DIARY FOR JUNE.

1. Tue.. Paper Day, C. P. ; New Trial Day, Q. B.
2. Wed. New Trial Day, Common Pleas.
4. Fri... New Trial Day, Queen's Bench.
6. SUN. *2nd Sunday after Trinity.*
8. Tues. General Sessions and County Court Sittings n county (except York).
11. Fri... *St. Barnabas.*
13. SUN. *3rd Sunday after Trinity.*
16. Wed. Last day for service for County Court of York.
20. SUN. *4th Sunday after Trinity.* Accession of Queen Victoria, 1837.
26. Mon. Longest Day.
24. Thur. *St. John Baptist.*
26. Sat... Declare for County Court York.
27. SUN. *5th Sunday after Trinity.*
29. Tue.. *St. Peter.*
30. Wed. Half-yearly schedule returns to be made. Dep. Reg. in Chan. to make returns and pay over fees.

THE

Canada Law Journal.

JUNE, 1869.

DEATH OF MR. JUSTICE JOHN WILSON.

The hopes we expressed last month for the recovery of Mr. Wilson were not destined to be fulfilled. After a temporary rally he sank rapidly, and expired on the morning of Thursday the 3rd June instant. The news, though not unexpected, cast a gloom over Osgoode Hall, where the news was received about one o'clock, whilst both the courts were sitting. Both Courts rose immediately, the Court of Common Pleas—his Court—adjourned until Saturday following, and the Court of Queen's Bench adjourned until the next day, the state of the public business preventing any further postponement of the numerous cases before it.

A short sketch of Mr. Wilson's career will be interesting to our readers.

Very full particulars are given in some of the papers in the Western District, of his early life, and the labours which eventually brought him to Toronto as one of the Judges of the Court of Common Pleas.

He was born at Paisley, in Scotland, in March, 1809, which would make him more than sixty years old at the time of his death, though he scarcely looked it, at least until lately. His father was a weaver by trade; and from him the subject of this sketch is said to have inherited the shrewd, vigorous mind characteristic of the man. He came to Canada in 1819 with his father, who settled near Perth.

His early life subsequent to this, until he became eminent in his profession is thus described in a London paper, from which we make the following extract:—

"Very early he engaged in farming, but not being strong enough for the work, had to give it up. From tilling the ground, he went, still very young, to school teaching, in which employment, while benefiting others, his own faculties were informed and cultivated. By and by he became anxious for a higher order of education, with a view to a profession, if fortune would second his laudably ambitious aims. He entered himself straightway as a pupil in the Perth Grammar School, then under the management of Mr. John Stewart, now a barrister in Stratford. Showing much aptness for learning and very marked capacity, the lad was recommended to study law, and he wisely accepted the advice. His next step was to enter the office of Mr. James Boulton, now a barrister in Toronto, but then practising in Perth. As an evidence of the confidence Mr. Boulton had in his apprentice, he at length entrusted him with the entire management of a branch office which was opened at Bytown, now known as Ottawa, the capital of the country. After some three years Mr. Boulton removed to Niagara, whither his clerk was invited to accompany his master, and there he completed his studies. In 1834, (in Easter Term, having been admitted as an Attorney on 5th November, 1834), Mr. Wilson was called to the Bar, and immediately proceeded to London to enter on an independent professional career. At that date London was a village containing 500 or 600 inhabitants, with only three lawyers —Mr Tenbroeck, and Stuart Jones, barrister, both of them dead years ago, and Mr. John Stewart, barrister, now clerk in the office of the Minister of Justice, at the seat of Government. In a very short time he acquired a large legal practice in what was then the London District, embracing within its extensive bounds what are now the counties of Elgin, Middlesex, Oxford, Huron, Grey, Bruce, Norfolk, Perth, and a portion of Brant. His old Grammar School master, Mr. Stewart, it is worth mentioning, ere long entered his office as a clerk, and completed his studies under his former pupil's supervision. And here it may be stated, quite as well as in any other connection, that the many students that passed through his office, from first to last, have a lively and pleasant

recollection of the interest he took in them and their progress. He who was willing to learn had in Mr. Wilson a competent guide and a warm hearted friend. Indeed, Mr. Wilson was prone to help and encourage young men, and his junior brethren were often indebted to him for valuable aid. Many a young man, not in the ranks of his profession, he assisted in a substantial manner, though he shunned all publicity in these and a thousand other generous deeds."

In politics he was a Reformer, and received his appointment as judge from that party. He was twice elected to the Assembly for the city of London, and once for the St. Clair division in the Legislative Council.

In 1856 he was made a Queen's Counsel at the same time as his townsman Mr. Becher. In the vacation after Easter Term, he was appointed to the judgeship rendered vacant by the changes consequent on the retirement of Chief Justice McLean from the Queen's Bench, Mr. Wilson taking the seat occupied in the preceding term by Mr. Morrison.

A powerful advocate everywhere, before the juries in that part of Canada where he was best known, he was without an equal. His success in this respect was largely increased by his personal popularity. He had a generous, honest, manly heart, ever ready to assist the needy, and at the same time the champion of those he considered oppressed. Above all things he loved fair play, and anything in the shape of meanness, oppresson or rascality, he abhored; few who knew him will not have noticed, whether in private life, at the Bar, or on the Bench, these prominent features of his character.

The most successful advocates do not necessarily make the best judges. The cast of mind so essential in the one has a tendency to prevent eminence in the other. This is so obvious and has been so often exemplified that it has become common to prophesy that a good jury lawyer will be a failure when placed on the Bench. In some of the attributes common to both Mr. Wilson excelled, though it cannot be said that in the latter position he was as great a success as in the former. Though not as a lawyer as deeply read, or as careful of, or well versed in case law as some of his brethren on the bench he had, to a remarkable extent, a shrewd strong common sense and intuitive perception of right and wrong, which seemed to steer him clear of the rocks that would have shipwrecked the reputation of even a more learned man, not possessed of the attributes we have attempted to describe. As might be expected, these characteristics combined with a ready wit, much decision of character, an intimate knowledge of human nature, and a clear insight into the motives of action, made him particularly useful as a *Nisi Prius* judge. As a Chamber judge on the other hand, though no complaints were ever heard that his decisions were not an equitable adjustment of the rights of parties, it has been said by some that occasionally difficulties arose from want of a more strict adherence to those rules of practice which, after all, are so necessary to keep the machinery of justice in harmonious working order.

In the West, where Mr. Wilson was best known, he was most liked, and as his popularity was based on respect for his good qualities, it was lasting, and followed him from the neighbourhood where he had lived so long to the more extended sphere of his labours on the Bench.

THE APPOINTMENT OF MR. GALT.

The vacancy caused by the death of Mr. Justice John Wilson, has been filled by the appointment of Mr. Thomas Galt, Q. C.

We congratulate the learned counsel upon his promotion to a position which has always been, so far as the postion itself is concerned, (and long may it so continue), an object of laudable ambition to the bar of Ontario. A sound lawyer, a man of unswerving integrity and stainless honor, with every instinct that of a gentleman, his appointment will be acceptable to the profession, nor will the public have reason to regret it.

NEW LAW BOOKS.

There are two Law Books just announced by Canadian authors which the profession will be glad to see.

The first is the new and long wanted edition of Harrison's Common Law Procedure Act. The first part of this invaluable book of practice has been published and is now ready for delivery. The remaining parts will be got out as speedily as possible, consistent with a thorough verification of the authorities cited.

It will be a complete compendium of practice, including as well the Common Law Procedure

Act as all the other acts relating procedure, and will contain much more information than the first edition, and the learned editor has taken great pains to work in all the latest cases in their appropriate places.

The second, no less important though treating on an entirely different subject, is Mr. Leith's edition of the Real Property Statutes of Ontario.

We are perfectly willing to take for granted, and others will follow our example, that whatever Mr. Leith writes on the law of Real Property will be well written, both as to the matter and the manner of it. We have not as yet had an opportunity of examining this his last work, but we may now mention that our readers have already had the benefit of at least a small portion of it, through the courtesy of the author, in an article on "Memorials as Secondary Evidence," published in our January number for last year.

We strongly advise our readers immediately to supply themselves with both of these books and *not* put them away merely to fill a place in their shelves.

Mr. O'Brien has published an unpretending edition of the late Division Courts Act, with notes, which the profession may find useful, as it collects all the cases in our Courts as to attachment of debts.

The following is extracted from the presentment of the Grand Jury at the recent assizes for the County of Norfolk.

The Chief Justice of Ontario presided.—

"The Grand Jurors for our Lady the Queen most respectfully present, that they have carefully considered and disposed of the various criminal matters laid before them by the learned officer for the Crown, and that in the discharge of these important duties they were materially aided by the very lucid and admirable exposition of the Criminal Law, (as applicable to the various cases on the calendar), contained in the remarks addressed to us by His Lordship the Chief Justice at the opening of this Court; and while, as members of this grand inquest, we congratulate ourselves, and the people of this province generally, in having the position vacated by that eminent jurist, the Honorable W. H. Draper, filled by one possessing in so large a degree the confidence, not only of the Bar, but also of the public, as your Lordship does, we would, at the same time, congratulate your Lordship upon your elevation to the high and honorable position of Chief Justice of Ontario—a position which, we earnestly hope, you will long continue to occupy and adorn.

Your Grand Jurors cannot avoid making some reference to a class of cases which occupies much of the time of both Grand and Petit Jurors, and adds largely to the expenses connected with the administration of criminal justice. We allude to petty larcenies, and we venture to express the hope that some legislation by which these cases may disposed of in some more summary and less expensive manner may, ere long, be initiated.

The following is the Bill that has just been introduced by the Minister of Justice to establish a Court of Appeal or Supreme Court for the whole Dominion. As it is a matter of great importance, we publish it in full (except a few formal provisions). It is not the intention to press it through this session.

Her Majesty, &c., enacts as follows:—

1. There is hereby constituted and established a Court of Common Law and Equity and Admiralty Jurisdiction in the Dominion of Canada, which shall be called "The Supreme Court of Canada."

2. The said Court shall be a Court of Record.

THE JUDGES.

3. The said Court shall be presided over by a Chief Justice and six Puisne Judges, any four of whom in the absence of the others of them may lawfully hold the said Court in General Term.

4. Her Majesty may appoint by Letters Patent under the Great Seal of Canada, one person who is or has been a judge of one of the Superior Courts in either of the Provinces of Ontario, Quebec, Nova Scotia or New Brunswick, or who is a Barrister or Advocate of at least fifteen years' standing at the Bar of either of the said Provinces, to be Chief Justice of the said Court, and six persons who are or have been Judges of one of the said Superior Courts or who are Barristers or Advocates of at least ten years' standing, to be Puisne Judges of the said Court; and vacancies in any of the said Offices shall from time to time be filled in like manner.

5. The Chief Justice of the said Court shall have rank and precedence over all other Judges in the said Dominion, or in any of the Provinces thereof; and the Puisne Judges of the said Court shall also take precedence over all other Judges in the Dominion, or any of the said Provinces (except Chief Justices and the Chancellor of Upper Canada), and as between themselves according to seniority of appointment to their respective offices.

6. The Judges to be appointed under this Act shall hold their Offices during good behaviour, but the Governor General may remove any Judge or Judges of the said Court, upon the address of the Senate and House of Commons.

7. [Salaries (amounts blank) and how payable.]

8. [Retiring allowances of Judges of the Court to be two-thirds of salary payable to such Judge;] but no annuity granted to any Judge appointed under this Act, shall be valid unless such person shall have continued in the said office for the space of fifteen years, or for that space in the said office and the office of a Judge of one or more of Her Majesty's Superior Courts of Law or Equity in one of the said Provinces, or shall be afflicted with some permanent infirmity, disabling him from the due execution of his office, which shall be recited in the grant.

9, 10. [Oath of Office.]

11. No Judge to be appointed under this Act, shall hold any other Office either under the Government of the Dominion of Canada, or under the Government of either of the said Provinces.

APPELLATE JURISDICTION.

12. The said Supreme Court shall have, hold and exercise an appellate civil and criminal jurisdiction within and throughout the Dominion of Canada.

13. Appeal shall lie to the said Supreme Court from all judgments of the Courts of Error and Appeal, Queen's Bench, Chancery and Common Pleas, in the Province of Ontario; of the Court of Queen's Bench and Superior Court in the Province of Quebec; of the Executive Councils and Supreme Courts in the Provinces of Nova Scotia and New Brunswick.

14. Appeals shall also lie to the said Supreme Court from the Special Terms of the said Court hereinafter provided for.

15. A Writ of Error may be brought in the said Supreme Court from the judgment in any civil action or criminal proceeding of any of the said Provincial Courts, or of any special term of the said Supreme Court, in any case in which the proceedings shall have been according to the course of the common law of England.

16. Four Judges of the said Supreme Court shall constitute a quorum for the purpose of hearing and determining causes in Appeal and Error.

17. The said Supreme Court for the purpose of hearing and determining Appeals and Writs of Error, and of exercising such original jurisdiction as is hereinafter directed to be exercised by the said Court sitting in general term, shall hold two terms in each year, at the City of Ottawa, one of such terms beginning on the third Monday in January, and the other of such terms beginning on the first Monday in June, in each year, and each of such terms shall continue for the space of twenty days.

18. The said terms shall be called and known as the General Terms of the said Supreme Court.

19. The said Supreme Court may adjourn the said General Terms from time to time, and meet again at the time fixed on the adjournment for the transaction of business.

20. The said Supreme Court shall have power to quash proceedings in cases brought before it, in which Error or Appeal does not lie, or where such proceedings are taken against good faith, or in which proceedings in Error may be quashed according to the law and practice of the Court of Exchequer Chamber in England.

21. The said Supreme Court shall have power to dismiss an Appeal, or to give the judgment or decree, and to award the process or other proceedings, which the Court whose decision is appealed against ought to have given or awarded; and the said Court may order the payment of the costs of the Court below, and also of the Appeal or proceeding in Error in their discretion, and as well when the judgment or decree appealed from is reversed as where it is affirmed.

22. Proceedings on Writs of Error shall, where not otherwise provided for by this Act, or by the general rules and orders to be made in pursuance hereof, be as nearly as possible in conformity to the practice of the Court of Exchequer Chamber in England.

23. Proceedings in Appeals from decrees, judgments or orders in Equity and Admiralty, and from the Courts of the Province of Quebec in civil causes, shall when not otherwise provided for by this Act, or by the general rules and orders to be made in pursuance hereof, be as nearly as possible in conformity with the present practice of the Judicial Committee of Her Majesty's Privy Council.

24. The judgment, decree or order of the said Supreme Court in Appeal shall be certified by the Registrar of the said Court, to the proper officer of the Court having original jurisdiction below, and all subsequent proceedings may be taken thereupon as if the judgment, decree or order had been given or pronounced in the said Court below.

25. An Appellant or Plaintiff in Error may discontinue his proceedings by giving to the Respondent a notice entitled in the Court and cause and signed by the Appellant, his Attorney or Solicitor, stating that he discontinues such proceedings, and thereupon the Respondent or Defendant in Error shall be at once entitled to the costs of and occasioned by the proceedings in Appeal or Error, and may either sign judgment for such costs, or obtain an order for their payment in the Court of original jurisdiction below, and may take all further proceedings in that Court as if no appeal or proceedings in error had been brought.

26. A respondent or defendant in Error may consent to the reversal of the judgment, decree or order appealed against, by giving to the appellant or plaintiff in Error, a notice entitled in the Court and cause, and signed by the respondent or defendant in Error, his attorney or solicitor, stating that he consents to the reversal of the judgment, decree or order, and thereupon the Court shall pronounce judgment of reversal, as of course.

