DIARY FOR NOVEMBER.

1. Sat. .. *All Saints.* Candidates for Attorney to leave Articles, &c., with Secretary of Law Society.
2. SUN.. 21*st Sunday after Trinity.*
4. Tues.. Primary examination of Students and Articled Clerks.
5. Wed... Battle of Inkerman, 1854.
9. SUN.. 22*nd Sunday after Trinity.* H. R. H. Prince of Wales born, 1841.
11. Tues.. Battle of Chrysler's Farm, 1813.
13. Thurs. Last day for service for Co. Cts. Exam. Law Stu. for call with Honors. Cand. for call to pay fees and leave papers.
14. Fri. .. Examination of Law Stu. for call to the Bar.
15. Sat. .. Exam. of Art. Clks for admission as Attorneys.
16. SUN.. 23*rd Sunday after Trinity.*
17. Mon.. Mich. Term begins. Art. Clks. and Stu. give notice for inter-examination.
18. Tues.. Certificates to be taken out during this Term.
20. Thurs. Inter-examination of Stu. and Art. Clks.
21. Fri. .. Paper Day, Q.B. New Trial Day, C.P.
22. Sat. .. New Trial Day, Q.B. Paper Day, C.P.
23. SUN.. 24*th Sunday after Trinity.*
24. Mon.. Last day to declare for Co. Ct. Paper Day, Q.B. New Trial Day, C.P.
25. Tues.. Examination for Scholarships. New Trial Day, Q.B. Paper Day, C.P.
26. Wed.. Last day for setting down and giving notice of re-hearing in Chancery. Paper Day, Q.B. New Trial Day, C.P.
27. Thurs. Open Day, Q.B. Paper Day, C.P.
28. Fri. .. Scholarship Exam. con. New Trial Day, Q.B. Open Day, C.P.
29. Sat. .. Open Day, Q.B. Open Day, C.P.
30. SUN.. 1*st Sunday in Advent. St. Andrew.*

CONTENTS.

THE

Canada Law Journal.

Toronto, October, 1873.

The Law School Lectures commence on the first of this month. The subjects to be discussed are stated in our advertising columns. We have no doubt that the privileges extended to students in these days will be largely made use of.

The advance sheets of Mr. Walkem's Treatise on the Law of Wills have been courteously sent to us by the publishers. It is not our intention, nor have we either time or space at present, to review the book, but we hasten to call the attention of the profession to it. The subject treated is a very difficult one; but we have reason to think that Mr. Walkem has mastered it, and a hasty glance would seem to show that he has done a good work for the profession. Defects there may be, and probably are; but no matter how this may be, we can nevertheless see that a most important branch of the law, differing, as it does, materially from the law in England, and recently subjected to great legislative changes in this country, has been discussed with great intelligence and industry, by the light, as well of English as of Canadian authorities. Should we be right in our supposition as to the value of Mr. Walkem's addition to Canadian legal literature, we may look forward to its being added to the Law Society curriculum. Every encouragement should be given to native talent; and, other things being equal, law books which state the law as it exists here, are preferable, as school text books, to those which are written with especial reference to the law as it stands in another country.

COSTS IN CASES OF APPEAL.

The two highest English tribunals to which colonial courts are wont to look for guidance are at variance on the important question as to the principle to be adopted in awarding costs of appeal to a successful appellant. The difference was tersely pointed out by Lord Cairns in *De Vitre* v. *Betts*, 21 W. R. 705, as follows: "The rule is, in this House (the House of Lords), that where an appellant, in succeeding, corrects a miscarriage of the court below, he is not entitled to the costs of the appeal, because the respondent in such a case is merely seeking to retain the advantage which he has obtained. The rule of the Judicial Committee of the Privy Council is, generally speaking, to give the successful party the costs of the appeal; and I own I consider the rule of the Privy Council on the whole the better rule of the two." The Court of Error and Appeal for this Province has always followed the practice of the House of Lords; and when some members of the court in the Goodhue case were, perhaps inadvertently, about to give their decision that the appeal should be allowed *with costs*—yet, on the remonstrances of counsel for the respondents against the innovation, the court gave effect to the general rule of practice, and simply allowed the appeal.

As to appeals from County Courts to the Superior Courts of Common Law, the practice now prevails here, as in England, of allowing such appeals with costs. We commented upon the change of practice in this respect in 8 C. L. J. N. S. 133.

Appeals to the Court of Chancery from inferior courts are but few and far between. For the most part they arise under the Insolvent Act, and we think the practice may now be considered as well-settled that the costs in such cases will usually follow the result. A distinction is to be observed between the Act of 1864 and that of 1869, now in force, as to the provisions respecting the costs of appeals. Sub-sec. 6 of sec. 7, of the former Act, provided that the costs in appeal were to be in the discretion of the court appealed to. In the latter Act this provision is altogether omitted, and no reference is made as to awarding costs in appeal, except in cases where the appeal is not duly prosecuted. Under the former Act, the usual course was to allow or dismiss the appeal with costs, and the same rule has been generally observed under the present Act. See *Re Williams*, 31 U. C. Q. B. 153. We understand that the right or jurisdiction of the appellate court to award costs in insolvency appeals was argued before Vice-Chancellor Strong in an unreported case, *Re Patterson* (January, 1873). The learned judge held that the court had power to deal with the question of costs upon allowing an appeal, and that, in his view, the practice of the Privy Council was preferable to that of the House of Lords, and in a colonial court was to be followed under analogous circumstances, as being the practice of the court of last resort for colonial appeals. Acting upon this opinion, he allowed the appeal, and awarded against the respondents all costs, both in the court below and in the Court of Chancery on the appeal. The Vice-Chancellor appears to be in accord with the views of Lord Cairns, subsequently expressed, as to the rule of the Privy Council being more satisfactory than that of the Lords; and from late decisions we observe that Malins, V. C., appears to be of the same opinion. In *Ashley* v. *Sedgwick*, 21 W. R. 455, he held that in appeals from a County Court where the subject-matter in dispute is small, the court will, in its discretion, give a successful appellant his costs, both in the court below and of the appeal. And so he also decided in *Booth* v. *Turle*, 21 W. R. 721.

In respect to re-hearings in Chancery, the practice in this Province appears to be somewhat changing in allowing the party who successfully re-hears to obtain all his costs. This seems in part to be due to the influence of the judge last appointed to the equity bench, Vice-Chancellor Blake, who has frequently taken occasion to express his views that in all cases costs should follow the result, and that an error of the judge of first instance should not protect the party who profits by it from paying all the costs in the long run, if the full court reverses the judgment below. The last reported decision in re-hearing, *Dalglish* v. *McCarthy*, 19 Grant, 578, exemplifies these remarks. There the court allowed the appeal with costs, Blake, V. C., citing the language of the late Lord Westbury in *Bartlett* v. *Wood*, 9 W. R. 817, where he says, "I have had occasion to observe upon the general rule, and it is one from which, most undoubtedly, so far as I am concerned, I shall seldom depart; namely, that in contentious cases, the costs of the litigation must be considered as following the result of it."

It may be well to note that the same volume of reports contains an able decision of the Chancellor in *O'Donell* v. *Black*, 19 Gr. 623, where the general question as to the principle on which costs should be awarded to successful litigants is discussed.

Upon the whole, the courts of Ontario may be said to have come to the conclusion that all appellants who succeed in their appeals should, as a consequence, obtain complete success, by having awarded to them their costs of appeal, except in the highest court of the Province, where the rule of the House of Lords is yet followed. It is desirable, in our judgment, that the practice of the Court of Error and Appeal should be reconsidered, or that a general order should be passed touching the costs of appeal which would render the disposition of these costs uniform in all the courts.

SELECTIONS.

LICENSE IN CROSS EXAMINATIONS.

Some instances of cross-examination to credit have recently occurred which must have suggested very generally that the prevailing license is apt to be grossly abused. The *Pall Mall Gazette*, whose representative in legal matters is Mr. Fitzjames Stephen, has handled the subject scientifically, and, we need hardly add, adduced an illustration connected with the Indian Evidence Act. The writer is afraid to mention the cases upon which his article is based, but he evidently refers to the cross-examination of Lord Bellew, who, having given evidence as to the tatoo marks in a celebrated pending trial, was asked in cross-examination whether he had ever acted dishonourably concerning another man's wife and cruelly to his own. In another case the victim of a seduction was asked a series of most offensive questions in cross-examination with a view to show that she had previously been unchaste. No evidence was called to support this cross-examination, and Mr. Justice Honyman condemned it in unmeasured terms. For the benefit and instruction of attorneys and counsel let us hear what a high-class thinker, and a man of unblemished character, says on the subject:—"The client," says the writer above named, "tells his attorney some lie about a witness against whom he has a spite. The attorney passes it on to the counsel, *and unless the counsel is a man both of experience and principle*, he is but too apt to regard this, however wrongly, as an instruction which relieves him from all responsibility in the matter, and compels him to throw in the face of the witness an insult which may not only deeply wound his or her feelings, but permanently injure his or her reputation. We do not at all forget, nor are we disposed in any degree to underrate, the good feeling and principle of legal practitioners, or the influence of the Bench in checking abuses of their legal powers. *No lawyer in either branch of the profes-*

sion who had either the feelings of a gentleman or any sort of position or reputation to lose, would degrade himself by slandering or insulting those who must from the nature of the case submit to his insult or his slander without defence or reply. When such conduct does take place it is sure to provoke indignant rebukes from the Bench, and it is to these circumstances that we owe it that English courts of justice are not, in fact, regarded with the horror with which they assuredly would be regarded if the parties used to their utmost their legal right of raking up every incident in the past life of every witness and every lying scandal which has ever been circulated by any enemy with respect to them, and flinging the whole in their faces in the confidence that imputations which may happen to be true will inflict moral injury on the reputation of the witness, and that even if the imputation is utterly false some of the dirt can hardly fail to stick." We hope the passages which we have italicised will be duly conned and remembered. It is suggested that an absolute discretion should be given to a court to permit or forbid the putting of any particular question. We agree that in any case the permission of the Judge should be obtained before cross-examination to the credit of a witness is allowed at all. If a question is put and not allowed to be pressed the object of the cross-examination is in a measure attained. It ought, in all cases, to be a question for the Judge whether the evidence of a witness is of such a kind that his credibility ought to be attacked. A further suggestion made by the writer in our contemporary is that a witness should not be allowed to decline to answer on the ground that he will thereby criminate himself. This is a wide proposition which we shall not at present discuss.—*Law Times.*

The following incident in the life of Lord Kenyon is recorded in an account of his life recently published by a descendant of his. It is taken from a letter of Lord Erskine to Lord Howell, in 1821, relating to a judgment in the court of admiralty in a case of collision at sea:—

"I remember my excellent friend, the late Lord Kenyon, one of the best and ablest judges, and the soundest lawyer, in trying a cause at Guildhall, seemed disposed to leave it to the jury whether the party who suffered might not have saved himself by going on the wrong side of the road, when the witnesses swore that ample room was left. The answer to which is, the dangerous uncertainty of such an attempt, destructive of all the presumptions of conduct founded upon law. Observing that Lord Kenyon was entangled with this distinction, from his observations in the course of the evidence, I said to the jury, in stating *(sic)* the defendant's case :— 'Gentlemen,—If the noble and learned judge, in giving you hereafter his advice, shall depart from the only principle of safety (unless where collisions are selfish and malicious), and you shall act upon it, I can only say that I shall feel the same confidence in his lordship's general learning and justice, and shall continue to delight, as I always do, in attending his administration of justice; *but I pray God that I may never meet him on the road!*' Lord Kenyon laughed, and the jury along with him, and when he came to sum up he abandoned the distinction, saying to the jury that he believed it to be the best course *stare super antiquas vias.*"

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

QUEEN'S BENCH.

Hilary Term, 1873.

Davis et al. v. McPherson.

Patents, construction of—Description of land—"N. W. ¼."

In 1857 a patent issued for the "North-Westerly quarter" of a two hundred-acre lot, the side-lines of which ran N. 45° W., and S. 45° E., and in 1859 another patent issued for the S. E. ¼ of the N. W. ¼ of the same lot. *Held*, that the first patent covered fifty acres, extending half the depth and half the width of the lot, and not fifty acres extending across the whole width and one fourth the depth. *Held*, also, the subsequent patent could not affect the first; for the question must be, what did the patent cover when issued? *Held*, also, that the

assignment to the respective patentees by the original purchaser of the N. W. ¼ could not be resorted to to aid the interpretation of the patents.

Roche et al. v. Kempt.

Promissory note—Accommodation maker—Principal and surety—Opening up account stated.

