on the subject of commitments, are encroachments on the principles and usages of the common law, and are not to be extended, or put in force unless where the enactments are clear and explicit. By the common law if a creditor once takes the body of a debtor, this being the highest kind of execution known to the law, it is a satisfaction of the judgment, and the debt is gone. Under the circumstances of this case, seeing that the defendant has been before imprisoned for non-payment of the remaining instalments, I must now refer the plaintiff to such remedy as he may have by execution against the lands, goods, or chattels of the defendant, as freely as if such imprisonment had not taken place. Though it is unquestionable that a defendant may be summoned anew, and imprisoned for each new or other default in paying another instalment when due, yet I think that any order of commitment that included the sum for the defaut in paying which the judgment-debtor had been before imprisoned, would be an invalid order. I trust the effect of this view of the matter may be to induce traders to be more cautious in giving credit to their customers.

Strutton v. Johnson.

The meaning of "forthwith" in an order for payment.

Execution cannot issue on an order of the Court until the record is complete—*i.e.*, signed by the registrar.

Mr. Fullager, for the plaintiff, after proving his case, one of no interest except for what followed, asked for and obtained an order for payment forthwith, and shortly afterwards returned into court to make an application. He said, acting on his honour's order he had applied in the issuing department for an execution against the goods of the defendant, but the registrar's clerk had refused to grant it, on the ground that "forthwith" did not mean the same day, and the execution could not issue until the next morning. Believing the clerk to be wrong he begged to ask his Honour to allow the process to issue immediately There was a case in point heard before the Exchequer Chamber on appeal, *Ely* v. *Moule and Tombs*, 20 L. J. Ex. 29 The case arose out of an action in the Droitwich County Court, where a forthwith order had been made and an execution levied on the goods of the defendant the same day. The defendant (Ely) then brought an action against the plaintiff and the registrar (Moule and Tombs) for trespass, when the Court found that the proceedings in the County Court were regular, and therefore no trespass had been committed. The Exchequer Chamber affirmed this decision, and he (Mr Fullager) now asked his Honour to act upon that precedent, and allow the execution to issue.

Mr. Pitt Taylor said in the case quoted the Court was not asked to decide the point now raised. The plaintiff in that case contended that he ought to have been served with an order before his goods were seized, and the Court decided that was not necessary according to the Acts and Rules regulating County Courts, and the proceedings were therefore regular. The point now raised was a very different one. The record of the court was not complete until signed by the registrar, and proceedings could not be taken until such completion. That officer did not sign each judgment, but, as provided by the Act, only every page, and it was necessary he should have time to make his record complete before allowing process to issue. The application would therefore be refused.

UNITED STATES REPORTS.

COURT OF APPEALS, NEW YORK.

ANNA ECKERT, ADMINISTRATRIX, &c., v. THE LONG ISLAND R. R. Co.

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

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

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

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

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

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

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

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

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

Aaron J. Vanderpoel for appellant.

George G. Reynolds for respondent.

GROVER, J.—The important question in this cases arises upon the exception taken by the defendants' counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fall and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere

protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore properly denied. That the jury was warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed with costs.

CHURCH, C. J., PECKHAM and RAPALLO, JJ., concurred.

CORRESPONDENCE.

Some recent Division Court Decisions.

TO THE EDITORS OF THE LAW JOURNAL.

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

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

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

Plaintiff sued defendant for rent due under a lease under seal. Defendant was called to prove the execution of the lease. While plaintiff's examination of defendant was going on, the learned Judge told defendant that he might or might not answer plaintiff's questions, as he pleased. After plaintiff's examination had closed, which was confined to the proving the execution of the lease, defendant volunteered evidence on his own behalf to the effect that the rent ought to be less than that stated in the lease. In vain plaintiff argued that such evidence was not admissible; that defendant could not thus, by his own *parol* evidence, impeach his own solemn deed. Nevertheless the learned Judge held otherwise, and made the reduction accordingly. In *Shannon* v. *Varsil*, 18 Grant, 10, Spragge, Ch., said: "A. agrees to sell B. certain land for $1,200. B. could not prove *by parol* that A. agreed subsequently to reduce the purchase-money to $800." This decision is now, I suppose, overruled by that of Judge Dennistoun above.

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

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

Reports of legal decisions are, or should be, valuable and instructive. Other cases will

be furnished you hereafter, this communication being already too long.

A SUITOR.

PETERBORO', September, 1871.

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

Evidence Act.

TO THE EDITORS OF THE LAW JOURNAL.

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

Yours truly,

NELSON DODGE, J.P.

Milford, 2nd August, 1871.

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

REVIEWS.

A GUIDE TO THE LAW OF ELECTIONS. As regulated by 32 Vic. c. 21 and 34 Vic. c. 3. By Charles Allan Brough, Barrister-at-law. Toronto: Henry Rowsell, 1871.

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

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

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

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

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

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