## DIARY FOR MAY.

1. SUN. *2nd Sun. aft. Easter. St. Philip & St. James.*
8. SUN. *3rd Sunday after Easter.*
13. Fri.. Exam. of Law Students for call to the Bar.
14. Sat.. Exam. of Articled Clerks for certificate of fitness.
15. SUN. *4th Sunday after Easter.*
16. Mon. Easter Term begins.
18. Wed. Last day for service for Co. Ct. York. Interim Exam. of Law Students and Articled Clerks.
20. Fri .. Paper Day, Q. B. New Trial Day, Common P.
21. Sat.. Paper Day, C. P. New Trial Day, Queen's B.
22. SUN. *Rogation.*
23. Mon. Paper Day, Q. B. New Trial Day, Common P.
24. Tues. Paper Day, C. P. New Trial Day, Queen's B.
25. Wed. Paper Day, Q. B. New Trial Day, Common P.
26. Thur. *Ascension.* Paper Day, Common Pleas.
27. Fri .. New Trial Day, Queen's Bench.
28. Sat... Declare for County Court.
29. SUN. *1st Sunday after Ascension.*
30. Mon.. Paper day, Q. B. New Trial Day, Common P.
31. Tues. Paper Day, C. P. New Trial Day, Queen's B.

THE

# Canada Law Journal.

MAY, 1870.

## THE MINISTER OF JUSTICE.

With mingled feelings of grief and hope, we allude to the painful and alarming illness which has prostrated for a time at least, Sir John A. Macdonald, the Minister of Justice. Grief, that one so eminent and so endeared to all who know him personally should suffer so much pain, and that the country should, at the present crisis especially, lose the services of one who has for so many years devoted his amazing talent with untiring industry to the arduous duties which devolve upon him—and hope, that he may yet recover from the illness which has brought him to the verge of the grave.

The attack came upon him in the midst of his work, the thought of which never leaves his mind day or night, and this combines with the painful nature of his malady to secure to him the sympathy of those politically opposed to him, and which was on a recent occasion gracefully expressed by the leader of the opposition.

We rejoice to hear that he is slowly but steadily improving. We trust his recovery may be permanent, and that he may long be spared to a people to whom his loss would be a public calamity, and whose warmest sympathies are with him and Lady Macdonald in their present affliction.

## LEX LOCI CONTRACTUS—LEX FORI.

By D. Girouard, Esq., *Advocate, Montreal.*

*Extinctive prescription or limitation of personal actions affects the remedy, and consequently is governed by the law of the country where the suit is brought, the "Lex fori"*

A question which for many years has been, and still continues to be discussed among jurists and in courts of justice is, whether the limitation of personal actions is governed by the *lex loci contractus* or by the *lex fori*. It is true that in England and the United States the point may be considered as settled in favor of the *lex fori*, although even in those countries we see lawyers of so high a standing as Westlake and Bateman strongly defending the claim of the *lex loci contractus*. We find furthermore, in a late case of *Harris* v. *Quine*, the learned Chief Justice Cockburn inclining towards the *lex loci contractus*, although he held the *lex fori* to be the settled rule. And if to this fact be added, that on the continent of Europe the question remains as yet undecided, a review of the law on this subject may not be found uninteresting to the members of the Canadian Bar.

True it is that the legal profession in every country are familiar with the reasonings *pro* and *con*. At the same time it must be admitted that there exists no complete review of the different systems advocated throughout the commercial world. The English and American writers do not fail to produce every English and American authority, but they rarely pay to the French and continental jurists the attention and consideration which their learning deserves, and *vice versâ*. Thus, Félix, Troplong and Marcadé, even Savigny, make little or no allusion to the English and American jurisprudence; and when we refer to the English or American writers, we find that in their apprehension of the opinions of French and continental jurists, they fall into many inadvertent mistakes, sometimes into grave errors. Thus, Dr. Parsons, in his late works on Notes and Bills, affirms, upon the alleged authority of Pardessus, "that in France the limitation and prescription of the place where the contract was made would prevail, no matter where the contractor was sued," (vol. 2, p. 382); whereas Pardessus supports the *lex loci solutionis*, and in default of it, the *lex domicilii debitoris* at the time of the contract. Again, at page 383, foot note *v.*, the learned professor states it to be the opinion of Pothier

that the *lex loci* and not the *lex fori* should govern, whereas Pothier never speaks of any but the *lex domicilii creditoris*. Mr. Guthrie, p. 219, in turn, says that Pardessus and Boullenois favor the *lex domicilii debitoris*, and does not notice the distinction which both these commentators make, when a place of payment is specified. Mistakes have even been committed by writers in their citation of works composed in their own language. Thus, Félix asserts that Dunod favors the *lex domicilii debitoris* at the time of the institution of the action, whereas it is the *lex domicilii debitoris* at the time of making the contract which is supported by Dunod. These examples, to which many others might be added, show the importance of a careful and detailed investigation of the subject.

To begin with our own country, I find a diversity of opinion. In a late case of *Wilson* v. *Demers*, his Honor, Mr. Justice Mondelet, held that the true rule of both the old and new French jurisprudence, which should prevail in Lower Canada, is the *lex loci contractus*, or *lex loci solutionis*.

It appears that Boullenois holds the law of the domicile of the debtor, if no place of payment be specified. "True," said Mr. Justice Mondelet, "Pothier is of a different opinion, whereupon Troplong says: 'C'est une erreur difficile à comprendre dans un jurisconsulte d'un aussi grand sens.'" Duranton, vol. 21, s. 113, as usual, without expressing his own view, replies: "Ou M. Troplong n'a pas lu avec attention le passage de Pothier, ou l'erreur qu'il lui reproche devrait être reprochée aussi à Dumoulin, qu'il cite cependant en l'approuvant."

Dunod (*Des Prescriptions*, part i. ch. 14), contends that the law of the domicile of the debtor should rule, but only of the domicile at the time of the contract..

It should be borne in mind that Boullenois does not advocate the *lex loci contractus*.

The old French jurisprudence, moreover, does not appear to concur in the opinion of Boullenois. Merlin, *Répertoire*, vo. *Prescription*, s. 1, § 3, par. 7, quotes two *arrêts* of the Parlement de Flandre, the first, of the 17th July, 1692, the second, of the 30th October, 1705, which held the law of domicile of the debtor at the time of the institution of the action to govern in case of conflict of prescriptions; and he further reports another case which originated before the code, and was decided in the same sense by the *Cour de Bruxelles*, on the 24th September, 1814. Berryer and Laurière on Duplessis, *Traité de la Prescription*, liv. 1, chap. 1, express the same view. And if to the above authorities we add the old civilians Huber and Voet, and also Merlin, who evidently wrote under the influence of the then prevailing notions on the matter, it seems that the old French Common Law does not admit the *lex loci contractus*.

It is contended that the weight of modern French authority is against the doctrine of the *lex fori*.

But what is the present opinion in France? Mr. Justice Mondelet thought it useless to recapitulate all the authorities which are to be found in France touching this point.

"Suffice it to say, with Félix, (*Droit International Privé*, vol. 1, art. 96, p. 209)," he said, "that, '*les lois romaines ont déjà consacré le principe que la matière du contrat est réglée par la loi du lieu où il a été passé.*' And when the contract is to be executed elsewhere, then it must be governed by the law of the place of execution. As he says at page 214, '*ce principe a été emprunté à la loi romaine*, 421, *de obli. et act. Elle repose sur la circonstance qu'en fixant un lieu pour l'exécution du contrat, les parties sont censées avoir voulu faire tout ce que prescrivent les lois du même lieu.*'

"It is true that Merlin (*Quest. de Droit* vo. *Prescription*) expresses the opinion that the *lex fori* or that of the domicile of the debtor, will govern a case like the present, but as he has failed to take into account the circumstances of a debt being due and payable in a particular place, and as he speaks of a debt made payable generally, we have to refer to those writers who have not omitted the distinction between the one and the other case. Boullenois, t. 1, pp. 530; 2, 488, and Pardessus, Droit Comm., No. 1495,(*) clearly draw the distinction, and hold that when the contract is to be executed in a particular place, it is the law of that place which is to govern. Félix cites as holding that opinion, Christin, Burgundus, Mantica and Favre.

"On reviewing most of those writers, one finds, especially with Savigny, that the true doctrine is that the prescription of the place of payment must govern, and where the place of payment is not specified, then that of the place where the contract was created. We may join *Troplong* with the others, for he says: '*L'action personnelle*

(*) Pardessus does not entirely agree with Boullenois as will be seen hereafter.

*se prescrit par la loi en vigueur au lieu où doit se faire le paiement.'* True, Pothier is of a different opinion, whereupon Troplong says: *'Pothier est le seul qui soutienne que la prescription est réglée par le cas du domicile du créancier, mais c' est une erreur difficile à comprendre dans un jurisconsulte d' un aussi grand sens.'* (Prescription, No. 38.) Pardessus, Droit Comm., t. 6, art. 1495, p. 383, is very explicit on that point: *'Ainsi lorsqu' un débiteur oppose la prescription, le droit d'user de ce moyen, et la durée de cette prescription, seront réglés par le droit du lieu où il a promis de payer.'"*

On reference to Pardessus, *Droit Commercial*, t. 6, p. 383, we find that his language has not been quoted in full, for there the sentence contains these words, immediately after those quoted: "et s' il ne l' a pas déterminé, par celiu du domicile qu' avait ce débiteur lorsqu' il s' est obligé; *parceque la prescription étant une exception qu' il est permis au débiteur d' opposer à la demande de son créancier, c' est naturellement dans sa propre legislation qu' il doit trouvor ce secours.*" If the debtor is thus to look only to the law of his own domicile, and if his plea of prescription affects merely the remedy, as admitted by Pardessus,—what has the law of the place of payment, or of the domicile of the debtor at the time of the contract, to do with the case? Nothing; it seems clear that the reasoning of Pardessus should lead to the opposite conclusion, to wit, the *lex fori* or *lex domicilii debitoris*, at the time of the institution of the action; and it is remarkable that two years before the publication of his *Droit Commercial*, he had, in his *Eléments de Jurisprudence Commerciale*, pronounced in an unqualified manner for the latter opinion. He says (page 112), "Le Commerce etendant con empire sur un grand nombre de contrées soumises à des législations différentes, il est important de connoitre par quelle loi le droit d' opposer la prescription, sa durée et ses conditions, doivent être détérmines. *Ce ne peut être par celle du lieu où la convention à été faite*, en la prenant, conformemént aux art. 1159 et 1160 du Code Napoleon, pour supplément naturel de ce que les parties n' auraient pas exprimé asseze clairement, parceque la prescription qui n' est pas acquise ne peut jamais, aux termes de l' article 2220 du méme code, être l' objet d'une stipulation. Ce ne doit pas étre par la loi du domicile du demandeur, parceque c' est contre lui que la prescription est etablie, et qu' elle est une exception à son action. *C' est donc par la loi du domicile réel* ou élu du défendeur, parceque toute action relative au commerce est mobilière et personnelle, *et que la prescription qui a pour objet de protéger le débiteur et de lui offrir une barrière contre les, poursuites de son créancier, ne peut dériver d'une antre loi que de celle du domicile de ce débiteur.*"

Evidently, the opinion of the learned judge rests principally upon the rule, *locus regit actum*, and the alleged authority of Félix and of the civilians he has referred to. It is astonishing that the learned judge did not quote from Félix a few pages farther on. Félix lays down various exceptions to the rule *locus regit actum*, and among others, the case of limitation of personal actions. He contends that the law of domicile of the debtor at the time of the action should be the criterion, without paying any regard to the place of payment. Félix further declares that the *lex loci solutionis* is favored only by Boullenois, Pardessus and Troplong among the French writers, and by Christin, Burgundus, Mantica and Favre among the civilians.*

"Lorsqu'il s'agit," says Félix, "non pas de statuer sur le fond de la demande, mais d'apprécier des *défenses* † qui y sont opposées, et qui ont leur base dans le lieu où siége le tribunal saisi de la cause, on suivra cette dernière loi.

"Cette même exception trouve son application à la prescrption extinctive. 'La loi,' dit Merlin, qui déclare une dette prescrite, n'anéantit pas le, droit du créancier en soi, elle ne fait qu'opposer une barrière à ses poursuites. Or, cette barrière, à qui appartient-il de l'etablir? C'est, sans contredit, à la loi qui protége le débiteur, et par conséquent à la loi de son domicile.' Ainsi la prescription se règle par la loi du domicile qu'a le débiteur au moment de la demande. Telle est aussi l'opinion de Jean Voet, de Dunod et de Boullenois. ‡ Ce dernier auteur, ainsi que, après lui, M. Pardessus, limitent cette décision au cas où les parties n'ont pas déterminé un lieu pour l'exécution du contrat; si cette détermination a été faite, Boullenois et M. Pardessus veulent que la prescription soit régie par la loi de ce lieu. Christin, Burgundus, Mantica, Favre et Troplong réglent aussi la prescription par les lois du lieu où l'obligation doit être exécutée. Suivant Pau,

* We will see hereafter that Pardessus does not fully agree with Troplong.

† On sait que les *défenses* ne tendent pas, comme les exceptions, à écarter simplement l'action, à la neutraliser, à différer ses effets, mais à la détruire, à l'anéantir sans retour. *V* Boncenne *Théorie de la Procédure*, vol. III, p. 162. Félix's note.

‡ Boullenois and Dunod do not fully agree.

Voet, Huber, Hommel, Weber, Tittmann, Meier, Glück, Mittermaier, Muhlenbruch, de Lindel Kent, Story, Burge, et un arrêt de la Chambre des Lords d'Angleterre, la prescription est régie par la loi du lieu où l'action est formée. *Bien qu'il y ait quelques différences dans les termes employés par ces auteurs, on voit qu'ils aboutissent tous à cette conclusion que la prescription s'acquiert d'après la loi en vigueur au lieu où siége le juge compétent, pour statuer sur les actions personnelles formées contre celui qui oppose cette défense.* Jean Voet s'exprime ainsi sur ce point: 'Une dette non encore recouvrée est placée sous la puissance du juge du domicile du débiteur, plutôt que sous la puissance dn juge du domicile du créancier, car le crèancier est obligé de s'adresser au tribunal compétent du débiteur. Ainsi ce n'est pas le juge du domicile du créancier, mais celui du domicile du débiteur qui peut repousser la demande en paiement'

"La Cour d'Appel de Cologne (arrêts des 7 janvier 1836, 4 avril 1839 et 14 décembre 1840,) et la Cour de Cassation de Berlin, (arrêt du 8 octobre 1838) ont également jugé que la prescription extinctive d'engagements personnels est régie par la loi du domicile du débiteur.

"Quelques auteurs, cependant," Félix adds, vol. I, p. 222, "sont d'un avis contraire: Hert, Mansord, l'auteur de l'article du *American Jurist and Law Magazine*, Rocco, Reinhardt et Schaffner appliquent, quant à la prescription, la loi du lieu où l'action est née, c'est-à-dire où la convention a été formée. Cette opinion, peut-être la mieux fondée en théorie, a aussi été adoptée par la Cour Royale de Douai et par la Cour Royale de Paris."

In addition to the foregoing continental authorities we may quote Demangeat on Félix, vol. i. p. 223, note *a*, and the eminent Prussian writer, Savigny, and to these may be added the name of Massé (*Droit Commercial*, vol. i. Nos. 558-565, ed. 1861).

Demangeat though not positive, inclines for the *lex loci contractus* only:

"C'est la cinquième opinion (la loi du lieu du contrat), qui paraît prévaloir dans la jurisprudence. Aux trois arrêts cités par M. Félix, on peut en ajouter un de la Cour d'Alger, du 18 août 1848, aux termes duquel l'accepteur d'une lettre de change ne peut pas opposer la prescription de cinq ans, quand il s'est obligé dans un lieu (à Malte dans l'espèce) où de semblables obligations se prescrivent par trente ans." (Dev.-Carr., 49, 2, 264.)

