DIARY FOR APRIL.

1. Mon.. *Easter Monday.* County Court Term begins. Clerks and Dep. Clerks of Crown and Master and Registrar in Chancery to make quarterly returns of fees.
6. Sat... County Court Term ends.
7. SUN.. *Low Sunday, or 1st after Easter..*
14. SUN.. *2nd Sunday after Easter.*
21. SUN.. *3rd Sunday after Easter.*
23. Tues.. *St. George.*
25. Thur. *St. Mark.*
28. SUN.. *4th Sunday after Easter.*

The Local Courts'
AND
MUNICIPAL GAZETTE.

APRIL, 1872.

LEGAL NOTES.

Mrs. Bradwell, the Editor of the *Chicago Legal News*, is one of the most indefatigable of her sex. She applied for admission to the Bar of Illinois; and on being refused, moved all the Courts of the State, from the lowest even unto the highest. But the law was against her, and, cherishing the motto of her paper, "*Lex vincit*," she submitted with serene grace. But it was only to gather up her energies for a new and now successful effort. The Senate of the State of Illinois has been moved, and the result is announced in her paper in jubilant capitals: "LIBERTY OF PURSUIT TRIUMPHANT IN ILLINOIS!" Her importunity has secured the passage of an Act, which takes effect next July, and reads as follows:

"Sec. 1.—No person shall be precluded or debarred from any occupation, profession or employment (except military), on account of sex. Provided, that this Act shall not be construed to affect the eligibility of any person to an elective office.

"Sec. 2.—All laws inconsistent with this Act are hereby repealed.

"Sec. 3.—Nothing in this Act shall be construed as requiring any female to work on streets or roads, or serve on juries."

We think this indomitable woman, or "female," as the Act has put it, is now entitled to change the motto of her journal into "*Sex vincit.*" If we may judge from the character of her paper (one of the most spirited of our weekly exchanges), she will, as a barrister, surpass many of her bearded brethren; and in time, we doubt not, should the gown movement obtain among the United States bar, she will arrive at the forensic honour of being "clad in silk attire." We notice that in the Washington District Courts a "female lawyer, coloured," has already been admitted to practice.

These are the halcyon hours of legal authors. Times are changed from the days when counsel were sternly reprimanded if they ventured to cite text-writers. Treatises even so weighty as Viner's Abridgement were once lightly esteemed by the court. In *Farr* v. *Dean* (1 Burr. 364), Mr. Justice Foster interrupted Sergeant Martin, when he was clenching an argument, thus: "Brother, Viner is not an authority. Cite the cases that Viner quotes; that you may do."

Notwithstanding the complacency with which the Judges now take a note of the text-writers cited, it remained for a Western Supreme Court (as duly chronicled in the *Chicago Legal News*) to render the finest compliment ever yet conceived by judicial intellect to legal authorship. That Court, it appears, suspended giving judgment in an important testamentary case, until Mr. Kerr's recent treatise on "Fraud and Mistake" could be imported from England, and placed in the hands of the Judges.

Since the four-and-twenty-day deliverance of the Attorney-General against the historical "claimant," minute statisticians have been overhauling the records of legal speeches famous for their "long, majestic march," if not for their "energy divine." The closest upon Sir John's heels was Miss Shedden, who, in the great Legitimacy case which so nearly concerned her, spoke for twenty-four days before the astonished and despairing law lords. Sir Charles Wetherell is said to have occupied eighteen days in discussing a cause in Chancery. In *Small* v. *Attwood*, the House of Lords listened for twelve days to the compact eloquence of Sergeant Wilde (afterwards Lord Chancellor Truro), whose fee, by the way, was £6,000—about the same sum as that which now ministers to the solace of Sir John Coleridge.

INFRINGEMENT OF PATENTS.

An important case on this point was recently decided by the Court of Queen's Bench in *Bonathan* v. *The Bowmanville Furniture Manufacturing Company.*

The plaintiff obtained a patent for a new and useful improvement on machines for bending wood for making chairs, and other purposes, and sued the defendants for infringement of it.

By the old process the wood to be bent for the back of a chair was placed on an iron strap, one end resting against a fixed shoulder upon the strap, the other confined by a movable shoulder which was tightened against the end of the wood by a wedge, in order to give the end pressure required to prevent the wood from breaking or splintering in bending. In the plaintiff's machine a screw was used in place of the wedge, and by it, but not by the wedge, the pressure could conveniently be regulated and adjusted during the bending. With the wedge, too, only a single curve or semi-circle for the back of the chair could be accomplished, while by the plaintiff's machine the two ends of the back piece could be bent down, so as to connect with the seat or body of the chair as side pieces. This also was effected by end pressure with the screw; and the side piece and back were thus formed out of one piece by continuous pressure, instead of from separate pieces.

It appeared that a machine had been used for many years in the United States which performed the same work as the plaintiff's, but it was too expensive. The plaintiff had been employed in defendants' factory in bending for about three months, and was asked by the foreman "to study up an invention or apparatus for bending chair stuff." He discovered the invention that same night, about the first of May, and next morning explained it at the factory. The machine was constructed there, defendants supplying the materials and the blacksmith's and carpenter's work, and was used there for chairs until about the 14th of July, when the plaintiff applied for a patent, many persons in defendants' employment being aware of its construction and operation. It appeared, also, that other persons in the factory as well as the plaintiff had been employed in trying to devise such an apparatus, and that when this was found successful the manager said he would patent it for the factory, to which the plaintiff did not then object. The plaintiff never informed defendants of his application for the patent, which issued in October following.

The Court held that there had been a public user of the invention with the plaintiff's consent and allowance before he applied for the patent, so as to destroy his claim to it.

They also decided that the plaintiff having been employed by the defendants expressly to make or improve the machine, could not claim to be the inventor as against them.

It would seem also that the use of the screw to produce the end pressure could not be the subject of a patent, though the construction of the side and back in one piece might be.

SELECTIONS.

THE JUDGMENTS OF VICE-CHANCELLOR MALINS.

If a Judge is disposed to take eccentric views of law and fact, and to decide in a way which courts of appeal find it impossible to approve, it is hard to conceive any remedy for the evil. In this respect experience does not always teach, and we believe there are not many Judges who take reversals of their decrees by our courts of appeal much to heart.

We are certain that no court of common law would regard as a matter of the least importance the fact that the Exchequer Chamber failed to take the same view as itself, and we quite understand that Vice-Chancellor Malins does not feel himself in any way prejudiced by the circumstance that Lord Hatherley comes to diametrically opposite conclusions on similar statements of fact, and in the construction of the same Act of Parliament.

It is somewhat an invidious task to discuss who is right in this conflict, and we shall perhaps be excused if we simply place the divergence of judicial opinion on record. The most recent instance in which it occurs, is in the case of *Turner* v. *Collins*, decided by Lord Hatherley on the 22nd instant. A voluntary settlement had been made by a son in favour of his father, which the son sought to set aside on the following grounds:—That the plaintiff was a young man, and was ignorant of the nature of the instruments he was induced to execute; that no proper explanation of the effect of what he was doing was given to him; that his interest throughout the transaction was not regarded, and that there had been an entire absence of that independent legal advice and protection which would justify the court in sustaining this voluntary settlement by which plaintiff had given up a large portion of his fortune. In an elaborate judgment, delivered on the 8th July last, Vice-Chancellor Malins came to the conclusion that the litigation was altogether unjustifiable, inasmuch as the deeds in question dated in 1855 simply

carried into effect the deliberate, well-considered intentions of the plaintiff; that he had ample independent advice, which put him in possession of a distinct knowledge of what he was about to do, and that the arrangement, having regard to the situation of the family and the relative circumstances of the father and son at the time, was a reasonable and proper one; and that, in addition to all the other objections, the delay of fourteen years in filing the bill, and, admittedly, seven years after the plaintiff had full knowledge of his rights, was fatal to the bill, which, so far as it sought to impeach the transactions of 1855, must be dismissed with costs. From this decision plaintiff has appealed.

Now on the material point as to the due execution of the settlement, the Lord Chancellor differed from the Vice-Chancellor, and concurred alone on the ground of the delay.

He was "unable to agree with Vice-Chancellor Malins that the provision made by this young man for his father, and his father's family, was either a prudent or a reasonable arrangement for a young man circumstanced as he was to have made." The Lord Chancellor then adds this extraordinary remark: "The Vice Chancellor seemed to be influenced by one or two considerations which, with great respect for his Honour, *had nothing whatever to do with the case.*" This is very startling, but as the case was one in which individual opinion of the operation of particular motives upon a man's mind would be likely to differ, the illustration of judicial conflict is not so striking as in a case where the construction of an Act of Parliament is in issue.

As we stated at the outset, we have an instance of this also, the judges being the same.

