THE

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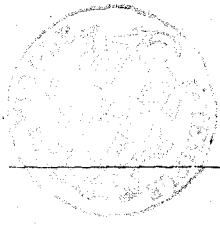

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# TABLE OF CASES.

## DIARY FOR JANUARY.

1. SUN. *1st Sunday after Christmas.*
2. Mon. Municipal Elections. Heir and Devisee Sittings begin. County Court Term begins.
6. Frid. *Epiphany.* Christmas vacation in Chancery ends. County Court Term ends.
8. SUN. *1st Sunday after Epiphany.*
9. Mon. County York Assizes begin. Election of Police Trustees in Police Villages.
11. Wed. Election of School Trustees in Toronto. Master and Register in Chancery to pay over fees to Provincial Treasurer.
12. Thur. Court of Error and Appeal sits.
14. Sat. Last day for Common School Trustees to report to Local Superintendent. Trustees and Chairmen of Municipalities to make returns to Board of Audit.
15. SUN. *2nd Sunday after Epiphany.*
16. Mon. Municipal Councils (except Counties) and Treasurers of Police Villages to hold first meeting.
17. Tues. Heir and Devisee Sitting ends.
21. Sat. Articles, &c., to be left with Sec. Law Society.
22. SUN. *3rd Sunday after Epiphany.*
24. Tues. First Meeting of County Councils.
29. SUN. *4th Sunday after Epiphany.*
30. Mon. School Finance Report to Board of Audit. Last day for Non-Resid. to give list of their lands.
31. Tues. Last day for City and County Clerks to make yearly returns to Provincial Secretary. Last day for Councils to report debts, &c.

THE

# Canada Law Journal.

JANUARY, 1871.

## COURTS OF THE SISTER PROVINCES.

### NOVA SCOTIA.

The closer commercial and political relations now being cultivated between the different Provinces of the Dominion can in no way be better cemented than by diffusing as widely as possible, within the limits of Dominion territory, correct information upon all those topics in which each section feels a common interest and pride with the others.

A few years ago Nova Scotia and New Brunswick were to us in the west places of comparative indifference, and we knew but little of the people, institutions or resources of the Provinces. But the times have changed, and already an interest has been awakened, and a dergee of anxious inquiry created amongst us, concerning our eastern brethren, which we have reason to believe they heartily reciprocate, and which promises to be productive of lasting benefit to the whole Dominion.

Anxious therefore further to increase this interest, and stimulate this spirit of inquiry into still greater activity, as well as to fulfil the duties which come legitimately within our sphere, we give to our readers in this issue a sketch of the Courts of Nova Scotia, their powers, functions, officials, &c., which we hope will, so far as that Province is concerned, accomplish the end we have in view.

We way mention that our information is from an authentic source in Nova Scotia, whence also we hope to be able to obtain occasionally for publication short notes of important decisions, which will afford our professional readers at least a knowledge of the laws and legal procedure of that Province that cannot fail to be of interest.

#### The Supreme Court.

The Supreme Court for the Province of Nova Scotia (having an Equity side over which the Equity Judge presides) exercises the same powers as are exercised by the Courts of Queen's Bench, Common Pleas, Chancery and Exchequer in England. Its original jurisdiction being both legal and equitable, embraces all kinds of actions, causes and suits, criminal and civil, real and personal, except actions for debt under $20, in which case it exercises only appellate jurisdiction. It also has power to avoid patents of land by process of escheat, and possesses concurrent jurisdiction with the Vice Admiralty Court, under an Imperial Statute, for the trial of persons charged with the commission of crimes and misdemeanours on the high seas. Its practice and procedure are prescribed by the revised statutes of Nova Scotia, based upon and assimilated to the English Common Law Procedure Act. In cases not specially provided for by the statutes its practice and proceedings conform, as nearly as may be, to the practice and proceedings of the Superior Courts of Common Law in force previous to the first year of the reign of William IV., the proceedings and practice of the Court of Queen's Bench in England, however, prevailing where those Courts differ from each other. This court, presided over by any one of the judges, holds two Sessions a year for trials of issues in fact, and of Oyer, Terminer and General Gaol Delivery, in every County of the Province. In Halifax County those Sessions are called Sittings, and elsewhere they are designated Terms.

The Supreme Court also sits twice a year *in banco* at Halifax for hearing arguments of rules for new trials, appeals from the Sessions of the Equity Court, the Courts of Insolvency, Courts of Probate, Courts of Sessions, and from orders and decisions of single judges sitting at Chambers, as well as for the argu-

ment of special cases and demurrers. Appeals lie thence to the Judicial Committee of the Privy Council.

The following are the judges of the Supreme Court, five of whom by a recent act constitute a quorum:

Chief Justice Sir William Young, K.C.B.; Hon. James W. Johnston, Hon. Edmund M. Dodd, Hon. Frederick W. DesBarres, Hon. Lewis M. Wilkins, Hon. John N. Ritchie, Hon. Jonathan McCully. Henry Oldright, Esq., is Reporter to the Court.

The Equity Court.

This Court, with its single judge presiding, is always open, and discharges the functions of the equity side of the Supreme Court, the Judge in Equity being also a Judge of the Supreme Court. Its jurisdiction, powers, &c., are identical with those of the Court of Chancery in England. Its forms of pleadings are those at Common Law, but modified to suit circumstances. The present Equity Court was organized and established by a recent Provisional Statute. Its sittings are always held at Halifax.

Judge in Equity: Hon. James W. Johnston.

The Practice Court,

Or Chambers wherein one of the Judges presides, is held every Tuesday at Halifax during the year, except in vacation. The duties and powers incident to this Court are the same as those exercised by Judges at Chambers in England, but somewhat modified and more extensive. The matters which most engage the attention of this Court are motions to amend pleadings, for leave to plead and demur, to refer causes to arbitration, to set aside pleas, &c., &c. A Judge at Chambers on the first Tuesday of every month, except in vacation, hears and determines in a summary way all suits and appeals for sums under $80, and cases of forcible entry and detainer, &c.

The Court for Divorce and Matrimonial Causes.

The jurisdiction of this Court embraces all matters relating to prohibited marriages and divorces, and has power to declare any marriage null and void for impotence, adultery, cruelty, or kindred, within the degrees prohibited in the 32 Hen. VIII. Its practice and procedure are similar to that of the like court in England, except that co-respondents are ot amenable to its jurisdiction, and juries are not used, the judge having the exclusive right to try the issues in fact as well as to determine the law in all cases. The judge also has power to make rules and regulations to govern the practice. Appeals lie to the Supreme Court *in banco* in all cases, except on mere questions of costs. It has no stated periods of sittings, is always open, and sits as occasion requires. Its sittings are always held at Halifax.

Judge ordinary: Hon. James W. Johnston. Registrar, James H. Thorne, Esq,

The Court of Vice Admiralty.

The jurisdiction of this Court may be said to extend to all maritime suits and causes. It also has jurisdiction in prize causes, and is the Court where prosecutions for violation of the Fishery laws are conducted; in a word, its jurisdiction, functions, &c., are the same as those of like courts in the other maritime Provinces. It always sits at Halifax.

Judge and Commissary General, Sir William Young, K.C.B. Registrar, Lewis W. DesBarres.

The Courts of Probate.

These Courts, of which there is one in every County of the Province, and two where the County happens to be divided, grant Probate and has testamentary jurisdiction over the estates of deceased persons, with power to appoint guardian to minors, children of persons who die intestate. Its practice and procedure are prescribed by the statutes of Nova Scotia, so far as they go, otherwise that of the Ecclesiastial Courts of England prevail and are followed. The laws of Nova Scotia regarding probate, the administration of estates, and the distribution of the estates of persons who die intestate, are based largely upon the English Statute of Distribution, &c., but somewhat assimilated to the laws in that respect prevailing in Massachusetts. Appeals lie from these Courts to the Judge in Equity at Halifax, and thence to the Supreme Court *in banco*.

The Insolvency Courts,

Being created by "The Insolvent Act of 1869," have the same powers, jurisdiction, &c., as like Courts in the other Provinces of the Dominion.

The Courts of Sessions,

Sits in the County of Halifax quarterly, and in some Counties twice, in others once a year. The Custos of the County preside. This Court is composed of the Custos, together with the

Justices of the County, the Grand Jury attending for municipal purposes. It has a limited jurisdiction in criminal matters which of late years has fallen largely into disuse. The duties now performed by this Court are confined almost entirely to local and municipal purposes.

Magistrates Courts,

Having jurisdiction in actions of debt, presided over by one Justice, when the whole dealing or cause of action does not exceed $20, and by two where it is above $20, but does not exceed $80, exist in every County of the Province. Where a trespass has been committed by horses, cattle, &c., and the damages do not exceed $12, a Justice of the Peace may try it, providing no question of title to land arises; and if the cattle alleged to have been trespassing are detained, and the alleged damage is not beyond $12, a Justice may grant a writ of replevin for the same. Two Justices may hear and determine all complaints for common assault and battery, and may try bastardy cases, and may grant orders of affiliation. Prosecutions for illegal sale of intoxicating liquors are also confided to two Justices. The criminal jurisdiction now possessed by Magistrates in Nova Scotia, out of Sessions, has been conferred by Dominion Legislation.

## ELECTIVE BENCHERS.

We regret to see that the proposition to make the Benchers of the Law Society elective has again been brought before the Legislature. The present Bill is however a Government measure, and may be expected to be, as it in fact is, more moderate and better digested than the crude Bill of last Session. Whilst we may rejoice at this the cause of rejoicing is but small, for it is the principle that we object to more than the details.

In thus objecting to the principle involved, if we do not speak for the majority of the profession, we claim to do so for those of the largest experience, and those who have had most occasion to think carefully on the subject, and to whose opinions we would give the most weight, and we now allude to those who have no connection with the present management.

The question now is, not whether there are defects, for that may for the sake of the argument be admitted, but whether the proposed change will remedy the alleged evils, and whether the cure will not be worse than the disease. Desperate cases may require desperate treatment, but to speak of anything being desparately bad in the present management is simply childish exaggeration. For even admitting all that is alleged, we can still boast that the Law Society of this Province, and its system of education for students, and its management in general is equal, if not superior, to any similar institution in the world. Why then such a violent remedy for so mild a disease. The effect must surely be bad; it cannot in the ordinary course of events be otherwise.

Probably nothing that can now be said will affect the result of the present bill, and it will perhaps be only left for us to make the best of what we cannot avoid—for even many of those who strongly disapprove of the change think it most prudent to accept the present situation and secure as moderate an act, and containing as many safeguards, as possible—but we cannot allow the Bill to go as it were by default, or tacitly admit that there is only one side to the question.

Whether it would not be wiser in those we have just alluded to, as in those who are responsible to the profession and public for their future as well as present well-being, to resist any hurried action, and ascertain the calm dispassionate voice of the profession (which we contend has never yet been done), after hearing the arguments on both sides, may well be questioned. It must not be forgotten also that a House composed of the elements that must necessarily be found there is eminently unfit to discuss the subject with advantage; and of the lawyers that are members of the House, we may safely say without fear of offending them, that there are very few that the profession would choose to decide upon a question so vital to their interests. Besides this, party politics enter largely even into matters of this kind. Again, there is no second House to act as a safeguard on hasty legislation, and it requires no ordinary courage and strength in the leader of a government to stand up against outside pressure, when he is not backed up by an Upper House (which unfortunately our constitution denies to us) less amenable to the voice of a fickle public, and not swayed by the influences that govern an elective body.

Even hastily as changes are now made, the House evidently felt a difficulty when attempting to alter the details of this Bill, and handed it over with rather ludicrous alacrity to those

few who, in the House, have even the slightest knowledge of the subject.

The following is the Bill as introduced:—

Whereas, it is expedient that a change be made in the manner of the election of benchers of the Law Society, and petitions have been presented, praying for the same. Therefore, &c.

1. [Repeals Con. Stat. U. C. Cap. 33, s. 1.]

2. The present benchers shall hold office, and continue with all their duties and powers unimpaired until the first day of Hilary Term, 1872, as if the said fourth section had not been repealed; and all By-laws, resolutions, rules and regulations of the Law Society at present existing, or which shall be passed by the present benchers until the said first day of Hilary Term, 1872, except so far as the same are, or shall be inconsistent with this Act, shall remain in full force and effect until altered by the benchers to be appointed as hereinafter provided for.

3. On the first day of Hilary Term, 1872, the present benchers except as hereinafter provided, shall cease to hold office, and from and after that day the benchers of the Law Society, exclusive of *ex-officio* members, shall be thirty in number, to be elected as hereinafter provided.

4. The Attorney-General for the time being of the Province of Ontario, and all members of the Bar of Ontario, who shall have at any time held the office of Attorney-General for the Province of Ontario, or of Attorney-General or Solicitor-General for that part of the late Province of Canada, formerly Upper Canada, and any retired Judge or Judges of the Superior Courts of Law or Equity for the Province of Ontario, shall respectively *ex-officio* be Benchers of the Society.

5. Her Majesty's Counsel learned in the Law of the Bar of Ontario, shall elect from among themselves twelve persons to be Benchers of the said Law Society.

6. For the purpose of the election of the remaining eighteen Benchers, this Province shall be deemed to be divided into the five districts following:—

One comprising the Counties of Essex, Lambton, Kent, Middlesex, Elgin, Oxford, Huron, Perth and Bruce.

One comprising the Counties of Wellington, Waterloo, Brant, Norfolk, Haldimand, Monck, Welland, Lincoln, Wentworth and Halton.

One comprising the Counties of Grey, Simcoe, Peel, York, Ontario, and the Districts of Muskoka, Algoma and Parry Sound.

One comprising the Counties of Victoria, Durham, Peterborough, Northumberland, Hastings and Prince Edward.

One comprising the Counties of Frontenac, Lennox and Addington, Renfrew, Leeds, Lanark, Grenville, Dundas, Stormont, Glengarry, Prescott, Russell and Carleton.

The said Districts shall be termed respectively, the London, Hamilton, Toronto, Cobourg and Brockville Districts.

7. For each of the said districts other than Toronto there shall be elected by the Members of the Bar, usually resident and practising in the said districts respectively, three Members of the Bar, of at least ten years standing, and whether resident or practising in said respective districts or not, and whether the same shall be one of Her Majesty's said Counsel or not, to be Benchers of the Law Society; and for the Toronto District, there shall be similarly elected as Benchers six members of the like standing.

8. The first election for such of the Benchers as by this Act are directed to be elected by Her Majesty's Counsel and of such Benchers as hereby directed to be elected for the Toronto District, shall take place on the first Saturday in the Michaelmas Term next succeeding the passing of this Act, and every subsequent election of such members as are hereby directed to be elected by Her Majesty's Counsel and of such Benchers as are hereby directed to be elected for the district of Toronto, shall take place on the first Saturday of the Michaelmas Term, in the year proper for holding such election; and such elections shall take place at Osgoode Hall, Toronto.

9. The first election for the districts of London, Hamilton, Cobourg, and Brockville, shall take place on the first Wednesday after Michaelmas Term next succeeding the passing of this Act; and every subsequent election for the said districts, shall be held on the first Wednesday after Michaelmas Term in the year proper for holding such elections: and such elections shall take place in the Court House of the Cities of London and Hamilton, and of the Towns of Cobourg and Brockville, respectively, for the districts in which such cities and towns are situated respectively.

10. In the case of such elections as are by this Act directed to be held at Osgoode Hall, in the City of Toronto, the Secretary to the Law Society for the time being shall act as Returning Officer, and shall receive the votes of all Her Majesty's said Counsel, and of all Members of the Bar entitled to vote at such elections, and shall record in separate books to be kept by him for that purpose, one for the election by Her Majesty's said Counsel, and another for the election by the Members of the Bar, the name and residence of each person voting together with the names of those for whom such person shall have voted: and such books shall be returned by the Secretary to the first meeting of the newly elected Benchers, together with all such books kept for a like purpose by the other Returning Officers, and which by this Act are required to be returned by such Returning Officers to the Secretary for the time being of the Law Society.