Savigny (Conflict of Laws, Guthrie's edition, Edinburgh, 1869) remarks:

"Many say that laws as to prescription are laws of procedure, and must, therefore, be applied to all the actions brought within their territory, without respect to the local law of the obligation."

"According to the true doctrine, the local law of the obligation must determine as to the term of prescription, not that of the place of the action; and this rule, which has just been laid down in respect to exceptions in general, is further confirmed in the case of prescription, by the fact that the various grounds on which it rests, stand in connection with the substance of the obligation itself. Besides this opinion has always been acknowledged to be correct by not a few writers."

Savigny finally holds the view that when a place of payment is specified, the law of that place should apply, in pursuance of the rule, *contraxisse unusquisque in eo loco intelligitur, in quo, ut solveret, se obligavit.*

Savigny (in foot note *u*) further observes, that this doctrine is agreed to by Hert, § 65; Schaffner, § 87; Wachter, 2, pp. 408-412; Koch, 1, p. 133, note 23; and Bornemann, 1, p. 66; but that their agreement is only in regard to the principle, not to all the applications of it; since the local law of the obligation is not determined in the same way even by these writers. In fact Hert and Schaffner are of opinion that the *lex loci solutionis* should be entirely overlooked, and that the *lex loci contractus* should rule in all cases.

Massé maintains that the *lex loci solutionis* or *lex loci domicilii debitoris* should rule in all cases:

"Il faut donc arriver," he says, p. 460, "au dernier système qui évite ces inconvénients, tout en se rattachant d'ailleurs au principe par lequel on rapporte la prescription, non à la formation du contrat, mais à son inexécution. Ce système fait prévaloir la loi du lieu de paiement on de l'exécution, quand un lieu a été indiqué, et celle du domicile du débiteur, quand aucun lieu n'a été indiqué pour le paiement, parce que c'est là que l'obligation est payable." Massé quotes in support of his view Casaregis, *Discurs.* 130, No. 25 *et seq.*, and a decision of the Senate of Chamberry (1593), reported by Favre, and thereupon he attacks Pardessus (*Droit Com.* No. 1495) for holding that, when no place of payment is specified, the law of domicile of the debtor at the time of the contract, and not at the time of the institution of the action, should be applied. "J'ai donc de la peine à m'expliquer pourquoi M. Pardessus qui reconnaît que la prescription doit être réglée par la loi du lieu où le débiteur a promis de payer, veut que dans le cas où ce lieu n'est pas déterminé et où par conséquent, le paiement doit être demandé au domicile du débiteur, la prescription

soit réglée par la loi du domicile qu'avait le débiteur au moment où il s'est obligé, bien que, s'il y a eu changement, le paiement ne doit pas être fait à ce domicile."

Marcadé on art. 2219 of the *Code Napoléon*, in turn attacks the opinion supported by Troplong and Massé:

"M. Troplong," he observes, "qui tient pour la loi du pays où le paiement devait se faire, en donne cet incroyable motif, que la prescription extinctive des obligations étant la peine de la négligence du créancier, c'est la peine établie dans le lieu convenu pour le paiement que ce créancier doit subir, puisque *c'est dans ce lieu qu' il a été négligent*.... .....Nous avouerons que loin de trouver une pareille raison fort simple, nous la trouvons au contraire fort bizarre, et aussi fausse que bizarre, fausse deux fois pour une, comme on va le voir bientôt.....

"Ainsi, de quelque côté qu'on se tourne et quelque ordre d'idées qu'on prenne pour point de départ, on se trouve toujours ramené à cette conclusion, conforme à la doctrine des anciens auteurs, que c'est uniquement le domicile du débiteur qu'il faut considérer ici."

Such is the state of opinion on the continent of Europe, upon the question now before us; and it will be conceded that if we had no other resource than these authorities, we should find it difficult, if not impossible, to arrive at a satisfactory conclusion. The review we have just made, clearly shows that no less than eight different systems prevail on the continent:—

1. *The law of domicile of the creditor in all cases*, supported by Pothier and Dumoulin.

2. *The law of domicile of the debtor at the time of the institution of the action in all cases*, supported by John Voët, Pôhl, Thôl, Bar, Berroyer and Laurière on Duplessis, Arrêts of the *Parlement de Flandre* (17th July, 1692, and 30th October, 1705), Bruxelles, (24th September, 1814), Merlin, Marcadé, Félix, Arrêts de Cologne, (7th January, 1836, 4th April, 1839, and 14th December, 1840), Cour de Cassation of Berlin, (8th October, 1838.)

3. *The law of the place of the contract in all cases*, supported by Hert, Mansord, Rocco, Reinhardt, Schaffner, Demangeat; Douai (16th August, 1834); Paris, (7th February, 1839. Alger, 18th August, 1848, and 18th January, 1840.)

4. *The law of the place of the contract, and when a place of payment is specified, the law of that place*, supported by Wachter, Koch, Brunnemann and Savigny.

5. *The law of the domicile of the debtor at the time of the institution of the action, and when a place of payment is specified, the law of that place*, supported by Christin, Burgundus, Mantica, Casaregis, Favre, Boullenois, Troplong and Massé.

6. *The law of the domicile of the debtor at the time of making the contract, and when a place of payment is specified, the law of that place*, supported by Pardessus.

7. *The law of the domicile of the debtor at the time of the making of the contract in all cases*, supported by Dunod.

8. *The law of the place where the action is brought, in all cases*, supported by Paul Voët, Hommel, Huber, Weber, Tittman, Mayer, Glück, Mittermaier, Mühlenbruch, de Linde, and by the English and American decisions, as will be seen hereafter.*

From this synopsis, it may be seen that the *lex loci contractus* or *solutionis*, is held only by four German writers, while the *lex domicilii debitoris* is sustained by most of the old and the new French jurists and commentators.

It is evident that the question of controversy is not a question of local, but of international law, *une question d'école*, upon which the jurisprudence of all nations ought to be properly consulted and weighed. It is necessary that upon matters of this highly practical importance not only to a special community, but to the commercial world at large, there should be uniformity of decision. It is equally beneficial to the people of this country and to foreigners, when they deal with each other, that they should know that the obligations arising out of their transactions are submitted to the same rules of international law. There has been in England, Scotland, and the United States, a uniformity of jurisprudence on this point, and it would be against public policy for our courts to rule differently.

We find in the nature of the English Statute of Limitations, adopted by the United States and the British Colonies, another reason for adopting the *lex fori*. On the European continent, prescription is essentially a presumption of payment, which may be rebutted by contrary evidence; it is more an exception

* In Scotland another system, still assented to by Guthrie on Savigny, prevailed in former times, viz., the law of the domicile of the debtor during the whole currency of the term of prescription.

than a defence. On the contrary, in Canada, as in England and the United States, prescription is a mere denial of action, so much so that the oath of the debtor, as to payment, cannot be demanded in a Court of Justice.

(*To be continued.*)

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We are glad to see that the Chief Justice has again taken his seat on the Bench in Term, after his holiday. He looks all the better for his rest from labour, and we trust his health is permanently better.

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## LAW SOCIETY, EASTER TERM, 1870.

### CALLS TO THE BAR.

Fifteen gentlemen went up for examination for call, of whom the following were successful (Mr. Fitzgerald and Mr. Sharpe without an oral examination):—

W. Fitzgerald, M.A., London; W. Sharpe, Toronto; J. F. French, Merrickville; — Holcroft, Ingersoll; A. F. Campbell, M.A., Simcoe; Chas. H. Bell, M.A., Belleville; D. Junor, M.A., St. Mary's; — Smith, Toronto; A. G. McMillan, Elora; J. G. Hodgins, M.A., Toronto.

### ATTORNEYS ADMITTED.

Of thirty-five gentlemen who presented themselves for examination for certificates of fitness as Attorneys, the following were successful:—

A. F. Campbell, Simcoe; C. H. Bell, Belleville; F. Arnoldi, Toronto; D. Wade, Brockville; H. Macdonell, Guelph (these five without oral); M. A. Dixon, Toronto; Alex. Grant, Stratford; H. H. Smith, Peterboro'; F. C. Clemow, Ottawa; J. H. Ferguson, London; E. W. Harding, St. Mary's; T. G. Coyne, Toronto; Geo. Hall (who passed the examination, but, as his articles were defective, has not as yet been admitted.)

In addition to the above, four gentlemen, who were unsuccessful on their oral examination, are to have another chance during the Term.

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The Session of the Dominion Parliament that has just closed, has not been fruitful of any measure peculiarly interesting to lawyers. The Supreme Court Act, the debate on which was looked forward to with much interest, has to stand over until next session. It is a most important measure, and will doubtless lose nothing by the opportunity thus given for further considering its provisions.

## SELECTIONS.

### THE FRENCH BAR.

(*Continued from page* 92)

We have not space to recount the chequered fortune of the Bar, its destruction at the Revolution, and its restoration under Napoleon, but we must pass on to that portion of Mr. Young's work, which doubtless may be considered the most interesting, namely the biographical notices of some of the many great men who have graced with their eloquence, or dignified with their learning, the ranks of the profession in France. Among jurists the names of Cujas, Pothier, and Portalis will ever be honoured, and the labours of the French Bar in jurisprudence are eminently worthy of recognition. Pothier was born at Orleans, in 1699. He completed his legal studies in the University of that city, and was appointed Councillor in the Presidial Court of Judicature at the age of twenty-one. In 1736 he commenced his great work on the Pandects, which occupied him during twelve laborious years. In this immense task he had the help of some of his intimate friends, among others of Prevot de la Janés, his colleague in the Court, and Professor of French Law. Upon the death of his colleague Pothier became professor, and his able and enthusiastic teaching speedily gave a remarkable impulse to the school of law at Orleans. For twenty-five years Pothier presided over it, and educated many of the first advocates and magistrates of France. The mantle of Pothier, as a jurist, seems to have descended upon Portalis, who was, perhaps, the ablest lawyer and most upright man who took part in the preparation of the Code Civil. The public life of this distinguished man did not commence until he was more than fifty years of age, and during the whole period of his great labours as a jurist and politician he was almost totally blind, unable either to read or write, his extraordinary memory, however, making up for this defect.

But whatever may be the claims of the French Bar to be considered learned, however much their labours may have added to the science of jurisprudence, it possesses the gift, we were nearly saying the "fatal gift," of eloquence to an extent which removes it far above all competition with our own.

## The French Bar.

Mr. Forsyth, in his "Hortensius," points out that until the magic of Erskine's voice and eloquence was heard in our Courts, the annals of our great trials do not furnish us with much, perhaps hardly anything at all, worthy of the name of eloquence. If this was the case before the days of Lord Erskine, what have we had since? It is true that Lord Brougham treated our Courts to some powerful and meteoric flights of what was termed in his day eloquence, and thundered forth in both our Houses of Parliament powerful and weighty orations which, in our opinion, did contain, among much, very much, that was extravagant and turgid, here and there passages of great beauty. But his speeches are drugs in the market, and his memory remains with us secured on other, it may be deeper, foundations. Since Lord Brougham we have not possessed half-a-dozen advocates as orators of any real mark. The late Lord Chief Baron, the present Lord Chief Justice, Lord Chelmsford, and perhaps pre-eminently Serjeant Wilkins, found no compeers, and have left no successors as orators, however able as nisi prius advocates the present generation of our leaders at the Bar may be.

The national character is ponderous, and he who can nonsuit by an array of cases, or set aside a verdict "upon the authorities," is as much, if not more to the taste of the English attorney (who, after all, is the *deus ex machinâ*), as the glib, agile Q.C., who makes a jury laugh with him.

The national characteristic to which we have pointed accounts for some of the differences between the two professions. But we cannot help thinking that, beyond this, the French possess a far more worthy appreciation than we do ourselves, of the duties, the reponsibilities, and the dignity of the advocate's calling. The tradition of their political power, the result of splendid service, the independence of their profession, their social status, all these furnish bonds of brotherhood, while the old custom of the interchange of papers (one of the oldest of their ordinances), and the ready joint action of the whole order where their privileges or their rights seemed to be in danger, show the confidence they possess in each other's loyalty and honour.

We have hardly space to mention the names even of the more eminent among them, whose reputation as orators still survives, and whose speeches are remembered. Among others, Pierre Séguier (one of whose descendants, the Baron Séguier, so recently resigned his office of Procureur-Imperial in the Court of Toulouse); Omer Talon, in the 16th, Servin and Antoine Lemaistre, in the 17th, and D'Auguesseau towards the close of the 17th century, are well known. Of these D'Auguesseau is the best known. This eminent advocate was born at Limoges, in the year 1668, and was appointed King's Advocate at the Châtelet of Paris at the early age of twenty-one. How true is the saying, "that the history of greatness is the history of youth." Distinction at the French Bar has been, in the great majority of cases, attained at an age which, in this country, would be barely sufficient to entitle a man even to hope for an assize prosecution for burglary, or an undefended cause in Middlesex. At thirty-two years of age D'Auguesseau was made Procureur-General, and Chancellor of France at forty-eight; a success almost as rapid as that of Grotius, who pleaded at the Bar when only seventeen, and was made Attorney-General of the Netherlands at twenty-four.

The discourses of D'Auguesseau are well known. In his magnificent eulogium upon the Bar occur those words, a portion of which we have already quoted, and which we will repeat. Speaking of the Bar, he says:—

"It is an order as ancient as the magistracy, as noble as virtue, as necessary as justice; it is distinguished by a character which is peculiar to itself, and it alone ever maintains the happy and peaceful possession of independence."

Passing the great names of Normand and Cochin, cotemporaries of D'Auguesseau, we must for a moment pause at that of Gerbier. This great advocate did not commence to plead in the Courts until he was twenty eight years of age. But his rare merit soon placed him at the head of the Bar. In his time we first begin to catch a glimpse of the lucrative character of the profession in France. It is said that he received a fee of 4000*l.* (about 100,000 francs), from the Company of the Indies, and 20,000*l.* from a Sieur Cadet, for whose cause he had pleaded successfully.

Mr. Young has here a note upon the fortunes made at the English and French Bars, and compares them with those amassed by the advocates of Rome under the empire, very much to the advantage of the latter: but it is by no means clear that the fee system, as we understand it, obtained at Rome at all, and regard being had to the *then* value of money, the amount of these sums appears to be enormous, very many times beyond any legitimate fee we think ever given in England.

At the time of the Revolution, when the Bar was abolished, after the law of August 16, 1789, under which every one was to have the right of pleading his own cause for himself, one and only one in the Constituent Assembly stood up in their defence, and that one, Robespierre.

"The Bar," said he, "seems still to display liberty exiled from the rest of the world; it is there that we still find the courage of truth, which dares to proclaim the rights of the weak and oppressed against the powerful oppressor. The exclusive power of defending citizens shall be confined by three judges and three lawyers! In that case you will no longer behold in the sanctuary of justice those men capable of rising to enthusiasm in behalf of the cause of the unfortunate, those independent and eloquent men, the support of innocence, and the scourge of crime. They will be repelled, but you will have

welcomed lawyers without delicacy, without enthusiasm for their duties, and only urged on in a noble career by sordid considerations of interest; you mistake—you degrade—functions precious to humanity, essential to the progress of public order; you close that school of civic virtues where talent and merit learned, while pleading the cause of citizens before the judge, to defend thereafter that of the people in the legislative assemblies."

Resuming the path of our history from which we turned aside for the moment, we find between the time of Gerbier and the present, materials that might well afford matter for a lengthy paper—the trial of Louis the Sixteenth and that of his queen, the reorganisation of the Bar under Napoleon, the trial of Marshal Ney, and the revolution of 1830; but the Bar of the nineteenth century must claim our remaining space. Hennequin, Berryer, *père et fils*, the brothers Dupin, Dufaure, Garnier-Pagès, Ledru-Rollin, Baroche, Rouher, Jules Favre, Emile Ollivier, with many others, are names with which we are familiar.