27. In case an appellant or plaintiff in Error shall fail to bring the appeal or proceeding in Error on to be heard at the first general term of the said Supreme Court, after the appeal or proceeding in Error shall be ripe for hearing, the respondent or defendant in Error may, on notice to the appellant or plaintiff in Error, move the said Supreme Court, or a Judge thereof in Chambers, for the dismissal of the appeal, or that the writ of Error be quashed, and such order shall thereupon be made as to the said Court or Judge shall seem just.

28. No appeal or writ of Error shall be allowed from any final judgment, decree or decretal order, unless the same be brought within two years from the signing or pronouncing thereof, and no appeal shall lie from any interlocutory order or rule, unless the same be brought within six months from the making or granting thereof.

29. No appeal shall be allowed or writ of Error issued, until the appellant or plaintiff in Error has given proper security to the extent of five hundred dollars to the satisfaction of the Court below, from whose judgment, order or decree he is about to bring Error or appeal or a Judge thereof.

30. Upon the perfecting of such security execution shall be stayed in the original cause, except in the following cases:—

1st. If the decree, order or judgment which is appealed from, or upon which Error is brought, directs an assignment or delivery of documents or personal property, the execution of the decree or judgment shall not be stayed until the things directed to be assigned or delivered have been brought into Court, or placed in the custody of such officer or receiver as the Court appoints, nor until security has been given to the satisfaction of the Court whose judgment, decree or order is appealed from, or from which Error is brought, or of a Judge thereof, in such sum as the said Court or Judge may direct, that the appellant will obey the order or judgment of the said Supreme Court.

2nd. If the decree, order or judgment appealed from, or upon which Error is brought, directs the execution of a conveyance or any other instrument, the execution of the decree, order or judgment shall not be stayed until the instrument has been executed and deposited with the proper officer of the said Court below, to abide the order or judgment of the said Supreme Court.

3rd. If the decree, order or judgment appealed from directs the sale or delivery of possession of real property, chattels, real or immovable, the execution of the decree, order or judgment shall not be stayed until security has been entered into to the satisfaction of the said Court below, or a Judge thereof, and in such sum as the said last mentioned Court or Judge directs, that during the possession of the property by the appellant or plaintiff in Error, he will not commit or suffer to be committed any waste on the property, and that if the decree, order or judgment be affirmed he will pay the value of the use and occupation of the property from the time the appeal or writ of Error is brought until the delivery of possession thereof; and also in case the order, judgment or decree is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant or plaintiff in error will pay the deficiency.

4th. If the decree, order or judgment appealed from, or upon which a writ of Error is brought, directs the payment of money, either as a debt, or for damages or costs, execution thereon shall not be stayed until the appellant or plaintiff in Error has given security to the satisfaction of the Court below, or of a Judge thereof, that if the decree, order or judgment or any part thereof, be affirmed, the appellant or plaintiff in Error will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed, if it be affirmed only as to part.

5th. If the decree, order or judgment appealed from, or upon which Error is brought, directs the delivery of perishable property the said Court below, or a Judge thereof, may order the property to be sold and the proceeds to be paid into Court, to abide the order or judgment on appeal.

31. When the security has been perfected and allowed, any Judge of the Court appealed from, or upon the judgment of which Error is brought, may issue his fiat to the Sheriff to whom any execution on the decree, order or judgment has issued to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not.

32. If at the time of the receipt by the Sheriff of the fiat, or of a copy thereof, the money has been made or received by him, but not paid over to the party who issued the execution, the party appealing may demand back from the Sheriff the amount made or received under the execution, or

so much thereof as is in his hands not paid over, and in default of payment by the Sheriff, upon such demand, the appellant or plaintiff in Error may recover the same from him in action for money had and received, or by means of an order or rule of the Court appealed from.

33. An appeal, but not a writ of error, shall lie from a judgment of a Court of common law, and from a judgment of the common law side of the said Supreme Court sitting in special term as hereinafter provided for, upon a special case, unless the parties agree to the contrary; and the proceedings for bringing a special case before the said Supreme Court shall as nearly as possible be the same as in the case of a special verdict, and the said Court shall draw any inferences of fact from the facts stated in the special case which the Court of original jurisdiction ought to have drawn.

34. An appeal shall lie from the decision of any Court of common law, and from the common law side of the said Supreme Court sitting in special term, in the case of a rule to enter a verdict or nonsuit upon a point reserved at the trial, whether a rule to shew cause has been refused or granted, or has been discharged or made absolute.

35. In all cases of motion for a new trial upon the ground that the Judge has not ruled according to law, if the rule to shew cause be refused, or if granted be afterwards discharged or made, absolute, the party decided against may appear provided any one of the Judges dissent from the rule being refused, or when granted, from its being discharged or made absolute, as the case may be, or provided the Court in its discretion think fit that an appeal should be allowed.

36. No appeal shall be allowed under the three next preceding sections, unless notice thereof be given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of, or within such further time as the Court appealed from or Judge thereof may allow.

37. When the application for a new trial is upon matter of discretion only, as on the ground that the verdict is against the weight of evidence or otherwise, no appeal shall be allowed.

38. The four next preceding sections shall apply to informations *in rem.* and to informations for penalties for the infraction of any Revenue Law.

39. Any appeal shall lie in ejectment in the same manner and to the same extent as in any other case.

40. An appeal shall, in addition to proceedings in Error, where the same are applicable, lie to the said Supreme Court in all cases of proceedings for or upon a Writ of Mandamus, and [to] all proceedings upon Habeas Corpus, and in all cases upon which a by-law of Municipal Corporation has been quashed by rule of Court after argument.

41. A person convicted of treason, felony or misdemeanor before the Court of Queen's Bench or Common Pleas, in the Province of Ontario, or before the Court of Queen's Bench in the Province of Quebec, or before the Supreme Court in either of the said Provinces of Nova Scotia or New Brunswick, or who has been convicted as aforesaid before any Court of Oyer and Terminer or Gaol Delivery, and whose conviction has been affirmed by any of the hereinbefore mentioned Provincial Courts, may appeal against the conviction or affirmation, and the Supreme Court shall make such rule or order therein either in affirmance of the conviction or for granting a new trial, or otherwise, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect; but no such appeal shall be made unless allowed by the Superior Court appealed from, or by two of the Judges thereof in term or vacation, nor unless such allowance has been granted and the appeal has been heard within six months after the conviction was affirmed, unless otherwise ordered by the said Supreme Court, and any rule or order of the said Supreme Court shall be final.

42. No other appeal from a decision of any Court of common law shall be allowed; but in any case, either civil or criminal, in which the judgment, decision or other matter appealed against shall appear of record, a Writ of Error shall notwithstanding lie.

43. A Writ of Error shall lie where the matters complained of appear of record, from all judgments of the Court of Queen's Bench in the Province of Quebec in criminal cases; but in all other cases in which any judgment or order of the said Court of Queen's Bench, or of the Superior Court of the said Province of Quebec, is sought to be reversed in the said Supreme Court the proceedings shall be by way of appeal only and no Writ of Error shall lie.

44. In the case of the death of one of several appellants pending the appeal to the said Supreme Court, a suggestion may be filed of his death and the proceedings may thereupon be continued at the suit of and against the surviving appellant as if he were the sole appellant, and such suggestion, if untrue, may be set aside on motion made to the said Supreme Court, or a Judge thereof in Chambers.

45. In case of the death of a sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appel-

lant, may, by leave of the Court, or a Judge, file a suggestion of the death, and that he is such legal representative, and the proceedings may thereupon be continued at the suit of, and against such legal representative as the appellant, and if no such suggestion be made, the respondent may proceed to an affirmance of the judgment, according to the practice of the Court, or take such other proceedings as he may be entitled to, and such suggestion, if untrue, may be set aside on motion by the said Court, or a Judge thereof.

46. In case of the death of one of several respondents, a suggestion may be filed of such death, and the proceedings may be continued against the surviving respondent, and such suggestion, if untrue, may be set aside on motion by the said Court, or a Judge thereof.

47. In the case of the death of a sole respondent, or of all the respondents, the appellant may proceed upon giving one month's notice of the appeal, and of his intention to continue the same, to the representative of the deceased party, or if no such notice can be given, then upon giving the notice to the parties interested, as a Judge of the said Supreme Court may direct.

48. The foregoing provisions respecting appeals shall apply as well to cases where the appeal shall be from any Court of Appeal in any of the said Provinces, as to cases where the appeal shall be brought directly from the Court of original jurisdiction.

49. In appeals in cases on the Admiralty side of the said Supreme Court no new allegations or evidence shall be admitted.

SPECIAL CASE ON CONSTITUTIONAL MATTERS.

50. The Governor General, by and with the advice and consent of the Privy Council may direct a special case to be laid before the Supreme Court sitting in general term, in which special case there may be set forth any Act passed by the Legislature of any Province of the Dominion of Canada, and thereupon there may be stated for the opinion of the said Supreme Court such questions as to the constitutionality of the said Act, or of any provision or provisions thereof, as the Governor General in Council may order.

51. The said Supreme Court shall, after hearing counsel for the Dominion of Canada, and for the Province whose Act shall be in question (if the respective Governments of the Dominion and the Province shall think fit to appear), and also after hearing counsel for such person or persons whose interests may be affected by the said Act, who may desire to be heard touching the questions submitted for the opinion of the said Court, and who shall have obtained leave to appear and be so heard on application to a Judge of the said Court in Chambers, certify their opinions upon the said special case to the Governor General in Council.

ORIGINAL JURISDICTION.

52. Except as hereinafter provided, the said Supreme Court shall exercise no original jurisdiction whilst sitting in General Term.

53. The said Supreme Court shall have and possess exclusive original jurisdiction in the Dominion of Canada in all causes at law and equity in the Provinces of Ontario, Nova Scotia and New Brunswick, and in civil causes in the Province of Quebec as follows:

1st. In all cases in which the constitutionality of any Act of the Legislature of any Province of the Dominion shall come in question.

2nd. In all cases in which it shall be sought to enforce any law of the Dominion of Canada relating to the revenue, or in which any such law shall come in question, including actions, suits, and proceedings, by way of information, to enforce penalties and proceedings by way of information *in rem*.

3rd. In all cases in which the Crown, as representing the Government of Great Britain and Ireland, or the Government of any British colony, or the Government of any Province of the Dominion, shall be a party, plaintiff or defendant.

4th. This shall not be deemed to take away summary jurisdiction in revenue matters in any case in which the same may now be exercised by Justices of the Peace.

5th. In all cases in which any foreign State or Government shall be a party plaintiff.

6th. In all cases in which any Consul of a foreign State shall be a party.

7th. In all cases in which any law of the Dominion of Canada passed to carry out a treaty with a foreign Government shall come in question.

8th. In all cases in which any question shall arise under any Statute or Act of the Parliament of Canada hereafter to be passed, and by which exclusive original jurisdiction shall be conferred on the said Supreme Court.

54. In case in any action or suit brought or instituted in any Court of any of the said Provinces, it shall be found impossible to proceed for want of jurisdiction, in consequence of a question arising therein as to the constitutionality of any Act of the Legislature of any of the said Provinces, the said cause may be removed by Certiorari into the said Supreme Court, in which case proceedings therein shall be thereafter carried on as though such action or suit had been originally brought or instituted in the said last mentioned Court.

55. The Judges of the said Supreme Court shall make general rules and orders regulating

the proceedings to remove such causes, and the proceedings therein after removal.

56. The said Supreme Court shall have, in the several Provinces of Ontario, Nova Scotia and New Brunswick, in causes at law and in equity, and in the Province of Quebec in civil causes concurrent and original jurisdiction with the Provincial Courts in the following cases:

1st. Where the plaintiff and defendant, or one of several plaintiffs and one of several defendants are domiciled in different Provinces of the Dominion.

2nd. Where either the plaintiff or defendant, or one or more of several plaintiffs, or one or more of several defendants, are domiciled without the Dominion.

57. The said Supreme Court and the Judges thereof shall also have exclusive original jurisdiction to issue the Writ of Habeas Corpus *ad ubjiciendum* to bring up the body of any person in custody within the Dominion of Canada, in pursuance of any treaty with any foreign State or Government for the extradition of criminals, or in pursuance of any Act of the Parliament of Great Britain and Ireland, or of the late Province of Canada, or of the said Dominion, to carry out the provisions of any such treaty.

58. The said Supreme Court shall also have and possess exclusive jurisdiction in Admiralty in cases of contract and tort, and in proceedings *in rem*, and *personam*, arising on or in respect of the navigation of, and commerce upon the inland navigable waters of the Dominion, above tide water, and beyond the jurisdiction of any now existing Court of Vice-Admiralty.

59. For the purpose of exercising the original jurisdiction of the said Supreme Court, a special term of the said Court shall be held on the first Monday of April and October in each year, at the cities of Toronto, Quebec and Halifax, for the respective Provinces of Ontario, Quebec and Nova Scotia, and on the third Monday of April and October in each year at the city of Fredericton, for the Province of New Brunswick, and the said special term shall continue until the Saturday of the following week.

60. Two Judges of the said Court shall constitute a quorum at such special terms.

61. At the said special terms there shall be transacted the following business:

1st. Such proceedings in suits at common law as may be had before the Courts of common law at Westminster sitting in Banc.

2nd. The re-hearing of causes, petitions and motions in equity causes which may have already been heard before a single Judge.

3rd. The review of proceedings in Admiralty causes which shall have previously been heard before a single Judge.

4th. In the Province of Quebec the review or the re-hearing of causes, petitions and motions which have already been heard and determined by a single Judge, and for the hearing and disposing of applications for new trials, and the disposal of such other matters as according to the code of procedure of the Province of Quebec may be disposed of by the Superior Court of the said Province sitting in Banc.

62. On the first Monday in March and September in each year a single Judge of the said Supreme Court shall hold a sittings at the said cities of Toronto, Quebec, Halifax and Fredericton, for the respective Provinces of which the said cities are the capitals, and at such sittings the following business may be transacted:

1st. The trial of all issues of facts in actions on the common law side of the said Court.

2nd. The disposition of matters of practice not cognizable by a Judge sitting in Chambers in actions at common law.

3rd. The hearing of causes in suits on the equity side of the said Court.

4th. The hearing of causes on the Admiralty side of the said Court.

5th. In the Province of Quebec the hearing and trial of causes and the transaction of all business which according to the provisions of the said code of procedure may be within the jurisdiction of a single Judge of the Superior Court, sitting in open Court.

63. A single Judge of the said Court may sit in Court out of Term, and may hear and determine causes and all interlocutory matters in Admiralty causes, and may hear and determine motions, petitions and all other interlocutory applications in equity suits.

64. All actions, suits and proceedings in the said Supreme Court, shall be carried to a termination in the Division of the Court for the Province in which the said actions, suits and proceedings shall be originally brought.

65. The rule of decision in all civil actions (excepting causes in Admiralty) which may be brought in the Province of Quebec, shall be the law of the said Province, and the proceedings in such suits shall be regulated by the Code of Procedure of the said Province.

66. The rule of decision in all actions at law, and suits in equity brought or instituted in the said Court, in any of the Provinces of Ontario, Nova Scotia and New Brunswick, shall be the law of England.

67. The procedure in actions at common law including suits relating to the Revenue, shall un-

less otherwise herein provided for or afterwards provided for by general rules made in pursuance of this Act, be regulated by the practice and procedure of Her Majesty's Courts of Common Law at Westminster.

68. Issues of fact on the common law side of the said Court shall be tried according to the rules of the common law of England by a jury.

69. The procedure in suits in equity shall unless otherwise herein provided for or afterwards provided for by general orders made in pursuance of this Act, be regulated by the practice of Her Majesty's High Court of Chancery in England.