11. In the event of there being no Secretary for the time being of the Law Society at the time at which any election under this Act is to be held at Toronto, or in the event of such Secretary being unable from illness or other unavoidable cause to act as returning officer at such election, then and in such case the treasurer for the time being of the Law Society shall appoint under his hand some other person to act as such returning officer, and such person so appointed shall perform all the duties of such returning officer as prescribed by this Act, and shall be entitled to receive the remuneration provided by this Act for the performance of such duties.

12. The Secretary of the Law Society for the time being, or such other person as may be appointed under the last preceding section, shall as soon as conveniently may be, by inspection of the books directed to be kept by him by the tenth section of this Act, determine who are the persons duly elected under this Act as benchers elected by Her Majesty's counsel and by the Members of the Bar for the district of Toronto, and shall advertise the same, together with the names of such persons as may be returned to him as duly elected for the other districts referred to in this Act in the *Ontario Gazette*, at least two weeks before the first day of Hilary Term then next ensuing.

13. The secretary of the Law Society for the time being, or such other person as shall be appointed under the eleventh section of this Act, shall attend at Osgoode Hall for the purpose of receiving all votes that shall be tendered to him from the hour of (ten) in the forenoon of the day appointed by this Act for such elections as are to be held by him, till the hour of (four) in the afternoon of the same day.

14. In the case of such elections as are by this Act directed to be held in the districts of London, Hamilton, Brockville, and Cobourg, the County Court Judge for the County in which such election is directed to take place shall act as returning officer for such district, or in the event of there being a vacancy in the office of County Court Judge for such county at the time when any such election is by this Act appointed to take place, or in the event of the County Court Judge being unable from sickness or other unavoidable cause to act as returning officer, then the Clerk of the County Court for the city or town wherein the election is to take place shall act as the returning officer.

15. The County Court Judge or other person acting as returning officer, under the provisions of the last preceding section, shall receive the votes of all persons entitled to vote for the district in which such election shall take place, and shall record in a book to be kept by him for that purpose, the name and residence of each person voting, together with the names of those for whom such person votes, and shall return such book together with the return of members elected for such district, to the secretary for the time being of the Law Society at Toronto, at least three weeks before the first day of Hilary Term next ensuing.

16. The County Court Judge or other person acting as returning officer shall, as soon as conveniently may be, by inspection of the book required to be kept by him by the last preceding section, determine who are the Benchers duly elected for the district in which such election has taken place, and shall under his hand return the names of such Benchers to the secretary of the Law Society for the time being, at least three weeks before the first day of Hilary Term next ensuing such election.

17. The County Court Judge, or person acting as returning officer, under the fourteenth section of this Act, shall attend at the court house of the city or town in which the election is to take place, from the hour of (ten) in the forenoon of the day appointed by this Act for such election, to the hour of four in the afternoon of the same day, for the purpose of receiving all votes that shall be tendered to him.

18. The person acting as returning officer under any of the preceding clauses shall be entitled to be paid out of the funds of the Law Society the sum of ———, in addition to necessary disbursements, for each occasion whereon he acts as such officer.

19. The persons so elected Benchers as aforesaid shall take office on the first day of Hilary Term following their election, and shall hold office until the beginning of the Hilary Term which shall be the fifth after they shall have entered on their said office, or till the election of their successors.

20. It shall be competent for the majority of the Benchers present at any meeting in the first Hilary Term after their election, to appoint a committee of their number to enter upon an enquiry with respect to the due election of any of the said Benchers whose election or elections may be petitioned against by any member of the Bar who has voted in the particular district for which the Bencher or Benchers petitioned against have been elected, or if the petition is against the return of any of the Benchers elected by Her Majesty's counsel; then on the petition of any of Her Majesty's counsel who voted at the election of such Bencher or Benchers, and after such enquiry, to report such Bencher or Benchers as duly or not duly elected or qualified according to the fact, and, if necessary, to report the name or names of the next in order of votes of the duly qualified Members of the Bar, or of Her Majesty's counsel, as Bencher or Benchers in lieu of the person or persons petitioned against and reported not duly elected or qualified; and on the confirmation of the said report by the majority of Benchers (other than

those petitioned against) present at any meeting for that purpose, the person or persons so reported in lieu of those petitioned against as aforesaid shall be taken and deemed to be the duly elected and qualified Bencher or Benchers.

21. No petition against the return of any Bencher shall be entertained unless such petition shall be filed with the Secretary of the Law Society at least ten days before the first day of Hilary Term next succeeding such election, and shall contain a statement of the grounds on which such election is disputed, and unless a copy of such petition be served upon the Bencher whose election is disputed at least ten days before the first day of the said Hilary Term, and no grounds not mentioned in petition shall be gone into on the hearing of such petition.

22. On any such notice being duly filed as aforesaid, the Benchers shall during the first week of the Hilary Term succeeding each election, appoint a day for the hearing of such petition, and give notice of such day to the petitioner, and to the person whose return is disputed; provided that all such petitions shall be finally disposed of during the said Hilary Term.

23. On the hearing of any such petition the Benchers shall have power to examine witnesses under oath; and a summons under the hand of the Treasurer of the Law Society or under the hand of three Benchers, for the attendance of a witness, shall have all the force of a subpœna, and any witness not attending in obedience thereto, shall be liable to attachment in either of the Superior Courts.

24. Any person petitioning against the return of any Bencher shall dedosit with the Secretary of the Law Society the sum of to meet any costs which such Bencher shall be put to in the opinion of the Committee before which such petition shall be heard; and such Committee shall have power in the event of such petition being dismissed, to award such sum to be paid to the Bencher petitioned against as in their opinion is just, and shall have power in their discretion in the event of such Bencher being decided to be not duly elected or qualified, to award costs to the petitioner, and the costs so awarded shall be recoverable in any Court of competent jurisdiction.

25. The Benchers shall, on the first meeting after their election proceed to elect one of their body as Treasurer, who shall be the President of the Society, and shall have all such powers as are at present possessed by the Treasurer of the Law Society; and such Treasurer shall hold office until the appointment of his successor; and the election of Treasurer shall take place on the first Saturday of Hilary Term in each year; provided that the retiring Treasurer shall be eligible for re-election.

26. In case of the failure in any instance, in any district, to elect the requisite number of duly qualified Benchers therefor, according to the provisions of this Act, or in case any of Her Majesty's counsel, or Member of the Bar, shall have been elected for more than one district, or in case one of Her Majesty's counsel shall have been elected for one district, and as one of the Benchers to be elected by Her Majesty's counsel under the provisions of the fifth section of this Act, or in case of any vacancy caused by the death or resignation of any Bencher, then it shall be the duty of the remaining Benchers, with all convenient speed, at a meeting to be specially called for the purpose, to supply the deficiency in the number of Benchers failed to be elected as aforesaid, or caused by any of the means aforesaid, by appointing to such vacant place or places, as the same may occur, any person or persons duly qualified under the provisions of this Act to be elected as a Bencher; and the person or persons so elected shall hold office for the residue of the period for which the other Benchers have been elected.

27. At all elections to take place under this Act, all retiring members shall be re-eligible.

## AN ENTERPRISING BARRISTER.

We like enterprise; we think we have been enterprising ourselves in a small way, and therefore have a fellow-feeling for those who desire, by enterprise, to do well for themselves in their business. But there are limits even to this, especially so far as our honorable profession is concerned. Its traditions draw the lines somewhat closely, and would be scandalized by what is expressed by the slang phrase, "touting for business."

Some extra-particular brethren even object to what they call the un-English practice of advertising cards in newspapers; but we do not go so far as this, and can see no great difference between this direct mode of advertising—which is in accordance with the custom that has prevailed in this country for many years past—and the many indirect modes of bringing themselves before the public adopted by professional men in England.

We must confess, however, to having had our professional feathers somewhat ruffled recently by seeing a printed circular, issued by a Barrister, and an "M.A.," sent to country practitioners throughout Ontario, in which he informs "Dear Sir" as follows:—"As Michaelmas Term is at hand, by enclosing me (each) $20, I shall be happy to take out your Law Certificates, and forward them to you free of expense."

This is "cheap," not to say "nasty," but it is unnecessary to point out the objectionable features of this mode of "working up" an agency business; they are patent to all who desire, with us, to uphold all that is nice and seemly in the members of the cloth. If there are any who disagree with us, we can only say that they are so few as only to form the exception generally supposed to be necessary to prove the rule.

## MULTIPLICATION OF REGISTRY OFFICES.

It is proposed to make several new Registry Offices in Ontario, the reason being, we understand, that the emoluments from some are much greater than it is reasonable for any one public officer to receive.

Persons holding official positions should undoubtedly be paid in proportion to the labour and responsibility involved, and the education and attainments necessary for the proper discharge of the duties of the office, and we gladly testify to the efforts of the Attorney General in this respect to supplement the salaries of the Judges of the Superior Courts. It would be a shame, for instance, that a registrar should be paid or receive from his office a salary as large as that of one of the judges, and we are told such is the fact in some few instances. But is the only remedy in the premises the division of counties for registration purposes?

The practising attorneys, and they know more about it than all the legislators—eminent Queen's counsel, highly respectable farmers, and whatever else they may be, put together. The system of pulling registration divisions into fragments is a bad one—it entails expense, it causes great confusion and trouble in searching titles and is a nuisance to the practioners who do the bulk of the business with these officers. It is sufficient that a Registration District is divided when an alteration is made in the size of a County. Lawyers congregate of course in county towns, and, instead of being able to search titles with promptitude, and with any degree of precision, by a personal reference to the books and original memorials, are compelled to trust to abstracts or agents instead. If the fees received by some registrars are too great, and if a change has to be made, surely some other remedy could be found. One proposes to fund the fees; but whatever is to be done, we hope some other expedient will be found other than multiplying Registry offices, to the great inconvenience of the public and those who do the business of the public in connection with them.

## LAW SOCIETY—MICH. TERM, 1870.

During this Term Hon. Sidney Smith, Q.C., and D'Arcy Boulton, Esq., Barrister-at-Law, were elected Masters of the Bench.

The following gentlemen were called to the Bar:

Daniel Wade, Brockville; James H. Macdonald, Toronto; Charles A. Brough, Goderich; Frank Arnoldi, Toronto; George A. Boomer, Toronto; William J. Green, Toronto; (without an oral). Also Henry F. Holland, Cobourg; Fred. G. A. Henderson, Belleville; D. Sheldon Smith, Brantford; E. H. Smythe, M.A., Kingston; C. W. Matheson, Simcoe; David L. Scott, Brampton; Michael Houston, Chatham; Edward Burns, Sarnia; and J. T. St. Julien, of the Quebec Bar.

And the following gentlemen were admitted as Attorneys:

S. R. Clarke, Toronto; C. A. Brough, Goderich; Henry Muckle, Toronto; D. S. Smith, Brantford; E. H. Smythe, Kingston; Wm. J. Green, Toronto; G. A. Boomer, Toronto; M. Houston, Chatham; (without oral). Also Leonard McL. Stewart, Ottawa; T. A. Keefer, Strathroy; George Brunel, Toronto; Jno. S. Ewart, Kingston; John R. Cartwright, Kingston; Peter Purves, Brantford; J. B. Browning, Toronto; Cox, and Æ. Macdonald.

The Scholarships were awarded as follows:

4th Year. F. A. Crysler, who obtained 283 marks on a maximum of 360.

3rd Year. R. M. Fleming, who obtained 284 marks on a maximum of 320.

2nd Year. Not awarded.

1st Year. J. McMillan, who obtained 248 marks on a maximum of 320.

# SELECTIONS.

## MISTAKES OF LAW.

*Ignorantia juris neminem excusat* is a familiar maxim of the law, but its practical application has been the source of much perplexity. Whether, for instance, money paid through ignorance of the law can be recovered back, is a question much vexed, and involved in no inconsiderable doubt. We propose, in the following article, to examine the English and American authorities on the subject, and to discover, as far as we may be able, the rule to be deduced from them.

One of the earliest, as well as leading cases on the subject is that of *Bilbie* v. *Lumley*, 2 East, 469. * * * * *

Lord Ellenborough asked the plaintiff's counsel "whether he could state any case where, if a party paid money to another voluntarily, with full knowledge of the facts of the case, he could recover it back again, on account of his ignorance of the law?" No answer being given, his lordship continued, that the only case he ever heard of was that of *Chatfield* v. *Paxton*, where Lord Kenyon, at *nisi prius*, had intimated something of the sort. "But, when it was afterward brought before the court, other circumstances were relied on, and it was so doubtful on what ground it turned that it was not reported." "Every man," continued Lord Ellenborough, "must be taken to be cognizant of the law; otherwise there is no saying to what extent ignorance might not be carried. It would be urged in almost every case." The only case cited by his lordship to sustain this doctrine was that of *Lowry* v. *Bourdieu*, Dougl. 468, in which he said, "money paid under a mere mistake of law was endeavored to be recovered back; and there Buller, J., observes, that *ignorantia juris non excusat, etc.*" But an examination of that case shows that it was decided on entirely other grounds. The action was brought to recover back money paid on a policy of insurance on a ship and cargo, in which the insured had no interest, and three of the justices, Lord Mansfield, Buller and Ashhurst, J J., were of the opinion that it was a gaming policy, and against an act of parliament, and that, therefore, the law could not aid the plaintiff in recovering back what he had paid according to the rule, *pari delicto melior est conditio possidentis.* Mr. Justice Willes did not concur, however, but said he supposed the parties believed there was an interest, and that it would be very hard that a man should lose what he had paid under a mistake. Mr. Justice Buller, in the course of his remarks, observed that there was no mistake in matter of fact, and if the law was mistaken, the rule applies, *ignorantia juris non excusat.* This observation was clearly *obiter*, as he, with the majority of the judges, had expressly held the policy to be a gaming policy, and the transaction beyond the aid of the court. Still, it is urged that Lord Mansfield and Mr. Justice Ashhurst would not have suffered the *dictum* to pass without animadversion if they had not assented to its correctness.* It is hardly necessary to remark that this argument can have but little weight in the consideration of the question. It will be seen, therefore, that the case of *Bilbie* v. *Lumley*, which is very often cited, and which is "one of the main pillars on which the subsequent decisions and *dicta* on the subject rest," is itself based upon a very doubtful foundation.

The case of *Chatfield* v. *Paxton*, referred to by Lord Ellenborough, and given in a note to *Bilbie* v. *Lumley*, need not be noticed in full, as it turned on other points.

It may be well at this point to refer to two or three cases decided prior to *Bilbie* v. *Lumley*, apparently holding a different doctrine. The first is *Farmen* v. *Arundel*, 2 W. Black. 825, which was an action for money had and received, and in which Chief Justice De Grey said: "Where money is paid by one man to another on a mistake, either of fact or of law, or by deceit, this action will certainly lie." In *Bize* v. *Dickason*, 1 T. R. 285, where there were mutual debts between two persons, and one of them becoming bankrupt, the other, instead of setting off his own claim, as he might have done, paid the assignees in full; and it was held that he might recover an amount corresponding to that which he had neglected to set off, in an action for money had and received against the assignees. In rendering judgment, Lord Mansfield said; "The rule has always been, that, if a man has actually paid what the law would not have compelled him to pay, but what, in equity and in conscience, he ought, he cannot recover it back;" and he gave, in illustration, the case of a debt barred by the statute of limitations, or contracted during infancy. "But," he continued, "where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."