Hennequin was engaged in almost all the great trials which took place between the years 1814 and 1834. Among them were the celebrated cases of the disputed succession which followed the death of the Prince of Conde, who was found hanged in his chateau in the August of 1830, and with whom perished the great house of which he was the last representative. Two years after he undertook the defence of the Duchesse de Berri, who had been arrested while vainly endeavouring to rekindle the smouldering embers of civil war in La Vendee. About this time, Antoine Pierre Berryer began to rise to fame. No name is so well known as his. This distinguished man was for many years the undoubted leader of the French Bar, and to him the Bar of our own country has paid reverential honour. The father of Berryer, an able and distinguished advocate, defended Marshal Ney, and the position of the father naturally paved the way for the son. Berryer's life, as that of nearly all the greatest advocates in France, is as much political as forensic. And this characteristic of the French Bar makes its own history almost the history of France.

Among many great political trials in which M. Berryer was engaged, one stands out far above all others in interest—we mean the trial of the present Emperor of the French, for his attempt at Boulogne. In 1852 M. Berryer was elected Bâtonnier of the Parisian Bar; and, so late as 1858, defended Count Montalembert, who was prosecuted by the Government for certain alleged libellous expressions contained in a newspaper. We most of us remember M. Berryer's visit to Lord Brougham in 1864. Upon that occasion the Bar entertained the two venerable advocates at a banquet in the Middle Temple Hall. His last appearance in the Legislature was in February, 1868; on November 29 following he breathed his last. To the last a Royalist, upon his death-bed, after receiving the last sacrament of the Church, he wrote that touching letter to the Compte de Chambord, which now is matter of history.

Louis Garnier-Pagés and Ledru-Rollin are known to us rather as politicians than barristers, and MM. Thiers and de Tocqueville have achieved a fame, broader and wider than that which the Bar alone can give. Two names of men living among us claim our notice, and with them our imperfect notice of Mr. Young's book must close.

Jules Favre, at present the acknowledged leader of the democratic party in France, and one of the most consummate of living orators, was born at Lyons in 1809. His speech before the Court of Peers in 1835, on behalf of those who were implicated in the fatal disturbances at Lyons, one of great eloquence, marked him out at once. On the retirement of the famous Abbe Lammennais from the management of the journal *Le Mouvement*, M. Favre became one of its chief political directors. In 1860 and 1861 M. Favre was elected Bâtonnier of the Parisian Bar. M. Favre is one of the most consummate speakers of modern times. He has acquired the art in its every branch, and possessing a profound knowledge of his own language, moulds it with a delicacy of finish that is, perhaps, unrivalled.

The present Prime Minister of France, Emille Ollivier, was born at Marseilles in 1826, and was admitted to the Parisian Bar in 1846. In politics a Liberal, his views are far more moderate than those of M. Jules Favre. As a lawyer he is eminent, and as a speaker, although far inferior to the great democrat, is bold and eloquent.

One quotation we shall give. It is taken from his reply to M. Baroche, in defence of liberty:—

"I affirm," says M. Ollivier, "that the honourable M. Baroche does not believe in the power of liberty, because he sees only its excesses These excesses I also, like him, acknowledge and detest. But, for the same reason that we do not forbid the use of fire, because it burns as well as warms; for the same reason that we reject not religion, because there are wicked priests, and justice, because there are false sentences; for the same reason that we condemn not marriage, because there are adulterers; for the same reason that we refuse not to commence a voyage, because we may encounter tempests on the sea instead of propitious winds and starry skies: for the same reason I do not understand why we should proscribe liberty on account of its excesses! In all worldly things the good and the bad are found side by side We must have the manly courage, when we follow the good, to accept the difficult conditions of strife and efforts which are the beauty the glory, the dignity of great undertakings. Royard-Collard has said so, and yet he was no demagogue. Constitutions are not tents set up for sleep; governments are not places of repose, where one's days may glide away in tranquillity, without care or

anxieties; they are posts of honour, because they are posts of battle and of danger!"

Our task is now done. Imperfectly as our work has been executed, we hope, nevertheless, that this mere outline that we have been able to lay before our readers may induce them to read a book, which apart from its own merit, and thjs is considerable, has an interest we venture to think very far beyond the limits of the profession to which it is more especially addressed.—*Law Times.*

## RIGHT OF A LANDLORD TO REGAIN POSSESSION BY FORCE.

"The law," says Mr. Justice Wilde, in *Sampson* v. *Henry*, 11 Pick. 379, 387, "does not allow any one to break the peace, and forcibly to redress his private wrong. He may make use of force to defend his lawful possession; but, being dispossessed, he has no right to recover possession by force and by a breach of the peace." A similar declaration was made by Lord Lyndhurst at Nisi Prius, in the case of *Hillary* v. *Gay*, 6 C. & P. 284. In neither case was so broad a proposition called for by the facts at issue; yet the doctrine thus advanced has been repeated without qualification by courts and text-writers, and applied in cases, or made the foundation for liabilities to which its application was warranted neither by authority nor on principle.

The subject we propose to consider is, how far a landlord, who regains by force the possession of the demised premises, after the possessory right of the tenant therein has determined, can be held subject therefor to any other liabilities than those which the Statutes of Forcible Entry and Detainer have expressly annexed to his act; and, secondly, what is nature and extent of these express liabilities.

By the Statutes of Forcible Entry and Detainer, whether in England or the United Stotes, but three penalties are anywhere expressly imposed; first, fine or imprisonment; secondly, restitution upon a conviction, or, when the force is found upon inquisition or otherwise by a justice or a jury, in some localities purely a criminal, and in others also a civil, consequence of the act; and, thirdly, a special action on the statute with treble damages, which is given by the English statute, and by those of a few of the United States.* But, by implication from the statutes, the employment of force by the landlord in regaining possession has also been held to render him liable in trespass for assault, or for removal of the tenant's goods, and in a few instances also to an action of trespass *qu. cl.* We propose to proceed in our inquiry in the inverse order to this enumeration, and to inquire, first, how far an action of trespass at common law is warranted by the authorities. and then what is the extent and application of the statutory penalties proper.

*Of Vermont, Connecticut, New York, and Wisconsin.

That a tenant whose right to possession is determined either by the expiry of his term, by forfeiture, or by notice to quit, and who is therefore a tenant at sufferance, and himself a wrong-doer, may yet treat his lessor, who is entitled to immediate possession, as a trespasser, and relying on his right, maintain trespass *qu. cl.* against him, merely because the right of the latter has been forcibly asserted, seems so extraordinary a proposition, that if not warranted by express words of the statutes, nothing but the clearest implication from their language could justify it, and as the removal of the tenant upon or after entry is but a part of the act of entry, and depends on the legality of the possession thereby gained, for its justification, the action for assault or for the removal of the tenant's goods, must stand or fall with the action of trespass *qu. cl.*

It is admitted, it should be remarked, in the first place, that, at common law, the lessor was liable to no action for forcible entry or expulsion of the tenant; but at most to an indictment for a breach of the peace, punishable only by fine or imprisonment.† But the ground taken is, that the express prohibition of such entry, with a penalty therefore, by the Statutes of Forcible Entry and Detainer, made the act civilly illegal and incapable of revesting the lessor with a lawful possession, and that for such entry or any assertion of possession based thereon, the lessor became liable like any mere stranger to the lessee.

The English statutes on this subject, from which, with some variations, all those in the United States have been derived, were, excepting only some supplementary enactments not material here, three in number; 5 Rich. II. c. 8; 8 Hen. VI. c. 9, and 21 Jac. I. c. 15. By the first, it was declared "That none from henceforth shall make any entry into lands or tenements but in case where entry is given by law; and, in such case, not with the strong hand, nor with multitude of people. but only in a peaceable and easy manner;" and fine and imprisonment were imposed upon conviction for such forcible entry. By the Stat. 8 Hen. VI. c. 9, forcible detainer, as well as forcible entry, was made criminal, an action of trespass or assize of novel disseisin on the statute with treble damages was given to the party disseised, and restitution on the finding of the force was also to be made to the party *disseised*, and as this term was held to imply a freehold, the right to have restitution was by the Stat. 21 Jac. I. c. 15, extended to tenants for years also.

It will be perceived, that while these statutes make a violent entry or detainer an offence, they also expressly specify the penalties incurred, and thereby exclude the idea of any implied liability, except the indictment at common law, and it has accordingly been held with increasing definiteness by the English

†Hawkins, Pl. Cr. B. 1, ch. 28, sec. 3; *Dustin* v. *Cowdrey*, 23 Vt. 631, 635.

courts that these statutes are special, subjecting the offender only to the penalties named therein, and do not affect the civil character of the act. But two decisions—one of them an extra-judicial Nisi Prius ruling, and the other a majority opinion—break the nearly uniform current of authority, and treat the lessor as a trespasser, and liable as such to his tenant at sufferance. Neither of them however—although they are the sole reliance of the American courts that have held the lessor to such a liability—sustain an action of trespass *qu. cl.*, but only of trespass for assault, and both were shaken and finally overruled by repeated decisions in the Courts of Exchequer, King's Bench, and Common Pleas.

For the doctrine seems early to have been established that the removal of the tenant by force, unless excessive, was not of itself the subject of a personal action, but depended on the title to the possession, and hence that *liberum tenementum* was a good plea to such a removal as well as to trespass *qu. cl.* Thus in *Taylor* v. *Cole*, 3 T. R. 292, in an action of trespass *qu. cl.* with a count for expulsion, a plea of justification of the entry under process was held a defence to both counts. The occupant yielded without forcible resistance to the expulsion, but it was held generally that expulsion was mere matter of aggravation to the trespass to the land, and was answered with this by a plea of title unless there was undue force and the plaintiff new assigned for an assault. The principle established by this case was, therefore, that a party regaining possession by title might assert that possession and expel the occupant with any proper amount of force. The sufficiency of title, as a justification, was again declared in *Argent* v. *Durrant*, 8 T. R. 403, where a lessor was held not liable for entering and pulling down a wall, while the tenant held over, and was carried still further in *Butcher* v. *Butcher*, 7 B. & C. 399, where a freeholder after entry was allowed to treat the party who persisted in remaining as a mere wrong-doer, and to maintain trespass *qu. cl.*, against him.

While these last two cases sustain the right to expel after a peaceable entry, they do not determine how much force in entering could be justified under color of title, or whether a violent entry, because criminal, was civilly illegal. But in *Taylor* v. *Cole*, *supra*, the principle that a legal possession can be acquired by an entry though made with such force as to be criminal under the Statutes of Forcible Entry and Detainer is very distinctly intimated by Lord Kenyon, who says, "It is true that persons having a right are not to assert that right by force; if any violence is used it becomes the subject of a criminal prosecution." And in *Taunton* v. *Costar*, 7 T. R. 431, the same eminent judge distinguished between the the penal consequences of a forcible entry and its civil effect still more clearly, saying, "Here is a tenant from year to year whose term expired. . . . . He now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear the landlord could have justified under a plea of *liberum tenementum*. If, indeed, the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry, but there can be no doubt of his right to enter upon the land," &c. In *Turner* v. *Meymott*, 1 Bing. 158, the point was directly decided. There the landlord, on the determination of a tenancy at will, broke into the house with a crowbar, tenant being absent, but having left furniture in the house, and resumed possession. It had been settled long before that such an entry into a dwelling-house was *per se* indictable.‡ The tenant brought trespass, *qu. cl.* on the ground that the entry, being a criminal act, was not a legal repossession, but a trespass, and obtained a verdict. It was strenuously urged in its support, that a right to regain possession by force would render the action of ejectment superfluous, and that it was absurd to hold an act legal for which an indictment lay. But the court at once set the verdict aside, saying, "It must be admitted that [the landlord] had a right to take possession in some way. . . . If he has used force that is an offence in itself, *but an offence against the public*, for which if he has done wrong he may be indicted.

It seemed well settled, therefore, that a legal possession might be regained by force with no other risk than that of an indictment; and no distinction was taken between force to the premises and to the person of the tenant, nor could any be made, as each is alike indictable under the statute; § and further, that when the lessor had repossessed himself, he could expel the occupant with necessary force. So stood the law when the case of *Hillary* v. *Gay* arose at Nisi Prius. The action was trespass *qu. cl.*, with counts for expulsion, &c., and the facts were that after the plaintiff's tenancy at will had expired, the landlord distrained, and then entered peaceably, and, when in, removed plaintiff's wife and goods without unnecessary force. The defendant pleaded the general issue, and relied on his title, citing *Turner* v. *Meymott*, to show his right to assert that title by force; but Lord Lyndhurst, who presided, distingnished that case on the ground that there the tenant was not in possession, adverted also to the fact that here the tenancy had not determined, as the landlord by distraining had reaffirmed it, and, in a brief opinion, said, "The conduct of the landlord cannot be justified. If he had a right to the possession, he should have obtained that possession by legal means." This is the whole case. The landlord had no right after distraining to enter at all, as by that act the tenancy was restored: (Taylor, Land, & T. sec. 485), and he was liable

‡ *Rex* v. *Bathurst*, 3 Burr. 1710, per Mansfield, C. J., Wilmot and Yates, JJ.

§ *Rex* v. *Bathurst*, *supra*; *Willard* v. *Warren*, 17 Wend. 257, 262.

for his entry without regard to force. What was said about force, was therefore extra-judicial; and whatever its weight, must, as there was no forcible entry at all, be referred to the count for expulsion. The decision amounts therefore, so far as our inquiry is concerned, only to a *dictum*, that, after a peaceable entry, the landlord is liable in trespass for assault, if he uses actual though moderate force to remove the tenant. But this would overrule *Butcher* v. *Butcher*, *supra*, which, it may be remarked, was not adverted to in this case, where a legal possession, once regained, left the occupant who persisted in remaining, liable to be treated as a mere trespasser.

When, therefore, the question next arose, the ground was taken, that the entry was not complete until possession was wholly regained, and hence, that, if the landlord after a peaceable entry used force to expel, his original entry became by relation forcible, and he was liable in trespass for assault, although not in trespass *qu. cl.* This anomalous doctrine was set forth in *Newton* v. *Harland*, 1 M. & G. 644, the second and only other English case which restricted the landlord's right to regain possession by force. The action was trespass for assault merely, and not trespass *qu. cl.* The lessor had entered quietly on the determination of the tenant's right of possession, and expelled him with moderate force. He pleaded lawful possession, *molliter manus*, on which issue on the above facts, Parke, B., directed a verdict for the defendant. A new trial was granted in the Common Pleas, Tindal, C. J., thinking that the facts had not been fully brought out, and expressing a doubt if the lessor could assert his right with force. On the second trial, Alderson, B., ruled that a lessor could expel a tenant holding over, if he "used no unnecessary violence," and a second verdict was found for the defendant. On the case again coming before the Court of Common Pleas, Tindal, C. J., held that there were two questions involved; first upon the right of the lessor to expel, after acquiring by entry peaceful possession; upon which he gave no opinion, and which in fact had already been decided by *Taylor* v. *Cole* and *Butcher* v. *Butcher*, *supra;* and second on the character of the possession acquired by the lessor by an entry with force to the person of the tenant, which he considered this to be. Such a possession he held to be unlawful, because gained by a criminal act. Erskine and Bosanquet, JJ., concurred. It was admitted, however, that the landlord could, after a peaceable entry, if the tenant remained in possession, maintain trespass against the latter; and also that, even for a forcible entry, the tenant could not have trespass *qu. cl.* against the landlord, for want of title; p. 667. How this liability of the tenant to be treated as a trespasser after the landlord's entry could be reconciled with the immunity claimed for him from expulsion with force, such as might be applied to any trespasser, was not explained. Coltman, J., dissented, holding that the right of the lessor to re-enter, even if force was used, was well established by the cases cited *supra*, and that having by his entry revested himself with a legal possession, his tenant at sufferance became a trespasser, and was liable to expulsion like any "mere wrong-doer."

