DIARY FOR DECEMBER.

2. Thur..Re-hearing Term in Chancery begins.
4. Sat. ..Michaelmas Term ends. Armour, J., sworn in, Q. B., 1877.
5. Sun... Second Sunday in Advent.
7. Tues...County Court sitt. for York begin.
11. Sat. ..Blake, V. C., sworn in, 1872.
12. Sun. ..Third Sunday in Advent.
14. Tues...County Court sitt. (ex-York) begin.
15. Wed...Christmas vac. in Supreme Court and Exch. Ct. begin. Morrison, J., sworn in, Court of Appeal, 1877.
17. Fri. ...First Lower Canada Parliament met, 1792.
19. Sun. ..Fourth Sunday in Advent.
24. Fri. ...Courts of Appeal and Chancery begin.
25. Sat. ..Christmas Day.
26. Sun. ..First Sunday after Christmas. Upper Canada made a Province, 1791.
27. Mon...Spragge, V. C, appointed Chancellor, 1879. Municipal nominations.
31. Fri. ...Rev. Stat. of Ont. came into force, 1877.

CONTENTS.

Canada Law Journal.

Toronto, December, 1880.

Sir A. J. E. Cockburn, Chief Justice of England, is dead. His successor is Lord Coleridge, Chief Justice of the Common Pleas.

The following appointments appear in the *Canada Gazette* of the 27th ult:—Hon. John F. McCreight, Q.C. and Hon. Alexander Rocke Robertson, Q. C., of Victoria, to be Puisne Judges of the Supreme Court of British Columbia.

When speaking in our last issue of the recent appointments of Queen's Counsel the name of Mr. Richard Martin, of Hamilton, was inadvertently omitted as one of those who was on the Ontario list of April, 1876, and whom we should have expected to have seen in the late list in the *Canada Gazette*. It is really, however, a matter of little consequence inasmuch as (to use the language of Lord Chelmsford when speaking of the multitude of silk gowns nowadays) "the distinction has now become *all stuff*."

We welcome the appearance and distribution (*gratis*) of the very complete and well-arranged Catalogue of Osgoode Hall Library, compiled and edited by Mr. G. M. Adam. A most important part of this volume is the arrangement and classification of the American reports, which one needs to have at one's fingers' ends to find the books as now shelved in the galleries of the Library. Another excellent point in the new catalogue is the index of subject which seems very exhaustive.

We understand that the feeling of hostility to the existence of the Supreme Court is in the Province of Quebec very marked. To say the least of it such judgments as that in *McKay* v. *Chrysler* do not tend to establish confidence in the Court in this Province. In that case the Court of Chancery, and Court of Appeal, and the two Ontario Judges in the Supreme Court agreed in sustaining a title on questions arising under Ontario Statutes. This formidable array was overruled by Chief Justice Ritchie, and Justices Fournier and Henry. How is

it possible to get an Ontario Bar or the Ontario public or in fact any unprejudiced mind to say that the probabilities are not largely in favour of the view of the nine eminent judges, who have been overruled, on points in which they are specially versed, by three judges of less experience and certainly of no greater ability or research.

The completion of the labours of the New Testament Revision Committee is a matter of national importance and of deep significance to all English-speaking people. There is little doubt that this revision will be accepted and adopted by the public, and if so, it will be the ninth English version which has successively come into general use. It is expected that the University presses of Oxford and Cambridge will issue the revised New Testament in February, 1881. We see it stated in our exchanges that immediately on the appearance of the new version, an eminent firm of London publishers will also issue an edition and contest at law the legal right of the Company of Revisors to the copyright. In our opinion, if it be necessary the right to this copyright should be protected by Parliament, as there is a great outlay of large necessary expenses incurred by the English and American Boards of Revision to be provided for.

The irrepressible Sheriff at Hamilton is out with another pamphlet on the subject of Sheriff's fees, &c. As far as we can judge, from what he states therein, he is so utterly disliked by the profession in his own county that they take every means to "starve him out." There are a few other sheriffs almost as obnoxious, but we are glad to say very few. Those of his cloth who have any regard for their own interests should endeavour to suppress this pamphleteer, for there is no knowing how he may injure them before he is stopped. We presume the Attorney-General will see to it that the public are protected from his scheme to put money in his own pocket at their expense. Curiously as it may sound to some, the interests of litigants and lawyers are the same in this matter. As the present pamphlet is much the same as the last, the statements therein need not again be refuted.

It has been supposed that the Bar of the United States is peculiar in the laxity of its discipline; but if the following extract from an exchange gives any indication, there is one country we know of, that, so far as the breach of professional ethics is concerned (not now making any comparison as to the ethics alone) has no ground for boasting of being in an advanced condition. We might here, *en passant*, ask what has been done by the Law Society in connection with the treatment of Mr. Hutchinson by a brother member of the London Bar. The extract referred to is as follows:—

"The Supreme Court of Baltimore, Md., after a protracted trial entered an order on the 9th inst. striking from the roll of attorneys of that Court the name of ex-Judge Wm. E. Gleeson. The order of the Court in the case professes to set out the offence charged, and is as follows:—

'Testimony having been argued fully on both sides by counsel, it is therefore, on this 9th day of November, 1880, found and adjudged by the Supreme Bench of Baltimore City, that the respondent the said Wm. E. Gleeson, on or about the 4th day of June, 1880, in the case of W. A. Reed & Co. against C. J. Proctor, and which was then being tried in the Baltimore City Court before the judge presiding therein, in answer to an inquiry from the judge why a certain witness was not produced, replied that we (meaning himself, the said Gleeson, and his client, S. T. Proctor), have had the witness, meaning a certain John S. Edwards, summoned but he failed to attend, or words of like import and effect, and that said reply was false, the said witness, as said Gleeson well knew, having on said day attended said Court after having been summoned aforesaid, and having been dismissed by said Gleeson, and that

said reply was made by said Gleeson with the intent to deceive and mislead the said judge, and tended to deceive and mislead him, and it is therefore further adjudged, ordered, and decreed that the name of the said Wm. E. Gleeson be stricken from the roll of attorneys of this Court, and that he be disbarred from practising therein, or in any of the Courts of Baltimore City in which the judge of this Court presides.'

The offence of the respondent seems to be that he deceived the judge in the course of the trial of a cause. It does not appear that the alleged deception was important or that it worked any injury to any one. The gravamen of the offence seems to be merely that of the untruthfulness of the lawyer on a certain occasion referred to. If this, without regard to results or attending circumstances, is an offence for which the name of an attorney may be stricken from the roll, Judge Gleeson may not have been the first guilty party in this regard among the legal fraternity. If this is to be adopted as the settled rule, it should be extended to the discipline among lawyers in their professional intercourse with each other. An untruthful statement to a judge on the bench would not appear in itself to be any greater offence than an untruthful statement to a brother lawyer in professional intercourse; and if the tendency of the decision quoted shall be towards including the latter class of cases, the bar will hail the decision as a step in the proper direction."

