DIARY FOR SEPTEMBER.

1 Tues..Selectors of Jur. meet (C. S. U. C. c 31, s. 15). Last day for notice of trial for Co. Ct. York.
2 Wed..Capitulation of Sedan, 1870.
4 Fri..French Republic proclaimed, 1870.
5 Sat..Trin. T. ends. Last day to give not. for call.

6 SUN..14*th Sunday after Trinity.*
7 Mon..Loss of the *Captain*, 1870.
8 Tues..Gen. Sess. & Co. Ct. York. Last d. for J.P.'s to ret. [conv. to Clk. of P. (32 V. c. 6, s. 9 (4); 32-33 V. c. [31, s. 76; 33 V. c. 27, s. 3.)
9 Wed..Sebastopol taken, 1855.

13 SUN..15*th Sunday after Trinity.*
17 Thurs..First U. C. Parliament met at Niagara, 1792

20 SUN..16*th Sunday after Trinity.*
21 Mon..*St. Matthew.*
22 Tues..1st day of Jewish year, 5634.

27 SUN..17*th Sunday after Trinity.*
30 Wed...*St. Jerome.*

CONTENTS.

THE

Canada Law Journal.

Toronto, September, 1874.

What with the new circuits and the trial of the Election cases, the full strength of the newly arranged Courts will be taxed to the utmost. There has been a re-arrangement of the circuits, as will be seen in due course, and the time of trial for some of the Election Petitions has been fixed. They are, up to the time we write, as follows:

Essex Case	Aug. 24.
Cornwall Case	Sept. 3.
London Case	" 7.
Lincoln Case	" 7.
South Renfrew Case (at Village of Renfrew)	" 8.
North Renfrew Case (Court House, Pembroke)	" 14.
Addington Case	" 21.
West Northumberland Case	" 25.

Before this reaches the hands of our readers, Trinity Term, which expired under the 18th sec. of 29 Vict., will have been electrified into life by the magic words of 36 Vict. cap. 8, sec. 53. We cannot say we rejoice at its reappearance from the tomb. It is a nuisance to the Bench and the Bar, and of no practical utility. Besides this it was so happily buried by a member of the Bar some years ago that we had hoped never to see its hoary head again. Many members of the profession will remember an exceedingly clever "Obituary Notice" of Trinity Term, written by the late Wm. Geo. Draper, Esq., County Judge at Kingston. It is quite too good to be lost, and the present time seems an appropriate one to reproduce it. It will be found on page 265

* DIGESTS OF ONTARIO REPORTS.

The New Digest, so long hoped for, is being issued in parts, and we have now the first part before us, containing the titles "Abandonment" to "Arrest," comprised in 104 full pages. It is supposed that the whole work will be complete in about fifteen parts, or about 1800 double column pages.

The first Digest of Upper Canada Reports was undertaken by the present leader of the Bar in Ontario and Treasurer of the Law Society, Hon. John Hillyard Cameron. He published a digest of cases from Mich. Term, 1828, to the end of the year 1843. Nine years afterwards Mr. R. A. Harrison, then a Student-at-law, published, under the supervision of James Lukin Robinson, the then Reporter to the Court of Queen's Bench, the volume known as Robinson & Harrison's Digest, containing all the cases from 1823 to the end of Vol. VII of the Upper Canada Reports—in a book of 530 pages, and including thirteen volumes of reports.

From about this period, and after the Courts of Common Pleas and Chancery were established, judicial decisions began to multiply, and after a few years there was again a demand for a new digest, or a continuation of the last one. Mr. R. A. Harrison, with his accustomed energy, determined to supply the want, but the pressure of other work induced him to hand over the arduous undertaking to Mr. Henry O'Brien, who in 1863 published the volume known as Harrison & O'Brien's Digest, which brought the cases down to the year 1861. This was a book of 870 pages, and included no less than thirty-five volumes of reports.

This digest was a great relief to the profession, though it was thought by some that it would have been better to have combined with it the contents of the previous digest. It was intended by the Editor to follow it up by a similar publication every few years. This, however, was not done, as Mr. Christopher Robinson announced his intention of preparing a consolidated digest, which should include all the cases in the previous ones, as well as all which should appear up to the time of publication.

As we have said Mr. Harrison's digest contained the cases reported in thirteen volumes of reports, Mr. O'Brien's those in thirty-five volumes, and the present one will contain the cases reported in over one hundred volumes. These figures alone will give some idea of the amount of labour involved, and the extent of the work. It is somewhat curious to remark, *en passant*, that each succeeding digest has contained about three times as much matter as the preceding one.

It will be noticed as a very important feature in the new digest that the head notes of many of the cases have been condensed, and many of them re-written. It cannot be denied that to make a really good digest this was absolutely necessary, as in many volumes of the reports the head notes were not all that could have been desired.

This condensation of head notes and the grouping of cases, which decide practically the same point, strikes one at once as a great improvement on the former digests, as does also the fewness of the cross references, the necessity for which is obviated by repeating the head note where the matter of it is equally applicable to different subjects.

The whole plan and style follows closely that of Mr. Fisher's last digest, as

* A Digest of the Reported Cases determined in the Courts of Common Law and Equity in Ontario from the commencement of the Reports in Trinity Term, 1823, to the present time, by Christopher Robinson, Esq., Q. C., and F. J. Joseph, Esq., Barrister-at-Law. Toronto: Rowsell & Hutchison, 1874.

well in the arrangement of the cases as in typographical execution. Mr. Fisher's digest, as is well known, was founded on that prepared by the late County Judge of the County of York, Hon. S. B. Harison, whose arrangement was doubtless the best that has as yet been published. Mr. Brunker also followed the same plan in Ireland.

In conclusion it may well be said that, so far as the first part of the book is concerned, the work which has been done has been done in a manner worthy of the high reputation of the Senior Editor, and which shows on the part of his co-worker, Mr. F. J. Joseph, great capacity for the scientific arrangement of cases, as well as the greatest accuracy, industry, and application.

We shall again have occasion to refer to this work, when it appears in the shape of a complete volume.

TENURES AND CUSTOMS.

A new edition of Blount's "Tenures of Land and Customs of Manors," rearranged, corrected and considerably enlarged by W. Carew Hazlitt, has lately appeared. In it the legal lover of antiquarian lore may find much to amuse and interest, as well as to instruct and edify; and from the quaint and apparently frivolous tenures of medieval days, much that will explain and illustrate various points of social and economic history may be extracted. The rents paid, or rendered in those good old days of yore, show that neither the King nor the great lords had much to give their faithful followers save land; that land was of comparatively small value, that it was given away with lavish bounty in payment of every kind of service—military, menial or ceremonial, and that usually the rents bore no relation to the fertility of the soil, or its nearness to market.

Some of the rents and services for which lands were held, mentioned by Blount are—taking charge of the King's table-cloths on coronation day; finding a spit of maple to roast the King's meat on that day; providing straw for his Majesty's bed, and grass and rushes for his chamber, whenever he chanced to come to Aylesbury; training a hare dog for the King; keeping a white bitch with red ears for the Kin;; carrying the royal horn when his Majesty hunted within the hundred of Lambourne; scalding the King's hogs; keeping the King's lame dog; and, *O pudor! O tempora! O mores!* "keeping for the King six damsels, to-wit, w—o—s, at the cost of the King;" carving for the Earl of Lancaster at dinner on Christmas Day; paying to the Lord of the Manor a snowball at Midsummer, and a red rose on Christmas Day; driving a goose three times round the fire on New Year's-day, while the lord blows the fire. A supply of herring-pies were paid to the King for the Manor of Carlton, in Norfolk. The Manor of Downhall was held by a service of holding the King's stirrup when he mounted his horse at Cambridge Castle. The Lords Grey of Wilton held the Manor of Acton by the serjeanty of keeping one ger-falcon for the King. In the time of Henry III., one Robert Aquillan held a carucate of land by the service of making one mess in an earthen pot in the King's kitchen on the day of his coronation. Henry de Greene held lands of the King, *in capite*, by the service of lifting up his right hand yearly on Christmas Day towards the King whenever he should be in England; and William Hunt held lands of the Earl of Lincoln, free from all services and demands except one rose in the time of roses.

Among the customs which have prevailed in the various Manors, many are most curious, fanciful and grotesque. In Rochford, in the County of Essex, at

the cock's crowing on the Wednesday after Michaelmas Day, a court was held by the Lord of the Manor of Staleigh, called the Lawless Court. At it the steward and suitors speak not above a whisper, no candles are used, pen and ink are forbidden, but a record of proceedings is kept with a coal; and the unfortunate who owes suit or service thereto and appears not, forfeits to the Lord double the rent for every hour he is absent. If the young men of Coleshill, in the County of Warwick, can catch a hare and bring it to the parson of the parish before ten o'clock on Easter Monday, his reverence is bound to give them a calf's head, and one hundred eggs for their breakfast, and a groat in money. Robert Fitzwalter, a well-beloved subject of King Henry, the third of that name, as death drew nigh, betook himself to prayer and deeds of charity, gave great and bountiful alms to the poor, kept great hospitality, and rebuilt the priory of Dunmow. Here arose the custom, that any man or woman who repented not of his or her marriage, either sleeping or waking, in a year and a day, might lawfully claim a gammon of bacon, which was presented with all the solemnity and triumphs that they of the priory and town of Dunmow could desire. The party claiming the bacon had to take his oath before prior and convent, and the whole town, humbly kneeling in the church-yard upon two hard, pointed stones; his oath was administered with such long process and such solemn singing over him as doubtless made his pilgrimage rather painful; afterwards he was hoisted aloft on the shoulders of the men, and carried first about the priory churchyard and then through the town, with all the friars and brethren and all the townsfolk following with shouts and acclamations, and with the hard-won bacon borne aloft in triumph. The Lord of the Manor held his lands by the tenure of giving the bacon to all applicants, but only six claimants are recorded between 1444 and 1751, which fact does not argue well for domestic felicity in those early days.

THE CASE OF THE CAROLINE REVIEWED.

We have often had occasion to quote from the pages of the *Central Law Journal*, which, under the editorship of Judge Dillon, is one the very best of our United States exchanges. In a number of that paper published last month, there is a very learned *critique* upon a pamphlet, written by George Ticknor Curtis, touching the case of the *Virginius*. The learned reviewer adverts, in common with his author, to the destruction of the *Caroline*, and proceeds to make some important comments upon the law, propounded in the case which grew out of that affair—*The People* v. *McLeod*, 1 Hill, N. Y. 337. The *Central Law Journal* proceeds as follows, first giving a history of the transaction, and then going on to demolish the law as laid down by Mr. Justice Cowen, who delivered the opinion of the Court:

This case was determined in the Supreme Court of New York in 1841, before Chief Justice Nelson and Justices Bronson and Cowen, all able and distinguished Judges. It is note-worthy in this connection from the fact that Mr. Justice Cowen, who delivered the opinion of the court, attempted to answer the assertion of the British Government that the destruction of the Caroline was a necessary act of self-defence.

The facts of the Caroline case were substantially as follows: In the winter of 1837-8, during Mackenzie's rebellion in Canada, and while the United States and Great Britain were at peace with each other, a body of armed men, mostly Americans, took possession of Navy Island, in the Niagara river, an island belonging to Great Britain, and, having fortified their position, kept up for several weeks a frequent bombardment against the position occupied by British forces on the Canadian shore. An American steamer, the Caroline, plied regularly between Navy Island and Schlosser, on the American side of the river, furnishing the armed forces on the Island with supplies and stores, and keeping up a communication between them

and the American shore About midnight of the night of December 29-30, a party of British troops, under command of Colonel Allan McNabb, proceeded in small boats in search of the Caroline, found her fastened to the dock at Schlosser, in the State of New York, made a hostile attack upon her, expelled her crew, set fire to her, and she floated in full blaze over the great falls. In the skirmish, one Amos Durfee, a person employed on the Caroline, was killed, and for his murder, nearly two years afterward, one Alexander McLeod, a British subject, was indicted by a grand jury in Niagara county, New York. McLeod having been arrested and confined in jail, the British minister, Mr. Fox, in a note to Mr. Webster, the American Secretary of State, (March 12, 1841), demanded his immediate release on the ground that the act in which he was engaged was one of a public character, "planned and executed by persons duly empowered by Her Majesty's colonial authorities to take any steps or to do any acts which might be deemed necessary for the defence of Her Majesty's territories and for the protection of Her Majesty's subjects, and that consequently those subjects of Her Majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made personally and individually answerable to the tribunals of any foreign country."

In the meantime McLeod was brought before the Supreme Court of New York, under a writ of *habeas corpus*. Here the prisoner brought to the notice of the court, by affidavits and exhibits, the character of the Caroline, and of the expedition which destroyed her, as well as the demand of the British Government for his release.

The case was argued with great ability by counsel, and many precedents and authorities were cited. The judgment of the court was finally pronounced by Mr. Justice Cowen, who argued the question involved at great length, displaying throughout his opinion the clearness of intellect for which he was distinguished, and the exhaustive research which was his habit. Referring to the demand of the British Government for the surrender of the prisoner, he said:

"She puts herself, as we have seen, on the law of *defence* and *necessity*, and nothing is better defined, nor more familiar in any system of jurisprudence, than the juncture of circumstances which alone can tolerate the action of that law. A force which the defendant has a right to resist, must itself be within striking distance. It must be menacing and apparently able to inflict physical injury, unless prevented by the resistance which he opposes. The right of self-defence and the defence of others, standing in certain relations to the defender, depend upon the same ground; at least they are limited by the same principle. It will be sufficient, therefore, to enquire of the right so far as it is strictly personal. All writers concur in the language of Blackstone, (3 Black. Com. 4), that to warrant its exertion at all, the defendant must be forcibly assaulted. He may then repel force by force, because he cannot say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. "But," he adds, "care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for then the *defender* would himself become the *aggressor*." The condition upon which this right is thus placed, and the limits to which its exercise is confined by this eminent writer, are enough of themselves, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition or those limits. The Caroline was not in the act of making an assult upon the Canadian shore; she was not in a condition to make one; she had returned from her visit to Navy Island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever he could find her, and were, in fact obliged to sail half the width of the Niagara river, after they had entered our territory, in order to reach the boat They were the assailants and their attack might have been legally repelled by Durfee, even to the destruction of their lives."

Further on Mr. Justice Cowen quotes from Puffendorf the rule applicable to cases of private or mixed war, as follows: "If the adversary be a foreigner, we may resist him and repel him any way, at the instant he comes violently upon us; but we cannot, without the sovereign's command, either assult him while his mischief is only *in machination*, or revenge ourselves upon him after he hath performed the injury against us." Puff. b. 2, chap. 5, § 7. "The sovereign's command must," adds the learned Justice, "in order to warrant such conduct, be a *denunciation* of war."

McLeod was accordingly remanded to take his trial in the ordinary course of law, and was tried and acquitted, having proved an *alibi*.

Notwithstanding the deference which is to be paid to the opinion of so eminent a judge, it is believed that the grounds taken by him in the language above quoted, are to a great extent fallacious.

1. In the first place it is to be observed that the juncture of circumstances which can alone tolerate the action of the law of self-defence, is by no means as clearly defined—at least in the United States—as the learned justice states it to be. It is true, that on the one hand, we find the rule stated in many cases, that the danger which alone will warrant a person in striking in his defence must be *impending* and about to fall *at the time* the act of defence is resorted to, or, at least, this must be apparent to the comprehension of a reasonable man: *People* v. *Sullivan*, 3 Selden, 396; *Harrison* v. *State*, 24 Ala. 67; *Creek* v. *State*, 24 Ind. 151; *Shorter* v. *People*, 2 Comst. 193; *Logue* v. *Cowe*, 2 Wright, 265; *State* v. *Scott*, 4 Ired. 409; *Dyson* v. *State*, 26 Miss. 362; *Cotton* v. *State*, 31 Miss. 504; *Wesley* v. *State*, 37 Miss. 327; *Evans* v. *State*, 44 Miss. 762; *Head* v. *State*, 44 Miss. 731; *Rippy* v. *State*, 2 Head, 217; *Williams* v. *State*, 3 Heiskell, 376: *Lander* v. *State*, 12 Tex. 462. These cases state the general rule, and the application of it is, of course, in criminal trials, left to the jury. So, it has been said, that the *right of attack for the purpose of defence* does not arise until the person defending has done everything in his power to avoid its necessity. *People* v. *Sullivan*, *supra*; *State* v. *Shippey*, 10 Minn. 223. On the other hand, the doctrine of these last two cases is distinctly repudiated in three cases in Kentucky, where it is held that a person who has once escaped from assassination at the hands of a desparate and persevering enemy, may kill such enemy whenever and wherever he may chance to meet him, so long as such enemy gives evidence that his murderous purpose continues: *Phillips* v. *Com.* 2 Duvall, 328: *Carico* v. *Com.* 7 Bush. 124; *Bohannon* v. *Com.* 8 Bush, 481. And in three other well considered judgments, it has been declared that no general rule on the subject applicable to all cases can be laid down, but that each case must depend to a great extent upon its own exingencies: *Cotton* v. *State*, *supra*; *Patterson* v. *People*, 18 Mich, 330, 334; *Jackson* v. *State*, Supreme Court Term, 1873.