Action upon a promissory note made by defendant, payable to M., and endorsed by M. to plaintiffs. Plea: that the note was made for the accommodation of M., and, before action, was paid by M. to plaintiffs. At the trial it appeared that the defendant made the note for M.'s accommodation, of which the plaintiffs were aware, and that there was an agreement between plaintiffs and M., to which defendant was not a party, by which, if on a final settlement of accounts the plaintiffs were indebted to M., such balance should be applied first in liquidation of this and other notes, and in the event of a loss it was to be borne *pro rata* by the several indorsers. It also appeared that there had been a settlement between M. and the plaintiffs, signed by them, by which M. was found to be indebted in a large sum; but M., in his evidence, stated that he had not got credit for some timber of his taken by the plaintiffs. Defendant offered evidence to show that under the accounts between M. and plaintiffs, there was a balance due to M., which, under the agreement referred to, would show this note to be paid by M.

Per Morrison, J.—Such evidence was properly rejected, and could not be given under the plea of payment by M., but the agreement and facts relied on should have been pleaded specially.

Per Wilson, J.—The evidence was admissible, and it was competent to defendant to open up the account between M. and plaintiffs.

Bateman v. City of Hamilton.

City corporation—Negligent construction and obstruction of culvert—Action for.

In an action for negligently constructing a culvert under a public street, and altering drains so that more water was directed through said culvert than it could carry off, and for allowing the culvert to become obstructed, whereby plaintiff's premises were overflowed, &c., it appeared that the culvert, &c., had existed for twenty years, under a public street in the city, but it was not shown by or for whom it was made, nor when the obstruction of the culvert by mud and stones, &c., took place, nor that it had been brought to defendants' knowledge.

Held, that the plaintiff must fail.

Groves (Assignee in insolvency of Owen McMahon) v. McArdle.

Insolvent act of 1869—Estoppel—Finality of proceedings in insolvency.

Declaration by plaintiff as assignee in insolvency of McM., on the common counts.

Plea: that McM. was not a trader within the meaning of the Insolvent Act of 1869.

Replication by way of estoppel, setting out in full the proceedings and adjudication in the insolvent court, showing that an attachment in insolvency issued against McM., that he petitioned the judge to set it aside, on the ground, among others, that he was not a trader within the act, that the judge decided that he was a trader, and that such decision was affirmed on appeal by one of the judges of the C. P.

Held, on demurrer, plea good; though the more formal plea would have been one denying that the plaintiff was assignee of McM. in manner and form, &c.

Held, also, replication bad, as such adjudication and proceedings were not conclusive, at all events, as against a debtor of McM., but were subject to question in this court.

Halpenny v. Pennock.

Husband and wife—Purchase of goods, and chattel mortgage by wife—Agency implied—Leave and license—Evidence.

The plaintiff went to British Columbia nine years before this action, leaving his wife here, to whom he wrote and occasionally sent money. She procured the defendant to endorse a note made by her for the price of furniture to carry on a boarding house (which she subsequently carried on with the plaintiff's knowledge), and executed to defendant a chattel mortgage under seal in her own name on said furniture. The rent of the house being in arrear, and part of the mortgage money overdue, the landlord distrained, and the defendant enforced his mortgage; and the plaintiff's wife not dissenting, but rather assenting, the goods were sold, and the balance, after the payment of rent and mortgage, was handed over to her. The plaintiff thereupon sued the defendant in trespass and trover.

Held, that the wife was the agent of her husband, the plaintiff, in respect to purchasing the furniture, and to do all that was necessary to acquire it.

Held, also, assuming that she exceeded her authority in giving a mortgage under seal, yet, as the mortgage would be valid without a seal in her own name, the seal did not make it invalid for all purposes, or prevent it from being given in evidence as a justification derived from the plaintiff through his agent of the acts complained of.

Held, also, that as by this action the plaintiff ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mortgage which formed part of the whole arrangement.

Semble, that the wife standing by and permitting the sale of the property under the mortgage was some evidence under the plea of leave and license.

Per Wilson, J.—Under C. S. U. C. ch. 73, the wife had power to buy the furniture with her own means and on her own credit, and to deal with it as if sole and unmarried; and in the ordinary exercise of that right she could give a mortgage by deed in her own name as if a *femme sole*.

Re Wescott et al. and the Corporation of the County of Peterborough.

Mandamus to build bridge—Public Works Act, Con. Stat. C. ch. 28, sec. 10, schedule "A"—Authority of Company to build.

In 1856 a road company obtained leave to build a bridge at a point on the O. river, from the Public Works Department, under whose control this portion of the river was, upon condition that in the event of navigation being resumed the bridge should be removed, and if the Government required a drawbridge should be substituted. Navigation being resumed, the bridge was ordered to be removed by the Department, and was removed by the County, under whose control the road had passed. Upon application for a mandamus to the Corporation of the County to build a swing or other bridge at the point. *Held*, that it was discretionary in the Government to allow a bridge there or not, and that the County were neither authorised nor compelled to build it. The application was therefore refused.

Taylor v. Campbell, Postmaster-General.

Contracts for parliamentary and departmental printing—Construction of.

On the 2nd of July, 1869, plaintiff contracted with one H. as clerk of the Joint Committee of both Houses of Parliament, to do the printing, &c., for both Houses at scheduled prices. On the 7th of October, 1869, the plaintiff contracted with Her Majesty for all the printing required for the several departments, as specified in requisitions to be made upon him by the departments respectively, including the Postmaster-General's, at scheduled prices; which were lower than those under the first contract, and so tendered for as alleged by plaintiff, because he expected in cases where similar matter was required under both contracts to use the type set to fulfil one for the other. When the contracts were entered into the custom was for the annual reports of the heads of departments to be printed on the order of, and paid by such departments, and the copies required for Parliament were ordered and paid for separately through the clerk of the Joint Committee on Printing; and afterwards by resolution of the Committee, concurred in by the House, it was directed that the annual reports should be printed on the order of the committee, under the first contract, including a sufficient number for the use of the departments with which the departments should be charged.

The reports of the Postmaster-General having been thus ordered and printed, the plaintiff claimed to charge for the extra number required for the department under the second contract, and for the composition as though re-set for the department. *Held*, that he had no such right.

Quære, whether such an action would lie against the Postmaster-General, and as to the propriety of asking the Court to pronounce an opinion.

Allen et al v. Chisholm.

Carriage by water—Agreement to pay shortage—Right to set it off against freight.

The plaintiffs agreed with defendants to carry 11662 30-60 bushels of wheat from Toronto to Kingston, at 3¾ cents per bushel. The bill of lading being signed for the whole amount, and stipulating that "the vessel was to deliver the quantity expressed or pay shortage." On the delivery to the consignees 181 bushels short, they, representing defendants, whose interest in the wheat continued, refused to pay freight.

Held, that defendants were liable for the freight, and had no right to deduct their claim for shortage; such claim not being a liquidated demand so as to form the subject of set off against the freight.

33 Vict. ch. 19, sec. 30, does not apply to cases between masters of vessels and owners of goods, but only between masters and consignees or endorsers for value.

COMMON PLEAS.

Hilary Term, 1873.

Roaf v. Garden et al.

Landlord and tenant—Acceptance of rent—Amount awarded for buildings—Receipt of after time.

Where in a lease for 21 years, ending on the 1st September 1872, it was covenanted that on the expiration thereof, the lessor, one R., should at his option either pay within 30 days, the value of the buildings, or renew for a further term of 21 years; such value and the rent to be determined by arbitration. On the expiration of the lease, an agreement of reference was entered into, between C., the lessee, one B. to whom C. had mortgaged his interest, and R., the award to be made by the 30th September, but it was agreed that should this award not be made by that time, and R. should select to pay for the buildings, he should pay the sum awarded within a week after the award, and the extension of time should be taken as a covenant in the lease. The parties enlarged the time for making the award until the 1st November, and on the 26th October, the umpire made his award. R. selected to pay for the buildings, but the amount awarded was not paid to the mortgagee, the person entitled to receive it, until the 5th November, more than a week after the award was made. Defendants were tenants under C., their terms were unexpired when this action was brought, and they had paid their rents to C. for the quarter ending the 1st October. On the 18th September, R. leased the premises to the plaintiff, and after R. had paid for the buildings, the plaintiff demanded possession from the defendants, which they refused to give, and informed plaintiff of their having paid their quarter's rent to C. The plaintiff then called on C., who paid to him the proportion of the rent which he had received, for the period between the expiration of C.'s lease, and the 1st October.

Held, that the receipt of the rent by plaintiff from C. was no evidence of a recognition of an existing tenancy between plaintiff and defendants, for there was no direct dealing with the tenants themselves, and the fact of plaintiff demanding possession, and only being paid a fractional part of the quarter's rent paid by the tenants to C., repelled the idea of any intention to recognise defendants as his tenants.

Held also, that the fact of R. not having paid the amount awarded for the buildings within the week, did not deprive him of his right of election, and so enable C. to hold for a further term of 21 years, for B. being the proper person to receive the amount, might extend the time.

The plaintiff was therefore held entitled to maintain ejectment against defendants.

Ferguson v. The Corporation of the Town of Galt.

Railway Contract—Certificate of Engineer—Condition precedent—Waiver—Pleading.

Declaration on the Common Counts.

Fifth plea referred to a sealed contract set out in the 4th plea, made between the plaintiff and the defendant, whereby the plaintiff for a lump sum of $22,123, agreed to build a railway from Galt to Doon, which was to cover all extras of every kind, except as specified; and then averred that it was further agreed by said contract that approximate estimates should be made every month, until the work was completed, of the work done the preceding month, and certified by defendants' Engineer: that 75 per cent. of such estimate should be paid to plaintiff on or before the 15th of each month, until the completion of the whole work to the satisfaction of said Engineer; that all percentages retained by defendants during the progress of the work, should be paid to the plaintiff, upon the certificate in writing of the completion of the work, being granted by the Engineer; that the plaintiff's alleged cause of action *was for the work alleged to have been done by him in performance of his said contract, in respect of the work embraced therein;* that one D. C. O. was defendants' Engineer in charge; that defendants have paid the plaintiff 75 per cent. of the approximate estimates; and that no certificate of the completion of the work had been procured or applied for by plaintiff, or granted by the Engineer, &c.; and so said percentages are not payable to plaintiff, except as to the same sum.

Sixth plea: that by the contract it was provided that all disputes, either as to quantities of work to be done over and above that of the contract, and defined in specifications, or as to the quantity of work done by the plaintiff; and the amount of the same demanded by the contract, should be determined solely by the engineer, whose decision on all questions pertaining to the contract should be final; and the defendants say *that the plaintiff's alleged cause of action was for work alleged to have been done by him under said contract;* that D. C. O. was the engineer in charge, and that he was not determined or decided that the plaintiff had performed any work over and above that of the contract, or that the plaintiff is entitled to recover from the defendants any sum whatever.

Replication to the fifth plea: that before [ac-

tion defendants accepted and received from the plaintiff all the work mentioned and referred to in the fifth plea, and waived any rights they had to the production or procurement by plaintiff from the engineer of the certificates of completion, and defendants so relieved the plaintiff from any obligation to procure such certificate.

Held, on demurrer: pleas good, for it being admitted by the demurrer that the cause of action was for work done under the sealed contract, the plaintiff could not recover without the stipulated certificate or the decision of the engineer. 2. Replication bad.

Easter Term, 1873.

Buchanan v. Young et al.

Clearing land—Damage by fire—Liability.

Persons have a right to set out fire on their land for the purpose of clearing it, and if the flames spread under the influence of a wind suddenly arising, and cause damage to a neighbor, no action will lie without proof of negligence.

It was held misdirection in such a case to tell the jury that defendants were bound to have anticipated the rising of the wind, and to use extraordinary caution.

Turner et al v. Wilson.

Action on forged guarantee—Estoppel.

In an action on a guarantee to secure payment for goods furnished by plaintiffs to one W., alleged to have been made by defendant and one G., but afterwards proved to be a forgery, it appeared that the plaintiff had had no communication whatever with defendant during the currency of the account sued for; but that W. afterwards becoming insolvent, one F. was sent to Kincardine, where W. lived, to represent certain creditors, amongst whom were the plaintiff, and at a meeting at which defendant was present, F. asked W. what claims were guaranteed and by whom, to which W. answered that the plaintiffs' note, with certain others, was endorsed by defendant and G., and although defendant heard this, he said nothing. F., however, did not then appear to have been aware of the guarantee. After this, W. absconded, and some time afterwards, defendant and G. went to plaintiffs' office and tried to make a settlement for a less amount of W.'s liability. This the plaintiffs refused to do, alleging that they were fully secured, and produced the guarantee. G. at once said that he did not believe it to be his signature; but defendant said nothing.

Held, that defendant was not estopped by his conduct from denying his liability.

COMMON LAW CHAMBERS.

Smith v. Thompson.

Practice in pleading—Date of declaration.

[August 28, 1873—Mr. Dalton.]

Held that the use of the abbreviation "A.D.," instead of the words "in the year of our Lord," in the dating of a declaration, is not sufficient ground for setting it aside.

Woodward v. Cummings.