LIABILITIES OF ASSURANCE COMPANY WHEN LIFE POLICY IS ASSIGNED.

Cases have lately been decided of great importance to insurance Companies (especially those insuring life) as to their rights and liabilities when the policy has been assigned for the benefit of a creditor. It has been a matter of some doubt and perplexity as to what attitude the company should take when a person whose life has been assured with them dies in a state of insolvency, and it appears that he has, before his decease, assigned the policy to secure a debt for a sum perhaps larger than the amount assured. In such a case is the Company justified in withholding payment until a proper personal representation of the deceased has been appointed, or is the Company safe in paying to the assignee of the policy? If in such or similar circumstances payment is withheld, is the Company liable to pay interest on the amount of the policy? It has been urged that when the policy has been assigned by the assured the assignee has the right to enforce payment and give a valid discharge to the Company. No doubt in such a case the Company could safely pay, and would be protected in the payment by the Court of Chancery,—but as a matter of strict law it is urged on the other side that the Company are entitled to require a discharge from the personal representatives of the deceased,—inasmuch as the cause of action and the right to receive the amount do not arise till the death of the assignor (the assured), and the vesting of that right of action in his personal representative cannot in law be anticipated by a previous assignment to a stranger. In *Crossley* v. *Glasgow Life Assurance Company* L. R. 4, Ch. D 421, it appeared that the deceased had promised to assign or deposit his policy to secure a debt due to the plaintiff, and had sent the policy to the plaintiff with the view of having the necessary documents prepared. But no writings were executed although the policy was retained by the plaintiff to secure a debt which exceeded the sum assured. No personal representative of the deceased had been appointed. The Master of the Rolls held that the Company was justified in refusing to pay without getting a proper receipt, and that they were not bound to accept an indemnity on paying the plaintiff. There was not even an equitable assignment of the policy, and the Company had the right to have it proved that there was a debt due by the deceased to the plaintiff equal to the amount of the policy. The way in which the Judge disposed of the case, however, was rather singular. He found on the

facts that the plaintiff was entitled to the money, and for this reason dispensed with the presence of the personal representative, but he ordered the Company to pay interest on the policy-money, not following the views expressed in *Wolfe* v. *Findlay*, 6 Ha. and relying on the Statute 3 & 4 Wm. IV. c. 42, s. 28, as making a difference. This provision is the same as our C. S. U. C. c. 43, s. 3. (now R. S. c. 50, s. 268, p. 667.) Respecting this statute, the construction placed upon it by Mowat, V. C., in *Box* v. *Provincial Insurance Company*, 19 Gr. 48 is that while it has been customary with the Courts to give interest on money recovered against Insurance Companies, yet it is a matter of discretion only with the Court, as with the jury, and not a strict legal right. And we would have thought that when there was no hand to receive or grant a legal discharge, as in the Crossley case, it was not a case for interest.

Very much the same question was again brought before the same Judge in *Webster* v. *The British Empire Mutual Life Assurance Company*. The facts were that, the deceased had deposited the policy with the plaintiff, to secure a sum less than the amount assured. No written assignment was executed and no letters of administration had been taken out,—the assured having died intestate and insolvent. The Master of the Rolls followed his previous decision, holding that the defendant could not safely have paid the money to the plaintiff in the absence of a personal representative without the protection and indemnity of an order of the Court; but he held that the Company must pay interest from the date of the proofs of the death. Upon appeal this part of the decree was reversed by the unanimous judgments of James, Cotton and Thesiger, L. JJ., 28 W. R. 818. They held in effect that interest would only be given by way of damages for the wrongful detention of the money, and the Company was not in default. The opinion of Lord Justice James supports the view that to put the Company clearly in the wrong the assignee should have clothed himself with the character of personal representative. He says "he was not bound to incur the expense of taking out letters of administration, or making himself liable to the responsibility of an administrator; he was not compelled to do that, and therefore he did not clothe himself with a legal title. But the guilt of default (if it is to be called so), was on his side because that was not done which it was perfectly clear was open *to the person in whose right the plaintiff is suing*, namely, at any time to have clothed himself with the legal representation which was required *to complete his title.*" This is manifestly right where the assignment was only of a part of the sum and no written assignment of the policy was executed. But it would be donbtful whether the assignee should be compelled to do this where the policy was wholly assigned to him by a proper instrument empowering him to receive the money and grant receipts there for. See *Fenner* v. *Mears*, 2 W. Bl. 1269.

Evidence was given in this case that the Company had kept the money ready to meet the demand, but L. J. Thesiger was of opinion that even if it had appeared that the Company had used the money, they should not be mulct in interest, as there had been no default by them.

THE DOMINION AND THE EMPIRE.

(*Concluded.*)

I look, I say, on the Imperial rights of Great Britain, and the privileges which the colonists ought to enjoy under these rights, as being just the most reconcileable things in the world.

EDMUND BURKE.

But as for the colonies, we purpose, through Heaven's blessing, to retain them awhile yet! Shame on us for unworthy sons of brave fathers if we do not.

THOMAS CARLYLE.

A passage quoted in the last article on the above subject showed that Mr. Todd fully recognizes—as, indeed, he does again and again—that the Crown must always act through advisers, approved of Parliament. And as Mr. Sheldon Amos says, in his recent work on the English Constitution from 1830 to 1880, "When once the principle of the responsibility of the Ministers of the Crown to Parliament has been firmly established, there is scarcely any opening left for the irresponsible action of the Sovereign in entire independence of the help or agency of persons who may be made accountable to Parliament." What opening there is seems to lie in the direction of what Mr. Amos calls, in another part of the same book, "cautious, self-restrained, and purely tentative suggestiveness," and in another place, "influence of the mere formal consultative sort." Nor, indeed, does Mr. Todd appear to claim much more than this, although there are certain passages in his first chapter on "the Sovereign, in relation to parliamentary government," which may seem to assert for the Sovereign a right to exercise that "subtle, undefined, and therefore unlimited influence, constantly playing on the deliberate counsels of those who are bound to give an intelligible explanation of every step taken to Parliament and the country," which Mr. Sheldon Amos declares would be a factor for which no theory of the English Constitution in its present form can possibly find a place. Mr. Todd, however, quotes with approbation (p. 21) words of Mr. Gladstone, to the effect that the constitutional influence of the Sovereign is a moral, not a coercive influence, and operates through the will and reason of the Ministry, not over or against them.

We have, however, to do mainly with the functions of the governor of a British colony, which, owing to his dual position before alluded to, must needs be practically greater than those of the Sovereign in the Mother Country. (See Todd, p. 458.) In briefly considering these, it will be impossible to separate the subject from that of the relation of the imperial Government to the colonies generally. It is proposed, therefore, to touch briefly on some of the more important points in this connection alluded to in Mr. Todd's work.