These two cases where cited by the plaintiff in the subsequent case of *Brisbane* v. *Dacres*, 5 Taunt. 143, and were commented on by the judges in their opinions. Gibb, J., after quoting the declaration of De Grey, C. J., given above, said: "Now, the case did not call for this proposition so generally expressed; and I do think that doctrine, laid down so very widely and generally, where it is not called for by the circumstances of the case, is but little to be attended to; at least, it is not entitled to the same weight in a case where the attention of the court is not called to a distinction as it is in a case where it is called to the distinction." And of the conclusion of Lord Mansfield, in *Bize* v. *Dickason*, he said: "I cannot think Lord Mansfield said 'mistake of law,' for Lord Mansfield had, six years before, in *Lowry* v. *Bourdieu*, heard it said: "Money paid in ignorance of the law could not be recovered back," and had not dissented from the doctrine; and Buller, J., sat by him who had expressely stated, six years before, in *Lowry* v. *Bourdieu*, and would not have sat by and heard the contrary stated without noticing it." It may be remarked, in passing, that conjectures of what Lord Mansfield or Mr. Justice Buller would or would not have done are worth but little. Lord Mansfield undoubtedly said "mistake," and it can hardly be doubted, from the context, that he meant *mistake of law* as well as of fact. Chambre, J. in *Brisbane* v. *Dacres*, said; "The opinion of De Grey is not a mere *dictum*, it is part of the argument—it is a main part of the argument." Mansfield, C. J.,

* Per Gibbs, J., in *Brisbane* v. *Dacres*, 5 Taunt. 143, and Sutherland, J., in *Clarke* v. *Dutcher*, 9 Cow. 681.

speaking of De Grey's opinion, said: "It certainly is very hard upon a judge, if a rule which he generally lays down is to be taken up and carried to its full extent." "In the case of *Bize* v. *Dickason*," he adds, "the money ought conscientiously to have been repaid."

Thus far we have on the one side the undoubted *dictum* of Mr. Justice Buller and the decision of Lord Ellenborough, that mistakes of law cannot be remedied, and, on the other side, the "intimation" of Lord Kenyon, the *dictum* (if it be only a *dictum*, which is very doubtful) of Chief Justice De Grey, and the opinion of Lord Mansfield.

The next important case on the subject is that of *Brisbane* v. *Dacres*, already cited. Here the plaintiff, while captain of a vessel belonging to the squadron of Admiral Dacres, had received on board his vessel a quantity of public specie and a large amount of private treasure, to be transported to England. Of the freight received for both, he paid over one-third part, according to a usage therefore established in the navy, to the admiral. Discovering that the law did not require captains to pay to admirals any part of the freight, he brought an action for money had and received, to recover it back from the admiral's executrix. The court held, unanimously, that he could not recover back the private freight. Gibbs, J., on the ground that it was illegal to carry the private treasure. Chambre, J., that, whether illegal or not, it was the practice of the admiral to receive his third part, and that that practice had the assent of the government. The point chiefly considered, however, by all the judges, respected the part of the freight paid on the public specie, and they held against Chambre, J., that the plaintiff could not recover. Gibbs, J., rested the case mainly on the ground that the money, being paid through a mistake of law, could not be recovered. He said: "We must take this payment to have been made under a demand of right, and I think that when a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is made, has paid a sum, he never can recover back the sum he has so voluntarily paid." But, apparently hesitating to run counter to Lord Mansfield's maxim before cited, he said he had "considerable difficulty in saying that there was anything unconscientious in Admiral Dacres in requiring this money to be paid to him, or receiving it when it was paid." Heath, J., found it "very difficult to say that there is any evidence of ignorance of the law here," and Mansfield C. J., admitted that, "according to the doctrine of Lord Kenyon, an action might be maintained to recover it back, but I do not see how the retaining this is against his conscience," It is but fair to presume from the opinions, that the case of *Brisbane* v. *Dacres* turned upon the distinction that there was nothing in the transaction contrary to *æquum et bonum*.

In *Stevens* v. *Lynch*, 12 East, 38, the defendant—the drawer of a bill of exchange—with full knowledge of the fact that the plaintiff had given time to the acceptor after his dishonor of the bill, said to the holder: "I know that I am liable, and if the acceptor does not pay it I will." The court held that the defendant could not now defend upon the ground of his ignorance of the law when he made the promise.

The case of *Bilbie* v. *Lumley* above cited was recognized in *Gomery* v. *Bond*, 3 M. & S. 378, and in *East India Company* v, *Tritton*, 3 B. & C. 280. Neither of these cases has much value on the question under consideration. In *Gomery* v. *Bond* the defendant agreed for the purchase of some seed, but, on its being brought to him, would not accept it; on which the plaintiff requested him to try and sell it for him, which he tried to do, but, failing, brought it back again; the plaintiff refused to receive it, and brought the action for the price. The judge submitted to the jury: 1. Whether there was an agreement for sale. 2. Whether the plaintiff had waived it. 3. Whether he had done so in ignorance of his rights, telling them "that, if he did it under an ignorance of the law and impression that his remedy was gone, it would not amount to a waiver of the benefits of the agreement." The plaintiff had a verdict. A rule for a new trial was obtained on the ground that the third question was improperly submitted to the jury. Nothing was said directly about ignorance or mistake of rights; Lord Ellenborough thought there could be no doubt from the evidence that the plaintiff had waived the contract.

In the *East India Company* v. *Tritton* the plaintiffs sued to recover money paid by them as acceptors of a bill of exchange to the defendants on the faith of an insufficient prior indorsement, of the validity of which the plaintiffs had, and the defendants had not, the means of judging. The defendants received the money as agents, and before any notice of the insufficiency of the indorsement. The court held that the action could not be maintained, basing their arguments mainly on the grounds that the agents, having paid the money over to their principals in good faith, were not liable. Holroyd, J., thought the case of *Bilbie* v. *Lumley* sufficient to dispose of the question, but agreed with the majority of the court on the ground above stated.

*Milius* v. *Duncan*, 6 B. & C. 671, contains a *dictum* of Mr. Justice Bailey, that "if a party pay money, under a mistake of the law, he cannot recover it back;" but that case was concededly one of error of fact, and on that alone was the decision based.

In *Goodman* v. *Sayens*, 2 Jack. & W. 248, and in *Marshall* v. *Collett*, 1 Younge & Coll. 232, the maxim was repeated, but in neither was it demanded.

In *Brumston* v. *Robius*, 4 Bing. 11, a landlord's receiver allowed the tenant to make a deduction in respect of a payment for land tax every year for seventeen years greater than the landlord was liable to pay. The tenant assigned his tenancy, and the landlord, discovering his mistake, distrained the assignee for the arrears. The court held that he had no right so to do. The court placed great stress upon the hardship of the case, and it was remarked that "the demand was most unconscientious." Best, C. J., however, observed that "it is an established principle, that if money be given or paid (and settlement in account is the same thing) with a full knowledge of all the circumstances at the time of the payment, it cannot be recovered back by the payer," citing *Brisbane* v. *Dacres* as authority.

There is a class of cases growing out of similar subject-matter as the above, and which are said by Mr. Justice Story, 1 Eq. Juris. sec. 112, to resolve themselves into an overpayment by mistake of law or of fact, and probably of the former. In this class may be cited *Widley* v. *Cooper's Company*, and *Atwood* v. *Lamprey*, cited in a note to *East* v. *Thornbury*, 3 P. Wms. 127; *Currie* v. *Goold*, 2 Madd. 163; *Smith* v. *Alsop*, 1 id. 623; *Nichols* v. *Lason*. 3 Atk. 573. But it does not appear in any of these cases that the mistake was not mutual; and none of them profess to proceed on the ground of mistake of law. There is, also, a decided conflict between them and the decision in *Brigham* v. *Brigham*, 1 Ves. Sr. 126, and Belt's Supp. 79. These cases come properly under the head of private rights defined by Lord Westbury as follows:

"It is said *ignorantia juris haud excusat;* but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country; but when the word 'jus' is used in the sense of denoting private right, that maxim has no application. Private right of ownership is matter of fact. It may be the result, also, of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded on a common mistake." *Cooper* v. *Phibbs*, 15 W. R. 1053; 2 L. R., H. L. Cas. 149.

There is, also, a class of cases sometimes cited as bearing on this question, which, in fact, stand not upon mere mistake of law, stripped of all other circumstances, but upon other and distinct grounds. Among these may be enumerated cases of compromise of doubtful rights. In *Naylor* v. *Winch*, 1 Sim. and Stu. 555, Vice-Chancellor Leach lays down the doctrine, that "if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of 'compromise,' a court of equity will relieve him from the effect of his mistake. But when a doubtful question arises, *** it is extremely reasonable that parties should terminate their differences by dividing the stake between them in the proportion which may be agreed upon." See, also, *Gibbons* v. *Caunt*, 4 Ves. 894; *Stockley* v. *Stockley*, 1 Ves. & Bea. 23.

There is likewise a class of cases commonly classed under this head, which really have but slight bearing on the question. These are cases of family agreement to preserve family honor or family peace. See 1 Story's Eq. Jur. sec. 113, n. And, as has been said by Lord Eldon, in family arrangement, an equity is generally administered in equity, which is not applied to agreements generally: *Stockley* v. *Stockley*, 1 Ves. & B. 30. The principal cases of this character are *Gordon* v. *Gordon*, 3 Swanst. 400; *Dunnage* v. *White*, 1 id. 137; *Cann* v. *Cann*, 1 P. Wms. 723; *Stapilton* v. *Stapilton*, 1 Atk. 2; *Pullen* v. *Keady*, 2 id. 537; *Cory* v. *Cory*, 1 Ves. Sen. 19; *Clifton* v. *Cockburn*, 3 Myl. and K. 76; *Neal* v. *Neal*, 1 Keen. 672; *Frank* v. *Frank*, 1 Cas. in Ch. 84.

There are, also, cases where parties have done what it was not their purpose to do; or where they have not done what they did purpose to do, and in which relief is denied. A familiar illustration of the first of these mistakes is where two are bound by a bond, and the obligee releases one, supposing that the other will remain bound. In such case there is certainly nothing inequitable in the co-obligor's availing himself of his legal rights; nor of the other obligor's insisting upon his release. See 1 Story's Eq. Jurisp. 124. An illustration of the second of these mistakes is where the parties would have introduced into their agreement a certain clause, but omitted it from an erroneous impression as to the effect of its insertion: See *Innham* v. *Child*, 1 Bro. Ch. 92; *Cockerell* v. *Cholmeley*, 1 Russ. and Myl. 418.

The case of *Platt* v. *Bromaye*, 24 L. J., N. S., Ex. 63, is the most recent English case we have been able to find on the subject. There the plaintiff, to secure advances made to him by the defendant, assigned to him his present, and also his after-acquired, property; and the former being insufficient to pay the debt, the latter was sold with the assent of the debtor, who supposed that the assignment passed the after-acquired property. The action was to recover the proceeds of such after-acquired property, and judgment given for defendant. Pollock, C. B., said that the plaintiff, having assented to the act, could not recover, although it was proved that there was a mistake in point of law, or a mistake in point of fact. Park, B., thought he must be bound by a mistake of law, but that point was immaterial, as the jury were not satisfied that there was a mistake of law; and it was said that the debtor had done nothing but what he ought, in justice, to have done.

Having given the English cases which decide or contain dicta that mistakes of law are not the subject of relief, we will now refer briefly

to the English cases holding a contrary doctrine.

We have already cited the case of *Chatfield* v. *Paxton*, the opinion of Chief Justice De-Grey in *Furmen* v. *Arundel*, 2 W. Black., and of Lord Mansfield in *Bize* v. *Dickason*. 1 T. R. 285. It has been argued, with considerable force and plausibility, that Lord Ellenborough did not regard the rule laid down by him in *Bilbie* v. *Lumley*, *ante*, as of universal application; and *Parrott* v. *Parrott*, 14 East, 422, is cited to support the argument. In that case Mrs. Terrill had executed a deed appointing the disposition of certain property; but afterward, having made her will, referring to that deed, had cut off her name and seal from the deed, saying that the object of it was fully accomplished in her will. Lord Ellenborough, in delivering judgment, said: "Mrs. Terrill mistook either the contents of her will, which would be a mistake of fact, or its legal operation, which would be a mistake in law; and, in either case we think the mistake annulled the cancellation. And," he added, "that it being clearly established that a mistake in point of fact may destroy the effect of a cancellation, it seems difficult, upon principle, to say that a mistake in point of law should not have the same operation." Lord Ellenborough also refused to extend the doctrine to executory contracts, and held that a mistake of law was a defense to an action on a mere promise. *Herbert* v. *Campion*, 1 Camp. 134; see also, *Rogers* v. *Maylor*, Park. Ins. 163; *Christian* v. *Coimbe*, 2 Esp. 489. This doctrine is irreconcilable with that announced in *Stevens* v. *Lynch*, 12 East, 38. The case of *Ancher* v. *The Bank of England*, 2 Dougl. 637, is sometimes cited as an authority on this side. Nothing was said in the case about mistake, though there evidently was a mistake of law, and the decision must have proceeded mainly on the ground that it could be relieved against.

In *Lansdown* v. *Lansdown*, Moseley, 364, Lord Chancellor King is reported as saying that the maxim of the law *ignorantia juris non excusat* was in regard to the public; that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases. The accuracy of this report has been doubted, but it has never been impeached, and Chief Justice Marshall in *Hunt* v. *Rousmaniere*, 1 Pet. U. S. said of it, "that, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded."

The case of *Brigham* v. *Brigham*, 1 Ves. Sen. 126, and Bell's Supp. 79, is an important case on this side. The plaintiff had purchased an estate which already belonged to him, under a mistake of law, and the court ordered the defendant to refund the money, holding that "there was a plain mistake, such as the court was warranted to relieve against." In *Pusey* v. *Desbouvrie*, 3 P. Wms. 315, a daughter made her election to accept a legacy in lieu of her orphanage part in the estate, under the custom of London or otherwise. It appeared, very clearly, that she did this under a mistake as to her legal rights, and Lord Chancellor Talbot said it seemed hard that a young woman should suffer for her ignorance of the law, or of the custom of London, or that the other side should take advantage of that ignorance, and ruled accordingly.

In *M'Carthy* v. *Decaix*, 2 Russ. and Myl. 614, where a husband had renounced all claim to his deceased wife's property, on the supposition that he had been legally divorced from her, and therefore not liable for her debts, Lord Chancellor Brougham said, "If a man does an act under ignorance, the removal of which might have made him come to a different determination, there is an end of the matter. What he has done, was done in ignorance of law, possibly of fact, but, in a case of this kind, that would be one and the same thing." The same learned judge in *Cliflin* v. *Cockburn*, 3 Myl. and Keen. 76, remarked, speaking of the distinction between error of law and error of fact: "The distinction is somewhat more easy to lay down in general terms than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one, and I think I could, without much difficulty, put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule and refuse to relieve against an error of law." And the master of rolls, Sir John Leach, in a later case, *Cockerell* v. *Cholmeley*, 1 Younge and Coll. 418, said that "no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequences in point of law; and here there is no proof that the defendant at the time of the acts referred to was aware of the law on the subject." We have already quoted the remark of the same judge in *Naylor* v. *Winch*. The principle that relief may be afforded in cases of mere mistakes of law is recognized, also, in the following cases: *Willan* v. *Willan*, 16 Ves. 72; *Onions* v. *Tyrer*, 1 P. Wms. 345; *Turner* v. *Turner*, 2 Rep. in Ch. 154; *Evans* v. *Llewellyn*, 2 Bro. Ch. 150; *Edwards* v. *McLeary*, Coop. 307.

From this cursory examination, it is evident that the question cannot be regarded as settled by the English authorities. While the preponderance of such authorities seems to be against relieving mistakes of law, it will be discovered that many of them did not necessarily involve the question, and were either in fact decided, or might have been decided, upon other grounds. We believe that the true principle to be deduced from the cases *pro* and *con.*, and one which strongly commends itself to our notions of right and justice, is that laid down by Lord Mansfield in *Bize* v. *Dickason*, 1 T. R. 285, namely: that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back. But when money is paid under a mistake,

which there was no ground to claim in conscience, the party may recover it back again.