2. If no settled rule can be laid down in advance which shall determine the exingencies in which a person will be permitted to strike in his private defence, the attempt to apply to a state of private or mixed war the rules which are supposed to be settled in regard to private defence, must be entirely fallacious. Thus, in a state of civil society, we say, as was said by Mr. Justice Cowen in the case we are considering, that the right to strike in one's defence does not arise when the threatened danger exists *in machination* only; because, at this stage of the danger, it is always possible to appeal to the preventive arm of the law. But a state of war, be it public, private or mixed, brings with it an accumulation of mischief which the civil law is utterly powerless to prevent; and hence, in such cases the defender must be supposed to be remitted to a state of nature in respect of his right of defence: and in a state of nature, where there is no law to which the defender can appeal for prevention, it cannot be possible that he is obliged to sit passively and watch his enemy while he compasses his destruction, instead of attacking that enemy during his work of preparation. The principle laid down by Dr. Rutherforth, as applicable to *defence of life* in a state of nature, would seem to be the reasonable and consistent rule to apply to such cases. He says: "The law [*i.e.*, the law of nature] cannot be supposed to oblige a man to expose his life to such dangers as may be guarded against, and to wait till the danger is just coming upon him, before it allows him to secure himself." But he shows that in a state of civil society he is obliged first to appeal to the civil magistrate before he can lawfully strike in defence against a mischief which is only in preparation: Ruth, Inst. b. 1, chap. 16, § 5.

The principles insisted on by Mr. Justice Cowen would have required Col. McNabb to attack the Caroline in his open boats in the middle of the Niagara river, or while moored under the guns of Navy Island, and to capture her, if at all, at a useless expenditure of the lives of his men; and this to satisfy a punctilious rule of supposed law, devised by some casuist in his library!

CRITICISMS ON TEXT-WRITERS, REPORTERS, AND OTHER LEGAL AUTHORITIES.

We now furnish our last instalment of judicial observations and comments on the merits and demerits of reporters and text-writers. We hope yet to see a treatise—the product of some able lawyer's learned leisure—which shall form a dictionary of reference to the works on English law and indicate their respective value and importance. Meanwhile we throw another stone upon the pile of materials which must be accumulated by many hands before such a volume is possible.

CRITICISMS ON TEXT WRITERS, REPORTERS, &C.

KAIMES, LORD. "His extreme inaccuracy in what he ventures to state with respect both to the ancient common law and the modern English law, tends not a little to shake the credit of his representations of all law whatever." Per Sir William Scott, in *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. R. 92.

KEBLE'S REPORT (Third Volume). "I hold that to be a book of no great authority:" Per Ashurst, J., in *Atkins* v. *Davis*, Cald. R. 332.

KELYNG'S REPORTS. "For the case of the Regicides I refer to Sir John Kelyng's report; and, though that is a book which can never be referred to without reprobating the course which appears there to have been taken, of Judges and Crown Counsel meeting together to settle, revise, and rule beforehand the points of the trial, yet these resolutions have subsequently received the stamp of the highest authority; and we must not forget that the book was edited by Lord Holt, and the preface written by him:" Per Fitzgerald, J., in *Mulcahy* v. *Regina*, Irish R. 1 C. L. 64.

LEONARD'S REPORTS (Third Volume). In referring to these reports Nottingham, L. C., says: "which, by the way, is the best book of reports of the later ones that hath come out, without authority" [i. e. without the *imprimatur* of the judges]. *Duke of Norfolk's Case*, 3 Chan. Ca. 49.

LUSH'S PRACTICE. "A very able book of practice:" Per Coleridge, J., in *Downes* v. *Garbett*, 7 Jur. 800.

MANNING, MR. SERJEANT. His note to *King* v. *Wilson*, 5 M. & R. 156, is recognized in *Longford* v. *Selmes*, 3 Kay & J. 220.

MITFORD ON EQUITY PLEADING. "Lord Eldon, I recollect, said of Lord Redesdale's Treatise on Pleading, that it was not surprising that there should be some mistakes in it, but it was surprising that there should be so few:" Per Stuart, V. C., in *Conduitt* v. *Soane*, 4 Jur. N. S. 504.

MOLLOY. "Not usually placed in the first class of authorities upon maritime subjects:" Lord Stowell, in *The Neptune*, 1 Hagg. Adm. R. 231.—"Almost anything can be proved by citations from Molloy:" Per Lord Mansfield, C. J., in *Goss* v. *Withers*, 2 Burr. 690.

NOTES OF CASES. Referring to *Re Wedge*, 2 No. of Ca. 14, and *Jane Taylor's Case*, 4 ib. 290, Warren, J., observes: "Reports of *ex parte* motions, where the assets are inconsiderable, and where the argument of counsel was, that because an ambiguity was patent the Court might take extrinsic evidence, are not of much authority." *Sullivan* v. *Sullivan*, Ir. R. 4 Eq. 462.

NOY. "I wholly reject as only an abridgment of cases, per Serjeant Noy says when a student:" Per Twisden, J., in *Freeman* v. *Barnes*, 2 Keb. 652.

OLD REPORTERS. "It is objected that these are books (Freeman and Keble) of no authority; but if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstrative of the truth of what they report, or they could not agree:" Per Mansfield, C. J., in *Rex* v. *Genge*, Cowp. R. 16. —"The inaccuracy of the early reports should be guarded against:" Sugden on Powers, p. 135, No. 81, n. 1.—"As to Equity pleading, the old cases occurring at a time when the Courts were very strict in matters of pleading, are very valuable on the subject" (reference to *Godbott* v. *Watts*, 2 Arstr. 543): Per Wood, V. C., in *The United States* v. *McRae*, L. R. 4 Eq. at p. 338.

POTHIER. "He is as high an authority as can be had, next to the decision of a court of justice:" Per Best, J., in *Cox* v. *Tray*, 5 Barn. & Ald. 480.

PRECEDENTS OF PLEADINGS. "Where they are all the one way, they ought to be considered as great authority; but where there are a variety one way and the other, they are not of so much weight:" Per Burton, J., in *Barry* v. *McDowell*, 5 Ir. L. R. 351.

POSTLETHWAITE. "A very accurate writer on commercial subjects:" Per Lord Stowell, in *The Matchless*, 1 Hagg. Adm. R. 100.

REDFIELD ON RAILWAYS. "A book very ably written:" Per Martin, B., in *Shepherd* v. *Bristol R. R.*, L. R. 3 Exch. 196.

SELDEN'S TABLE-TALK "cannot be considered any authority on points of law:" *De Haber* v. *Queen of Portugal*, 17 Q. B. 171.

SHEPHERD'S TOUCHSTONE. "It is a work of very high authority, and contains the cream of Coke upon Littleton." Warren's Law Studies.

WYATT'S PRACTICAL REGISTER IN CHANCERY. "Not a book of authority, but it is better collected than most of the kind:" Per Lord Hardwicke in *Davis* v. *Davis*, 2 Atk. 22,

SELECTIONS.

JUDICIAL ERRORS.

What honest man, asks George Eliot, does not feel rather tickled than otherwise on being taken for a housebreaker? Nay, how innocent soever he be, let him tremble. For, in the words of Chief Baron Pollock, "The annals of our criminal courts, unhappily, record many various instances where, by perjury or mistake (especially as to identity), by blunder or misapprehension, and sometimes by the misconduct and fatal indiscretion of the accused himself, a conviction has taken place which has been considered, upon further investigation, to be erroneous." One is panic-stricken, and takes to flight—

His flight was madness: when our actions do not,
Our fears do make us traitors.

Another, overwhelmed by the insensate impulse of some strange mischance, confesses. Fatal error! In vain would he

Unspeak his own detraction, here abjure
The taints and blame he laid upon himself.

And how many, paralysed in the coils of immitigable circumstance, have perished the victims of judicial errors! It may, indeed, be hoped that now-a-days instances of such fatal misprisions of justice are extremely rare. The reaction produced in the public mind, in the early part of the present century, by the occurrence of cases of wrongful conviction, such as that of Eliza Fenning, and by the increased sense of the value of human life, still operates beneficially. And not only is the law more humane, but those who administer it are now more cautious. Yet are we warned from time to time, by startling exceptions, that no precaution can be too great, and that whatever protection against error is afforded by the law of evidence cannot be too unswervingly sustained. It is not very long since that two brothers were sentenced to death in the county of Limerick—and one of them hanged—for a murder which was afterwards, in time to save the other brother, confessed by another criminal, who was himself under sentence of death for a different murder. We have not yet forgotten how Pelizzioni was sentenced to be hanged for a murder of which he was guiltless, and for which he would have been hanged but for the persevering exertions of Mr. Negretti. And it was but in 1869 that Bisgrove and Sweet were convicted, when, had it not been for the timely compunction of Bisgrove, Sweet, though wholly innocent, would have been hanged. In the same year an extraordinary case of a judicial error was brought to light by an appeal before the Imperial Court of Nancy. Adèle Bernard, a girl twenty-two years of age, had been brought to trial, in 1868, on a charge of infanticide. The prosecution alleged that in October, 1868, she clandestinely gave birth to a child and threw it into a pigstye, where it was eaten. This allegation was confirmed by her own confession both before the Judge of Instruction and in open court. Moreover, a midwife and a parochial surgeon certified that they examined her immediately after her arrest, and found traces of recent delivery. On this evidence the correctional tribunal sentenced her to six months' imprisonment for the concealment of the birth of a child who was not proved to have been born alive. She went to prison accordingly, and about a month later, on December 24, she was delivered of a fine healthy child, perfectly formed, and born in altogether normal conditions. The time allowed for her appeal against a sentence which circumstances appeared to show was manifestly unjustifiable had then expired, but the public prosecutor lodged an appeal in her interest. When interrogated by the president of the Appeal Court, she said that she had been induced to make a false confession by her mother and the midwife, who told her that if she confessed the crime she would get off easily, whereas if she persisted in denying the accusation she would certainly be condemned to fifteen or twenty years' imprisonment with hard labour. Some medical evidence was produced before the Court of Appeal to show the bare possibility of a superfetation. But the Court rejected this hypothesis; held that she had been impelled by intimidation to make a confession for which there was no foundation; and reversed the verdict against her. One is reminded of the similar case of Madame Doize, an innocent woman who had been driven to confess herself guilty of a murder in order to get released from the torture of solitary confinement.

O white innocence,
That thou shouldst wear the mask of guilt to hide
Thine awful and serene countenance
From those who know thee not!

The case of the conviction of the Boorn brothers for the murder of Russell Colvin is pretty well known from the statement in "Greenleaf on Evidence." But a full report of it* has recently been published by one of the counsel at the trial, taken from the minutes of Chief Justice Chase, who presided at the trial (uncle of the late Chief Justice of the United States). In 1812 Barney Boorn, his wife, two sons, Stephen and Jesse, a daughter, and her husband, Russell Colvin, lived in the town of Manchester, Vermont. Colvin was a man of weak intellect, at times partially insane, and accustomed occasionally to wander away for weeks without giving an account of himself. In May, 1812, he suddenly disappeared. But now years went by and he came not back. Suspicion became rife. It was remembered that the brothers Boorn and Colvin had not lived amicably together; and it was reported that one of the brothers had stated that Colvin was dead, and the other that "they had put him where potatoes would not freeze." An uncle of the young men dreamed three times that Colvin came to him, and indicated that his remains lay in an old cellar hole, used as a place for burying potatoes. Then a hat was found near the homestead, and recognised as Colvin's; and next, some bones were dug up out of a hollow stump on the property, and pronounced to be human bones. Accordingly, in 1819, the brothers were arrested. Mr. Sargeant says:—"The country was scoured for evidence. The old cellar hole was re-opened, and a large knife, a pen-knife, and a button were found. The large knife and button were identified as having belonged to Colvin. The bones found in the hollow stump were brought into court, and four physicians were called, who, after an examination, pronounced them to be the bones of a human foot, together with some toe-nails, and perhaps a thumb-nail. One of the physicians, who lived in Arlington, after thinking the matter over, concluded there might, after all, be a doubt about it, and on examining a human skeleton at home was convinced that he had been mistaken, and the next day went into court and retracted his former statement. The other physicians were not satisfied, and to settle the matter sent to a neighboring town and had a leg that had been amputated and buried, exhumed and brought into court, and on comparing the two specimens, every one was convinced that the bones alleged to be Colvin's were not human. This dampened the public ardour somewhat, and it is probable that Jesse would have been discharged, but that on Saturday he made a statement that he believed Colvin had been murdered, and that his brother Stephen was the murderer; that Stephen had told him the previous winter, that he (Stephen) and Colvin were hoeing in what was called the "Glazier lot;" that they had a quarrel, and Colvin attempted to run away; that he struck him on the back part of the head with a club, and fractured his skull; that he (Jesse) did not know what had become of the body, but mentioned several places where it might be found. In September following, an indictment was found against both the brothers, the principal witness being a fellow-prisoner, who testified that Jesse had made a confession to him one night after awaking much disturbed. After the indictment was found they were visited in gaol by men of character and influence, and men of the law, who declared that the case was clear against them, but that if they confessed an attempt would be made to have their sentence commuted. Thereupon, Stephen made a written confession (coinciding in its general substance with what circumstantial evidence there was) that he killed Colvin, adding that it was done in a quarrel, and in self-defence—but the sequel shows how inconclusive may be even a written "death warrant" extracted from the self-condemned. The trial took place in November. The evidence against them was wholly circumstantial, and mostly unimportant, with the exception of the confessions. A verdict of murder was returned, and they were sentenced to be executed on January 28, 1820—all efforts failing to secure a commutation. They then protested their innocence; and an advertisement was inserted in the newspapers, asking information respecting Colvin. On November 29, 1819, it attracted the notice of Mr. Chadwick, of New Jersey, who recognised the description as that of a man living at Dover, in his

* "The Trial, Confession, and Conviction of Jesse and Stephen Boorn for the murder of Russell Colvin, and the return of the man supposed to have been murdered." By Hon. Leonard Sargeant, ex-Lieutenant-Governor of Vermont. Manchester: D. K. Simonds, 1873.

State. The man was brought to Vermont, and at once recognised and identified by scores of people as the veritable Colvin. He was partially insane and could give no reason for his absence, but freely admitted that the Boorns had neither hurt him nor frightened him away. The Boorns were released, although the Court was at a loss to know what course to pursue for the purpose.

We have selected these cases, and presented the facts in detail, for the purpose especially of illustrating the expediency of upholding a doctrine, that a conviction should not be had merely upon the confession of the prisoner without any other proof of the *corpus delicti*—a doctrine which has been recently questioned in the case of *Regina* v. *Unkles*, 8 Ir. L. T. R. 38.—*Irish Law Times.*

A DISQUISITION ON NAMES.

The case of *Kinnersley* v. *Knott*, 7 C. B. 980; 18 L. J. C. P. 281, has long been quoted as a solemn adjudication on questions of misnomers in pleadings; but now that the ancient strictness in pleading, even at common law, is no longer insisted upon, the most valuable portion of that case must be regarded to be that portion of it which does not appear in the reports, but which has been furnished us through the courtesy of Professor Ordronaux, State Commissioner in Lunacy:

In this case the plaintiff, as indorser of a bill of exchange of £65 10s., brought an action against the defendant as the acceptor, and declared against him by the name of "John M. Knott," being that by which he had signed the note, but without stating in the declaration that the defendant had so signed it. To this declaration the defendant demurred specially, and assigned as the ground of his demurrer that the declaration had not properly set forth his Christian name, nor assigned any reason under statute 3rd and 4th Wm. IV., ch. 42, for not doing so.