Sir Alexander Bannerman, writing as Governor of Newfoundland in 1861, declares that the new system of responsible government, which was conceded in 1855, instead of lessening, increases a governor's responsibility (Todd, p. 449). It would appear, however, that with reference to the local concerns of a colony, the governor can directly do no more than exercise the same sort of influence that the Sovereign may constitutionally exercise in England. The position of a governor in this respect seems admirably expressed by Sir G. Bowen in a despatch written when Governor of Queensland in 1860 (Todd, p. 66-67):

"There cannot, in my opinion, be a greater mistake than the view which some public writers in England appear to hold; namely, that the governor of a colony, under the system of responsible government, should be, in a certain sense, a *roi fainéant*. So far as my observation extends, nothing can be more opposed than this theory to the wishes of the Anglo-Australians themselves. The governor of each of the colonies in this group is expected not only to act as the head of society;

to encourage literature, science. and art; to keep alive, by personal visits to every district under his jurisdiction, the feelings of loyalty to the Queen, and of attachment to the Mother Country, and so to cherish what may be termed the imperial sentiment; but he is also expected, as head of the Administration, to maintain, with the assistance of his council, a vigilant control and supervision over every department of the public service. In short, he is in a position in which he can exercise an influence over the whole course of affairs, exactly proportionate to the strength of his character, the activity of his mind and body, the capacity of his understanding, and the extent of his knowledge."

The governor is bound to maintain a strict neutrality between contending parties in politics, and a strict impartiality on all party questions, in which neither the prerogative of the Crown nor other imperial interests are involved. Mr. Todd illustrates this by the case of Sir C. Darling, whose infringement of this obligation, when governor of Victoria, in 1865, led to his recall by the imperial Government (Todd, p. 103, and see p. 490). Again, he is forbidden to implicate himself in disputes between the two Houses of the Legislature, such as that still in progress in Victoria. "It is clearly undesirable," writes Lord Canterbury, in 1867, "that he should intervene in such a manner as would withdraw these differences from their proper sphere, and so give them a character which does not naturally belong to them, of a conflict between the majority of one or another of the two Houses and the representative of the Crown" (Todd, p. 491).

There are, however, as Mr. Todd points out, (p. 432), two limitations to this rule of non-interference on the part of a constitutional governor in matters of local concern, viz.: (1) the governor must never sanction any ministerial act or principle which infringes upon an existing law: see Lord Granville's despatch to the Governor of Nova Scotia, dated January 7th, 1870, (Todd, 439). (2) The governor is bound not to ratify an act or proceeding of his ministers before satisfied of its wisdom and expediency. As to this Mr. Todd explains his meaning to be that if the governor disagrees with his ministers "upon any matter affecting the public interests which he may consider of sufficiently vital consequence to justify such an extreme measure, he is always entitled, as a last resort, to dismiss them from his counsels, and to have recourse to other advisers." Should the country refuse to support the action of the governor, he must, as we are told (p. 41): "either recede from the position he has taken in the first instance or retire from office."

The administration of Sir C. Darling in Victoria affords Mr. Todd many illustrations of various parts of his subject, and amongst others of the duty of the governor of a colony to refuse to sanction any unlawful proceedings. In 1865 the Assembly of Victoria endeavoured to impose a new tariff by tacking it to the annual appropriation bill, and the Legislative Council threw the whole bill out; Sir C. Darling yielded to his ministers so far as to sanction the levy of new duties on the mere resolution of the Assembly. For this he was severely reprimanded by Mr. Cardwell who in a despatch, quoted by Mr. Todd (p. 104-5), says:—

"The Queen's representatives is justified in deferring very largely to his constitutional advisers in matters of policy, and even of equity; but he is imperatively bound to withhold the Queen's authority from all or any of those manifestly unlawful proceedings by which one political party or one member of the body politic is occasionally tempted to endeavour to establish its preponderance over another."

Thus, then, the conduct of a governor, though pursued in deference to the advice of his ministers, is open to censure on the part of the imperial Government, whose representative he is.

The prerogatives of dismissing his ministers, and of dissolving Parliament (provided other ministers can be found to shoulder the responsibility), are among the most important constitutional powers of the Sovereign or her representative, and afford some of the most striking examples of beneficial action on the part of governors in British colonies. A good example of the beneficial exercise of this prerogative, though in direct opposition to his ministry, who at the time commanded a majority in the local house, is furnished by the action of Mr. Manners Sutton (afterwards Lord Canterbury), when Governor of New Brunswick in 1855. Deeming the repeal of certain legislation prohibitory of the liquor traffic —which it had proved impossible to enforce—expedient to the best interests of the community, he insisted on dissolving Parliament; and by the newly elected house his action was supported by a vote of thirty-two to two, and both houses expressed their satisfaction at the governor's judicious exercise of his constitutional powers, and at the promptitude with which he had had recourse to the advice of Parliament.

Mr Todd, indeed, gives most interesting precedents of the exercise of this discretion, in opposition in some cases to the advice of ministers, and in others to the votes of legislative bodies,—in the old Province of Canada, in Nova Scotia, South Australia, Victoria, New Zealand, and Tasmania. The last example he gives occurred last year in Quebec, on the defeat in the Legislative Assembly of the Joly abministration. Mr. Todd gives at full length what he call the "excellent memorandum" of M. Robitaille on that occasion.

And as the power of the governor of a Colony in respect to the local concerns of the colony is subject to the same constitutional restrictions as that of the Sovereign in the mother-country, so also the imperial Parliament, in the case of self-governing colonies has conceded the largest possible measure of local independence, and practically exerts its supreme authority only in cases of necessity or where imperial interests are at at stake: (Todd p. 462.) As Sir M. Hicks Beach says in a despatch written in 1877, quoted by Mr. Todd p. 497,—"Her Majesty's Government have no wish to interfere in any questions of purely local colonial policy; and only desire that the colony should be governed in conformity with principles of responsible and constitutional government, subject only to the paramount authority of the law."

But even in matters of internal administration Mr Todd remarks (p. 161), that the interposition of the Crown through a Secretary of state may be constitutionally invoked and properly exercised, (1) in questions of an imperial nature: (2) in the interpretation of imperial statutes which have consigned to the imperial authorities certain specified duties on behalf of the colony: (3) where the local authorities voluntarily appeal to Her Majesty's secretary of state for his opinion or decision. A good example of the second class of cases is afforded by the application of Mr. Mackenzie in 1873 to Her Majesty to add six members to the Canadian Senate under sec. 26. of the B. N. A. act. Lord Kimberley, then Secretary of state, declined to interfere, saying:

"Her Majesty could not be advised to take the responsibility of interfering with the constitution of the Senate except upon an occasion when it had been made apparent that a difference had arisen between the two houses of so serious and permanent a character that the government could not be carried on without her intervention, and when it could be shewn that the limited creation of Senators allowed by the act would apply an adequate remedy."

Thus, in Mr. Todd's view, (p. 164), a

move which was undeniably intended to give the existing administration a majority in the Senate was frustrated.

Of the third class a good example is the arbitration by Lord Kimberley between British Columbia and the Dominion in 1874,—when, as Mr. Todd says (ib.): "His terms were frankly accepted by the parties concerned, and contributed for a time to restore a good understanding between the Dominion and Provincial government."