In *Pemberton* v. *Barnes* (25 L. T. Rep. N. S. 577) the Lord Chancellor reviewed and overruled a decision of Vice-Chancellor Malins dealing with the Partition Act of 1868 (31 & 32 Vict. c. 40). The judgment of the Lord Chancellor opens in a manner quite as extraordinary as the passage in his jndgment in *Turner* v. *Collins*, to which we have referred. "It appears to me," said his Lordship, "that in this case the Vice-Chancellor has adopted a construction of the Partition Act which entirely destroys the effect of the 4th section." The suit was for partition of a large estate. The plaintiffs, who were devisees in trust under a will of one equal undivided moiety, asked for a sale instead of a partition, under the aforesaid sect. 4. The Vice-Chancellor held that a large estate like the one in question was not within the purview of the Act, and made a decree for partition. The Lord Chancellor said that the difficulty of partition was dealt with in sect. 3, and that there is not in sect. 4 a single word about the size of the estate or the difficulty of partition—it simply speaks of a case where half the parties interested desire a sale, and it provides that they shall have a preponderating voice. Consequently the decree of the Vice-Chancellor was reversed, and an order for sale substituted for that for partition.

And lastly, the Vice-Chancellor seems to have stretched the equitable doctrine of the liability of trustees to an extent calculated seriously to alarm trustees. The comments of our contemporary, the *Times*, will best describe the alarm:—"The myriad trustees and executors scattered throughout the kingdom will have read with dismay our report of the judgment of Vice-Chancellor Malins in a case reported in our columns last Thursday, and have asked themselves, 'Who, then, is safe?' Many more, who are not yet trustees, will probably have resolved, from a perusal of the same report, never upon any consideration to to undertake the office. A man knows that he subjects himself to great trouble for few thanks, but he strains a point to oblige a living friend, or to do what he can for the family of one whom he has known intimately and pleasantly all the years of his manhood. He is content to give his time and his pains for the sake of 'auld lang syne.' Vice-Chancellor Malins shows us by his decision in *Sculthorpe* v. *Tipper* that a trustee exposes himself to many liabilities beyond the mere labour and the vexation of spirit attendant upon it. He may have to make good the value of the estate which he has most conscientiously striven to guard. A man dies, and by his will leaves certain property to some friends to watch over and sell 'so soon after his death as they may see fit.' For little more than two years they dealt with it just as he would have done had he been alive, and it then turns out to their unbounded surprise, as it would have been to his unbounded surprise, that part of it is worthless. If the man had lived, he would have suffered the loss, and those upon whom he intended to confer his bounty would have suffered it: but as he luckily died at an opportune time, his friends and executors find that they are personally called upon to pay for his indiscreet investments. If the law be as it was enunciated by Vice-Chancellor Malins, the executors and trustees in *Sculthorpe* v. *Tipper* must perforce submit to it. There is, however, always the possibility of an appeal, and until the time for it has passed by it would be premature to call upon Parliament to relieve trustees from so unexpected a pitfall." And our contemporary feels so strongly on the case that it goes into the law of it, quotes Lord Cottenham against the Vice-Chancellor, and plainly doubts whether the latter's view of the law be sound.

These three cases even as they stand, the third being unappealed as yet, present an extraordinary condition of things—a condition of things unpleasant to comment upon, and which it is only possible to deal with gracefully by leaving alone.—*Law Times.*

A FRENCH VIEW OF LORD BROUGHAM.

At the annual public meeting of the Académie des Sciences Morales et Politiques, a branch of the French Institute, held on Saturday last, M. Jules Simon read a report on the various essays sent in competition for the prizes offered by the Academy. The feature of the day, however, was an address delivered by M. Mignet upon the career and character of the late Lord Brougham, which occupied the attention of the assemblage for more than an hour and a half, which was listened to throughout with the closest attention. M. Mignet said:—"Lord Brougham was the oldest as he was the most illustrious foreign associate of the Academy. He was Lord High Chancellor of England when, in 1832, the Académie des Sciences, Morals et Politiques was re-established, and he was immediately admitted to its ranks, and with indisputable titles. A celebrated and an intellectual writer, he had since the beginning of the century applied his powerful faculties and his varied talents to the propagation or defence of the noblest and most humane ideas. He had cultivated with an aptitude that was in some degree universal the vast field of social science, after having in his earlier day traversed not without distinction, the field of physical and mathematical sciences.

A great advocate, he pleaded the greatest causes with earnest speech and vigorous dialectics, and he acquired by his eloquence an imperishable renown. A political orator of extraordinary fertility, and not less remarkable for the loftiness of his views than for the brilliancy of his talents, he was placed from 1810 to 1830 at the head of that party in the House of Commons which desired to improve the laws and to extend the public liberties. An enterprising Minister and a reforming Chancellor, he effected in the Government and in the administration of justice those happy changes, equally prudent and just, which he had recommended while in Opposition." The talents and tastes of Lord Brougham were displayed at an early age, and M. Mignet dwelt at some length upon this portion of Brougham's career, recounting many anecdotes which have become familiar to the English public. After alluding to Brougham's advocacy on behalf of Queen Caroline, and to the famous speech demanding the repeal of the well-known Order in Council forbidding neutral vessels from entering French ports, the orator passed to the period when the subject of his address became Lord Chancellor, having in the meantime, during a space of twenty years, displayed inexhaustible activity and eloquence on behalf of the most liberal and generous views of reform. The new Chancellor was described as being—"Not only a Liberal Minister in the Council, a fruitful legislator in Parliament, but also a great magistrate in the High Court of Equity, where he was the supreme judge. No one possessed in a greater degree the sentiment and the perception of justice. Scarcely had he become installed in the chief seat of the Court of Chancery than he applied himself with honourable promptitude and ardent equity to accelerate the suits which had accumulated from time immemorial, and which formed a congealed mass of litigation. He sat with indefatigable assiduity in his Court, where he was many times found at the dawn of day listening to argument or delivering judgments. His penetrating sagacity and his general knowledge of jurisprudence enabled him to constitute a real Court of Equity. He there at the same time abolished abuses which would have been lucrative to himself, and he suppressed sinecures which were onerous to the State." Brougham's career in the House of Commons and his efforts on behalf of the parliamentary reform were dwelt upon by M. Mignet, who, referring to the celebrated speech in which the orator implored upon his knees the House not again to reject a bill so anxiously desired by all lovers of the country, said, "Certainly the kneeling was out of place." Referring to that later period when Brougham had become somewhat estranged from the leaders of the Whig party, he said, "At this time Lord Brougham was no less admired than he was fortunate, but perhaps he did give way a little to the intoxication of pride, and failed to restrain the intemperance of a mind whose fiery nature was capable of leading to any extravagance."

Passing to a consideration of Brougham's labours—political, philosophical and historical—M. Mignet said, "He loved the English Constitution as an Englishman, he admired it as a publicist. He has ably traced its history, explained its structure, appreciated its influence and pointed out its useful developments."

Always in progress, the Constitution, becomming more and more representative of England and bending to the exigences, had adapted itself to the diverse conditions of a great country, whose ideas it follows, and whose wants it satisfies. Little by little it has thus directed the efforts of all powers and classes within the state to the same end—the growing establishment of all that is right, the increasing respect for public interests, the skilful management of common affairs. Lord Brougham well explained that progressive Constitution which, without changing the form of Government, has perfected its means of action, has rendered loyalty limited in its intervention, the aristocracy limited in its conduct, and the democracy moderate in its pretensions; and which, constructed not by force of logic, but by history, has issued less from the spirit than from the very existence of a people which it has enabled in our days to conduct itself as a republic under a monarchy, to enjoy order, prosperity, and greatness combined with liberty. Lord Brougham dedicated his book upon the Constitution of England to Queen Victoria, under whose long reign that Constitution, faithfully observed in its spirit, has never been evaded in its exercise. Written at the age of

eighty-one, that dedication is a model of propriety and grace. In the same year in which he dedicated a political work to the Queen of England he dedicated a scientific work to the University of Edinburgh, which selected him for its Chancellor in 1860. That volume contained treatises upon mathematics and physics, written between 1796 and 1858, upon the most various subjects—general theorems of geometry, problems of Keppler, dynamic principles, the differential calculus, the architecture of the cells of bees, analytical and experimental researches into light, the attraction of forces, and lastly, the admirable speech which he delivered at Grantham, upon the occasion of inaugurating the monument to Sir Isaac Newton." After describing the residence at Cannea and the industrious and learned life which Brougham passed there during many winters, and where he died on May 7, 1868, M. Mignet thus summed up his estimate of his character: —"Henry, Lord Brougham, belongs to the number of the great men of his time and of his country. Endowed with extraordinary genius, possessed of vast knowledge, gifted with brilliant talents, animated by incomparable ardour, he devoted the thoughts of his mind, the enthusiasm of his soul, the resources of his knowledge, the brilliancy of his talents to the service of the noblest causes—to the progress of justice, of law, of intelligence, of humanity.

A Reformer without a chimera, a Conservative without a prejudice, he never separated, either in his writings or in his actions, what was expedient from what was right, and it was his pride to keep in accord the free advancement of men and the moral order of society.