Mr. Serjeant Talfourd, on behalf of the defendant, said their lordships were often told that a case rested on a word, but here it rested on a letter only. It was his duty to contend, both upon principle and precedent, that this was a good ground of demurrer. The court had decided that the letter "I," being a vowel and capable of pronunciation, might be taken to be a Christian name, but they had at the same time intimated that such would not be the case with a consonant, which, as it could not be sounded alone, would be deemed to be not a name but an initial letter only. Now, in this case, "M" was plainly an initial letter, for it could not be pronounced by itself. Standing by itself, therefore, it meant nothing. He was sure a very eminent authoress (Miss Edgeworth), whose loss they had recently to lament, was of opinion that all the letters of the alphabet, by the mode in which they were explained, were rendered little more (to use judicial language) than a "mockery, a delusion, and a snare"—that A B C D, etc., meant A B C D, etc., and nothing more; but even if it would avail him, he feared his friend could not rely upon such authority.

The Lord Chief Justice: You say the "M" means nothing—then let it mean nothing. Would a scratch be demurrable?

Mr. Serjeant Talfourd: I say that "M," by itself, cannot be pronounced and means nothing; but here it does mean something, which something ought to have been stated or explained under the statute. Suppose a person of the name of John Robbins, the court would surely hold a declaration bad which described him by the word John and figure of the red-breast? In like manner the court would hold this declaration bad because it either put a sign for one of the defendant's names or described it by the initial letter. A consonant by itself was a mere sound without meaning. The letter H, indeed, by the custom of London and some other places, was no sound at all [laughter], though elsewhere it often protruded itself on all occasions. [Renewed laughter.]

Mr. Justice Maule: I had a policeman before me as a witness the other day, who told me he belonged to the "hen" division, and it was not until at some farther stage in the case that I discovered it was not a division designated by the name of a bird, but by "N," the alphabetical letter. [Great laughter.]

Mr. Serjeant Talfourd: It will probably be contended that this person might have been christened in the manner that the bill is signed, but I submit that the court will not intend that. It is true, we often hear of absurd Christian names, and

I myself remember when many persons insisted upon having their children christened "Sir Francis Burdett."

Mr. Justice Maule: I remember a very learned and ingenious argument by Mr. Jardine, when I sat in the Court of Exchequer, by which he proved to the satisfaction of the court, that the Christian name is the real name, and the surname is only an addition; that in the case of John Stiles, for instance, John is the real name, but Stiles was originally added only because the ancestor lived near one.

Mr. Serjeant Talfourd: Then having, I hope, convinced the court that "M" by itself cannot be a name, and means nothing, I submit it must be understood as an initial, and therefore that it ought to have been so stated.

Mr. Justice Maule: Pleadings are in writing, therefore the law presumes that the court can read and know its letters. Vowels may be names, and in "Sully's Memoirs" a Monsieur D'O. is spoken of; but consonants cannot be names alone, as they require, in pronunciation, the aid of vowels.

Mr. Serjeant Talfourd: Yes; but in the case of consonants they are taken to be but initials when used alone in law and literature. Throughout the ponderous volumes of Richardson's novels, for instance, we find persons spoken of in this manner. In "Clarissa Harlowe," for instance, "Lord M." is mentioned throughout four volumes, but it could never be understood that this was the real name, or anything more than an initial. Again, an author well known to the Lord Chief (Charles Lamb) wrote a farce entitled simply "Mr. H.," but the whole turns upon this being the initial only of a name he wished to conceal. In his prologue to it he humorously says:

"When the dispensers of the public lash
Soft penance give; a letter and a dash—;
When vice, reduced in size, shrinks to a failing,
And loses half her progress by curtailing,
Faux pas are told in such a modest way,
The affair of Colonel B— with Mrs. A—,
You must forgive them; for what is there, say,
Which such a pliant Vowel must not grant
To such a very pressing Consonant?
Or who poetic justice dares dispute
When, mildly melting at a lover's suit,
The wife's a Liquid, her good man a Mute."

And he concludes by an appeal to the consequences of this "mincing fashion," which (said the learned serjeant) I trust will have great weight with your lordships, for he adds—

"Oh should this mincing fashion ever spread
From names of living heroes to the dead,
How would ambition sigh and hang the head,
As each loved syllable should melt away,
Her Alexander turned into great A,
A single C her Cæsar to express,
Her Scipio sunk into a Roman S—
And nick'd and dock'd to this new mode of speech,
Great Hannibal himself to Mr. H—."

The learned serjeant then cited and argued upon a variety of cases on this side of the question, and submitted that their lordships ought to decide in favour of his client.

Mr. F. Robinson, on behalf of the plaintiff, said he did not deny the right of every Englishman to be called by every name given him at his baptism; but he submitted that before he claimed to be privileged on that account, he must show that his privilodge has been invaded. Here it was assumed throughout that the "M" in the name "John M. Knott," was an initial letter, but he believed there were instances in which persons had been christened in this remarkable way in this country. He was told there was lately a bank director who was christened "Edmond R. Robinson;" but were it otherwise in this country, did it follow that in no other country, Jew, Turk, or heathen might not use such names? If, however, it were an initial letter, why did not his friend apply to have the right name substituted? If it were a misdescription, it was pleadable in abatement. Such a name might originate from an error of the clergyman at the christening.

The Lord Chief Justice: In the upper circles of society it is customary to hand in the name in writing, which prevents mistake.

Mr. Justice Maule: The practice of the circles with which I am conversant was, and I believe is, to give the name verbally. There was, however, a gentleman, the sheriff of one of the counties I went through on circuit, Mr. John Wanley Sawbridge Erle Drax, whose name was probably handed in. [Laughter.]

Mr. Robinson: There are many Scotch and French names, such as M'Donald, M'Taggart, D'Harcourt, D'Horsey—how are such names, to be set out in the pleadings? Suppose, again, a man's name were the name of a river, as X?

Mr. Justice Maule: But that is not

spelt so: it is *idem per idem*, X for ex. Beer, I believe is sometimes called X, but not water. [Laughter.]

Mr. Robinson: There are some of our names which are precisely those of letters, as Gee, Jay, Kay, etc.

Mr. Justice Maule: But here it is not *sonans*, only *consonans*, and they can not be sounded without other letters.

Mr. Robinson: Their lordships should remember the existence of a publication called the *Fonetic Nuz*, and unless they meant to give a "heavy blow and great discouragement" to that rising science, he hoped they would not decide against his client. [Laughter.] But he had seriously to submit that by demurring to this declaration the defendant admitted, on legal principles, that his name was that which was stated in the declaration.

Mr. Justice Creswel referred to and distinguished this case from the case of *Roberts* v. *Moon*, in 5 Term Reports, where a plea in abatement of misnomer, beginning "and the said Richard, sued by the name of Robert," was held bad.

Mr. Justice Maule suggested that as £65 10s. depended on the question, it would be better for plaintiff to amend.

Mr. Robinson declined to do so, and contended no case could be cited directly in support of the demurrer, and therefore that the court should decide in favour of the plaintiff.

Mr. Serjeant Talfourd having replied,

The Lord Chief Justice: The various stages in the argument in this case have been already discussed and decided. The courts have decided that they will not assume that a consonant letter expresses a name, but they will assume it expresses an initial only; and they further decided that the insertion of an initial letter instead of a name is a ground of demurrer, and is not merely irregularity. In the case of *Nash* v. *Collier*, this court decided that a demurrer to the declaration which describes the defendant's name as Wm. Henry W. Collier was not frivolous, and gave a strong intimation, which the plaintiff had the good sense to attend to, that he ought to amend his declaration. That decision was acted upon by the Court of Exchequer in the subsequent case of *Miller* v. *Hayes*, and as it appears to me the case is precisely similar to the present, I think we must decide in favour of the demurrer.—*Pittsburgh Legal Jour.*

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

[Before Richards, C. J.; Spragge, C.; and Hagarty, C. J. C. P.]

East Toronto Election Petition.

Woodhouse, *Petitioner*, v. O'Donohoe, *Respondent.*

Hiring teams—Corrupt practices—Bribery.

Held, (1). That the hiring of teams, &c., is not a "corrupt practice" within the meaning of sec. 3 of Controverted Election Act, 1873, unless the hiring amounts to bribery.

2. That the words "Act of the Parliament of Canada" in that section refer to an Act of the Dominion of Canada.

[Election Court—June 20, 1874.]

The petitioner alleged, in the eighth clause of his petition, that the respondent, during the election, hired cabs and other vehicles to carry voters to and from the polls, and that owing to such hiring the election was void.

The respondent took a preliminary objection to this clause on the ground that the allegation was immaterial in this, that it would not, even if true, avoid the election.

A summons being obtained to strike out the clause objected to,

Bethune supported it. The hiring of teams or cabs does not make the election void. That is only an illegal act under the 3rd section of the "Corrupt Practices Prevention Act, 1860," and does not come within the meaning of the 3rd section of the "Controverted Elections Act, 1873," that section confining the offences to those defined by "Act of the Parliament of Canada." The "Act of the Parliament of Canada" there referred to meant the "Act of the Dominion of Canada." The hiring of cabs and vehicles in England is not a "corrupt practice:" *Staleybridge case*, 1 O'M. & H. 66.

Till, for petitioner, showed cause. The hiring of cabs and vehicles as mentioned in the 3rd section of "The Corrupt Practices Prevention Act, 1860," being an illegal act, comes within the meaning of the words "corrupt practice" mentioned in the 3rd section of the "Controverted Elections Act, 1873." In any case the payment of an excessive sum would amount to bribery, and if so, the clause ought not to be struck out.

Richards, C. J.—We think the hiring of cabs and vehicles is not a "corrupt practice" within the meaning of those words in section 3 of the "Controverted Elections Act, 1873." The "Act of the Parliament of Canada" there

mentioned refers to an "Act of the Dominion of Canada." But the clause will not be struck out, as the hiring might amount to bribery, and the petitioner should have the right to give evidence under it for that purpose.

Spragge, C., and Hagarty, C.J., concurred.

Niagara Election Petition.

Black et al, *Petitioners*, v. J. B. Plumb, *Respondent*.

Form of recognizance—Signature of Sureties not requisite.

The recognizance filed in this case was in the usual form, but was not signed as directed by Rule 24 of the General Rules of the Election Court.

Held, that the recognizance was nevertheless valid.

[Election Court—June 26, 1874.]

A summons was obtained from the Clerk of the Election Court to set aside the recognizance filed herein, and to stay proceedings on the petition, on the ground (amongst others) that the alleged recognizance was void and insufficient, because it was not signed by the persons purporting to enter into it, pursuant to Rule 24 of the Election Court.

Hodgins, Q.C., for the petitioner, showed cause. The security to be given is a recognizance, and is so called in the Act and Rules. The requirements of a recognizance are well understood, and it is not one of them that the persons to be bound by it should sign it, the acknowledgment and taking being sufficient: Burns' Justice, Vol. 5, p. 71; *The Queen* v. *St. Albans*, 8 A. & E. 932.

O'Brien, for the respondent, supported the summons. Sec. 11, ss. 4, 5 of 36 Vict. cap. 28, C directs that "Security * * shall be given in the prescribed manner, if any;" and Rule 24 prescribes the manner, which is by a document styled a recognizance, which, in the form given, is directed to be signed, thus: "Signed (*signature of securities*)." True that Rule 24 says the form "*may* be as follows," but it does not follow from this expression that the plain direction of the Rule should be ignored. The same word, "may," is used in several cases in an imperative sense. Our Election Rules are the same as the English Rules, and the Judges who framed them appear to have required the signature of the sureties in addition to their acknowledgment, which would have been sufficient for a recognizance at common law. Probably the signature was required as a greater precaution in these cases, for purposes of identification, &c., not being taken in open court, and the words of the rule should not be thrown aside as devoid of meaning. If there is any doubt as to the validity of the document it should be set aside, so that the respondent may not be deprived of security for his costs. The petitioner is not shut out, as he can pay money into court in lieu of the security.

Mr. Dalton, Clerk of Election Court. Rule 24 says that "the recognizance *shall* contain the name and usual place of abode of each surety, &c., and *may* be as follows." The form, therefore, is not material, except as to certain particulars, and a recognizance is good without the signature of those entering into it. I must therefore disallow this objection to the security.

A summons by way of appeal was thereupon obtained from the Chancellor, which was heard before the Election Court, and was argued by the same Counsel. *O'Brien*, for the respondent, referring in addition to the case of *Cousins* v. *Heley*, 34 U.C. Q.B. 74, where, under similar words in Con. Stat. U.C., cap. 29, sec. 8, "the bond and assignment may be in the form B," and the form saying, "signed &c., in presence of," it was held that a subscribing witness was necessary

Richards, C.J. We think the security is sufficient. The document required is a "recognizance," and a recognizance does not require a signature for its validity.

Summons discharged with costs.

CHANCERY CHAMBERS.

NOTES OF CASES.

Re Halletette.

Administration order.

[June 8, 1874.—Blake, V. C.]

An administrator is entitled *ex parte* to an administration order, where the liabilities of the estate exceed the assets.

Campbell v. Edwards.

Staying proceedings pending rehearing.

[June 15, 1874.—The Chancellor.]

On motion to stay proceedings pending rehearing, the Court will follow the practice laid down in Con. Stat. U.C. H. 13., with reference to staying proceedings pending an appeal to the Court of Appeal.

Where, therefore, a decree had been made, directing the defendant to pay to the plaintiff a large sum of money and costs, an order was made, on the application of the defendant, who intended to rehear, staying proceedings in the meanwhile, upon the defendant's giving security for the due payment of the said money and costs, in case the decree should be wholly or in part affirmed upon the rehearing.

MUNICIPAL ELECTION CASE.

Reg. ex rel. Campbell v. O'Malley.

Quo Warranto Summons—Proof of Relator's status.

Held, That the proper proof of the right of an elector to be a relator is the production of the roll or an authenticated copy. His own statement on oath is insufficient.

[St. Thomas—April 17, 1874.]

On the hearing of this case the relator was called as a witness. He stated that he was an elector of the Township, but no other evidence of the fact was tendered, and the roll was not produced.

McMahon, for defendant. This evidence is not sufficient. The proper proof would have been the production of the roll. Proof of the relator's qualification was material to his case, and not having been given, the summons must be discharged.

McDougall for relator, *contra.*

Hughes, Co. J.—I can see nothing in this case to take it out of the general rule applicable in all such cases. The statute requires that the election complained of by this proceeding must be questioned by some person having an interest in the election, either as a candidate or an elector. In this case the statement sets forth that the relator claims interest as an elector. Under the previously existing statute, the practice was to have the parties before the Court by written statements and answers, supported by affidavit; and the decisions cited by the relator in this case refer to that practice; but they are now inapplicable. The law and the practice relating to such matters are now so changed that the respondent does not make his answer in writing, so that he cannot be now presumed to have waived his right to object to any defect in the relator's case.

I therefore think it was the duty of the relator to make good all his principal allegations, the first of which was (in the order of importance) that he himself had an interest in the election so as to give him the right to be heard in this Court and to object to the election. There were other necessary allegations in his statement that required proof; but a written admission on the part of the respondent had been secured by the relator which covered them all, except those referring to alleged acts of bribery and corruption. I am therefore led to infer that the relator came before me expecting to prove his interest as an elector as well as the acts of alleged bribery. The cases are numerous which go to show the kind of evidence that should have been offered to support the relator's interest—that he was an elector. For purposes of the election the voters' list would supply it, if at all, and I apprehend that that which the statute provides for on that occasion would be the best and proper proof of it here, although an examined copy, duly proved, would have answered the same purpose: *Reed* v. *Lamb*, Ex. R. N. S. 75. It has been held in the Court of Queen's Bench in England, in *Rex* v. *Parry*, 6 A. & E. 818, that an affidavit alone does not show, in a *quo warranto* proceeding, sufficient ground for the information, but the relator's interest should be shown by other and more competent proof. In *Rex* v. *Inhabitants of Coppull*, 2 East, 25, Lord Kenyon held that parol evidence could not be given of rates which were not produced nor excuse furnished for not producing—that the best evidence which the nature of the case would admit of should have been offered; and Grose, J., said that "it is in every day's experience to reject parol evidence of a writing which may and ought to be produced."