This case, it will be seen, gives no countenance to an action of trespass *qu. cl.* This was expressly declared by Erskine, J. *ubi supra*. In so far as Lord Lyndhurst's *dictum* in *Hillary* v. *Gay* has been regarded as supporting such an action, it is here directly repudiated. But the doctrine maintained is, that force to the person of the tenant in possession is not justified by entry under title, because by relation such an entry is affected by the violence which followed it, and is illegal and void. And yet after such entry the tenant has not rightful possession enough to sue his lessor in trespass *qu. cl.*, for his entry, although he could have maintained that action against a stranger. The lessor's entry is, therefore, at once unlawful and yet not actionable, an injury to the tenant for which he nevertheless cannot sue. How it can be at the same time unlawful and justifiable is not attempted to be explained.

Nor does this anomalous doctrine derive mere weight of authority from this case. The opinions of the three judges who decided it are quite balanced by the judgments of the dissenting judge, and of Barons Parke and Alderson. For the rulings of these latter judges at Nisi Prius in this case were not hasty enunciations, abandoned when controverted by a higher court, by were reasserted by them, with distinct emphasis, in the next case which arose —*Harvey* v. *Brydges*, 14 M. & W. 437—Parke, B., laying down the law in the broadest manner in these words: "Where a breach of the peace has been committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt, that it is a perfectly good justification, that the plaintiff was in possession of the land against the will of the defendant, who was owner, and entered upon it accordingly, even though in so doing a breach of the peace was committed." Alderson, B., added, "may a freeholder lawfully enter on his own premises with any degree of force? I have still the misfortune to retain the same opinion that I expressed in *Newton* v. *Harland*." A plea of *liberum tenementum* was accordingly held a good answer both to trespass *qu. cl.*, and for expulsion also. The amount of force did not appear; but even if there were no actual force, and these statements of law went beyond the facts of the case before the court, they must now be considered conclusive, as the language of Parke, B., has been adopted in terms as a controlling authority in a late and parallel case where actual

force was used, arising in the same court that decided *Newton* v. *Harland: Blades* v. *Higgs*, 10 C. B. N. S. 713, 721.

The language of Parke, B, is, it will be seen not limited to a denial of the anomalous doctrine of forcible entry by relation, propounded by the court in *Newton* v. *Harland*, but broadly lays down the right of entry by force, and its competency to confer a legal possession and consequent right to expel by force; and the decisive adoption of this broad proposition by the court in *Blades* v. *Higgs* is conclusive as to the position of the English law on this point at the present day. But without disposing of the questions involved in this inquiry merely by referring to this latest decision, we find that the cases prior to this and since *Harvey* v. *Brydges* have reaffirmed with equal distinctness the positions taken by the earlier cases first stated, and as distinctly have denied the authority of *Newton* v. *Harland*.

The doctrine asserted in this latter case and in *Hillary* v. *Gay*, that the presence of the tenant restricted the lessor from using force was effectually disposed of by *Davison* v. *Wilson*, 11 Q. B. 890, where title was held on demurrer a sufficient plea to trespass *qu. cl.*, for entering, &c., "with a strong hand" on the tenant's possession in such a manner as to constitute an indictable offence; and even more decisively by *Burling* v. *Read*, *ib.* 904, where the same plea was held good to trespass, *qu. cl.* for a forcible entry made on the possession of the tenant, and for destruction of the premises, and a plea of *molliter manus* to a count for assault for the forcible removal of the tenant. In *Davis* v. *Burrell*, 10 C. B. 821, the court in terms denied the authority of *Newton* v. *Harland*, and in fact overruled it, holding title a good plea to trespass for assault against the lessor who had re entered during the tenant's temporary absence, and forcibly held him out; since no distinction can be drawn between forcibly putting and forcibly keeping out of possession, and the facts were on all fours in the two cases. On the other hand, the sufficiency of the plea of title not only to trespass *qu. cl.* but to a count for expulsion also, unless this last was a distinct or excessive assault, was reaffirmed in *Meriton* v. *Coombes*, 1 Lowndes, M. & P. 510; where on the new assignment by the plaintiff of the expulsion, a demurrer was sustained, as there was no assault; since the expulsion was only an injury to the possession, and covered by the plea of title; in other words that the title or right to immediate possession gave also the right to expel with necessary force; and in *Pollen* v. *Brewer*, 7 C. B. N. S. 371, where, on trespass against the lessor, with separate counts for assault and *qu. cl.* with expulsion, he court held the latter not maintainable upon a plea of title, as the tenant was "clearly a trespasser," and that "the landlord had a right to enter and turn the tenant out," and the latter could only recover for the excessive force under the count for assault.

In all this long line of cases not one sustains the action of trespass *qu. cl.*, and it is distinctly admitted not to lie by the only decision adverse to the lessor's right to use force; and it is as distinctly the result of authority that no action lies for force to the person, unless this is excessive, and the distinction, if any, between force to the person and to the premises —the so-called doctrine of vacant possession —meets not the slightest countenance.

(*To be continued.*)

## CLERICAL DISABILITIES.

"Once a priest always a priest," is a law which the public mind was very prone to approve, and possibly a considerable minority will even now be shocked at the introduction of a bill to enable priests and deacons to relinquish their offices and to become laymen. Nothing, however, can be more fair or more expedient than such a measure. To keep a man for lifetime in a profession for which he is unsuited, or which compels him to do violence to his conscience, is cruel oppression. On the other hand, it is for the interest of the Church that she should be rid of unwilling ministers. The bill introduced by Mr. Hibbert enacts that a priest or deacon may, after having resigned every preferment held by him, execute a deed relinquishing the office of minister, and after six months the deed shall be recorded. and the one-time minister will become for all purposes a layman. If the ex-minister wants to return to the clerical profession he can revoke the deed of relinquishment, and the archbishop may, if he thinks fit, immediately or after a lapse of time cause the new deed to be recorded, but the re-admitted minister will not be capable of holding any perfermeut for two years after the recording of the deed of revocation. We deem this a very just clause. It is right that the archbishop should have a discretion in respect to re-admitting a person who has once relinquished the office of minister, and the disability to hold any preferment for two years will prevent any playing fast and loose with the ministerial office for the sake of emolument. The 9th clause says, 'Nothing in this Act shall relieve any person or his estate from any liability in respect of dilapidations, or from any debt or other pecuniary liability incurred or accrued before or after the execution of a deed of relinquishment under this Act.' This is an unexceptional provision. Any minister availing himself of this Act will do so either on account of conscientious scruples in respect to his continuing a minister of the Church of England, or else because he thinks he can do better for himself and his family in some other calling. Mr. Hibbert's bill is a well-considered measure, and we hope it will be accepted by Parliament.—*Law Journal.*

## ONTARIO REPORTS.

## PRACTICE REPORTS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### In re Potter and Knapp.

*Arbitration — Notice of meetings — Proceeding ex parte — Duty of Arbitrator and dominus litis.—Costs.*

*Held*, 1.—That before an arbitrator undertakes to proceed *ex parte*, he should satisfy himself by proper evidence that necessary notice of the appointment has been served, so as to enable the party notified to appear, and in case of non-appearance, it should clearly be shewn that such absence is wilful.

2. That the party acting in the prosecution of the arbitration ought to take care that all proper notices are served on the opposite party and should be able to shew, if he desires to proceed *ex parte*, that the other party has been properly notified, and that he wilfully absents himself; nor should the arbitrator proceed *ex parte* unless the notice conveys the information, that the arbitrator will proceed *ex parte* if the party served does not attend, nor should he so proceed, if a reasonable excuse for his inability to attend is given.

A party, therefore, who had not fulfilled his duty in this respect was ordered to pay costs, and the case was referred back.

[Practice Court, Hil. Term, 1870, *Gwynne, J.*]

*O'Brien* for Knapp, hereafter called the defendant, obtained a rule *nisi*, calling upon Potter, hereafter called the plaintiff to shew cause why the award made in this cause should not be set aside, and vacated upon the following, among other grounds, viz:—On the ground of misconduct of the arbitrator: 1st. In having proceeded with the said reference and heard evidence on behalf of the plaintiff in the absence of the defendant, and without notice to him, and without giving notice to the defendant of the time, if any, fixed for proceeding with the said reference, and without giving said defendant an opportunity of examining the remainder of his witnesses, or being heard on the examination of the witnesses of the plaintiff before said arbitrator, subsequent thereto; and, because the said arbitrator exceeded his authority under the submission in having assessed the costs of and incidental to the award, and ordered payment of the same.

The rule was founded mainly upon an affidavit of the defendant, and one Henderson.

*J. B Read* shewed cause, and filed four affidavits, namely, of Mr. Geo. Whates, McCrea, the plaintiff himself, and one Chase. He contended that the award should stand, the fault, if any, having been that of the defendant

*O'Brien* contra cited *McNulty* v *Jobson*, 2 Prac Rep 119; *Waters* v *Daly*, Ib 202; *Williams* v. *Roblin*, Ib. 234; *In re Manley et al.*, Ib. 354; Russell on Awards, 179, 191, 199, 207, 655; *Gladwin* v *Chilcote*, 9 Dowl. 550. The main facts of the case appear in the judgment of

Gwynne, J.—It appears from the affidavits that neither plaintiff nor defendant had any person attending the arbitration for them as counsel or attorney, but that they acted each as his own counsel.

Now from these affidavits I am to say whether I am satisfied that the defendant wilfully abstained from attending the arbitration, although he had ample notice of its several sittings, and, whether the circumstances established by his affidavits shew that the arbitrator was justified in proceeding *ex parte*, or whether the arbitration was conducted in any part in the absence of the defendant, without his having had that reasonable notice of the proceedings which he was entitled to, and without which the arbitration would be divested of its judicial character, and the solemn duty of administering justice between parties be degraded into a farce.

I take it to be sufficiently established that the arbitration opened on the 28th May, which day the arbitrator says he formally appointed, by an appointment endorsed on the bond of submission. By reference to this bond, which was filed on the motion to make it a rule of court, I find that this is so, the appointment being dated the 22nd May for Friday the 28th May, and signed by the arbitrator. Upon the 28th May, it appears that the plaintiff's witnesses were examined, but whether his case was closed upon that day, or upon the 4th June, does not appear; however, there is no complaint made of any of the proceedings of the 28th May. Referring again to the submission, I find an endorsement thereon, also signed by the arbitrator in these words: "adjourned till Friday, June 4th, by consent of parties, J. Higgins, Arbitrator." So far the proceedings appear regular, and to have been as represented by the defendant.

Upon the 4th June, then, I take it that the plaintiff's case was closed, if it was not closed on the 28th, and then the defendant's case was opened by the examination of Henderson. Now the substance of defendant's affidavit and Henderson's is, that the arbitration upon that day broke off without Henderson's evidence having been closed, and while the defendant had another witness named Buck, present to be examined: that there was no adjournment to any other day: and, that defendant left, informing both the plaintiff and McCrae that he would expect a notice of the next meeting, whenever it should be appointed. All the affidavits in reply state, on the contrary, that not only was Henderson's examination completed, but also his cross-examination; and the clerk swears that it was taken down in writing, and when so completed was signed by Henderson. Now upon this point, which certainly was a very material point, it would have been very easy, if this were true, for the examination so taken and signed to have been produced; it would no doubt have settled *one* point upon which there is a very grave contradiction in the affidavits filed by the respective parties.

Then again, the affidavits in reply, concur in saying that there was an adjournment made on the 4th June, after the close of Henderson's testimony, to a future day. The arbitrator, McCrea, and Chase, stating that day to be the 11th June, and the plaintiff stating it to have been until the 18th of June. This *may* be a clerical mistake, and yet in view of what I am about to advert to it *may not*. The arbitrator swears that he made a *formal* adjournment to the 11th; McCrea says that the adjournment was made unto the 11th June, and that he acted as clerk and noted all the adjournments. Now referring to the the submission upon which the first appointment and adjournment are endorsed, I find no adjournment upon the 4th June endorsed at all, but under the adjournment *to* the 4th June. I do find an entry of an adjournment, *which is erased*, and which is

in the words following: "adjourned June 11th *to* Friday next, J. Higgins," and the Friday following the 11th June was the 18th June, which is the day mentioned by the plaintiff as the date of the adjournment from the 4th June, so that there may be some colour for something having taken place at some time relating to the 18th June, the day named by the plaintiff; but why is this erased, and why, if the arbitrator did make the *formal* adjournment which he says he he did on the 4th to the 11th, does not that appear on the submission where the other entries of appointment and adjournment, of which there is no dispute, do appear.

Again, if, as McCrea says, he noted down the several adjournments, the production of the minute kept by him would have been very material upon a point as to which also there is such grave contradiction in the affidavits. Then again, the arbitrator swears that what the defendant said upon the alleged adjournment to the 11th being made upon the 4th June was, "that he did not think he would attend, that I might go on whether he was present or not, that he had no further evidence to put in." McCrea states it in somewhat similar terms, namely, "that *he did not think* he would attend as he had no more evidence to offer, and it was of no use coming, and that the arbitrator might proceed in his absence." The plaintiff swears that the defendant stated "that *he would not* attend again, that there was no use as he had no more evidence to put in, and the arbitrator might go on with the hearing." Chase states it as the plaintiff does, that defendant said "that *he would not* attend as he had no further evidence to offer, and that he did *not think* it any use" Now, was Buck there or not in attendance to be examined as a witness by defendant. He swears he was, and no allusion is made to this fact in any of the affidavits filed by the plaintiff, but, assuming that the defendant said what is sworn to by the arbitrator and McCrea, *that he did not think* he would attend; or even what is sworn by the plaintiff and Chase, "that he would not *attend, that he did not think it of any use*" I do not think than an arbitrator in the conduct of a judicial proceeding is justified from such language to proceed *ex parte*, behind the back of one of the parties, without seeing that he had had notice of the further proceedings, so as to give him an opportunity of changing his mind, and of calling more witnesses if he should think fit, or, of being present at least when other witnesses, if any, should be called by his opponent, and of pressing his views equally with his opponent before the arbitrator, if that should have been the purpose for which the meeting was to be held.

Then, the next point is, had the defendant any, and if any, what notice of the intended proceeding upon the 11th, and had the arbitrator any, and if any, what evidence of his having had such notice before he proceeded to take further evidence upon the part of the plaintiff.

The arbitrator swears that he directed McCrea to notify both parties of the intended meeting, that he *knows* that McCrea did so by sending notice to plaintiff and defendant; he says he *knows* that McCrea did so, but he gives me no means of testing the correctness of his knowledge. If he *knows* that McCrea sent the requisite notice he must know what information the notice contained, and how it was sent; but he says nothing in his affidavit upon either of these points. Then McCrea swears that he sent notices as directed by the arbitrator, but he does not say *how* he sent them; and this is in answer to an affidavit of the defendant, that he lives only two miles off, and that he never received any such, or any notice. McCrea without saying how he sent the notice, contents himself with saying that he sent one to defendant, and that he believes he received it, but he gives me no means of judging of the foundation for his belief, or, whether it should out-weigh the affidavit of the defendant, who swears that he never received it. The arbitrator, indeed, swears that the defendant acknowledged to him that he had received the notice.

Now the defendant in his affidavit swears that after he had heard of the award being made, he remonstrated with the arbitrator for having proceeded in his absence, and without having given him notice of his intended sitting of the 11th June; and that the arbitrator replied, that he regretted he had not had notice, but that he could not open the matter, and that he had taken advice upon the subject. Now did this occur or did it not? it is sworn that it did, and the arbitrator does not deny it. If the allegation of the arbitrator is intended as a denial of the statement in the defendant's affidavit, it is a bald way of denying a very precise and material averment; and if being uncontradicted I am to take the defendants statement in this particular to be true, how am I to understand the arbitrator's reply to the effect that he had acted under advice, upon a point relating to his having proceeded *ex parte* without giving sufficient notice; if he had, *then* the defendant's acknowledgment that he had *received* the notice, or if the arbitrator, as he swears, *knew* that it had been sent *in time*; assuming it even to be true that the defendant did, as the arbitrator swears, *at some time* acknowledge that he had received a notice for the meeting of the 11th, the statement of the arbitrator upon that point is loose enough to be consistent with the fact that the acknowledgment was made after the conversation alluded to by defendant, and that the notice had been so carelessly sent, or sent so late that he did not receive it until long after the award was made, and when it was too late to be of any use But, looking at the preciseness of the affidavit of the defendant upon this point, and the vagueness of the affidavits in reply, I am compelled to adopt the affidavit of the defendant that he never received one; and I am left in doubt whether any was ever sent, or if sent, whether it was sent in such a manner as to present a reasonable expectation that the defendant would receive it in time.