He was also the defender of political liberty, the persuasive advocate, of civil equality, the zealous promoter of public education, the eloquent supporter of human emancipation. Illustrious by his works, memorable by his services, Lord Brougham must be counted among those great men who honour the country whose glory they sustain, who maintain what is right and strengthen what is good, and who, by the brilliancy of their talents and the generosity of their souls, are held by posterity in everlasting esteem."—*Law Journal.*

RAILWAY GRANTS.

The construction of railroads as aids to the settlement of our public lands is an enterprise of the highest national importance, and as such ought to receive from the community and from the Government all the assistance which they can command. Every person must have seen with satisfaction the liberality with which our rural and urban municipalities have subscribed to the stock of the various companies now in process of organization or which are already pushing on the construction of new lines. The Provincial Legislature has resolved to insure the success of these enterprises by granting to them large tracts of the public lands. Are these grants constitutional? Such is the question to which the writer purposes to draw public attention. This point of constitutional law would have been raised more opportunely before the incorporation of these companies; but it cannot be denied, even at the present time, that it is one of great practical importance. If the success of the present railway movement depends in great measure on the grant of those public lands; if the money votes of the municipalities have been given on the faith of these grants, it becomes necessary to ascertain that their legality cannot be called in question. If the constitution is defective in this respect, it must be amended, not violated. The following opinion is published only after a full discussion in the editorial committee of the *Revue*, and after having received the approbation of several *confrères* of the Montreal Bar.

By the common law, all the public lands are the property of the Crown. It was formerly a disputed question whether the Kings of England had the right to alienate the Crown Lands. In course of time the Kings certainly exercised the right of granting the Crown Lands at their pleasure. But the exercise of this prerogative having greatly impoverished the Crown, it has been restrained by several modern statutes.*

In the Province of Canada previous to 1867, the public lands were the property of the Crown for Provincial purposes and subject to many restrictions enumerated at length in chapters 22, 23 and 24 of the Consolidated Statutes of Canada. Certain free grants could even be made by the Governor in Council. As to the Legislature, its power over the public lands was unlimited.

Under the British North America Act of 1867, the tenure of the public lands has undergone very large modifications. The ownership is vested in the Dominion or in the Provinces according to the nature and situation of the property. With regard to the Dominion, section 108 declares that "The Public Works and Property of each Province enumerated in the third schedule in this Act, shall be the property of Canada." This property comprises the canals, public harbours and fortifications, and others of alike nature.

The right of ownership in the Dominion of this property is absolute and free from all restriction. Section 91 enacts that the exclusive legislative authority of the Parliament of Canada extends to certain matters therein specified and particularly to "the public debt and property."

Is it thus with the right of ownership vested in the several Provinces? Section 109 declares: "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due and payable for such lands, mines, minerals and royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in

* 5 Cruise's Dig. 46. 2 Greenleaf on Real Property, 39.

which the same are situate and arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

Thus, the public lands are the property of the Provinces, subject to the restrictions imposed by the law. There is no doubt that if the Imperial Parliament had not made any other provision, the Provincial Legislature could dispose of the public lands in the same manner as the heretofore Province of Canada, subject to the trusts established by previous laws, such as the trusts in favour of the Clergy, the Indians and the Schools. But the constitution, adopting in this respect a policy wholly different from the one applied to the Dominion, has taken care to limit the exercise of the right of ownership of the Provinces to certain objects. It declares at section 92, par. 5, that the exclusive authority of their legislatures shall extend, not to the ownership of the public property or lands of the Province, but to "*the management and sale of the public lands* belonging to the Province and of the timber and wood thereon."

Thus, then, the Province is proprietor of the public lands; she can administer and sell them, but she cannot make a gift of them. Without this 5th paragraph, she might dispose of them according to her good pleasure by sale, gift or otherwise; but with these expressions the enumeration of the powers given ought to be interpreted as limiting and excusive, according to the maxim *qui dicit de uno negat de altero.*

It cannot be asserted that the 16th paragraph, giving to the local legislature jurisdiction "generally in all matters of a merely local or private nature in the Province," gives to it by implication the right of making land grants. That paragraph, in fact, relates only to matters which have not been expressly provided for by the constitution. Now, as the public lands have been arranged in a certain way, it cannot be supposed that it was the intention of Parliament that the Local Legislatures should dispose of them in a different way.

The intention of the Imperial Parliament appears to have been to ensure the permanency of the local revenues and to put the lands beyond the reach of great corporations, religious or otherwise, like those railway companies which in the United States have become mighty political potentates through the aid of numerous land grants. There can be no doubt that it is it the highest degree dangerous to abandon the public domain in favor of any corporation which is not under the exclusive control of the Government. This question of high political importance.—can have no place in the pages of a legal review. But it cannot be denied that the aim of the framers of the constitution was to prevent these grants, seeing that the prohibition bears only upon the public lands and forests, and does not touch the mines, minerals and other royal reserves or the Provinces, nor the property of the Dominion, over which the respective legislatures have absolute and unlimited control. It may be said that the intention of the Imperial Parliament was to confer upon the Dominion Parliament and the Provincial Legislatures the whole of the powers formerly enjoyed by the legislature of the Province of Canada. We can only say of the legislature with Lord Ellenborough in *Rex* v. *Shone, quod voluit non dixit.** "If the Legislature intended more," said Lord Denman in *Haworth* v. *Ormerod*, "we can only say, that according to our opinion, they have not expressed it."†

"A *casus omissus*," said Dwarris,‡ "can in no case be supplied by a court of law; for that would be to make laws. Judges are bound to take the Act of Parliament as the Legislature have made it."

The grant of public lands by the Imperial Parliament to the Provinces must be strictly interpreted; it must, in fact, be regarded as a grant by the Crown; that is, most favorably to the Imperial Parliament and against the Provinces. "A grant made by the King," says Blackstone, (lib. II, p. 347.) "at the suit of the grantee, shall be taken most beneficially for the King and against the party.....The King's grant shall not enure to any other intent than that which is precisely expressed in the grant." "The King's grants," says Cruise, vol. 5, p. 53, "are construed in a very different manner from conveyances made between private subjects; for being matter of record, they ought to contain the utmost truth and certainty; and as they chiefly proceed from the bounty of the Crown, they have at all times been construed most favorably for the King and against the grantee, contrary to the manner in which all other assurances are construed."

Story lays down as a rule of interpretation of the American Constitution—similar to ours in so many respects—the following principle: "A rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic or even mischievous. If it be mischievous the power of redressing the evil lies with the people by an exercise of the power of amendment."* Further on (sec. 107) the learned commentator remarks: "It is often said that in an instrument a specification of particulars is the exclusion of another. Lord Bacon's remark that as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated, has been perpetually referred to as a fine illustration."

It has been also said that a statute must be construed, if possible, so as to give sense and meaning to every part, and the maxim *expressio unius est exclusio alterius* is never better applicable than in the interpretation of a statute. †

Dwarris, p. 605, says; "The maxim is clear, *expressum facit cessare tacitum*, affirmative specification excludes implication."

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* 6 East 518. † 6 Q. B. 307. ‡ p. 598.

* Const. U. S., § 193.

† Brown's Legal Maxims, p. 592; 9 Johns, U. S., 349.

It was on the same principle that the statutes by which our Courts were invested with jurisdiction in civil and criminal causes, were recently construed, in the Guibord case, as limitative and exclusive of ecclesiastical matters.

Coleridge *in re The Queen* v. *Ellis*,‡ observed: "It is an inflexible rule that under a special power, parties must act strictly on the conditions on which it is given."

It has been intimated that the restriction could be evaded by making a sale to the Railway Companies for a merely nominal consideration. But the Legislatures, any more than individuals, are not allowed thus to trifle with the laws of their country. Land grants are either constitutional or unconstitutional. If they are unconstitutional, they cannot be made in an indirect manner and in fraud of the law. Mr. Justice McLean, for the Supreme Court of the United States, said: "The power must not only be exercised *bonâ fide* by a State, but the property, or its product, must be applied to public use.....The public purpose for which the power is exerted must be real, not pretended."‖

Judge Woodbury said in the same cause: "If on the face of the whole proceedings it is manifest that the object was not legitimate, or that illegal intentions were covered up, *in forms*, or the whole proceedings a mere pretext, our duty would require us to uphold them."

How is this want to be remedied? The Constitution has wisely withheld from the Parliament of the Dominion all control over the Provincial lands; it has been conferred expressly and it is certain that it has not been granted impliedly by section 91, declaring that the Parliament of Canada "for the peace, order and good Government of Canada," has general jurisdiction "*in relation to all matters not coming within the laws of subjects assigned exclusively to* the legislatures of the Provinces." The matter of the public lands is especially assigned to the Provincial Legislature.