Ejectment—Married Woman—Practice.

[August 28, 1873—Mr. Dalton.]

Held, when a wife, living apart from her husband, is in possession of land under such circumstances as precludes the presumption of her being agent for her husband, she must be made a defendant in ejectment for the land.

McIntyre v. Fair.

Commission to examine witnesses in Quebec.

[August 31, 1873—Mr. Dalton.]

Con. Stat. Can. cap. 79, sec. 4, *et seq.*, which authorizes the issue of subpœnas to the Province of Quebec, does not take away the power of the Court to examine witnesses there by commission. (See *Stratford* v. *G. W. R.* below.)

CHANCERY CHAMBERS.

O'Donohue v. Hembroff.

Reference back to a Master—Jurisdiction of Referee.

[May 21, 1873—The Referee.]

A motion to refer a cause back to a Master for the reception of further evidence, after he has made a report which is confirmed, should be made in Court.

Stratford v. Great Western Railway Co.

Commission to Quebec—Con. Stat. Can., c. 79, § 4.

[March 31st, 1873—The Referee.]

Con. Stat. Can. c. 79, sec. 4, which authorizes the issue of a subpœna to the Province of Quebec, merely gives a plaintiff an additional mode of procuring his evidence, and does not deprive him of the right to have the examination by a Commission. (See *McIntyre* v. *Fair* above.)

Cotton v. VanSittart.

Reference back to a Master—Mistake.

[June 6, 1873—The Referee.]

A creditor who, through a mistake, had not come into the Master's office to prove his claim,

was allowed to do so upon payment of costs of and subsequent to the report, including costs of application—the Master's report not having been confirmed.

STRATFORD v. GREAT WESTERN RAILWAY CO.

Production.

[June 7, 1873—THE REFEREE.]

The proper mode of contradicting an affidavit on production is by cross-examination of the deponent, and not by counter-affidavit.

Re MULLARKY, McANDREW v. LAFLAMME.

Application for leave to rehear—Delay.

[June 23, 1873—BLAKE, V.C.]

The rule that no re-hearing will be permitted after the time limited, unless the delay is excused, is to be strictly followed. The fact that negotiations for a settlement were pending during all the time since decree was considered no sufficient excuse for the loss of three re-hearing terms.

RE FOSTER.

Affidavits in reply—Cross-examination on.

[June 23, 1873—BLAKE, V.C.]

In the absence of authority to the contrary, it was held that cross-examinations upon affidavits in reply should be allowed, as in the case of other affidavits, more especially as affidavits in reply could not otherwise be answered.

HARDING v. HARDING.

Supplemental answer.

[June 26, 1873—THE REFEREE.]

Applications for leave to file a supplemental answer should be made in Chambers before the Referee. (*Churton* v. *Freweon*, 13 L. T. N. S. 491 not followed.)

Upon a similar application in *Watkiss* v. *Western Assurance Co.*, on 27th Sept., 1873, an order was granted in Chambers.

Parent v. *Murphy* (Strong, V.C., April 25, 1873) followed.

DUNN v. McLEAN.

Amending—Adding and striking out parties under the common order.

[June 27, 1873—THE REFEREE.]

Held that a party plaintiff may be added under a *præcipe* order to amend. Neither a party plaintiff nor a party defendant can be struck out under an order to amend obtained *ex parte*.

Hitchens v. *Congreve*, 1 Sim. 500 followed.

BROWN v. DOLLARD.

Reference to a Master—Jurisdiction of the Referee.

[August 25, 1873—CHANCELLOR on appeal from REFEREE.]

One Horkins filed a bill for redemption, which was dismissed with costs. This amounted to a foreclosure (see *Bishop of Winchester v. Payne*, 11 Ves. 109). Horkins remained in possession and some time afterwards a suit was instituted to wind up a partnership, in which suit, on a motion for an order requiring Horkins to attorn to the receiver, it was referred to the Master to ascertain whether he held as tenant or was in possession as mortgagor and still entitled to redeem. The Master found that he was entitled to redeem and appointed a day for that purpose.

A motion was then made before the Referee to set aside this order on the ground, amongst others, that no notice of the application on which the order was made, or of the enquiry had thereunder, had been given to the administratrix of the mortgagee, who might have cause to show against redemption. The Referee made an order referring the matter again to the Master. On appeal this order was set aside, for the reason that it was not within the jurisdiction of the Referee to order a reference to a Master to ascertain such a question, and the original order was also rescinded for the same reason.

BAIN v. McCONNELL.

Dismissal for want of prosecution—Excuse for delay.

[September 4, 1873—THE REFEREE.]

The pendency of another suit, which would give the relief desired, but in which no decree has been obtained, is not a sufficient answer to a motion to dismiss for want of prosecution.

RE NOLAN.

Married woman—Order allowing to execute a deed without her husband's joining—Statutes, 36 Vict. c. 18, § 4—Jurisdiction of the Referee.

[Sept. 11 and 15, 1873—REFEREE and CHANCELLOR.]

Applications under 36 Vict. c. 18, sec. 4, O., for an order allowing a married woman to execute a deed without her husband's being also a party, should be made to a Judge in Chambers, and not to the Referee.

McGILLIVRAY v. McCONKEY.

Dismissal for want of prosecution—Costs.

[September 4, 1873—THE REFEREE.]

Upon a motion to dismiss where the only complaint is that the replication has not been

filed within the time limited for so doing, and no sitting of the Court has been lost, the plaintiff may be put on terms to go down to the next hearing at the place where the venue is laid, but the defendant will not be awarded costs of the application unless he has, by letter or otherwise, required the plaintiff's solicitor to proceed and file replication and the latter has neglected to do so.

NOVA SCOTIA.

In re Pyke, an Insolvent.

Insolvent Act, 1869, *sec. 50—Delivering goods to real owner—Entitling affidavit.*

Held.—1. That an application to deliver goods seized on attachment against an insolvent to the real owner, under sec. 50 of the Act of 1869 may properly be made whilst the goods are still in the hands of the guardian and before given up to the Assignee.

2. That the petition and affidavits need not be headed in any cause.

[Halifax, August-December, 1872.]

This was an application made to the Court under section 50 of the Insolvent Act of 1869, on the summary petition of Henry Lawson to obtain the possession of certain goods conveyed to him by a bill of sale from the insolvent, bearing date the 8th day of July, 1872, which was recorded on the 13th day of the same month.

Ritchie, for Lawson, presented and supported the petition.

Bligh appeared for the creditors and opposed the application.

The application cannot be legally granted :—

1. Because the petition and the affidavit are not headed in any cause.

2. The application is made too soon, as under section 50 of the Insolvent Act of 1869 the property must be in the possession of the Assignee, and the order to restore must be made upon the Assignee and not upon the Guardian, who is at present in possession of the goods.

Mr. Sutherland (Judge in Probate and Insolvency.) As to the first point I do not think in an application such as the present it is necessary that either the petition or affidavit to verify it should be headed in the cause. It does not, in any manner, influence the cause, though it has an influence on the general funds of the estate. Indeed the cause itself or the attachment is only the medium by which the estate of the Insolvent is brought into bankruptcy, and after the property attached passes into the hands of the Guardian, unless a motion be made to set aside the proceedings, the attachment has, as I conceive, accomplished its object and is at an end. The petition and affidavit are, in my apprehension, sufficiently and properly headed.

Upon the second objection I am of opinion that the application is made in proper time, and that the spirit of the 50th section of the Act applies to guardians who hold the property as well as to assignees. The object of the section is by a summary mode to restore property to the legal and proper owner which is improperly held by the officer appointed under the Act as belonging to an insolvent.

The Guardian holds the property in the same manner as an interim or official Assignee until an Assignee to the estate be appointed by the creditors, and there can be no reason why the same remedy under the 50th section of the Act should not be extended to owners when the property is in the hands of a Guardian as when in the hands of an Assignee. I have no difficulty in deciding that the order to restore property may be made to the Guardian.

As to the last objection urged it was also contended that the property being in the possession of the Insolvent at the time of the attachment as the reputed owner, it belonged to the estate of Pyke, and could not be restored to Lawson the real owner.

The cases quoted in support of this contention were decided upon the 125th section of the 106th chapter of 12 & 13 Vict., the English Bankruptcy Act, which says: If any Bankrupt, at the time he becomes so, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. There is no such provision, however, in our law, and the cases do not apply.

The present application must, I think, be decided under section 87 of the Insolvent Act of 1869.

I therefore order that the goods contained in the Bill of Sale be delivered up to Lawson, the applicant, within 14 days; or if the Guardian, Assignee or creditors of the Insolvent shall deem it for the benefit of the estate to retain and sell the said goods and chattels, then Lawson shall be paid out of the estate the sum of

eight hundred dollars, money advanced by him under the said Bill of Sale upon the said goods.

From this judgment the creditors appealed to the Supreme Court, where it was confirmed, Mr. Justice Ritchie and Mr. Justice McCully coinciding on all points with the views expressed by the Judge below.*

ENGLISH REPORTS.

COURT OF COMMON PLEAS.

GOURLEY v. PLIMSOLL.

Libel — General plea of justification — Criminal charges.

As a general rule, in actions for defamation the ordinary plea that the matters complained of by the declaration are true in substance and in fact, is sufficient, and will be allowed.

Therefore, where the plaintiff charged as a libel and set out in his long declaration passages from a book written by the defendant, imputing to the former that he, being a shipowner, sent vessels to sea overloaded and unseaworthy, and over insured, with a wilful and reckless disregard of the lives on board, and with the object of losing the ships, and a general plea of justification was pleaded, the court allowed the plea, on the ground that particulars thereof might be obtained, and that such a plea with particulars is in practice preferable to a special plea.

[28 L. T. N. S. 598—April 25, 1873.]

Motion for a rule calling upon the defendant to show cause why an order of Cleasby, B., should not be varied in so far as it permitted the defendant to plead two pleas to the following declaration: For that before, etc., the plaintiff was member of Parliament for the borough of Sunderland, in the county of Durham, and was also engaged very extensively in the business of a ship-owner and merchant, and as such was possessed of many ships which traded between the ports of the United Kingdom and also between those ports and divers ports and places in foreign countries, and as well in the coal trade as in other and general merchant trades and mercantile marine business, and the defendant was Member of Parliament for the borough of Derby, in the county of Derby; and thereupon the defendant falsely and maliciously printed and published and caused and procured to be printed, published, and circulated of and concerning the plaintiff, and of and concerning him in relation to his aforesaid business, in a certain printed book, entitled, "Our Seamen: an Appeal; by Samuel Plimsoll, M.P.," the false, scandalous, malicious, and defamatory words and matters following, that is to say:—

[The alleged defamatory matter was then set out, and the innuendoes followed thus:—]

The defendant thereby meaning that the plaintiff, as a shipowner, needed the restraint and prohibition of the law, and without being made subject to the penalties of the law would have no hesitation in exposing others to the risk of losing their lives if, by so doing, he would augment his own profits, and that the plaintiff was a greedy and unscrupulous man, and would not scruple to ship too large a load in a vessel for the same to carry with safety to the ship and crew, if thereby he could enhance his own profits, and habitually and wantonly ran the risk of causing the loss of his said ships and the deaths of the crews of the same, for the purpose that in so doing he could augment his profits on such ships, and that the plaintiff was one of the shipowners who, by such overloading, wantonly and needlessly imperilled ships and men's lives, and caused nearly all the losses of ships and lives on the English coast, and that by over-insurance the plaintiff habitually made himself secure from loss in such a course of conduct. And further, that the plaintiff, by such practices, had acquired an evil reputation in his said business, and was generally known as one who habitually overloaded his ships, and that he was also of evil reputation for terribly frequent and disastrous losses of ships and lives occasioned by his aforesaid practices or his cynical disregard of human life in order to increase his pecuniary gains, and that by reason of the premises the plaintiff's name in the said business had become so black with infamy that the insurance brokers in London dared not offer risks for insurance unless they warranted that the cargoes were not to be carried in (amongst others) the plaintiff's ships, and that plaintiff, though he held his head very high, was in the trade, and among those who knew his business affairs and reputation, and his aforesaid practices, of evil character and repute, and was in truth guilty of practices which justly rendered him infamous. Whereby the plaintiff was greatly injured in his name, character and reputation, and in his said business, and was held up and exposed to public ignominy and disgrace, and was otherwise greatly damnified.

Second count alleged the writing, composing, and publishing of the aforesaid defamatory words by the plaintiff of the defendant, and of him in relation to his business, with the innuendoes as in first count.

* We are indebted for a note of this case to Mr. Bligh, Barrister, of Halifax. It should have appeared before, but was crowded out by a press of other matter.

Third count, repeating all the prefatory averments in the first count, alleged that defendant falsely and maliciously printed and published and circulated of and concerning the plaintiff, and of and concerning him in relation to his said business in the said book, the false, scandalous, and malicious and defamatory words and matters following, viz. :—

[Here followed the alleged defamatory matter.]