So, too, as to legislation, although the constitutional supremacy of the imperial parliament as formally reasserted by Imp. 28 & 29 Vic. c.63,—is indisputable. Yet, as stated as far back as 1839, in a despatch of Lord Glenelg to Sir Francis Head, then Lieut. Governor of Upper Canada, "parliamentary legislation on any subject of exclusively internal concern, in any British Colony possessing a representative assembly, is as a general rule unconstitutional."

Mr. Todd gives in one part of his work an interesting sketch of the steps by which the colonies have acquired entire freedom in the regulation of their commerce, subject to certain limitations in regard to differential duties, and the observance of treaty obligations: a development of freedom which Mr. Anderson in his recent article in the *Contemporary Review* on the Future of the Canadian Dominion, forcibly deplores, with, it can scarcely be denied, some show of reason. In the case of Canada, the special instructions to colonial governors to reserve all bills, imposing differential duties (as also similar instructions as to other matters) are no longer issued, having been first omitted in the instructions to the Marquis of Lorn in 1878. Mr. Todd gives an account of the making of this change, and of the important part taken by Mr. Edward Blake therein, who observes in a passage quoted (p. 86), that the Crown necessarily retains all its constitutional rights and powers, which would be exercisable in any emergency in which mutual good feeling, and proper consideration for imperial interests on the part of Her Majesty's Canadian advisers might be found to fail. And Mr. Todd points out (p. 139) that it is important to notice the continual exercise of imperial ascendency over legistation in Canada up to the present time. He gives precedents of bills disallowed by the imperial Government, not only on the ground that they infringed upon the royal prerogative, but for other reasons, such for example as because repugnant to the B. N. A. Act or other imperial Acts, or because their provisions exceeded the powers of the Dominion Parliament.

In the case of all other governors however, except the Governor-General of Canada, the royal instructions direct the reservation of certain specified bills for the signification of Her Majesty's pleasure thereon. Such bills are bills affecting currency, the army and navy, differential duties, the operation and effect of treaties with foreign powers, and any enactments of an unusual nature touching the prerogative, or the rights of the Queen's subjects not resident in the particular colony, in short matters of imperial concern. (see Todd p. 131). And it is this necessity of protecting imperial interests which has led to the prerogative of vetoing legislation remaining in active exercise in the colonies, whereas it has fallen into disuse in England. Though even there Mr. Todd is careful to maintain that it still exists, and might in emergency be exercised. (p. 125.)

And in this connection Mr. Todd alludes (p. 184) to the recent appointments of Agents-general deputed by different colonies to reside in London, and watch over the interests of their respective colonies, and generally to transact business

on behalf of their respective colonies with the imperial Government.

Finally, in respect to this subject, Mr. Todd remarks (p. 189):—

"The B. N. A. Act of 1867, in distributing the powers exerciseable under its provisions, and in vesting 'exclusive' right (secs. 91, 92, 93) of legislation in certain specified matters, either in the Dominion Parliament or Provincial Legislatures, has in no respect altered the relation of Canadian subjects to the imperial Crown or Parliament, or interposed any additional obstacle to prevent imperial legislation in reference to Canada in any case of adequate necessity."

For he says:—

"No parliament is competent by its own act or declaration to bind or restrain the freedom of action of a succeeding parliament."

This reasoning appears so self-evident that it is surprising to find r. O'Sullivan maintaining in his Manual (p. 60) that "It would appear that *neither the Imperial authorities* or the Provincial Legislatures have any power to legislate on these subjects" (*i.e.*, these reserved to the Dominion Parliament by the B. N. Act). Mr. Watson, in his volume on the Powers of the Canadian Parliament, takes the same view as Mr. Todd. He says:—

"Political imagination, in its most fervid and patriotic flights, would shrink from picturing the Imperial and Federal Legislatures as the possessors of co-equal powers. Still, there may be a few who fancy that the B. N. A. Act, while giving pre eminence to the Ottawa House of Commons as respects the Provincial Parliaments, constitutes it, in a mysterious and definite manner, the compeers of the Imperial Legislature. For better or for worse, they will never be compeers."

This paper is already far too long to admit of any reference to the other important matters in relation to imperial connection treated of by Mr. Todd; such as treaty obligations,—appeals to the Privy Council, and military and naval control. The object of these articles have been, not so much to call attention to Mr Todd's book,—it stood in no need of that,—much less to presume to add to the praise it has already received in many quarters, as for example, in the English Law Journal for August 7th ult. The object has rather been to bring out, in some degree, what appears to be the most interesting lesson it teaches. It shows that the British empire is after all a real empire: that, though the general public may not hear of them, despatches are constantly passing to and fro between the Home authorities and the Colonies, and the imperial government is constantly exercising not only direct control in imperial matters, but also that "paternal influence" which Mr. Todd (see p. 126-sq:) dwells upon and illustrates. He must be a bold man who would deny the hand of Providence in the spectacle of England, the home of Parliamentary Government, enabled, though no deliberate design of her own, to guide and help the progress of young communities in the application of the principles of Parliamentary Government in every quarter of the globe.

F. L.

SELECTIONS.

LORD JUSTICE THESIGER.

We regret to record the death of Lord Justice Thesiger, which occurred on the 20th Nov. During the last nine days, inflammation of the ear (which may have been due to want of caution in seabathing) spread internally and led to blood-poisoning. This, it is said, was the proximate cause of death. The Right Hon. Alfred Henry Thesiger was the third son of the first Baron Chelmsford (Lord Chancellor in 1858 and again in 1866), by Anne Maria, youngest daughter of Mr. William Tinling, of Southampton. The late Lord Justice was born in 1838, and educated at Eton and Oxford. His papers in the schools were so well done that, upon his going in for the *viva voce* part of his examination, the examiner advised him to allow