70. The procedure in Admiralty causes shall unless otherwise herein provided for by general orders made in pursuance of this Act, be regulated by the present practice of the High Court of Admiralty of England, on its instance side.

71. In actions at common law and suits in equity, brought in the said Court by the Crown, as representing the Government of the United Kingdom, or the Government of one of the Provinces, or of a British Colony, the proceeding shall be by information in the name of Her Majesty's Attorney General for the Dominion.

72. In actions and suits brought against the Crown as representing any of the Governments in the last preceding section mentioned, the procedure may be as nearly as possible according to the Act of the Imperial Parliament, known as the "Petition of Rights Act."

73. The said Supreme Court sitting in special term, may on a proper case and subject to the provisions as to jurisdiction hereinbefore contained, grant the prerogative Writ of Mandamus.

74. The process of the said Court shall run throughout the Dominion of Canada, shall be tested in the name of the Chief Justice of the said Court, and shall be directed to the sheriff of any County, or other judicial division into which any of the said Provinces may be divided, and the Sheriffs of the said respective Counties or divisions shall be deemed and taken to be ex-officio Officers of the said Supreme Court, and shall perform the duties and functions of Sheriffs in connection with the said Court and shall also perform the duties of the Marshall in Admiralty causes and matters.

75. The said Sheriffs shall receive and take to their own use, such fees as the Judges of the said Supreme Court shall by general order fix and determine.

76. The Sheriff of the respective Counties or district in which the said sittings of the said Supreme Court are to be held on the first Mondays of March and September, as hereinbefore provided for, shall in the same manner as jurors are struck and summoned according to the laws of the particular Province in which the sittings shall be held, for service on juries of the Superior Courts of the Province, strike a panel of thirty-six jurors and cause such jurors to be duly summoned to attend the said sittings for the trial of issues of fact, and the said Sheriff shall return the said panel into Court on the first day of the said sittings.

77. There shall be a Registrar of the said Court who shall reside and keep his Office at the City of Ottawa.

78. There shall be four Deputy Registrars of the said Court, one of whom shall reside and keep his Office at each of the said Cities of Toronto, Quebec, Halifax and Fredericton.

79. The proceedings in actions, suits or causes originally brought in the said Supreme Court or removed thereto as hereinbefore provided, shall be carried on in the offices of the said Deputy Registrars respectively.

80. The said Registrar shall be paid a salary of dollars per annum, and the said Deputy Registrars shall each be paid a salary of dollars per annum, and the said Registrar and Deputy Registrars shall be appointed by an instrument under the great seal of the Dominion of Canada to hold office during pleasure.

81. [Fees to be paid by stamps.]

82. The Judges of the said Court may appoint such persons as they may think fit, being Barristers-at-law of not less than three years standing, to be masters, referees and examiners in suits in equity depending in the said Court, to whom reference may be ordered, and who may take evidence in causes in equity depending therein.

83. The said masters shall receive and take to their own use such fees as the said Supreme Court may by orders made by the said Court in general term direct.

84. The Judges of the said Supreme Court may appoint such persons, being Barristers-at-law, as they may think fit, to be examiners to take evidence in suits in Admiralty, who shall receive and take such fees as the said Supreme Court shall by general rules or orders fix and determine.

GENERAL PROVISIONS.

85. [Reporter to be appointed.]

86. All persons authorised to take affidavits in any of the Superior Courts of any Province may administer affidavits sworn in such Province in the said Supreme Court.

87. All persons being Barristers or Advocates in any of the said Provinces shall be admitted by the said Supreme Court sitting in general term to practice as Barristers and Counsel at the bar

of the said Court, and before the Judges thereof, upon paying such fees as the said Court shall by its general rules or orders fix and determine, and upon signing a roll to be kept in the custody of the Registrar of the said Court amongst the records thereof, to be called "The Barristers' Roll."

88. All persons being Attorneys, Solicitors or Proctors of the Superior Courts of any of the said Provinces shall be admitted to practice as Attorneys, Solicitors and Proctors in the said Supreme Court, upon taking such oath and paying such fees as shall by the said Supreme Court be prescribed and fixed, and upon signing a roll to be kept in the custody of the Registrar of the said Court amongst the records thereof, to be called "The Roll of Attorneys and Solicitors."

89. [Judges to make rules of procedure as well in appellate as original jurisdiction, but which shall not vary or in any way alter or affect any provision of the code of procedure of the Province of Quebec.

90. This Act shall come into force so soon as His Excellency the Governor General shall issue his proclamation so declaring.

91. This Act may be cited as "The Supreme Court Act."

SELECTIONS.

THE REPORT OF THE JUDICATURE COMMISSION.

The Commissioners appointed to "inquire into the operation and effect of the present constitution" of the Court of Chancery, the Superior Courts of Common Law, the Central Criminal Court, the Courts of Admiralty, Probate, and Divorce, the Admiralty of the Cinque Ports and the Common Pleas of Lancaster and Durham, and the Courts of Error and Appeal from all the said Courts, have made their first Report. Whether the Court of Chancery of Lancaster was excluded from the purview of the Commissioners advisedly or *per incuriam* we do not know; but at any rate there is no mention of that court either in the Commission or the report, an omission at which we feel the more regret because we had been led to expect that a most important and beneficial change in the character and constitution of that court would have been recommended.

It is not necessary, writing as we do for the profession rather than the public, to say a word in explanation, either of the importance of the questions submitted to this Commission, or (beyond the pure recital of the Commissioners' names) its fitness for the task imposed upon it. The Commission as nominated consisted of Lord Cairns, Sir William Erle, Lord Penzance (then Sir J. P. Wilde), The Lord Chancellor (then Vice-Chancellor Wood), Mr. Justice Blackburn, Mr. Justice Montague Smith, Sir J. B. Karslake (then Attorney-General), Sir Roundell Palmer, Vice-Chancellor James (then Vice-Chancellor of Lancaster), J. R. Quinn, Q.C., Mr. Registrar Rothery, Mr. Acton Smee Ayrton, Mr. Ward Hunt (since Chancellor of the Exchequer), Mr. Childers (now first Lord of the Admiralty), Mr. Hollams (Thomas & Hollams), and Mr. Francis Dobson Lowndes (Lowndes & Lowndes). Very shortly afterwards it appears to have been thought that the chancery element was too strong on the Commission, for the civil and common law elements were strengthened by the addition of Sir Robert Phillimore and Mr Baron Bramwell respectively, while the country solicitors were represented by Mr. William Gandy Bateson, of Liverpool. Finally, since the last change of Government the names of the present Attorney and Solicitor-General have been added.

The Report before us is signed by everyone of these gentlemen, though some of them have (as might among so many have anticipated) appended to their signatures certain notes either qualifying their concurrence in or signifying their dissent from some of the recommendations.

The Report opens with a concise and lucid account of the origin, progress, and present state of the various distinctions of jurisdiction now existing, and expresses an opinion (not exactly in terms but in substance) that the attempts made in the various Common Law Procedure and Chancery Amendment Acts to remedy the inconveniences arising therefrom are defective in principle as well as deficient in extent, and it illustrates the completeness of the separation between the different jurisdictions, even when they appear to be most intimately "fused," by a reference to the present state of county court jurisdiction which is so completely apposite, and so incapable of condensation, that we give it entire:—

"The county court has jurisdiction in common law cases up to £50 in contracts, and to £10 in torts. It has also equitable jurisdiction in certain cases when the value of the property in dispute does not exceed £500, and in at least one of such cases, namely, an administration suit, it is now competent for any county court judge to restrain the prosecution of actions brought by creditors in any of the Superior Courts of Common Law. By an Act of Parliament of last session some of the county courts have also been invested with Admiralty jurisdiction in a large class of cases, where the amount in dispute does not exceed, in some cases, £150, and in others £300. There is an appeal in each class of cases, within certain limits, to a Court of Common Law, to the Court of Chancery, or to the Court of Admiralty. But these jurisdictions, though conferred on the same court and the same judge, still remain (like the common law and equity sides of the old Court of Exchequer,) quite distinct and separate. The judge has no power to administer in one and the same suit any combination of the different remedies which belong to his three jurisdictions, however convenient or appropriate such redress may be. That can only be accomplished under the county court system, by three distinct suits brought in

the same court and before the same judge, carried on under three different forms of procedure, and controlled by three different courts of appeal. In this case, therefore, although we appear at first sight to have obtained that great desideratum, which the Common Law Commissioners call 'the consolidation of all the elements of a complete remedy in the same court,' yet, as that remedy can only be had in three separate suits, the evil is equally great."

The Report having thus pointed out the existing evils, proceeds to recommend their remedy. This we think it expedient to give in the Commissioners own words:—

We are of opinion that the defects above adverted to cannot be completely remedied by any mere transfer or blending of jurisdiction between the courts as at present constituted; and that the first step towards meeting and surmounting the evils complained of will be the consolidation of all the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty, into one court, to be called "Her Majesty's Supreme Court," in which court shall be vested all the jurisdiction which is now exercisable by each and all the Courts so consolidated.

This consolidation would at once put an end to all conflicts of jurisdiction. No suitor could be defeated because he commenced his suit in the wrong court, and sending the suitor from equity to law or from law to equity, to begin his suit over again in order to obtain redress, will be no longer possible.

The Supreme Court thus constituted would of course be divided into as many chambers or divisions as the nature and extent or the convenient despatch of business might require.

All suits, however, should be instituted in the Supreme Court, and not in any particular chamber or division of it; and each chamber or division should possess all the jurisdiction of the Supreme Court with respect to the subject-matter of the suit, and with respect to every defence which may be made thereto, whether on legal or equitable grounds, and should be enabled to grant such relief or to apply such remedy or combination of remedies as may be appropriate or necessary in order to do complete justice between the parties in the case before the Court, or, in other words, such remedies as all the present Courts combined have now jurisdiction to adminster.

We consider it expedient, with a view to facilitate the transition from the old to the new system, and to make the proposed change at first as little inconvenient as possible, that the Courts of Chancery, Queen's Bench, Common Pleas, and Exchequer, should for the present retain their distinctive titles, and should constitute so many chambers or divisions of the Supreme Court; and as regards the Courts of Admiralty, Divorce, and Probate, we think it would be convenient that those courts should be consolidated, and form one chamber or division of the Supreme Court.

It should further be competent for any chamber or division of the Supreme Court to order a suit to be transferred at any stage of its progress to any other chamber or division of the court, if it appears that justice can thereby be more conveniently done in the suit; but except for the purpose of obtaining such transfer, it should not be competent for any party to object to the prosecution of any suit in the particular chamber or division in which it is being prosecuted, on the ground that it ought to have been brought or prosecuted in some other chamber or division of the court. When such transfer has been made, the chamber or division to which the suit has been so transferred will take up the suit at the stage to which it had advanced in the first chamber, and proceed thenceforward to dispose of it in the same manner as if it had been originally commenced in the chamber or division to which it was transferred."

That this, or something tantamount to this, is the true remedy for which we have so long been seeking, we have little doubt; and although not the same in form, it is practically the same thing on a more complete scale as the proposition made some years ago in this journal, that no suit in equity should fail solely on the ground that the remedy was at law, but that the Court should have power on motion at any time before issue joined (but not after) to remove the record into a court of law, which should try the questions arising upon the pleadings as issues to be settled, if necessary, by the judge, on the system now, or lately, prevailing in Ireland. The only practical difference between the two suggestions is that that of the Commissioners embraces "all courts and causes whatsoever," and is put into a form apt for that purpose, whereas we had only under consideration the particular case of a suit in equity, and proposed a remedy adapted to that case only.*

The report then takes up the question, which the Commissioners describe as "important and difficult," as to the number of judges who should ordinarily sit together, and they come to the conclusion that for a court of first instance a single judge is sufficient, although they recommend that for the present the system of sitting in banco in Courts composed of *not more than* three judges should be continued in the common law divisions of the Court. From this recommendation we feel compelled, not without hesitation and reluctance, to dissent: we entertain a strong opinion that no final decree or order whatever should be made, except by consent of the parties, by a single judge, and that instead of extending the system now prevailing in chancery to the common law divisions of the proposed Supreme Court, it would have been better to constitute a full Court, consisting of *not less than* (instead of "not more than") three judges, who should hear and determine all contested causes. As the details of our proposal for this purpose, showing that it would not require any greater addition to the

* In fact, our remarks were caused by the result of a suit then recent, in which, after the cause had been duly brought to the hearing, and both sides had gone at great length and considerable expense into the merits of their respective case, the Vice-Chancellor (Wood), after expressing a strong opinion that the plaintiff was right on the merits, felt himself obliged to dismiss the bill with costs, because the bill of exchange, to restrain the negotiation of which the suit was brought, had been, in fact, discounted a day or two before the bill was filed, so that, at the time *of the institution of the suit*, the plaintiff's was "*a mere* money demand."—E. A. M.

number of the Bench than that proposed by the Commissioners, is already † before our readers, we need say no more here than that we think that, in this respect at any rate, equity should "follow the law," not *vice versâ*.

The Report then goes on to consider a scheme for uniformity of procedure. We were at first much startled at this proposition, because we are fully persuaded that diversity, and not uniformity of practice, is essential, not merely in legal but in all human affairs of importance, to meet the endless variety of circumstances, complications, and dispositions which are to be provided for in all human systems, legal, social, political, or ecclesiastical. Upon further examination, however, we found that this proposed uniformity was only to be superficial, and that underneath was to be preserved all the existing diversity of procedure, with this difference—that the question, to which kind of operation any cause is to be submitted, is to be determined henceforth by the nature of the question to be tried, not by the constitution of the tribunal before which it is brought. This is an undoubted improvement; a necessary consequence, indeed, of the power of transfer already mentioned, but not the less important to bear in mind as the *principle* to which all recommended systems of pleading and practice should be referred, which may be shortly stated thus;—differing methods of investigation are adapted for the determination of different questions, and it is the duty of the Court, as soon as it has discovered the nature of the question or questions at issue, to apply to the case that form of procedure best adapted to produce the desired result. We fully agree, however, with what we understand to be the view of the Commissioners, that this diversity should be confined within as narrow limits as is conveniently practicable, and we therefore hail with pleasure the recommendations—first, that all suits should be commenced by a document of a single nature, and secondly, that there should be a power of adapting this document by special endorsement to various circumstances and with various results.

The recommendations on this point may be shortly described as follows:—all suits are to be commenced by writ of summons, but whenever the claim is a liquidated money demand, or for an account, the writ is to be specially endorsed: and judgment to be recoverable at once in default of appearance, either for payment of the demand or for taking the account, as the case may be; and even after appearance, there is to be provided a summary method of arriving at the same result, unless upon cause shown a different order is made.

Next in order comes the question of pleading in cases not disposed of summarily under the preceding provisions. Here, again, the Commissions appear to have been anxious to preserve as much uniformity as possible, and we are not quite sure that they have not for this purpose gone somewhat further than convenience would altogether dictate. After some preliminary observations to the effect that common law pleading as now carried on is unintelligibly technical, and equity pleading intolerably prolix, (neither of which propositions are, we think, true to their full extent,) the Report proceeds:—

"The best system would be one which combined the comparative brevity of the simpler forms of common law pleading with the principle of stating, intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case, as distinguished from his evidence. It is upon this principle that most modern improvements of pleading have been founded, both in the United States and in our own colonies and Indian possessions, and in the practice recently settled for the Courts of Probate and Divorce. We recommend that a short statement constructed on this principle of the facts constituting the plaintiff's cause of complaint, not on oath, to be called the declaration, should be delivered to the defendant. Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defence, to be called the answer. When new facts are alleged in the answer the plaintiff should be at liberty to reply. The pleadings should not go beyond the reply, save by special permission of a judge; but the judge should, at any stage of the proceedings, permit such amendment in or addition to the pleadings as he may think necessary for determining the real question or controversy between the parties, upon such terms, as to costs and otherwise, as he may think fit."