An amendment of the British North America Act by the Imperial Parliament is the only legal means to remedy the evil. Each Provincial Legislature can change or amend its own constitution without the sanction of the Parliament of Great Britain agreeably to section 92, par. 1; but these changes can affect only its local political organization as established by ss. 58–90, for instance the abolition of the Legislative Council, and they cannot extend to its jurisdiction or the distribution of the legislative powers. These can be changed only by means of an Imperial Statute, sect. 129. This mode of procedure may be slow and troublesome, but it is prudent at the least, if not absolutely necessary.—*La Revue Critique.*

‡ 6 Q B 501, 1844

‖ West River Bridge Co., v. Dix et al., 6 Howard, T. S. 537.

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

BANKRUPTCY.

Three persons assigned the firm property for the benefit of creditors. Previously, one partner had accepted, in the name of the firm, a bill of exchange in which the drawer's name was left blank, giving the bill to his agent for negotiation. After said assignment, a drawer's name was inserted in the bill, which was then indorsed to a *bona fide* holder for value. The holder obtained an adjudication of bankruptcy against the firm, grounded on the assignment. *Held*, that the adjudication must be reversed, as there was no debt on the bill until the indorsement to the holder, which was after the assignment.—*Ex parte Hayward*, L. R. 6 Ch. 546.

TAX.

By statute, the "occupier of land covered with water" pays a certain sewer rate. The appellant possessed a canal; land occupied by filter beds and appurtenances for filtering water: land adjoining used for preparing sand for filter beds; and last, land, part of public roads, footpaths, and other ways occupied by iron pipes, mains and sewer pipes. *Held*, that the canal and filter beds should pay said rate, but not the two latter parcels of land.—*East London Waterworks Co.* v. *Leyton Sewer Authority*, L. R. 6 Q. B. 699.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

BILLS AND NOTES

A note payable on demand, dated February 16, 1864, was presented for payment Dec. 14, 1864, and it was held on the circumstances of the case that the delay of presentment was not unreasonable. — *Chartered Mercantile Bank of India, London and China* v. *Dickson*, L. R. 3 P. C. 574.

DEED OF SETTLEMENT.

In the deed of settlement of a Baptist chapel it was provided that the minister should be subject to removal by order of the church, made at one meeting and confirmed at a subsequent. Notice may be given of the object of each meeting. Notice was given that a meeting would be held for the purpose of bringing charges against the minister. A meeting was held, and it was resolved that the minister "having on different occasions uttered

deliberate falsehoods," and "also having on several occasions been seen drunk," he was "not a fit and proper person to occupy the position of pastor, and that his office of pastor cease forthwith." Notice was given of a second meeting, for the purpose "of confirming the resolutions passed" at the first meeting, and at the second meeting it was ordered "that the above minutes be confirmed." *Held*, that vague and insufficient reasons having been assigned for the minister's removal, the latter was invalid, but if no reasons had been assigned, the same could not have been set aside. And that the notice of the second meeting should have set forth the resolution which was to be confirmed.—*Dean* v. *Bennett*, L. R. 6 Ch. 489.

LUGGAGE.

A passenger on a railway from Liverpool to London took with him a trunk containing six pairs of sheets, six pairs of blankets, and six quilts, for the use of his household when he should have provided himself with a home in London. The trunk was lost. *Held*, the above articles were not "ordinary luggage," and that the railway company was not liable for their value. The Court (per COCKBURN, C. J.), *held* "the true rule to be, that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage."—*Macrow* v. *Great Western Railway Co.*, L. R., 6 Q. B. 612.

NEGLIGENCE.

By statute, gates must be maintained across a road on each side of a railway crossed by the road, and must be kept closed, "except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway." The gates being open on one side of the railway, the plaintiff walked within them, and, waiting for a train to pass, started to cross, when he was injured by another train. *Held* (BRAMWELL, J., dissenting), that there was evidence of negligence on the part of the railway company to go to the jury.—*Wanless* v. *North Eastern Railway*, 6 Q. B. (Ex. Ch.) 481.

PARTNERSHIP.

One partner of a firm carried on business in Manchester, and the other in York, in each place under the name of "K. & Co." The former partner opened a bank account in Manchester in his own name, and, when closed, the account showed a balance due to the bank. The balance had been used for partnership purposes. *Held*, that one partner had no authority to open a banking account on behalf of a firm in his own name, and that the York partner was not liable for the balance.—*Alliance Bank* v. *Kearsley*, L. R. 6 C. P. 433.

RECEIPT.

The plaintiff having been injured by an accident on the defendant's railway, was offered and accepted a certain sum in full of all claims for his injuries, after first asking whether the receipt would prevent his recovering further if his injuries proved more severe than they supposed, and receiving an answer in the negative from the defendant's agent. The injuries proved more severe than supposed, the plaintiff brought an action, and the defendant set up the receipt in full. The plaintiff then filed a bill that the defendant be enjoined from setting up such defence, that no fraud on the part of the defendant was alleged. *Held*, that the bill must be dismissed, as the plaintiff might rebut his receipt in an action at law.—*Lee* v. *Lancashire and Yorkshire Railway Co.*, L. R. 6 Ch. 527.

RELIGIOUS EDUCATION.

A Roman Catholic died, leaving a widow who was a Protestant, and an infant six months old, who was baptized in the Catholic Church shortly before the father's death. The mother educated the child in the Protestant faith until arriving at the age of eight and a half years. The court ordered the child to be educated in the Roman Catholic faith, the religion of the father.—*Hawksworth* v. *Hawksworth*, L. R. 6 Ch. 539.

SEAL.

A commission was issued for taking the acknowledgment of a deed at Melbourne. The deed when sent out had pieces of green ribbon attached to the places where the seals should be, but no wax. The deed was returned in the same state, properly attested as "sealed," &c. *Held*, that there was sufficient *prima facie* evidence that the deed was sealed at the time of its execution. — *In re Sandilands*, L. R. 6 C. P. 411.

WATER-COURSE.

The plaintiff's stream was supplied in part by underground springs, which the defendant drew off by his drain. *Held*, that if the defendant could not get at his underground water without touching water in a defined surface channel, he could not get it at all, and the defendant was enjoined drawing water from the stream. — *Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. 483.

AGENTS—ACCOUNTS—TREATING—BRIBERY.

A candidate in good faith intended that his election should be conducted in accordance both with the letter and the spirit of the law; and he subscribed and paid no money, except for printing. Money, however, was given by friends of the candidate to different persons for election purposes, who kept no accounts or vouchers for what they paid. *Held*, that bribery would not be inferred as against the candidate, who neither knew nor desired such a state of things, from the omission of these subordinate agents to keep an account of their expenditure, especially as the law is new, and contains no provision similar to the Imperial statute, which requires a detailed statement of expenditure to be furnished to the returning officer. But it is always more satisfactory to have the expenditure shown by proper vouchers; and if money is paid to voters for distributing cards, or for teams, or for refreshments, this will be open to attack, and judges will be less inclined, as the law becomes known, to take a favourable view of conduct that may bear two constructions, one favourable to the candidate and the other unfavourable.

The candidate is not restricted to his purely personal expenses, but may (if there is no intent thereby to influence votes, or to induce others to procure his return) hire rooms for committees and meetings, and hire men to distribute cards and placards, and similar services.

The friends of the candidate formed themselves into committees, and some of them voluntarily distributed cards and canvassed different localities with books containing lists of voters, noting certain particulars as to promises, &c. These canvassers often came across voters in public houses, and when there, according to custom, treated those whom they found there, and thus spent their money as well as their time. On this being represented to those who had charge of the money for election expenses, the latter, in several cases, reimbursed the canvassers. *Held*, 1. That these general payments, if not exceeding what would be paid to a person for working the same time in other employments, would not be such evidence of bribery as to set aside an election. 2. That the furnishing of refreshments to a voter by an agent of a candidate, without the knowledge or consent of the candidate, and against his will, will not be sufficient ground to set aside an election, if not done corruptly or with intent to influence votes.

The total expenditure proved was $610, and the number of votes on the roll was $669. *Held*, that the expenditure was not excessive.

Various acts of alleged bribery discussed; and *held*, that the evidence was not sufficient.

The language of Martin, B., in the *Wigan case* (1 O'M. & H. 192), adopted as a general rule applicable to this case.—8 L. J. N.S. 113.

CANADA REPORTS.

ONTARIO.

ELECTION CASE.

IN THE MATTER OF THE ELECTION FOR THE WEST RIDING OF THE CITY OF TORONTO.

Controverted Elections Act of 1871—Presentation of Petition—Computation of time

The Interpretation Act of Ontario, 31 Vic. ch 1, sec. 6, and sub-sec. 13, enacts that in construing it or any Act of Ontario, certain days s; ecified, including Good Friday and Easter Monday, shall be included in the word holiday; and the Controverted Elections Act of 1871, sec. 52, enacts that in reckoning time for the purposes of that Act, any day set apart by any Act of Ontario for a public holiday shall be excluded.

Held, that the effect of the Interpretation Act alone, independently of any other statute, was to make the days mentioned in it holidays; and if this were not so, that when the other statute used the word holiday, such days would by virtue of the Interpretation Act be included in it.

Held, therefore, that in reckoning the twenty-one days after the return allowed for presentation of a petition, Good Friday and Easter Monday must be excluded.