the whole of his pass papers to be annulled, and to go in for honours. He, however, reserved himself for the school of law and history; but, his health failing, he was eventually obliged to take an ordinary pass degree. In Trinity Term, 1862, he was called to the bar. He worked assiduously, and became a favourite with members of both branches of the profession for his modesty and genuine, but unobtrusive, attainments. He had the invaluable aid to an advocate with his fellows of being known never to take an advantage not permitted by the rules of the game. Mr. Thesiger was always looked upon as the soul of honour and the model of professional etiquette and integrity. *Causes célèbres* he was not often concerned with; his practice lay in paths quieter, but not less avenues of fame. He held, however, a junior brief in the great Roupell case. He had the appointment of "postman" in the Court of Exchequer, which entitles the holder to precedence in making motions, even before the Attorney-General in other than Crown cases, and to a comfortable seat in Court. At one time he was frequently to be seen in the committee-rooms of the Houses of Parliament; but he made up his mind to resign this part of his practice, and returned all his Parliamentary briefs. He applied to Lord Selborne for silk, and was made Q.C. in 1874 by the present Lord Chancellor. In distinction from the ordinary practice, which is to make a batch of Queen's Counsel at a time, Mr. Thesiger alone was added to the list of Her Majesty's Counsel, and took his seat within the bar. Leading business fell to his lot at once in remarkable profusion. No advocate was heard more often in heavy commercial cases; in compensation cases he was the regular opponent of Sir Henry Hawkins. Eloquence was never ascribed to him; but his fair and common-sense way of presenting facts, and his complete mastery of details—above all, the virtue of always reading his instructions—gave him great power with juries. With the judges, his habit of close reasoning and power of lucid argument prevailed. He had the reputation of being an excellent lawyer; and it was notorious that no counsel was listened to with more attention in the House of Lords. In 1877 he was made Attorney-General to the Prince of Wales, in succession to Mr. Loch—an appointment he was not to hold for many weeks. He had been elected a bencher of his Inn in 1874, and in 1876 sat on the commission to which the Fugitive Slave Circular was referred. Mr. Thesiger had never made an attempt to enter Parliament, but in the election that was impending it was understood to be his intention to issue an address on the Conservative side. During the year, however, the post of Lord Justice of Appeal fell vacant by the resignment of Sir Richard Amphlett, and Mr. Thesiger was nominated to the vacant place. The appointment took most people by surprise.

Lord Justice Thesiger's startling and untimely death puts an end to those anticipations of his career to which his sudden and unexpected elevation to the Court of Appeal, three years ago, gave birth. There were persons who saw more in the appointment than an example of the prediction of Lord Beaconsfield—with whom, as Prime Minister, the nomination of Lords Justices rested, rather than with the Chancellor—for young men in the service of the State, and a graceful reparation for Mr. Disraeli's supersession of Lord Chelmsford in 1868. A parallel was drawn between the progress of Lord Cairns and that of Mr. Thesiger, and, in spite of the fact that the new Lord Justice had never been in the House of Commons, he was pointed at, with some confidence, as the future Conservative Chancellor. Whether there was any ground for a kind of prophecy not uncommon at such times among ingenious persons, it is now hardly likely that it will ever be known; but there was much in Lord Justice Thesiger's powers and position to support the theory that Lord Beaconsfield wished to hold him in reserve for the woolsack. As a sound lawyer, an industrious worker, with a good presence and ample powers of expressing himself, and as bearing a reputation for integrity and honour something like that of the *preux chevalier*, Lord Justice Thesiger would not have brought discredit on the woolsack. What he wanted was brilliance, and there are occasions when other qualities make up for the lack of it.

Lord Justice Thesiger's career conveys

the impression of a man who was always worked up to the highest pressure of his powers, both physical and intellectual. He was not one of those of whom there have been many examples in English legal history—men who made their way, in spite of adverse circumstances, by force of genius and perseverance alone. He was rather one who, being placed in the best situation for success, was quite equal to the situation, and succeeded. He would not have succeeded had he not possessed great industry and conscientiousness. Those who sent their briefs to Mr. Thesiger knew that the law and facts would be mastered by him. He acquired by labour what others had by intuition, and was able to equal and sometimes beat them in the race. He had not the facility for picking up facts as the case proceeded, and perceiving the law as if by intuition; but, by hard work, he made himself practically almost as effective a forensic ally as if he had been gifted by nature with these qualities. The process he pursued was in the highest degree creditable to his powers of application and self-constraint; but it required great bodily and mental exertion. Without any wild theorising, it may well be supposed that under this strain the machine wore out. The rest which the bench supplied—coming, although it did, much earlier than any one born under inferior auspices could have expected—was not sufficient to restore the balance. He was not long enough on the bench to make a judgment of his judicial capacity possible. The moral qualities which had served him so well at the bar asserted themselves in the higher position. He was patient, dignified, and painstaking. It fell to his lot to prepare several of the judgments of the Court of Appeal in the cases in which he took part, and they are examples of close reasoning and clear expression. He also exhibited great independence of judgment. As recently as last February he differed in opinion from the Master of the Rolls and Lord Justice Baggallay in the case of *In re Hallet's Estate*, 49 Law J. Rep. Chanc. 415, being of opinion that the Court of Appeal ought not to overrule a previous case decided in the same Court—an opinion in which it is not presumptuous to say that he was supported by professional opinion. The judgment on the career of Lord Justice Thesiger will be that he deserved success; that he was in a position to attain it; and that, in availing himself to the full of his opportunities, he displayed qualities of a high order.—*Law Journal.*

THE LASH.

On the 15th ultimo one of the most brazen-faced ruffians who ever stood up in a British court suddenly wilted and uttered a scream, on hearing the terms of the judge's sentence, and was taken away in a fainting condition. He had no defence. The evidence against him was conclusive. He was sure of conviction and of a severe sentence, and he knew it. But he was not prepared for one part of the punishment prescribed by Mr. Justice Stephen. He screamed and almost fainted, not in view of the twenty years of penal servitude, but because the judge ordered, as a fitting prelude, thirty lashes from a cat-o'-nine-tails. This man had robbed and attempted to murder by drugging, and then throwing from a railway carriage, a travelling companion, in whose confidence he had artfully ingratiated himself. It was a premeditated crime of the most heinous kind. It would have ended in murder but for the inability of the assassin to eject his victim from the car before the train stopped. The ruffian then escaped with his booty, but was followed by the half-stupefied, badly-injured man, who staggered upon the platform and gave an alarm which led to the capture of his assailant. This strange affair took place in a car (of the London underground line), of which the two men were the only occupants. Mr. Justice Stephen, in passing sentence, said it was "the most cowardly and brutal outrage that had ever been brought under his notice." He marked his sense of horror, as well as made the sentence a wholesome caution to all other minded desperadoes, by prefixing the thirty lashes to the twenty years' imprisonment. The prisoner would not have flinched from the incarceration, but he winced terribly under the judgment of the cat, as if he already felt her nine tails raising whales on his back. It is the uniform experience of British judges that corporal punish-

ment is the most certain known deterrent of cowardly and brutal offences. When any peculiarly shocking crime against the person begins to become common in England, the judges always check it by ordering a dose of the cat well laid on, in addition to a long term of imprisonment with hard labour. This is the best known preventive for outrages on women and children. It is the only thing that has put a stop to garrotting. Its success is so marked in the declining frequency of cruel and malicious assaults upon the person in England, that the British public almost unanimously approve of it. Only a little minority of those philanthropists, whose sympathies for criminals rise in exact proportion to the diabolism of their proteges, continue to protest against the lash as a remedial agent of society. While that agent does so manifestly good a work in England, it will be judiciously conserved there. The theoretical opposition to it in the United States is widespread and intense, as any man finds out to his cost who proposes to re-introduce it in our judicial system. But now and then thinking Americans will brave the consequences and ask themselves and their neighbours if corporal chastisement, so common among our ancestors as a penalty for minor violations of law, might not be revived, with signal advantage to society, for the punishment of certain specially atrocious crimes.—*New York Sun.*

DRAWING, HANGING, AND QUARTERING.