Then, after a proposal (in which we heartily concur) for enabling any cross claims which might have the operation of a set-off to be made by answer, without a cross suit, and for enabling either party to add parties for the purpose of bringing before the Court all persons interested in the subject-matter, the Report proceeds:—

"We think that either party should be at liberty to apply at any time, either before or after pleading, for such order as he may upon the admitted facts in the case be entitled to, without waiting for the determination of any other questions between the parties.

The Commissioners, naturally following the progress of the cause, now come to the question of the mode of trial. And here, for the first time, their recommendations have the qualification (be it merit or otherwise) of absolute novelty. Up to this point nothing has been suggested which has not, in principle at any rate, been prominently urged before; but, so far as we know, the scheme now put forward with all the weight of the unqualified concurrence of all the commissioners is absolutely new to the public. After a succinct account of the different modes of trial at present in vogue, they say:—

"It seems to us that it is the duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried.

† 12 Sol. Jour. 911.

We therefore recommend that great discretion should be given to the Supreme Court as to the mode of trial, and that any questions to be tried should be capable of being tried in any division of the court.

1. By a judge.
2. By a jury.
3. By a referee.

The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the judge to appoint any other mode. When the trial is to be by a jury or by referee, a judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have power to order that issues be prepared by the parties, and if necessary settled by himself. The judge should also, on the application of either party, have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

The system which, in all the divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by referees, is as follows:—

We think that there should be attached to the Supreme Court officers to be called official referees, and that a judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a referee: and that whenever a cause is to be tried by a referee, such trial should be by one of these official referees, unless a judge otherwise orders. We think, however, that a judge should have power to order such trial to be by some person not an official referee of the court, but who on being so appointed should *pro hâc vice* be deemed to be and should act as if he were an official referee. The judge should have power to direct where the trial shall take place, and the referee should be at liberty, subject to any directions which may from time to time be given by the judge, to adjourn the trial to any place which he may deem to be more convenient.

The referee should, unless the judge otherwise direct, proceed with the trial in open court, *de die in diem*, with power however to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the court.

The referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit, any question to the decision of the Court, or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In some other respects the decision of the referee should have the effect as a verdict at Nisi Prius, subject to the power of the Court to require any explanation or reasons from the referee, and to remit the cause or any part thereof for reconsideration to the same, or any other referee. The referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding before him.

In connection with the subject of trial, it seems proper to refer to the recommendation of the Patent Law Commissioners in the report of the 29th July 1864, who, after observing that the present mode of trying the validity of patents is not satisfactory, advise, that such trials should take place before a judge, sitting with scientific assessors to be selected by himself in each case, but without a jury, unless at the desire of both parties to the suit; and that on such trials the judge, if sitting without a jury, should decide questions of fact as well as of law. It appears to us that a plan similar in substance to that recommended by the Patent Law Commissioners, might with advantage be applied to the trial, not of patent cases only, but of any cases involving questions of a scientific or technical character, in which the judge, or the referee by leave of the judge, may think it desirable to have the aid, during the whole or any part of the proceedings, of scientific assessors."

With this proposal, with one or two slight modifications, we entirely concur. We have already* given our reasons for disapproving of the trial of contested points of law before a single judge, and we think that it is even more objectionable to submit to a single mind the duty of deciding, upon conflicting evidence, disputed questions of fact; and we could therefore reserve to either party the right, *ex debito justitiæ*, to have all issues of the former kind referred to a Court, to consist, *in the first instance*, of three judges at the least, and to have all issues of the latter kind settled by the verdict of a jury: this right is by the proposal above-quoted left to the Court in its discretion, but we think that it ought to be vested absolutely in either party, and that the discretion of the Court should be limited to those cases in which the questions of law and fact are so blended as to be undistinguishable. On the subject of referees, also, we think that the report requires some qualification. We think that no case should be referred, except by consent, in any case where the order goes beyond "accounts and inquiries," but that the Court should have the fullest authority to order all such matters to be referred instead of prosecuting the inquiries itself or in chambers. The referees, however, (official or other), should be strictly limited to finding the facts, and should not, in the absence of agreement, be competent to make any final award; the Court, applying the law to the facts certified by the referees, should make the order, in the same manner as an order founded upon the certificate of the chief clerk is now made on the further consideration of a suit in chancery. We think also that provision should be made for the selection of the official referees partly from the profession and partly from the classes who now supply what is known as "*expert* evidence," with power from the Court to associate a legal and scientific referee or referees in any case, much as is now done in the Court af Amiralty on a reference to the "registrar and merchants." This would, we think, be preferable to leaving the legal referee uncontrolled by the opinions—save in so far as he

* *Ubi Sup.*

felt bound *verecundiæ causâ* to defer to them —of scientific assessors.

In the same manner, without at all desiring to trench upon the power of the Court to sit with the assistance of assessors merely, we think it would be advantageous to enable the parties to require issues of fact involving special knowledge to be referred to a specially qualified jury of some limited number (say five), and to render their verdict (at all events when unanimous) absolutely and finally binding upon the parties. We say "when unanimous," because we think that such a jury ought to be entrusted with the power of finding a verdict by a majority, irrespective of consent, with, perhaps, the qualification that the Court, if dissatisfied with the verdict, might in such a case set it aside and order a new trial on the ground of such difference of opinion alone.

The Commissioners next take up the question of evidence, and upon this point we do not exactly understand their proposal.

They recommend that—

"In the absence of any agreement between the parties, and subject to any General Order of the Court applicable to any particular class of cases, the evidence at the trial should be by oral examination in open court, but that the Court should have power at any time to direct that the evidence in any case, or as to any particular matter at issue, should be taken by affidavit, or that affidavits of any witnesses may be read at the trial, or that any witnesses may be examined upon interrogatories or otherwise before a commissioner or examiner. Any witness who may have made an affidavit should be liable to cross-examination in open court, unless the Court or a judge shall direct the cross-examination to take place in any other manner. Upon interlocutory applications, the evidence should, we think, as a general rule be taken by affidavit, but the Court or a judge should upon the application of either party have power to order the attendance, for cross-examination or otherwise, of any person who may have made an affidavit."

If this means that wherever there is a dispute of fact the evidence *upon that issue* is to be taken orally in court, but that all subsidiary facts not in issue, and all formal proof of facts not really contested, may be given by affidavit, we fully agree with it, but if and so far as it may mean anything else we are unable to concur with it. We think that one of the principal objections—we had almost said *the* principal objection—to the existing common law system is the necessity for bringing witnesses, often at enormous expense, into court to prove every link in a long story of which perhaps but one or two points, depending often upon the evidence of a single witness, are really in contest; while, on the other hand, we believe it to be the unanimous opinion of all who have any personal experience of its working that no more solemn farce exists than a cross-examination in chancery before an examiner, ordinary or special. It would be utterly ludicrous were t not so terribly expensive.

The Report then proposes to give to the Court or judge very extensive discretionary powers, to which no objection can, we think, be taken, followed by a proposal* that "in all divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court." As this is coupled with a proposal† that, "as a general rule, no appeal should be allowed as to costs only," we are constrained to object to it as vesting in the hands of a single judge a power which obviously may be, and where it exists not unfrequently is, used very arbitrarily, and even harshly, against suitors with whose conduct, on some point immaterial to the issue, the judge is dissatisfied, and whom, though he cannot deny their right to success in the suit, he punishes by the denial of their costs, knowing that of that decision there is no chance of reversal, though often such a victory is worse than a defeat. Nay, we have known more than one instance in which counsel, feeling morally certain of success on the merits, but knowing that the judge had a strong feeling against the case, have felt obliged to deprecate a successful decision, and actually to ask for an appealable decree, a request not invariably acceded to. We confess we cannot see any reason for the rule, and we are sure that it often operates to produce great injustice. Let us take as an instance a case which has been recently much before the public—*Martin* v. *Mackonochie*. If the learned Dean of the Arches had decided against Mr. Mackonochie on *all* the questions submitted to him, but added, "I do not, however, consider it a case for costs," Mr. Martin would have been without remedy, though in the opinion of the Court of Appeal (which must, of course, be presumed to be right) he was entitled to all his costs.‡

For so far (with the exception of a protest from the learned judge of the Court of Admiralty against the abolition of the exclusive jurisdiction of that Court, in which few, if any, will, we think, be found to follow him) the Commissioners appear to be perfectly unanimous. At this point, however, they enter upon a new field of inquiry, "the general arrangements for the conduct of judicial business," and from this point there appears to be some difference of opinion amongst them, though not perhaps so great as might reasonably have been anticipated.—*Solicitors' Journal.*

INTERROGATORIES—TENDENCY TO CRIMINATE.

Villeboisnet v. *Tobin and Others*, C. P., 17 W. R. 322.

This is another decision on the much argued question whether interrogatories the answers

* Page 15. † Page 24.

‡ We are not, of course, here expressing any opinion whatever on the *merits* of this case; we are merely considering its operation on the question of *costs*.—Ed. S. J.

to which may criminate the person interrogated may be administered, or whether such a tendency in the interrogatories is a sufficient objection to them. Several cases have been lately before the Courts in which this point has been in dispute, and the decisions are by no means uniform. The result, however, of *M'Fadzen* v. *The Mayor &c. of Liverpool* (16 W. R. 1212) and *Edmunds* v. *Greenwood* (17 W. R. 142), the two cases which immediately preceded *Villeboisnet* v. *Tobin*, appeared to be that it is no objection to interrogatories that they may criminate, but if the direct object is to criminate they will not be allowed. This view of the law is now further sanctioned by the decision in *Villeboisnet* v. *Tobin*, where it was held in an action for misrepresentations in a prospectus that interrogatories should not be allowed which inquired into the truth or falsehood of the alleged misrepresentations.

Montague Smith, J. says—"The only intelligible rule to be deduced from all the cases, including *Edmunds* v. *Greenwood*, seems to be that where interrogatories are *bonâ fide* put to elicit what is relevant to the issue they may be allowed, though the answers may tend to criminate, giving the party interrogated the option of answering or refusing to answer on that ground. But when interrogatories are so put the Court and the judge at chambers will require a stronger case and stronger reasons than in other cases. These interrogatories should not in ordinary cases be allowed on the ordinary affidavit only, but special circumstances must be laid before the judge to induce him to allow them."

This judgment is quite in accordance with *Edmunds* v. *Greenwood*, and with the decisions which are cited and discussed in the considered judgment of the Court in that case. There seems to be no doubt that the law now is that interrogatories will not be allowed if their direct object is to criminate; but if they are put *bonâ fide* for the purpose of discovering matters relevant to the issue it is not a sufficient objection to them that they tend to criminate if there are any special reasons why such interrogatories should be allowed, and such reasons are properly brought before the judge at chambers on affidavit.—*Solicitors' Journal.*

THE PERILS OF ARBITRATION.

Tribunals of arbitration are, both in the legal and commercial world, rising in favour; and their great value has been authoritatively recognised in that portion of the Report of Judicature Commission which seeks to establish official referees. Yet, as the law stands, there is considerable peril in a resort to such such tribunals. If a judge goes wrong in his law at Nisi Prius, or a jury blunders, there is ample means of setting the error right. But it is a very old principle that the award of an arbitrator is final, and not open to review, except where the mistake of the arbitrator is apparent on the face of the award, where he has exceeded or failed to exercise his jurisdiction, or where he has been guilty of misconduct. Yet independently of such cases, injustice may occur. In a case of *Flynn* v. *Robertson*, referred to a Master of the Common Pleas, it was admitted on both sides that a sum of about 40*l.* was due from the defendant to the plaintiff. The Master found that nothing was due, and condemned the plaintiff in costs. A rule *nisi* was obtained to refer the matter back to the Master, and the Master informed the Court that he had made a mistake, and that he wished the matter sent back. Upon cause being shown against the rule, it was contended that, however gross the injustice might be, the Court had no power to set aside or send back the award. At the same time it was stated that the defendant, to meet the fairness of the case, had offered 40*l.* in settlement of the whole matter. Counsel for the defendant showed that the present rigour of the law was established by the judgment of of Baron Parke in *Phillips* v *Evans*, 12 M. & W. 309, and that his ruling had been followed in *Hogkinson* v. *Fernie*, 3 C. B. N. S., and in a recent Irish case. It is hardly necessary to remark that, in the present day, the Courts lean in favour of doing justice to the parties, and endeavour to break through iron rules which have the direct effect of bringing scandal on the law by working a clear wrong. Actuated by this principle, the Court made the rule absolute, adopting a doctrine that a case shall be sent back when the arbitrator himself states that he has made a mistake. Their Lordships fortified themselves in their decision by what was said by Lord Denman in *Hutchinson* v. *Shepperton*, 13 Q. B., and by Vice-Chancellor Wood in 13 Kay and J., 66. To have adhered to an old rule, at the hazard of doing what was in the highest degree inequitable, would have tended to throw discredit on a judicial instrument which in the future is destined to prove even of higher advantage than it has in the past.—*Law Journal.*

EX-CHIEF JUSTICE LEFROY.

On Tuesday last died Thomas Lefroy, the late ex-Chief Justice of Ireland, at the age of ninety-three. Three years ago he was on the bench, and his friends assure us that his faculties were unimpaired to the last.

Mr. Lefroy, who was the eldest son of Mr. Anthony Lefroy, of Carrickglass, was born in the year 1776. He took his bachelor's degree at Trinity College in 1766, and was called to the bar in 1797. He soon had an excellent equity practice. He became a bencher of the King's Inns, a King's Serjeant, and a King's Counsel. In 1830 he entered Parliament as member for the University of Dublin. He was from the outset of his public career a staunch Tory. He represented the University

for eleven years. He was appointed by Sir Robert Peel one of the Barons of the Exchequer, and in 1852—being then in his seventy-sixth year—he was promoted by Lord Derby to the post of Lord Chief Justice of the Queen's Bench. He retired in 1866, when in his ninetieth year.

The late venerable Ex-Chief Justice was married in 1799 to Mary, daughter of Mr. Jeffrey Paul. His eldest son is Mr. Anthony Lefroy, M.P. for the University of Dublin.—*Law Journal.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

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

Holmes v. Reeve.

Certiorari to remove case from Division Court.

Held, 1. The mere fact that a judge of a Division Court has expressed an erroneous opinion in a case before him is no ground for its removal by certiorari.

2. Where a defendant knows all the facts of a case before the day of trial, but, nevertheless, argues the case and obtains an opinion from the judge, the case should not be removed, and the fact that the judge is desirous that the case should be disposed of in the Superior Court can make no difference.

[Chambers, March 15, 1869.]

This was an action brought on a promissory note for sixty-eight dollars, made by the defendant, and was placed in suit in the third Division Court of the County of Huron, and the summons was served for the Court to be holden on 25th January, 1869.

The defendant obtained a summons for a writ of *certiorari* to remove the case from the said Division Court into the Court of Common Pleas, on the ground that difficult questions of law were likely to arise.