In the absence of any legal evidence of the contents of the voters' list or of the assessment roll, I think the relator was bound to produce it in this case, and that he could not be allowed to state whether his own name was inserted in it; or (putting it in another way) he could not be allowed to say whether or not he were *an elector*, when the law makes the insertion on the last revised assessment list the indisputable test of his right to vote, and *ergo* of his being legally an elector The case of *Justice* v. *Elstob*, 1 F. & F. 256, decided at Nisi Prius in England, was similar in principle. There Mr. Justice Hill said that in the absence of any evidence of the contents of a rate book, a collector could not be asked to say whether a particular person's name was on the rate. In "Taylor on Evidence," 6th ed. vol i., sec, 380, it is said: "Oral evidence cannot be substituted for any writing, the existence or contents of which are disputed, and which is material to the issue between the parties. * * * The fact of rating cannot be legally proved without the production of the rate books."

I therefore think, as the relator's case failed in one of the first essentials, the summons should be discharged, and that judgment should be given for the respondent with costs.

Summons discharged with costs.

IRISH REPORTS.

COURT OF QUEEN'S BENCH.

Reede and Goodman v. Pipon.

C. L. P. Act, 1853, *ss.* 31, 34—*Extra territorial jurisdiction—Substitution of service—Service on defendant in person, out of the jurisdiction—Conclusiveness of decisions in the Court where made.*

The Courts of Common Law have jurisdiction to order that service of a writ of summons and plaint by serving the defendant in person, out of the jurisdiction, shall be deemed good service.

Kelly v. *Dixon*, Ir. R. 6 C. L. 25, discussed; and (dub., Fitzgerald and Barry, J.J.,) followed.

[Ir. L. T. Rep., Feb. 14, 1874.]

Cause shown against making absolute a conditional order, obtained by the plaintiffs, that service of the writ of summons and plaint and order upon the defendant in Jersey be deemed good service of the writ.

The action was brought to recover £100, 15s. 6d. for work done by the plaintiffs, as attorneys for the defendant, and for money paid, and on accounts stated. The order had been obtained upon an affidavit of the plaintiffs, stating that the defendant, Thomas Le Breton Pipon, permanently resided at La Maisonette, St. Peter's, in the island of Jersey, out of the jurisdiction of the Court, and that he was possessed of property in that island; that he had no agent, place of business, or property within the jurisdiction of the Court; that the causes of action arose within the jurisdiction; that part of the services respecting which the action was brought were rendered in defending certain actions brought in Dublin against the defendant's son, while he was a minor, upon the defendant's retainer; and that other part of said services were rendered in defending another action in Dublin against defendant's son after he had come of age, and also for miscellaneous professional services, in reference to his son's affairs, rendered upon the defendant's retainer; that the defendant attended as a witness upon some of the trials; that when the costs were being taxed, the plaintiffs intimated to the defendant the fact, and received from him a communication, forwarding a banker's draft for £55, and requesting to be furnished by them with, as soon as convenient, their account for professional charges; and that the plaintiffs were advised and believed that the recovery of said costs and money would be attended with great difficulty, expense, and delay in Jersey, but that, in the event of procuring a judgment in the Court in Ireland, it could, without difficulty and at a trifling expense, be made available against the property of the defendant in Jersey. The motion stood over from Consolidated Chamber, by direction of Morris, J., and now,

Cleary, on behalf of the defendant, showed cause. The Court has no power to order service to be had upon the defendant in person out of the jurisdiction; but, even if the Court have the power, it is one which should not be exercised, in the discretion of the Court, in this instance. It does not appear that the defendant is a British subject, or that he was ever personally in this country; and he cannot be said to be constructively within or subject to this jurisdiction, since he has no agent, place of business or property in this country—and, if a judgment were had against him here, there is nothing to show that it could be made to attach either his person or property. Unless, therefore, jurisdiction has been given by the express language of the Legislature, its exercise here would contravene the general principles upon which territorial jurisdiction depends, *Cookney* v. *Anderson*,* 1 De G. J. & S. 365, 379. Morris, J., in Chamber, when directing that the motion should stand over, intimated that his impression had heretofore been that the Irish Courts had no power to effect service of process upon a defendant in person out of the jurisdiction; and in *Knox* v. *Lord Rosehill*, not reported, Dowse, B., questioned whether service could in such case be ordered to be made merely by a registered letter.†

[O'Brien, J.—We decided the contrary in *Kelly* v. *Dixon*, Ir. R. 6 C. L. 25; and as I have been informed by an officer of the Common Pleas, that Court has followed our decision. Barry, J.—It may be said that "substitution of service" is a different thing from an order directing personal service. I may mention that, in granting the conditional order in this case, I had regard to section 31 of the C. L. P. Act, 1853. Fitzgerald, J.—The words "or other sufficient grounds," in section 34, seem to mean for substitution of service.]

The Court of Exchequer refuses to grant orders on the authority of *Kelly* v. *Dixon*.

* See as to this decision, *Steele* v. *Stewart*, 33 L. J. Ch. 190; *Foley* v. *Maillardet*, 9 L. T. N. S. 643; *Osborne* v. *Osborne*, 2 Ir. L. T. 58; *Newland* v. *Arthur*, ib., 316; *Frizelle* v. *Cotton*, ib. 4 105. In Bankruptcy, see *Re O'Loghlen*, L. R. 6 Ch. Ap. 406; *Re Williams*, 28 L. T. N. S. 488; *Re Vaughan*, 8 N. R. 298.—Ed. *Ir. L. T. Rep.*

† See reply of Morris, J., to the Eng. and Ir. L. and Ch. Com. (1863), 7 Ir. L. T. 494. See also *Barre* v. *M'Neight*, 8 Ir. L. T. 64 *bis.*; and observations in *Knox* v. *Lord Rosehill*, 7 Ir. L. T. 504.—Ed. *Ir. L. T. Rep.*

In that case *Dixon* v. *Capes*, 11 Ir. C. L. 345, was not cited, where it was held by the Court of Exchequer that the words in section 34, "or on other good and sufficient grounds," mean grounds of the same character as those enumerated.* The preamble of the Act shows that it was passed merely to simplify and amend procedure, and not to enlarge jurisdiction.† It virtually enacts the law previously existing, as declared by judicial decision regarding substitution of service. The terms of 43 Geo. 3, c. 53, s. 8, were most extensive; and yet, it was a matter of controversy whether that provision applied to a person out of the jurisdiction at all—and it was never applied unless the defendant was, at least, constructively within the jurisdiction, as by having an agent here, *Phelan* v. *Johnson*, 7 Ir. L. R. 527.

[FITZGERALD, J.—Your argument goes to this, that, being made without jurisdiction, the order is a nullity; and if so, that there would be no authority to enforce it, or to affect the defendant. BARRY, J.—Do you admit that the defendant has sufficient notice of the proceedings within the principles of natural justice, according to *Sheehy* v. *The Professional Life Assurance Co.*, 13 C. B. 787?]

That is conceded, and, therefore, there would not be a defence in that regard to an action on the judgment in Jersey. But the notice has been effected by an excess of jurisdiction, to which we are now entitled to except, and which is not cured by our appearing for that purpose, *Cookney* v. *Anderson*, *supra*.

[WHITESIDE, C. J., referred to *Reilly* v. *White*, 11 Ir. C. L. R. 142].

A defendant may be present by his agent, as well as act by an agent. But, there is no more power to serve him in person out of the jurisdiction than to substitute service on him by serving an agent out of the jurisdiction. Sections 31-33 relate to service within the jurisdiction. Section 34 relates to substitution—1st. Where the defendant is within the jurisdiction, and avoiding service; and 2nd. Where a defendant is without the jurisdiction, and has an agent within it. The words "or on other good and sufficient grounds" may receive application by dealing thereunder with defendants who are within the jurisdiction, but cannot be served under the previous section; thus by serving a prisoner or lunatic by substituting service on the governor of the gaol or keeper of the asylum.‡

[WHITESIDE, C. J.—Must a person who has "removed to avoid service" have an agent here?"]

It may be that a person cannot, in the eye of the law, be said to change his domicile within the jurisdiction by absconding, with the intention of defeating process of law;§ and if his place of abode is still to be considered as within the jurisdiction, it is unnecessary that he should have an agent here. At all events, it is unnecessary to press this argument to the extent of saying that a person so removing could not be served in person; although probably he should be served by some mode other than by service in person. In this case there is no reason why the defendant should be deprived of the right of having a suit against him disposed of in his own forum; and the argument on the other side must go to the extent of contending that a defendant may be served by sending a telegram to San Francisco.

[BARRY, J.—The English C. L. P. Act made provision for serving a foreigner in person. The Irish Act is founded on it to a great extent; and may it not be argued that it was intended in the one section of our Act to comprise everything to which the English provisions on the subject extended?]

The powers given by the English Act were carefully defined and limited, not only with a view to secure private rights, but to prevent the sovereignty of the State coming into conflict with others, C. L. P. Act, (Eng.), 1852, s. 18; Day C. L. P. A. 45. It could not have been intended that the provisions contained in three or four special enactments in the English Act were to be spelled out from as many words in the Irish. In the Irish Act no inquiry precedent is enforced as to whether the defendant is a British subject, with a view to prevent a violation of sovereignty; but, if it were in-

* By inadvertence the reference of Hughes, B., to section 31 was not cited.—ED. *I. L. T. Rep.*

† Compare title of C. L. P. A. Act., 1856. And as to construction of the Acts see *Sichel* v. *Borch*, 2 H. & C. 967; *Jackson* v. *Spittal*, L. R. 5, C. P. 550; *Carlisle* v. *Whalley*, L. R. 2, H. L. 416.—ED. *Ir. L. T. Rep.*

‡ Compare on the construction of similar words in 13 & 14 Vic, 18, 9, *Sheehy* v. *Professional Life Assurance Co.*, 3 C. B. N. S. 597. As to substitution of service on lunatics, see *Wilmot* v. *Marmion*, 8 Ir. L. R. 224; *Vance* v. *O'Connor*, 11 ib. 60; *Sweeny* v. *Shee*, 2 Ir. L. T. 574; *Kimberley* v. *Alleyne*, 2 H. & C. 223, 11 W. R. 757; *Dennison* v. *Harding*, 15 W. R. 346, 2 W. N. 17; *sed vide Ridgeway* v. *Cannon*, 23 L. T. 143, 2 W. R. 473; *Holmes* v. *Sweeny*, 24 L. J. C. P. 24; *Williamson* v. *Maggs*, 28 L. J. Ex. 5 7 W. R. 50 As to service on defendant in prison, see *Maguire* v. *Gardiner*, 4 Ir. L. R. 310; *Cosby* v. *Robinson*, 5 Ir. Jur. N. S. 37; *Dawson* v. *Le Capelaine*, 21 L. J. Ex. 219—ED. *Ir. L. T. Rep.*

§ See *Re Williams*, 28 L. T. N. S. 488—ED. *Ir. L. T. Rep.*

tended to confer this jurisdiction, the first care of the Legislature would have been, by enforcing such inquiries, to prevent the civil power of the State from coming into conflict with that of other States. And it is to be observed that the English Act contains provisions of a peculiar character as to the mode of procedure to be subsequently adopted, so that, instead of enabling final judgment to be marked by default in the ordinary way, special safeguards are ordained compensatory to a defendant for the deprivation of his right of being sued in his own forum. Here, if the defendant is to be sued in this country, the plaintiffs can gain nothing thereby; they must seek a remedy by another distinct action in Jersey on the Irish judgment; and the defendant is thus harassed by a double procedure, while one tribunal would have given the plaintiffs redress.

Holmes, contra.—Except from his name and address, there is nothing to show that the defendant is a foreigner; and he does not suggest even that he has a case on the merits.

[WHITESIDE, C. J.—His letters show that he can write English in the purest vernacular. BARRY, J.—And I may add—for I know something about it—that he has very wisely abstained from going into the merits.]

It has been settled by *Kelly* v. *Dixon* that the jurisdiction here in question exists, and will be exercised in a fitting case. This case was not argued or fully opened before Morris, J., and he expressed nothing approaching to a final opinion upon it. The Court of Common pleas have made similar orders to that made in *Kelly* v. *Dixon*, as I myself can vouch. The question then is whether this Court will follow its own practice, or permit the same question to be re-argued which was settled in *Kelly* v. *Dixon*.*

He was then stopped by the Court.

WHITESIDE, C.J.—I think that the conditional order in this case should be made absolute. We have before us the case of *Kelly* and *Dixon*, decided in this Court by the full Court—decided consistently with justice, and in furtherance of a beneficial purpose. It does not appear that any case conflicts with the decision there made. The Court of Common Pleas appear to have followed it, and we cannot now review or reconsider our decision. It is as if counsel came in the day after that decision and asked us to review the very matter we had decided. It is of importance that a rule, once made (even apart from whatever may be its intrinsic value), should be steadily and consistently adhered to;† and though we respect the arguments urged on behalf of the defendant by his counsel, yet, looking to the words of the Act of Parliament, and the decision in *Kelly* v. *Dixon*, which has been adopted by a Court of co-ordinate jurisdiction and not impugned by any, we cannot proceed further with this motion. I may, however, add that I have been much impressed by what is said by the Chief Baron, in *Reilly* v. *White* (*ante*). The order must be made absolute.

FITZGERALD, J.—I shall merely add that, although I was one of the members of the Court by whom the case of *Kelly* v. *Dixon* was decided, and was myself a party to that decision, I would personally desire a reconsideration of the case, as I entertain considerable doubts relative to its correctness; but we have decided in that case a point of practice, and when we are now asked not to follow it, it does seem as if the day afterwards another counsel came in and asked us to re hear the case—and that although followed by another Court. It wowld be a different thing if that case had been quarreled with by another Court; and I should then think that it would be desirable to reconsider it fully with a view to uniformity, and to overrule it if it has been incorrectly decided. If the abstract proposition here contended for is well founded, that the order is an excess of jurisdiction, the defendant may have it in his power to prevent the consequences of it.

BARRY, J.—I entirely concur in opinion with my Lord Chief Justice, that it would be exceedingly inconvenient to re-agitate the question decided, after solemn arguments, in the case of *Kelly* v. *Dixon*, since followed by the Common Pleas. I was not a member of the Court when it was decided; the decision came upon me with surprise. I am not prepared to say whether I would abide by it. But I think, however, that it is not inconsistent with the principles of natural justice.

O'BRIEN, J.—I concur in the opinon pronounced by the other members of the Court. I cannot see the propriety of re-arguing the case of *Kelly* v. *Dixon*, where there has not been any appeal from that decision, and it has not been dissented from by any Court of co-ordinate jurisdiction. The question may come before us

* See *per* Bushe. C. J., *Sterne* v. *Guthrie* 1 F. & S. M. 55; *per* Lord Eldon, *Wellesley* v. *Duke of Beaufort*, 2 Russ. 19; *sed vide per* Dallas, C. J. *Smith* v. *Jersey*, 2 B. R. & B. 581.—ED. *Ir. I. L. T. Rep.*

† "Perhaps it is of less importance how the law is determined than that it should be determinate and certain; and such determinations should be adhered to, for then every man may know how the law is;" per Ashhurst, J., 7 T. R. 419. "Uniformity, perhaps, is of more importance than extreme accuracy of construction;" per Pennefather, B., 6 L. R. N. S. 213.—ED. *Ir. L. T. Rep.*

again after it has been considered by another Court. I remember a case from the North of Ireland, in which, in like manner, a question arose and the Court made a decision. The same question was brought before us in another case, but as we heard that the principle involved in that case was to be argued in a case that was about being discussed in the Common Pleas, we postponed pronouncing our decision in the case to which I have referred, till we had ascertained how the Common Pleas had determined. If the Common Pleas dissented, we would have reconsidered our views; but as the decision to which they came was in conformity with our judgment, we would not permit the question to be re-agitated. But if *Kelly* v *Dixon* should be dissented from—I do not refer to mere loose expressions of disapprobation—we shall willingly reconsider it.

Order made absolute.

UNITED STATES REPORTS.

SUPREME COURT OF IOWA.

GEORGE HOOKER, BY HIS NEXT FRIEND, ETC., v. JOHN MILLER.

Defence of Property by Spring-Guns.