In another paper we shall endeavor to collect and examine the American authorities on the question.—*Albany Law Journal.*

## HUMOROUS PHASES OF THE LAW.

### THE IMMORALITIES OF WILLS.

Man has a natural longing to perpetuate himself, his likes and his dislikes, his ambitions, his ideas. He dreads to have his name die out, and desires male offspring to keep it alive. If he is a link in a long unbroken chain of family, he shrinks at the reflection that he may be the last link; and hence arises the establishment of an inheritable order of nobility. Above all he clings to material possessions. It is a bitter thought to most men, that others shall pluck the fruit of the trees which they have planted, and thrive under the roofs which they have reared, and follow the North star in ships which they have built; and so one bestows his name on a forest or a graft of apples, another erects a block of houses and calls it after himself, and the third nails his name to the broad stern of a steamship. The desire exists in all; it is only a difference in measure. Napoleon desired to found a dynasty: Smith leaves his India-rubber business to his sons, and directs that the firm shall be Smith's Sons. In others the desire has more of philanthropy, but not much less of vanity; one founds a library and another endows a college, but both insist that their name shall be attached to the gift. Few persons can do even as simple a thing as give a book, without writing their name as donor on the fly-leaf.

Experience has taught man that sooner or later he must give up his possessions, but he clings to the power of controlling what he leaves behind him. He wants to have his way, and make others feel his power, even after he is dust. Like a trustee of long standing, he grows to consider the fund as his own. Instead of viewing his interest in the property which God has permitted him to accumulate, as usufractuary merely, he not only regards it as his own, but endeavors to impress the stamp of his ownership upon it after death. So, while his bones are slowly mouldering, and cattle crop the grass that springs from his dust, he still has a bone of contention among his descendants or beneficiaries, in the shape of an estate burdened with conditions, or loaded with intricate trusts. None but the lawyers call him blessed.

It has been a grave moral and legal question whether a man has a right to effect the disposition of his property by will. Political economists have differed on this subject. Shall I not do what I will with my own? asks one. But another replies, you have no more right to direct the course of your property after your death than to dictate the policy of government. You are done with earthly societies, and all you had falls back into the common fund. Society listens to man's pleadings for posthumous power only in a measured degree. His right to make a will is everywhere attended by limitations, differing according to the form of the government or temperament of the people. In some countries the rule "first come first served" is adopted, and primogeniture obtains. In others the testator may give to whom he chooses, but not as long as he chooses—for not longer than two lives, for instance—on the theory that to control his estate for twice as long as he possessed it is a sufficient reward for getting it. In others, he is restricted in the objects of benefactions; for example, if he leave a wife or child he cannot give more than a certain proportion to religious or charitable uses. In all communities he is prohibited from depriving his wife of dower in his estate.

At first thought one would suppose that the law would care but little concerning the disposition of a man's body after death. The law sometimes hands the bony parts of malefactors over to the surgeons for the instruction of students and the warning of the evilly disposed. But if a man proposes to do this for himself by will, the law makes a great fuss, and even suggests that the idea argues insanity. It is related of Ziska, that, as his end drew near, he commanded that drums should be made of his skin, in order that, though dead, he might speak terror to his enemies; he would have made a complete drum corpse of himself. In the case of *Morgan* v. *Boys*, the testator devised his property to a stranger, wholly disinheriting the heir or next of kin, and directed that his executors should "cause some parts of his bowels to be converted into fiddle-strings, that others should be sublimed into smelling salts, and that the remainder of his body should be vetrified into lenses, for optical purposes." In a letter attached to his will the testator said: "The world may think this to be done in a spirit of singularity or whim, but I have a mortal aversion to funeral pomp, and I wish my body to be converted into purposes useful to mankind." The testator was shown to have conducted his affairs with great shrewdness and ability, and, so far from being imbecile, he had always been regarded by his associates through life as a person of indisputable capacity. Sir Herbert Jenner Fust regarded the proof as not sufficient to establish insanity, it amounting to nothing more than eccentricity, in his judgment. Judge Redfield, from whose work on wills I quote this case, remarks on it: "This must be regarded as a most charitable view of the testator's mental capacity, and one which an American jury would not be readily induced to adopt. *We do not insist* that the mere absurdity and irreverence of the mode of bestowing his own body, as a sacrifice, to the interests of science and art, in so bald and lawful a mode, *was to be regarded as plenary evidence of mental*

*aberration.* But we have no hesitation in saying that *a jury would be likely always to regard it in this light*, in the case of an unnatural or unofficious testament. *And we are not prepared to say it should not be so.*" (What! that a jury should find against evidence?) "The common sense instincts of a jury are very likely to lead them right in cases of this character. The man who has no more respect for himself or for Christian burial, than this will indicates, has no just claim to the regard or respect of others." With great deference for the learned writer, I must differ from him. How can the law refuse to execute a testator's will, so far as it is not unlawful or abhorrent to morals or contrary to public policy, unless the testator be proved to have been of unsound mind? Suppose, in addition to proof of his clear intellect, the objects of his bounty were unobjectionable or praiseworthy; suppose he should bequeath his estate to the American Bible Society, for instance; shall we defeat his will because he also gives his bones to the New York Medical College? Refuse to execute that portion of his will, perhaps, as against good morals and public policy, but don't pluck up the wheat with the tares. The disposition of this testator's remains was undoubtedly repugnant to men's finer feelings, but I must confess I see nothing improper in a great scientific man, like Agassiz, for example, bequeathing his skeleton to a university which he has done much to adorn. If he should die at sea it would be a much more sensible use of his bones than to give them to the fishes, although the latter might well consider such an event of poetic justice on one who has reduced so many of their tribe to skeletons.

When a man comes to me to have his will drawn, and proposes to make his bounty to his wife dependent on her "remaining his widow," I always feel an ardent desire to kick or otherwise evilly entreat that man. I am generally able to convert such a heathen. If I fail, my omission to act on my aforesaid muscular impulse is wholly owing to the restraining power of divine grace. A good thing for such men to remember is the golden rule: "Whatsoever ye would that others should do unto you, do ye even so unto them." Would they like to have their rich wives leave such wills behind them? The welkin would ring with their howls. That men can go out of life leaving such testamentary directions is an evidence of their desire to perpetuate their jealousy, as well as their memory and wealth. Of such it cannot be said,

> "The good men do, lives after them;
> The bad is oft interred with their bones."

Perhaps, quite probably, the very money so grudgingly bestowed came from the wife; indeed, it may have been given her by a former husband; or the wife may have earned it in teaching music or keeping a boarding house, and weekly handed it over to a mean-spirited wretch of a husband, who never did an honest hour's work in his life, but having lived on his wife all his days, is bound that no other man shall ever have the like temptation. I have noticed that such men generally contrive to get their wives to sign off all their dower right in their life-time. So there is no inducement left for the poor creatures to be extravagant. Some communities have had the good sense and magnanimity to declare such devises void, as being in restraint of marriage, but New York has not arrived at that pitch of moral elevation yet. Our state has been the pioneer in all other reforms concerning the rights of married women, and now wives among us enjoy pecuniary privileges in a larger degree than in any other state, I believe, and in a larger degree than their husbands. Why then do we yet retain this heathenish concession to the jealousy of hateful husbands? In a community where the right of a wife to hold separate property is not recognized, there might be some pretext for sanctioning the practice, on the hackneyed argument that a second husband might waste the savings of the first; but where she is constituted equal to her husband in respect to rights of property, this reasoning fails. What right has any man to adjudge that his widow shall not marry again, or inflict a pecuniary penalty on her so doing? All the pious expressions that the language is capable of, cannot cover up the wickedness of such a provision. It is really blasphemous to invoke the name of God in favor of such a testament. God does not bless jealousy, envy, hatred, enforced celibacy. The spirit of such testamentary dispositions is well ridiculed in an old quatrain which I have carried in my memory for some years:

> "In the name of God, amen:
> My feather-bed to my wife, Jen:
> Also my carpenter's saw and hammer;
> Until she marries; then, God damn her!"

Only one degree less mean is the habit of wreaking posthumous vengeance on a disobedient child by "cutting him off with a shilling." One may possibly be excused for a hasty act of this sort, but when the deliberate judgment approves it and lets it stand, it argues a screw loose in the testator's moral machinery. While he is writing or reading the good words at the commencement of his will, why does he not recall sundry expressions of scripture: "Let not the sun go down upon my wrath;" "He that hath no rule over his own spirit, is like a city that is broken down and without walls;" "Vengeance is mine, I will repay, saith the Lord?" Undoubtedly cases occur where children prove permanently unworthy of parental benefaction. But I am speaking of the common cases, as, for example, where a daughter marries a man whom her father dislikes. Such a one came to me once to have his will drawn, or rather a man who proposed to cut his son off because he had married a woman whom the father did not approve. The old man was a plain farmer, who, when I asked his reason

for this course, replied: "Well, I haint got nothing again the gal partikler, only she's a schoolmarm." "Well, what of that?" "Why, she don't know nothing about housekeeping!" It was evident that it might have been beneficial to the old man if *he* had fallen in with a schoolmarm in his young days. What a world this would be, now, if children were compelled to marry as their parents should dictate! How much it would add to conjugal fidelity and happiness! Look at France, where such marriages are substantially the rule. It would become necessary to erect a divorce court at once, with a large number of judges, to relieve each other. Another frequent excuse for disherison, is moral misconduct of a child, especially of a daughter. Fathers ought to be extremely deliberate in such a decision. If Christ could pardon Magdalen, a father may pardon his erring daughter. Especially when he cannot say that her straying is not the result of inherited passions or of defective moral teaching. "Let him that is without sin among you cast the first stone." How humiliated ought such a father to feel, when perhaps he is in the habit of sinning, under the promptings of his passions, every month of his life! During the prevalence of negro slavery in this country, I noticed that the men who were the most fearful of the consequences of "amalgamation" and loudest in their denunciations of it, were usually those who held the closest associations with females of African descent. So, I believe, the men who are the most "sensitive" about the honor of their wives and daughters, and most apt to go temporarily crazy, and shoot people, are those who practically have least regard for the honor of other men's wives and daughters.

Even when a man has no claims of family upon him, he can hardly be content with making good gifts in secret; he must proclaim them. An amusing instance of a man's pride and piety living after him may be found in *Downing* v. *Marshall*, 23 New York, 336. This was an action to obtain a construction of a will. The testator, an excellent and pious man, was a manufacturer of cotton goods, on whose adventures the Lord had smiled, and whose wealth consequently loomed up in large proportions. Being one of the earliest and most extensive manufacturers in the country, and justly proud of his material success, and being also childless and without kin on this side of the ocean, he resolved at once to perpetuate his name and commemorate that liberality toward charitable and religious objects for which he had always been remarkable. So, with the help of an attorney, he concocted and left behind him, as a beneficial fund for half a score of lawyers, one of the most singular wills that it ever entered into the heart of man to conceive. His scheme was, in a word, to have his executors carry on his manufacturing business for the benefit of religious and charitable corporations! He left his manufacturing establishment to his executors in trust to carry on the same and divide the profits in certain proportions between the American Tract Society, the American Home Missionary Society, the American Bible Society, and the Marshall Infirmary, the latter being a hospital which he had founded. But the architects of this remarkable scheme had heard that it was against our laws to tie up property for more than two lives, and so they provided that the trusts were to continue during the lives of two young men named in the will, and on their death the property was to be sold, and the proceeds were to be divided in the like proportion among the same beneficiaries. The court held the trust void, and that the estate descended to the next of kin, subject to the direction to sell and divide on the falling of the two lives. The court in effect decided that the business of the religious societies was the printing of tracts and Bibles, and not of cotton cloths; even religious pocket handkerchiefs, calculated for the meridian and intelligence of heathendom, would not answer. The Home Missionary Society, being unincorporated, did not participate in the benefits of the will in any degree. It took eight years and cost $50,000 to establish the legal meaning of the will, which was a very different meaning from what the testator intended. Perhaps the result was designed by Providence as a rebuke, for the scheme which the testator had contrived to minister to his vanity, by carrying on his manufacturing establishment as long as legally possible after his death, was frustrated, while the purely benevolent objects alone were effected. His trust in Providence was approved; his trust in man was held void under the statute.

If there is not now, there some time will be, a special department in lunatic asylums for the treatment of lawyers who have become insane in the investigation of the law of charitable trusts and religious uses, and especially in the endeavor to ascertain what is at present the rule on these subjects in this state. I have too much regard for my own reason and that of my readers to attempt any analysis of the legal situation of these questions, but will offer a few suggestions upon them in a moral point of view, or rather a legal-moral point of view, for law and morals are so bound together that it is difficult to separate them.

Some philosophers teach that every human action, even if it have the semblance of charity, springs from selfishness. Thus, if I give a beggar a sixpence, it is not on account of the beggar, but because it confers pleasure on myself. This is a hard view of human nature, but has some plausibility. It could hardly be on this theory alone that a rich man impoverishes his family by giving his estate to found a church or an hospital. Some other influence must enter into the operation, such as fear. The church men have always had such powers of persuasion, that it has been found necessary to check them by legal restrictions. Poverty was inculcated to certain

orders of monks, no doubt the better to fit them as beggars. At all events their begging has always been remarkably potent and attended by most remarkable responses. They have prevailed on moribund and wealthy sinners with as much certainty, if not by the same means, as the highwayman in the ballad on the coachman; who

"Put an ounce of lead in his nob
And *purwailed* on him to stop."

Swinburne, who is one of the most entertaining writers in the world, gives, in his treatise on wills, the case of a monk, who came to a dying gentleman, to make his will. The monk asked the gentleman if he would give such a manor and lordship to his monastery. The gentleman answered yea. Then if he would give such and such estates to such and such pious uses. The gentleman answered yea, to them all. The heir-at-law, observing the covetousness of the monk, and that all the estate would be given from him, asked the testator if the monk was not a very knave, who answered yea. And upon the trial, for the reason above said, it was adjudged no will. The New York legislature may have read or heard of this scene, for in 1848 they enacted that no testamentary gift to any benevolent, charitable, scientific, or missionary society or corporation shall be valid, unless the will be executed at least two months prior to the testator's death; and, if he leave a wife, child or parent, the gift shall be valid to the extent of one-quarter of his estate, but no more. In 1860 the extent to which such bequests are valid was enlarged to one-half the testator's estate, and literary and religious associations and corporations included within those provisions. This would have been an awkward provision for the benevolent gentleman who should desire to leave money to *portion deserving old maids*,* and let his own daughters pine in single-cursedness for want of portions; and to the other person, with a nautical passion, who should yearn to set up a posthumous *life-boat*,* compelling his boys to "paddle their own canoe;" or to a third, who having been possessed in life by "the root of all evil," should, when death approached, contemplate bestowing his estate to plant a *botanical garden*,† leaving his daughters to fade as wall-flowers, and his sons, having sowed their wild oats, to go to seed in perjury; all of which testamentary schemes have been held to come within the definition of charitable. Such testators ought to remember and act upon the adage, "Charity begins at home."

Those who build up great religious trusts, to the exclusion of family, should think upon the scripture: "If any provide not for his own, and specially for them of his own house, he hath denied the faith, and is worse than an infidel." If one were to believe all the clergy tell them, he must conclude that gifts to religion are the best pecuniary investments he can make in life. They tell us that the more money one gives away, the more money he will get in return. Now there are two objections to this argument of the church. First, it is a very sordid and mean appeal; and second, it is not true, in a pecuniary sense. "To him that *hath* shall be given." One should give to good objects according to his means, but let him not be urged by any such appeal to make an extravagant or disproportionate donation, however deserving the object. Let him not be seduced by those convenient blank forms of testamentary gifts, which the great religious publishing houses put forth on the covers of their publications. No matter how pure a man's motives, he has no right to ignore the claims of blood. It is possible that he may be absorbed by religious zeal to such an extent as to deny the faith which he would advance, and in his efforts to convert the heathen, he may become worse than an infidel.