One of the affidavits upon which the summons for the *certiorari* was granted was made by Mr. Sinclair, attorney for the defendant, and was as follows: "That the said judge reserved his judgment on said evidence, and the points raised from the twenty-fifth day of January last until the sixth instant, and from then until the thirteenth day of February, instant, when I attended before him, and he expressed a desire to have a short time longer for consideration, and he suggested the eighteenth day of February, instant, as the day he would be prepared to give his judgment: that on said last mentioned day I attended before the said judge, and Mr. Elwood appeared for the plaintiff, when the judge of said Division Court expressed his opinion adversely to the defendant: that he did so with great hesitation, as he expressed it, on the ground that the decisions bearing on the point appeared contradictory, that I suggested to the said judge the propriety of his delaying his delivery of judgment until I had an opportunity of applying for a *certiorari* to remove the case to one of the superior courts of law, the case being one of great importance to the defendant, and one involving some questions of law which had not then come up for decision in any of the superior courts of law in the manner raised by the facts of this case: that the said learned judge remarked that he certainly thought it a fit case to be removed by *certiorari* and would grant time to enable me to apply therefor, and postponed the delivery of judgment until the fourth day of March next, for the purpose of such application."

The plaintiff's attorney, in his affidavit filed on shewing cause, swore "That on the return of the said summons (in the Division Court) the said John Reeve appeared, and also the said Richard Holmes: that James Shaw Sinclair, of the said town of Goderich, Esquire, appeared as counsel for the said John Reeve, and I this deponent appeared as counsel for the said Richard Holmes: that the said cause was duly called on for hearing on that day before Secker Brough, Esq., judge of the County Court of the County of Huron, who is also the judge of the said third Division Court: that after the said case had been thoroughly gone into, and after several witnesses were examined, both on behalf of the said Richard Holmes and the said John Reeve, and after a lengthy legal argument had taken place, and when the said judge had expressed his opinion that his judgment should be for the said Richard Holmes, and just as he was about to endorse his said judgment on the said summons, the said James Shaw Sinclair got up and asked and pressed on the said judge, that if he would not then enter his judgment but would defer same to some future day, he could produce to him authority to shew that in law he was entitled to his judgment: that the said Judge, in pursuance of the said request, adjourned the said cause until the sixth day of February: that on that day the said Mr Sinclair on behalf of the said John Reeve, and John Y. Elwood, of the said town of Goderich, barrister-at-law, my partner, on behalf of the said Richard Holmes, appeard before said judge, and further argued the said case. That after hearing the said argument, the said judge informed the said parties that he would be prepared to give his judgment on the thirteenth day of February: that on that day the said Sinclair and Elwood appeared before the said judge to hear his said judgment, but he not being prepared to give it then, said he would give same on the eighteenth day of February."

It also appeared from another affidavit, that on the 18th February, the learned judge said he was then prepared to deliver his judgment, and then proceeded to deliver, and did deliver the same; and said that "in his opinion the plaintiff Richard Holmes was entitled to his judgment," and then proceeded to give, and did give his grounds for said judgment, and reviewed the authorities cited to him on the said argument: that after the said judge had delivered his said judgment, Mr. Sinclair, on behalf of the said John Reeve, applied to, and urged upon the said judge not to endorse his judgment on the back of the said summons, but to refrain from doing so until the fourth day of March instant, as in the meantime he would apply for a writ of *certiorari* to remove the said plaint.

Spencer shewed cause, and contended that the application was made too late, the case having been considered by the judge of the court below and judgment in effect given though not formally entered: *Black* v. *Wesley*, 8 U. C. L. J. 277; *Gallagher* v. *Bathie*, 2 U. C. L J. N. S. 73.

John Patterson, contra, urged that the judge had given no judgment, and had expressly postponed his decision to enable the *certiorari* to be applied for. He had merely expressed an opinion. He cited *Paterson* v *Smith*, 14 U. C. C. P. 525.

Richards, C. J.—On principle I do not think this case ought to be removed from the Division Court. If the case was one fit to be tried before the judge of that court, the mere fact that he may have formed and expressed an opinion which was erroneous, is no ground for taking the case into the Superior Court. The defendant knew all the facts of the case before the day of trial, and if it was considered it ought to have been removed from the Division Court, steps should have been taken for that purpose before it was heard.

It seems to me to be an unseemly proceeding, that the defendant, after having argued the matter before the judge, and obtained his opinion, and having had the cause adjourned for the purpose of furnishing new authorities, and after consideration of those authorities, the judge had expressed an opinion, that the case should then be taken out of his jurisdiction by a *certiorari*. The fact that the judge himself may have been willing or even desirous to have the matter disposed of in the Superior Court can make no difference. After he has taken on himself the burthen of disposing of the case, having heard the evidence, and expressed his opinion, I do not think, as a general rule, a *certiorari* ought to issue. The cases of *Black* v. *Wesley*, 8 U. C. L. J. 277; *Gallagher* v. *Bathie*, 2 U. C. L. J. N. S. 73, seem to me to lay down principles inconsistent with removing this case. The case of *Patterson* v. *Smith*, 14 U. C. C. P. 525, does not, I think, lay down any doctrine contrary to that of the other cases referred to, for although there had been an abortive attempt to have a trial there was no verdict, and the court no doubt looked at that case in the same way as if no jury have been sworn at all.

I think the summons should be discharged on the grounds I have mentioned, but as the learned judge of the County Court delayed the entry of judgment to enable the defendant to make this application, it will be without costs. I arrive at this conclusion as to the costs more readily from the fact that one of the affidavits filed on behalf of the plaintiff states the belief of the deponent, that the attorney for the defendant speculated on the chance of getting a decision in his favor, and it being against him, he now makes this application. I do not see how this statement thus made was calculated to be of any service to the plaintiff; the way in which it is made is not likely to keep up kindly feelings between professional gentlemen practicing in the same town. No particular grounds seem to be referred to in the affidavit as justifying the belief expressed, though no doubt the person making the affidavit entertained such belief. If the facts stated in the affidavit justify the inference, it will generally be better to place that inference before the court as a matter of argument and conclusion to be drawn from facts rather than as a fact in the affidavit, which the deponent swears he believes.

Summons discharged without costs.

In re Davy.

Costs—Taxation—One-sixth struck off.

Where a sum had been abandoned by an attorney after a summons taken out for the taxation of his bill, but before actual taxation; this abandonment is not to be taken into consideration by the master in settling whether one-sixth has been taxed off the bill.

[Chambers, March 15, 1869.]

A summons was taken out to tax costs of the defendant's attorney against his client, in a suit of *Ham* v. *Eliza Amey*, but before the taxation took place, the attorney abandoned an item of $20 in his bill.

The effect of this abandonment was, that the bill was reduced by more than one-sixth, and the master in settling the costs of taxation, decided that the position of the attorney was no better than if the item had been merely struck off on taxation, and he charged the attorney with the costs of taxation.

The attorney thereupon obtained a summons calling on the client to show cause why the master should not be directed to review his taxation; and why he should not be directed upon such review to disallow to the said Eliza Amey her costs of the said reference, and to tax to the said attorney his costs of the said reference, on the ground that the said master has not taxed off one-sixth of the amount of the said bill referred to him for taxation, after taking into account the amount abandoned thereupon by the said attorney. Or why the said order made in this matter for reference to taxation, should not be amended by inserting therein, a direction to the master to take into his consideration, in determining by whom the costs of the said reference should be paid, the fact of the abandonment of the sum of twenty dollars from the said bill by the said attorney, and his offer to pay the said Eliza Amey her costs of the summons for taxation of the said bill. And why the said Eliza Amey should not bring into court the original order, for the purpose of amending the same as aforesaid. And why upon such amendment being made therein, the said master should not be directed to reconsider his allocatur and his taxation of the costs of the reference, and disallow the said Eliza Amey the whole or any part of the costs of such reference, and allow to the attorney the whole or any part of his costs of the said reference, or otherwise alter his said allocatur as he might be advised on grounds disclosed in affidavit and papers filed. The said attorney to have leave to file a copy of the said master's allocatur on the return hereof; or why such other order should not be made in the premises as to the said presiding judge should deem proper.

Osler shewed cause, citing Con. Stat. U. C. cap. 3, secs. 27, 28, 31; 1 Ch. Arch. Pr. (12 ed.) 124; *In re. Davy*, 1 U. C. L. J., N. S. 213, and cases there referred to.

Holmsted for the attorney, *contra*, cited *Ecollier* v. *Dutour*, 1 Barnes' notes, 128.

Richards, C. J., discharged the summons with costs.

Summons discharged with costs.

McGregor v. Small.

Examination of insolvent debtor—Effete order.

An execution creditor cannot examine a judgment debtor on a stale order which has been partially acted upon.

[Chambers, March, 15, 1869.]

On the 26th of February, 1867, an order was made for the examination of the defendant touching his estate and effects before the deputy clerk of the Crown, for the County of Frontenac. Upon this an appointment was a few days afterwards made, which was served on the defendant together with the order. An arrangement was subsequently made between the parties for the payment of the judgment debt by instalments, and though some of the debt was paid pursuant to such arrangement, the defendant made default in his promises of payment, and execution was issued for the balance due, the result of which was an interpleader issue to test the right of a claimant to the goods seized, which was still pending. On the 10th of March, 1869, the plaintiff obtained from the deputy clerk of the Crown, and served on the defendant, another appointment for the 12th of March, 1869, on the order of the 26th of February, 1867.

The defendant then obtained a summons to shew cause why the order of the 26th of February, 1867, and the last appointment thereunder, or the said appointment alone should not be set aside on the ground that the said order was effete and lapsed, a previous appointment having been made thereon, and that it had been waived by delay.

Osler shewed cause. The first appointment was never acted upon, and the proceedings were stayed at defendant's request and for his benefit, and he cannot be heard now to object to proceedings on this order. There is no time limited within which those orders can be acted upon.

O'Brien contra, the order has been acted on and is effete. This attempted proceeding would, if successful, give the plaintiff a new order for the examination of the defendant, without giving the latter an opportunity of shewing cause why he should not be examined. The circumstances of the case may have so changed that a judge would not grant an order for examination. There is, in fact, an interpleader issue about to be tried, which may result in the payment of the debt, and the object sought to be gained by this examination, viz, to obtain evidence for the execution creditor in the interpleader suit is not a legitimate object.

He cited *Jarvis* v. *Jones*, 4 Prac. R. 341.

Richards, C. J.—The defendant cannot in my opinion be examined on an appointment under an order more than two years old, and which has been partially acted upon. This appointment must be set aside, but I give no costs.

Campbell v. Mathewson.

Practice in ejectment—Infant plaintiff—Setting aside proceedings.

An infant plaintiff can sue out a writ of ejectment in his own name, but, after appearance entered, he cannot take any further step, such as giving notice of trial, without having a next friend appointed; and any such further proceedings in the infants own name will be set aside.

[Chambers, May 4, 1869.]

This was an action of ejectment in which notice of trial had been given for the Spring Assizes, for the County of Grey.

J. A. Boyd obtained a summons to set aside the notice of trial and notice to admit, with copy and service thereof, and to stay all proceedings till the plaintiff should give security for costs, or a sufficient next friend should be appointed on the affidavit of the defendant, who swore as follows:—

"That the claim of title as to said lot is as follows as I verily believe, from searches made in the proper Registry office: patent of the whole lot to John Gallinger: conveyance from said Gallinger to John Campbell: conveyance of the south half (the premises in question) from said Campbell to John B. Courtemanche, and the said Courtemanche gave back a mortgage conveying the legal estate, and to secure the purchase money to the said John Campbell: that the said Courtemanche, as I am informed and believe, made default in his payments on said mortgage, and, thereupon the said John Campbell exercised a power of sale contained in the said mortgage and sold the said premises by auction sale to his son who was then, and is still, a minor under the age of twenty-one years; namely, the above-named plaintiff, Duncan Campbell, and the premises were so sold to the son of the said John Campbell, for the sum of one hundred and twenty dollars, being an entirely inadequate consideration: that after said sale, the said premises were conveyed to the said plaintiff by his father in pursuance of such sale in or about the year 1864, and I afterwards entered into an agreement with the said John Campbell and his son, the said plaintiff, for the sale and purchase of the said land, and a bond to that effect was duly entered into between us, on the 1st day of May, 1865: that on the ninth day of the present month of December, I made application to the said plaintiff and his father for a deed of the said premises, being then ready and willing to pay all that was due in respect of said premises on the footing of the said bond, but they declined, on the ground that the deed of the said plaintiff would be of no use, as he was under age: that I then made inquiries from the father of the said plaintiff as to the age of the said plaintiff, and he referred to some papers, and read out to me the day of his birth, (which I now forget), and stated that he, (the said plaintiff), would not come of age for a year and a-half"

Pending this summons, *Osler* for the plaintiff obtained an order for the admittance of John Campbell, (who was sworn to be worth five-hundred pounds), to prosecute the action as the next friend of the plaintiff. On the return of the summons,

Osler shewed cause, and relied upon this order as being an answer to the defendants application, and asked to be allowed to amend the style of cause in the notice of trial, by inserting the name of the next friend. He objected to the delay in making the application, and relied upon the language of *Richards*, J., in *O'Reilly* v. *Vanevery*, 2 P. R. 184, that in such cases the defendant could obtain security for costs by applying immediately after appearance. He cited Cole on Ejectment, 584.

Boyd, in support of his summons, contended that the language of *Richards*, J., was *obiter dictum*: that the text writers cited, referred to no authorities, since the action of ejectment was re-

modelled: that the application was immediately after the first irregular step: that it was not necessary for the defendant to apply immediately after appearance, as it was not to be assumed that the plaintiff would proceed irregularly: that the appointment of next friend could not relate back so as to give validity to previous proceedings, and that the practice in suits by infants when pleadings were filed, was to set aside the proceedings by him after appearance when no next friend had been appointed. He cited *Doe d. Roberts* v. *Roberts*, 6 Dowl. 556; *Doe d. Selby* v. *Alston*, 1 T. R. 491; *Major* v. *McIntire*, Sm. & Bat. 273; *Byrne* v. *Walsh*, 5 Ir. L. R. 217; *Grady* v. *Hunt*, 3 Ir. C. L. R. 522.

Hagarty, C. J. C. P., held, that the notice in question must be set aside, and if costs had been asked for, with costs. It was clear that the infant had the right to issue and serve the writ without the appointment of a next friend, but he could take no further step in prosecution of the suit without such an appointment. The practice which prevails in ordinary actions by infants must apply to actions of ejectment since the Common Law Procedure Act, and in these cases the authorities referred to shewed that any proceeding taken by an infant after appearance, without the intervention of a next friend would be set aside for irregularity if promptly moved against. He did not feel pressed by the language of *Richards*, J. referred to, as it might well be that the defendant could have moved for security after appearance and yet have his remedy open of moving to set aside the first proceeding irregularly taken by the infant. The plaintiff in this case having procured the appointment of a solvent next friend, it will not be necessary to deal with his application for security.

Order accordingly.

Synge v. Aldwell.

Law Reform Act, sec. 18—*Withdrawal of issue to enable plaintiff to give notice for jury.*

The plaintiff obtained a summons, asking amongst other things, to be allowed to withdraw his replication joining issue, and take the same off the files, and file a similar replication with a notice requiring a jury. The joinder of issue had been filed after the Law Reform Act came into force.

Gwynne, J., gave the leave required.

ENGLISH REPORTS.

Reg *v.* Alsop.

Perjury—Corroborative evidence—Materiality.

Upon the trial of C. for perjury, committed in an affidavit, proof was given that the signature to the affidavit was in C.'s handwriting, and there was no other proof that he was the person who made the affidavit. The prisoner was then called, and swore that the affidavit was used before the taxing master; that C. was then present, and that it was publicly mentioned, so that everybody present must have heard it, that the affidavit was C.'s.

Held, that the matters sworn by the prisoner were material upon the trial of C.

[C. C. R. 17 W. R. 621.]

Case reserved by the Recorder of London at the February Session of the Central Criminal Court, 1869.—

The defendant was at this session convicted before me of wilful and corrupt perjury committed by him in the evidence which he gave before me at the preceding session of this court upon the trial of one James Coutts, for perjury.