1. *Spring-Guns—Trespassers.*—Where the owner of a vineyard sets a spring-gun, so arranged with cords or wires, that a trespasser coming into the vineyard will by coming in contact with such cords or wires discharge the gun and receive injury therefrom, and gives no notice of having such spring-gun in his vineyard, and a trespasser entering the vineyard, comes in contact with such cords or wires, whereby the gun is discharged, and he receives injury, the proprietor is liable in damage to the trespasser.

2. ——. *In pari delicto.* The rule *in pari delicto* does not apply in such cases.

3. ——. *Notice.*—Whether notice that such a contrivance had been laid for the protection of the property, would justify the resort to such means, the court do not determine.

[Central Law Jour., Jan. 29, 1874.]

Action to recover damages resulting from injuries sustained by plaintiff from a gun-shot wound received by him by means of a spring-gun placed by defendant on his own premises. There was a verdict and judgment for plaintiff: defendant appeals. The facts of the case appear in the opinion.

S. P. Vanatta, I. M. Preston & Son, for appellant; *Thompson Davis* and *Nichols*, for appellee.

BECK, CH. J.—The defendant was the owner of a vineyard, and had lost grapes by trespassers entering his enclosure and carrying them away. To protect his fruit from such persons, he planted a spring-gun, so arranged that it would be discharged, in the direction of one entering his premises, by means of wires or cords, which the trespasser would be likely to come in contact with and disturb. He gave no notice whatever that he had so arranged the gun, or of his intention so to do. The gun being thus placed, and charged with powder and shot, the plaintiff, in the night-time went into the vineyard, without defendant's permission, and received a severe wound from discharging the gun, through the arrangements provided for that purpose. The plaintiff testifies, that his object in entering the premises was, to ask permission of the defendant to take some grapes. But it may be conceded for the purpose of this case, that he entered with the intention of wrongfully taking the fruit without the plaintiff's permission. The court instructed the jury, in effect, that if defendant had set the gun in such a way as to destroy life, or do great bodily harm, of which the plaintiff had no knowledge, and the plaintiff in entering the premises for the purpose of taking grapes, without defendant's permission, was wounded by means of the gun, he is entitled to recover; that the act of plaintiff in that case was but a misdemeanor, and would not justify its resistance by means that would take life, or do great bodily harm; that defendant had no right to use a spring-gun, for his protection against a mere trespasser, without notice to him, and the defendant's liability, on account of the wound caused by the spring-gun, is the same as though he had discharged it with his own hands.

The giving of these instructions, and the refusal of others presenting a conflicting doctrine, constitutes the foundation of the errors assigned by defendant.

I. The act of the plaintiff entering defendant's vineyard in the night-time, conceding that it was for the purpose of taking grapes without permission, is a misdemeanor. Acts 12 Gen'l Ass. Ch. 74; § 2, Code § 3898. But the defendant had no right to prevent or resist the trespass of the plaintiff by using means dangerous to life or by inflicting great bodily injury. In doing so he violated the law, and became liable for injuries sustained by plaintiff, under the doctrine that all injuries inflicted by one, while acting in violation of the law, will support an action in favor of the injured party against the perpetrator. This court has held that a mere trespass against property other than a dwelling, is not a sufficient justification to authorise the use of a deadly weapon by the owner in its defence; and that, if death results in such a case it will be murder, though the killing be

actually necessary to prevent the trespass. The *State* v. *Vance*, 17 Iowa, 138. The rule is based upon the consideration that an act of violence done to prevent trespass which causes death, is beyond the provocation, and the perpetrator is guilty of murder. If the intention was not to take life, or the act was done in the heat of passion, the offence would be extenuated, and become no more than manslaughter.

Under the law, at the time of the killing, for which defendant was convicted, in the case just cited, a trespass of the character of the one committed by the person killed, which was not different from the act of the plaintiff in this case pleaded by the defendant as a justification, was not punishable as a misdemeanor. But this fact cannot defeat the application of the rule of the case now. The rule is based, not on the light in which the law regards the act and the punishment provided for it. The criminality of the act, or the turpitude of the trespasser is not the foundation of the rule. But it is based upon the limitation which the law imposes upon the right of the owner of property in rendering it protection. He cannot prevent a trespass by using means dangerous to life. Now, if the act of the trespasser is punishable as a misdemeanor, that fact does not demand greater violence, or more dangerous means, to secure protection, than if the same act were regarded as a mere trespass and not a crime. In other words, it requires no more violence to protect property from a trespasser when there is a statute punishing him criminally, than it would in the absence of such an enactment.

The act of defendant, we conclude upon the authority cited and upon principle, in preparing the means whereby the plaintiff's life was endangered, and from which he sustained great bodily injury, was unlawful. It follows in the application of familiar doctrines, which do not demand the support of authority to secure their recognition that he is liable for the injury inflicted upon plaintiff.

It has been held in England that a trespasser, having notice that spring-guns are laid upon the premises, cannot recover in an action against the owner thereof, for injuries sustained thereby. *Ilott* v. *Wilkes*, 3 Barnewall & Alderson, 304. And that when a trespasser, without such notice, is injured in the same way, he may recover in such an action. *Bird* v. *Holbrook*, 4 Bingham, 628. So the owner of a vicious dog is liable for injuries sustained by a trespasser, from being bitten by such dog. *Shirfy* v. *Bartley*, 4 Sneed, 58. In New York the same doctrine, with modifications on the side of humanity, has been recognized. It has been there held that the nature and value of the property ought to be such as to justify the use of means for its protection which are dangerous to life, and that the trespasser must have full notice of the mischief, in order to exempt the owner from liability for injuries inflicted. *Loomis* v. *Terry*, 17 Wend. 496.

Whether notice to the trespasser of the dangerous contrivances laid for the protection of property would relieve the owner of liability for injuries caused thereby, we do not determine, as the facts before us do not involve that question, no such defence having been made in this case. The authorities that have come to our notice seem to recognise such a rule.

It has been often held that it is no justification for killing animals, that they were trespassing upon another's premises, or doing injury to his property. *Ford* v. *Taylor*, 4 Texas, 492; *Tyner* v. *Cory*, 5 Ind. 216; *Wright* v. *Ramscot*, 1 Saund, 83.

This rule is doubtless supported upon the consideration that the protection of one's property will not justify the resort to means that are destructive to the property of another, when not demanded by necessity, or the nature of the rights and property concerned. Certainly, humanity requires that a like rule be extended to the person of a trespasser, and that he be not exposed to bodily injury or death, on the mere ground that he is, at the time, acting in violation of law.

II. The defendant insists that under the rule, *in pari delicto*, or of contributory negligence, the plaintiff cannot recover If the case be regarded as one of simple negligence on the part of defendant, plaintiff could not be held to the exercise of care, and, in its absence, of contributing to the injury, by his own negligence without having notice of the dangers to which he would be exposed. He could not be regarded as wanting in care, by failing to use means for his protection, from dangers unknown to him, or in exposing himself thereto. The rule *in pari delicto*, affords no protection in a civil action, to a party who has control of dangerous implements and negligently uses them or places them in a situation unsafe to others, whereby another person, without knowledge thereof, is injured, although, at the time, in the commission of a trespass.

This qualification of the rule is demanded on the ground that proper regard for life and the person of others requires care, on the part of persons using deadly weapons and dangerous implements, that injury to others may not be inflicted, and that mere trespasses and other incon-

siderable violations of the law, are not to be visited by barbarous punishments, or prevented by inhuman infliction of bodily injuries. The instruction of the court directing the jury that the doctrine of contributory negligence was not applicable to the case, is therefore correct.

It is our opinion that the jury were properly instructed, and that the instructions asked by defendant were correctly refused.

(Note by Editor of *Central Law Journal.*)

1. *Defence of Property by Spring-guns—The English Rule.*—The question whether the owner of property may lawfully resort to the use of spring-guns and engines of like character, for protecting it in his absence, against trespassing men or animals, is somewhat novel in this country. The question first arose in England in 1817, in the Common Pleas, in *Deane* v. *Clayton*, 7 Taunt. 489. The defendant, who was the owner of a wood, had fixed to the trees what were commonly known as dog-spears, being iron spears fastened to the trees past which the hares were accustomed to run, placed at such a height that while the hares would pass under them, dogs and foxes pursuing the hares would run against them, and be killed. The defendant had posted notice that such spears were set in the wood. The plaintiff being engaged in hunting in the wood with a valuable dog, the dog made his escape from him, and, pursuing a hare, ran against one of the spears and was killed. The judges were equally divided as to whether the plaintiff ought to recover damages, and so no result was reached. Three years later, in the leading case of *Ilott* v. *Wilkes*, 3 Barn. & Ald., 304, (cited in the principal case), the question came before the King's Bench upon the following state of facts: The defendant had placed spring-guns in a wood owned by him, and had posted notices that such guns were so set. Nevertheless, the plaintiff entering the wood to gather nuts, trod upon a wire connecting with one of them, by which it was discharged, and he severely wounded. The question received an exhaustive dicussion, and all the judges agreed that the plaintiff could not recover. In both of these cases the plaintiff had *notice* of the existence of the engines which caused the injury: and in both cases the judges were agreed that, had there been no notice, the plaintiff would be entitled to recover, and that without notice it would not be lawful to expose even a trespasser to mortal injury. And agreeably to this view, in a subsequent case —*Bird* v. *Holbrook*, 4 Bing. 628, (cited in the principal case—where the defendant for the protection of his property, some of which had been stolen, set a spring-gun, *without notice*, in a walled garden, at a distance from his house, by which the plaintiff, who had climbed over the wall in pursuit of a stray fowl, was shot, it was held that the defendant was liable in damages, on the ground that there had been no notice: but the correctness of this ruling is doubted in *Jordin* v. *Crump*, 8 Mees. & Wells, 789. So in *Jay* v. *Whitefield*, an unreported case, cited in 3 Barn. & Ald. 308, and in 4 Bing. 644, the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring-gun, for which injury he recovered £120 damages; but it does not appear whether or not notice had been given in this case.

The reasoning upon which *Ilott* v. *Wilkes* proceeded was, that since the plaintiff had *notice* that there were spring-guns set in the wood, the act of discharging the one which caused the injury to him, was his own act, and not the act of the defendant. The fallacy of this reasoning is conclusively shown by SHERMAN, J., in *Johnson* v. *Patterson*, 14 Conn. 1, where the reasoning of Justice HOLYROYD is said to involve the proposition that a man is not responsible for not guarding against the *intended* consequences of his own *innocent* act; and, if he does not, that shall be considered as *his own act*, which is the act of *another*. The reasoning of the judges appears to have been little better than mere sophistry, intended to clothe with some color of legal reason a barbarous rule of law, which really had its foundation, like the English game laws, in feudal and aristocratic policy—a policy which has no existence in this country. And, it is to be said to the credit of the English legislature, that very soon after the determination of this case, the rule declared by it was abolished by statute, 7 and 8 Geo. 4, ch. 18; and this statute has been substantially re-enacted in the 24th and 25th Vict., ch. 100, § 31, by which it is declared, in substance, that whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and, being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years, 27 [and 28 Vict. ch. 47.] or to be imprisoned for any term not exceeding two years, without hard labor. And by the subsequent provisions, whosoever shall knowingly and wilfully permit such traps to be set, is deemed to have set them himself; provided this act shall not apply to traps set to destroy vermin, nor to engines set at night for the protection of dwelling-houses.

But, notwithstanding this statute, the English judges seemed disposed to favor the practice prohibited by it as much as possible. Thus in *Wootton* v. *Dawkins*, 2 Com. Bench, N. S. 412, the plaintiff entered the defendant's garden at night without his permission, to search for a stray fowl, and, whilst looking closely into some bushes, he came in contact with a wire, which caused *something* to explode with a loud noise, knocking him down and slightly injuring his face and eyes. It was held—1. That the defendant was not liable for this injury at common law. 2. That in the absence of evidence that it was caused by a spring-gun or other engine calculated to inflict grievous bodily harm, he was not liable under the 7 and 8 Geo. 4, ch. 18 § 1.

2. *Dog-Spears—The English Rule.*—The question left unsettled in *Deane* v. *Clayton*, *supra*, as to the right to protect game in parks by means of dog-spears, was finally resolved in favor of the right, in *Jordin* v. *Crump*, 8 Mees. & Wells, 782, where the rule was laid down that a person passing, with his dog through a wood, in which he knows dog-spears are set, has no right of action against the owner of the wood, for the death or injury of his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured; because the setting of dog-spears was not in itself an illegal act, nor was it rendered so by the 7 and 8 Geo. 4, ch. 18.

In a case earlier than any of the above, it was held that if a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept on his neighbor's premises, must probably be attracted by their instinct into the traps; and if, in consequence of such act, his neighbor's dogs are so attracted, and thereby

injured, he is liable in damages. *Townsend* v. *Wathen*, 9 East, 277. But in this case it was proved to have been his intention to kill dogs by this means, as well as other animals; and several dogs having been killed in such traps, and he having allowed his game-keeper a reward of one shilling for every dog so killed.

3. *Spring guns—The American Doctrine.*—The question as to the lawfulness of the use of spring-guns in the defence of property first arose in the United States, in *Gray* v. *Coombs*, 7 J. J. Marshall, 478, in the Court of Appeals of Kentucky, in 1832; and it was there ruled that where a person has valuable property in a strong warehouse, well secured by locks and doors, he may, as an additional security *at night*, erect a spring-gun which can only be made to explode by entering the house; and if a slave in endeavoring to break into the warehouse is killed by such spring-gun, the owner of the warehouse will not be liable to the master of the slave for his value.

The question next received an exhaustive discussion in *Johnson* v. *Patterson*, 14 Conn. 1, decided in the Supreme Court of Errors of Connecticut in 1840; although it was not directly involved in the case. The action was for damages for poisoning the plaintiff's fowls. The defendant, to prevent the plaintiff's fowls from trespassing on his lands, as they had before done, mixed Indian meal with arsenic, and spread it upon his land, having given the plaintiff previous notice that he should do so; and such fowls coming afterwards upon the defendant's land ate the poisoned meal, in consequence of which some of them died; it was held: 1. that the previous notice, in contradistinction to notice after the fact, was sufficient; 2. that notwithstanding such notice, the defendant was not justified in the use of deadly means, and consequently was liable in damages. And, the right of an owner to defend his property in his absence, by means of engines or poisons placed so as to kill or injure trespassing men or animals, was discussed at length upon principle and in view of the English authorities, and it was held, that no such right exists in Connecticut. But the doctrine of this case was limited to cases of trespasses merely. What may be done to prevent *burglary or felony*, was admitted to be governed by other rules.

The question appears next to have arisen in *State* v. *Moore*, 31 Conn. 479, determined in the Supreme Court of Errors of Connecticut, in 1868. The defendant was indicted for a *nuisance* in placing spring-guns in his blacksmith shop so as to endanger passers-by on the highway. The jury, by a special verdict, found that the defendant placed spring-guns in his shop for its protection against burglars, that the guns were loaded with large shot, and so placed as to discharge their contents obliquely towards the highway, the travelled path of which was about a rod and a half from the shop; that the shop was lathed and plastered on the inside and double-boarded on the outside, but that it was possible that scattering shot might pass through the boards at places where, by reason of the cracks between them, there was not a double thickness of boards; and that the travelling public were annoyed and apprehensive of harm from the guns. *It was held*, that it did not appear that there was such real and substantial danger to the public as to warrant a conviction.

Concerning the right of resorting to spring-guns for the purpose of protecting property, the court reason, that the mere act of setting spring-guns on one's own premises for their protection, is not unlawful in itself, but the person doing it may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance, if the public are subjected by it to any danger; that what a man may not do directly, he may not do indirectly: that a man may not, therefore, place instruments of destruction for the protection of his property, where he would not be authorized to take life with his own hand for its protection; that the right to take life in defence of property, as well as of person and habitation, is a natural right, but the law limits its exercise to the prevention of forcible and atrocious crimes, of which burglary is one; that in the absence of any statutory provision-making it burglary to break and enter a shop in the night-time, with intent to steal, and by the early strict rules of the common law, a man may not take life in the prevention of such a crime; but that the habits of the people and other circumstances have so greatly changed since the ancient rule was established, that it is very questionable whether, in view of the large amount of property now kept in warehouses, banks, and other out-buildings, it should not be held lawful to place instruments of destruction for the protection of such property; that breaking and entering a shop in the night-season with intent to steal, is, by the law of Connecticut, burglary; and that the placing of spring-guns in such a shop for its defence, would be justified, if the burglar should be killed by them; that the guns would, however, constitute a *nuisance* if they cause actual danger to passers-by in the street; but that the danger to the public must be of a real and substantial nature.