There appears to be much misapprehension existing as to the English punishment for treason, and this may be a fitting occasion on which to point out that the sentence of decapitation, pure and simple, is one unknown to the English law (for the innovations of the long Parliament and Commonwealth, of course, legally go for nothing). The same doom of drawing, hanging, evisceration, dismemberment, and quartering was passed on peer and peasant alike (of course, I except the fair sex, whose invariable sentence was combustion), but constitutional lawyers held that, inasmuch as the sovereign could, in his mercy, remit the whole of the penalty, so he had the power to dispense with any part. Thus, usually in the case of peers and connections of noble families, decapitation was, by the King's grace, all that was exacted. The soundness of this theory of the royal prerogative was doubted by Lord William Russell in the case of Lord Stafford, executed for alleged complicity in the pretended Popish plot, in the reign of Charles II. The rather overrated husband of Rachel Wriothesley, with a brutal fanaticism that does not display his character in a favourable light, eagerly craved that his political opponent should undergo to the full the whole of the degradation and suffering involved in his sentence. Charles, however, exercised his prerogative. When Lord Russell's own turn came, for his share in the Rye House Plot, the King again displayed this peculiar form of clemency, accompanying the remission with the sardonic remark: "My Lord Russell shall now experience that I do indeed possess that power which he denied me in the case of my Lord Stafford." But, to return. The drawing, as every legal scholar knows, means the drawing of the criminal to the place of execution, and therefore precedes the infliction of death. According to Mr. Justiee Blackstone, vol. iv., "drawing" formally meant, and formerly actually involved, dragging the condemned along the ground by a rope tied round his legs to the place of execution; and this torture the judgment literally ordains. "But," says the learned author of the "Commentaries," "usually a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement." This quaint view of indulgence seems of a piece with the same legal sage's oft-quoted vindication of the humanity and propriety of the English law in the judgment for treason passed upon women alluded to above. The passage is worth consulting. The last criminals "drawn" to the gallows were, I believe, Col. Despard and his gang. As they were to be executed in the prison in which they were confined, and as the Government insisted that they should be "drawn," this grimly humorous expedient was had recourse to. The conventional sledge or hurdle—the body of a cart or tumbril

without the wheels—was introduced into the prison-yard, and the condemned men entered it in batches of two at a time (except the Colonel, who had the honour of an appearance *en seul*) at the door of the staircase leading to their cells, and the vehicle thus making four trips, its miserable passengers were "drawn" across the flagged space to the foot of the stairs leading to the tower on which they were to die. When the vehicle returned, after its third journey, to take up the Colonel, that gentleman remarked—and no wonder—"Ha, ha! what nonsensical mummery is this?" The late Dr. Doran tells us ("London in the Jacobite Times") that when, during the horrid year that followed the '45, the sledges arrived to receive their wretched occupants outside the gates of Newgate, to set forth on their ghastly progress to Tyburn or Kennington Common, the polite keeper of the jail would announce the fact to the moribund in these courteous terms: "Now, gentlemen, if you are quite ready, your carriages are at the door."—*Notes and Queries.*

COMPELLING PRISONER TO FURNISH PEESONAL EVIDENCE OF HIS IDENTITY.

One of the most interesting questions in the law, and one of frequent recent occurrence is, how far can a person accused of crime be compelled to furnish personal evidence of his identity with the perpetrator, and thus to make evidence against himself? It will be useful to group and review the decisions *pro* and *con.*

To commence with the most recent. In *State* v. *Ah Chuey*, 14 Nev. 79, on a question of personal identity, in a trial for murder, a witness testified that the defendant had certain tattoo marks on his person. The court compelled the defendant, against his objection, to expose his person to the jury. *Held*, no error. This was held by two judges, the third dissenting in a very learned and able opinion, to which we shall advert. The prevailing opinion is elaborate, and likens the exposure in this case to compelling a prisoner to remove a veil or mask. The distinction however is, that there the prisoner tries to conceal evidence which is ordinarily visible, and from which the jury have a right to draw a conclusion, and the removal simply restores that evidence. The prisoner has no more right to hide his face than to secrete his whole person. The court also liken the ruling to the searching a prisoner and finding false keys or stolen property upon him. The sufficient answer to that is, that such things are not part of his person, but are circumstances by which he has surrounded himself. When these circumstances are disclosed, it is not the *man* who is compelled to give evidence against himself, but the circumstances by which he has environed himself. The conclusion of the court is "that no evidence of physical facts can, upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the Constitution." This decision cited with approval the North Carolina decisions and distinguished the Tennessee case which we shall allude to.

In *Walker* v. *State*, 7 Tex. Ct. App. 245, on the trial of an indictment for murder, the prosecution were allowed to prove that the examining magistrate had compelled the prisoner to make his footprints in an ash-heap, and that they corresponded with footprints found at the scene of the crime. *Held*, no error. Counsel acutely argued that "if the prisoner can be compelled to make an impression with his foot in order to see if it is similar to the impression made by the foot of the person who committed the crime, then if he were charged with forgery he could be compelled to take a pen, and write, in order to see if his handwriting was similar to that of the party who committed the forgery." (This he may now by statute be compelled to do in England.) This decision is founded on *State* v. *Graham*, *infra*, and *Stokes* v. *State*, *infra*, is distingnished on the ground that there "the prisoner was asked in the presence of the jury to give evidence against himself"—a perfectly futile distinction, as we shall see. The worst of this decision is that it permits secondary evidence of incompetent evidence—evidence of an experiment out of court, which, if tried in Court, might

not have been conclusive against the prisoner.

In *State* v. *Graham*, 74 N. C. 646; S. C., 21 Am. Rep. 493, an officer, who had arrested a person charged with larceny, compelled him to put his foot in a track found near where the larceny was committed, and testified as to the result of the comparison. *Held*, no error. The court say, "no hopes or fears of the prisoner could produce the resemblance of his track to that found in the cornfield." They instance the case of a fragment of a knife-blade found sticking in a window, and its correspondence with the blade of a knife found in a prisoner's pocket; the similar case of gun-wadding found in a wound, and evidently torn from paper in a prisoner's pocket; the correspondence of marks on a prisoner's face with the wards of a key with which he was struck at the time of the commission of the offence; and ask: "If an officer arresting one charged with an offence had no right to make the prisoner show the contents of his pocket, how could the broken knife, or the fragment of paper corresponding with the wadding, have been found. If when a prisoner is arrested for passing counterfeit money, the contents of his pocket are sacred from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of the *scienter?* If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged?" They then instance a veil and a mask. This is fairly the substance of the opinion, and we have already sufficiently commented on this line of argument.