Coutts was indicted for perjury, committed in an affidavit made by him in a cause of *Kelsey* v. *Coutts*, and which affidavit had been afterwards made use of before the master upon the taxation of the costs in the said action.

Proof was given that the signature to the affidavit was in the handwriting of Coutts, but no other proof was given that he was the person who had made the affidavit, the commissioner who administered the oath being unable to identify him. The case of *R.* v. *Morris*, 1 Leach, 50, was referred to.

The present defendant, John Alfred Alsop, was then called, and swore that the affidavit in question was used before the taxing master upon the adjourned taxation, and that the defendant Coutts was then present, and that it was publicly mentioned, so that everybody present must have heard it, that the affidavit was the affidavit of James Coutts. The indictment against the present defendant Alsop alleged that it was a material question upon the trial of the said James Coutts, whether the said James Coutts was present on the 14th of November before the master on the taxation of the said costs.

And whether or not on the said 14th of November the said affidavit was used and read in the presence of Coutts.

And whether or not on the occasion of the taxation of the said costs it was stated publicly in the presence and hearing of Coutts that the affidavit was his

Upon the trial it was objected that the abovementioned matters were not material questions for inquiry upon the trial of Coutts, as the particulars sworn to related to matters occurring subsequently to the making of the affidavit, and were tendered merely as collateral proof that the affidavit had been made by Coutts, and that the only matter material for inquiry was the truth or falsehood of the statements contained in that affidavit.

The opinion of the Court for the Consideration of Crown Cases Reserved is requested whether the above-mentioned matters were material to the issue involved in the trial of Coutts, and whether the conviction should stand or be reversed.

The defendant was admitted to bail with sureties for his appearance at the session next after the judgment of the Court is pronounced upon these points.

Poland, for the prisoner, submitted that inasmuch as the identity of the person making the affidavit was established by proof of his handwriting (*R.* v. *Morris*, 1 Leach, 50, 3 Russ. 92), the evidence of the prisoner given subsequently was collateral and immaterial. [*Waddy*, for the prosecution —At the trial the identity of Coutts was not made out, and then it was that the prisoner supplemented the proof of it.] [Brett, J.—The jury may have disbelieved the witnesses who gave evidence as to the handwriting.] Lush, J.—The prisoner's counsel must go to the extent

of saying that all evidence in corroboration of facts of which other proof has been given is immaterial.]

Waddy, for the prosecution, was not called on.

Kelly, C.B.—The prisoner's counsel has done his duty, and we must now do ours. This conviction must be affirmed.

Conviction affirmed.

Reg. *v.* Henry Jenkins.

Murder—Evidence—Dying declaration.

Upon a trial for murder, a declaration of the deceased taken by a magistrate's clerk, tendered as evidence for the prosecution, contained the following:—"From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope *at present* of my recovery." The words "at present" were interlined, and the clerk having been recalled to explain the interlineation, said that after he had taken the deposition he read it over to the declarant and asked her to correct any mistake that he might have made, and that she suggested the words "at present;" that she said "no hope at present of my recovery," and he then made the interlineation.

Held, that the words suggested by the declarant qualified the statement as it stood previous to the alteration, and showed that she was not absolutely without hope of recovery, and, therefore, that the declaration was inadmissible.

C. C. R. 17 W. R. 621.

Case reserved by Byles, J.:—

The prisoner, Henry Jenkins, was convicted at the last Bristol assizes of the murder of Fanny Reeves, and is now lying under sentence of death, subject to the decision of the Court of Criminal Appeal as to the admissibility of the dying declaration of the deceased woman.

It appeared in evidence that on the night of the 16th October, between eight and nine o'clock, the screams of a woman were heard in the river Avon, at a place where the river is deep. It was about high tide. Assistance was procured, and the deceased was rescued from the water, but in an exhausted condition. She continued very ill, and became, according to the medical evidence, in great danger. On the next day, the 17th, she said she did not think she should ever get over it, and desired that some one should be sent for to pray with her. A neighbour of the name of Axell accordingly visited her about eight o'clock p.m., who prayed with her, and, as her mother said, talked seriously to her.

At ten o'clock the same evening the magistrate's clerk came. He found her in bed, breathing with considerable difficulty and moaning occasionally. He administered an oath, and she made her statement, as hereinafter set forth. He asked her if she felt she was in a dangerous state—whether she felt she was likely to die. She said, I think so. He said, why? She replied, from the shortness of my breath. Her breath was extremely short; the answers were disjointed from its shortness; some intervals elapsed between her answers. The magistrate's clerk said, "Is it with the fear of death before you that you make these statements?" and added, "Have you any present hope of your recovery?" She said, none.

The counsel for the defendant pointed out that in the statement the words "at present" are interlined.

The magistrate's clerk was recalled. He said that after he had taken the deposition he read it over to her, and asked her to correct any mistake that he might have made. She then suggested the words "at present." She said—no hope "at present" of my recovery. He then interlined the words "at present." She died about eleven o'clock the next morning.

Without the declaration of the deceased there was no evidence sufficient to convict or even to leave to the jury, but the evidence for the prosecution was, so far as it went, confirmatory of the deceased woman's statement.

The case therefore rested on what was called the dying declaration of the deceased.

The counsel for the defendant, Mr. Collins, submitted that upon the evidence there was not such an impression of impending death on the mind of deceased as to render the declaration admissible.

I expressed no opinion, but thought it the safest course to reserve this question for the opinion of this Court, and to let the case go to the jury.

The examination of Fanny Reeves, taken on oath the 17th of October, 1868:—

The deponent saith—I am a single woman and have two children, the one aged four years and the other aged about five months. The father of the first child, which is a boy, is Henry Jenkins. He lives in Ship-lane, Cathay, and is a ship carpenter. He has been paying me, under order of magistrates, 2s. per week for the support of that child, but he has not kept up the payments, and he now owes me £1 7s. Last night, the 16th inst., about half-past six o'clock, I met him by appointment on the New Cut, in the parish of Bedminster, in this city, and I asked him if he was going to give me some money to buy a pair of boots for myself. He said that he hadn't any money. I told him that I must sue him for my money, and then he asked me to walk with him to the Hot Wells, and said that he would get some there. I accompanied him to the Hot Wells, and he went into a house at Cumberland-terrace; I waited for him outside, and he came out in a short time, and said that he could not get any money, and he asked me then to walk with him up Cumberland-road, and we went along that road together, until we got near Bedminster-bridge, and we stood on the New Cut, near his residence, and we had a few angry words together about the money he owed me, and he told me that I could have a warrant for him if I liked. After we had stood there about ten minutes, he said, "here's a rat climbing up the bank," and he advanced to the edge of the bank, and I went too, and looked, but could not see any rat, and directly I got on the edge of the bank, he pushed me with both hands on the back, and at the same time said, "take that you bugger," and he pushed me direct into the river Avon, which runs along there; I screamed out and managed by catching hold of the bank to keep myself up until I was taken out of the water, and I believe it was by a policeman. After being so taken out, I became insensible, and did not recover till I found myself in bed in this house. Since then I have felt great pain in my chest, bosom, and back. From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope *at present* of my recovery. Dr. Smart has been to see me

twice to-day. It was about eight o'clock on the said evening when the said Henry Jenkins pushed me into the water. He was under the influence of liquor at the time—but was not tipsy: I had two drops of rum with him during our walk; I know of no motive for his so pushing me into the water, except it was that I had asked him for money.

The mark × of Fanny Reeves.

The jury found the prisoner guilty.

Sentence of death was passed, but execution stayed, that the opinion of this Court might be taken on the admissibility of the declaration.

J. Barnard Byles.

Collins (*Norris* with him), for the prisoner.—This declaration was inadmissible. The general principles on which this anomalous species of evidence is admitted are laid down in *R* v. *Woodcock*, 1 Leach, 500, 3 Russ. on Crimes, 4th ed. 250. The preliminary facts to be proved before it can be received are that the deceased at the time of making her declaration was under a sense of impending death and an impression of immediate dissolution; but it is not essential that death should, in fact, take place immediately. There must be no hope of recovery: *R.* v. *Van Butchell*, 3 C. & P. 629, 3 Russ. 253; *R* v. *Crockett*, 4 C. & P. 544, 3 Russ. 252; *R.* v *Dalmas*, 1 Cox C. C. 95; *R.* v. *Spilsbury*, 7 C. & P. 187, 3 Russ. 254. "It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant," per Willes, J., in *R.* v. *Peel*, 2 F. & F. 22; *R.* v. *Hayward*, 6 C. & P. 160, 3 Russ. 253; *R.* v. *Nicolas*, 6 Cox C. C. 120; *R.* v. *Megson*, 9 C. & P. 418, 3 Russ. 255. In this case it appears that on the day following that on which the deceased was rescued from the Avon she said she did not think she should ever get over it, and desired that some one should be sent for to pray with her, and on the same evening the magistrate's clerk took her deposition. It appears that he had asked her if she had any present hope of recovery, to which she replied—None; and, having reduced her statements to writing, he read them over to her, asking her to correct any mistake he might have made, and that she then suggested the words interlined "at present." She said—No hope at present of my recovery. It is submitted, therefore, that she treated what he had at first written as a mistake, and qualified that. Some meaning must be given to the words "at present," and it is submitted that what the deceased intended was that she had no hope then, but thought that a time might come when she might have hope; and, if so, there was not such a settled hopeless expectation of death as is essential to the reception of such evidence.

Sanders (*Bailey* with him), for the prosecution, admitted the authority of the cases cited, but contended that this came within them. If there is a belief on the part of the deceased that she will die, though she does not feel it to be impossible that she may recover, it is sufficient. The question is, What is the belief? and not, What the possibility?—for it may almost in every case be said, whilst there is life there is hope. *R.* v. *Brooks*, 3 Russ. 264. [Kelly, C.B.—She treats what the clerk first wrote as a mistake, not as a mere omission.] [Lush, J.—The added words do not strengthen what she had previously said; but do they not weaken it?] [Byles, J. *Do they not mean—I have no present hope*; but I think I may have hope by and bye?] [Lush, J.—It must be clear that the deceased has no hope, and must not be left doubtful.]

Collins.—The law looks with jealousy on this kind of evidence (Greenleaf on Evidence, 233), and any hope, however slight, renders it inadmissible. Here the deceased declined to say all hope was gone.

The learned judges constituting the Court (Kelly, C.B., Byles, Lush, and Brett, JJ., and Cleasby, B.) having retired, on their return

Kelly, C.B., delivered judgment as follows:—We are all of opinion that this conviction must be quashed. The question for us, and the only question, is whether the declaration of the deceased was admissible; and it is clear that if that is excluded, there was no evidence to go to the jury. The question depends entirely upon what passed between the magistrate's clerk and the dying woman. It appears that he found her breathing with difficulty, and moaning, and, having administered an oath, that he asked her if she felt she was in a dangerous state and likely to die. She said, "I think so." So far it shows she was under an impression merely that she was likely to die, and there is nothing in that part of the statement to render it admissible; but he goes on to ask her why? and she replies from the shortness of her breath. Her answers were disjointed from its shortness. He then asks her, "Is it with the fear of death before you that you make these statements; have you any present hope of your recovery?" She said none, and thereupon he reduced to writing what she had said in these terms: "From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope of my recovery." If the dying woman had subscribed that declaration it is sufficient for us to say that the case for our consideration would have been a very different one from the present. But it appears that after the prisoner's counsel had pointed out to the judge at the trial the interlineation of the words "at present" in the statement as it then stood, the magistrate's clerk was recalled, and said that after he had taken the deposition he read it over to her and asked her to correct any mistake that he might have made, and that she then suggested the words "at present," and said, "No hope at present of my recovery," and he interlined the words "at present." The question is, whether this declaration is admissible. I am of opinion that the decisions show that there must be an unqualified belief of impending death, without hope of recovery. Looking at the decisions, the language of Eyre, C.B., is, "When every hope in this world is gone;" of Willes, J., "There must be a settled hopeless expectation of death in the declarant." To make this kind of evidence admissible the burden of proof lies on the prosecution, and we must be perfectly satisfied beyond doubt that the deceased was at the time under an unqualified expectation of impending death. Here the declarant herself suggests the interlined words, "at present." The counsel for the prosecution would have us give no effect whatever to them; but they must have had some meaning. She may have meant by

them—I desire to alter and qualify my previous statement; I mean to say, not that I have absolutely no hope of recovery, but that I have no present hope of recovery. If the words admit of two constructions, one in favor and one against the prisoner, we should adopt that one which would be *in favorem vitæ*. But the interlineation and alteration here was caused by the magistrate's clerk asking the declarant to correct any mistake, and, the case being one of life and death, she in effect says—There is a mistake, and I desire it to be corrected. The words, therefore, have a definite and fixed meaning, namely, to qualify the statement read to her.

Byles, J., said that, having tried the case, he wished to state that from the first he entertained a strong doubt upon the question, but as there was no other evidence to leave to the jury he had thought it best to reserve the case. The law properly regarded the admissibility of this kind of evid nce with jealousy. There was no power of cross-examining the declarant—no means of indicting for perjury; great danger of mistakes. What the declarant said in effect was, "If I don't get better, I shall die."

Conviction quashed.

UNITED STATES REPORTS.

SUPREME COURT OF ILLINOIS.

The Chicago & Great Eastern Railway Company, et al v. Marshall.

Dying declarations.

In no case, save that of a public prosecution for a felonious homicide, can the dying de larations of the party killed be received in evidence. In civil cases they are not admissible.

Breese, C.J.—The only question of any real importance presented by this record, which we are disposed to discuss, is, were the dying declarations of the boy admissible in evidence to charge the defendants?

The action was case to recover damages for death occasioned by the careless management of a railroad locomotive, and brought by the father of the boy killed, as his next of kin and personal representative.

This is a new question in this court, and quite an interesting one, which we lack time to discuss at very great length. A few principles of evidence will be noticed, and such opinions as text writers on evidence or courts of justice may have declared on the point.

The general rule is, that *hearsay* evidence, that is, statements coming from one not a party in interest, and not a party to the proceeding, and not made under oath, are not admissible, for the reason that such statements are not subjected to the ordinary tests required by law for ascertaining their truth; the author of the statement not being exposed to cross-examination in the presence of a court of justice, and not speaking under the penal sanctions of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observation; and the misconstructions to which such evidence is exposed, from the ignorance or inattention of the hearers, or from criminal motives, are powerful objections.

There are, however, well established exceptions to this rule, whether wisely so or not, is certainly a grave question, and among them are dying declarations. These are understood to be statements made by a person under the immediate apprehensions of death, and who did die soon after. In 1 Phil. Ev., 215, it is said, the declarations of a person who has received a mortal injury, made under the apprehension of death, are constantly admitted in criminal prosecutions, and are not liable to the common objection against hearsay evidence, partly for the reason that the awful situation of the dying person is considered to be as powerful over his conscience as the obligation of an oath, and partly on a supposed want of interest, on the verge of the next world, dispensing with the necessity of a cross-examination. Without questioning the soundness of this last reason, obnoxious as it may be to fair criticism, it may be safely said, the exception itself deprives an accused party of a most inestimable privilege secured to him by the ninth section of Article 13 of our State Constitution, "to meet the witnesses face to face," so that by cross-examination the truth may be eliminated.