4. *Limit of the Right to defend one's Goods.*—If we adopt the conclusion of the Connecticut case last above quoted, that what a man may not do directly, he may not do indirectly, the question involved in the principal case will be found to have been settled by a great weight of authority. That a person is not obliged to surrender the possession of his goods, his lands or other property to a wrong-doer without resistance, does not admit of question. *People* v. *Hubbard*, 24 Wend. 369; *Curtis* v. *Hubbard*, 1 Hill, 336; S. C., 4 Hill, 437; *Commonwealth* v. *Kennard*, 8 Pick, 133, 137; *Commonwealth* v. *Power*, 7 Metcalf, (Mass.) 596; *People* v. *Honshell*, 10 Cal. 87; *Harrington* v. *People*, 5 Barb. 611, 612; *McAuley* v. *State*, 3 G. Greene, 485: 1 Bish. Crim. Law, § 861, 5th ed. He may by the doctrine of these, and all the cases where the rule is stated, use, within a certain prescribed limit, as much force as is necessary to preserve his possession—taking care the degree of force used does not exceed what is necessary, or what reasonably appears to be necessary, for the purpose of defence and prevention. The limit here spoken of, is the limit at which it becomes necessary *to take or endanger life*, in order to protect one's possession. And here, the criminal law, which seeks certainty in its rules as far as possible, divides offences against property into two general classes, namely, *felonies and trespasses*, for the purpose of determining whether a killing in prevention of such offences shall be deemed justifiable or culpable.

And the first rule which may be stated is, that a killing which is necessary, or which reasonably appears to be necessary, to prevent a *forcible* and *atrocious felony* against property, is justifiable homicide. *Pond* v. *People*, 8 Mich., 150; *People* v. *Payne*, 8 Cal., 341: *State* v. *Roane*, 2 Devereaux, 58; *Gray* v. *Coombs*, 7 J. J. Marsh, 478; *State* v. *Moore*, 31 Conn., 479; *Johnson* v. *Patterson*, 14 Conn., 1. This rule, the common law writers limit to cases of *secret* felonies or felonies not accompanied with *force*. 1 Hale P. C., 488; 1 East P. C., 278; Foster, 274. Though we do not find this distinction adjudged in any modern case which we have seen, yet it has been quoted with approbation in several. Pond's

case, *supra*; Moore's case, *supra*. Mr. Bishop, however, is of opinion that upon principle there can be found no such distinction in the law itself; but why he is of this opinion, he does not satisfactorily tell us. 1 Bish. Crim. Law, § 853, 5th ed. It is pretty clear that the right to kill in defence of property does not extend to cases of *larceny*, which is a crime of a secret character; although the cases which illustrate this exception are generally cases of theft of articles of small value. Thus, in *Reg.* v. *Murphy*, 2 Craw & Dix C. C., 20, the prisoner was indicted under the statute for maliciously shooting with intent to do grievous bodily harm, etc. It appeared that on the day in question, the prisoner, who was the game-keeper and wood ranger of Lord Dunsany, and armed with a fowling piece, detected the prosecutor in the act of carrying away from his employer's lands a bundle of sticks, consisting of branches severed from the growing timber by a recent storm; that the prisoner hailed him, when he dropped the sticks and ran; upon which the prisoner called out, "If you don't stop, I'll fire;" but the prosecutor still going on, the prisoner fired, wounding him in the head, back and arms. Doherty, Ch. J., said: "There is no doubt that the prosecutor, in carrying away the branches previously dissevered from the trees, was committing a felony, and the prisoner was clearly entitled to arrest him; but in discharging his gun at the prosecutor, and perilling his life, the prisoner has very much exceeded his lawful powers, and I cannot allow it to go abroad, that it is lawful to fire upon a person committing trespass and larceny; for that would be punishing, perhaps with death, offences for which the law has provided milder penalties." And see to the same effect, *McClelland* v. *Kay*, 14 B. Monroe, 106; *Gardiner* v. *Thibodeau*, 14 La. An., 723; *State* v. *Vance*, 17 Iowa, 144; *Priester* v. *Augley*, 5 Rich. (Law), 44. It may be observed, however, that the right extends to statutory felonies, as well as to felonies at common law. *Gray* v. *Coombs*, *supra*; Pond's case, *supra*; Moore's case, *supra*. And it would seem that the fact that a common law felony has been reduced by statute to a misdemeanor, does not diminish the right of defence applicable to such cases. *Gray* v. *Coombs*, *supra*; *Dreman* v. *People*, 10 Mich., 169. These cases are in accord upon this point with what is said by the learned Chief Justice in the principal case, where he says that the rule which forbids the resorting to such dangerous means for the prevention of trespasses does not depend upon the light in which the law regards the act and the punishment provided for it, but upon the limitation which the law puts upon the right of the owner of property in rendering it protection. Language of similar import was used by Nicholas, J., in *Gray* vs *Coombs*, *supra*, where he said that "a name can neither add to, nor detract from, the moral qualities of a crime; and in the eye of reason and justice, the intrinsic nature of the offence, together with the time and manner of its attempted commission, must ever test the legality of the means to be resorted to for its prevention." 7 J. J. Marsh, 483

But the ordinary rule is, that a killing to prevent a mere trespass upon property, or any asportation of or injury to it, which does not amount to a felony, is a felonious homicide; or, viewed in the light of a civil action, unlawful. *Harrison's case*, 24 Ala., 67; *Drew's case*, 4 Mass., 391; *United States* v. *Williams*, 2 Cranch, C. C., 439; *Priester* v. *Augley*, 5 Rich. (Law), 44; *State* v. *Morgan*, 3 Ired., 186; *State* v. *McDonald*, 4 Jones; (Law), 22; *State* v. *Brandon*, 8 Jones (Law), 467; *State* v. *Vance*, 17 Iowa, 144; *Gardiner* v. *Thibodeau*, 14 La. An. 733; *McClelland* v. *Kay*, 14 B. Monroe, 106. As where a person kills an officer who comes unlawfully to distrain his goods. *United States*, v. *Williams*, *supra*. Or where a person kills a slave who is stealing sugar-cane. *Priester* v. *Augley*, *supra*. Or stealing chickens, *McClelland* v. *Kay*, *supra*; *Gardiner* v. *Thibodeau*, *supra*. Or where a person kills another who lets down a dividing fence, and hauls off manure as to which there is a disputed claim. *State* v. *McDonald*, *supra*. Or kills one who is taking corn from a bin, the right to which is in dispute. *State* v. *Brandon*, *supra*. Or where a person fires among a party of boys, who are stealing his melons, and kills one of them. *State* v. *Vance*, *supra*. Or shoots and wounds a person who is carrying off branches severed from his master's trees. *Reg.* v. *Murphy*, 2 Crawf. and Dix, C. C., 20.

It is seen, therefore, that the rule that it is unlawful to set engines dangerous to life, for the defence of property against mere *trespassers*, is not only correct upon principle, as enforced by the reasoning of the principle case, but is sustained by a great array of authority; although it is possible that such means of defence are permisible to secure valuable prroperty kept in warehouses and shops against nocturnal depredators.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS

FOR NOVEMBER AND DECEMBER, 1873, AND JANUARY, 1874.

From the American Law Review.

(Continued from page 205.)

Legacy.

1. A testatrix had a power of appointment by will over a fund held in trust for her for life. She gave "£100 of such trust funds to my nephew P.," and several other legacies in the same terms. *Held*, that said legacies were specific, and bore interest from the date of the death of the testatrix.—*Davies* v. *Fowler*, L. R. 16 Eq. 308,

2. A testatrix bequeathed to certain parties "all the money of which I die possessed." At the time of her death she held a sum in cash in her house, and she was entitled to a legacy which the executors had not paid or acknowledged as at her disposal, to the apportioned part of an annuity from the last stated day of payment, and to interest on a balance at the banker's accrued since the last time she was credited with it. *Held*, that the cash only passed by the bequest.—*Byrom* v. *Brandreth*, L. R. 16 Eq. 475.

3. A testatrix gave a legacy to "my niece L., second daughter of J. H. W." She then gave a further legacy "to each of my nieces, the said L. W.," &c., and gave her residuary estate "in trust for the said L. W." and others. The testatrix had another niece, L. F. T. W. *Held*, that evidence was not admissible to show that the testatrix intended her niece L. F. T. W. to take in the residuary bequest.—*Webber* v. *Corbett*, L. R. 16 Eq. 551.

4. A testator, after giving certain pecuniary legacies, gave all his messuages, farms, and lands at N., his stock, crops, and implements of husbandry, moneys, securities for money, and all the residue of his estate and effects, real and personal, to his wife, until his youngest child should attain twenty-one. *Held*, that said pecuniary legacies were not charged upon the testator's real estate.—*Castle* v. *Gillett*, L. R. 16 Eq. 530.

5. A testator gave his interest in leasehold estates to trustees, to pay half the income to his son H. for life, or until his bankruptcy or insolvency, and after H.'s decease, bankruptcy, or insolvency, which should first happen, to pay said income to all or any the children of H., in such manner as H. should appoint, and in default of appointment, to pay the same to all the children of H. There was a similar provision in favor of the testator's son F. The will contained a proviso that if, at the death of the testator's wife, either H. or F. should become entitled to the D. estate, then the son so entitled should receive no portion of said rents, but that the other son should receive the whole rents. H. filed a declaration in insolvency in Australia in 1863, and afterward received his discharge. He had four children born before said insolvency and one afterward. The testator's widow died in 1866, and F. became entitled to the D. estate. *Held*, that upon the death of the testator's wife new trusts arose of the whole of said leaseholds, identical with the trusts of H.'s moiety, and that said rents were payable to H.'s five children, subject to his power of appointment, as the gift over on the insolvency of H. took effect upon his insolvency in Australia.—*In re Aylwin's Trusts*, L. R. 16 Eq. 585.

6. A testator sent a duplicate of his will to a legatee, leaving the original with his solicitor. Subsequently he executed upon the same day two codicils in identical terms, one of which he retained, and the other he sent to said legatee. *Held*, that the legacies in said codicils were not cumulative, and that the legatee was entitled to but one legacy under them.—*Whyte* v. *Whyte*, L. R. 17 Eq. 50.

7. A testator gave £1000 to the children of his cousin R., to be divided equally between them. The will contained the proviso that in case any legatee should die in the testator's lifetime leaving children, such legacy should not lapse, but be paid to the children of such deceased legatee. One of R.'s children had died before the date of the will, leaving children. *Held*, that the children of the deceased child of R. did not take under the will.—*Hunter* v. *Cheshire*, L. R. 8 Ch. 751.

8. A married woman having separate estate, and having under her marriage settlement a power of appointment in the event of her dying in the lifetime of her husband, made a will with the assent of her husband, whom she survived. *Held*, that the will passed the separate estate, but did not execute the power of appointment, nor pass property acquired by the wife after the death of her husband, whose death operated as a revocation of his assent to the will of his wife.—*Noble* v. *Willock*, L. R. 8 Ch. 778; s. c. 2 P. & D. 276.

9. A testator gave the residue of his estate to his nephews and nieces, and the issue of any of his nephews and nieces dead before him. The testator had not at the date of his will any brother, sister, nephew, or niece of his own, but there were nephews and nieces of his deceased wife. *Held*, that the nephews and nieces of the testator's wife took under the will, and that evidence that the testator and such nephews and nieces were on unfriendly terms was inadmissible.—*Sherratt* v. *Mountford*, L. R. 8 Ch. 928.

10. A testator gave a fund upon trust for his wife for life, then to his daughter for life, and after his daughter's death to her children, who being sons should attain twenty-one, or being daughters should attain that age or marry; and if no such children, to certain persons named. By a codicil the testator added the proviso, that in case his daughter should be living at the expiration of five years from the death of the testator's wife, and should not have had any children, said fund should be at once divided among said ulterior legatees. At the expiration of five years and six months from the death of the testator's wife the daughter had her first child. *Held*, that the ulterior bequest did not take effect, as there was a child *in ventre sa mère* at the expiration of said five years.—*Pearce* v. *Carrington*, L. R. 8 Ch. 969.

11. A testator gave a fund to his widow for life, and after her decease one moiety in trust for each of his two daughters for life, remainder to their respective children. If either daughter died childless, her moiety to be held upon the trusts of the other moiety. If both daughters died childless, the fund was to go to the testator's two sons in equal shares. If both said sons died childless, the fund was to be held in trust for M. But if said M. should die without leaving issue living at her death, then over. One daughter survived her sister and brothers, and M. survived said daughter, and died without issue. *Held*, that the gift over was contingent on M.'s dying without issue in the lifetime of said sons, and that M.'s representatives were entitled to the fund.—*In re Heathcote's Trusts*, L. R. 9 Ch. 45.

See APPOINTMENT, 1, 2; CHARITY; ELECTION; EXECUTORS AND ADMINISTRATORS, 2; ILLEGITIMATE CHILDREN; MARSHALLING ASSETS; MORTGAGE, 3; TRUST, 3, 5.

BETTER.

C., a banker at Lyons, received a bill of exchange from D., drawn on a firm at Milan. C. enclosed bills in a letter to D., which he posted. After posting the letter, C. received information from D.'s agent that the Milan firm refused to accept D.'s drafts, and directing him to remit nothing to D. By rules of the French post-office, a letter can be recov-

ered after it has been posted and before it has been despatched. Accordingly C. applied for his letter to D., but it was forwarded to D. by mistake of the post-office clerk. *Held*, that the property in the bills did not pass to D.—*Ex parte Cote. In re Devcze*, L. R. 9 Ch. 27.

See Guarantee, 2.

Lex Loci.

The testator, a domiciled Irishman, disposed of a leasehold estate in England upon the same trusts as those of his other personal estate, which trusts were void under the Thellusson Act in England, though not in Ireland. *Held*, that the bequest of the leasehold estate was invalid.—*Freke* v. *Lord Carbery*, L. R. 16 Eq. 461.

Lien.

1. Solicitors for the trustees of an estate which is under the administration of the court have not, after their discharge, such a lien for costs and money advanced in the suit as will enable them to refuse production of documents which are required by the receiver for the management of the estate.—*Belaney* v. *Ffrench*, L. R. 8 Ch. 918.

2. The creditors of a liquidating debtor resolved, in 1872, to allow him to carry on his business, he accounting to the trustee for the stock in hand as and when disposed of. The debtor carried on his business for two years, when the creditors resolved to sell the same for the benefit of the estate. The business was accordingly sold and the proceeds paid to the trustee. A creditor who had lent the debtor money since 1872 claimed a lien on such part of said proceeds as represented stock purchased after 1872. *Held*, that said creditor had no lien upon any part of the purchase-money.—*Ex parte Robertson. In re Magnus*, L. R. 8 Ch. 962.

Light and Air.—*See* Party-wall.

Lis Pendens.—*See* Executor and Administrator, 4.

Married Woman.—*See* Legacy, 9.

Marshalling Assets.

A testator gave an annuity and certain legacies, devised his real estate in trust for sale and payment of said annuity and legacies from the proceeds, and then bequeathed his personal estate upon trust for payment of so much of the debts and legacies as the proceeds of the real estate might be insufficient to satisfy, and the residue for charitable purposes; and he directed that only such parts of his estate should be included in said residue as might by law be bequeathed for charitable purposes. The testator left real and pure and impure personal estate. *Held*, that the proceeds of the real estate and the impure personal estate must be applied in payment of said annuity and legacies before the pure personal estate.—*Wills* v. *Bourne*, L. R. 16 Eq. 487.

See Wages.

Mortgage.

1. A company had power to raise money by mortgage, with or without a power of sale, of any of the property of the company. The company borrowed money on mortgage, among other things, of its book debts. *Held*, that said mortgage covered debts accrued due since the date of the mortgage.—*Bloomer* v. *Union Coal and Iron Co.*, 16 Eq. 383.

2. The plaintiff handed title-deeds to a bank with a memorandum stating that the deeds were deposited in consideration of the bank's lending B. £1000 for seven days from date. The bank allowed B. to overdraw his account within said seven days to the extent of £900. *Held*, that there had been no advances to B. according to the terms of said memorandum, and that the bank was not entitled to retain the deeds.—*Burton* v. *Gay*, L. R. 8 Ch. 932.