But further, an arbitrator who acts in the character of a judge, before he undertakes to proceed *ex parte*, should satisfy himself by some proper evidence, that the necessary notice not only had been sent, but delivered so as to enable the party notified to appear, and there is no suggestion that the arbitrator required or called for any such evidence before he entered upon the *ex parte* examination of the plaintiff's witnesses on the 11th June.

Granting that the defendant may have had no further evidence to call, though he swears to the contrary, what right had the arbitrator to suppose

that he knew that after his evidence was closed further evidence would be received from the plaintiff, without the defendant having notice of that proceeding. The plaintiff indeed swears that the defendant knew that the plaintiff would require to call witnesses to rebut Henderson's evidence. How must the defendant have *known* that? the plaintiff does not pretend that he communicated to the defendant his intention of calling such evidence, and even though the defendant might be content to be absent at any future meeting, as all his evidence had been given, that reason for his absence will scarcely account for its being supposed that he should not attend if the plaintiff should be permitted to adduce fresh evidence, when we find him attending regularly while all the previous testimony was being taken.

In arbitrations, it is, in my opinion, the duty of the *party* acting in the prosecution of the arbitration, whether he be plaintiff or defendant, to take care that all proper and sufficient notices are *served* upon the opposite party, and it is the duty of the arbitrator, before he proceeds *ex parte*, to satisfy himself by sufficient evidence that such notices have been given. Before an arbitrator is justified in proceeding *ex parte*, he ought, in my opinion, to have before him the clearest evidence that the party not attending is wilfully absenting himself; and, when a question arises before the court as to whether an arbitrator has or has not been justified in proceeding *ex parte*, it is incumbent upon the party who did proceed before the arbitrator, to adduce evidence abundantly sufficient to satisfy the court that the party absenting himself had full notice of the meeting or meetings from which he was absent, so as to enable the court to see clearly whether the absence was wilful or excusable, and whether the arbitrator was or was not justified in proceeding in his absence. A very strong case indeed should be made to justify an arbitrator in so proceeding, and it might be well perhaps that it should be established as a rule, that no notice would justify such a proceeding unless it should convey the information that the arbitrator will peremptorily proceed *ex parte* in case the party served with the notice should not attend, and the party serving it should, and even in such a case, the arbitrator should not proceed *ex parte* if the party served should, before the day of meeting, communicate to the arbitrator a reasonable excuse for his inability to attend.

In this case, I must say that I am not satisfied that the absence of the defendant was wilful. There is reason, I think, to doubt that it was even negligent. I am not satisfied that the matters contained in the affidavits filed upon the motion have been displaced by the affidavits in reply, so as to place the defendant in the position of having committed a wilful default; and I do not think that a sufficient case is shewn to have justified the arbitrator in proceeding in the manner in which he did, *ex parte*. Whatever may be the merits of the case, I cannot say that those due precautions have been observed which alone could justify judicial proceedings being taken or continued against a party in his absence.

I have come to this conclusion upon a careful perusal of the several affidavits, and a consideration of the abstract principles of justice, with which all who are conversant with the conduct of proceedings in courts of justice are familiar, without seeking for decisions in like cases, although I doubt not that if it were necessary, abundant authority can be found to support the conclusion at which I have arrived.

As I do not think that the arbitrator's conduct was wilfully improper, but that it proceeded rather from ignorance of the judicial duties of an arbitrator, the rule will be to refer the matter back to the arbitrator, with such enlargements as may be necessary.

I think the plaintiff must pay the costs of this application. It was his duty to see that the enlargements were properly made and notice served, before he called upon the arbitrator to proceed *ex parte*.

## Stacey v. McIntyre.

*New trial to plaintiff on payment of costs—When to be paid.*

When a plaintiff obtains a new trial on payment of costs, he is not bound to pay them before the next assizes, because, even had the costs been paid, the plaintiff could not be compelled to go to trial at such assizes; but he must be *tout temps prist* to pay the costs taxed to defendant.

On 19th June the judgment for new trial was given, and on 19th August the rule was served, and on 30th September the costs were tendered. *Held*, that the tender was made within a reasonable time.

A rule to rescind a rule for new trial was therefore discharged, but, as the costs taxed, which had (too late for the assizes) been tendered and refused, were not paid into court, without costs.

[Practice Court, H. T., 1870, *Gwynne*, J.]

*O'Brien*, for defendant, obtained a rule *nisi* to rescind a rule granted in Easter Term, 1869, giving plaintiff a new trial on payment of costs, on the ground that the costs taxed under said rule were not paid in accordance with the terms of said rule and the practice of the court in such cases.

It appeared that the venue in this cause was laid in the county of Elgin, and that the case was tried at the assizes in and for the said county, on the 8th April, 1869, and that a verdict was then rendered for the defendant on the first count, and for the plaintiff on the second count of the declaration, with fifty dollars damages, and leave was reserved to the plaintiff to move in Term to enter judgment for himself on the first count.

In Easter Term last the plaintiff obtained a rule *nisi* upon the leave reserved, which rule was argued by counsel for both sides during the same Term, and judgment thereon was reserved; and on or about the 19th June last judgment on the rule *nisi* was given to the effect that the plaintiff should have a new trial upon payment of costs.

On 19th August last a copy of the plaintiff's rule for said new trial, upon payment of costs, was served upon the Toronto agent of the said defendant's attorney, and the said copy was forwarded by the agent to the attorney.

On the 24th September last a letter was received from the attorney for the plaintiff, asking for the bill of the costs so required to be paid by the plaintiff; which was on the same day forwarded by post to the Toronto agent of the defendant's attorney for taxation, and upon the same day a letter was written and posted to the plaintiff's attorney, informing defendant that the bill had been so forwarded to be taxed according to the usual course of practice, and on the

next day the agent of the defendant's attorney told the agent of the plaintiff's attorney that the bill was ready for taxation.

The costs were not taxed until the 28th of September last, and on the 30th September were tendered to the defendant's attorney but refused.

The commission day for the fall assizes for the county of Elgin was the 5th October, the last day for notice of trial for the said assizes being therefore the 27th September.

*Boyd* shewed cause:

There is a material difference between an application of this kind by defendant and by plaintiff The plaintiff was not bound to go down to trial at the next assize: the defendant could not have forced him to do so, and consequently the plaintiff was not required to pay the costs previous to the time for giving notice of trial for the first assizes. The plaintiff is not in default, and this rule should be discharged with costs There is no case directly in point, but *Summerville* v *Joy*, 5 Prac. Rep. 144, is an authority in plaintiff's favor, and see C L. P. Act, sec. 227.

*O'Brien, contra.* It was the plaintiff that obtained the new trial, and it was his duty to have had the costs taxed promptly and paid forthwith If this rule is granted it must be with costs; if not the plaintiff cannot have costs: *Lush's* Prac. 494; *Rabidon* v. *Harkin*, 2 Prac. R 129; *Van Every* v. *Drake*, 3 *Ib.* 84; *Johnson* v. *Sparrow*, 1 U. C. Q B. 397; *Stock* v. *Shewan*, 18 U. C C. P. 185.

Gwynne, J —Upon the principle on which I proceeded in *Summerville* v. *Joy*, I must hold that the defendant is not entitled to rescind the rule for a new trial, because the plaintiff did not proceed to trial at the last assizes in the county of Elgin. The rule granted to the plaintiff, upon his own application, a new trial upon payment of costs. Had these costs been taxed and paid before the last day for giving notice of trial for the last assizes, there was no process by which the defendant could have compelled the plaintiff to give notice of trial for, and to proceed to trial at these assizes; his default in doing so would have given defendant no right to rescind the rule, the costs of which had been paid. He must have proceeded according to the practice of the court to bring the case down to trial by proviso, or by notice under the 227th section of the C L. P. Act, whichever is or shall be determined to be the correct practice.

Now, here the plaintiff tendered the costs two days after the last day for serving notice of trial. The defendant refused to accept the costs thinking he could rescind the rule for the default of the plaintiff in not having given notice of trial, but I think the defendant should have received the costs as tendered I think they were tendered within a sufficiently reasonable time to comply with the rule, and as the defendant could not have moved to rescind the rule, if the costs had been paid, so he can not succeed in rescinding it since he himself prevented the payment by his refusal to accept. But the plaintiff should have been *tout temps prist* since to pay the costs, and if he had, upon this rule being served upon him, brought the taxed costs into court I should have felt bound to give him the costs of opposing this application; not having done so, I think the proper rule to make, if it should be necessary to issue any rule, will be to make the defendants rule absolute without costs, unless the plaintiff shall within three weeks pay the taxed costs of the former rule, and in such case the defendants rule will be discharged without costs.

## ELECTION CASE.

### Reg. ex. rel. McGouverin v. Lawlor.

*Quo warranto summons—Forfeiture of seat.*

A summons in the nature of a *quo warranto*, under the Municipal Act, is not an appropriate proceeding to unseat a defendant who has forfeited his seat by an act subsequent to the election, the election having been legal.

[Chambers, March 8, 1870, *Mr. Dalton.*]

This was a summons in the nature of a *quo warranto* under the Municipal Act, complaining of the election of the defendant, as Reeve of the Municipality of the Township of Alfred, in the County of Prescott.

The facts appeared to be, that the defendant filed the office of Reeve for the year 1869: that at the election which took place on the 3rd January last, the defendant was again elected, and accepted office, and afterwards, on the 24th January last, was convicted before two justices "for that he the said George Lawlor, did on the 21st day of December, 1869, at the Township of Alfred aforesaid sell and barter spirituous liquors without the license required by law," and he was fined $20 with $5 costs.

Mr. Clarke (Cameron & Smart) for the relator, claimed that the defendant should be unseated, the defendant having forfeited his seat under 32 Vic. (Ont.) cap 32, secs 17, 22, 25.

*W. S Smith* shewed cause, contending that the act did not cover a case where the election or qualification of the defendant was not called in question, but only matters subsequent thereto; and he alleged matters against the conviction not necessary to be noticed here.

Mr. Dalton —The only cause alleged by the relator for unseating the defendant is the above conviction.

This proceeding, in the nature of a *quo warranto* summons, is entirely statutory. Section 130 of the Municipal Act contemplates the case of the *validity of the election* being contested, and sec. 131, which prescribes the proceeding for the trial, enacts, that if the relator shows by affidavit to the judge reasonable grounds for supposing that the election *was not legal*, or, *was not conducted according to law*, or, *that the person declared elected thereat was not duly elected*, the judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matters contested; and, throughout the subsections of sec 131, the language is consistent. It is said in subsec. 9: *The judge shall in a summary manner upon statement and answer, without formal pleadings, hear and determine the validity of the election.*

Now from the time of his election and acceptance of office to the 24th January, the defendant properly filled the office, because, 1st, the election was legal; 2nd, it was conducted according to law, and 3rd, the defendant declared elected

thereat was duly elected. The election was therefore valid, but by his conviction on that day it is alleged that the defendant forfeited his office, which till then he had rightly held. By the 17th sec. (Statutes of Ontario), 32 Vic. cap. 32, it is provided "If any member of any municipal council shall be convicted of any offence under this Act, (which this conviction is), he shall *thereby* forfeit and vacate his seat, and shall be ineligible to be elected to, or to sit or to vote in any municipal council for two years thereafter, &c."

Whether such a case would, or would not, be within secs. 120, 124 & 125 of the Municipal Act, no doubt the law affords an appropriate remedy, but the present proceeding is, by express language of the Act, as it seems to me, confined to cases which exclude the cause now alleged, as an objection against the defendant's election.

Judgment should therefore be for the defendant, with costs.

*Judgment for defendant with costs.*

## COMMON LAW CHAMBERS.

### Roche v. Patrick

*Change of venue—Balance of convenience—Fair trial.*

An application to change the venue in an action of libel to a county where the cause of action arose and the witnesses resided, and whereby there would be a great saving of expense, was opposed on the ground that a fair trial could not be had in such county, owing to alleged prejudices against the plaintiff, arising from a political excitement occasioned by an election held there three years previously.

*Held*, that the venue must be changed: the action being for a private injury and not a matter of public interest, and the probabilities of the case being against the belief that a fair trial could not be obtained, as alleged, and the preponderance of convenience and expense being greatly in favor of the change.

[Chambers, March 8, 1870, *Mr. Dalton.*]

This was an application by the defendant to change the venue from the County of Frontenac to the united Counties of Leeds and Grenville.

The action was for libel, the plaintiff being the Parish Priest of the Parish in which Prescott is situated. The pleadings in the case were of immense length, there being twenty-four pleas of justification, upon which issues were joined.

The affidavits put in on the motion to change the venue were in substance as follows:—

The defendant's affidavit stated, that the publication consisted in the alleged sale by the defendant, in the Town of Prescott, of a pamphlet containing the libel: that 45 witnesses who lived in Prescott, or the immediate neighbourhood, must be called by the defendant: that (he believed) all the plaintiff's witnesses also resided in the Town of Prescott, or in the immediate neighbourhood: that Brockville is distant not more than 12 miles from Prescott, whereas Kingston is more than 60 miles: that at the trial at Kingston it would cost not less than $350 more than at Brockville for defendant's witnesses and that it must necessarily cost the plaintiff more in like proportion for his witnesses: and "that a perfectly fair and impartial trial can be had in the Town of Brockville, and that such trial can be had at an expense less by $500 or $600 than a trial at Kingston, that is regarding the extra expense to both parties: and that any political excitement caused by the election referred to in the affidavit of the plaintiff's attorney, had long since died away.

The affidavit of the defendant's attorney was to the same effect.

The affidavits on the part of the plaintff were made by his attorney, and, as far as seemed important, were to the following effect: that shortly before the publication of the alleged libel an election had occurred in the South Riding of Grenville, at which the defendant was a candidate, and against whom the plaintiff voted: that a few weeks after the election the libel in question was published, as was alleged, and publicly sold by the defendant: that the libel was alleged to have been written by one John Gray, and refers to the part which the plaintiff took in the election, and is supposed to have been written on account of the part which the plaintiff then did take: that the plaintiff was a Roman Catholic Priest, and that the part he took in the election, and the influence he was allowed to use over his parishioners had excited a strong feeling against him in the minds of many of the supporters of the defendant: that all these matters were well known throughout the Counties of Leeds and Grenville, and have been referred to in the public journals: that from the above facts the deponent believed that a large number of the people, especially in the South Riding, were prejudiced for or against the parties, and that a fair trial could not then be had, nor a jury selected which would not contain some men prejudiced on the subject of the action, or who would be likely to agree, and that he therefore thought it indispensable to the ends of justice, that the case should be tried in some other county: that he believed the application to be made, because any jury of those counties would be likely to disagree: that the plaintiff's witnesses reside chiefly about Prescott, and that it would be little more expensive to take them to Kingston than to Brockville.

*S. Richards*, Q C., for the defendant, urged that the venue should be changed upon the grounds, that the cause of action arose in Leeds and Grenville: that both parties reside there: that the witnesses on both sides also reside there: and, that a trial at Kingston, besides other inconveniencies, will cost more than one at Brockville to an amount between $500 and $600.

*John Patterson* shewed cause, and opposed the application upon the grounds that it was not made in time; and that on account of the prejudice existing against the plaintiff in Leeds and Grenville upon the matters above mentioned, it would be impossible to obtain a fair trial there.