The decision in Chambers in this matter, 7 C. L. J. N. S. 179, affirmed as regards the computation of time.

[31 U. C. R. 409.]

The respondent was elected a Member of the Legislative Assembly of Ontario for the Electoral District of West Toronto, on the 21st March, 1871. On the 3rd April the Returning Officer executed his return, declaring the respondent so elected, and on the following day posted it addressed to the Clerk of the Crown in Chancery. On the 1st of May a petition was filed, praying that the said election should be set aside on the grounds of bribery, treating, and undue influence.

A summons was obtained in Chambers to strike the petition off the files, on the ground that it was filed after the period of twenty-one days from the return made had elapsed.

Sec. 6, sub-sec. 2, of the "Controverted Elections Act of 1871, says that the petition shall be filed within twenty-one days after the return made to the Clerk of the Crown in Chancery; and sec. 52 enacts that "in reckoning time for the purposes of this Act, Sunday, and any day set apart by any Act of the Legislature of Ontario for a public holiday, fast or thanksgiving, shall be excluded."

Good Friday and Easter Monday intervened between the return and filing the petition, and the question was whether these days were to be excluded. The learned Chief Justice of the Common Pleas held that they were. See C. L. J. N. S. 179, where the argument and judgment in Chambers are fully reported.

Crooks, Q. C., the respondent in person, obtained a rule *nisi* to rescind the order discharging the summons.

Harrison, Q. C., shewed cause. No appeal lies. Rule 50 of the Election Rules, *ante* p. 289, says that all interlocutory questions and matters,

except as to the sufficiency of the security, shall be heard and disposed of before a judge, &c This means determined, or finally disposed of. The two days in question must be excluded. The interpretation Act of Ontario, 31 Vic ch. 1 sec. 6 and sub-sec. 13, enacts that in construing that or any Act of Ontario, "the word holiday shall include Good Friday, Easter Monday, &c. By this Act, and sec. 52 of the Controverted Elections Act, these days are clearly excluded, as held by the learned Chief Justice, in computing the twenty-one days in question.

Crooks, Q C., the respondent in person, contra, contended that the Interpretation Act did not set apart these days, but enacted only that they should be included under the word "holiday" when used in any other Act: that the effect of sec 52 was merely to exclude any day set apart by Statute of Ontario for a public holiday, which these days were not; and that they must therefore be included in the twenty-one days here.

WILSON, J., delivered the judgment of the Court.

The Interpretation Act declares, in sec. 6, that "in construing this or any Act of the Legislature of Ontario, unless it be otherwise provided," &c. *Thirteenthly*: "The word 'holiday' shall include Sundays, New Year's Day, Good Friday, Easter Monday," &c.

In construing *this* Act, then—that is, the Interpretation Act—the word *holiday* does by the very language of the Act include Good Friday and Easter Monday, the days in question. By including them it constitutes them holidays.

The case was not argued on this view or construction of the Act. Read in this manner,—the proper mode of reading it in my opinion,—the Interpretation Act has an independent and self-operating power, and does not require the passing of another statute which contains the word holiday to call it into action.

The case was argued as if the Interpretation Act had no vitality until or unless another Act were passed to give it power, or on which it could operate.

I will consider the Act, then, as if that alone had been its purpose and effect. In such a case the Act would, until the passing of another Act which contained the expression *holiday*, have been passive and suspensive.

On the passing of another Act which contained the word *holiday*, and applied that word in a general and unqualified manner (and said nothing of holidays set apart), the two days in question, Good Friday and Easter Monday, would by virtue of the Interpretation Act thus called into action be included in the word "holiday," and would be constituted holidays; these days would be canstituted holidays by virtue of the two Acts of the Legislature.

It is said that they have not been "set apart by any Act of the Legislature of Ontario for public holidays, according to the language of the Controverted Elections Act of 1871: that saying holidays shall include these days, does not *set apart* these days as holidays.

They do, however, become holidays by force, effect, and enactment of the one statute or of the other, or of the two combined. The result is, that they are set apart by the mere force and effect of the Statute, whether the Statute declares they are or shall be set apart or not.

Setting apart can have no such technical meaning as murder, felony, fee simple, promissory note, or deed.

Days which are dealt with by legislation in a different manner from other days,—which are made holidays,—and upon which, but for the legislation, many acts which could have been properly or lawfully done cannot by reason of the Legislation be now properly or lawfully done, may not inappropriately be spoken of as days which have been set apart.

We take no notice of the addition of the word *public* "*holiday*" in the Election Act, which is not to be found in the Interpretation Act. It does not in our opinion alter the construction of either Act in the least

I have not touched upon the arguments of the learned Chief Justice of the Common Pleas on other views of the Statutes which he considered in disposing of the case when it was before him, I am well satisfied to take his opinion for my guide on these points In my opinion the Interpretation Act does, independently of any other Act to operate upon, constititute Good Friday and Easter Monday holidays, or public holidays.

That Act has therefore *set apart* these days as public holidays, if the Interpretation Act have not alone done so; but if it is to be construed, as it was contended it should be, as operating upon and only when another Act was passed which used the word holiday in a general sense, then we are of opinion that when that other Act has been passed, as the Controverted Elections Act has been the effect of the two Statutes, the operating and the one operated upon, is to set apart the two days in question as holidays or public holidays: that the expression *set apart* has no technical, special, or peculiar significacation, and days dealt with by the Legislature as these two days have been may be said to be and are days set apart by Act of the Legislature.

I should not have thought there was so much doubt about this, if it had not been argued so strongly that the construction was so plainly and almost unquestionably the other way.

In our opinion the rule should be discharged with costs.

Rule discharged.

QUEBEC.

EX PARTE PAPIN.

Petitioner for a Writ of Habeas Corpus.

Held—1st. That the powers conferred by the Local Act of the Province of Quebec, contained in section 17 of the 32 Vict., ch. 70, on the Corporation of Montreal for cumulative punishments therein enacted, are unconstitutional.

2nd. That the By-Law of the Corporation of the City of Montreal, imposing a fine *and* imprisonment for the infraction of its provisions against gambling, made under the provisions of the Statute 32 Vict., chap. 70, section 17, passed by the Legislature of Quebec in 1869, is null and void, inasmuch as by the British North America Act, 1867, section 92, sub-section 15, the punishment imposed by Local Legislatures for an offence against its own laws, cannot be cumulative.

[Montreal, 24th Nov., 1871.—In Chambers.
Drummond, J.]

In the Recorder's Court for the City of Montreal, the petitioner was convicted of gambling in a tavern in the city, contrary to the By-Law

in such case made and provided, and was condemned to pay a fine of $20 *and* to be imprisoned for two months, and was, in consequence, committed to the common gaol about the 2nd November, 1871. A writ of *Habeas Corpus* was issued, and the case was argued in Chambers. The Counsel for the petitioner, amongst other objections to the conviction and commitment, contended that the Legislature of Quebec exceeded its authority in granting to the Corporation of Montreal, by the Act 32 Vict., ch. 70, sec 17, the powers of punishment for infraction of by-laws more extensive than it possessed itself with respect to offenders against its own laws. By that Local Act the Corporation is vested with the right of imposing a cumulative punishment, fine and imprisonment, whereas the Local Legislature does not possess that right, under the British North America Act, 1867, 30 and 31 Vict., ch. 3, sec. 92, sub-sec. 15.

DRUMMOND, J.—The most important point to be considered is the extent to which the Local Legislature can empower the Corporation to punish by fines, imprisonment or both, parties detected in the infraction of the by-laws. The Local Legislature, under the 32 Vict., ch. 70, 1869, cannot endow Municipal Corporations with powers of punishment for infraction of their by-laws more extensive than it possesses itself. The enactments of the British North America Act, 1867, 30 and 31 Vict., ch. 3, sec. 92, sub-sec. 15, are as follows: "The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Therefore the punishment imposed by Local Legislatures cannot be cumulative; it must be either fine, penalty or imprisonment; it cannot be fine *and* imprisonment. This provision, therefore, limits the whole of the powers of imposing punishment by Provincial Legislatures, and they cannot grant to Corporations any greater powers of punishment than they possess themselves, so that the 32 Vict., ch. 70, sec. 17, is clearly *unconstitutional* in so far as it assumes to authorize the imposition of punishment by fine and imprisonment for infraction of a by-law of the City of Montreal. This section 17, of the 32 Vict., ch. 70, being the clause relied on to maintain the commitment and conviction in this matter, Papin having been condemned to pay $20 and to be imprisoned for two months, it is clear that both conviction and commitment are null and void. The petitioner must therefore be discharged.

Order for his discharge granted.

ENGLISH REPORTS.

TEAGUE AND ASHDOWN v. WHARTON AND ANOTHER.

Testamentary suit—Administration to a nominee of both parties refused.

Except under very special circumstances the court as a general rule will refuse to make a grant of administration to the nominee of the next of kin, who has himself no interest, even though all the next of kin may consent.

[Nov 21, 1871, 25 L. T., N. S. 764].