The exception is in derogation of common right, for, independent of constitutions and laws, an accused person has the right to hear the witness, who is to condemn him, in his presence, so that he may be subjected to the most rigid inquisition. To hang a man, on the statements of one who is on his dying bed, racked with pain, incapable in most cases of giving a full and accurate account of the transaction, weakened in body and in mind; and, though in *articulo mortis*, harboring some vindictive feeling against him who has brought him to that condition, is, to say the least, and has always been, a dangerous innovation upon settled principles of evidence; and no court ought to be disposed to extend it, to enhance cases to which it did not, in its inception apply. The rule itself has no great antiquity to recommend it, it having been first declared, by Lord Chief Baron Eyre, at the Old Bailey, in 1787, in Woodcorlis case, 1 Leach, Crown Law 500, in which the montrouss doctrine was held, that although the *declarant* did not apprehend she was in a critical state, in momentary expectation of death, soon to appear before the throne of the Eternal—and, although the witnesses could give no satisfactory information as to the sentiments of her mind upon that subject, and the surgeon testifying that she did not seem to be at all sensible of the danger of her situation, and never saying whether she thought she should live or die; the court held, on its own conviction, that she was in a condition rendering almost immediate death inevitable; and, as persons about her thought she was dying, her declarations, made under such circumstances, ought to be considered by the jury as being made under the impression of her approaching dissolution, when the case showed, by the most positive proof, she had no impressions upon the subject.

Having no such impression, how could her conscience have been touched?

The prisoner was convicted and executed, thus adding one more to the judicial murders which blacken the page of history.

And this is the leading case in support of the exception.

To tolerate this exceptional rule, the declarant ought to be, at the time of making the declarations, under the impression of almost immediate dissolution, and without any hope of recovery.

When that has departed—when he is conscious he is, in a moment, to be among the dead, and his soul to take its flight from the body, thus circumstanced, it might be said, his declarations, understandingly made, were of equal force with his testimony delivered in a court of justice; and entitled to be received, and justly, were it not for the fact, the accused was not present, and had no opportunity to cross-examine him.

The bed of death affords no opportunity for this; and the accused may become the victim of statements, which, by reason of the fading condition of the body, in which the mind must in in some degree participate, of him who makes them, *depriving* them of that clearness, distinctness and correctness which should characterize them, and, destitute of which, human life should not be sacrificed by them.

In looking into the books, we find that such declarations are restricted to cases of homicide, not those resulting from accident or mischance, but felonious homicide.

The cases, in England, in which they were received, and not in cases of felony, were the case cited by appellee, in 3 Burrows 1244, *Wright, lessor of Clymer*, v. *Little*. The declarations admitted in that case were the confessions of the forger himself, made on his death-bed, and Lord Mansfield said he should admit them as evidence, but that no general rule could be drawn from it.

The same was the case of *Aviston* v. *Lord Kinnaird*, 6 East, 195. These two cases, the learned author (Phillips on Evidence) thinks, were overruled by the case of *Stobart* v. *Dryden*, 1 Meeson, and Welsby 615, and one not supported by the deliberate judgment of any court; but that the disposition of courts was rather to restrict the admissibility of dying declarations, even in criminal cases.

The true foundation of the rule, that they were admissible in cases of felonious homicide, was policy and necessity, since that crime is usually committe : in secret ;and it cannot be allowed to such an offender to commit the crime, and, by the same act, still forever the tongue of the only person in the world which could speak his crime.

That they are not admitted in civil cases, is held by most courts in this country and in England.

The only case to the contrary, is the one referred to by appellee, as decided in N. Carolina, *Falcon* v. *Shaw*, 2 N. Car. Law R. 102.

This was a case for seduction, brought by the father, and he was permitted to give in evidence the dying declarations of his daughter, that the defendant was her seducer.

the leading case in this country against this admissibility, in civil cases. is *Wilson* v. *Bowen*, 15 Johns. 286, opinion of the court by Thomson, Ch. J., referring to the case of *Jackson* v. *Kniffen*, 2 ib. 35, opinion of Livingston, J. The same rule was held in *Gray* v. *Goodrich*, 7 ib. 95, which appellee has cited, were it is said the law require the sanction of an oath to all parol testimony.

It never gives credit to the bare assertion of any one however high his rank or pure his morals.

The cases of pedigree, prescription or custom, are exceptions to this rule. What a deceased person has been heard to say, except upon oath, or in extremis when he came to a violent end, never has been considered as competent evidence.

This clearly, has no reference to a civil case but to a criminal prosecution for a felonious homicide. See also *Kent* v. *Walton*, 7 Wend. 256.

We think it may be safely said, that the rule at present prevailing in this country and in England on this subject is, that in no case, save that of a public prosecution for a felonious homicide, can dying declarations of the party killed be received in evidence, and to this extent, and no further are we inclined to go.

In civil cases they are not admissible. To admit the dying declarations in this case was error, and for that error the judgment must be reversed and the cause remanded.

SUPERIOR COURT OF CINCINNATI.

Bailey v. Berry et al.

Joint Trespassers.

Joint trespassers may be sued together, or any of them separately, and the non-joinder of the others is no defence.

A release to one of several joint trespassers will discharge all, but it must be a technical release, not merely a covenant not to sue, or other instrument amounting to a release by implication merely.

Where plaintiff sued joint trespassers and then made an agreement with a portion of them to withdraw the suit as to them for a certain sum of money, and in pursuance of this agreement made an entry on the record that he was unwilling further to prosecute his action against the parties named, and as to them the action was dismissed; *Held*, that the others were not discharged, but they were entitled to have the jury instructed, in making up their verdict, to deduct the amount received already by plaintiff from the amount of damages sustained by him.

This was a case reserved from special term upon the pleadings and the evidence contained in the bill of exceptions.

In February, 1860, the plaintiff filed his petition against J. Q. A. Foster and fifteen other persons, for an alleged trespass upon his property, in Campbell county, Ky., and in March, in the same year, by leave, filed his amended petition, claiming damages for the injury described in the former pleading.

Five of the defendants—B. Taylor, Hallam, Piner, Root and Winston, filed demurrers to the petition, which, after argument, were overruled. On the 16th of June, 1862, Charles Air answered whith a general denial of the allegations of the petition.

While the action was pending, an entry was made upon the minutes by the plaintiff, that he would not further prosecute his claim against four of the defendants, James Taylor, Jr., Barry Taylor, John Taylor, and James R. Hallam, as to whom the action was dismissed.

Subsequent to this Berry, Winston, Root and Air filed answers, to portions of which the plaintiff demurred, and his demurrer was afterwards overruled. In March, 1866, the plaintiff, by leave, filed an amended petition, in which he set forth that in October, 1859, at Newport, Ky., he was the owner and in possession of several printing presses, and divers articles attached to his printing establishment, including a large quantity of type, of the value of ten thousand dollars,

which the defendants had unlawfully taken and converted to their own use, for which sum he asked judgment.

To this last amended petition, the defendants Winston, Berry, Air and Root severally answered, denying the matters alleged against them generally, and setting up as a bar to the action against them, "that since its commencement the plaintiff had, in consideration of $1,500, paid to him by J. R. Hallam, Barry Taylor and James Taylor, Jr., who were originally their co-defendants in the action, settle, released and discharged said defendants, from whom said sum was received, from any and all liability for the wrong and injury committed by them, and as they were all joint trespassers, the release of those parties discharged all the wrongdoers." To this last allegation in their answer the plaintiff replies by a denial of the whole statement.

On these pleadings the case was tried before a jury. The evidence, which is fully contained in the bill of exceptions, was submitted to the jury, and a verdict rendered in favor of the plaintiff for $2.556 against all the defendants remaining on the record.

To establish the fact of the release alleged in the answer, written and oral testimony was heard, which was uncontradicted, but the effect of which the judge who tried the cause held to be a legal question only, and directed that a verdict should be rendered upon the whole evidence offered to establish the plaintiff's right to recover, as well as that of the defendants to oppose it, subject, however, to the opinion of the court on the law arising upon the alleged release.

The defendants afterwards severally moved for a new trial.

Stallo & Kittredge for plaintiff.

Jordans & Jackson for defendants.

Storer, J.—The important question for us to consider, as the counsel upon both sides admit, is, what was the effect of the entry by which four of the defendants were dismissed from the action; does it apply only to those named, or does it extend to all the defendants?

The entry is, in substance, this:

"The plaintiff comes and makes to the court known that he is unwilling further to prosecute this action against the parties described, and thereupon they are adjudged to go hence without day, and as to them the action is dismissed, at their proportion of the costs then accrued."

It cannot be claimed that this dismissal, which is equivalent only to a judgment of *nol. pros.* at the common law, can operate either for or against the other defendants. No such effect would be produced even in a criminal case. This was held in *Rex.* v. *Sergeant* (12 Mod. 320), and is now the settled law.

We find in the early case of *Parker* v. *Lawrence*, decided in the reign of James I., Hobart 70, that the court were of opinion that a *nol. pros.* as to one or more joint trespassers, before action, would discharge the action. But in the next reign the case just quoted was overruled, and the court held that a discontinuance as to one defendant was a mere agreement to relinquish the action as to him only, and he alone could take advantage of it, the plaintiff being still at liberty to proceed against the other defendants: *Walsh* v. *Bishop* (Cro. Car. 243).

Since this decision the current of the law has been uniform on the point. We find it settled in *Noke* v. *Ingham* (1 Wilson 90;) *Dale* v. *Eyre* (*Id.* 306;) *Cooper* v. *Tiffin* (3 T. R. 511;) *Mitchell* v. *Milbank* (6 T. R. 200).

The cases are carefully collected and approved by Sergeant Williams in his note to *Salmon* v. *Smith* (1 Saunders 206, note 2), and establish fully the rule we have indicated, that a *nol. pros.* dismissal or discontinuance as to one defendant, before judgment, does not enure to the benefit of the others. And thus it is when an infant or a married woman are jointly sued with another, a plaintiff may enter a *nol. pros.* as to the minor or the *feme covert*, without affecting the liability of the other party to the suit: *Pell* v. *Pell* (20 Johns. 126;) *Woodward* v. *Newhall* (1 Pickering 500).

The principle which governs all these decisions implies that the party injured by co-trespassers, or who is the creditor of co-debtors, may sue either one of the individuals against whom the action may be brought; he is not bound to prosecute all, and although a plea in abatement is permitted in case of the non-joinder of debtors, the privilege does not extend to tort-feasors; all are regarded as principals, and neither the omission to sue all, nor, if all are sued, the dismissal of one of them from the suit, can be pleaded by the other parties in bar.

From a very early period it has been held that the absolute release of one joint trespasser from his liability, discharges all who may have participated in the act; such is the language in Co. Litt. section 376, and contemporaneous cases of *Cocke* v. *Jenner* (Hob. 66), and *Hitchcock* v. *Thornland* (3 Leonard 122). All united to produce the injury, there was a common purpose to be accomplished by the result, and there could be no severance of the liability. Hence, if there was a remission of his liability to one, it became the privilege of all. These decisions have since been followed by the English and American courts, wherever the state of facts warranted their application, and we need not refer to the numerous adjudications which have sustained the principle. In *Ellis* v. *Bitzer* (2 Ohio 89) it is fully admitted.

But the release pleaded, as a discharge for all, that has been given to one only, must be a technical release, under seal, expressly stating the cause of action to be discharged, with all condition or exceptions: *Fitch* v. *Sutton*, 5 East 232; *Rowley* v. *Stoddard*, 7 Johns. 207; *Dezeng* v. *Baily*, 9 Wend. 336; *Shaw* v. *Pratt*, 22 Pick. 305; *Mason* v. *Jouetts' Admr.*, 2 Dana 107; *Miller* v. *Fenton*, 11 Paige 18; *Hoffman* v. *Dunlap*, 1 Barb. 185; *Crawford* v. *Millspaugh*, 13 Johns, 87; *Seymour* v *Minturn*, 17 *Id.* 169; *Couch* v. *Mills*, 21 Wend. 425; *Jackson* v. *Stackhouse*, 1 Cowen 122.

So strictly are these technicalities adhered to, that no release is allowed by implication; it must be the immediate legal result of the terms of the instrument which contains the stipulation; hence it is that a covenant not to sue, or to assert a claim, or in any manner to hold liable one joint debtor or trespasser, though it operates between the immediate parties, does not extend to the others.

Thus, in the early case of *Hitchcock* v. *Thornland*, already referred to, where it was admitted a release to one would discharge all, the distinction we have stated was recognized by Atkinson, J.; and in *Lacy* v. *Kynaston* (1 Lord Raym. 689), reported also in 12 Mod. 548, where the question came directly before the judges, it was held that a covenant not to sue was personal to the covenantee only, and could not be set up by other parties. In those cases it was well observed, that such a covenant operated as a release between the parties themselves, to avoid circuity of action, but could not extend further, "as if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenants with B. not to sue him. That shall not be a release but a covenant only, because he covenants only not to sue B., but does not covenant not to sue A., against whom he still has his remedy."

Late in the last century the case of *Dean* v. *Newhall*, 8 T. R. 168, was determined by Lord Kenyon, where the defendant pleaded that his principal, with whom he was jointly bound, having been, as he claimed, released by an agreement under seal, which obligated the plaintiff not to sue him, and if he did, the agreement thus made "should be a sufficient release and discharge to all intents and pusposes, both at law and in equity, to and for the debtor, his executors, &c." It was argued that this agreenment was a release of the right of action against principal and surety, but in reply the case we have cited from Raymond was referred to, and his lordship, in giving the opinion of the whole court, said: "The case of *Lacy* v. *Kynaston* removes all difficulty on this subject, and is a direct authority for the plaintiff. I had only been doubting in my own mind on the strict law of the case, for that the honesty and justice of it are with the plaintiff, cannot be doubted. Even if the defendant had succeeded here, a court of equity would have given the plaintiff full relief. But I am glad to find, by the case cited, that we are fully warranted in deciding for the plaintiff on legal grounds." Since the determination of this case, there is not, we believe, a single reported decision opposed to the principle it affirms, to be found in the English Courts, and we might quote cases *ad libitum* to the same point, if there could be a doubt of the correctness of our statement: *Farrell* v. *Forest*, 2 Saund. 48, note 1.

In the American courts the same rule is adhered to without exception: *McLellan* v. *Cumberland Bank*, 24 Maine 566; *McAllister* v. *Sprague*, 34 *Id.* 296; *Walker* v. *McCullough*, 4 Greenl. 421; *Tuckerman* v. *Newhall*, 17 Mass. 581; *Shaw* v. *Pratt*, 22 Pick. 305; *Smith* v. *Bartholemew*, 1 Metc. 276; *Brown* v. *Marsh*, 7 Vt. 327; *Durrell* v. *Wendell*, 8 N. H. 369; *Snow* v. *Chandler*, 10 *Id.* 92; *Crane's Admr.* v. *Alling*, 3 Green N. J. 423; *Catskill Bank* v. *Messenger*, 9 Cowen 38; *Rowley* v. *Stoddard*, 7 Johns. 207; *Couch* v. *Mills*, 21 Wend. 424; *Bronson* v. *Fitzhugh*, 1 Hill 185; *Frink* v. *Green*, 5 Barb. 455.

The courts, in the examination of the numerous decided cases, have been required to give a construction to every conceivable stipulation inserted in the agreements which have been pleaded as releases of liability, and have invariably pursued the same course in yielding nothing to mere implication, wherever words of release are found in the instrument.

The intention of the parties is alone regarded, holding the established legal maxim, that where a particular purpose is to be accomplished, and language which expresses it is clear and certain, no general words subsequently used in the same agreement shall extend the meaning of the parties: *Thorpe* v. *Thorpe*, 1 Lord Raym. 235.

Dallas, C. J., in *Solly* v. *Forbes*, 2 Brod. & Bing. 46, having examined the leading cases, observes, as courts look at the intention of the parties, in modern times more than formerly, rather than the strict letter, not suffering the latter to defeat the former, held that general words of release even could not be operative to enlarge a previous statement which defined the particular object for which the agreement was made. The same principle is found in *Turpenny* v. *Young*, 5 Dowl. & Ry. 262, and is referred to and affirmed in *Thompson* v. *Lack*, 3 M., G. & Scott 551. See also *North* v. *Wakefield*, 13 Ad. & E. 540.