In *State* v. *Garrett*, 71 N. C. 85; S. C., 17 Am. Rep. 1, at a coroner's inquest, upon the body of a person found dead, it was proved that defendant had said that deceased was accidentally burned to death, and that defendant had burned her own hand in trying to put the fire out. Defendant being then in custody on suspicion of having murdered the deceased, was ordered by the coroner to show her hand, which she did, and it appeared uninjured. *Held*, that evidence of such fact was admissible upon the trial of defendant for murder. This might be classed with the mask and veil as an instance of an attempt to conceal evidence ordinarily visible. The jury, of course, have a right to scrutinize patent facts, such as stature, shape, complexion, hair, features, scars, loss or peculiarity of members, etc. These are public matters, which the public cannot be prevented from viewing, and which the prisoner knows are liable to comment and comparison. Of these, witnesses who observed them may speak, or the jury may look at them in court. So if witnesses have observed the patent characteristics of gait and voice, they may testify to them, or the jury may observe the prisoner's gait as he voluntarily and naturally walks, or his voice as he voluntarily speaks. But will it be contended, that on a question of resemblance of gait, the court can compel the prisoner to get up and walk, or that on a question of voice, they can compel him to speak?

The foregoing are the only cases holding this doctrine. On the other hand is *Stokes* v. *State*, 5 Baxt. 619; S. C., 30 Am. Rep. 72. On an accusation of murder, it being claimed that certain footprints were those of the prisoner, the prosecuting attorney brought a pan of mud into court, and placed it in front of the jury, and having proved that the mud in the pan was about as soft as that where the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused, and the court instructed the jury that his refusal was not to be taken against him. The prisoner being convicted, *held*, that he was entitled to a new trial. It is impossible to distinguish this case. If the court had considered the evidence competent, it would have compelled the prisoner to "make tracks," or instructed the jury that his refusal might be considered against him. The court said: "In the presence of the jury the prisoner is asked to make evidence against himself." That is exactly what he was asked to do in the tattoo case, and what he was

compelled to do in the *Graham* case. It is immaterial whether he is compelled to do it out of court or in court. The distinction drawn by the court in the *Walker* case against the *Stokes* case, would apply just as well to the *Graham* case.

In *People* v. *McEvoy*, 45 How. Pr. 216, an indictment of a woman for murder of an illegitimate child at birth, the coroner had directed two physicians to go to the jail and examine her private parts to determine whether she had recently been delivered of a child. She objected to the examination, but being threatened with force, yielded, and the examination was had. Their evidence was offered on the trial, and ruled out. The court said the proceeding was in violation of the spirit and meaning of the Constitution, which declares that "no person shall be compelled in any criminal case to be a witness against himself." "They might as well have sworn the prisoner, and compelled her, by threats, to testify that she had been pregnant and had been delivered of a child, as to have compelled her, by threats, to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and been recently delivered of a child." "Has this court the right to compel the prisoner now to submit to an examination of her private parts and breasts, by physicians, and then have them testify that from such examination they are of opinion she is not a virgin, and has had a child? It is not possible that this court has that right; and it is too clear to admit of argument that evidence thus obtained would be inadmissible against the prisoner."

Leonard, J., dissenting in the tattoo case, said among other things: "I think the framers of the Constitution, and the people who adopted it, intended, that at criminal trials, the accused, if such should be his wish, should not only have the right to close his mouth, but that he might fold his arms as well, and refuse to be witness against himself in any sense or to any extent, by furnishing or giving evidence against himself, whether testimony under oath or affirmation, or confessions or admissions without either, or proofs of a physical nature." "If witness Rhoades had testified that he knew the defendant was Ah Chuey, because he was a good English writer, and had for years kept a diary; that he wrote in it every day, and signed his name "Ah Chuey," to each entry; that he saw the book a few minutes before coming into court; that defendant then had had the book on his person, would any one say that the court, without error, could have compelled him to show the book to the jury? And yet why not, on principle, if he could be compelled to exhibit a private, harmless mark, for the same purpose? The object would have been to ascertain the truth, and the result would have verified the statement. Suppose, instead of the hand and bust of a woman, he had written upon his breast, in India ink, the words, "I am Ah Chuey," why could those words be shown with more propriety than the words in the diary, and could they not have been shown if it was proper to compel him to exhibit the mark?" "Had the identifying mark been upon some portion of the body not concealed, and had the jury seen it by reason of the defendant's presence in court, I do not say that they could not have acted upon the fact so observed. What I say is, that whether the mark is concealed or not, the court cannot compel a defendant, for the purpose of identification, or any other, the tendency of which is to criminate, to exhibit himself, or any part of himself before the jury as a link in the chain of evidence." "Had the district attorney asked the defendant whether he had on his right forearm the tattoo mark described, and had the court, against the defendant's consent, compelled him to answer that he had such a mark, there can be no doubt that such action would have been a grave error. Could the court, at the trial, in the presence of the jury, by other and forcible means, accomplish indirectly what it could not do by direct means?"

Neither Warton nor Bishop express any opinion on this question, but it seems to us that on principle a prisoner cannot be compelled to say anything, or do anything, nor submit to any act addressed to his actual person, which may tend to criminate him.—*Albany Law Journal.*

NOTES OF CASES.

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SUPREME COURT.

OCTOBER SESSIONS, 1880.

APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

FRASER, *Appellant*, v. TUPPER, *Respondent.*

Appeal — Habeas Corpus — 38 Vict. c. 11, sec. 23.

The appellant, imprisoned under executions for penalties for selling liquors without license (Rev. Stat. N.S., 4 series, c. 75) applied under Rev. Stats. N.S., 4 series, c. 99, "An Act for securing the liberty of the subject," for a discharge. The order was made returnable before the Supreme Court of Nova Scotia, and the discharge was refused. Before instituting an appeal from the judgment of the Supreme Court of Nova Scotia, the appellant, whose time for imprisonment had expired, was at large. On motion to dismiss the appeal for want of jurisdiction, the Supreme Court.

Held, that an appeal will not lie in any case of proceedings upon a writ of Habeas Corpus, when at the time of the bringing of the appeal the appellant is at large.

Graham, for respondent,

Rigby, Q. C., for appellant.

EXCHEQUER COURT.

ROBERTSON, *Suppliant*,
THE QUEEN, *Respondent.*

B. N. A. Act, sec. 91 & 92; 31 Vict. c. 60— Fishing leases issued under authority of s. 2 of said Act — Validity of—Exclusive right of fishing ad filum aquæ in rivers above tidal waters in New Brunswick— Rights, as riparian proprietors, of the Nova Scotia &c., Land Company.

On the 5th November, 1835, a grant issued to the Nova Scotia and New Brunswick Land Company of 580,000 acres, which included within its limits that portion of the Miramichi above tidal waters, covered by a fishery lease issued to the suppliant on the 1st January, 1874, by the Minister of Marine and Fisheries under the provisions of the Act of the Parliament of Canada, intituled "An Act for the regulation of fishing and protection of the Fisheries," 31 Vict. c. 60. During the year 1875, J. S. and E. H., with the permission and consent of and under and by virtue of conveyances from the said N. S. and N. B. Land Company, entered, and fished for, and caught salmon by fly-fishing upon the portion of the river so leased, and the suppliant prevented them from fishing thereupon. J. S. and E. H. sued and recovered against the suppliant damages before the Supreme Court of New Brunswick. The suppliant by his petition of right prayed for compensation for losses sustained through the illegal issue of a lease by the Dominion Government, and the following questions were submitted in the special case.