When a man is about to die, he ought to forgive his enemies, but occasionally we find a will perpetuating the testator's spite and sense of earthly injuries. Such was Dr. Rowland Williams' recent will. The testator was a contributor to the famous volume of "Essays and Reviews," published in England some years ago, and author of the article therein entitled "Bunsen's Biblical Researches," on account of which he was prosecuted before the court of Arches, convicted and sentenced to suspension for one year—a sentence afterwards revoked. He was once professor in the College of St. David's, Lampeter, South Wales, but having some difficulty with the faculty, he exiled himself to a neighboring town, where he died, leaving in his will £50 to the town of Lampeter, one-third of the income of which is perpetually to be given to the town crier "for making proclamation once a year, about midsummer, on a market day, that I, Rowland Williams, never consented to the election of George Lewellin to a scholarship in this college, but in this as in other things I was foully slandered by men in high places; because I loved righteousness and hated iniquity; therefore, I died in exile; but while unjust men permitted me, I kept both the needy student by his right, and defended the alms of the altar of God." It remains to be seen whether this direction will be executed. Should it be approved, it would become a bad precedent, for scores of men might adopt the same peculiar expedient for perpetuating their censure, and it would thus result in a *crying evil*. Market day alone would not suffice, nor midsummer's heats, but every day, Sundays not excepted, summer and winter, would be vocal with the uncherubic officials, who continually would cry.

The last thing that is done to a man is to build a monument over his remains. A few thoughts on bequests for such purposes will form a fitting close to this paper. The topic

* Stat. 43 Eliz. ch. 4.
* *Johnson* v. *Swan*, 3 Madd. 457.
† *Townley* v. *Bedell*, 6 Ves. 194.

has been suggested to my mind by the testament of a distinguished soldier, recently deceased, in which there is a bequest of $50,000 for a mortuary monument. It has been held that the erection of a monument to perpetuate the memory of the donor is not a *charitable* purpose: *Melick* v. *President of the Asylum*, 1 Sack. 180. The question arises, is such a bequest to be applauded, even if sustained in courts of law? Can it answer any useful purpose? Is it not a monument to the testator's vanity? A monument at Thermoyplæ or Bunker Hill, commemorating a great event, and erected by a grateful people, incites the beholder to patriotism. A monument to an individual, even, provided it springs from the gratitude of others, is an appropriate offering. But is it not better to leave the erection of such a monument to that grateful people or those mourning relatives? Of course I am speaking of very costly erections. How is such a bequest defensible in morals, when Lazarus, with his sores unhealed, may lie at the foot of the costly pile, and houseless wretches may cower under its shelter to escape the north wind? Let the great equestrian statue be set up, then; it will only serve to remind the moralist of posthumous pride that goes on horseback, while living poverty hobbles a-foot.

On reading the foregoing it strikes me that it is not strictly "humorous." It sounds more like a sermon. But a sermon on legal matters is a humorous idea, and it may go for what it is worth, as humorous or serious.—*Albany Law Journal.*

## CANADA REPORTS.

### COMMON LAW CHAMBERS.

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

Caisse v. Tharp.

Bank of Montreal, *Garnishees.*

*Attachment of debts.*

A sum of money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order and summons to pay over. The order was issued on the 17th of August, thirteen days before the bank agency, where the debtor resided, was advised of the deposit.

*Held*, that the amount could not be attached.

*Semble*, that the father might revoke the gift, and therefore it could not be looked upon as a debt.

[Chambers, Sept. 9, 12, 1870.—*Mr. Dalton.*]

The execution creditor in this case obtained an order attaching a sum of money alleged to be standing to the credit of the execution debtor, in the agency of the Bank of Montreal at Cobourg.

The proper name of the execution debtor was Frederick S. G. Tharp, but he was sued as Frederick J. G. Tharp, and the money was said to be payable to one J. G. Thorp.

The money had been sent from England by the father to his son, the execution debtor, but there had been no communication between the Bank and the execution debtor on the subject.

*O'Brien*, for the execution debtor, showed cause:

1. The garnishees are a foreign corporation, and a debt cannot be attached in their hands. *Lundy* v. *Dickson*, 6 U. C. L. J. 91.

2. There is no debt in fact. The sum of money, even if intended for this debtor, is a gift from the father, and has never been claimed by the son, nor has there been acquiescence by him. The son could not sue the Bank for the money, and the father could recall it.

*Osler* for the garnishees.

*Dr. McMichael*, for the execution creditor, supported the summons, contending that there was a debt, which could be attached.

Mr. Dalton.—I notice only one of the objections made in this case. The judgment creditor is required by the statute to show that "some person is indebted" to the judgment debtor. It is conclusively established that in such an application there must be a *legal* debt from the garnishee.

The facts shown in the case are as follows: The manager of the Bank of Montreal at Cobourg was notified, on the 30th August last, by the manager at Montreal, that the Cobourg agency was credited by the principal Bank at Montreal with $339 33, on account of one J. G. Thorp, deposited in the Union Bank of London, in England.

I think it appears that the person named is the judgment debtor, and I take it, on the affidavits, that the money had been deposited for him as a gift from his father: that on the same 30th day of August, "immediately after" the manager was advised of such credit, he was served with this garnishing order and summons. The order was issued on the 17th August, thirteen days before the Bank at Cobourg was advised of the deposit, and probably before it had been received by the Bank at Montreal. It does not appear when that was. Then surely no debt was shown when the order was issued. But suppose the order not to have been issued till after the receipt by the Cobourg agency, no communication had been made to the judgment debtor by the Bank, nor even an entry to his credit (so far as shown) in their books; and if any point is clear at law, I should say it is clear that the depositor in this case could revoke the authority to the Bank to pay the judgment debtor, at any time, until something had occurred to create a privity between him and the Bank.

As to whether the Bank could be made garnishees in this proceeding, I do not say anything.

The attaching order and summons to pay over must be discharged, with costs to the garnishees.

*Order accordingly.*

## In re Watts and In re Emery.

*Conviction—Sale of liquor contrary to by-law—27 & 28 Vic. cap. 18—32 Vic. cap. 32 (Ont.)—Certiorari—Appeal.*

The above persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors and the issue of licenses were prohibited, under the Temperance Act of 1864, 27 & 28 Vic. cap. 18, and a memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the justices to the accused.

An application for writs of certiorari to remove the convictions for the purpose of quashing them was refused; for even if the conviction should have been under the Temperance Act of 1864, and not under 32 Vic. cap. 32 (Ont.), it was amendable.

*Quære*, whether the conviction could not be supported as it stood.

*Semble*, that although 27 & 28 Vic. cap. 18, sec. 36, takes away the right of certiorari and appeal, a certiorari may be had when there is an absence of jurisdiction in the convicting justice, or a conviction on its face defective in substance, but not otherwise.

[Chambers, Sept. 12, 1870.—*Gwynne, J.*]

These were applications for writs of certiorari to remove two several convictions, whereby the above named parties were respectively convicted of selling liquors in the township of Ernestown without a license.

The applications were supported by affidavits showing the summonses, which charged that the accused "did within the last twenty days sell or dispose of intoxicating liquors without the license required by law so to do, and contrary to the by-law of the corporation of the township of Ernestown, prohibiting the sale of intoxicating liquor in Ernestown;" and a memorandum dated 30th July, 1870, which was signed by the convicting magistrates, whereby it was said that after hearing the evidence, they adjudged that each of the above parties respectively is guilty of selling intoxicating liquors in the township of Ernestown without a license within the last twenty days.

There were also affidavits showing that by-law No. 1, of the year 1870, passed by the Municipal Council of the township of Ernestown, on the 17th January, 1870, whereby the sale of intoxicating liquors, and the issue of licenses for the purpose, is prohibited within the township of Ernestown, under the authority of the Temperance Act of 1864 (27 & 28 Vic. cap. 18). The affidavits show this to be a valid and subsisting by-law, and that it was brought under the notice of the magistrates at the hearing of the respective charges.

The ground of the application was that the memorandum of the justices showed the convictions to have been under the statute of Ontario, 32 Vic. cap. 32, whereas it was contended that the conviction should have been under the Act of 1864, 27 & 28 Vic. cap. 18.

*McKenzie*, Q. C., for the convicting justices and the prosecutor, shewed cause.

*Holmested* supported the application.

Gwynne, J.—The point made in favor of the applicants is, that a person cannot be convicted of selling intoxicating or spirituous liquors without a license in the township of Ernestown, because, by reason of the by-law, the issuing of such license is prohibited.

In my opinion, there is nothing in these cases to justify the issuing the writ. The statute of Ontario, 32 Vic. c. 32, s. 1, enacts that "no person shall sell by retail any spirituous, fermented or other manufactured liquors, within the Province of Ontario, without having first obtained a license authorizing him so to do," as provided by the act. The act provides that these licenses shall be issued upon the certificate of the clerks of the respective municipalities, which were empowered to pass by-laws for granting the certificates, and for declaring the terms and conditions upon which the licenses shall issue.

Now, assuming a complaint to be made for selling spirituous liquors without a license, I am not at all prepared to say that a conviction which finds that the accused is guilty of that offence is bad because he may have adduced evidence which shows not only that he sold the spirituous liquors without a license, but that he could not have obtained a license, because its issue was prohibited by a by-law.

Since the passing of 32 Vic. cap. 32, any sale of intoxicating liquors is in effect illegal as made without license, unless the accused has the protection not only of a license, but also of a by-law of the municipality authorizing the same. Why may not, then, a person be convicted under 32 Vic. cap. 32, for selling without a license, when the accused produces a by-law prohibiting instead of authorizing the issue of a license?

I am not at all prepared to say that there is anything in the point made, even if the magistrates had conclusively prepared and returned their conviction in the terms of their memorandum; but it is said that in fact they have returned a conviction which sets out the by-law and convicts the parties of selling liquor in violation of the by-law.

However, whether this be so in fact or not, I do not enquire; because it is quite apparent that the charge against the accused was of selling liquor without any legal warrant to do so, and in fact in defiance of a law forbidding it. Now, in whatever form the magistrates may have expressed their conviction of that offence, I apprehend, if an appeal be not taken away, that the conviction would be amendable under 29 & 30 Vic. cap. 50, that is, that the charge which was before the magistrate should have to be heard on the merits, "notwithstanding any defect of form or otherwise in the conviction," and, if necessary, upon the party complained against being found guilty, the conviction would be amended, so as to conform with the facts adduced. The matter then, if appeal be not taken away, being capable of being amended on appeal, I do not think that a certiorari should issue. But whether the conviction be under 32 Vic. cap. 32, or 27 & 28 Vic. cap. 18, there is no appeal from this conviction to any court. Now, it would be defeating the object of the statute if, notwithstanding they declare that there shall be no appeal, still a party should be permitted to remove a conviction for the purpose of quashing it in respect of a matter not appearing upon the conviction itself to be a defect rendering it bad, and which, if the appeal had not been taken away, would have been rectified on an appeal.

I do not think that these writs of certiorari should be granted, except in cases where there appears to be an absence of jurisdiction in the convicting justice, or a conviction, upon the face of it, defective in substance.

Here the applicants in substance admit that they have sold the spirituous liquors contrary to

law; that is, without having such a license as made the act of sale legal. Under these circumstances, I see no way in which they can be prejudiced by the form of the conviction, whatever it may be, even though it be in terms for selling without a license contrary to 32 Vic. cap. 32; and I therefore discharge the summonses with costs, to be paid by the respective applicants, Watts and Emery, to the parties called upon to show cause.

*Application refused with costs.*

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SINCLAIR v. CHISHOLM.

*Special endorsement.*

A writ of summons was specially endorsed for interest on the balance of an account, and for protest charges on an unaccepted draft.

*Held*, that the endorsement was right as to the interest, but not as to protest charges.

*Bank of Montreal* v. *Harrison*, 4 Prac. R. 331, explained.

[Chambers, Sept. 15, 1870.—*Mr. Dalton.*]

This was a motion to set aside a judgment for irregularity.

The writ of summons was specially endorsed for the price of

| | |
|---|---|
| 20,000 bushels of wheat..... | $24,600 00 |
| Less paid..... | 23,977 00 |
| Balance ..... | 623 00 |
| Expense of draft protested.. | 1 32 |
| | $624 32 |

And the plaintiff claimed interest on the latter amount from the 1st June, 1870.

Judgment was signed on default of appearance for the $624 32, and interest.

It was objected that the interest and the expense of protest were not properly the subject of a special endorsement.

*Harrison*, Q. C., showed cause.

*Dr. McMichael* contra.

MR. DALTON.—First as to the interest. *Smart* v. *The Niagara Railway Co.*, 12 U. C. C. P. 404, is exactly in point, to show that this endorsement is warranted as to the interest. The Chief Justice says (p. 406), "It has become so settled a practice to allow interest on all accounts after the proper time for payment has gone by, and particularly upon the balance of an account, which imports that the accounts on each side are made up and only the difference claimed, that I do not think we should treat the claim for interest as vitiating the special endorsement; and I feel the less inclined to interfere because the objection is patent on the face of the roll, and a writ of error will therefore lie." That case governs this, though it is true that upon a reference to the Master, he could not allow the interest on such a claim, though a jury could give it.

Then as to the claim for the expense of protest. It is to be observed that this protest is for non-acceptance, and is very like the noting referred to in *Rogers* v. *Hunt*, 10 Ex. 474. The plaintiff could only recover this item upon a special count, showing a contract to accept, authorising his draft, and is in the nature of unliquidated damages. It is not like the case of a special endorsement for the amount of a bill or note, and for the expenses of protest for non-payment, in which case the endorsement of the cost of protest would be good: Con. Stat. U. C. cap. 42, sec. 14.

The case of *The Bank of Montreal* v. *Harrison*, 4 Prac. Rep. 331, when examined, is really a decision, so far as the present point is concerned, that the plaintiff might appropriate payments in a particular way, and nothing more. I have referred to the judgment papers, and the endorsement is simply for $391 11, the balance due on a bill of exchange, which was surely good.

I do not think it can possibly be held that this sum of $1 32 could be specially endorsed, nor can it be waived.

The judgment must be set aside, upon payment of 5*s.* costs—the defendant to bring no action.

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## ENGLISH REPORTS.

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### CROWN CASES RESERVED

THE QUEEN v. WARBURTON.

*Conspiracy—Combination to do a civil wrong—Attempt to defraud partner by falsifying accounts.*

On an indictment for conspiracy, it is not essential that the combination should have been to do an act which, if done by one alone, would have been a criminal offence, but it may be enough that it would have effected a civil wrong.

The prisoner and L. being partners, the prisoner gave notice for a dissolution of the partnership. On the dissolution, an account was to be taken, and the property to be divided in certain proportions between the prisoner and L. The prisoner agreed with W. (who was manager of a branch of the business) and P. to make it appear, by documents purporting to have passed between W. and P., and by entries in the partnership books made by W., that P. was a creditor of the firm, and that certain partnership property was to be withdrawn and handed to P., so as to be divided between the prisoner W. and P., to the exclusion of L.

The prisoner was indicted for conspiracy with W. and P. to cheat and defraud L. The facts upon which the indictment was founded took place before the passing of 31 & 32 Vic. cap. 116, which makes a partner who steals partnership property liable to conviction as if he was not a partner.

*Held*, that the agreement was a conspiracy, for which the prisoner could be convicted.

[C. C. R., 19 W. R. 165.]

Case stated by Brett, J.

The prisoner, James Warburton, was tried before me at the summer assizes held in 1870, for the West Riding of Yorkshire and Leeds, upon a charge of conspiracy. The indictment charged, among other counts, that the prisoner had unlawfully conspired with one Joseph Warburton and one W. H. Pepys, by divers subtle means and devices, to cheat and defraud the prosecutor, S. C. Lister.