Emily Harvey Jeffries, late of Spring-grove, Isleworth, in the county of Middlesex, died a widow, and without parent or children. She and her husband died at different places within two hours of each other, and there was a question as to the survivorship.

By her will, dated 14th Oct., 1870, she had nominated her husband her sole executor and universal legatee. Mr. Jeffries also left a will, by which he had named his wife sole executrix and universal legatee.

The next of kin and persons entitled in distribution of the estate of Mrs. Jeffries were one brother, Mr. C. R. Teague, and three sisters, Mrs. F. M. Ashdown, Mrs. L. S. Wharton, and Mrs. Elizabeth Anne Owen. The two first named of these were about to apply for a grant of administration, but were met by a caveat lodged on the part of Mrs. Wharton. To avoid litigation it was subsequently arranged among the parties interested, that as they could not agree upon the appointment of any one of themselves as administrator, they should all consent to the appointment of a stranger—Mr. James Waddell.

Dr. *Tristram*, on behalf of the defendant, accordingly moved for a grant of administration to Mr. James Waddell, as nominee of the next of kin. He cited *Farrell* v. *Brownbill*, 3 Sw. & Tr. 467.

Inderwick consented on behalf of the next of kin of the husband. *Cur. adv. vult.*

Nov. 28.—Lord PENZANCE.—In this case the court was asked to make a grant to the nominee of the next of kin. The court expressed some difficulty at the time, upon which the case was cited of *Farrell* v. *Brownbill*, 3 Sw. & Tr. 467. From that case it appears that the court has done something similar. In that case there was a litigation. The next of kin came before the court, and the court made a grant, under the 73rd section, to the nominee of the next of kin. This was done on the authority of a case *In the goods of John Holroyd*, and I have had that case looked out to ascertain what were the facts. I find that in that case the next of kin were permitted to nominate somebody other than themselves to take the grant. There were special reasons there, because the persons put forward were persons who had been executors of the will of the father of the next of kin, and they had had the management of the father's estate, of which the property in issue consisted, up to the death of the party whose administration was contested. The case, therefore, forms no authority for a general proposition that the court should permit the parties entitled to renounce in order to make a grant to a third party who has no interest, but who is nominated by them. Since *Farrell* v. *Brownbill* the court has decided another case—*In the goods of Peter Richardson*, (40 L. J. 36, P. & M.; 25 L. T. Rep. N. S. 348,) of which the marginal note is, "The court refused, in the absence of special circumstances, to make a grant to the nominee of the next of kin, although she was an old lady of eighty, not able to transact business." In refusing that grant several cases were cited, and the court pointed out that it would be an inconvenient practice to make the grant in the manner asked for without some special circumstances, because it would result that people who know nothing of their own rights would be induced to put them in the hands of third persons, and the grant passing to a nominee would become vested in

the hands of a third person who had no interest in the administration. The court, therefore, refused to make the grant, and refused to adopt as a general rule the proposition that if the next of kin chooses to renounce and nominate a third person to take the grant, the court will therefore make the grant to this third person. The more I consider the matter the more I am satisfied that that is the way in which the court ought to look at these cases. There being no special circumstances here, the grant must go to the next of kin, and if they choose to renounce, then to any person entitled who may apply.

UNITED STATES REPORTS.

McClure v. The Philadelphia, Wilmington, and Baltimore Railroad Co.*

Contract between Railroad Company and Passenger—Right of Conductor to put off a Passenger refusing to pay his fare—Agency.

M. on the first of May, purchased a through ticket from N. Y. to B. over the P. W & B. R. R., and on that day took the through train. The conductor of the train took up the ticket and gave M. a "conductor's check," with the words "good for this day and train only," and with the numerals 5 and 1, showing the month and day, punched out of the "check." M. desiring to leave the train at a way station inquired of some one at the window of the company's ticket office at the station, if the "check" would take him to B. on another train and day, and was told that it "was good till taken up." On the 6th of May, M. entered another train going to B., and being called upon for his ticket, offered the "check." The conductor refused to receive the "check," and M. having refused to pay fare, the train was stopped at a point intermediate between two stations, and, by direction of the conductor, M. left the train.

Held: 1. That M. had no right to leave the train at the way-station, and afterward to enter another train and proceed to his original point of destination without procuring another ticket, or paying his fare.

2 That on the refusal of M. to pay his fare, the conductor had the right to put him off the train, using no more force than was necessary to affect his removal, and was under no obligation to put him off at a station

3. That even if the person by whom M. was told that the "check" was good until taken up was an agent of the company, the presumption is, that a ticket agent at a way-station has no authority to change or modify contracts between the company and through passengers, and the *onus* of rebutting this presumption rested on M.

Appeal from the Superior Court of Baltimore city.

The facts are given in the opinion of the court.

At the trial below, the plaintiff ordered the following prayers:

1. Even should the jury find from the evidence that the conductor of the train in question had a right, under the regulations of the company and the contract made with the plaintiff, should they find such contract, to put the plaintiff off the train in question, the plaintiff is entitled to recover, if they find that in so doing, he acted in an unwarrantable manner, as to time or place or mode thereof.

2. That even should the jury find from the evidence that the plaintiff would have been confined, by the terms of his ticket, to the particular train on which he then was, still, if they further find that before leaving said train, the plaintiff as a matter of precaution, inquired of an authorized agent of the company whether he would be permitted to lie over under the check he then held, and was informed that "he would be," that said check was good until taken up, then the fact of his ticket or check having contained any such instruction would not, of itself, prevent the plaintiff from recovering.

3. Even should the jury find from the evidence that the conductor of the train in question had a right to put the plaintiff off, the plaintiff is entitled to recover if they find from the evidence that in so doing the conductor required him to leave while the train was in motion, or put him off at a place where there was no station.

4. Even if the jury should find from the evidence that the conductor of the train in question had a right to put the plaintiff off, the plaintiff is entitled to recover, if they find from the evidence that in so doing the said conductor put him off at a place where there was no station or house near at hand, or any adjacent place for shelter or food, or at any unusual place.

The following instructions were asked by the defendant.

If the jury shall find from the evidence that the plaintiff, on the 1st day of May, 1867, purchased at New York, a through ticket from the place to Baltimore, over the New Jersey Railroad and P. W. & B. Railroad, and on that day proceeded on his journey as far as Perryville, on the last-named road, where he left the train; and if the jury shall further find that after passing Phildelphia, the then conductor of the train took up said thorough ticket and give plaintiff the check in lieu thereof, which has been offered in evidence; and if the jury shall further find that the plaintiff, on the 6th day of said May, get upon the defendant's train for Baltimore at Havre-de-Grace, and the then conductor refused to take said check, but informed the plaintiff that he must pay his fare to Baltimore, or he would be obliged to stop the cars and put him off, and that the plaintiff refused to pay said fare, and the said plaintiff was then put off, then the plaintiff is not entitled to recover in this case, provided the jury shall find that no more force than was necessary was used in putting said plaintiff off the train, even if the jury shall further find, that on arriving at Perryville on the train, on the said 1st day of May, the plaintiff inquired from a man at the window of the ticket-office of the defendant at that place, whether said check would be good to take him on to Baltimore another day, and was told by said man that it would.

The court rejected the first, second and third prayers of the plaintiff, and granted the fourth, as also the prayer of the defendant. The plaintiff excepted to the ruling of the court in rejecting his prayers, and granted the prayer of the defendant, and the verdict and judgment being against him, he appealed.

The cause was argued before Bartol, C.J., Stewart, Maulsby, Grason, Miller and Alvey, JJ.

Albert Ritchie, for the appellant, cited the following authorities: *Balt. & O. R. R* v. *Blocker*, 27 Md. 277; *Goddard* v. *Grand Trunk R. R.*, 10 A. L. R. 17; *Terre Haute A. & St. L R. R.* v. *Vanatta*, 21 Ill. 188; *Du Laurans* v. *St. P. & P. R. R.*, 15 Minn. 49; *Holmes* v. *Wakefield*, 12 Allen 580; *Sanford* v. *8th Av. R. R.*, 23 N.Y. 343.

Thomas Donaldson, for the appellee, referred to *Balt. C. Pass. R.* v. *Wilkinson*, 30 Md. 224; 2 Redf. on R. 219; *C. C. & C. R. R.* v. *Bartram*, 1 Ohio 457; *Cheney* v. *B. & M. R. R. Co.*, 112

* Court of Appeals of Maryland, to appear in 34 Maryland.

Metc. 121; *Beebe* v. *Ayres*. 28 Barb. 275; *Johnson* v. *Concord R. R.*, 46 N. H. 213; *State* v. *Overton*, 4 Zab. 435.

GRASON, J., delivered the opinion of the court.

At the trial of this case in the court below the plaintiff offered four prayers, the last of which was granted, and the others were rejected; and the defendants offered one prayer which was granted. The plaintiff excepted to the rejection of his first three prayers and to the granting of the defendants' prayer, and the judgment being against him, he has taken his appeal.