The defendant thereby meaning that the plaintiff was notorious as a shipowner for the practice of overloading his ships and for a systematic and reckless disregard of the lives of the crews of his said ships, and that by such overloading he had recklessly and wickedly sacrificed at least 105 lives out of the crews of his said ships, and more the particulars of which were not known, and that it was awful to contemplate the loss of human life from the operations of the plaintiff alone in his said business, and that the plaintiff, on being threatened with exposure in the Huose of Commons, turned craven and coward, and was conscience struck at his own guilt. Whereby the plaintiff suffered such damage as in the first count is alleged.

Fourth count alleged the composing, writing, and publishing of the same.

Fifth. And also repeating all the prefatory averments in the first count mentioned, that the defendant falsely and maliciously printed and published and circulated in the aforesaid book of and concerning the plaintiff, and of and concerning his relation to his said business the false, scandalous, malicious and defamatory words and matters following, that is to say:—

[Setting out other defamatory matter.]

The defendant thereby meaning that the plaintiff was one of a small minority of bad men, who were, and that the plaintiff in fact personally was, guilty of evil practices in his said business, and of recklessly overloading his said ships for his private profit, and thereby of wrongfully, heartlessly and wickedly endangering the lives of "the crews of the said ships, and that the plaintiff was one of three out of the said minority of bad men who had obtained a seat in Parliament, and that he was a man of evil character and repute, and properly classed with one John Sadleir, deceased, who having been a Member of Parliament, was yet notorious as a forger and swindler, and with one William Roupell, who having also been a Member of Parliament, was yet notorious for forgery, perjury, and fraud, and that the plaintiff was one of the two or three called in the north, "the greatest sinners in the trade," and that the plaintiff was in fact one of the greatest sinners in his said business, and that he recklessly, wilfully, and purposely overloaded his said ships, after having caused them to be over-insured, thereby wrongfully and wickedly endangering the lives of the crews of his said ships, in order that he, the plaintiff, might augment his gains and reap a profit from fraudulent over-insurance, being utterly callous as to the loss of human life, and that there was by the plaintiff's procurement a systematic overloading of his said ships, so that whether they came safe to hand or were lost he might receive in the one case more than the full and fair profit of a voyage, or in the other, more than the full value of the said ships from the underwriters, and that the plaintiff was notorious for habitual and excessive overloading his said ships to an extent endangering their safety and that of their crews, and also for his reckless disregard of the lives of the crews of the same, and that by such overloading and disregard the plaintiff had caused the loss of seven of his said ships, and had caused the deaths by drowning of over one hundred men of the crews of the said ships in less than two years, and that by reason of the premises the plaintiff was one of the men in whose ships the insurance brokers at Lloyd's had to warrant the underwriters that the cargoes they offered for insurance should not be shipped in the plaintiff's vessels before they would underwrite the policies, whereby the plaintiff suffered such damage as in the said first count is alleged.

Sixth count alleged the composing, writing, and publishing of the same with the innuendoes.

Pleas :—First, not guilty; secondly, "that the said several words and matters concerning the plaintiff, whether charged as the words of the defendant, or as the words of another person or other persons respectively, are true in substance and in fact;" thirdly, the defendant, as to so much of the declaration as relates to the printing and publishing, and causing and procuring to be printed and published, and to the writing, composing, and publishing by the defendant of the said alleged words and matters respectively without the alleged respective meanings, says that the said several words and matters concerning the plaintiff, whether charged as the words of the defendant or as the words of another person or other persons respectively, are true in substance and in fact.

Philbrick, in support of his motion—These pleas in this general form ought not to have been allowed. [Bovill, C. J.—It is the com-

mon form at the present day.] The older authorities uniformly show that the plea of justification in such a case must contain specific allegations. [Bovill, C. J.—And so specific as not to be open to special demurrer]. Nowadays there are cases where a general plea is allowed *with particulars*, yet never where the libel imputes a *criminal charge*. In *Behrens* v. *Allen* (8 Jur. N. S. 118), Willes J. said (p. 121) "*I'Anson* v. *Stuart* makes it clear that before the Common Law Procedure Act, 1852, a general plea of justification in these circumstances was not allowed, with the exception, possibly, of a case of a specific charge in the declaration, and a plea alleging the charge to be true." And in the notes to *I'Anson* v. *Stuart* (1 Sm. I. C. 6th edit., p. 67), it is stated that "A plea of justification, therefore, to declaration in slander or libel must contain a specific charge, set forth with certainty and particularity. . . . . Since the Common Law Procedure Act, 1852, a practice has prevailed of pleading in general terms that the matters in the declaration complained of are true in substance and in fact. . . . This mode of pleading is clearly insufficient where the libel or slander complained of does not consist of a distinct statement that particular facts have occurred, which statement may be deemed to be incorporated in the plea which asserts in general terms the truth of the libel." During the argument in *Behrens* v. *Allen* (*sup.*) Willes, J., said, "*I'Anson* v. *Stuart* (1 T. R. 750) adverts to the distinction between the case where the plea states in justification an indictable matter, and where it states what is not of that character. In the latter case I have always at chambers allowed the plea, the defendant furnishing particulars." [Denman, J. — "In *Behrens* v. *Allen* (8 Jur. N. S. 118), where a declaration in libel complained of charges made by the defendant against the plaintiff's honesty, which were mostly of a specific nature, the court allowed a general plea of justification, the defendant giving particulars of the charges intended to be justified; and this course has been conveniently pursued in many cases." (See note to *I'Anson* v. *Stuart*, *sup.*) [Bovill, C. J.—Ever since I have been on the Bench I do not remember any instance where a plea of justification has not been merely "true in substance and fact," whether the charge in the declaration was specific or not. The only effect of requiring the defendant to plead specially is that he raises an argument and discussion, not on the real facts of the case, but on the facts which some ingenious pleader may put on the record, and I find that a general plea, with particulars, leads to no inconvenience]. In *Jones* v. *Bewick* (L. Rep. 5 C. P. 32) the defendant, in an action for libel, pleaded that the defamatory matter in the declaration complained of was and is true in substance and in fact. The court ordered him to give particulars of the facts and matters he relied on to justify the libel, or in default that the plea should be struck out. Bovill, C. J.—That case will illustrate the convenience of the modern system of particulars as compared with a special plea; the defendant had written of the plaintiff as "Old Perjury Jones," and the consequence was that he might have proved perjury committed in any one year during the whole lifetime of the plaintiff. So, we ordered particulars, as the charge was too general, and then when they were given what was the use of a special plea? [Grove, J.—What distinction do you make between the charge of an indictable offence and any other defamation?] When a charge of an indictable offence is complained of in the declaration, the plaintiff has a right to have the full statement of the matters on the record, so that it remains for a testimony of his character having been cleared. [Bovill, C. J.—The same effect would follow from a verdict for the plaintiff on the plea of Not Guilty only. The object here is to hamper the defendant in pleading to your innuendoes, whereas, if the facts were in particulars only the whole matter would go to the jury. Grove, J.—A constant cause of new trials in such actions used to be that some trifling allegation in a special plea was not justified, and an immense expense and inconvenience followed.] The statements in particulars are made with much more looseness than in a special plea, in which nothing more is put than the defendant may be able to prove. In *Jones* v. *Bewick* (*sup.*) Keating, J., said, "I doubt whether such a plea should be allowed at all." Here the charge is of a most serious kind. [Bovill, C. J.—In the recent case of *Odger* v. *Waterlow* (unreported) the charge amounted to one of treason.] And here in effect to murder, viz., that the plaintiff sent ships to sea with the avowed object of sinking them. In Bullen and Leake's Precedents of Pleading a note to the form of plea of justification says (p. 613), "When the charges contained in the libel or slander, instead of being specific, are general, and particularly when they impute indictable matter, a general form of plea ought not to be used. It is contrary to the essential objects of pleading, namely, that the other side should be informed of what facts are to be heard, and that

the court should be able to judge whether the facts relied on are, if true, sufficient in law. The former object may no doubt be attained by the delivery of particulars, but there is no sufficient reason why the proper office of pleading should be superseded by this more complicated and expensive substitute. In practice, too, it is a matter of frequent experience that imputations are sought to be justified in a general form which no one could attempt to justify specifically; and thus the test which pleading affords, even to the pleader himself, of the validity of a defence, is lost. The other object, that of enabling the court to judge of the sufficiency in law of the justification, is unavoidably sacrificed by a general plea, the plaintiff is, in effect, precluded from obtaining the opinion of the court (and of a court of error) on the question whether the facts justify the imputation, and the matter has to be left in the hands of the jury in cases most peculiarly open to feeling and prejudice. And, after all, there remains no record of the distinct determination of any particular facts which can be afterwards binding on the parties." [He referred to passages of the libel charged in the declaration.] If the pleas were allowed at all it should have been made a condition that particulars should be given.

BOVILL, C. J.—I am of opinion that the most convenient course in actions for libel, as a general rule, although there may be exceptions, is that a plea of justification should be allowed in a general form. The old system of pleading a special justification led to all kinds of inconveniences and difficulties, according to my experience. A defendant who desired to plead something which might or might not be a justification, framed his plea in such form that he might possibly obtain judgment on the verdict of the jury on one interpretation of the plea when the interpretation put on it by the court might be another, and so, contrary to the merits of the case, the defendant might succeed. On the other hand, in many cases, parties were disposed to insert allegations without foundation to make the plea good on the face of it; that occupied the court constantly in determining a state of facts in the plea other than the real facts of the case, which might fall far short of a justification. Although the object of pleading specially was in order that the plaintiff might have notice of what was intended to be charged against him, it seems to me that a special plea is very unlikely to inform him of that, and that the very object of giving information to the plaintiff, and to prevent the defendant going into a general statement, is obtained by a liberal allowance of particulars, so that the plaintiff may not be taken by surprise, and the trial and judgment of the court may proceed on the real facts. As to an instance given by Mr. Philbrick of a plea as to part, and not as to the residue of the declaration, so far as the plaintiff is concerned, that is an advantage to him, for if the imputations thrown out are well founded the defendant obtains the verdict, if not, the plaintiff will recover. I see no inconvenience in this course, and after an experience of some years I have come to the conclusion that the most satisfactory course is to allow a general plea and order particulars thereof, if required afterwards, and particulars of such kind that the parties may not be misled on one side or the other. Therefore I think the order of my brother Cleasby ought to be upheld, and the rule refused.

GROVE, J.—I am of the same opinion. I can recollect a great many cases in which I have been counsel either for the plaintiff or for the defendant, where there were special pleas of justification, that much more time of counsel was occupied in ascertaining how much must be proved and how much might be material, than in actually finding out the merits to be tried. This gave rise to great technicality and many new trials, and I think the modern way of pleading is of benefit in elucidating the merits of the case. Mr. Philbrick says all that he wishes is that the real substantial question should be tried. Now, it is best that that should be in the issue which goes to the real merits of the case, and to prevent the plaintiff being taken by surprise, particulars may be given which would afford all information required. Thus the whole matter will be fairly laid before the jury.

DENMAN, J.—I also think this rule ought to be refused. The defendant is charged with publishing a book containing libellous matters, and the plaintiff has had an opportunity of selecting a large quantity of passages which he says reflect libellously on him. Then the defendant pleads a general plea, saying the allegations are true in substance and in fact. The question raised is whether such general plea should be allowed where the charges are of so serious a character. Now in my judgment the fairest mode of proceeding is to allow a general plea in such cases as this, with the power in the plaintiff to obtain particulars of the occasion on which, and circumstances under which, certain parts of the statement were made in this publication of which the plaintiff complains.

The court has always been liberal in allowing such particulars, and we cannot assume that they would not be allowed. Mr. Philbrick relied on certain expressions of my brothers Keating and Smith in *Jones* v. *Bewick*, but those observations must be taken as applicable to the particular case in which they were used, and the mere fact that in *Jones* v. *Bewick* Keating J. doubted whether the plea should be allowed, amounts only to a doubt as to whether it should be allowed in that particular case, because the practice of the court for a considerable time has been to allow such plea, and to grant particulars. I agree with my Lord that there may be cases in which such rule ought not to be adopted, although I do not think this is such a case, and therefore I am of opinion that this rule should be refused.

Rule refused.

COURT OF PROBATE.

Boughton and Marston v. Knight and others.

Will—Testamentary capacity.

Mental capacity is a question of degree, but the highest degree of capacity is required to make a testamentary disposition, inasmuch as it involves a larger and wider survey of facts than is needed to enter into the ordinary contracts of life. A sound mind in contemplation of law does not necessarily mean a perfectly balanced mind.

Banks v. *Goodfellow* (22 L. T. Rep. N. S. 813; 5 L. Rep. Q. B. 549), considered.

[28 L. T. N. S. 562—June 21, 1873.]