It appeared in evidence that the prisoner and Lister were, in 1864, in partnership, and carried on a part of the partnership business at Urbigau in Saxony, by there selling patent machines; that the prisoner had given notice, according to the terms of the partnership agreement, for a dissolution of the partnership between himself and Lister; and that upon such dissolution an account was to be taken, according to the partnership agreement, of the partnership property; and that according to it, such property would be divided, on such dissolution, in certain propor-

tions between the prisoner and Lister, after payment of partnership liabilities; and that the prisoner, in order to cheat Lister, had agreed with his brother, Joseph Warburton, who managed the partnership business at Urbigau, and with W. H. Pepys, a friend of the prisoner residing at Cologne, to make it appear by documents, purporting to have passed between Pepys and Joseph Warburton, and by entries in the partnership books or accounts, made under the superintendence of Joseph Warburton, that Peyps was a creditor to the firm for moneys advanced, and that by reason of such documents and entries certain partnership property was to be withdrawn and to be handed to Pepys, or otherwise abstracted or kept back, so as to be divided between the prisoner and Joseph Warburton and Pepys, to the exclusion of Lister from any interest or advantage in or from or in respect of it. The jury upon this evidence found the prisoner guilty of the conspiracy charged, and I think rightly so found, if, in point of law, such an agreement, made by a partner with such an intent to defraud his partner of partnership property, and to exclude him entirely from any interest in or advantage from it on such an occasion, that is to say, on the taking of an account for the purpose of dividing the partnership property on a dissolution of the partnership, by means of false entries in the partnership books, and false documents purporting to have passed with a supposed creditor of the firm, is a conspiracy contrary to law, for which a prisoner can be criminally convicted.

The offence, if it be one, was fully committed and completed before the passing of the statute, by which a partner can be criminally convicted for feloniously stealing partnership property.

I request the opinion of the Court of Criminal Appeal whether the verdict found in this case upon the evidence so stated, assuming such verdict to be correct in point of fact, can be sustained so as to support a conviction for conspiracy in point of law. If it can be, the conviction to be affirmed; if it cannot, the conviction to be set aside. I reserved the sentence to be passed on the prisoner.

*Waddy* (*Whittaker* with him) for the prisoner. There is no conspiracy, unless there is a combination by two or more to do an illegal act, or to do a legal act by illegal means, and both those elements are wanting in the present case. The transaction for which the prisoner was indicted was complete before 31 & 32 Vic. cap. 116 came into force. By that act, a partner who steals or embezzles any of the partnership effects is made liable to conviction as if he was not a partner; but apart from that act, there would be no illegality in dealing with partnership property as was done by the prisoner, and he has at most been guilty of an immoral act. In 2 Lindley on Partnership, 856, it is said that there is no method by which an ordinary firm can sue or be sued by any of its members, either at law or in equity, and that follows from this—"1. That no action at law can be brought by one partner against another for the recovery of money or property payable to the firm, as distinguished from the partner suing. 2. That no criminal prosecution is sustainable by one partner against another for what he may do with the property of the firm." The case of *R.* v. *Evans*, 11 W. R. 125, 9 Jur. N. S. 134, is then cited, where a partner who misrepresented the partnership accounts, and thereby obtained more than his share of the property, was held not liable to conviction for obtaining money by false pretences. This case was decided upon the ground that the prisoner only obtained his own, that is to say, the partnership property, and the present case is on all fours with it. [Brett, J.—Here there was to be no result of the fraud till after the dissolution of partnership, and the effect of the prisoner's act would have been to obtain not his own, but his partner's property.] [Cockburn, C. J.—There was a conspiracy to do something which, when it took effect, would be an illegal act in every sense of the word. The criminality of a combination must be judged of by its result if carried out.] The prisoner was guilty of no actionable wrong; and an act which, if done by one alone, is not actionable, cannot be ground for an indictment for conspiracy when done by two or more. Buller, J., giving judgment in *Pasley* v. *Freeman*, 3 T. R. 51, says, p. 58, "If one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured." Here the prisoner had not ceased to be a partner, and there was no time at which he would have been liable to an action for reparation of damages.

*Maule*, Q. C. (*Nathan* with him) for the prosecution, was not called upon.

Cockburn, C. J.—I am of opinion that this conviction was right. It may be that the law of England goes further than that of other countries in holding that an act which, if done by one alone, would not make him liable to the criminal law, may become an indictable offence if carried out by two or more acting in combination; but, if that be so, the present case is most certainly not one in which I should desire to restrict the operation of the law.

The prisoner is indicted for having unlawfully conspired with others to cheat and defraud his partner. The offence charged was committed before the passing of the statute 31 & 32 Vic. cap. 116, and it has been contended, on the part of the prisoner, that because the act, if committed by him alone, would not have been a criminal offence, he cannot be convicted; and further, that if it is enough, for the purpose of this prosecution, that the prisoner should have committed an illegal act, it must be illegal in the sense of being actionable, and that that element is also wanting. I cannot agree with the argument that the act must of necessity have been a criminal act, if done by one alone, and I think it may, under some circumstances, be enough if the act is unlawful, in the sense that it is a civil wrong. It appears to me that it is not material whether the conspiracy had reference to a dissolution of partnership, or to the share which each partner would take on a division of present profit. The intent would in either case be an equal wrong to the other partner, tending to deprive him of his share of the profits, or of the partnership property. It is clear that that would be a civil injury, and would be within the ordinary definition of conspiracy or combination of two or more to wrong another by fraud and false pretences. It

was a conspiracy during the existence of the partnership to do something which, upon its taking effect, would be illegal in every sense of the word; and assuming for the present purpose that no action would have been brought, there would certainly have been an equitable remedy on the dissolution of the partnership. I think that the facts of this case bring it within the principle of the authorities which have decided that an act not criminal in one person acting alone, may become so if carried out by two or more acting in combination.

*Conviction affirmed.*

## COMMON PLEAS.

The Great Western Railway Co., *Appellants*; Talley, *Respondent*.

*Railway company—Common carrier—Passenger's luggage—Negligence of passenger.*

A passenger by the G. W. Railway from Cheltenham to Reading took his portmanteau into the carriage with him at Swindon. Having left the train for refreshment, he failed to find his carriage, and continued his journey in another carriage. When the train arrived in London, the portmanteau was found in the carriage in which it had been placed at Cheltenham, but it had been cut open, and the contents were gone.

In an action by the passenger against the company for the the value of the articles, the jury found that there had been negligence on the plaintiff's part, but not on that of the company.

*Held*, that the general liability of the company was, under the circumstances, modified by the implied condition that the passengers should use reasonable care, and that as the loss was due to his neglect alone, the verdict was to be entered for the company.

[C. P., 19 W. R. 154.]

This was an appeal from the judgment of the County Court. The action was tried in the Marylebone County Court on the 5th of October, 1869, and a verdict was given for the respondent for £16 10s. A new trial was subsequently granted, and such new trial came on for hearing on the 1st of December, 1869, before the deputy judge and a jury.

The following is a statement of the particulars of claim:—For that the defendants were carriers of passengers and their luggage from Cheltenham to Reading, and that the defendants, on the 27th day of March, A.D. 1868, promised for reward paid to them by the petitioner in that behalf, to carry the petitioner and his luggage safely and securely from Cheltenham to Reading, yet the defendants did not so convey the petitioner's luggage safely and securely, but entirely made default in so doing, whereby the petitioner was deprived of the said luggage, and was put to much trouble and expense in endeavouring to obtain the same, and in providing other goods in the place of the said luggage, and the petitioner claims £18.

At the trial of the action the following facts were proved:—The respondent (the petitioner in the county court action) on the 26th of March, took an ordinary first-class return ticket from Reading to Cheltenham and back. Reading is a station on the Great Western original main line, as authorised to be constructed by an Act of Parliament (5 & 6 Will. 4, c. 107), and Cheltenham is also a station belonging to the Great Western Railway Company, and the railway from Cheltenham to Swindon (on the main line) was authorised to be constructed by 6 Will. 4, c. 77. The respondent, in time for the 6.50 train on the 27th of March, went to the Cheltenham station, and on arriving at the station he handed his portmanteau to the guard and got into a first-class carriage, and the guard placed the portmanteau under the seat of the carriage. Plaintiff travelled safely with his portmanteau to Swindon, and on arriving at that station, he got out for the purpose of taking some refreshment, ten minutes being the time allowed by the company's printed regulations for that purpose. Four other passengers had travelled in the same carriage with the petitioner, who all got out at the same time for a like purpose.

The respondent was away for nearly ten minutes at the refreshment room, and on his return to the platform he was unable to find the carriage, which, with all the first-class carriages that came from Cheltenham, had, in his absence, and without intimation to him, been shunted on to the main line, as carriages usually are at Swindon station. It was sworn by the plaintiff that, upon making immediate inquiries of the guard, he was informed that the carriage he had occupied was not going on, and that his luggage had been removed into the van. He further alleged that he continued to remonstrate with the guard, and eventually, having delayed the train some minutes, entered another carriage.

Vale, the guard from Cheltenham to Swindon, denied the plaintiff's statement that he had informed him the carriage was not going on, and his luggage was removed into the van. He swore that when spoken to by the plaintiff about the loss, he pointed to the carriage in which the portmanteau was, the doors of which were not locked.

The plaintiff did not recognise the carriage as the one he had travelled in, and the guard did not go with the plaintiff to where it stood, because he feared ill treatment from some of the passengers, who had travelled to Swindon in some of the shunted carriages. The guard further proved that the carriages had been shunted by one of the company's servants, not called at the trial, and that no extra servants had been employed at the station on that night, in consequence of which (it being a full train returning from Cheltenham races) the train was delayed ten minutes beyond its proper time there; and that he told Mr. Talley two of the carriages were not going on to London.

All the first-class carriages by the train in question, except two, which had joined the train from South Wales and had not come from Cheltenham, went up to London by the same train as respondent quitted at Reading, and on arriving in London the portmanteau was found by Farquharson, the guard, who joined the train at Swindon, in Vale's place, and who proved finding it in one of the carriages from Cheltenham; but it had, however, been cut open, and the following portion of its contents had been abstracted:—Field-glass, £7; spurs. £1; overcoat, £3; sundries, 15s; books, 10s.; portmanteau, 15s.; money, £3 10s.; making a total of £16 10s.; leaving a pair of hunting-boots and other articles which, with the portmanteau, were duly returned to the plaintiff.

At the conclusion of the respondent's case, the

judge was requested by the appellant's attorney to direct a non-suit, on the ground that there was no evidence that respondent had entrusted the portmanteau to the care of the appellants, and on the ground that there was evidence of contributory negligence on the part of the plaintiff. It was thereupon contended by the plaintiff's counsel, that if it was an action of contract, the doctrine of contributory negligence did not apply; and that if it were an action of tort, any private Act of Parliament limiting the liability of the court could not, under rule 96 of the County Court Rules and Orders, be given in evidence. It was admitted and agreed to by the defendant's attorney, that this action was to be treated as an action of contract entirely.

The judge declined to nonsuit the plaintiff, and received the defendant's evidence, and upon the whole case, subject to the objection of the plaintiff's counsel, that the question of contributory negligence should not be left to the jury, the verdict of the jury was taken by the judge in answer to the five following written questions, with further explanations by the judge:

1. Was there a delivery to the Great Western Company's servant, or porter, at Cheltenham station, by the plaintiff on his arrival there?

2. Was there such an assumption of personal control of the portmanteau, when delivered into the carriage at the plaintiff's desire, as to amount to an entire resumption by him of liability?

3. If so, was there at Swindon a fresh undertaking of liability on the part of the defendants?

3. Was there a want of due diligence on the part of the defendants' servants at Swindon, when their attention was called to the loss of the portmanteau?

5. Did the plaintiff, by his negligence, contribute to the loss of the portmanteau?

The jury answered the first three questions in the affirmative, the 4th in the negative; and to the 5th, replied—Yes. Thereupon both the appellants and respondent claimed the verdict. The judge directed a verdict to be entered for the respondent for £16 10s., the amount claimed, and granted leave to the defendants to appeal.

In further explanation of the fourth question, the judge also asked the jury broadly, whether there was at Swindon any negligence on the part of the appellants.

A further question was raised at the trial, upon which the opinion of the court was requested, should they, upon the above state of facts, consider that the respondent was entitled to the verdict; but should the court be of opinion that the appellants were entitled to the verdict, this further question will not be necessary.

The 169th section of 5 & 6 Will. 4, c. 107, and the 169th section of 6 Will. 4, c. 77, is as follows:

"And be it further enacted, that without extra charge it shall be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing not exceeding 40lbs. in weight and four cubic feet in dimensions, and the said company shall in no case be in any way liable or responsible for the safe carriage or custody of or for any loss of or injury to any articles, matters, or things whatsoever carried along or upon the said railway with, or accompanying the person of, or belonging to, any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing, not exceeding the weight and dimensions aforesaid. Provided always that nothing herein contained shall in any case extend, or be deemed or construed to extend, to charge, or make liable the said company further or in any other case than where, according to the laws of this realm for the time being, stage coach proprietors and common carriers would be liable, nor shall anything herein contained extend, or be deemed or construed to extend, in any degree to deprive the said company of any protection or privilege which either now or at any time hereafter common carriers or stage coach proprietors have or may have, but the said company shall from time to time and at all times have and be entitled to the benefit of every such protection and privilege."

The company's time bills contain the following regulation:

"Luggage.—First-class passengers are allowed 120lbs.; second-class passengers, 100lbs.; and third-class passengers, 60lbs. of personal luggage only, free of charge. All excess will be charged for according to distance."

"Children paying half-fare are allowed half the above quantity of luggage. All excess will be charged for according to distance. Passengers are requested to see the company's label placed upon each article of their luggage, otherwise it will not be put into the train."

"In order to prevent delay and inconvenience on the re-delivery of luggage at the end of the journey, passengers are requested to place on each article their name and address. And notice is hereby given that the company will not be responsible for the care of the same unless booked and paid for."

It was contended on the part of the appellants that the Act of Parliament limited their liability to articles of clothing, and could not be affected by the regulations; and if such regulation was valid and binding the company would, by the concluding paragraph, be released from all liability whatever.

For the respondent, who gave the regulation in evidence, it was contended that he would be entitled by it to carry personal luggage, and the company would be liable for it, notwithstanding the Act of Parliament recited above. It was further contended that the appellants were rendered liable for personal luggage by the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, s. 7.

It is admitted that the great coat, the sundries, and the portmanteau itself, amounting in value to £4 10s., are articles of clothing within the meaning of the recited Act, for the value of which the company is liable if their liability is limited to articles of clothing only, subject to the opinion of the court upon the respondent's claim to have the spurs included.

The questions for the opinion of the court are,

1. Should the judge have directed the respondent to be non-suited?

2. Should the question of the plaintiff's contributory negligence have been left to the jury?

3. Should the verdict upon the finding of the jury have been entered for the appellants or respondent?

4. If the court are of opinion that the verdict upon such finding should have been entered for the respondent, then to what amount not less than £4 10s. ought it to be reduced so as to be in accordance with the Act of Parliament?

*Paine* (*Lopes*, Q.C. with him) argued for the appellants.

*Finney* for the respondent.

The cases and the arguments are set out in the judgment.