The first question to be considered is, whether a person who has purchased a thorough ticket from New York to Baltimore, taken his place in a train, and entered upon his journey, has the right to leave the train at a way-station on the route, and afterwards to enter another train and proceed to his original point of destination without procuring another ticket or paying his fare from the station at which he again enters the car. We think it clear that he cannot.

The contract between the parties is, that upon the payment of the fare the company undertakes to carry the passenger to any point named, and he is furnished with a ticket as evidence that he has paid the required fare, and is entitled to be carried to the place named. When the passenger has once elected the train on which he is to be transported, and entered upon his journey, he has no right, unless the contract has been modified by competent authority, to leave the train at a way-station and then take another train on which to complete his journey, but is bound by the contract to proceed directly to the place to which the contract entitled him to be taken. Having once made his election of the train and entered upon the journey, he cannot leave that train, while it is in a reasonable manner in the undertaking of the carrier, and enter another train without violating the contract he has entered into with the company. "A contrary doctrine would necessarily impose the carrier additional duties, the removal of the passenger and his baggage from one train to another, and the consequent additional attention on the part of the company; also an increased risk of accidents, and a hindrance and delay, not contemplated by a reasonable interpretation of their undertaking." *C. C. & C. R. R. Co.* v. *Bartram*, 11 Ohio, 463; *State* v. *Overton*, 4 Zab. 438; 2 Redf. on Railways, 219.

In the case now under consideration the appellant, on the 1st day of May, 1867, purchased a through ticket from New York to Baltimore, and on that morning took his place in the through train and entered upon his journey, and some miles south of Philadelphia his ticket was taken up, according to custom, by the conductor of the appellees' train, who gave him in its stead what is called a "conductor's check," with the words "*good for this day and train only*," printed upon one side, and a list of stations and numerals on the other; the numerals indicating the months and days of the months. The numerals 5 and 1 were punched, showing that the conductor's check had been used on the appellees' train, on the 1st day of May. It is clear, therefore, that the appellant had notice that the check, thus delivered to him in the place of his ticket, could be used only on that day and train. When the train arrived at Perryville, the appellant, desiring to go to Port Deposit to remain a few days, sought the conductor for the purpose of ascertaining from him whether the conductor's check which he held would take him to Baltimore on another day and train. Not finding the conductor, he asked a person whom he saw standing at the window inside the ticket office of the appellee at that place, and was informed by him that it "was good till taken up." The appellant entered another train of the appellee on the 6th day of May, at Havre-de-Grace, having a Mrs Taylor in his company, and after proceeding some distance was called upon by the conductor for his ticket. He handed him Mrs. Taylor's ticket, procured before entering the train, and the conductor's check which he had received from the other conductor on the 1st day of the month. He was told by the conductor that the check was not good, and that he must give a ticket or pay the fare. The appellant then explained to the conductor what had occured at Perryville five days before, and that the agent there had informed him that the check was good until it was taken up. The conductor again said that it was not good, and that the appellant must give him a ticket or pay his fare or be put off the train. The appellant still declining to pay, the conductor rang the bell to stop the train, and either after the train had stopped, or when it had nearly stopped, and was moving very slowly, the conductor either beckoned or nodded his head to the appellant, who immediately left his seat, went to the platform of the car and stepped off the train. He then walked to Aberdeen, two and a half or three miles off, purchased a ticket and took another train of the appellees three or four hours afterward, and went to Baltimore. The appellant and Mrs. Taylor both testified that the conductor seemed to be very angry and excited; that they thought so from the violence with which he pulled the bell-rope to stop the train. The conductor testified that he controlled the train by the bell-rope, and that it was always necessary to pull it violently to insure the ringing of the bell, and, in long trains, to take up the slack of the rope. There is no proof of any anger or excitement whatever, except as regards the manner of pulling the bell-rope. There is some conflict in the evidence as to the fact whether the train had stopped when the appellant left it; but be this as it may, it is certain that it was moving very slowly at the time. The bell had been rung to stop the train; it would no doubt, have come to a full stop, if the appellant had waited a moment longer before getting off. The conductor used no force whatever to put him off; did not require him to get off while the train was in motion, and did not touch or say a word to him. It therefore appears that if the appellant did leave the train while it was in motion, that he did so voluntarily and without injury to himself. Upon the refusal of the appellant to pay his fare to the conductor he had the undoubted right to put him off the train, using no more force than was necessary to effect his removal, and the proof shows that he used none whatever. We cannot concur in the doctrine contended for by the counsel of the appellant, that a passenger, having no ticket and refusing to pay his fare,

can only be put off at some *station* on the road. The establishment of such a principle would result in compelling railroad companies to carry a passenger to the station next to the one at which he entered the train, which might, and doubtless would, often turn out to be the very point to which he desired to be taken, and if the passenger were unknown to the conductor the company would be without remedy.

It is claimed, however, that the appellant was authorized by the information received from the agent of the appellees at Perryville, to use the conductor's check received by him on the 1st day of May, and, therefore, that it was unlawful to compel him to leave the train. There is no evidence to prove that the person from whom the appellant received the information was an agent of the appellee. But even if there were proof to establish that fact, the presumption is, that a ticket agent at a way-station has no authority to change or modify contracts between the company and its through passengers, and the *onus* of rebutting such presumption rests upon the appellant; but upon this point he offered no proof whatever. The check held by the appellant showed upon its face that it was good on the 1st day of May only, and upon but one train on that day, and the prescribed numerals showed to the conductor to whom it was offered that it had been used on that day; the conductor had, therefore, the right to reject it, and to require the appellant to furnish a ticket or pay his fare, and, upon his failure to do either, to compel him to leave the train.

There was no evidence to show that any violence whatever was used in effecting his removal from the train, or that he was compelled to leave it at an improper time, and the first three prayers of the appellant were properly rejected; the fourth, which was granted, having left it to the jury to find whether his removal from the train was at an unusual or improper place. The appellee's prayer fairly presented the law of the case to the jury, and it was properly granted. There being no error in the rulings of the court below, its judgment will be affirmed. *Judgment affirmed.*

Maulsby, J., dissenting.

REVIEWS.

THE LONDON, EDINBURGH, BRITISH QUARTERLY AND WESTMINISTER REVIEWS. New York: Leonard Scott & Co. Toronto: Copp, Clark & Co. January, 1872.

The contents of the great British Quarterlies are to those of the general run of the current popular periodicals, pretty much what good bread and beef are to sponge cakes and whipped cream. They eschew novels and sensationalism in all its forms, and afford recreation as well as instruction in the discussion, under the form of reviews, of such works in literature and science as seem most worthy of being brought under the notice of the public.

Representing the great political parties in the state, as well as the principal school of religious and scientific thought, they shew the progress of each in their respective spheres, and their views and opinions on the social and political questions of the day, as set forth by their ablest champions. They are of value therefore rather to the student than to the mere reader who wishes to wile away an idle hour. To the former they will, in a condensed form, give a mass of information on many subjects to which he otherwise would have no access, and will inform him of the views held with regard to them by men, who have both the time and material for their elucidation, which he from circumstances does not possess. Of the two numbers before us, the *British Quarterly* is the more interesting to the general reader, being rather less scientific than the others and chiefly filled with reviews of historical works. Among them is a very good paper on "The Speaker's Commentary," to which illusion is so frequently made, though few have yet seen the work itself. "An English Interior in the Seventeenth Century" is very interesting. "Mahomet" is the title of a critique on a very remarkable work, viz.: "A series of Essays on the Life of Mahomet," written by Khan Bahador, a lineal descendant of the Prophet and a professor of his religion, who is withal a Knight of the English Order of the Star of India, and who does not fear in defence of his religion to meet "either Christian divines or European scholars on their own ground."

The contents of the *Westminster* are chiefly political and scientific. Among the subjects discussed are, "The Political Disabilities of Women," — "The Development of Belief,"— and "A Theory of Wages." Among the lighter articles is an interesting sketch of the "Life of the first Earl of Shaftesbury."

Of the articles in the *Edinburgh*, we notice especially "Yeale's Edition of the Travels of Marco Polo,"—"Lace Making as a Fine Art," — "Tyerman's Life of John Wesley," — "Railway Organization in the late War."

THE CANADIAN MONTHLY. Adam, Stevenson & Co.: Toronto.