John Knight, deceased, late of Henley Hall, in the county of Salop, died 7th Sept. 1872, aged sixty-nine, leaving a will, bearing date 27th Jan. 1869. This was propounded by the plaintiffs, Sir Charles Henry Rouse Boughton and Mr. Edward Marston, the executors, and it was opposed by the defendants, the three sons of the deceased, and the children of a deceased daughter, on the ground that the deceased, at the time of the execution of the will, was not of sound mind.

The testator was married in 1827, and shortly after his marriage removed to Brussels, where he resided until 1848. His wife died in 1842, and in 1853, on the death of his father, he came into possession of considerable landed property in Shropshire. At his death his personal estate was of the value of £62,000; his reality was of the value of £1,500 a year. The will was prepared by Mr. Marston, who was a solicitor at Ludlow, and who was recommended to him at his desire by Sir Charles Boughton. By the will the testator gave legacies of £8,000 to his son James, £7,000 to his son Charles, and a life interest in £10,000 to his son John, £10,000 to his brother Humphrey, £10,000 to be divided between the daughters of his deceased brother Thomas, £1,500 to his sister, Mrs. Mansfield; £1,000 to each of his executors, and then smaller legacies, amounting together to £1,300. He appointed Sir Charles Boughton residuary legatee and devisee, and he also named him joint executor with Mr. Marston.

In support of the will the plaintiffs relied on the fact that the testator, who was admittedly of eccentric habits, and led a retired and secluded life, had always managed his own affairs, and had been treated by those with whom he had business transactions as of sound mind. For the defence it was alleged, that besides labouring under mental perversion in some other particulars, the deceased had conceived an insane aversion to his children, and that he was actuated by it to dispose of his property in the manner in which it was purported to be conveyed by the will.

Sir C. Boughton was a neighbour of the testator, and was on friendly but not on intimate terms with him.

The case was tried before Sir J. Hannen and a special jury, and the trial extended over thirteen days in the month of March.

Serjt. *Parry* (with him *Day*, Q. C., and *Inderwick*), for the plaintiffs.

Sir *J. B. Karslake* (with him *Lloyd*, Q. C., Dr. *Swabey*, and *C. A. Middleton*), for the defendants.

In the course of his summing up to the jury, Sir James Hannen made the following observations:—The sole question in this case which you have to determine is, in the language of the record, whether Mr. John Knight, when he made his will, on the 27th Jan., 1869, was of sound mind, memory, and understanding. In one sense, the first phrase, "sound mind," covers the whole subject; but emphasis is laid upon two particular functions of the mind which must be sound in order to create a capacity for the making of a will, for there must be memory to recall the several persons who may be supposed to be in such a position as to become the fitting objects of the testator's bounty. Above all, there must be understanding, to comprehend their relations to himself and their claims upon him. But, as I say, for convenience, the phrase, "sound mind," may be adopted, and it is the one which I shall make use of throughout the rest of my observations. Now you will naturally expect from me, if not a definition, at

least an explanation of what is the legal meaning of those words, "a sound mind;" and it will be my duty to give you such assistance as I am able, either from my own reflections upon the subject, or by the aid of what has been said by learned judges whose duty it has been to consider this important question before me. But I am afraid that, even with their aid, I can give you but little help, because, though their opinions may guide you a certain distance on the road you have to travel, yet where the real difficulty begins—if difficulty there be in this case—there you will have to find or make a way for yourselves. But I must commence, I think, by telling you what a "sound mind" does not mean. It does not mean a perfectly balanced mind. If it did, which of us would be competent to make a will? Such a mind would be free from the influence of prejudice, passion, and pride. But the law does not say a man is incapacitated from making a will because he proposes to make a disposition of his property which may be the result of capricious, of frivolous, of mean, or even of bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this—to take care that that, and that only, which is the true expression of a man's real mind shall have effect given to it as his will. In fact, this question of justice and fairness in the making of wills, in a vast majority of cases, depends upon such nice and fine considerations that we cannot form, or even fancy that we can form, a just estimate of them. Accordingly, by the law of England, every man is left free to make choice of the persons upon whom he will bestow his property after his death, entirely unfettered as to the selection which he may think fit to make. He may wholly or partially disinherit his children, and leave his property to strangers, to gratify his spite, or to charities to gratify his pride; and we must respect, or rather I should say we must give effect to, his will, however much we may condemn the course which he has pursued. In this respect the law of England differs from the law of other countries. It is thought better to risk the chance of an abuse of the power arising, than altogether to deprive men of the power of making such selection as their knowledge of the characters, of the past history and future prospects of their children or other relatives may demand; and we must remember that we are here to administer the English law, and we must not attempt to correct its application in a particular case by knowingly deviating from it. I have said that we have to take care that effect is given to the expression of the true mind of the testator, and that, of course, involves a consideration of what is the amount and quality of intellect which is requisite to constitute testamentary capacity. I desire particularly, now and throughout the consideration which you will have to give to this case, to impress upon your minds that, in my opinion, this is eminently a practical question—one in which the good sense of men of the world is called into action, and that it does not depend either upon scientific or legal definitions. It is a question of degree, which is to be solved in each particular case by those gentlemen who fulfil the office which you now have imposed upon you; and I should like, for accuracy's sake, to quote the very words of Lord Cranworth, to which I referred in the observations which I had to make on a former occasion, and from which Sir John Karslake, in his opening speech, quoted a passage. In the case of *Boyse* v. *Rossborough* (6 H. of L. Cas. 4), in the House of Lords, Lord Cranworth made use of these words:—"On the first head, the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot, in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect—ever degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine." In considering the question, therefore, of degree, large allowance must be made for the difference of individual character. Eccentricities, as they are commonly called, of manner, of habits of life, of amusements, of dress, and so on, must be disregarded. If a man has not contracted the ties of domestic life, or, if unhappily, they have been severed, a wide deviation from the ordinary type may be expected, and if a man's tastes induce him to withdraw himself from intercourse with friends and neighbours, a still wider departure from the ordinary type must be expected; we must not easily assume that because a man indulges his humours in unaccustomed ways, that he is therefore of unsound mind. We must apply some other test than this, of whether or not the man is very different from other men. Now the test which is usually applied, and which in almost every case is found sufficient, is this—was the man labouring under delusions? If he laboured under delusions, then to some extent his mind must be unsound. But though we

have thus narrowed the ground, we have not got free altogether from difficulty, because the question still arises, what is a delusion? On this subject an eminent judge, who formerly sat in the court, the jurisdiction of which is now exercised here, has quoted with approbation a definition of delusion, which I will read to you. Sir John Nicoll, in the famous case of *Dew* v. *Clark* (1 Hagg. 11), as to which I will have to say a word to you by-and-bye, says:—"One of the counsel"—that counsel was Dr. Lushington, who afterwards had to consider similar questions—"accurately expressed it, it is only the belief of facts which no rational person would have believed that is insane delusion." Gentlemen, in one sense, that is arguing in a circle; for, in fact, it is only to say that that man is not rational who believes what no rational man would believe; but for practical purposes it is sufficient definition of a delusion, for this reason, that you must remember that the tribunal that is to determine the question, whether judge or juryman, must, of necessity, take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure, in this sense, that you should say, I do not believe such and such a thing; therefore, the man who believes it is insane. Nay, more; you must not say, I should not have believed such and such a thing; therefore, the man who did believe it is insane. But you must of necessity put to yourself this question, and answer it. Can I understand how any man in possession of his senses could have believed such and such a thing? And if the answer you would have to give is, I cannot understand it; then it is of the necessity of the case that you should say that that man is not sane. Sir John Nicoll, in a previous passage, has given what appears to me to be a more logical and precise definition of what a delusion is. He says:—"The true criterion is, where there is a delusion of mind there is insanity; that is, when persons believe things to exist which exist only, or at least in a degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind." I believe you will find that that test applied will solve most, if not all, the difficulties which arise in investigations of this kind. Now, of course there is no difficulty in dealing with cases of delusion of the grosser kind of which we have experiences in this court. Take the case, which has been referred to, of Mrs. Thwaites. If a woman believes that she is one person of the Trinity, and that the gentleman to whom she leaves the bulk of her property is another person of the Trinity, what more need be said? But a very different question, no doubt, arises where the nature of the delusion which is said to exist is this, when it is alleged that a totally false, unfounded, unreasonable—because unreasoning—estimate of another person's character is formed. That is necessarily a more difficult question. It is unfortunately not a thing unknown, that parents—and, I should say in justice to women, it is particularly the case rather with fathers than with mothers—that they may take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which you can feel that it ceases to be a question of harsh, unreasonable judgment of character, and that the repulsion which a father exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them mischief or to deprive them of advantage which most men desire, above all things, to confer upon their children—I say there is a point at which, taken by itself, such repulsion and aversion become evidence of unsoundness of mind. Fortunately it is rare. It is almost unexampled that such a delusion, consisting solely of aversion to children, is manifested without other signs which may be relied on to assist you in forming an opinion on that particular point. There are usually other aberrations of the mind which afford an index as to the character of the treatment of the children. Perhaps the nearest approach to a case in which there was nothing but the dislike on the part of a parent to his child on which to proceed was the case of *Dew* v. *Clark* (*sup*). There were indeed some minor things which were adverted to by the judge in giving his judgment, but he passes over these, as it was natural he should do, lightly; as, for instance, there was in that case the fact that the gentleman who had practised medical electricity attached extraordinary importance to that means of cure in medical practice. He conceived that it might be applied to every purpose, among the rest even to assisting of women in childbirth. But those were passed over, not indeed cast aside altogether, but passed over by the judge as not being the basis of his judgment. What he did rely on was, a long, persistent course of dislike of his only child, an only daughter, who, upon

the testimony of everybody else who knew her, was worthy of all love and admiration, for whom indeed the father no doubt entertained, so far as his nature would allow him, the warmest affection; but it broke out into these extraordinary forms, namely, he desired that that child's mind should be subject entirely to his own; that she should make her nature known to him, and confess her faults, as, of course, a human being can only do to his Maker; and because his child did not fulfil his desires and hopes in that respect, he treated her as a reprobate, as an outcast. In her youth he treated her with great cruelty. He beat her; he used unaccustomed forms of punishment, and he continued throughout her life to treat her as though she were the worst, instead of, apparently, one of the best of women. In the end he left her indeed a sum of money sufficient to save her from actual want, if she had needed it, for she did not need it. She was well married to a person perfectly able to support her; and therefore the argument might have been used in that case, that he was content to leave her to the fortune which she had secured by a happy marriage. He was not content to leave her so. He did leave her, as I say, a sum of money which would have been sufficient, in case of her husband falling into poverty, to save her from actual want; and, moreover, he left his property not to strangers—not to charities—but he left his property to two of his nephews. He was a man who, throughout his life, had presented to those who met him only in the ordinary way of business, or in the ordinary intercourse of life, the appearance of a rational man. He had worked his way up from a low beginning. He had educated himself as a medical man, going to the hospitals, and learning all that could be learnt there, and he amassed a very large fortune—at least a large fortune, considering what his commencement was—a fortune of some £25,000 to £30,000, by the practice of his profession. Yet, upon the ground which I have mentioned, that the dislike which he had conceived for this child reached such a point, that it could only be ascribed to mental unsoundness, that will so made in favour of the nephews was set aside, and the law was left to distribute his property without reference to his will. Now I say usually you have the assistance of other things, besides the bare fact of a father conceiving a dislike for his child, by which to estimate whether that dislike was rational or irrational; and in this case, of course it has been contended that you have other criteria by which to judge of Mr. Knight's treatment of his children in his lifetime, and his treatment of them by his will after his death. You are entitled, indeed you are bound not to consider this case with reference to any particular act, or rather you are not to confine your attention to a particular act, namely, that of making the will. You are not to confine your attention to the particular time of making the will, but you are to consider Mr. Knight's life as a whole with the view of determining whether, in Jan. 1869, when he made that will, he was of sound mind. I shall take this opportunity of correcting an error, which you indeed would not be misled by, because you heard my words; but I observe that in the shorthand report of what I said in answer to an observation made by one of you gentlemen in the course of the cause, a mistake has been made, which it is right I should correct; because, of course, everything that falls from me has its weight, and I am responsible for my words to another court which can control me if I am wrong in the directions I give you. Therefore I beg to correct the words that have been put into my mouth, when I said that if a man be mad admittedly in 1870, and his conduct is the same in 1868 as it was in 1870, when he was, as we will assume, admittedly mad, you have the materials from which you may infer the condition of his mind in the interval. I have been reported to say, "from which you *must* infer the condition of his mind." That is of course what I did not say. Now, gentlemen, I think I can give you assistance by referring to what has been said on this subject in another department of the law. Some years ago, the question of what amount of mental soundness was necessary in order to give rise to responsibility for crime was considered in the case of *Macnaghten*, who shot Mr. Drummond under the impression that he was Sir Robert Peel, and the opinion of all the judges was taken upon the subject; and though the question is admittedly a somewhat different one in a criminal case as to what it is here, yet I shall explain to you, presently, in what that difference consists; and there is, as you may easily see, an analogy which may be of use to us in considering the point now before us. There, Tindal, C. J., in expressing the opinion of all the judges (one of them was a very eminent judge, who delivered an opinion of his own, but it did not in any way differ from the other judges), says:—"It must be proved that at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the

nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." Now that, in my opinion, affords as nearly as it is possible a general *formula* that is applicable to all cases in which this question arises, not exactly in those terms, but in the manner in which I am about to explain to you. It is essential, to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall not be able to distinguish in the act he is doing right from wrong. Now a very little degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act he is doing when he kills another; a very little degree of intelligence is sufficient to enable a man to know whether he is doing right or wrong when he puts an end to the life of another; and accordingly he is responsible for crime committed if he possesses that amount of intelligence. Take the other cases that have been suggested. Serjt. Parry, with the skill which characterises all that he does as an advocate, endeavoured to alarm your mind, as it were, against taking a view hostile to him, by representing that if you come to the conclusion that Mr. Knight was of unsound mind in Jan. 1869, you undo all the important transactions of his life. In the first place, it is obvious that the same question which is now put to you on behalf of the plaintiff in this case would be put to any jury who had to determine the question with reference to any other act of his life, namely, whether at the time of the act done he was of sufficient capacity to understand the nature of the act he was doing. But in addition to that, take, for instance, the question of marriage. The question of marriage is always left in precisely the same terms as I have said to you, it seems to me it should be left in almost every case. When the validity of the marriage is disputed on the ground that one or other of the parties was of unsound mind, the question is, was he or she capable of understanding the nature of the contract which he or she was entering into? So it would be with regard to contracts of buying or selling; and, to make use of an illustration—a very interesting one given us by the learned serjeant—take the case of the unhappy man who, being confined in a lunatic asylum, and with delusions in his mind, was called to give evidence. First of all the judge had to consider, was he capable of understanding the nature and character of the act that he was called upon to do when he swore to tell the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If he was, then he was of sufficient capacity to give evidence as a witness. But, gentlemen, whatever degree of mental soundness is required for any one of these things, responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness, I tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. Because you will easily see it involves a larger and a wider survey of facts and things than any one of these matters to which I have called your attention. Every man, I suppose, must be conscious that in an inmost chamber of his mind there resides a power which makes use of the senses as its instruments, which makes use of all the other faculties. The senses minister to it in this manner; they bring, by their separate entrances, a knowledge of things and persons in the external world. The faculty of memory calls up pictures of things that are passed; the imagination composes pictures and the fancy creates them, and all pass in review before this power, I care not what you call it, that criticises them and judges them, and it has moreover this quality which distinguishes it from every other faculty of the mind, the possession of which indeed distinguishes man from every other living thing, and makes it true in a certain sense that he is made in the image of God. It is this faculty, the faculty of judging himself; and, when that faculty is disordered, it may safely be said that his mind is unsound. Now I wish to call your attention to a case which has been frequently adverted to in the course of this cause. It is the case of *Banks* v. *Goodfellow*, a judgment of the Court of Queen's Bench, at a time when I had the honour of being a member of it. I was, therefore, a party to the judgment; but everybody, or rather, I should say, all the members of the legal profession who hear me, will, of course, recognise the eloquent language of the great judge who presides over that court, the present Lord Chief Justice. But I was a party to the judgment, and, of course, while bound by it, I am bound by it only in the sense in which I understand its words. I think there can be no room for misconception as to their meaning, but I must explain to you the scope and bearing of it. That was a case in which a man who had, indeed, been subject to delusions before and after he made his will, was not shown to be either under the influence of those delusions at the time, nor, on the other hand,

was he shown to be so free from them that if he had been asked questions upon the subject he would not have manifested that they existed in his mind. But he made a will, by which he left his property to his niece, who had lived with him for years, and to whom he had always expressed his intention of leaving his property, and to whom, in the ordinary sense of the word, it was his duty to leave the property, or it was his duty to take care of her after his death. It was left to the jury to say whether he made that will free from the influence of any of the delusions he was shown to have had before and after, and the jury found that the will which I have described to you was made free from the influence of the delusions under which he suffered, and it was held that, under those circumstances, the jury finding the fact in that way, that finding could not be set aside. I will not, of course, trouble you with reading the whole of the judgment, which, however, I may say, would well reward the trouble of reading it by laymen as well as by professional men, but I shall pick out passages to show you how carefully-guarded against misapprehension this decision is. I shall have occasion by-and-bye to call your attention to instances in it which I think it has been sought to apply it incorrectly in the argument which has been addressed to you. Now, at one passage of the judgment, the Lord Chief Justice says this:—"No doubt, when the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. When insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will mader under such circumstances becomes sufficiently strong when the will is, to use the term of the civilians, an inofficious one—that is to say, one in which natural affection and the claims of near relationship have been disregarded." But, in an earlier passage in the judgment, the Lord Chief Justice lays down with, I think I may say, singular accuracy, as well as beauty of language, what is essential to the constitution of testamentary capacity. Sir John Karslake anticipated me in many of the passages I should have read to you. I shall not read all he read, but I shall select this passage, as containing the very kernel and essence of the judgment:—"It is essential to the exercise of such a power" (that is the power of making a will), "that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affection, pervert his sense of right, or prevent the exercise of the natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degrees of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion or aversion take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence, in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand." I have no fear, when rightly understood, of that case being misapplied. [His Lordship then proceeded to consider the evidence in the case. Having done so at considerable length, he pointed out that while the witnesses called on behalf of the plaintiffs had few opportunities of meeting the deceased, and could only say that they had never seen anything odd or strange in his behaviour, the witnesses for the defence, who deposed to his insanity, were in constant association with him, and had therefore ample means of observing his true and inner life. The learned judge continued:]—It is for you to say whether the accumulation of this evidence for the defendants has not this effect on your mind, that it leads you to the conclusion that whatever fluctuations there may have been in the condition of Mr. Knight's mind, for some years before he made that will he had been subject to delusions, and especially he had been subject to delusions with reference to the character, the intention, the motives of his son's acts; and if you come to the conclusion that he was subject to these delusions, I beg to particularly impress on your minds that it is the duty of the plaintiffs to satisfy you that at the time when the testator made that will he was free from those delusions, or free from their influence. The

burden of proof, as it is called, is upon those who assert that the testator was of sound and disposing mind. In considering that question you cannot, I am sure, put aside the contents and the surrounding circumstances of that will. Then, on considering whether or not he was free from delusions as to the characters of his several sons whom he passed over in the disposition of his estate, though he left them sums of money out of his personalty, you cannot disregard the fact that he selected one having no natural claims upon him, of whom he knew little, and to whom he was under no obligations, which are usually recognised as the foundation on which to make a gift of this kind. This must be taken into your consideration in determining whether at the time he did this those prevailing delusions which I have referred to had passed away, or were utterly inoperative.

The jury found that at the time the will was executed the testator was not of sound mind.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS

FOR JANUARY, FEBRUARY, MARCH, AND APRIL, 1873.

(Continued from page 303.)

EQUITABLE SECURITY.

The owner of a farm deposited deeds, dated 1774, by way of security for a loan, stating them in a letter to be title-deeds of said farm, and the deeds were so received in good faith. Subsequently said owner deposited later title-deeds of said farm with the plaintiff, who had no notice of the previous transaction, as security for another loan. *Held*, that said letter, together with the deposit of said deeds of 1774, created an equitable security. The depositee was not bound to examine the deeds, and was not bound by constructive notice of their contents.—*Dixon* v. *Muckleston*, L. R. 8 Ch. 155.

EVIDENCE.—*See* DAMAGES, 4; PRINCIPAL AND AGENT, 1; TROVER.

EXECUTORS AND ADMINSTRATORS.

1. A bill alleged that the defendant was executor of a testatrix, and, before probate, had possessed himself of part of the personal property of the testatrix, and prayed for general administration. The defendant pleaded that no legal representative of the testatrix had been appointed. *Held*, a good plea.—*Cary* v. *Hills*, L. R. 15 Eq. 79.

2. A testator was a partner in a firm under an agreement, whereby, on the death of a partner, his share was to be determined and taken from the firm in two years. The testator appointed three executors, one of whom was his partner. His share was not withdrawn, but interest was allowed upon it. All the residuary legatees to whom such share belonged, acquiesced in this arrangement, except the plaintiff, who filed a bill demanding an account and a share in the profits which had arisen from the employment of said share in the business. *Held*, that the plaintiff was not entitled to an account or share in said profits.—*Vyse* v. *Foster*, L. R. 8 Ch. 308.

3. Action against an executor. Plea, *plene administravit*. Judgment for plaintiff. The same plaintiff brought an action on said judgment, suggesting a *devastavit*. The defendant pleaded facts, showing that assets had come to his hands before said judgment, which had been misappropriated, if at all, with consent of the plaintiff. *Held*, that if said facts constituted an answer, they would have been a defence upon the plea of *plene administravit* in the first action, and therefore could not be set up as a defence to the suggestion of a *devastavit*.—*Jewsbury* v. *Mummery*, L. R. 8 C. P. 56.

See PAYMENT.

FRAUDULENT PREFERENCE.—*See* BANKRUPTCY.

GENERAL AVERAGE.—*See* ARBITRATOR.

GIFT.—*See* ADVANCEMENT.

GUARDIAN.

Where a person has been duly appointed by will under 12 Car. 2, c. 24, § 8, to be guardian of the testator's child, a common-law court has no discretion to refuse a writ of *habeas corpus* to enable the guardian to obtain possession of the child, unless the child is of an age to choose a guardian for herself, or the guardian is an improper person.—*In re Andrews*, L. R. 8 Q. B. 153.

HABEAS CORPUS.—*See* GUARDIAN.

HIGHWAY.—*See* WAY.

HOUSE.—*See* STREETS.

HUSBAND AND WIFE.

A woman deposited money received as executrix in a bank to her account as executrix. Her husband paid money to said account after it had ceased to be used for executorship purposes, and checks were drawn by the wife for payment of debts due by her husband and for household expenses. The husband died. *Held*, that the wife was the agent of the husband in receiving and drawing the money deposited by the husband, and that such money belonged to the husband's estate, and not to the wife.—*Lloyd* v. *Pughe*, L. R. 8 Ch. 88; S. C. L. R. 14 Eq. 241; 7 Am. Law Rev. 475.

INDECENT ASSAULT.—*See* ASSAULT.

INDICTMENT.

Indictment for conspiracy by a trader to remove his goods within four months before presentation of a bankruptcy petition against him. Verdict of guilty. *Held*, that the omission to allege that the trader had been adjudged bankrupt was cured by verdict.—*Heymann* v. *The Queen*, L. R. 8 Q B. 102.

INFRINGEMENT.—*See* COPYRIGHT.

INJUNCTION.

1. Creditors of C. began actions in New York on bills of exchange accepted, payable and dishonored in London, wtih a view to attach debts due C. from various New York houses. *Held*, that the court in England would not grant an injunction to restrain said actions in New York.—*In re Chapman*, L. R. 15 Eq. 75.

2. A corporation having compulsory powers for supplying gas within a borough, began to supply gas within a neighboring township. The

plaintiff, who had similar powers within said township, prayed an injunction to restrain said corporation from suppplying gas within said township, alleging that the corporation was about to supply a mill with gas, which otherwise would have been supplied by the plaintiffs. *Held*, that there was no such allegation of private injury as the court would allow as the foundation of a bill.—*Pudsey Coal Gas Co.* v. *Corporation of Bradford*, L. R. 15 Eq. 167.

See Insurance, 2; Nuisance.

Insolvency.—*See* Bankruptcy, 3.

Insurable Interest.—*See* Insurance, 3.

Insurance.

1. The plaintiff requested a broker to effect insurance for him upon chartered freight in the *Cambria*. The broker saw certain information in Lloyd's list, a paper which was regularly taken by the defendant, which upon examination he did not believe related to the *Cambria*, and in good faith he requested the defendant to insure said freight without disclosing said information, which was in fact material. A slip was accordingly initialled, but before the policy was made out, said information came to the knowledge of the defendant. A policy was, however, filled out and delivered to the broker. A few days later, further information was received showing that the *Cambria* was a total loss. *Held* (by Martin and Bramwell, B.B., Cleasby, B., dissenting) that the defendant could not be assumed to know the contents of Lloyd's list, but that the policy was valid, as the defendant was by his actions estopped from denying the policy was good; or had elected, by filling out the policy, to treat the contract as valid.—*Morrison* v. *Universal Marine Insurance Co.*, L. R. 8 Ex. 40.