3. A testator directed that his debts should be paid, and then gave a certain estate to J., one of his executors, subject to the payment of the testator's debts. J. mortgaged the estate to C., and used the money for his own purposes. C. had no notice of the purpose to which J. intended to apply the mortgage money. *Held*, that the mortgage was valid, and not subject to a charge for the payment of the testator's debts.—*Corser* v. *Cartwright*, L. R. 8 Ch. 971.

See Charge; Executors and Administrators, 4; Priority.

Negligence.

By statute, railway trains which travel twenty miles without stopping must maintain means of communication between the passengers and the servants of the company in charge of the train. *Held*, that where a passenger on such a train was injured, the Act was to be taken into account in determining whether there had been negligence.—*Blamires* v. *Lancashire & Yorkshire Railway Co.*, L. R. 8 Ex. (Ex. Ch.) 283.

See Burden of Proof; Railway, 1; Statute.

Notice.—*See* Guarantee, 1; Mortgage, 3; Priority, 1.

Parties—*See* Action; Vendor and Purchaser, 1.

Partnership.

1. Where a partnership is terminated prematurely, a person who has paid a premium to become a member of the partnership may lose his right to a return of a proportionate part of the premium by waiver, by wilful repudiation of the partnership contract, and by gross misconduct necessitating the dissolution of the partnership. Discussion concerning forfeiture of such premium by misconduct.—*Wilson* v. *Johnstone*, L. R. 16 Eq. 606.

2. L. borrowed money in London of W., one of two partners in the firm of W. & Co., bankers at Vienna, and a deed transferring shares in a company from L. to W. & Co. by way of security for said loan was executed by L., and W. who signed as W. & Co. L. held the above shares, but the transfer to him had not been registered at the time he transferred to W. & Co. Subsequently the transfer to W.

& Co. was registered, and shortly after this the transfer to L. was registered. L. died insolvent, and said company was wound up. *Held*, that W. had authority to accept the transfer of shares from L. so as to bind the firm of W. & Co., and that the irregularities in the registration of the transfers did not affect the liability of W. Co. to call.—*In re Land Credit Company of Ireland. Weikersheim's Case*, L. R. 8 Ch. 831.

3. By articles of partnership it was provided that upon the death of A., (the partner to whom the capital belonged), the share of B., the other partner, in the profits should belong to A.'s representatives, who should carry on the business and pay to B. his share of the profits up to A.'s death. The business was carried on by B., who was A.'s executor, until liquidation was ordered. It then appeared that the stock on hand was partly the old stock formerly belonging to A., but principally new stock bought by B. *Held*, that the terms of said partnership did not convert the stock on hand at A.'s death into separate estate, but that such stock was applicable to payment of the joint firm debts, and that stock bought since A.'s death was B.'s property, and applicable to his separate liabilities.—*Ex parte Morley. In re White*, L. R. 8 Ch. 1026.

See BANKRUPTCY, 2; BILLS AND NOTES, 1.

PARTY-WALL.

Where a wall was a party-wall to the height of the first story, and above that height had ancient windows opening to the external air, it was *held* that the wall was not a party-wall above the height of the first story.—*Weston* v. *Arnold*, L. R. 8 Ch. 1084.

PATENT.

Upon a decree against a party for infringement of patent the patentee is not entitled to have both an account of profits and an inquiry into damages, but must elect which he will have.—*De Vitre* v. *Betts*, L. R. 6 H. L. 319. See *Neilson* v. *Betts*, L. R. 5 H. L. 1; 6 Am. Law Rev. 94.

PAYMENT.—*See* EVIDENCE, 2.

PEERAGE.—*See* SETTLEMENT, 4.

PENALTY.

A dock company incorporated by statute agreed to purchase certain land for £4000, half payable upon the execution of the agreement, the remainder on a certain future day. The agreement provided that if the second moiety was not paid by a certain day, in which respect time should be of the essence of the contract, it should be lawful for the vendors to enter and repossess themselves of their former estate without any obligation to repay any part of said sum which might have been paid to them. *Held*, that the above stipulation was in the nature of a penalty, from which the company would be relieved on payment of the residue of the purchase-money remaining unpaid with interest.—*In re Dagenham (Thames) Dock Co. Ex parte Hulse*, L. R. 8 Ch. 1022.

PLEDGE.—*See* EXECUTORS AND ADMINISTRATORS, 4; MORTGAGE, 2; PRIORITY, 1.

PORTION.—*See* DEVISE, 6.

POST.—*See* LETTER.

POWER.

Shares were held in trust for a woman for life, and after her death as she should by deed or will appoint. The trustee and the woman joined in a deed of transfer of the shares to herself. *Held*, that the power of appointment was well executed.—*Marler* v. *Tommas*, L. R. 17 Eq. 8.

See DEVISE, 2; SETTLEMENT, 2.

PREMIUM.—*See* PARTNERSHIP, 1.

PRINCIPAL AND AGENT.—*See* BROKER; INSURANCE, 2.

PRIORITY.

1. L. deposited title-deeds with his bankers to secure advances, and agreed to execute any deeds necessary to carry out the security. Subsequently, when about to be married, the intended wife directed her solicitor to prepare the necessary settlement. The solicitor asked L. if the title-deeds of his land were in his possession unincumbered, and L. replied that they were, but were at his banker's. The solicitor thereupon prepared the settlement whereby the real estate was to be settled upon trusts for the wife and issue of the marriage; and after the marriage L. conveyed the land upon trusts accordingly. *Held*, that the wife had constructive notice of the mortgage to the bankers, also that L.'s contract to execute a legal mortgage gave the bankers a priority over subsequent purchasers without notice.—*Maxfield* v. *Burton*, L. R. 17 Eq. 15.

2. S. sued out an *elegit* upon a judgment against a railway company. The company subsequently filed a scheme of arrangement, which was confirmed by the court, whereby mortgagees of the railway were to be paid by certain debentures preferred in payment of interest over other stock. *Held*, that S. was not bound by said scheme, but that he could not claim a priority over the holders of said debentures on the ground that their mortgage, which was a charge prior to the *elegit*, had been discharged.—*Stevens* v. *Mid-Hants Railway Co. London Financial Association* v. *Stevens*, L. R. 8 Ch. 1064.

PUBLIC POLICY.—*See* CONTRACT, 6.

RAILWAY.

1. The court ordered an inquiry as to damages where a railway company had exercised its statutory powers carelessly in constructing its railway.—*Biscoe* v. *Great Eastern Railway Co.*, L. R. 16 Eq. 636.

2. The H. railway company was empowered by statute to make a junction with the G. railway at B. The plaintiff railway company obtained by agreement running powers over the G. railway passing through B. The plaintiffs then, by agreement with the H. railway, obtained the right to use the H. railway; the H. company to keep its line in repair and pro-

vide a sufficient staff for the traffic of the plaintiffs; the plaintiffs to pay the H. railway a proportion of the through rates and fares by way of commuted toll; and the plaintiffs to haul the local traffic of the H. company, should the latter so desire. The G. Company refused to permit the passage of trains from the plaintiff's line on to the H. railway, alleging that said agreement between the plaintiffs and the H. railway was *ultra vires* and void. *Held*, that said agreement was valid—*Midland Railway Co.* v. *Great Western Railway Co.*, L. R. 8 Ch. 841.

See Contract, 1; Statute.

Ratification.—*See* Contract, 3.

Receipt.—*See* Evidence, 3.

Receiver.—*See* Company, 3.

Repairs.—*See* Devise, 4.

Residue.—*See* Devise, 1, 2, 5; Legacy, 4, 5.

Reversion.—*See* Charge.

Revocation of Assent.—*See* Legacy, 9.

Sale.—*See* Broker; Contract, 2; Trust, 4; Vendor and Purchaser.

Salvage.

1. More than half of the proceeds of the property saved, less salvor's expenses, awarded as salvage in *The Rasche*, L. R. 4 Ad. & Ec. 127.

2. Salvage awarded to a steam-tug which attempted unsuccessfully to aid a vessel exhibiting signals of distress.—*The Melpomene*, L. R. 4 Ad. & Ec. 129.

See Wages.

Satisfaction.—*See* Devise, 3.

Security.—*See* Bills and Notes, 1; Mortgage, 1; Priority, 2.

Settlement.

1. A widower, two days before going through the ceremony of marriage with his deceased wife's sister B., executed a deed reciting that he had previously transferred certain bank shares to trustees, and directing said trustees to hold said shares in trust for B. for life, remainder as B. should by will appoint. The widower and B. lived together as husband and wife until the former's death. *Held*, that said deed could not be set aside as founded upon an illegal consideration.—*Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.

2. Where a covenant to settle after-acquired property is limited to the case funds of a specified amount are acquired at any one time, such funds must be derived from the same source; and where a person receives funds subject to such a covenant, but over which he has a power of advancement, any sum advanced must be included in determining whether said funds are of sufficient amount to fall within the covenant.—*Hood* v. *Franklin*, 16 Eq. 496.

3. A settlement was executed by a married woman and a trustee, wherein a sum of money recited to be in the trustee's hands was settled upon certain trusts. Said recital was untrue; and the deed was executed upon the faith of a promise made by the woman, that she would forthwith pay said sum to the trustee from her separate estate. *Held*, that said promise could not be enforced.—*Marler* v. *Tommas*. L. R. 17 Eq. 8.

4. By letters-patent a barony was conferred on E. for life, with remainder to her second and other sons and the heirs male of their respective bodies successively. The patent contained a proviso that if any person taking under the patent should succeed to a certain earldom, the succession to the barony should devolve upon the son of said E., or the heir who would be next entitled to said barony if the person succeeding to the earldom was dead without issue male. A testatrix devised lands to trustees in trust to convey, settle, and assure the same in a course of entail, to correspond as nearly as may be with the limitations of said barony and the provisos affecting the same; and a settlement was made accordingly, containing the proviso that if any person taking under the limitations therein contained should succeed to the above earldom, then the succession to said lands should devolve upon the son of said E. or the heir who would be next entitled to succeed to said barony if the person succeeding to said earldom was dead without issue male. The second son of E. afterward succeeded to said earldom, and had issue male. *Held*, that the third son of E. became entitled to said lands upon the succession of said second son of E. to the earldom.—*Cope* v. *Earl De la Warr*, L. R. 8 Ch. 982.

See Company, 4; Devise, 4.

Shareholder.—*See* Company, 2, 4, 5; Partnership, 2.

Ship—*See* Bill of Lading; Burden of Proof; Freight; Jurisdiction; Salvage; Wages.

Solicitor.—*See* Lien, 1.

Sovereign Power.—*See* Settlement, 4.

Specific Appropriation.—*See* Bills and Notes.

Specific Bequest.—*See* Legacy, 1.

Specific Performance.—*See* Contract, 3; Jurisdiction.

Statute.—*See* Appointment, 2; Corporation.

Statute of Frauds.—*See* Frauds, Statute of.

Statutory Power.—*See* Railway, 1.

Stock Exchange.—*See* Broker.

Succession.—*See* Settlement, 4.

Suit.—*See* Company.

Surety.—*See* Guarantee, 1.

Tenant by the Curtesy.—*See* Estoppel.

Digest of English Law Reports.

Tenant in Tail.

The court refused to order money representing land taken by a railway company under compulsory powers to be paid to a tenant in tail until he had executed a disentailing deed.—*In re Butler's Will*, L. R. 16 Eq. 479.

Testimony.—*See* Evidence.

Thellusson Act.—*See* Appointment, 2.

Title.—*See* Lease.

Trade-mark.

Injunction to restrain the defendant from using upon their labels the words "nourishing stout," which had been used by the plaintiff on their labels as a trade-mark, refused, on the ground that "nourishing" was a mere English adjective denoting the quality of the stout. Interesting discussion concerning trade-marks.—*Raggett* v. *Findlater*, L. R. 17 Eq. 29.

Trespass.—*See* Landlord and Tenant.

Trust.

1. B., an unmarried woman, called her servant, the plaintiff, into her room, placed an envelope in a box, and gave the box to the plaintiff, telling him that the box would be of service to him some day, but that he must not open it until after her death. B. retained the key of the box. The box was opened after B.'s death, and in said envelope was a paper signed by B., stating that the contents of the box was a deed of gift to the plaintiff of certain real and personal estate described. The plaintiff subsequently found in an outhouse an envelope directed to himself and signed by B., of the same date as the aforesaid paper, stating that the plaintiff would find the deeds of an estate mentioned in the first paper, which deeds were to be handed over to the plaintiff "free, and all expenses to be paid out of the bulk and writings of M" (a certain farm). *Held*, that there was not a valid declaration of trust of said real and personal estate in favor of the plaintiff.—*Warriner* v. *Rogers*, L. R. 16 Eq. 340.

2. The court refused to permit trustees who had authority to "continue or change securities from time to time, as the majority shall seem meet," to invest trust funds in United States bonds or American railway bonds.—*Bethell* v. *Abraham*, L. R. 17 Eq. 24.

3. A testator empowered trustees to apply the annual income of the presumptive shares to which children would be entitled towards the maintenance and education of such children, if the trustees should think fit, notwithstanding the father of such children might be living and able to maintain his children. A suit was instituted for the administration of the testator's estate, and part of the property was sold and the proceeds brought into court. *Held*, that the court would not interfere with the discretion of the trustees, who might apply the income as empowered in the will—*Brophy* v. *Bellamy*, L. R. 8 Ch. 798.

4. Trustees being about to sell certain land, and being unable to find a deed of 1819, through which the grantors, who had conveyed to the trustees in 1858, derived title, made it a condition of sale that the title should begin with the deed of 1858. A bill was filed by a *cestui que trust* to set aside the sale. *Held*, that said condition might have depreciated the value of the land at the sale, and was improper, and that the sale would be set aside. The smallness of the interest of the *cestui que trust* in the land constituted no objection to the bill.—*Dance* v. *Goldingham*, L. R. 8 Ch. 902.

5. A testator directed his real estate to be sold, and the proceeds held upon certain trusts, which failed. The lands remained unsold. *Held*, that said lands, though unsold, must be treated as money, so that the heiress of the testator who took the same having died, her administrator must pay probate duty.—*Attorney-General* v. *Lomas*, L. R. 9 Ex. 29.

See Executors and Administrators, 2; Settlement, 3; Vendor and Purchaser, 1.

Ultra Vires.—*See* Company, 1; Railway, 2.

Unborn Children.—*See* Legacy, 11.

Vendor and Purchaser.

1. A testator devised an estate in trust for his daughter for life, remainder to her husband for life, and after the death of the survivor, upon trust to sell and hold the proceeds in trust for all the daughter's children living at the death of such survivor. The daughter had six children living, one having issue two infant children. A petition for sale was filed and assented to by said daughter, her husband, and her children. *Held*, that an order of sale was not invalid by reason of said infant children not being parties to the petition.—*In re Strutt's Trusts*, L. R. 16 Eq. 629.

2. The defendant sold lands to the plaintiff at auction upon certain conditions, one o which was that the vendors should deliver an abstract of title to the plaintiff within seven days, and all objections not made within a certain period thereafter were to be considered waived; and in case such objection should be made, the vendor reserved the option of rescinding the contract of sale upon repaying the deposit money. An abstract was delivered and objections were made. The defendant thereupon filed a bill for specific performance, and the plaintiff in answer set up said objections, and a further objection, consisting of matters affecting the title which had not been disclosed in the abstract. The bill was dismissed. The defendant rescinded the contract and tendered the deposit, and the plaintiff brought this action against the defendant for not deducing a good title. *Held*, that the defendant, by bringing the above bill, waived his right to rescind on any of the original objections but that he had a right to rescind upon the additional objection made in the answer, although relating to matters not disclosed in said abstract.—*Gray* v. *Fowler*, L. R. 8 Ex., and Ex. Ch. 249.

Wages.

The master of a vessel gave a bottomry bond on ship, freight, and cargo, and also bound himself personally. The bond was indorsed to the owner of the cargo, who began a suit against ship, freight, and cargo, to enforce payment of the bond. The master afterward instituted a suit against the vessel and freight for his wages. The proceeds of the ship were insufficient to pay said bond, but the proceeds of ship and cargo were sufficient to pay both the bond and the wages. The wages of the master were ordered to be paid from the proceeds of the vessel before any portion of such proceeds was appropriated to payment of said bond.—*The Eugenie*, L. R. 4 Ad. & Ec. 123.