Mr. Dalton—The plaintiff's first objection is, that this application is not made in time. I think, however, that upon the understanding between the attorneys, as explained by the plaintiff's attorney, the state of the record and the facts which have occurred, that it is in time.

Then as to the principal questions which have been argued. I have read all the cases which I have been referred to, and others, I will state the effect of some of them: *Jackson* v. *Kidd*, 8 C. B. N. S. 355; Byles, J., says, "To induce a judge to make such an order (to change the venue), three things are necessary; first, that defendant's witnesses reside at the place to

which it is sought to change the venue: secondly, that the plaintiff's witnesses also reside there, and thirdly, that the cause of action arose there;" and in the same case Erle, C. J., says, "the principle by which the judges have been guided since the framing of the Common Law Procedure Act is this,—that if it be made to appear that there will be great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of costs in a trial of the cause at the place to which it is sought to change the venue, the judge is at full liberty to exercise his discretion in the matter, and to make the order if he sees fit."

No doubt the plaintiff is *dominus litis*, and it lies upon the defendant to prove the facts necessary to change the venue from where the plaintiff has laid it There must be a manifest preponderance of convenience in a trial at the place to which it is sought to change it: *Helliwell* v. *Hobson*, 3 C. B. N. S. 761. All the cases I have referred to on this point are consistent with those I have cited, and now let us apply this rule to the present facts.

Both parties live in Leeds and Grenville; so do the witnesses of both parties. The cause of action arose there, and the difference of expense of trial in the two places must be very considerable. How are these facts met by the case of the plaintiff?

I entirely agree with Mr. Patterson, that if it be reasonably established that a fair trial cannot be had in Leeds and Grenville, that all the above considerations are overborne. Upon this point Mr. Patterson has referred me to an important case, *Penhallow* v. *The Mersey Dock, &c.*, 29 L. J. N. S., Ex 21. It was an action against the Dock Company for the loss of a ship by negligence. It was shown upon the affidavits that the matter had excited great discussion in Liverpool, that almost every merchant and shipowner had made up his mind upon it, and upon the court being urged to restore the venue to Liverpool because the cause arose there the parties and witnesses on both sides residing there, and that much greater expense would arise from the trial elsewhere, the learned Chief Baron said: "all other considerations must give way to that of a fair trial. The learned Baron who tried the former cause is of opinion that this cause could not be fairly tried at Liverpool;" and the court refused the rule. But is there any cause to believe that a fair trial cannot be had in this cause in Leeds and Grenville?

The affidavit of the plaintiff's attorney states his belief that it cannot. The defendant and his attorney are as confident that a fair trial may be had there.

It is necessary to look at the probabilities. The action is for a private injury, not for any matter of public interest, and I cannot bring myself to think that there can be any danger of prejudice arising at the trial from the cause assigned. It would be unfortunate for Canada if the heat of a political contest had such an effect three years after the event, for we have an election every four years. How little the courts have regarded suggestions of prejudice alleged to have arisen from such causes, may be learned from the language of the judges in *Rex* v. *Harris et al.*, 3 Bur. 1330; *Seely* v. *Ellison*, 6 B. N. C. 229; and *Dowling* v. *Sadleir*, 3 Irish Com. Law Rep. 603.

As the balance of convenience is very greatly in favor of a trial at Brockville, and the suggested prejudice to the plaintiff is not established, I must make the summons absolute to change the venue.

*Order accordingly.*

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### Westover v. Brown.

*Striking out issues after demurrer.*

A defendant will be allowed, where the plaintiff's declaration is held bad on demurrer, upon payment of the plaintiff's cost of the application and of the replication, to strike out the issues in fact upon some of the pleas and need not move to rescind the order allowing him to plead several matters.

[Chambers, March 10, 1870, *Mr. Dalton.*]

*F. Osler* obtained a summons on behalf of the defendant to strike out the issues in fact upon some of defendant's pleas, the plaintiff's declaration having been held bad on demurrer.

*J. K. Kerr, contra*, objected that the summons should have been to set aside the order allowing the defendant to plead several pleas, and not merely to strike out the issues upon those pleas.

Mr. Dalton—In 1 Wm. Saund. 80 note (1), the editor says:—"It seems to follow that when the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is determined in favor of the plea, judgment of *nil capiat* shall be entered, notwithstanding there may be also one or more issues in fact, because upon the whole it appears that the plaintiff has no cause of action. So where several pleas are pleaded, since the Stat. 4 & 5 Anne, c. 16, all of them going to destroy the action, and one or more issues are joined upon some of the pleas, and there are one or more demurrers to the rest—if the court determine the demurrers in favor of the defendant *before* the issues are tried they shall not be tried, and if *after* the trial it will make no difference, for in each case judgment of *nil capiat* shall be given against the plaintiff."

But later authorities show that in such case the issues would not be struck out against the will of the defendant. *Beckham* v. *Knight*, 7 Dowl. 409; *Carden* v. *General Cemetery Co*, *ib.* 425. For though the defendant may be entitled to enter judgment of *nil capiat* on the whole record, yet here he is not bound to do so. But if the *defendant* wishes to strike out the issues on his own pleas, it can be but a question of costs.

The order obtained to plead several pleas or to plead and demur, is for the defendant's benefit, and he may waive the advantage to any extent he pleases. He need not plead all the pleas allowed; after he has pleaded them he may move to withdraw them, and he will be allowed to do so upon proper terms, for he does but waive his own right, and the foundation of the order is not meddled with. Should the plaintiff move to strike them out, no doubt he must attack the order which is the authority to the defendant to plead them.

The present application of the defendant to strike out the issues is simply to be allowed to withdraw his pleas, which he should be allowed to do, upon payment of the costs to the plaintiff occasioned by them, that is, the costs of the

replication and of his application, to be deducted from the plaintiff's costs.

Courts have gone a good way to prevent the incurring of useless costs. In *MacMartin* v. *Thompson*, 26 U C. Q. B. 334, the defendant pleaded the general issue, and a special plea, to which latter the plaintiff demurred. On the trial of the issue the defendant succeeded, and the Court having refused to the plaintiff a rule *nisi* for a new trial, would not hear the argument of the demurrer, which had been set down by the plaintiff; for the plaintiff, having failed on the merits could not be allowed to put the defendant to the costs of an argument, for the mere purpose of getting the costs of the demurrer.

In the judgment, the learned Chief Justice suggests this present proceeding as a proper measure for the defendant to take. This was decided after time taken, and the clauses of the C. L P. Act, as to the acts of several issues, were considered by the Court.

*Order accordingly.*

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### Commercial Bank v. Harris.

*Issue Book.*

Where pleadings are altered in a material point, it is necessary to serve a new or amended issue book.

[Chambers, March 11, 1870, *Mr. Dalton.*]

*J. G. Scott*, for defendant, applied to set aside the notice of trial in this cause, on the ground that no issue book had been served shewing the existing state of the pleadings.

It appeared that an issue book had been served at an early stage of the suit, but subsequently the pleadings on the files had been altered, some additional pleas having been pleaded, and some of the former withdrawn, and a demurrer had been disposed of before notice of trial was given. Notice of trial was served without a new issue book being served or the old one amended.

*Crooks*, Q C., shewed cause.

Mr. Dalton—I think on the authority of *Woodruff* v *Watson*, 6 Taunt. 400, that the notice of trial is irregular, for the reasons given, and must be set aside.

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## DIGEST.

### DIGEST OF ENGLISH LAW REPORTS.

FOR NOVEMBER AND DECEMBER, 1869, AND JANUARY, 1870.

*(Continued from page 110.)*

Abatement—*See* Executor and Administrator, 2; Legacy, 4.

Account—*See* Appropriation of Payments; Bank; Contract, 1; Foreign Office; Limitations, Statute of.

Action.

An action cannot be maintained for writing to purchasers, or intended purchasers of machines, that such machines infringe the defendant's patents, and threatening legal proceedings in case of the use of such machines without the payment of a royalty, unless it can be shown that the defendant's claim is not *bonâ fide* in support of a right which, with or without cause, he fancies he has.—*Wren* v. *Weild*, L. R. 4 Q. B. 730.

*See* Award, 3; Family Name; Limitations, Statute of, 4.

Administration—*See* Executor and Administrator.

Admiralty—*See* Bail; Costs, 4; Damages, 2, 3; Principal and Agent; Salvage; Statute.

Adultery—*See* Connivance.

Affidavit—*See* Misdemeanor.

Agent—*See* Contract, 1, 2; Principal and Agent; Privileged Communication.

Agreement—*See* Contract.

Alimony.

By the practice of the Ecclesiastical Courts, more than one moiety of the joint income cannot be allotted to a wife after a decree of judicial separation, although she may have brought more than one moiety of the property into settlement.—*Haigh* v. *Haigh*, L. R. 1 P. & D. 709.

Annuity.

A testator gave an annuity which he directed to be paid by his son; and subject and charged with the payment of his debts, legacies, and the annuity, he left his real and persenal property to his son. On bill filed by the annuitant to enforce payment: *Held*, that he was not entitled to a receiver, as he could help himself by distress under St. 4 Geo. II. c. 28.—*Sollory* v. *Leaver*, L. R 9 Eq. 22.

*See* Executor and Administrator, 2; Will, 2, 6.

Appeal.

There is no settled rule that when one party to an administration suit has appealed, any other party may insist on having the decree varied in his favor.—*Pardo* v. *Bingham*, L. R. 4 Ch. 735.

*See* Limitations, Statute of, 3.

Apportionment.

C. covenanted and gave bond to pay a fund three months after his decease in trust for a tenant for life and remainder-man, with interest from the date of his death until payment. Several years after C.'s death, it appeared that there were some assets, but less than the principal fund. *Held*, that the sum must be calculated which would amount, at four per cent. from C.'s death, to the assets on hand, and the difference paid to the tenant for life.—*Cox* v. *Cox*, L. R. 8 Eq. 343.

## Digest of English Law Reports.

Appropriation of Payments.

A., an attorney, having £5,000 to invest for B., a client, paid it to his own general account at his banker's, and afterwards drew out more than that amount and his previous balance, and paid in considerable sums. He died not having invested the £5,000, and with a balance at the bank of £2,700. *Held*, that the sums drawn out must be set against those paid in in the order in which they were paid in, and that B. could not restrain A.'s administrator from dealing with the balance.—*Brown* v. *Adams*, L. R. 4 Ch. 764.

Arbitration—*See* Award.

Assignment—*See* Priority; Stoppage in Transitu.

Assumpsit—*See* Fraud.

Attorney—*See* Appropriation of Payments; Limitations, Statute of, 3; Solicitor.

Attorney-General—*See* Railway, 3.

Award.

1. The plaintiff, S., agreed to row a race with K., each to deposit a stake with the defendant, and "the decision of the referee to be final." There was a default in the start, and the referee, who had power to interfere in that event, ordered K. to inform S. that if he did not start, K. was to row over the course without him. K. rowed over the course, and, as the jury found, without communicating this order to S., or giving him an opportunity to start. The referee, who could not see what occurred between K. and S., without any inquiry, and against the protest of S.'s umpire, ordered the stakes to be paid to K. *Held*, that, as the court could see that the question whether K. communicated his order to S. had not been passed on by the referee, and as K. did not do so in fact, there was no race, and the referee had no jurisdiction to award the stakes, and that S. was entitled to recover his deposit. (Exch. Ch.)—*Sadler* v. *Smith*, L. R. 5 Q. B. 40; s. c. L. R. 4 Q. B. 214; 3 Am. L. Rev. 682.

2. The umpire in whose discretion were the costs of the submission, reference, and award, awarded a sum to one party, and directed him to pay the costs of the other party, which were double the sum awarded. *Held*, that this was no ground for setting aside the award.—*Re Fearon & Flinn*, L. R. 2 C. P. 34.

3. Suit for £400. Plea, by way of estoppel, as to all over £145; an award, not alleged to be satisfied, of £145 in favor of the plaintiff for the same cause of action. Demurrer. *Held*, that the plea was a good bar.—*Commings* v. *Heard*, L. R. 4 Q. B. 669.

Bail.

1. A vessel was arrested in a cause of collision. At the time of the collision she had a cargo on board, a portion only of which remained on board at the time of the arrest. The vessel and cargo belonged to the same owner. On motion for release of the portion of the cargo remaining on board: *Held*, that the freight due upon the whole must first be paid into court.—*The Roecliff*, L. R. 2 Ad. & Ec. 363.

2. A vessel was arrested in a cause of collision, having been herself injured by the collision. She was afterwards repaired and much increased in value. On motion for her release on bail: *Held*, that she ought to be released on bail being given to the amount of her value at the time of her arrest.—*The St. Olaf*, L. R. 2 Ad. & Ec. 360.

Bailment—*See* Telegraph.

Bank.

A railway company having general and special accounts with a bank was credited with a sum "Per Loan," and drew cheques against it which were entered under the head "Loan Account." The company became insolvent, and the claim of the bank was disputed as being for an unauthorized loan. *Held*, that the above was not a loan, but merely an overdrawn account.—*Waterlow* v. *Sharp*, L. R. 8 Eq 501.

*See* Trust, 1; Will, 9.

Bankruptcy.

1. A payment of a sum by a sub-tenant to release his goods, lawfully distrained for rent due from the tenant to the landlord, does not create a liability from the tenant to the sub-tenant "by reason of any contract or promise, to a demand in the nature of damages," which is barred by the tenant's discharge in bankruptcy.—*Johnson* v. *Skafte*, L. R. 4 Q. B. 700.

2. After an order *nisi* in a divorce suit, dissolving the marriage, and ordering the co-respondent to pay damages and costs, the co-respondent made away with his property, and shortly after the order was made absolute, became bankrupt. *Held*, that he was not guilty of contracting a debt without reasonable expectation of being able to pay it, within the Bankruptcy Act, 1861, s. 159.—*Ex parte Clayton*, L. R. 5 Ch. 13.

3. A solicitor, who had been solicitor to a former assignee, but who was attending at the Bankruptcy Court for another party, was examined, without having been summoned, as to his receipts on account of the estate. He admitted receipts, and claimed deductions, but

was told to pay over the full sum received. Afterwards, and without notice to him, an order was made to that effect. *Held*, that the order must be discharged as made without giving the solicitor a proper opportunity to defend himself.—*Ex parte Prance*, L. R. 5 Ch. 16.

*See* Partition, 1; Priority; Winding Up.

Beer House.

A covenant not to use a house as a "beer house" is not broken by the sale, under a license, of beer, by retail, not to be drunk on the premises.—*London & N. W. Railway Co.* v. *Garnett*, L. R. 9 Eq. 26.

Bill of Lading.

By the bill of lading for a quantity of sugar the ship-owner was "not liable for leakage." The sugar, in consequence of improper stowing, was damaged during the voyage by the drainage from other sugar stowed above, which caused it to heat. *Held*, that this was not damage by leakage, and the owners were liable to the consignee.—*The Nepoter*, L. R. 2 Ad. & Ec. 375.

*See* Ship, 1; Stoppage in Transitu.

Bills and Notes.

Plaintiff, having agreed to receive a company's acceptance for a debt due him if two directors would indorse it, went to the office of the company and received a bill which directors A. and B., who were in the habit of attending there, indorsed at the time. The bill was dishonored, and notice was sent to A. at the office of the company. *Held*, that the notice was sufficient. The office was A.'s place of business for the purpose of this transaction.—*Berridge* v. *Fitzgerald*, L. R. 4 Q. B. 639.

*See* Evidence, 1; Payment; Trust, 1.

Bond.

1. Railway bonds represented that the company was indebted to L. in an amount there stated; they were given for the purpose of being deposited by him as security for advances to be made. The money obtained by the deposit was in part applied to payment of debts of the company. St. 7 & 8 Vic. c. 85, s. 19, imposes penalties on a company for giving loan-notes or securities. *Held*, that, so far as the company had had the benefit of the money obtained, as above, for its legitimate purposes, the bondholders had a valid claim against its assets.—*In re Cork and Youghal Railway Co.*, L. R. 4 Ch. 748.