2. A bill was filed by an insurance company for cancellation of a policy on account of misrepresentation, and a few days later an action at law was begun on the policy. The company then prayed for an injunction to restrain the action at law. *Held*, that the court of equity had jurisdiction of the case, but that a court of law was a more convenient tribunal for trial of the facts. Injunction refused.—*Hoare* v. *Bremridge*, L. R. 8 Ch. 22.

3. The plaintiffs, shipowners, obtained an open policy to a specified amount, upon cotton *per* steamers from A. One hundred and two bales of cotton were received by the plaintiff's agent at A., with directions from the shipper to ship at the latter's risk. By mistake said agent gave a bill of lading under which the bales were at the plaintiff's risk, but thinking they were at the shipper's risk, he did not advise the plaintiffs, and the bales were not declared upon the policy. The plaintiffs declared on other cotton on said policy in the order of its shipment. Said one hundred and two bales were lost, and the shipper claimed payment under his bill of lading. Thereupon the plaintiffs inserted in said declaration on the policy a declaration of said one hundred and two bales. It was found that by usage of insurance business, where a policy is effected on goods by ships to be declared, the policy attaches to the goods as soon and in the order in which they are shipped, and that the assured was bound to declare them in such order. In case of mistake in the order of declaration, it is the duty of the assured to correct the declarations, which is sometimes done even after loss. *Held*, that the plaintiffs were liable for the loss of said bales under the bill of lading, and therefore had an insurable interest in the bales; and that both by said usage and by law declarations might be altered as above in the absence of fraud.—*Stephens* v. *Australasian Insurance Co.*, L. R. 8 C. P. 18.

See Priority, 1.

Interest.

A trustee for a company paying his own money on behalf of the company in accordance with a contract obliging him to make such payments, is entitled to interest on such payment on the winding up of the company.—*In re Beulah Park Estate. Sargood's Claim*, L. R. 15 Eq. 43.

See Partnership.

Joint Tenant.—*See* Legacy, 2.

Jurisdiction.

On a special case raising questions of legal limitations at the instance of a plaintiff not in possession, the court declined to make any order, or to entertain any fictitious question as to title-deeds or accounts, in order to found jurisdiction.—*Pryse* v. *Pryse*, L. R. 15 Eq. 86.

See Injunction, 1; Insurance, 2.

Land.

Adjoining arches supporting a railway was certain land used as an embankment to the arches, and a strip of land running alongside the railway and necessary for the purpose of repairing the arches. *Held*, that said pieces of land were "land" under 25 & 26 Vict. c. 102, § 77.—*Higgins* v. *Harding*, L. R. 8 Q. B. 7.

Landlord and Tenant.—*See* Distress.

Lease.—*See* Contract.

Legacy.

1. A testator bequeathed one-sixth part of his property in trust for each of his daughters for life, remainder to the children of each daughter respectively upon attaining twenty-one years or marriage; provided any of such daughters should die without leaving a child who should attain twenty-one or marry, then her share in trust for the testator's surviving daughters in equal shares, if more than one, during their respective lives, and after their respective decease for their respective children *per stirpes* and not *per capita*. The testator's daughters were minors when the will was made. Two daughters married, and died leaving children who attained twenty-one; and then a third daughter died leaving no children. *Held*, that the share of said third daughter was divisible between her three surviving sisters and the children of her two sisters who had died.—*Waite* v. *Littlewood*, L. R. 8 Ch. 70.

2. A testatrix directed "at the death of my sisters A. and J. the residue of my property is to pass to my relatives in America." *Held*, that the next of kin of the testatrix in America, living at her death, were entitled as joint tenants.—*Eagles* v. *Le Breton*, L. R. 15 Eq. 148.

See Devise; Executors and Administrators, 2; Payment.

Letter.

Where a person applies by letter for shares in a company, *it seems* he will be bound as a shareholder from the moment the letter of allotment is posted although it is never received.—*Wall's Case*, L. R. 15 Eq. 18.

Lien.—*See* Bank.

Liquidated Damages.—*See* Damages, 3; Penalty.

Loan.—*See* Bank.

Marshalling Assets.—*See* Devise, 1.

Master and Servant.—*See* Negligence, 1; Principal and Agent, 1.

Measurement.—*See* Covenant, 2.

Mine.—*See* Damages, 1; Negligence, 4.

Mortgage.

W. demised certain estates to L. on long terms by way of mortgage. Subsequently W. conveyed the estates by deed, to which L. was party, but not a conveying party, to C. upon trust for W. as follows: W. was to receive the rents until a certain day, and in case W. then repaid certain sums advanced by L., C. was to reconvey. In case of W.'s default C. was to sell the estates and hold the proceeds in trust to repay L.'s advances and hold the remainder for W. *Held*, that the terms were not surrendered or merged, and that said deed was a mortgage, and was not a deed creating a trust which W. could enforce. —*Locking* v. *Parker*, L. R. 8 Ch. 30.

See Devise, 2; Equitable Security; Priority, 2.

Ne Exeat.

A *ne exeat* may be issued against a defendant who has been ordered to pay a sum of money in an administration suit, although the day of payment has not arrived, if he is about to leave the country.—*Sobey* v. *Sobey*, L. R. 15 Eq. 200.

Negligence.

1. The daughter of the plaintiff was instantly killed by the defendant's negligence. *Held*, that as the daughter was killed no action lay for loss of her services, or for her burial expenses.—*Osborn* v. *Gillett*, L. R. 8 Ex. 88.

2. By statute a railway company must maintain fences along the line of its railway, for the accommodation of the owners and occupiers of lands adjoining. The plaintiff hired a stable for his horse, with privilege of allowing the horse to graze during the day over land adjoining a railway. One night the horse escaped into said land, strayed through a defective fence on the railway, and was killed. *Held*, that the railway company was liable.—*Dawson* v. *Midland Railway Co.*, L. R. 8 Ex. 8.

3. Action for injuries received by plaintiff in consequence of collision while travelling on defendants' railway. Plea that the plaintiff was carried under a free pass, wherein it was provided that he should travel at his own risk. Replication that the injuries were by reason of the gross and wilful negligence and mismanagement of the defendants. Demurrer. *Held*, that the defendants were not liable. Demurrer sustained.—*McCawley* v. *Furness Railway Co.*, L. R. 8 Q. B. 57.

4. The defendants were a canal company, and the plaintiff proprietor of a coal mine under part of the bed of the canal. Said company was authorized by statute to take land for the canal, the minerals in the land being reserved to the owners thereof, subject to a proviso that in working the same no injury should be done to the navigation. It was also provided that a mine owner wishing to work his mine should give certain notice to the company, which should then inspect the mine, and consent or refuse to allow the same to be worked; in the latter event paying the market price for the same. If the company should omit to give or refuse such consent, the mine owner might work the mine. The plaintiff gave proper notice, but the defendants did not inspect, and refused to purchase the mine. The plaintiff worked the mine without regard to the surface, with knowledge that the effect would be to let down the surface and probably dislocate the slate and admit water, but otherwise was not negligent or unskilful, but took coal in the ordinary manner, and could not otherwise have obtained full benefit of the mine. Consequently, without negligence of the defendants, water entered the mine. The plaintiff brought an action of tort, charging negligent management of the canal, whereby the water escaped to the damage of the mine. *Held*, that the action could not be maintained. *It seems* (Kelly, C. B., and Pigott, B.) that the plaintiff was entitled to compensation for the loss of the coal under said act.—*Dunn* v. *Birmingham Canal Co.*, L. R 8 Q. B. (Ex. Ch.) 42; s. c. L. R. 7 Q. B. 244; 6 Am. Law Rev. 695.

See Arbitration; Principal and Agent, 3.

Noise.—*See* Nuisance.

Notary Public.—*See* Affidavit.

Notice.—*See* Priority, 2.

Nuisance.

Bill for injunction to restrain owners of buildings adjoining the plaintiff's house from causing nuisance by noise and vibration by use of an engine. Discussion on amount and nature of noise necessary to sustain the injunction.—*Gaunt* v. *Fynney*, L. R. 8 Ch. 8.

Order of Court.

If an order of court has been made to sell at auction, and there has been an attempt to

sell at auction which has failed, the property cannot be sold at private sale without an alteration in the order; and any practice in chambers to the contrary is irregular.—*Berry* v. *Gibbons*, L. R. 15 Eq. 150.

Partnership.

By articles of partnership a partner advancing money to the partnership was to be considered a creditor of the partnership in respect of such advance, and was to be allowed interest on the same. The partnership was dissolved. *Held*, that interest must be allowed to the partners on their respective advances. It appears that in general partnership, accounts subsequent to dissolution will not bear interest as between partners.—*Barfield* v. *Loughborough*, L. R. 8 Ch. 1.

See Executors and Administrators, 2.

Payment.

A testator directed an annuity to be paid to H. for life, and a "proportionable part of said annuity to be computed to the day of H.'s death from the last preceding day of payment," to the executors or administrators of the said H. Such proportionate part was paid to the husband of H., who never took out letters of administration; and the husband died leaving his son his executor. *Held*, that said payment to the husband of H. was not valid, and that the son might recover said proportionate part.—*Mitchell* v. *Holmes*, L. R. 8 Ex. 119.

See Principal and Agent, 2.

Penalty.

Under an award W. was to purchase an annuity of £1200 for D. If such annuity should not be secured as directed the sum of £100 should become due on the last day of each month, until the annuity should be secured; "these monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same." W. made default in securing the annuity. *Held*, that said monthly payments of £100, though called a "penalty," was not one which the court would allow to be satisfied except upon the terms of securing the annuity.—*Parfitt* v. *Chambre, ex parte D'Alteyrac*, L. R. 15 Eq. 36.

See Damages, 3.

Perpetuity.

A testatrix, after stating that she did not confidently feel that her family would not spend her money on the vanities of the world, and that as a faithful servant of the Lord Jesus Christ she felt she was right in returning it in charity to God who gave it, gave personal estate to trustees to make certain annual payments for charitable purposes, and directed that when and so soon as land should at any time be given for the purpose, two almshouses should be built, and surplus appropriated in making weekly allowances to the inmates. *Held*, that the gift was valid, as it was an immediate gift for charitable purposes, although the time of its application was indefinite.—*Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206.

Pleading.—*See* Damages, 3; Executors and Administrators, 1; Pleading, 3.

Posting Letter.—*See* Letter.

Power.—*See* Cy-Pres.

Practice.—*See* Ne Exeat.

Presumption.—*See* Principal and Agent, 1.

Principal and Agent.

1. By statute railway companies have power to arrest any person committing certain frauds upon them. A station inspector arrested a passenger on a railway under the erroneous belief that he had committed a fraud on the railway company. *Held*, that in the absence of evidence to the contrary it must be inferred that the company had given said inspector authority to arrest under said statute; and that the company was liable for his mistake.—*Moore* v. *Metropolitan Railway Co.*, L. R. 8 Q. B. 36.

2. C., the managing director of the plaintiffs, who were printing a periodical for D., refused to go on with the work without a guarantee. Accordingly the defendant drew a bill on D. and indorsed it to the plaintiffs, with the understanding known to C. that a sum due D. from S. should be appropriated to its payment. Prior to this, C. had lent money on his private account to D., for which he held D.'s acceptance to a draft in C.'s name. When the latter bill fell due, D. gave C. an order on S., which was paid. *Held*, that the manner in which C. received payment of his private debt constituted no defence to an action by the plaintiffs on the first bill, as C. was not acting therein in pursuance of any authority, expressed or implied, from the plaintiffs.—*McGowan* v. *Dyer*, L. R. 8 Q. B. 141.

3. By the rules of a railway company its porters were to prevent passengers going by wrong trains so far as they were able, but it was not their duty to remove passengers from the train. The plaintiff received injuries by being violently pulled from a carriage on said railway by one of its porters, who was under the mistaken belief that the plaintiff was in the wrong carriage. *Held*, that there was evidence upon which the jury might find that the said porter was acting within the scope of his employment, whereby the company would be liable for the plaintiff's injuries.—*Bayley* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, L. R. 8 C. P. 148; s. c. L. R. 7 C. P. 415; 7 Am. Law Rev. 297.

4. K. wanted shares in a company. B. told K. he could get a certain number of shares at £3 per share, and was authorized by K. to buy them for him. B., in fact, owned the shares, having bought them at £2 per share. *Held*, that B. was the agent of K., and must repay to K. the difference between the cost of the shares, and the price K. paid for them.—*Kimber* v. *Barber*, L. R. 8 Ch. 56.

Principal and Surety.—*See* Surety.

Priority.

1. R. insured his life and assigned the policy in 1860 as security for a debt. R. was adjudged bankrupt in 1862, and in 1868 said debt and policy were transferred for value to the plaintiff, who had no notice of the bankruptcy. In 1871 R. died and the plaintiff gave notice to the office that said policy was mortgaged. Subsequently, notice of R.'s bankruptcy was given to the office. *Held*, that the plaintiff's debt was entitled to priority.—*In re Russell's Policy Trusts*, L. R. 15 Eq. 26.