*Cur. adv. vult.*

Nov. 11.—Willes, J., delivered the judgment of himself, Keating, and Smith, JJ.—This was an appeal from the judgment of the county court in favor of the respondent, who was the plaintiff below. The plaintiff, a passenger by the defendants' railway, upon a return journey from Cheltenham to Reading, had his portmanteau put into the same carriage with him. At Swindon the train stopped, as usual, for ten minutes, the plaintiff got out for refreshment, and upon returning, failed to find his carriage, which however, in fact, continued in the train until it reached Paddington. He continued his journey from Swindon in another carriage of the same train, and afterwards obtained his portmanteau *minus* a portion of its contents, which had been stolen by some person in the carriage after he had left it at Swindon, and before its arrival in London. This action was thereupon brought to recover the value of the missing articles. There was contradictory evidence as to what passed at Swindon, and especially as to the circumstances which led to the plaintiff getting into another carriage, and so becoming separated from his luggage. The jury must be taken to have believed the evidence of the company in preference to that of the plaintiff, for they negatived any negligence on the part of the company's servants, and found that the plaintiff, by his negligence, contributed to the loss. This latter finding also shows that the jury must have adopted, as the more probable conclusion, that the theft took place between Swindon and London, so that the portmanteau would have been safe under the plaintiff's protection, had he regained the carriage. Notwithstanding these findings of the jury, the verdict was, by the direction of the judge, entered for the plaintiff, with leave to appeal, whereupon this appeal was brought. The law laid down by Chambre, J., in *Robinson* v. *Dunmore*, 2 B. & P. 419, as to stage coaches, has been considered by eminent authorities to be, in general, equally applicable to railway carriages, viz., that "if a man travel in a stage coach and take his portmanteau with him, though he had his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost;" *Richards* v. *The London, Brighton and South Coast Railway Co.*, 7 C. B. 839; *Butcher* v. *The London & South Western Railway Co*, 3 Com. Law Rep. 805, 16 C. B. 13; *Le Couteur* v. *The London & South Western Railway Co.*, 6 B. & S. 961; though it has been questioned by equally high authority whether the liability in respect to passengers' luggage is as stringent as that in respect of the ordinary carriage of goods, and whether there be any larger obligation in respect of goods carried with passengers than in respect of the passengers themselves, to whom they are accessory: *Stewart* v. *The London & North Western Railway Co.*, 3 H. & C. 135, 139; *Munster* v. *The South Eastern Railway Co*, 4 C. B. N. S. 701; and it should be remarked that in the case of *Butcher* v. *The London & South Western*, and *Le Couteur* v. *The London & South Western Railway Co.*, there was evidence of negligence on the part of the company's servants. Whatever may be the correct solution of this question, it is obvious at least that with respect to articles which are not put in the usual luggage van, and of which the entire control is not given to the carriers, but which are placed in the carriage in which the passenger travels, so that he, and not the company's servants, has *de facto* the entire control of them while the carriage is moving, the amount of care and diligence reasonably necessary for their safe conveyance is in fact considerably modified by the circumstance of their having been during that part of the journey in which the passenger might under ordinary circumstances be expected to be in the carriage, intended by both parties to be under his personal inspection and care. To such a state of things the rule which binds common carriers absolutely to ensure the safe delivery of the goods, except against the act of God or the Queen's enemies, whatever may be the negligence of the passenger himself, has never, that we are aware of, been applied.

If the passenger packed up articles liable to ignition by friction, and by the shaking of the carriage they caught fire—if a passenger were to look on while his luggage was being taken away or rifled when he might reasonably be expected to interfere—if he were to expose small articles of apparent great value in a conspicuous part of the carriage and leave them there whilst he unreasonably absented himself, and they were in consequence purloined—he would have no more just reason for complaint against the carrier, than if he had on some false alarm thrown his property out of the carriage window. The latter case, equally as the former, would in terms be out of the exception of the act of God or the Queen's enemies, and the rule especially affecting the liability of common carriers, if construed literally, and without regard to the reason upon upon which it is founded, would prevail. There is great force in the argument that where articles are placed, with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of a common carrier which is found on the bailment of the goods to him, and his being entrusted with the entire possession of them should not attach, because the reasons which are the foundation of the liability do not exist. In such cases, the obligation to take reasonable care seems naturally to arise, so that when a loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them.

There is, moreover, a general principle applicable to these as to all bailments, namely, that the bailee shall not be heard to complain of loss occasioned by his own fault; and the loss in this case was so occasioned, and without such fault would not have taken place. In truth, the expression, "contributory negligence," in such a

case, is inaccurate, if it implies any negligence on the part of the company, all the negligence having flowed from one source, namely, the conduct of the passenger, and the whole loss having been occasioned thereby. The verdict is, that the company's servants were not negligent, and the passenger was, and that by his negligence he contributed to the loss, the other contributory thereto being the thief to whom such negligence gave the temptation and the opportunity. The question, apart from the more general one, as to the extent of liability for passenger luggage, is thus reduced to whether there was any sufficient evidence to justify the jury in finding that the loss was occasioned by the passenger's negligence in the sense of neglect of duty; whether, in fact, the passenger, as between him and the company, assumed any duty in respect of the portmanteau, for in the absence of duty there could be no negligence such as to affect his remedy against the company. Upon this we are of opinion that the jury were justified in inferring from the circumstances of the portmanteau being put, with the passenger's assent, and of course for his convenience, into the carriage in which he was to travel, and so out of the immediate and active control of the company's servants instead of the ordinary luggage van, where it would have been under such control, that it was intended by both parties, and was an implied term of the contract of carriage, that in return for the convenience of having his luggage at hand, the passenger should during the journey take such reasonable care of his own property as might be expected from an ordinary prudent man, and should not by his negligence expose it to more than the ordinary risk of luggage carried in a passenger carriage, and that the finding of negligence in not using such reasonable care was sustained by the evidence.

This is enough to dispose of the case, but it may be proper to say a word on the questions left to the jury, and their answers as to the delivery of the goods, and the responsibility successively assumed by the company and the plaintiff. The first, finding that there was a delivery to the servants of the company, decides nothing as to the terms of the delivery; the second, finding that there was such an assumption of personal control of the portmanteau when delivered into the carriage at the plaintiff's desire, as to amount to an entire resumption by him of his liability, and the finding that if so there was at Swindon a fresh undertaking of liability on the part of the defendants, appears to be inconsistent; for if the plaintiff, upon getting his luggage into the carriage, resumed the entire liability, he could not cast it back upon the company by his own neglect; and in strictness, perhaps, the latter finding ought to be rejected, leaving the former conclusive against the plaintiff. We do not, however, proceed upon this ground, seeing that the question which led to the former finding involved matter of law, as to which the plaintiff ought not to be concluded by the verdict. Had the case turned upon this point, we might have thought it necessary to direct a new trial. Upon the ground first explained, however, namely, that the general liability of the company was, under the circumstances, modified by the implied condition that the passenger should use reasonable care, and that the loss was caused by his neglect to do so, and would not have happened without such neglect, we think the judgment of the county court ought to be reversed, and the verdict entered for the defendants. The costs must follow the event.

*Judgment for the appellants.*

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## McDonough v. Brophy.

*Practice—Computation of time—Exclusion of Sundays—Construction of the Common Law Procedure Act (Ireland) 1870 (33 and 34 Vict. c. 109), s. 6.*

33 & 34 Vict. c. 109, is to be read together with the Common Law Procedure Act (Ireland), 1853, and consequently the eight days mentioned in section 6 of 33 & 34 Vict. c. 100, within which an application may be made to remit an action to the Civil Bill Court, are exclusive of Sundays, as provided by section 232 of the Common Law Procedure Act (Ireland), 1853.

(C. P., Ireland, 19 W. R. 157.)

Application under 33 & 34 Vict. c. 109, s. 6, to remit for trial in the Civil Bill Court an action for slander. The section requires that such an application should be made within eight days from service of the summons and plaint. If Sundays were to be included in the eight days, the application was not within eight days.

*G. Fitzgibbon* for the defendant.—Sundays are not included in the eight days, and the application is therefore in time.

*Purcell, Q.C.*, and *C. Coates*, opposed the motion.—Sundays are included in the eight days: *Brown* v. *Johnson*, 10 M. & W. 331; *Rowberry* v. *Morgan*, 2 W. R 431, 9 Ex. 730; *Peacock*, appellant, *The Queen*. respondent, 6 W. R. 517, 4 C. B. N. S. 264; *The Queen* v. *Justices of Middlesex*, 7 Jur. 396 At common law Sunday is just like any other day. The Common Law Procedure Act, 1853 (16 & 17 Vict. c. 113), is not incorporated with 33 & 34 Vict. c. 109.

*G. Fitzgibbon*, in reply.—The whole question is whether the Act of 1853 is incorporated with the present Act. By section 232 of the Act of 1853 Sundays are not to be counted in legal proceedings. If Sundays and holidays are included in the eight days, it will be possible to evade the section altogether by bringing an action on the day before Christmas-day, it and the seven following days being holidays. *Rowberry* v. *Morgan* was decided on the ground that the General Orders were not intended to interfere with the statute: *Smith* v *Grant*, 6 Ir. Jur. 317, Ferguson's Practice, 23.

Lawson, J.—I am of opinion that this application ought to be granted. The present Act and the Common Law Procedure Act of 1853 ought to be read together. The one is called an amendment of the other. I think the case must be governed by the 232nd section of the Common Law Procedure Act of 1853.

Morris, J.—I am of the same opinion, but at first I had considerable doubts about the question. The Common Law Procedure Act of 1856 dealt with nothing new. Yet it was expressly stated that it was a part of that of 1853. The Bills of Exchange Act (9 Geo. 4, c. 24), had a special section relating to holidays. In this Act the point is left to be decided. The consequence is that difficulties have arisen from what appear

to be obvious objections. However, the question is decided by implication. Considering the extraordinary absurdities which would arise under the contrary construction, I think the two acts ought to be read together.

Monahan, C.J.—I also had considerable difficulty in arriving at a conclusion. I am of opinion that we must have regard to the nature of the Act. I think it impossible not to construe the two Acts together, since they must be regulated by the same terms of common law procedure.

*Order granted.*

## EXCHEQUER CHAMBER.

### Denham v. Spence.

*Practice—Action against British subject residing abroad —"Cause of action"—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 18 and 19.*

A marriage contract was entered into by the plaintiff and defendant abroad. The plaintiff came to England, and was there followed by the defendant. Immediately on his arrival in England, the defendant wrote to the plaintiff that he did not intend to fulfil the contract, and subsequently refused to marry the plaintiff.

A rule to set aside a suit issued against the defendant under section 18 of the Common Law Procedure Act, 1852, was refused by the court (Kelly, C. B., *dissentiente*).

*Contra* (per Kelly, C. B.), "Cause of action" means the whole and entire cause of action, both contract and breach.

*Semble* (per Martin, B.), a marriage contract creating a personal relation between the parties to it, is a continuing contract down to the time of its breach.

*Sichell* v. *Borch*, 12 W. R. 346, 2 H. & C. 954; *Allhusen* v. *Malgarejo*, 16 W. R. 854, L. R. 3 Q. B. 340; *Jackson* v. *Spittal*, 18 W. R. 1162, L. R. 5 C. P. 542, commented on.

[Ex. 19 W. R. 162.]

Motion for rule to show cause why writ and subsequent proceedings in the above action should not be set aside, on the ground that the cause of action, if any, did not arise within the jurisdiction of the superior courts, under section 18 of the Common Law Procedure Act, 1852. The said section enacts as follows:—

In case any defendant, being a British subject, residing out of the jurisdiction of the said superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the Schedule A to this Act annexed, marked No 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors; to direct, from time to time, that the plaintiff shall be at liberty to proceed in the action in such manner, and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case; provided always that the plaintiff shall, and he is hereby required, to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the masters of the said superior courts, in the manner hereinafter provided, according to the nature of the case, as such court or judges may direct, and the making such proof shall be a condition precedent to his obtaining judgment.

This was an action for breach of promise of marriage. The offer and acceptance of marriage were contained in letters which passed between the plaintiff and defendant at the time that the former was living in Calcutta and the latter at the Cape of Good Hope. The plaintiff came to England, whither she was followed by the defendant. When off Plymouth the defendant wrote a letter to the plaintiff, dated the 8th of April, in which he informed her of his intention not to fulfil his engagement. He subsequently refused to marry the plaintiff. The letter of the 8th of April, was posted in Plymouth, and received, in due course of post, by the plaintiff on the 9th of April.

*Day*, in support of the motion.—The question turns on the construction of the words "a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction" of section 18 of the Common Law Procedure Act of 1852. The contract in this case was certainly made out of the jurisdiction, therefore the defendant is not within the latter part of the sentence, nor is he, I submit, within the meaning of the words "a cause of action which arose within the jurisdiction," for even admitting the breach to have occurred in England, "cause of action" means the whole cause of action, and embraces the contract as well as the breach; and the former was not subsisting at the time that the defendant landed in England, for he had broken it by letter before disembarking. The authorities are divided as to the construction of the words in question. In 1858, this court, *Fife* v. *Round*, 6 W. R. 282, held that the dishonour in England of a promissory note made and delivered to the plaintiff in France, but payable in England, was within the section. But in 1864, this court, in *Sichell* v. *Borch*, 12 W. R. 346, 2 H. & C. 954—where the defendant, a foreigner residing in Norway, there drew a bill of exchange on E., after endorsing it to D.'s order, sent it by post to D. in London, who endorsed it to the plaintiff—held that the cause of action did not arise within the jurisdiction. However, in 1865, in *Chapman* v. *Cottrell*, 13 W. R. 843, 3 H. & C. 865, 34 L. J. Ex. 186—where the defendant, a British subject residing in Florence, signed two promissory notes there as joint and several maker with his brother in London, to whom he sent them by post, and his brother thereupon signed the notes and delivered them to the payees in England—this court held that the "cause of action" had arisen within the jurisdiction; but this case is, it is submitted, distinguishable from that preceding it, as the defendant's contract was not complete until the notes were signed and delivered by his brother,

a joint maker in England. In 1868, the Court of Queen's Bench, in *Allhusen* v. *Malgarejo*, 16 W. R. 854, L. R. 3 Q. B. 340, following *Sichell* v. *Borch*, held that "cause of action" must mean the whole cause of action; that is, all the facts which together constitute the plaintiff's right to maintain the action. This case has been chronologically, but not otherwise, followed by the case of *Jackson* v. *Spittal*, 18 W. R. 1162, L. R. 5 C. P. 542, where the Court of Common Pleas has held that "cause of action" is satisfied by the breach of a contract arising within the jurisdiction; but that case is clearly wrong, as it proceeds on the idea of an analogy existing between the present procedure and that of outlawry. Now the foundation of the proceedings in outlawry was that the defendant must be in the jurisdiction, while the procedure introduced by the Common Law Procedure Act, is directed against those who are beyond the jurisdiction. I therefore submit that on this review of the cases, the balance of the authority is in the defendant's favour, and cause of action must mean "whole cause of action."

*Petheram* against the motion.—This was a continuing contract, and therefore both breach and contract were in England; but if the court is not of that opinion, then I submit that by "cause of action" is meant a substantial part of the cause of action, and that is the breach which it is admitted arose within the jurisdiction: Day's Common Law Procedure Act, 1852, 3rd edit. p. 18.

*Cur. adv. vult.*

Pigott, B.—I regret to say that there is a difference of opinion in this court, and as the other superior courts have also differed in the construction to be put upon the language of the Common Law Procedure Act, 1852, s. 18, of that section I am bound to express my opinion. The words which raise the difficulty are a cause of action which arise within the jurisdiction "or in respect of the breach of a contract made within the jurisdiction." In the case of *Sichell* v. *Borch* I did not then differ from the rest of the court, but contented myself with expressing my doubts as to the correctness of the decision of the court. The Court of Common Pleas, in the case of *Jackson* v. *Spittal*, have had this section under their consideration, and have affirmed those doubts. After full consideration, I adopt the language of the Common Pleas. The Legislature, no doubt, intended to give increased facilities to creditors against debtors who are out of the country, and for this I rely upon the words "or in respect of the breach of a contract made within the jurisdiction" being used in the alternative. The present case arises upon facts which were correctly stated by Mr. Day, and that statement of the facts was accepted as correct by the other side; what we now have to determine is the intention of the Legislature conveyed by the words "cause of action." Mr. Day contends that the meaning of the words is the whole cause of action or all the facts which together constitute the plaintiff's right to maintain the action. It seems to me that that is not the true meaning of the words, or the intention of the Legislature.