2. A., the nominal plaintiff, received from a company of which he was a member, in part payment of a debt due from them, £32,000 in their debentures of £100 each, expressed to be payable to him or his assigns. Some of these he assigned to B. and some to C., the real plaintiffs, and transfers to them were registered on the company's books. They also received certificates that they were "registered proprietors," and were dealt with by the company as such. The company then made a mortgage to A. in trust for the "holders for the time being" of the debentures unpaid. Afterwards A. became the debtor to the company, who by their articles had a primary lien on the debentures of any members liable to them. The question was, whether the company were equitably entitled to set off A.'s debt to them in suits on the debentures assigned to B. and C. *Held*, that they were not.—*Higgs* v. *Northern Assam Tea Co.*, L. R. 4 Ex. 387.

*See* Bottomry Bond.

Bottomry Bond.

1. The extent of the authority of the master of a vessel to bind the owners, either of the ship or of the cargo, is derived from, and bounded by, the law of the flag.

When the master fails to obtain funds from the owners of the ship or cargo, he is authorized to raise money to pay for necessary repairs and supplies, after such supplies and repairs have been furnished, by giving a bottomry bond on ship, freight, and cargo to persons other than those who have furnished the repairs and supplies, when by the *lex loci* these latter persons have a lien on the ship for their claim.

The court being of opinion that certain advances made by the charterer, and indorsed on, but not stipulated for, by the charter-party, were, as between him and the owners, advances of freight: *Held*, that the master's bond did not give the obligee a right to demand more freight than the master could have.—*The Karnak*, L. R. 2 P. C. 505; s. c. L. R. 2 Ad. & Ec. 298; 3 Am. L. Rev. 685

2. A. was the owner of a vessel, and insolvent; B. was the first mortgagee; C. was the second mortgagee, and knew these facts, and that A. and B., as well as himself, lived at Liverpool. C.'s agents at Cuba were applied to for further advances to the vessel on bottomry, telegraphed to C., and by his authority made the advances, there having been no communication with A. or B. *Held*, that the bond was invalid, because, under the particular circumstances, C. should have communicated with A.—*The Panama*, L. R. 2 Ad. & Ec. 390.

3. A bottomry bond was given for payment "in case of the loss of the ship" of "such an

average as by custom shall have become due on the salvage, or if on the said voyage, the said ship shall be utterly lost, cast away, or destroyed," then the bond was to be void. The vessel was sold before the end of the voyage under circumstances which would, as between insurers and insured, constitute a constructive total loss. The proceeds were less than the amount of the bond. *Held*, that the bondholder was entitled to them.—*The Great Pacific*, L. R. 2 Ad. & Ec 381; s. c. L. R. 2 P. C. 516.

Carrier—*See* Negligence, 2, 3; Railway, 1; Ship, 1; Telegraph.

Cases Overruled—*See* Contribution.

Charity.

In 1558 a testator devised realty to "the Master, Wardens and Comonaltie of the *Misterie of the Wax Channdlers* . . . for this entent and purpose, and upon this condicon, that they shall yerely distribute" £8 as follows: £7 15*s*. to charities, 5*s*. to the Master and Wardens for the time being equally, "and the rest of the profits . . . I will shall be bestowed upon the reparacons of the said houses and tenements. And yf the Master, Wardens, and Comonalltye . . . do leave any of these things ondonne . . . then I will that the next of Kynrid unto me . . . shall enter the said tenements . . . and holde unto him and unto his heirs for ever upon condicon that he and they and every of them do all these things." About the date of the will the whole income was £9 4*s*. It had since much increased. *Held*, that the company was entitled to the surplus.—*Attorney-General* v. *Wax Chandlers' Co.*, L. R. 8 Eq. 452.

*See* Mortmain; Will, 13.

Church—*See* Voluntary Association.

Codicil—*See* Will, 1.

Collision—*See* Bail; Costs, 4; Damages, 2, 3; Ship, 2.

Commission.

A commission was issued to examine the surviving witness of a will, on affidavit that he was sixty-six years old, and frequently suffered from ill-health.—*Brown* v. *Brown*, L. R. 1 P. & D. 720.

Common Carrier—*See* Negligence, 2, 3; Railway, 1; Ship, 1; Telegraph.

Company.

1. The directors of a company had power to buy the business of a firm of bill-brokers on such terms and taking such guarantee as they might think fit. A deed of transfer was made, and was referred to in the prospectus; but, by a second deed, doubtful debts of such amount that the firm was then insolvent were retained by the firm for collection, and payment of the balance uncollected after a certain time, was secured only by the firm's personal guaranty. The second deed, and the facts rendering the purchase imprudent, were not disclosed to the shareholders. A bill was filed by the company against the directors, alleging loss of capital and loss from liabilities incurred through their breach of duty, but not charging fraud. *Held*, that there was a remedy in equity for loss of capital only, and that as to that, the purchase, the taking of personal security only, and the secret deed, were all within the powers of the directors as against the company.—*Overend, Gurney & Co.* v. *Overend*, L. R. 4 Ch 701.

2. Directors of a company authorized to invest in securities, applied on its behalf for shares in another company, on the understanding that they were not really to take more than their share of what remained untaken by the outside world. For the shares so taken £30,000 was paid out of the company's funds. They also received five hundred shares for an agreement not to sell the former ones under a certain rate for a time. *Held*, *ultra vires*, and the payment a breach of trust.

One director, who merely wrote two letters protesting against the scheme, but was present at the meetings, before and afterwards, was charged, although he was not an allottee, and did not sign the cheques for said £30,000. So one not at the original meeting, but who signed one of the cheques, and was party to the subsequent transactions. Bill dismissed, without costs, against one who was present at none of the meetings. Also against a secretary and assistant manager.—*Joint Discount Co* v. *Brown*, L. R. 8 Eq. 381.

3. It being necessary, to start the A. company, that forty thousand shares should be taken, and A. being prohibited to buy its own shares, the C. bank discounted the notes of B., the purchaser, for the necessary sum, by crediting that sum to A. on its books, and A., as soon as organized, gave a guarantee to leave with C. an amount equal to the notes of B. remaining unpaid. The sum so credited to A. was applied by C. to B.'s bills; but C., to procure for A. a settling day on the Stock Exchange, certified that the sum had been deposited with them in payment of shares. A shareholder of A. filed a bill against the directors of A. and against C. *Held*, that A.'s guarantee was *ultra vires*, and that C., having participated in the breach of trust, must refund the amount

applied to B.'s bills.—*Gray* v. *Lewis*, 8 L. R. Eq. 526.

4. A shareholder in the L. Co., who had subscribed for twenty-five shares in the C. Co., received four hundred and seven-nine paid-up shares as shareholder in the L. Co. *Held*, that this satisfied the subscription.—*Drummond's Case*, L. R. 4 Ch. 772.

*See* Bank; Bills and Notes; Bond; Illusory Suit; Winding Up.

Condition—*See* Charity; Will, 1.

Conflict of Laws—*See* Bottomry Bond, 1; Domicile; Executor and Administrator; Limitations, Statute of, 1, 2.

Congregation—*See* Minister.

Connivance.

A separation deed, with the facts, was *held* not to prove the wife's connivance at the husband's adultery. *Semble*, a consent, although unwilling, on her part, for the sake of getting the allowance, would be connivance.—*Ross* v. *Ross*, L. R. 1 P. & D. 734.

Consideration—*See* Stoppage in Transitu.

Construction—*See* Bankruptcy, 1, 2; Beer-house; Bill of Lading; Bottomry Bond, 3; Company, 2; Contract, 3; Copyright; Legacy, 3, 4; Limitations, Statute of, 2; Marriage Settlement; Mortgage, 1; Pleading; Power, 1, 2; Railway, 1; Revocation of Will; Statute; Vendor and Purchaser, 1; Will, 2–13.

Contempt.

Publishers of a newspaper, in which a petition for winding up a company, containing charges of fraud against the directors, was printed *in extenso* before the hearing of the petition, were made to pay the costs of a motion to commit for contempt of court.—*In re Cheltenham and Swansea Railway Carriage and Wagon Co.*, L. R. 8 Eq 580.

Contingent Interest—*See* Will, 6.

Contract.

1. A., an army agent, to secure balances from time to time due to him from B., an officer, took out and paid for policies on B.'s life, but charges B. in his books with the premiums paid, and credited B. with a sum refunded. A. also drew on B. for round sums, more than the balance due from B. including the premiums, and B. accepted the bills, which were afterwards dishonored. No account had been sent to B. charging him with the premiums. *Held* that after payment of A.'s debt, the rest of the proceeds of the policies belonged to B.'s estate.—*Bruce* v. *Garden*, L. R. 8 Eq 430; s. c. *reversed*, L. R. 5 Ch. 32.

2. A. was hired by B. to serve as farm bailiff, at weekly wages, with certain bonuses, and a residence in a farm-house; the service to continue until six months after notice, or payment of six months' wages. B. died. *Held*, that B.'s administratrix was not bound to continue A. in her service, or pay him six months' wages. The death of either party to a contract founded on personal considerations dissolves it.—*Farrow* v. *Wilson*, L. R. 4 C. P. 744.

3. A building contract was made terminable by a board in case the contractor "shall not, in the opinion and according to the determination of the said architect, exercise due diligence, and make such due progress as would enable the works to be" completed by the specified time. The architect certified *bonâ fide* that the contractor was not exercising due diligence, and the board terminated the contract. *Held*, that the contractor was bound by the architect's decision, although the board caused the delay.—*Roberts* v. *Bury Commissioners*, L. R. 4 C. P. 755.

*See* Bill of Lading; Bond; Bottomry Bond; Covenant; Damages, 1; Frauds, Statutes of; Husband and Wife; Interest; Limitations, Statute of, 1, 2; Minister; Negligence, 1; Railway, 2, 3; Reformation of Instruments; Sale; Salvage; Ship, 1; Stoppage in Transitu; Telegraph; Trust, 1; Vendor and Purchaser of Real Sstate.

Contribution.

A testator gave pecuniary legacies, and then devised real estate to his wife for life, and after her death with all the residue of his real and personal estate in trust for his niece for life, with remainder to her children. The personal estate was insufficient to pay the debts. *Held*, that the pecuniary legatee could not make the residuary devise contribute to the payment. *Hensman* v. *Fryer*, L. R. 3 Ch. 420; 3 Am. L. Rev. 101; *denied*.—*Collins* v. *Lewis*, L. R. 8 Eq. 708.

Copyright.

St. 25 & 26 Vict. c. 68, s. 1, giving a copyright to "the author of every original painting, drawing and photograph, and his assigns," gives a copyright in a photograph from an engraving of a picture.

By s. 5, and by 5 & 6 Vict. c. 45, s. 14, "if any person shall deem himself aggrieved," he may apply to have the entry of the copyright expunged from the register. W., who had been convicted of infringing G.'s copyright on the evidence, *inter alia*, of a copy of the entry

of G 's title, applied to the court to expunge the entry. W. did not set up any title in himself. *Held*, that W. was not a person "aggrieved" within the acts.—*Graves' Case*, L. R. 4 Q. B. 715.

Costs.

1. A trustee's costs of paying a fund into court under the "Trustees' Relief Act," are payable out of the *corpus*; his costs of appearing on a petition for payment of dividends are payable out of income.—*In re Whitton's Trusts*, L. R. 8 Eq. 352.

2. When a testator has given a fund to trustees to be invested in land which is to be settled on A., B., and C. successively for life, and the fund is paid into court in an administration suit, and has not been invested in land, the costs of a petition by the tenant for life for payment of the dividends to him are payable out of the *corpus*—*Scrivener* v. *Smith*, L. R. 8 Eq. 310.

3. When a plaintiff, who has been ordered to pay the costs of a proceeding in the suit, becomes bankrupt, and the suit is revived by his assignee, proceedings will be stayed until payment of such costs.—*Cook* v. *Hathaway*, L. R 8 Eq. 612.

4. In a cause of damage by collision, defendants pleaded and proved that the collision was caused by the fault of a pilot whom they were compelled to employ. The plaintiffs were condemned in costs.—*The Royal Charter*, L. R. 2 Ad. & Ec. 362.

5. A husband who was condemned in his wife's costs in a suit by her for dissolution, which was decreed, was allowed to deduct therefrom the amount which he had paid for her costs in a previous suit for nullity of marriage, which had failed.—*Ditchfield* v. *Ditchfield*, L. R. 1 P. & D. 729.

*See* Award, 2; Contempt; Cruelty; Damages, 3; Inspection of Documents; Tender.

Covenant.

After life-estates in A. and B., A. had a power to appoint £5,000 by will among his children (C., D., E., F., and G.) In default of appointment, or subject to any such as should not be a complete and entire disposition of the whole sum, the fund was to go to said children, to vest at twenty-one or marriage. C. died over twenty-one. D. afterwards reached twenty-one, and married, and A. then covenanted to appoint one fifth of the fund in D.'s favor. A. died without having appointed. There was claimed for D £1,000 under the covenant, and one fifth of the residue as not disposed of. *Held*, that D. was entitled to only £1,000. *Semble*, the covenant was, void.—*Thacker* v. *Key*, L. R. 8 Eq. 408.

*See* Beer-house; Marriage Settlement; Railway, 2, 3.

Creditor—*See* Partnership.

Criminal Law—*See* Forgery; Larceny; Misdemeanor; Venire de Novo.

Cruelty.

A wife, shortly after marriage, was found to be affected with syphilis. Her virtue was unquestioned, but the husband swore that he had never had the disease, which was only contradicted by inference from the state of the wife. The jury found the husband guilty of cruelty. *Held* (Willes, J., *dissentiente*), that the evidence did not support the finding. Rule absolute for a new trial on payment of costs.—*Morphett* v. *Morphett*, L. R. 1 P. & D. 702.

Custom—*See* Sale.

Damages.

1. Defendants, mortgagees of a leasehold, sold it to plaintiff, possession to be given on completion of the purchase. The plaintiff resold, at an advance of £105, to G. There was no failure of title, as in *Flureau* v. *Thornhill*, 2 W. Bl 1078; but the mortgagor, who was in possession of the premises, refused to give them up. Thereupon the defendants declined to complete the sale, although they could have ousted him. *Held*, that the plaintiff could recover, besides the deposit and expenses of investigating the title, the difference between the contract price and the value at the time of the breach; and that the advance on the re-sale was evidence of this in the absence of other proof. (Exch. Ch.)—*Engell* v. *Fitch*, L. R. 4 Q B 659; s. c. L. R. 3 Q. B. 314; 8 Am. L. Rev. 95.

2. The owners of a ship taking advantage of St. 25 & 26 Vict. c. 63, s. 54, to limit the damages payable by them, for a collision, to £8 for each ton of the ship's tonnage, may be held to pay interest from the date of the collision on the amount recovered.—*The Northumbrian*, L. R. 3 Ad. & Ec. 6.

3. So, where damages by such means were reduced below the sum which usually carries costs in the admiralty, but the damage suffered and the amount claimed were above that sum, the plaintiff was allowed costs.—*The Young James*, L. R. 3 Ad. & Ec 1.

*See* Vendor and Purchaser of Real Estate.

Death—*See* Contract, 2.

Debenture—*See* Bond.

Dedication.

As far as living memory went, the occupier of a field, crossed by a foot-path, had been wont, in the due course of farming, to plough it up, and so to destroy the foot-path for the time being. There was no evidence of the existence of the foot-path before living memory. *Held*, that the owner must be presumed to have dedicated this way to the public, subject to the right of ploughing it up.—*Mercer* v. *Woodgate*, L. R. 5 Q. B. 26.

Deed—*See* Forgery; Marriage Settlement; Registry of Deeds.

Desertion.

A husband, not having cohabited with his wife, or provided a home for her, gave her £100 on her agreeing not to molest him in future by insisting on her right to live with him. They never cohabited afterwards. *Held*, that the husband had not been guilty of desertion.—*Buckmaster* v. *Buckmaster*, L. R. 1 P. & D. 713.