2. An officer assigned to A. and B., two assignees, separately the money which should be payable on the sale of his commission, and the assignees gave the agents of the regiment simultaneous notice of their incumbrances.—On Oct. 6, the agents received notice from the *Horse Guards* to transfer a sum, payable upon the sale of said commission, to said officer. Previously to said notice said agents had no authority in regard to said sum; and they could not pay it over without a written receipt from said officer. On Oct. 14, A. gave the agents a second notice of his charge. On Oct. 20, said officer sent a receipt as aforesaid to said agents. On Nov. 4, B. gave said agents a second notice of his charge. *Held*, that A.'s charge had priority over B.'s. —*Addison* v. *Cox*, L. R. 8 Ch. 76.

See Equitable Security.

Railway.—*See* Damages, 2; Negligence, 2, 3; Principal and Agent, 1, 3.

Recoupment.—*See* Vendor and Purchaser, 1.

Rent.—*See* Vendor and Purchaser, 1.

Rescission of Contract.—*See* Contract, 2; Vendor and Purchaser, 2.

Riparian Rights.

A stream divided into two branches at E., one branch flowing on into the river Irwell, and the second branch to a farm, where it supplied a trough, the overflow percolating by no defined course into said river. In 1847, W., who owned said farm and land thence to the Irwell, collected said overflow, and carried it by a drain to a mill on the banks of the Irwell. In 1865, W. purchased the land through which said second branch flowed from E. to said farm. In 1867, W. sold said mill, with water in said second branch, to the plaintiff. *Held*, that the plaintiff could maintain an action against a riparian owner above E. for obstructing the flow of the water. —*Holker* v. *Poritt*, L. R. 8 Ex. 107.

River.—*See* Riparian Rights.

Sale.—*See* Bankruptcy, 3; Order of Court; Principal and Agent, 4.

Security.—*See* Bank, 1; Equitable Security.

Set-off.—*See* Bank, 2; Company, 2.

Specific Appropriation.—*See* Bills and Notes.

Specific Performance.—*See* Contract, 1; Vendor and Purchaser, 2.

Stay of Proceedings.—*See* Ejectment.

Stoppage in Transitu.—*See* Bankruptcy, 3.

Stream.—*See* Riparian Rights.

Street.

A corporation had power, whenever it should appear to it expedient, to prescribe the street line upon which any house to be built should be erected. The foundations of a church were laid, and the building had made considerable way, when a line was fixed falling within the church limits. *Held*, that a church was a house, and that said line was fixed too late.—*Corporation of Folkestone* v. *Woodward*, L. R. 15 Eq. 159.

Surety.

1. Plea to an action on a bond, that it was executed by the defendant as surety only, whereof the plaintiff had notice; and that, afterwards, a deed was made between the principal and the plaintiff, and with the consent of the creditors of the principal, whereby the latter conveyed his property to the plaintiff, to be administered for the benefit of the creditors; in consideration whereof the plaintiff and all other creditors released said principal, "in like manner as if he had obtained a discharge in bankruptcy;" and that this was without the consent of the defendant. *Held*, that the defendant was discharged.—*Cragoe* v. *Jones*, L. R. 8 Ex. 81.

2. The defendant gave a bond, which recited that the plaintiff had agreed to employ J. as clerk, on the latter's giving a bond, with sureties, to pay over to the plaintiff all moneys received on the plaintiff's account, and which was conditioned that J. should pay over moneys as aforesaid. To an action on the bond the defendant pleaded, first, that, by the terms of the agreement between the plaintiff and J., the agreement might be terminated by one month's notice, which was afterward, without the consent of the defendant, altered to three months; and, second, that before the default complained of, J. had committed other defaults of the same kind, notwithstanding which the plaintiff had continued to employ J., without notice to the defendant. *Held*, that the first plea was bad, as it did not show that the agreement concerning notice formed any part of the defendant's contract; but that the second plea was good.—*Sanderson* v. *Aston*, L. R. 8 Ex. 73.

See Interest.

Surrender.—*See* Mortgage.

Tenant in Common.—*See* Legacy, 2.

Title.—*See* Equitable Security.

Toll.

Certain tolls existed from time immemorial upon goods passing to, through, or from the borough of Brecon. A railway company had, under an act of Parliament, acquired land and built a railway through the borough. *Held*, that there could be no toll traverse upon goods carried by the railway company entirely upon their railway or land belonging to them.—*Brecon Markets Co.* v. *Neath & Brecon Railway Co.*, L. R. 8 C. P.

(Ex. Ch.) 157; s. c. L. R. 7 C. P. 555; 7 Am. Law Rev. 485.

Trade.—*See* Covenant; Distress.

Trespass.

Defendant drove his cab on to a railway company's land having the appearance of a public street, and refused to leave when requested to do so on behalf of the company. *Held*, that the defendant was a wilful trespasser.—*Foulger* v. *Steadman*, L. R. 8 Q. B. 65.

See Damages, 1; Negligence, 3.

Trover.

The plaintiff who was in possession of certain goods in a house was told by the defendant that he meant to distrain for rent on the day following, and he would not allow the plaintiff to remove the goods as the latter desired. In an action of trover, *held* (by Kelly, C. B., Bramwell and Pollock, B. B., Martin, B., dissenting), that there was no evidence of a conversion.—*England* v. *Cowley*, L. R. 8 Ex. 126.

Trust.

The trustees under a will built a villa upon part of the testator's land for the purpose of developing the remainder of the land. He had given the trustees no such authority. *Held*, that, as the trustees had *bona fide* laid out a sum to increase the value of the estate, they could only be charged with the loss (if any) caused by such expenditure.—*Vyse* v. *Foster*, L. R. 8 Ch. 309.

2. The defendants received certain proceeds of real estate from two trustees, and subsequently paid the same over to one trustee without the assent or sanction of the co-trustee, and it was in consequence lost to the estate. *Held*, that the defendants must make such loss good to the estate.—*Lee* v. *Sankey*, L. R. 15 Eq. 204.

Verdict.—*See* Indictment.

Ward.—*See* Guardian.

Water.—*See* Riparian Rights.

Way.

A path was dedicated across a field, with a reservation to the owners of the field of the right to plough up the path. The owners ploughed up the path, which in consequence became muddy, and placed hurdles at the sides of the path, which the defendant overthrew in order not to walk in the mud. *Held*, that the defendant had no right to deviate from the path, and was liable in trespass.—*Arnold* v. *Holbrook*, L. R. 8 Q. B. 96.

Will.—*See* Devise; Executors and Administrators, 2; Legacy; Payment.

Winding up.—*See* Company.

Writ.—*See* Guardian; Ne Exeat.

Words.

"*Other.*"—*See* Legacy, 1.

"*Relatives.*"—*See* Legacy, 2.

"*Surviving.*"—*See* Legacy, 1.

REVIEWS.

A Treatise on the Law of Insurance, by S. R. Clarke, of Osgoode Hall, Barrister-at-law. — Monetary Times Office, Toronto, 1873.

This will be found a useful collection of cases on the law of insurance. All the Canadian decisions seem to be referred to on the several branches of fire, marine and life insurance, whilst there is a very full collection of English and United States authorities on fire insurance.

The author does not so much attempt to put forward views of his own, as to give a careful arrangement of the points decided under the several chapters into which the work is divided. This is a very safe plan to pursue, and one which gives a certain value to a book on this subject, though we would gladly welcome a fuller discussion on the various points of doubt and difficulty which arise in insurance cases. Insurance law is known to few, and of these few, fewer still are lawyers. We believe that there are many "insurance men" who are, fortunately for the companies they represent, more familiar with the law on any given insurance case than the professional adviser of the company.

The author puts prominently forward a suggestion which we have heard made before, that it would be advisable for Parliament to establish a standard policy for use by all companies doing business in Canada. Such a provision would be a great advantage in this, that people would by degrees know something of their position in case of a loss. It is inconceivable that at this period of time there should be such general ignorance on the subject of insurance. Insurance companies are not free from blame in this matter; nor is it to be wondered at that there is a general want of sympathy for them when they feel called upon to resist claims on technical grounds, when the insuring public see on every side the efforts that are made by agents to obtain risks without the slightest effort to ascertain the correctness of the statements made to them. The usual course is to require insurers to fill up and sign a partly printed form of application. It would be well for the public to decline this part of the programme in all cases

where it is possible or convenient for an inspection to be made by the Company's agent. It may be, as is alleged on behalf of insurers, that no fair claims for compensation are resisted, and that technical defences are only resorted to when they have a "moral conviction" that the claim is fraudulent. But it cannot be denied that a proper system of inspection would frequently obviate the necessity for a contest. It would very generally operate as a restraint upon the insured, and be a safeguard to the insurer, more creditable and effectual than the usual technical defences to which companies are so often driven by their own carelessness. This matter has more than once been made the subject of judicial comment.

Mr. Clarke's book will find a ready sale among mercantile men and insurance officers, as well as amongst the legal profession.

American Law Review—October, 1873. Boston: Little, Brown & Co.

The subject of an Elective Judiciary is again taken up. The writer thus concludes his observations:

"It is seldom that a man or community consents voluntarily to surrender the immediate exercise of any accustomed power. Even its delegation to agents requires a considerable exertion of moderation and self-restraint. If the people of New York shall deliberately resign the power of electing their judges, and deliberately return to the ways of ancient wisdom, they will, in our opinion, evince a high degree of political intelligence, and furnish to the world a striking proof of their fitness for self-government, and their capacity to profit by the lessons of experience."

This is instructive to those who scorn the old paths, and is some evidence of a healthy re-action in a most important matter.

The distribution of the Geneva award occupies a number of pages, and is an appeal for the fair division of these ill-gotten gains. "Easy come, easy go—" We wish them joy of the whole business, and hope this is about the last we shall ever hear of it, though this may be doubted.

There is a long and learned article on the law of homicide, speaking especially as to the presumption of malice, and, after a careful review, the writer lays it down that the presumption of malice from the fact of killing, and *a fortiori* from the fact of intentional killing, has been so firmly established by the common law from the earliest period that, if it is thought conducive to change the rule, resort must be had to the Legislature.

There is a further addition to the criticisms on the reporters and text writers, which we have from time to time reproduced, and to a certain extent supplemented.

CORRESPONDENCE.

Law Society—Primary Examinations.

To the Editor of the Canada Law Journal.

Dear Sir,—I wish to lay before you what is in my case (and may be in many others) the harshness of the present examinations for admittance to the Law Society; and especially as of late, when the examinations have been made much more severe than they were (which I do not say was not necessary), for the purpose of decreasing the number of candidates of the quality that were presenting themselves. As you are aware, the books have been increased by the addition of Cæsar, Cicero, Virgil, and with that a much more searching examination. Now the writer, when at school, did not think that he would ever study law, so that the dead languages were, I may say, put aside (excepting the Latin grammar), and devoted his time to French (about four years), Euclid, algebra, and the commoner studies. Now, it may be that my scholastic education is quite as good as many of those who have been fortunate enough to have studied Latin instead of French, thereby being enabled to pass the present examination. Now, sir, it is indeed hard that I should be compelled to devote my time to the study of these works when I should be reading for my "intermediates." During the time of the Edwards of England, French was the language wholly used in courts, and quoted in many text books. I think it should be optional (as it was a few years past—if the candidate chose, he could be examined in Sallust or Horace); and it should be now Telemachus, Charles the Twelfth, or Horace, &c. Do you think that, on application to the proper parties, they would consider my case, and allow an examination in French in lieu of Latin?

Respectfully yours,

An Articled Clerk.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Easter Term, 36th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law. (The names are given as on the roll, and not in order of merit.)

No. 1257. Charles Victor Warmoll.
R. H. Caddy.
Hugh Matheson.
Harry Vincent.
James Reeve.
Michael Brennan.
Samuel Platt.
William Macdiarmid.
Robert Baldwin Carman.
C. R. W. Biggar.
George A. Mackenzie.

No. 1263. James Stafford Kirkpatrick.

Admitted and Called.

No. 1269. Henry J. Morgan.

And the following gentlemen received Certificates of fitness:

Charles R. W. Biggar.
J. B. McArthur.
Hugh Matheson.
Alexander Dunbar.
George A. Mackenzie.
Michael Brennan.
James Stafford Kirkpatrick.
D. G. Macdonell.
R. H. Dennistoun.
John McMillan.
C. Bogart.

And on Tuesday, the 20th May, the following gentlemen were admitted into the Society as Students of the Laws:

University Class.

Hamilton Cassels.
John W. Burnham.

Junior Class.

Rolland A. Macdonald.
Donald M. Christie.
G. Wallace Bain.
W. John Mulholland.
J. Clarke Eccles.
A. McD. Knight.
Franklin J. Brown.
Ethelwolf Scatcherd.
Hugh Stewart.
William Lawrence.
M. G. Cameron.

Articled Clerk.

Alfred Wright.

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

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

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding.—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shal be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.