We are glad to find in this periodical a steady improvement as regards the character and variety of its contents, and rejoice to be informed by the publisher that its continuance is no longer experimental, and "that its per-

manent establishment is now assured" In the April number now before us, we find something like a style of its own, such as pertains to all magazines which have a recognized place in the literary world. The principal topics of the day are treated of in an impartial and judicial spirit, which contrasts most favourably with the heated and acrimonious partizanship of the daily Press. An article on "The Late Session" of the Ontario Parliament, by "a Bystander," is politically fair, historically instructive, and is evidently the production of one who has studied political and constitutional questions in a higher school than we regret to say is afforded by the proceedings of any Colonial Legislature. In his opening remarks, "a Bystander" pleads for the incognito of writers for the Press. Would that all writers for the Canadian Press refrained as punctiliously as he does from "all abuse of the privileges of an anonymous writer." We should like to know why the principle here laid down as most conducive "to the moral influence of the Press" is not adopted by all the writers for *The Canadian Monthly*. It is well for a writer to be known by his style, but not so well for his article to be known by his name being attached to it. The former is a distinction won by the intrinsic merits of the writing, the latter is very likely to cause the writing to be estimated according to our preconceived ideas of the personal character of the writer. "A Bystander" suggests the evils likely to arise in our Provincial Legislatures from the existence of party government not based upon party principles, and his observations on this point are worthy of consideration. The evil already exists in a palpable degree, but the remedy is not so easily pointed out.

The legal interpretation of the Treaty of Washington is given in very clear terms by a Barrister of Ontario. The more this matter is discussed, the more arrogant and grasping does the conduct of the American Government appear. The most ardent philo-Americans will see what waste of good material it is to treat with the public men of Yankeedom as though they were gentlemen.

"The Romance of the Wilderness Missions', and "Old Colonial Currencies" are well written historical sketches relating to "old times," though on very different subjects. We hope to see the first of these subjects continued in some future number.

The departments of poetry and fiction in this number are fairly filled, though the poetry is not equal to the other matter. As we have had occasion to remark before, the Book Reviews form a most valuable part of the contents.

THE RELATION AND DUTY OF THE LAWYER TO THE STATE: Baker & Godwin, New York, 1872.

This forms the subject of a lecture delivered by Henry D. Sedgwick, before the Law School of the University of the City of New York. The theme was no doubt suggested by the scandalous mismanagement of public affairs in that city, although the lecturer profits by the occasion to give his audience the benefit of a wide extent of reading and much thoughtful observation upon the proper functions of a lawyer among the community in which he lives. In our judgment he does not attach sufficient importance to the legal element in English affairs. He speaks as if the whole profession were in a state of subservience to the Lord Chancellor, and as if the people were without appeal from that high functionary, who technically keeps the conscience of the state. But at the present day the Lord Chancellor is controlled, as well by the force of legal as by that of public opinion. The time will be remembered when Lord Chelmsford was constrained to change some appointments he had made by reason of the unpopularity of his nominees. There was again the time when Lord Campbell was taken to task in the House of Lords for his appointment of the *quondam* reporter, Mr. Blackburn, to the judicial office which he has so ably filled. A similar occurrence has taken place with respect to the appointment of Sir Robert Collier to the Judicial Committee within the last few month; which we refer to at length in another place, while the constrained resignation of Lord Westbury proves the force of a public morality that will be looked for in vain among any of the United States. Again, it is often overlooked that the Lord Chancellor cannot claim the highest legal patronage in the realm. The disposal of the Chief Justiceship of the Queen's Bench belongs to the Premier of England, while the Attorney-General, at the time of vacancy, can claim for himself the dignity of Chief in the Common Pleas.

The lawyer has as important a work to do in this country as devolves upon him in the adjoining republic. From the ranks of law-

yers our greatest men are drawn; our ablest statesmen; our best parliamentarians, and law-makers. In all public matters the lawyers are relied on as the men, to speak, and act, and write. These lawyers hands and heads are all needed for the general service of the community. It is for them to know that it is their duty to render such service in the best and honestest way, feeling with Sir Edward Coke, that they are owe the debt, not to their profession only, but also to their country.

This *brochure* will, in this view, be of value to the Canadian lawyers. The author has done his work well, and casts no discredit on the name of Sedgwick, already illustrious in legal literature.

EWART'S INDEX OF THE STATUTES.

We noticed the receipt of this Index some time ago, but had not space then to do more. It is, however, worthy of more than a passing notice, seeing that it is becoming of daily reference in lawyers' offices.

The title page declares it to be an alphabetical index of all the public statutes passed by the legislatures of the late Province of Canada, the Dominion of Canada, and the Province of Ontario, subsequent to the consolidation, and down to and inclusive of the year 1871. That such an index was wanted is not likely to be disputed; nor can it be denied that Mr. Ewart has most successfully come to the rescue. His work has been well done and on an intelligent plan. We trust the encouragement given to him will be sufficient to induce the editor to republish the index yearly, or every two years at least. The startling rapidity with which our laws are changed now makes everything which assists us in keeping track of the alterations most acceptable.

The *Albany Law Journal*, in speaking of the Alabama Claims, remarks that "The beauties of pleading under the old system are finely illustrated in the proceedings thus far under the so-called Alabama treaty. The United States have prepared, for use before the joint high commission, what is analogous to a declaration in common-law practice. For fear that they will be thrown out of court, or something else, they complain of every imaginable matter, whether they hope anything from it or not. In a multitude of counts there is safety, seems to be the motto of the American pleaders. Of course the defence pleads the general issue, and this is all the parties can get before the trial comes on. All persons familiar with the ways of the common-law lawyers measure the cases published at their true value. The great misfortune is that the public on both sides of the water, not being familiar with legal fictions outside of the courts, are misled, and this misfortune is aggravated by partizans who are anxious to embarrass government action, both in the United States and England."—*Law Times*.

APPOINTMENTS TO OFFICE.

SHERIFF.

JAMES GILLESPIE, of the Town of Picton, Esquire, to be Sheriff of and for the County of Prince Edward, in the room and stead of Absolom Greeley, Esquire, resigned. Gazetted March 23rd, 1872.)

ASSOCIATE CORONERS.

JOHN SOMERVILLE TENNANT, Esquire, M.D., for the County of Huron. (Gazetted Jan. 27th, 1872.)

JAMES A. SIVEWRIGHT, Esquire, M.D., for the County of Essex. (Gazetted Feb. 17th, 1872.)

THOMAS KIERNAN, Esquire, M.D. for the County of Simcoe.

DONALD McDIARMID, Esquire, M.D., for the United Counties of Stormont, Dundas and Glengarry.

HERMAN L. COOK, Esquire, M.D., for the United Counties of Lennox and Addington.

WILLIAM HIGINBOTHAM, Esquire, M.D., for the County of Peterborough. (Gazetted Feb. 24th, 1872.)

GEORGE CARSON McMANUS, Esquire, M.D., for the County of York.

JAMES KENNEDY, Esquire, M.D., for the County of Gray. (Gazetted March 9th, 1872.)

JAMES W. SMITH, Esquire, M.D., for the County of Ontario.

JAMES RAE PATERSON, Esquire, M.D., for the County of Bruce

GEORGE MITCHELL, Esquire, M.D., for the County of Kent. (Gazetted March 16th, 1872.)

THOMAS HENRY THORNTON, Esquire, M.D., for the County of Prince Edward. (Gazetted March 23rd, 1872.)

HAWTRY BREDIN, Esquire, M.D., for the County of Prince Edward.

ALEXANDER HECTOR BEATON, Esquire, M.D., for the County of Simcoe.

JAMES ACLAND DE LA HOOKE, Esquire, M.D., for the County of York. (Gazetted March 30th, 1872.)

PETER McDONALD, Esquire, M.D., for the County of Norfolk. (Gazetted April 6th, 1872.)

SYLVESTER LLOYD FREEL, Esquire, M.D., for the County of York. (Gazetted April 13th, 1872.)

SAMUEL BLYTH SMALL, Esquire, M.D. for the County of Huron. (Gazetted April 20th, 1872.)

NOTARIES PUBLIC FOR ONTARIO.

WILLIAM A. FOSTER, and ARTHUR H. SYDERE and WILLIAM McDONALD, of the City of Toronto, Esquires, Barrister-at-Law. (Gazetted Jan. 13th, 1872.)

FRANCIS S. STEVENSON, of the Village of Dunnville, Gentleman, Attorney-at-Law. (Gazetted Feb. 24th, 1872.)

GEORGE A. CONSITT, of the Town of Perth, Gentleman, Attorney-at-Law. (Gazetted March 9th, 1872.)

DANIEL HENRY MOONEY, of the Town of Prescott, Gentleman, Attorney-at Law. (Gazetted March 16th, 1872.)

WILLIAM P. LAIRD, of the Village of Strathroy, RICHARD AUSTIN BRADLEY, of the City of Ottawa, CHARLES JOHN FULLER, of the Town of Simcoe, and BEVERLEY JONES, of the City of Toronto, Attorneys-at-Law. (Gazetted March 23rd, 1872.)

JOHN O'DONOHOE, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted March 30th, 1872.)

COUNTY ATTORNEY.

RUPERT MEARSE WELLS, of the City of Toronto, Esquire, Barrister-at-Law, to be County Attorney in and for the County of York, in the room and stead of John McNab, Esquire, deceased. (Gazetted March 30th, 1872.)

CLERK OF THE PEACE.

THOMAS HENRY BULL, of the City of Toronto, Esquire, Barrister-at-Law, to be Clerk of the Peace in and for the County of York, in the room and stead of John McNab, Esquire, deceased. Gazetted March 30th, 1872.)