Discovery.

A. filed a bill against B., C., and others, stating that B. married C., by whom he had "one son only, namely," A., and that A. was "the first and only son of" B., and as such was entitled to certain property as tenant in tail in remainder; that an indenture, to which B. was a party, recited that there was, in 1860, "one child only of the marriage of the said B. and B.," meaning A; that the defendants, except C., pretended that A. had no interest in the estate, but refused to discover the grounds of such pretences, and that the estate had been sold. Prayer for account and other relief. Interrogatives filed. Plea to all the relief and discovery that A. was not the son of B. *Held*, that, taking the bill and interrogatories together, the plaintiff was entitled to discovery (as to the deed, and as to the allegation that he was a child, and the only one of the marriage), and the plea was overruled; but not on the ground that it was negative or to the person.—*Wilson* v. *Hammonds*, L. R. 8 Eq. 323.

*See* Privileged Communication, 1.

Distress—*See* Annuity.

Divorce—*See* Connivance; Costs, 5; Cruelty; Desertion.

Domicile.

Domicile of choice is a conclusion of law from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time. It is not a question of nationality.

One whose domicile of origin was Scotch, and who for many years held a medical appointment in India, was *held* to have acquired a domicile in Jersey on the facts. (Residence for twenty-five years until death; provisions for favorite grandson residing there; removal of children to a tomb there; stock of wine; making a will under advice that it would not be good unless he were domiciled in Jersey.)—*Haldane* v. *Eckford*, L. R. 8 Eq. 631.

Dower.

A testator, after directing his debts to be paid by his executors, devised his real and personal estate, subject as aforesaid, to trustees upon certain trusts, being partly for the benefit of his widow. *Held*, that the widow was deprived of her right to dower by the Dower Act, 3 & 4 Will. IV. c. 105, s. 9.—*Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466.

Easement—*See* Dedication.

Entries—*See* Evidence, 2.

Equitable Assignment—*See* Priority.

Equitable Conversion—*See* Legacy Duty.

Equitable Mortgage—*See* Interest.

Equitable Plea—*See* Set-off.

Equity—*See* Company, 1; Foreign Office; Fraud.

Equity Pleading and Practice.

1. To protect a bill from demurrer for want of equity it is not enough to allege generally that the defendant holds a fund in trust for the plaintiff. The facts must be set forth which establish that conclusion.—*Grenville-Murray* v. *Earl of Clarendon*, L. R. 9 Eq. 11.

2. Whether an order of court is necessary to enable a married woman who is sued as a *feme sole* to file a plea of coverture, *quære*.—*Heygate* v. *Thompson*, L. R. 8 Eq. 354.

*See* Appeal; Contempt; Costs, 1–3; Discovery; Illusory Suit; Partition, 1; Patent, 1; Railway, 3; Trust, 2.

Estoppel—*See* Award, 1, 3; Bond.

Evidence.

1. Evidence that B. had previously paid a bill accepted in his name by A., A. not having any general authority to accept bills for B., is immaterial, in the absence of an allegation that the plaintiff discounted the bill on the faith of the signature being that of B.—*Morris* v. *Bethell*, L. R. 4 C. P. 765.

2. Entries over a century old made by the steward of a predecessor in title of the plaintiffs, and setting forth payments to him of rent for certain land from predecessors of the defendants, are admissible to prove the plaintiff's title.—*Gifford* v. *Williams*, L. R. 8 Eq. 494.

*See* Commission; Frauds, Statute of; Negligence, 2; Privileged Communications; Will, 12.

Executor and Administrator.

1. The deceased died intestate, leaving her husband surviving her, who did not take administration to her estate. The will of the husband was proved in Ireland, but no grant was made in Englank. The will of the sole executor of the husband was proved in Ireland, and resealed in England. *Held*, that the executor under the last-mentioned will was not entitled to administration of the goods of the deceased.—*Goods of Gaynor*, L. R. 1 P. & D. 723.

2. In the course of administration of an insufficient estate, there being a legacy, life-annuities, and an annuity to A. for life, with remainder to B. for life, before further consideration of the cause, A. and some other annuitants had died. *Held*, that in fixing the proportions in which the annuities were to abate, the value of B.'s annuity was the present value with arrears since A.'s death.—*Potts* v. *Smith*, L. R. 8 Eq. 683.

*See* Apportionment; Contract, 1, 2; Legacy, 1, 2; Trust, 2.

—*American Law Review.*

## GENERAL CORRESPONDENCE.

### *Clerk of the Peace—Fees—Adjourned Sessions.*

To The Editors of the Law Journal.

Gentlemen,—At the first meeting of the "Board of Audit" for the County of Waterloo, held under the recent Act 33 Vic. cap. 8, of which Board the writer is a member, the Clerk of the Peace had in his account the following item, viz.: "To attending seven adjourned sessions and making up record of each at $2.50=$17.50," which caused considerable discussion and was finally allowed by a majority of votes, one member of the Board dissenting.

The Minute Book of the Court of General Sessions of the Peace for the County of Waterloo, kept by the Clerk of the Peace, shows that the Court held last December had been adjourned seven times before it rose, viz.:—

On the 14th day of December the Court met for the transaction of general business; during that day the Clerk of the Peace brought into Court the Jurors' Book under the 39th section of the U. C. Jurors' Act—the Court after deciding as to a full Jury list, found that the selecting of Jurors could not be proceeded with "immediately" as there were civil and criminal cases for trial which were supposed, and subsequently proved, to occupy the whole of the first day, and as there was certain business such as auditing of accounts and the reading of Certificates for Naturalization of Aliens, the former of which requiring to be commenced on the second day of the Sessions, the latter to be read a second time on the last day of the General Sitting of the Court—an adjournment took place in the evening until the following day, 15th December. On that 15th December the general business of the Session was completed, the Court commenced the selection of Jurors and again adjourned to the 16th December for the purpose of continuing the selection of Jurors. On the 16th December the Court again met in open Sessions pursuant to adjournment, sat all day and adjourned to the 17th December; it again met in open Session on the 17th December pursuant to adjournment, sat all day and adjourned to the 21st December; then again met in open Sessions pursuant to adjournment, and so on for three days more till the Court rose.

The question arose whether the Clerk of the Peace was entitled to a fee for adjourning the Court from day to day and making up record of each adjourned sittings.

One of the members of the Board of Audit held that the Clerk of the Peace was not entitled to any of said adjournment fees, holding that an adjournment mentioned in the Tariff of Fees did not mean one held from day to day; another member of that Board maintained the very opposite and expressed himself in favor of allowing the item of $17.50 as charged by the officer, while the third Auditor entertained some doubts, but finally voted in favor of allowing the same; thus giving the individual the benefit of his doubt; and as this is considered a sound principle in Criminal Law, it is probably also sound in civil matters.

The Tariff of Fees for Clerks of the Peace, as framed by the Superior Court Judges in Trinity Term, 1862, has the following, under which the above-mentioned charge of $17.50 is made, viz.: No. 66, "*Attending* each *adjourned or special sessions and making up record thereof*, $2.50," to be paid out of the County funds to the Clerk of the Peace. The

Tariff of 1862 appears to be an amendment to the Tariff framed by the Judges in Michaelmas Term, 1845, in which the Judges ordered: "That besides the fees set down in that Table, the several Officers will be entitled to receive fees for other services rendered by them respectively, which are not mentioned in that Tariff, wherever specific fees for such services are fixed by any Statute." Webster's Dictionary explains the word "*adjourn*" to signify, to suspend business to another day or for a longer period.

Blackstone, Vol. I., page 186, says: "An *adjournment* is no more than a continuance of the Session (of Parliament) from one day to another, *as the word itself signifies.*" He no doubt understood French and hence the meaning of "ajourner" and of "ajournement."

In Burn's Justice, Vol. V., it is laid down that the proper caption and style of an adjourned Session is thus:—

"Be it remembered that at the General Sessions of the Peace of Our Sovereign Lady The Queen, holden in and for the County of ——, at —— in the said County, on —— the —— day of ——, A. D. 18—, before —— and ——, Esquires, and others, their fellow Justices of the Peace of Our said Lady, the said General Sessions were continued by them the said Justices by adjournment until —— the —— day of ——, A. D. 18—, and at an adjourned Sessions then accordingly held by adjournment on the —— day of ——, A. D. 18—, before —— and ——, Esquires, and others, their fellow Justices, &c." In another part of Burn's Justice it will be found that where there is an equal division of Justices, or from any other good cause no judgment is given, an adjournment should be entered by the Clerk of the Peace, that the Justices may resume the consideration at an adjourned Sessions.

The principal points advanced against allowing the charge for adjournments were: that the literal meaning of the word was not contemplated by the Tariff; that an adjournment from day to day did not entitle the Clerk of the Peace to the fee in No. 66 of said Tariff, and that that fee was only to be allowed when the Court adjourned for a longer period, as from week to week or the like.

While on the other hand and in favor of allowing said charge it was contended that the fee mentioned in the Tariff, being given without qualification, the Auditors were justified in giving it a liberal construction: that if it were conceded that for an adjournment from week to week the fee in the Tariff should be allowed, that there is no difference in principle or in law, whether the adjournment of the Sessions were for one day or for one week, and the common sense view was to allow the officer for making up the record of each adjournment, and that therefore the charge made by the Clerk of the Peace should be allowed.

Will you, gentlemen, kindly give your valuable opinion on the above subject, as no doubt many of your readers are interested in the same, and as it would be very desirable for future occasions to have so weighty an opinion as one from you bearing on the same.

I may add that, on enquiry, I am credibly informed, that in the Counties of Wellington and Middlesex the Clerks of the Peace are allowed $2.50 *for each and every day* there is an adjourned Sessions, whether for selecting Jurors or otherwise.

Respectfully yours, Otto Klotz.

[We have much pleasure in inserting the above letter. Mr. Klotz has ably and we think very fairly argued out the position he takes, and whatever may be thought as to the strict law every one who has any knowledge of the duties of the office will readily admit that the most favorable construction of the tariff gives but a poor compensation to the officer.

We should like to hear what answer, if any, could be given to the arguments advanced by Mr. Klotz. But so far as the matter is before us we must, without at present committing ourselves to an opinion on the point, think that a strong case has been made out by that gentleman. The narrow construction contended for was, we think, rightly overruled by the Board, until at least there is an authoritative decision on the point.

We have always taken ground against the payment of officers of justice by fees—that is, in cases where a salary could be estimated for or fixed. A fixed salary for general duties at least would save much labour in audit, and avoid unseemly contentions, which must be very unpleasant to officers. It is not an agreeable occupation to be contending, quarter after quarter, for one's rights; and, whatever may be the case in the future, we fear that in the past justice was not always done to officers. —Eds. L. J.]

## REVIEWS.

The Canadian Parliamentary Calendar and Directory, 1870. Edited by H. J. Morgan, Ottawa: printed by Bell & Woodburn, Elgin Street.

Mr. Morgan, the Editor of the *Canadian Parliamentary Companion*, has done good service in issuing a *Parliamentary Celendar*. The one is a twin book to the other. Each contains in convenient form, information useful and necessary for members of the Canadian Parliament and others who take an interest in the public affairs of Canada.

This is the first year for the publication of the Calendar; but if at all successful, the editor promises that it shall be issued annually. Year by year it will, if continued, be of increased value as a history of the Dominion as it grows from youth to manhood. Already events of great public importance have transpired, and been duly chronicled in the Calendar before us. While we write events of equal importance, and of great public significance, are transpiring; it will be convenient for our public men to have before them a "ready reckoner," which gives day and year for every such event, without the necessity for a search being made in the cumbrous journals of the House and other public records.

Besides containing the Calendar, the little book before us is replete with information. In it, we find the official title of the Governor General, and a short historical sketch of his life and public services. Next his Staff, and then the members of the Queen's Privy Council. The part of the book which contains the Directory, is very complete. The name and residence in Ottawa of each member of the Senate and House of Commons are given in alphabetical order, together with a statement shewing the names of the House of Commons candidates for the several constituencies at the last general election, and at each election since held, with the number of votes polled for each candidate, and the population of each constituency in the Dominion. Next there is an alphabetical list of the members of the Dominion Parliament, and of the four Local Legislatures, shewing their constituencies, and particularizing those who have been appointed or elected since the general election of 1867. Following this is a Directory to the Public Departments, shewing where they are to be found, and the names of the officers in each of them Then we have the names of the members of the Local Governments, and the names of the officers in the several departments of each of the Provinces of the Dominion.

We call attention to the advertisement of an enterprising florist, whose "*Floral Guide*" speaks for itself.

The best recreation for a man wearied with the toils of court or an office is an hour's "labour of love" in a garden either before or after business hours. We therefore make no apology in speaking at this season of the year of something which, though not of professional interest, has been the solace and pleasure of many whose names are eminent in the legal world.

## APPOINTMENTS TO OFFICE.

STIPENDIARY MAGISTRATE AND REGISTRAR.

JESSE WRIGHT ROSE, of Prince Albert, Esq., to be Stipendiary Magistrate and Registrar of Deeds in and for the Territorial District of Parry Sound. (Gazetted March 26th, 1870.)

NOTARIES PUBLIC.

RUPERT MEARSE WELLS, of the City of Toronto, Esq., Barrister-at-Law. (Gazetted Feb. 12, 1870.)

GEORGE YOUNG SMITH, of the Town of Whitby, Esq., Barrister-at-Law. (Gazetted March 5th, 1870.)

HENRY CARSCALLEN, of the City of Hamilton, Gentleman, Attorney-at-Law. (Gazetted March 19th, 1870.)

JOSEPH JACQUES, of the City of Toronto, Attorney-at-Law; and THOMAS CHAS. PATTESON, of the City of Toronto, Attorney-at-Law. (Gazetted March 26, 1870.)

ARTHUR J. MATHESON, of the Town of Perth, Esq., Barrister-at-Law; P. McVEAN CAMPBELL, of the Town of Chatham, Esq., Barrister-at-Law; ALFRED FROST, of the Town of Owen Sound, Gentleman, Attorney-at-Law. (Gazetted April 2nd, 1870.)

ASSOCIATE CORONERS.

DAVID P. BOGART, of Carleton Place, Esq., M.D., to be an Associate Coroner within and for the County of Lanark. (Gazetted Feb. 19th, 1870.]

PETER McLAREN, of the Town of Paisley, Esq. M.D., to be an Associate Coroner within and for the County of Bruce. (Gazetted March 12th, 1870.)

THOMAS W. POOLE, of the Town of Lindsay, Esq., M.D., to be an Associate Coroner within and for the County of Victoria. (Gazetted March 19th, 1870.

JAMES P. LYNN, of the Village of Renfrew, Esquire, M. D., to be an Associote Coroner within and for the County of Renfrew. (Gazetted April 9th, 1870.)

ALCIDE J. B. DELAHAYE, of the Gore of Toronto, Esq., M.D., to be an Associate Coroner within and for the County of Peel. (Gazetted April 9th, 1870.)

DAVID BONNAR, of Albion, Esq., M.D., to be an Associate Coroner within and for the County of Peel. (Gazetted April 16th, 1870.)

JOHN ALBERT, of the Village of Meaford, Esq., to be an Associate Coroner within and for the County of Grey. (Gazetted April 23rd, 1870.)

SHERIFF.

ABSALOM GREELY, of the Town of Picton, Esq., to be Sheriff of and for the County of Prince Edward, in the room and stead of HENRY I. THORP, Esq., deceased. (Gazetted March 26th, 1870 )

COUNTY CROWN ATTORNEY AND CLERK OF THE PEACE.

HENRY H. LOUCKS, of the Town of Pembroke, Esq., Barrister-at-Law, to be County Crown Attorney and Clerk of the Peace in and for the County of Renfrew, in the room and stead of William Duck, Esq., deceased. (Gazetted March 26th, 1870.