Wall.—*See* Party-wall.

Will.—*See* Appointment, 1; Charity; Election; Executors and Administrators, 2; Illegitimate Children; Legacy; Marshalling Assets; Mortgage, 3; Trust, 1, 3, 5.

Words.

"*All the Money of which I die possessed.*"—*See* Legacy, 3.

"*Devolve upon.*"—*See* Settlement, 4.

"*From six to eight Weeks.*"—*See* Contract, 5.

"*Nephews and Nieces.*"—*See* Legacy, 10.

"*Quantity and Quality unknown.*"—*See* Bill of Lading.

"*Restraint of Princes.*"—*See* Insurance, 3.

"*Succession to.*"—*See* Settlement, 4.

"*Then living.*"—*See* Devise, 3.

FLOTSAM AND JETSAM.

One has heard of a judge of some kind—an Indian Civil Servant, if we are not mistaken—who said that but for the evidence of the defendant and his witnesses, there would be no difficulty in deciding cases. As long as the plaintiff and his witnesses had the ear of the Court the case seemed as plain as possible, but then came the defendant and his witnesses, and jumbled the case up, and made it quite impossible to come to a decision one way or other.

Mr. Fitzjames Stephen, in the dissertation upon the Law of Evidence which precedes his edition of the Indian Evidence Act, mentions a statement made to him by a barrister who had practised in the Courts of Ceylon. This gentleman said that he could always guess that a Cingalese witness was lying if he observed a peculiar twitch in his toes. We wonder whether the toes of perjurers twitch in this country. A Royal Commission ought surely to be appointed to inquire and report. And perhaps, before long, the common "take off your glove," bawled by the usher to every witness who comes into the box may give place to "take off your boot," in which case, upon the theory of Mr. Stephen's informant, we might possibly learn something that might be of advantage to Justice.

There appear to be some peculiarities in matters legal in the Orient, as the following extracts from some of our exchanges would seem to testify.

Liu Chang-yeo, Governor of Kwangsi, denounces the acting magistrate of Ts'üan Chow for "recklessness and wanton severity." The Governor had already heretofore laid down strict rules concerning the method to be pursued by district magistrates in capital cases. All persons found guilty of murder were to be sent to the high provincial authorities for sentence, and only in extreme cases was authority to be granted, on application, for execution on the spot. Notwithstanding this, the functionary complained of—who was already labouring under a charge of wrongfully releasing a prisoner on bail while in another magistracy—has actually of his own motion beheaded a prisoner, without awaiting the reply to the application he had sent up for permission to execute the sentence locally, on grounds wholly inadequate. The reason alleged for this precipitancy is that the prisoner was in so precarious a condition that, unless executed forthwith, it was doubtful whether he would live long enough to be made a public example. A rescript directs that the offending magistrate be stripped of his rank, and placed on trial to answer for his shortcomings.

The police censors of the south division of Peking memorialise respecting a case of daring highway robbery in broad daylight, which took place on February 13th last. A clerk in a paper shop was proceeding on that day through the southern part of the city, carrying a package containing 420 taels in silver, when the money was snatched from him by a mounted person, whose description is given, and who made off with his plunder. Two Manchu soldiers have been arrested on suspicion, but the case is not clear against them. The assistant magistrate within whose area of jurisdiction the crime was committed is recommended for deprivation of his button, and for further penalties, if he fail in due time to apprehend the actual culprits and recover the stolen property.

Trinity Term—Obituary Notice.

Died, on the 15th of August last, (18), at Ottawa, TRINITY TERM, Esq., in the fulness of years.

It may not be generally known that the ancestors of this venerable and respected member of the Law Society owed their celebrity in life to the monks of old, whilst their unhappy descendant, who immigrated to this country in the year 1792, owes his untimely end to a Monck of the present day, who accomplished his purpose by a deliberate act, we will not say of unparalleled atrocity, but the next thing to it, viz.: an Act of Parliament.

His faculties were unimpaired to the last, and he was as legally hazy as ever he was in his life. After breathing a short prayer for the amendment of sec. 18 of 29 Vic., if possible, he departed this life to join in legal hallelujahs with his demised friends, John Doe and Richard Roe, who perished some years ago of the same complaint.

His remains were conveyed to Toronto in a Grand Trunk, and the procession is expected to start from Osgoode Hall at twelve o'clock on the first paper day of next Term.

The following will be, as nearly as can be gleaned, the order of the procession, with the names of the different individuals who are to figure promiscuously.

DEAF MUTES.

THE MESSENGERS OF THE COURTS.

W. B. HEWARD, Esq.,

Bearing a Standard, on which is to be lithographed a Rule Nisi composed entirely by himself, without swearing.

EXCITED STUDENTS,

Clothed in astonishment.

THE HEARSE.

PALL BEARERS.	Containing THE BODY "*Cepi Corpus*," Enrolled in PARCHMENT Tied up with Red Tape and Docketed.	PALL BEARERS.
Sir Shy O'Rary, A.C.		General Issue, C. P
O. Murrer, Esq., Q.C.		Sir E. Joinder.
Sir E. Butter.		C. C. A. Peel, Esq.
Sir Cuits Spring.		Sir O'Gate.
A. Sizer, Esq.		E. S. Crow, Esq.

CHIEF MOURNERS.

MICH'L. MASS, Esq. E. STARR, Esq

HILL. TERM, Esq.

Followed by

THE CHIEF JUSTICE.

TWO PUNIES.

THE CHANCELLOR.

HIS TWO VICES.

THE CHIEF JUSTICE, C. P.

THE TWINS,

CHANG AND ENG.

THE COUNTY JUDGES,

Without any divisions.

THE TREASURER OF THE LAW SOCIETY.

THE BENCHERS.

THE LIBRARIAN IN A GOOD TEMPER,

and new Wig.

THE BAND,

Composed of plucked Law Students, deeply wailing.

THE GOVERNOR OF THE GAOL,

Arm in arm with Habeas Corpus, Esq.

A STRING OF FENIANS WITH KETCH'S NEW SHIRT COLLARS,

Inscribed "Sus. per Coll."

TWO ROWS OF TIPSY ORANGE WOMEN.

THE CRIER OF THE COURT,

Bearing aloft the last Fi. Fa. issued during the limitfee of the deceased, with the well-known motto,

"*Nulla Bona.*"

JUBILANT SHERIFFS,

Who have not read the Act, and think they will not be required to return any more Writs.

MELANCHOLY SHERIFFS,

With unrequited attachments, and possibility of issue extinct.

A HOST OF CORONERS.

Closely followed by

ELISORS.

DIVISION COURT BAILIFFS.

The Funeral Sermon will be preached by a distinguished Canadian Prelate who was unanimously elected to his own Diocese.

The Text will be

"QUARE FREMUERUNT *GENTES.*"

EPITAPH.

"*Laus deo.*"

[Note.—It will be remembered that at the time the above was written Lord Monck was Governor General; the Chancellor was the much lamented Hon. P. M. Vankoughnet; that Mr. Justice Adam Wilson and Mr. Justice John Wilson were in the Court of Common Pleas; that the late Hugh N. Gwynne, Esq., was Librarian and Examiner. We are pleased to add that Mr. Heward is still Clerk in Chambers, but whether that "Rule Nisi" has yet been lithographed we are unable to say.—Ed. L. J.]

REVIEWS.

Cases determined by the Supreme Court of New Brunswick. Vol. II. Reported by William Pugsley, Jr., A.B. Saint John, N. B., 1874.

We are in receipt of the first and second number of this volume of reports. Mr. Pugsley explains in a short preface that the publication of the reports of the Supreme Court of the Province being in arrear, it has been arranged that he should publish the cases from Hilary Term, 1872, inclusive, and that the former reporter, Mr. Hannay, shall complete his second volume with the cases of Michaelmas Term, 1871. In order, however, that the current decisions may not be delayed, Mr. Pugsley commences his second volume with these contemporaneous cases, and will hereafter publish his first volume. This, therefore, is a very suitable time for our readers to subscribe for these reports, and there are very substantial reasons why their circulation should not be limited to the professional circles of New Brunswick. The common law of England obtains there, as here; their local statutes, arising from similar circumstances, are many of them similar in character to ours; while the statutes of the Dominion apply alike in both provinces. Decisions upon these subjects in the New Brunswick Court must of necessity be interesting and instructive to the bar of Ontario. The handsome appearance and varied character of the contents of the number before us, commend them to the patronage of the profession. The cases as reported bear very satisfactory testimony to the care and ability with which Mr. Pugsley attends to his duties: the observations and questions of the judges during the argument are pointedly given, and the citations are verified with great accuracy. The reporter evidently discharges his work as a labor of love, and in no grudging or perfunctory style.

Among the cases reported we may mention *In re Harrison*, p. 11, wherein is an interesting discussion as to the effect of the local Homestead Exemption Act, in which the owner thereof becomes insolvent. The Court seem disposed to hold that the Act, giving as it does exemption from seizure under execution to real estate, is in conflict with the Dominion Act relating to insolvency, and therefore *ultra vires* in so far as it affects traders, while perfectly valid as to non-traders. *Wiggins* v. *Teovil*, p. 31, is a decision in equity where a very well-considered and elaborate judgment is given by Allen, J., upon the question as to whether, when the directors of a bank have determined to increase the capital stock of the bank, and with that purpose shares were allotted from the accumulated profits, such shares were to be treated as a part of the "dividends, interest, and annual produce" of certain shares of the capital stock of the bank bequeathed to a testator. Unfortunately, in the number of the reports we have, there is a hiatus from p. 40 to p. 57, so that we had to stop short in the perusal of this interesting judgment. We find also a case relating to municipal aid to railways, *Ex parte the N. B. R. Co.*, p. 78, in which it is held that a municipality authorized to take stock in a company incorporated for the construction of a line of railway particularly defined by the Act, is not bound to issue debentures to a company not incorporated to construct that specific line, a subscription to their stock-list by the warden being a nullity. In *McGowan* v. *Betts*, p. 90, it was decided that the notice of action required by the Fisheries Act, 31 Vict. c. 61, sec. 13, does not apply to an action of replevin. In *Reg.* v. *McMillan*, p. 110, the interminable liquor question came up, and the Court held that the local Act imposing fines and penalties for selling liquor without licence is not *ultra vires* since Confederation; and though there may be thereunder a question as to the power of the local legislature to direct the manner in which the fines shall be recovered, the excess only, that is the mode of recovery, would be void.

It seems that questions arising upon assessments may be brought before the Supreme Court for decision. There should be such a provision here. Among such cases is *Ex p. Smith*, p. 147, where it was ruled that a clerk in the Provincial Secretary's office in Frederickton, who resides outside of the city, is not a "person carrying on business," within the meaning of the local Assessment Act, so as to make him an inhabitant of the city for the purposes of taxation.

In *Reynolds* v. *Vaughan*, p. 159, it was held that the payee of a note is not a "subsequent party," and cannot render it

valid by affixing a double stamp duty, if the proper duty has not been paid at the time of issuing the note. Nor is an attorney who merely receives the note for collection such a "holder" as the Act contemplates. He must have a beneficial interest in the note. A novel point arose in *Ex p. Bejean*, p. 200, where the Court held that a debtor who assigns under the Insolvent Act of 1869, cannot, if then in custody, obtain an order for support under the Confined Debtors Act, and can receive his discharge only in the manner pointed out by the former Act.

There are many other important cases, relating to wild land taxes, insurance, railways, and riparian rights, for which, however, we have not further space.

American Law Review. Little, Brown & Co., Boston. July, 1874.

In this number, which concludes Vol. 8 of this admirable Law Review, are discussed, "The Fraudulent Misrepresentations of Agents," "The Three Degrees of Negligence," "Testamentary Powers of Sale."

The Forum Law Review. Baltimore: Henry Taylor & Co.

This is a new review published in the South-Quarterly, as we take it, though it is nowhere so stated. The first number issued in January, and was then designated "The Bench and Bar Review." But with the second number, of which we are just in receipt, and issued as of April, the name is changed to "The Forum." The occasion of the change is that there was already a "Bench and Bar," a monthly legal periodical, published, we think, at Chicago, and it was deemed desirable to change the name so as to avoid confusion. The characteristics of this new serial are much the same as those of the *Southern Law Review*, of which we have heretofore spoken with commendation. One of its specialties is, furnishing in each number the portrait of some distinguished jurist or lawyer. Those already given are Caleb Cushing and Reverdy Johnson. In the last number there is a paper on the valid voluntary settlement of a chose in action, which, we think, we remember to have seen first in the *Solicitors' Journal*, and it is perhaps an oversight that no credit is given in *The Forum* for the article in question. The papers it contains on the civil law are of a very satisfactory character, and manifest a comprehensive grasp of the subject. We by no means complain of the article on William Pinckey, at Bel Air, as some captious writers, "who are nothing if not critical," seem to have done. No one would imagine the account to be literally true, but *si non e vero e ben trovato;* if it is not true it ought to be.

British Quarterly. July, 1874. Leonard Scott Publishing Co., New York.

The principal articles for this quarter are, "The Depths of the Sea," "Lord Ellenborough," "Indian Administration," "Society, Philosophy and Religion," a political article, and an amusing history of "Finger Rings."

Blackwood's Magazine for July, the first number of a new volume, is now before us. The most noticeable articles among its contents are: "Family Jewels," "Two Cities—Two Books," and "Brackenbury's Narrative of the Ashanti War."

The first is a collection of gems of verse which have a family likeness; examples of one subject variously treated by poets of different ages.

In the second we have a picture of Florence, in connection with George Eliot's "Romola;" and Venice, with which is associated in like manner George Sand's "Consuelo."

The third of these articles is a review of an "authentic memoir of that extraordinary war which England made on the Gold Coast last winter." The book tells of the "ancient history of the region;" "the troubles of the governors and traders of old;" "the Ashanti invasion which led to this last war, and the steps taken to meet it;" its results, and the prospects of the settlements, giving altogether a very fair idea of the whole subject. The writer was Assistant Military Secretary to General Wolseley, and speaks *ex cathedra*, and the reviewer speaks very highly of the book as a truthful narrative of the war and its causes.

The serials, "Alice Lorraine" and "Valentine and his Brother," are continued.

LAW SOCIETY OF UPPER CANADA

Osgoode Hall, Easter Term, 37th Victoria.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

Joseph Egbert Terhune.
Peter McGill Barker.
Charles Egerton Ryerson.
Alfred Servos Ball.
Charles Edgar Barber.
Frank D. Moore.
Harruel Madden Deroche.
Clarence Widmer Ball.
E. George Patterson.
George Levack B. Fraser.

These gentlemen are called in the order in which the entered the Society and not in the order of merit.

Joseph James Gormully, Esq., of the Middle Temple, England, Barrister-at-Law, was admitted into the Society and called to the degree of Barrister-at-Law.

The following gentlemen obtained Certificates of Fitness as Attorneys, namely:

Joseph James Gormully.
E. George Patterson.
Thomas Horace McGuire.
Charles Egerton Ryerson.
David Robertson.
George Levack B. Fraser.
A. Basil Klein.
Alfred Trevos Ball.
Josiah R. Metcalf.
Arthur Lyndhurst Colville.
Clarence Widmer Ball.
D. Ellis McMillan.

And on Tuesday, the 19th of May, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

George Robert Grasett.
John Maxwell.
William Seton Gordon.
James Craig.

Junior Class.

Frank Fitzgerald.
Duncan Dennis Riordan.
David Haldane Fletcher.
Isaac Campbell.
Jas. W. Holmes.
Nicholas DuBois Beck.
Arthur Beatty.
John Sandfield McDonald.
John Arthur Patrick MaMahon.
William James Lavery.
John Lewis.
Andrew Halley Hunter.
John Jacob Wheeler Stone.
John Gibson Currie.
Maxfield Sheppard.
George Albert Fletcher Andrews.
Walter James Read.
Thomas William Phillips.
Nathaniel Mills.
John Malcolm Munro.
John Joseph Blake.
Wm. Edgar Stevens.
Charles Egerton Macdonald.
Colin Scott Rankin.
Charles Michael Roley.
John Greeley Kelly.
John Ross McCord, and
Ernest Joseph Beaumont as an articled clerk.

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 and 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; Ac 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 shall 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.