On similar grounds it was held in *McAllister* v. *Sprague*, 34 Maine 297, where a receipt had been given by a creditor to one of his joint debtors, which recited that the debtor had paid a certain sum in full of his half of the debt, due jointly by him and another, and which was to be his discharge in full for debt and costs, but no discharge of the co-debtor. It was decided that this could not be pleaded as a release by the other judgment debtor, the intention of the parties being that his liability should still remain. See also *Durell* v. *Wendell*, 8 N. H. 369.

Having thus ascertained what is now the established rule in deciding the question raised by the defendant, let us now examine the facts as they are found proved in the bill of exceptions, and to which there is no contradiction.

Before we proceed, however, it is proper to consider how far the entry on record, by which the defendants Taylor and Hallam were dismissed from the suit, can be explained or enlarged by parol evidence. The purpose is plainly stated, and as to the parties named therein, it was a legal discharge from the pending proceedings, but how far it was a bar to a subsequent action, is not now a question, as counsel admit it would be barred by the statute. As the only written evidence of an arrangement between the plaintiff and these parties, is the record made at the time, and without which it would be difficult to say how these parties could avail themselves of the alleged benefit they had secured, it would seem to be inconsistent with the established rule of evidence to permit any explanation where there is neither ambiguity in the terms used, or the purpose intended to be accomplished.

But to give the testimony its weight, the result of a careful analysis of the whole is this:

During the pendency of this suit, the counsel of both parties met the father (Col. Taylor) of two of the then defendants, and with James R. Hallam, another, the plaintiff also being present, when it was agreed that $1,500 should be paid, and these defendants dismissed or released from the action, reserving to the plaintiff his right to proceed against the other defendants. The money was paid by Col. Taylor, and the entry referred to made accordingly.

If then, we apply the doctrine already stated, where written instruments pleaded as releases, have been construed by the courts, we cannot perceive that the arrangements made by the plaintiff with the defendants, is without the rule.

To give it all the weight to which it is justly entitled, it must be determined upon the same principles which control every similar case, however formal may be the evidence to establish the facts.

The result of our investigation has led us all to conclude that neither the entry on the record dismissing three of the defendants from the action, or the arrangement with the parties, which preceded that entry, and on which the agreement to dismiss was founded, can be regarded as a discharge in law of the defendants who still remain on the record.

1st. Because they are not technical releases in writing sealed by the proper party.

2nd. That if they could be construed as implying an agreement not to sue, they can avail only to the defendants with whom they were made, and cannot operate for the benefit of the defendants who set up the facts in discharge of the plaintiff's action against them

3rd. That the entry referred to dismisses the defendants only from the action, without reference to their co-defendants. It was the privilege of the plaintiff to have entered a *nol. pros.* or discontinuance as to any one or more of the defendants, and the dismissal in the case before us but produces the same result.

The plaintiff might have sued either of the defendants, or all, and as it would be no ground of defence that other parties were not joined, it must follow, the remaining defendants in the suit have no cause of complaint.

4th. That the intention of the parties, as expressed when the arrangement was made and proved by the witnesses, must be taken to qualify the agreement, and thus establish its true character, and we believe it was merely to decline to prosecute further the defendants who were dismissed, and nothing more.

Neither do the facts we have alluded to prove an accord and satisfaction, as it must be admitted, if they did, it would have the same effect as a technical release, nor do they contain the ordinary elements of what the law regards as necessary to constitute such a bar.

We have been secially referred to the case of *Ellis* v. *Bitzer*, already quoted, to change or modify the rule we have stated, but it does not, we think, conflict with the leading principle which we suppose governs all similar cases. The courts do not there assume any new rule of interpretation, or attempt to extend the operation of that which has hitherto been received, and acted on in the trial of causes, and we find nothing inconsistent, therefore, with the conclusion to which we have arrived.

Nor do we doubt, although there may be found individual judgments against joint tresspassers, the plaintiff can have but have but one satisfaction; he must elect which of the judgments he will enforce, on the same principle, were there may be different findings by the same verdict when all the trespassers are sued, the successful party must choose "*de melioribus damnis*"—he cannot claim to collect all. It follows, then, if the damages are satisfied in part, by payment or compromise whith some of the defendants, the plaintiff may still proceed against those who remain on the record, and we hold it was the duty of the judge who tried the cause at special term, to have instructed the jury as he did, to deduct in their finding whatever sum the plaintiff has already received on account of his alleged injures, from the parties who were afterwards dismissed.

This was the just application of the rule that there cannot be a double remuneration for the same wrong.

This is very distinctly stated by Upham, J., in *Snow* v. *Chandler*, 10 N. H. 95. It is, he says, that "the sum paid was not received in satisfaction of the damages, but only in part satisfaction, and the fact that it was coupled whith an engagement not to sue, does not alter the case. But to the extent of the amount paid, the defendant may avail himself of the arrangement." See also *Merchants' Bank* v. *Curtis*, 37 Barb. 320.

We have thus traced the principle, familiar as it is, that determines this case to its source, and followed down the course of decisions to the present time, not that there was any novelty in the rule, but that we might satisfactorily determine what in reality was a legal bar to this action, and although the examination of the numerous cases, both ancient and modern, has convinced us that the old mazim "*Melius est petere fontes, quam sectari rivulos*," has not always been regarded by the courts, we find no difficulty in arriving at the result we have reached. Not only upon the law as we hold it to be, but on the facts proved, we are all of opinion that the motion for a new trial should be overruled, and judgment entered on the verdict.—*Am. Law Register.*

GENERAL CORRESPONDENCE.

Mortgages by Married Women—Power of Sale.

To the Editors of the Law Journal.

Gentlemen,—Suppose a married woman owns real estate, and with her husband duly mortgages the same; suppose further, that among the covenants and clauses in said mortgage there is the usual power of sale clause. In the event of default being made in payment, can such mortgaged premises be sold under such power of sale?

Does not cap. 85, Con. Stat. U. C., merely enable a married woman, upon certain formalities being observed to convey her lands? But does the act also enable her to give to her mortgagee, the power, upon nonpayment of the mortgage, to convey her lands for the purpose of paying his claims &c., on such real estate? See *Graham* v. *Jackson*, 6 Q.B., 811 and 2nd edition of Darts Vend. & Pur., 297 & 298.

I have lately noticed in investigating titles, that several sales under the sanction and advice

of professional gentlemen have been made under the circumstances above mentioned, but I have some doubt as to such a title. I think that such married woman, at least after her husband's death, has a right to redeem notwithstanding such sale.

Your opinion on the above will much oblige,

Yours Truly, Lex.

[We cannot undertake to answer questions of this nature. We shall be happy however to publish any letters discussing the point.—Eds. L. J.]

Will's Act 1868-9.

To the Editors of the Law Journal.

Gentlemen,—I notice in the Act to amend the Law as to Wills, in the Statutes of Ontario 1868-9 what appears to be a misprint. The 3rd section provides, that "Every will shall be revoked by the marriage of testator, *except* a will made in exercise of a power of appointment when the real or personal estate thereby appointed *would* in default of such appointment, pass to the testator's heir, executor or administrator or the person entitled as the testator's next of kin under the Statute of distributions." Now, the English Stat. 7 Will. IV and 1 Vict. c. 26, s. 18, from which this Act is taken excepts appointments not which *would*, but which "*would not* pass to the testator's heir &c., and this seems to be more reasonable. Is there not an error in our Statute? Yours truly,

G. C. G.

St. Catharines, June 12th, 1869.

[Will be referred to hereafter.—Eds. L. J.]

Signing final Judgment and issuing execution in two days—A law trick.

To the Editors of the Law Journal.

Gentlemen,—A curious *law trick*, for I can call it nothing else came lately under my observance, to which it may be worth calling the attention of the legal profession. Indeed it is a curiosity in its way. It has been for many years understood to be the policy of the law in Canada, to prevent as far as poss ble, an embarrassed debtor from preferring one creditor to another—in other words, the law favors an equal, just distribution of a debtor's property. Hence a confession of judgment in favor of, or a sale or assignment of all a debtor's property when he is in insolvent circumstances to a favored creditor, is legally bad. By the ordinary process of the law, as marked out in the Common Law Procedure Act, a creditor has to wait a certain time—to take certain steps before he can get a judgment and issue execution on a specially endorsed writ. Thus—he issues a Summons—serves it—and the debtor has ten days within which to appear after service. If the debtor fails to appear on the tenth day, the creditor can sign judgment on the eleventh day. Then the creditor waits eight days more, in all eighteen days, before he can issue execution. But it seems a few lawyers in Toronto (one at least to my knowledge), has found out a way to set at defiance the law as to confessions of judgment—the law as to preferences, and to laugh to scorn the slow process of the Common Law Procedure Act. What, wait eighteen days? nonsense-it can all be done in two. Thus "A" has a claim against "B"—he issues and serves a specially endorsed writ on "B" through some convenient attorney (or if you will by himself), all in one day—"B" by another convenient attorney appears the second day as a matter of form, (perhaps the name of some attorney at a distance is used, with or without his assent). The appearance is filed on the first or second day. Then "A" at once files his declaration, and "B" (accommodating man!) at once pleads, all on the second day. Suddenly "B" without assigning any reason, withdraws his pleas or enters a written disclaimer. "A" watching his opportunity (spider-like) makes up and enters a judgment by *nil dicit*, and as quick as thought pounces on "B's" goods with an execution—or garnishees his debts, and has the money in his pocket before some poor creditor has even got a judgment. Now all this is done in two days. It is done in concert by having a debtor *willing to prefer* a creditor, and by two attornies playing into each other's hands, or acting as the machines of two men setting the objects of the law at defiance.

I happen to know that two judgments were lately signed in the Queen's Bench in this way, and signed evidently to obtain an illegal advantage over a creditor who had a judgment laying unpaid.

Now here is a trick—a legal trick—that two may play at. Is it, or is it not legal? Is it not in fact an abuse of the process of the court

—doing what the law calls a fraud. Why should "B," who pleads, thus withdraw his pleas? or why should "A," who ought to wait eight days after a declaration served—sign judgment the same day he filed his declaration?

Why should these two men, *through two* lawyers, do an act, which is in fact no less than a confession of judgment by an insolvent debtor?

For my part I very much question the legality of the judgment, yet I am told by the Crown officers, such a thing can be legally done.

C. M. D.

Toronto, June 8th, 1869.

AUTUMN CIRCUITS, 1869-

Eastern Circuit.

Hon. Mr. Justice Gwynne.

Pembroke	Wednesday	Sept.	8.
Ottawa	Monday	Sept.	13.
L'Orignal	Monday	Sept.	20.
Cornwall	Thursday	Sept.	23.
Perth	Thursday	Oct.	7.
Brockville	Monday	Oct.	11.
Kingston	Wednesday	Oct.	20.

Midland Circuit.

Hon. Mr. Justice Morrison.

Napanee	Wednesday	Sept.	15.
Picton	Wednesday	Sept.	22.
Belleville	Monday	Sept.	27.
Whitby	Wednesday	Oct.	6.
Cobourg	Monday	Oct.	25.
Lindsay	Tuesday	Nov.	2.
Peterborough	Monday	Nov.	8.

Niagara Circuit.

Hon. the Chief Justice of Ontario.

Milton	Wednesday	Sept.	8.
Owen Sound	Tuesday	Sept.	14.
Barrie	Monday	Sept.	20.
Hamilton	Monday	Oct.	11.
Welland	Tuesday	Oct.	26.
St. Catharines	Monday	Nov.	8.

Oxford Circuit.

Hon. Mr. Justice Wilson.

Cayuga	Wednesday	Sept.	15.
Simcoe	Monday	Sept.	20.
Guelph	Monday	Sept.	27.
Berlin	Wednesday	Oct.	6.
Stratford	Monday	Oct.	11.
Woodstock	Monday	Oct.	18.
Brantford	Monday	Nov.	1.

Western Circuit.

Hon. the Chief Justice of the Common Pleas.

Walkerton	Wednesday	Sept.	8.
Goderich	Monday	Sept.	13.
Sarnia	Wednesday	Sept.	22.
Sandwich	Monday	Sept.	27.
St. Thomas	Tuesday	Oct.	5.
Chatham	Monday	Oct.	18.
London	Monday	Oct.	25.

Home Circuit.

Hon. Mr. Justice Galt.

Brampton	Monday	Sept.	27.
City of Toronto	Tuesday	Oct.	5.

APPOINTMENTS TO OFFICE.

JUDGES.

THOMAS GALT, of Osgoode Hall, and of the City of Toronto, in the Province of Ontario, one of Her Majesty's Counsel learned in the Law, to be a Judge of the Court of Common Pleas, in the said Province, in the place of the Hon. John Wilson, deceased. (Gazetted June 12, 1869.)

COUNTY JUDGES.

JAMES JOSEPH BURROWES, of Osgoode Hall, and of the Town of Napanee, in the Province of Ontario, Esquire, Judge of the County Court of the County of Lennox and Addington, to be the Judge of the County Court of the County of Frontenac, in the said Province of Ontario, in the room and stead of William George Draper, Esquire, deceased. (Gazetted June 5, 1869.)

WILLIAM HENRY WILKISON, of Osgoode Hall, and of the Town of Napanee, in the Province of Ontario, Esquire, Barrister-at-Law, to be the Judge of the County Court of the County of Lennox and Addington, in the said Province of Ontario, in the stead of James Joseph Burrowes, Esquire, appointed Judge of the County Court of the County of Frontenac. (Gazetted June 5, 1869.)

WILLIAM ELLIOTT, Esquire, of Osgoode Hall, Barrister-at-Law, to be Judge of the County Court of the County of Middlesex, in the Province of Ontario, in the room and stead of the Honourable James Edward Small, deceased. (Gazetted June 12, 1869.)

DEPUTY CLERK OF THE CROWN.

WILLIAM A. CAMPBELL, of the City of Toronto, Esquire, to be Acting Deputy-Clerk of the Crown, and Clerk of the County Court of the County of Oxford, in the room and stead of James Kintrea, Esquire, superseded. (Gazetted June 12, 1869.)

COUNTY ATTORNEY.

WILLIAM ALBERT REEVE, of the Town of Napanee, Esquire, Barrister-at-Law, to be County Attorney and Clerk of the Peace, in and for the County of Lennox and Addington in the room and stead of William H. Wilkinson, Esquire, resigned. (Gazetted June 12, 1869.)

NOTARIES PUBLIC.

THOMAS MACINTYRE, of the County of Elgin, Esquire, (Gazetted May 29, 1869.)

WILLIAM A. REEVE, of the Town of Napanee, Esquire, (Gazetted June 5, 1869.)

HAROLD RANDULPH PARKE, of the Village of Port Colborne, Gentleman, Attorney-at-Law. (Gazetted June 12, 1869.)

CORONERS.

RICHARD DRAKE SWISHER, of the Village of Thamesville, Esquire, M.D., to be an Associate Coroner within and for the County of Kent. (Gazetted June 12, 1869.)

Old but Good.—Nevada sets a good example of liberality in legal proceedings. Last winter a prominent lawyer of that state had a suit of some importance before Bob Wagstaff, justice of the peace in Scrub City, a small mining district in the upper part of the the county. After the evidence had been taken, and the lawyers had finished their talkee-talkee, the counsel for plaintiff arose and asked the justice if he would charge the jury. "Oh, no, I guess not," replied his honor; "I never charge 'em anything; they don't get much anyhow, and I let 'em have all they make!"—*Chicago Legal News.*