The expression "cause of action" means the breach of the contract. It is of course clear that a contract can be broken, but the breach alone would—and I think does—satisfy the language of the Legislature, and that is, I think made clear by the words used in the section. To exemplify them—Suppose a contract made in China to deliver goods in England and the contract is broken by non-delivery, then I say, according to this section, a cause of action would arise in England. The Act was intended to be a remedial Act, and I don't think we ought to narrow the words which the Legislature has made use of.

Martin, B.—I am of the same opinion. I think that this writ was rightly issued. The words of the section are, "It shall be lawful for the court or judge upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction to direct, &c." The facts of the case are very short.

It appears that the defendant wrote an offer of marriage from the Cape of Good Hope to the plaintiff at Calcutta, and she wrote from that place accepting his offer. She came to England; he followed her; but before landing at Plymouth wrote to her that he held himself disengaged from his promise. Now, in my opinion, there is this peculiarity in the contract of marriage that it is a continuing contract, and therefore when the parties were in England, the one being at London and the other at Plymouth, it seems to me that there was a valid contract in England, and then the defendant having broken the engagement it follows that a cause of action arose within the jurisdiction. We were pressed by the judgment of this court in the case of *Sichel* v. *Borch*, but I am not embarrassed by that, for I still adhere to that judgment. The circumstances of this case are easily distinguishable from those in *Sichel* v. *Borch*; there the defendant was a Norwegian, residing in Norway; he may never have been in this country in his life; he both drew and endorsed the bill on which he was sued in Norway. It would have been monstrous on account of the dishonour of the bill here to have held that there was a cause of action within our jurisdiction, I therefore think that *Sichel* v *Borch* was decided rightly, and I would decide both that case and the present, as they have been decided, if I had to decide them again.

Kelly, C.B.—I entirely agree with my brother Pigott, in regretting that there is a difference of opinion in the court on the construction of this section. In my opinion, "the cause of action" really means the whole and entire cause of action, and not merely such an act as the non-acceptance or non-delivery of goods. I think it almost obvious that that expression must include the making of a contract as well as its breach. My brethren read the words, "cause of action," as if they were equivalent to breach of contract; but it appears to me obvious that that is not the meaning, for the words breach of contract are used immediately afterwards To treat non-payment, non-appearance, or non-delivery of goods as a cause of action is a mistake, for such acts of themselves do not constitute a cause of action; that which makes them so is the contract, and without the contract there can be on

cause of action at all. I think therefore in the first place, that as the contract was not made in England, no cause of action did in this case arise within the jurisdiction. Now, as to the words of the statute on which this question arises, they are—"it shall be lawful for a court or a judge, upon being satisfied by affidavit that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction," &c. Now, the effect of the construction I put upon the words "cause of action" would be, that if in the case of a contract made abroad, say for the delivery of goods in England, that contract were broken by the non-delivery of goods in England, no cause of action would arise within the jurisdiction; but in the case of a contract made in England, there a cause of action would arise, although the breach of the contract be committed abroad; but if that construction be not right, why, it may be asked, did not the Legislature, if it intended that actions should be brought here for breaches of contracts arising in England, although the contracts were made abroad, use half a dozen more words, and plainly express such intention. It seems to me, therefore, that, quite irrespective of authority, the meaning of this section is clear and obvious. But when we look at the authorities, several of which are in this court, and which terminate with the case of *Sichel* v. *Borch*, I think the balance of authority is in favour of my view of this section. I also look upon the case of *Allhusen* v. *Malgarejo*, decided in the Queen's Bench, as rightly decided. There it was expressly said that the cause of action means the whole or entire course of action. There it was expressly said that the cause of action means the whole or entire course of action. My brother Martin has dealt with this case in a way that I cannot accede to. He says that the contract continued until the plaintiff and defendant came into this country; but if that were the case the same might be said of every contract if the parties to it happened to come to England, and where such an event happened there would be no necessity for the Act. Then as to the case of *Jackson* v. *Spittal*, recently decided in the Common Pleas, I have looked through that case with great attention, and it seems to me that they have purposely adopted such a construction of the section as would extend the jurisdiction of the superior courts. But I think such a construction would prejudicially affect thousands of persons, and would work positive injustice; and therefore, with every respect for the decision of that court, and agreeing, as I do, that it is generally a sound rule to put such a construction on an Act of Parliament as should have the effect of extending the jurisdiction of the superior courts, I am unable, for the reasons I have given, to agree with that decision. I am therefore of opinion that in the case of a contract made abroad, but broken in England, the "whole cause of action" does not arise within our jurisdiction.

Cleasby, B. (after saying that although not in court during the whole of the case, he felt himself entitled to give judgment, as he had heard Mr. Day's argument, proceeded)—I agree with the majority of the court that the defendant's application ought to be refused. The expression "cause of action" is very intelligible, though if the words used had been "whole cause of action" that might not, perhaps, have been so clear. Now when does the cause of action arise? It seems to my mind clear that it arises when that is not done at the time at which it ought to have been done, and when that takes place in this country then it follows that the cause of action arises here, or, in other words, the cause of action arises when something takes place inconsistent with the obligations of the party; now that in contract is the breach, and therefore, I hold that the cause of action can arise nowhere except where the breach occurs. As to the inconvenience which my Lord Chief Baron suggests would arise from our holding that actions can be brought in this country in respect of contracts made abroad, but broken in England, I confess that it does not seem to me that any would arise, for such contracts would be interpreted according to the law of the country where they were made; yet, as the breach has occurred in England, it seems to me only fair and reasonable that the action should be brought in England. As to the case of contract made within but broken without the jurisdiction, if we expand the section it will read "or that there is cause of action in respect of the breach of a contract made within the jurisdiction," and the action, therefore, gives us jurisdiction over contracts made here, but of which the breach has arisen abroad.

*Rule refused.*

## GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—Could you kindly give me an opinion as to whether a barrister can legally enter into a partnership with an attorney who is not a barrister, and hold themselves out to the world as a firm of attorneys. It seems to be an improper mode of procedure, but I cannot find any authority against it. *Quæry*, could they, suing as a firm, recover any fees?

By giving an opinion you will oblige,

Yours respectfully, Enquirer,

Guelph, December 2, 1870.

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[We cannot say that there is anything illegal in the practice alluded to, nor even improper under certain circumstances, unless of course done from an improper motive or with intent to mislead clients or the public. It is very common for one member of a firm simply to do the counsel part of the work, and for the other to attend to the attorney's department, though both are responsible to the client. It would of course be very improper for the barrister to attempt to shield himself from this responsibility by the fact, probably un

known to the client, of his *not* being an attorney.

So far as the practical result is concerned, it would not be likely to make much difference to the client; the barrister, it may be assumed, would be at least as good a lawyer as the attorney, and it would be only in very extreme cases where the barrister partner would find it to his advantage, even if fraudulently inclined, to set up the fact that he was not what he pretended to be.

They could not recover fees as a firm of attorneys; proceedings would have to be taken in the name of the attorney alone.

## OBITUARY.

[We shall be glad to receive full information under this head, from reliable correspondents, so as to enable us to keep as complete and accurate a record as possible.]

### THE HON. JOHN PRINCE, Q.C.

(Extracted from the *Essex Record.*)

The Honorable John Prince, late Judge of the district of Algoma, better known to the public as Col. Prince, was born in Herefordshire, England, on the 12th of March, 1796, and consequently upon his death at his residence at Sault Ste. Marie, Algoma, on the 30th of November, 1870, was in the 75th year of his age.

He was early in life devoted to the profession of the law, and in 1821 was admitted to practice in all the courts of law and equity in England. He followed the practice of his profession in the Counties of Herefordshire, Kent and Gloucestershire, until 1833, when he decided upon emigrating to America. His extraordinary fondness (amounting to a passion) for field sports, is said by those still living who remembered him at that time, to have been the cause of this sudden severance from a lucrative practice and all his home ties; it is said he would occupy all his leisure at this time in reading and dilating upon accounts of the deer and turkey shooting in Kentucky, which he then intended as his destination. Had he carried out his intention, with the knowledge we now have of him, and of the subsequent history of the country he proposed as his future home, a curious speculation might be formed as to the position of himself and family; but the facts were that his course was changed by the influence, we believe, of some accidental companions of voyage, and in August, 1833, he finally settled in Sandwich, two miles from where we write.

In 1835 he went into Parliament, and from this point of his career there were few men whose actions for twenty years after this time were more continually before the people of Ontario and Quebec than those of Col. Prince. From 1836 to 1860, he sat in the Parliaments of Upper Canada and United Canada, and for the latter few years, in the Legislative Council or Upper House of the United Provinces, to which, when made elective, the electors of Essex and Kent, the "Western Division," returned as its representative the man who both counties always "delighted to honour." Colonel Prince was the representative of the Western country; but he was not merely a representative in the House of Parliament, for —whether he were urging to its passage a bill for the admission of aliens to the real estate privileges of British subjects, and thereby bringing American capital into the Province, or whether he were ordering the shooting on the spot of these same Americans when caught in the sin of piratical invasion and brutal murder, and thereby subjecting himself to abuses and misrepresentations, culminating in duels and court martials (and recent events have shewn his course to be the proper treatment of like marauding scoundrels after all), or whether he was arranging an agricultural show or cattle fair in a little Essex town on the plan of his old Herefordshire recollections, or haranguing in the principal city of Canada thousands on the then, to Conservatives, most exciting topic of the day, the payment of "rebellion losses," in all circumstances, on all occasions, he was the representative man.

He was called to the Bar and admitted as an attorney in Michaelmas Term, 1838, at the same time as the present Treasurer of the Society, and was elected a Bencher in the same term twenty years afterwards.

In 1860 he was offered and accepted the situation of District Judge of the District of Algoma, which he never quitted until the year 1870, when he visited Toronto in search of medical assistance which could not be of use, for he died suddenly on the morning of Wednesday, November 30, but quite calmly and free from pain.

As a lawyer he was a remarkable instance of a practical application of the maxim that law is the highest reason, the best of common sense; for, without being a student, he would almost instinctively seize upon the true bearing, and the inevitable result of a certain state of facts, and would astonish consumers of the midnight oil, by shewing that he knew the law without having read the cases.

As a politician he was successful as regards the interest of the country, an utter failure as regards his own. He would urge with the whole power of his intellect some measure he deemed for the good of the country, utterly indifferent to the fact that the ministry he professed to support at the time were its opponents. He never could be made to understand the necessity which seems now-a-days to be so universally admitted, the necessity for party government. He never held office.

As both lawyer and politician his distinguishing characteristic was his eloquence, elo-

quence which would sometimes rise, especially in his references to the classics (for he was a scholar of old Hereford College, and no mere "crammer" of Latin and Greek), to the height of oratory. And with his eloquence, with the expression of his thoughts in the most fluent and fitting language, was joined almost all the advantages which subserve it, ease of manner, power and pliability of voice, and a most gracious and commanding presence. But the feature of Colonel Prince's character, upon which most of those who knew him well fixed their attention, was always his manliness, his independent assertion of not what always was right, but always what he thought to be so, and his generous and disinterested recantation of such opinions when he thought them to have been wrong.

His warm impulsive nature, fed by and resting upon a superb bodily constitution, led him to error as well as to truth, but in either event men came to know that what he did he did with all his heart, and that that heart was never sullied by anything mean, sordid, or dishonest.

Two biographical sketches of Colonel Prince have been published, one by Mr. F. Taylor, in 1865, another by Mrs. Jamieson, in the earlier portion of the Colonel's Parliamentary career, we think about 1838.

## GEORGE A. CUMMING, ESQ.

(Extracted from the *British Whig.*)

George Alexander Cumming, Esq., Barrister-at-Law, an old and esteemed resident of Kingston, died on Wednesday, the 28th December last, in the fifty-eighth year of his age.

His father, John Cumming, Esq., was one of the first settlers in Kingston, and represented the then town in the Parliament of Upper Canada about the year 1826.

He first studied law in the office of the late George Mackenzie, and finished his studies with the late Mr. Thomas Kirkpatrick, Q. C., and was called to the bar in Michaelmas Term, 1837. His health, which was impaired by a severe accident in childhood, maiming him for life, would not permit him, however, to devote himself to the arduous duties of the practice of the law, to which otherwise, by his keen intellect and talent, he was admirably adapted.

In 1840 he was appointed Judge of the Surrogate Court of the United Counties of Frontenac, Lennox and Addington; but this office being subsequently merged in that of the Judge of the County Court, Mr. Cumming was necessarily obliged to resign. In 1864 he received the appointment which he held until the time of his death, namely, that of Registrar of the city of Kingston, in which office he was most invaluable—a link, as it were, connecting the present with the past.

The worthy Judge—for as "the Judge" he was best known—was universally esteemed. From his kind, gentle and generous disposition, he could not but be beloved; and we think we are safe in saying that since the death of his kinsman, the late Mr. Archibald J. Macdonell, not one has passed away from amongst us, whose death has caused more sincere regret, or whose memory will be longer cherished.

## REVIEWS.

The United States Jurist. Washington, U.S.

A new monthly publication intended as a *multum in parvo*. The editor says: "We would seek to be in a measure a labor saving contrivance; and, instead of encumbering our columns with legal arguments and judicial opinions which may be found elsewhere, we would be content to present the leading principles, leaving our reader to pursue the investigation at his leisure."

The tendency of the age is towards superficial knowledge. No "labor saving machine" can make a good lawyer; though we may admit that it confers some benefits in these days of phrenzied haste.

## APPOINTMENTS TO OFFICE.

### COUNTY JUDGE.

THE HON. WALTER RAE McCREA, of the Town of Chatham, in the County of Kent, to be Judge of the Provisional Judicial District of Algoma, *vice* Hon. John Prince, deceased. (Gazetted December 24th, 1870.)

### COUNTY ATTORNEY.

JOHN BAN McLELLAN, of the Town of Cornwall, Esquire, Barrister-at-Law, to be County Attorney and Clerk of the Peace for the United Counties of Stormont, Dundas and Glengary, *vice* James Bethune, resigned. (Gazetted December 3rd, 1870.)

### DEPUTY CLERK OF CROWN.

FRANK E. MARCON, of Sandwich, Gentleman, Attorney-at-Law, to be Deputy Clerk of the Crown and Clerk of the County Court of the County of Essex. (Gazetted 1st October, 1870.)

WILLIAM ALEXANDER CAMPBELL of the City of Toronto, Esquire, to be Acting Deputy Clerk of the Crown and Clerk of the County Court of the County of Kent, *vice* T. A. Ireland, deceased. (Gazetted 1st October, 1870.)

### REGISTRAR.

JOHN COPELAND, of the Township of Cornwall, Esquire, to be Registrar for the County of Stormont, *vice* George Wood, resigned. (Gazetted November 19th, 1870.)

### NOTARIES PUBLIC.

GEORGE FREDERICK HARMAN, of the Village of Orangeville, Esquire, Barrister-at-Law; THOS. DIXON, of the Village of Durham, Esq., Barrister-at-Law; ARCH. BELL, of the Town of Chatham, Gentleman, Attorney-at-Law. (Gazetted November 5th, 1870.)

FRANCIS R. BALL, of the Town of Woodstock, and EDWARD MERRILL, of the Town of Picton, Esquires, Barristers-at-Law. (Gazetted November 12th, 1870.)

SIMON HARRISON PAYNE, of Colborne, Gentleman, Attorney-at-Law. (Gazetted November 26th, 1870.)

JOHN HENRY GRASSETT HAGARTY, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted December 3rd, 1870.)

ADAM HENRY MEYERS, jun., of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted Dec. 17th, 1870.)

ROBERT OLIVER, jun., of the Town of Guelph, Esq., Barrister-at-Law. (Gazetted December 24th, 1870.)

ALEXANDER S. WINCH, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted 31st December, 1870.)