"1. Had the Parliament of Canada power to pass the 2nd section of said Act, entitled "An Act for the regulation of fishing and protection of the fisheries?"

2. Had the Minister of Marine and Fisheries the right to issue the fishery lease in question?

3. Was the bed of the S. W. Miramichi within the limits of grant to the Nova Scotia and New Brunswick Land Company, and above the grants mentioned and reserved therein, granted to the said Company?

4. If so, did the exclusive right of fishing in said river thereby pass to the said Company?

5. If the bed of the river did not pass, had the Company as riparian proprietor the right of fishing *ad filum aquæ;* and if so, was that right exclusive?

6. If an exclusive right of fishing in a portion of the Miramichi River passed to said Company, could the Minister of Marine and Fisheries issue a valid fishery lease of such portion of the river?

7. Where the lands (above tidal waters), through which the said river passes, are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?"

Held, 1. That all subjects of legislation of every description whatever are within the jurisdiction and control of the Dominion Parliament to legislate upon, except such as are placed by the B. N. A. Act under the exclusive control of the local legislatures, and nothing is placed under the exclusive control of the local legislatures unless it comes within some, or one, of the subjects specially enumerated in the 92nd section, and is at the same time outside of the several items enumerated in the 91st section, that is to say, does not involve any interference with any of those items.

2. That the effect of the closing paragraph of the 91st section, namely, "and "any matter coming within any of the "classes of subjects enumerated in the 91st "section shall not be deemed to come "within the class of matters of a local or "private nature comprised in the enumera- "tion of the classes of subjects by this Act "assigned exclusively to the legislatures of "the Provinces," is to exclude from the jurisdiction of the local legislatures the several subjects enumerated in the 92nd section in so far as they relate to, or affect any of, the matters enumerated in the 91st section.

3. That by sub-sec. 12 of sec. 91, B. N. A. Act, the fisheries, or right of fishing in all rivers running through ungranted lands in the several Provinces as well as in all rivers running through lands then already granted, *as distinct and severed from the property in, or title to, the soil or beds of those rivers*, were placed under the exclusive legislative control of the Dominion Parliament, and that the statute 31 Vict. c. 60 is *intra vires* of the Dominion Parliament.

4. That by the following words in sec. 2 of c. 60, 31 Vict., viz:—"where the exclusive right of fishing does not already exist," the rights of all persons seized and possessed of the right of fishing in rivers above tidal waters, either as a right incident to ownership of the bed and soil covered by such waters, or otherwise, were preserved.

5. That the true construction of the letters patent from the crown to the Nova Scotia and New Brunswick Land Company bearing date the 3rd of November, 1825, was to convey to them the bed or soil of the south-west branch of the Miramichi River, where it passes through the lands so granted and with the exclusive right of fishing therein, *ad filum aquæ*, and therefore that the Minister of Marine and Fisheries was not authorized under 31 Vict. c. 60 to grant a salmon fishery license for that portion of the South-west Miramichi river.

Haliburton, Q. C., for suppliant.

Lash, Q. C., for respondent.

The following are extracts from the judgment of

Mr. Justice Gwynne.—The right of fishing in rivers above the ebb and flow of the tide may exist as a right incident upon the ownership of the soil or bed of the river or as a right wholly distinct from such ownership, and so the ownership of the bed of a river may be in one person and the right of fishing in the waters covering that bed may be wholly in another or others. Now that the B. N. A. Act did not contemplate placing the title or ownership of the beds of fresh water rivers in the Dominion Parliament under the control of the Dominion Parliament, so as to enable that Parliament to affect the title of the beds of such rivers sufficiently appears, I think from the 109th section, by which "all *lands*, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the union," are declared to belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate, and this term "lands" in this section is sufficient to comprehend the beds of all rivers in those ungranted lands. We must, however, in order to give a consistent construction to the whole Act, read this 109th section in connection with and subject to the provisions of the 91st section, which places "all fisheries," both sea coast and inland, under the exclusive control of the Dominion Parliament. Full effect can be given to the whole Act by construing it, (and this appears to me to be its true construction) as placing the fisheries or right of fishing in all rivers running through lands then already granted as distinct and severed from the property in, or title to, the soil or beds of the rivers,

under the exclusive legislative control of the Dominion Parliament. So construing the term "fisheries" the control of the Dominion Parliament may be, and is, exclusive and supreme without its having any jurisdiction to legislate so as to alter in any respect *the title to* or *ownership of*, the beds of the rivers in which the fisheries may exist. That title may be, and is in the grantees of the crown where the title has passed, or may pass hereafter by grants to be made under the seal of the several provinces, in which the lands may be, but the exclusive right to control the "fisheries," as a property or right of fishing distinct from ownership of the soil, is vested in the Dominion Parliament.

So construing the term it must be held to comprehend the right to control in such manner as to Parliament in its discretion shall seem expedient, all deep sea fishing and the right to take all fish ordinarily caught either on the sea coast or in the great lakes, or in the rivers of the Dominion.

Now the Act under consideration, viz: 31 Vict. c. 60 maintains the like scrupulous respect for *private* rights as the old Acts which it repealed had done; for by the 2nd section the power given to the Minister of Marine and Fisheries to issue leases or licenses is confined expressly to those places "where the exclusive right of fishing does not already exist by law," following the provision of the Canada Statute 29 Vict. c. 11, sec 18. In all matters placed under the control of Parliament, all private interests whether provincial or personal must yield to the public interests and to the public will in relation to the subject matter as expressed in an Act of Parliament, constituted as the Dominion Parliament is, after the pattern of the Imperial Parliament and consisting as it does of Her Majesty, a Senate, a House of Commons as separate branches, the latter elected by the people as their representatives, the rights and interests of private persons, it must be presumed, will always be duly considered, and the principle of the British Constitution which forbids that any man should be wantonly deprived of his property under pretence of the public benefit or without due compensation be always respected. It is however, in Parliament, upon the passing of any Act which may affect injuriously private rights, that those rights are to be asserted, for once an Act is passed by Parliament in respect of any matter over which it has jurisdiction to legislate, it is not competent for this, or any court to pronounce the Act to be invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in England, for the like reason, to refuse to give effect to a like Act of the Parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the Parliament, and the terms of the Act be explicit, so long as it remains in force, effect must be given to it in all Courts of the Dominion, however private rights may be affected.

The Imperial Parliament having supreme control over the title to, or ownership of, the beds and soil of all inland waters of the Dominion, and also over the franchise or right of fishing therein as a distinct property, has, at the request of the old Provinces of Canada, Nova Scotia and New Brunswick, as the same were constituted before the passing of the B. N. A. Act, so dealt with those subjects as, while leaving the title to the beds and soil of all rivers and streams passing through or by the side of lands already granted in the grantees of such respective lands, to place the franchise or right to fish, as a separate property distinct from the ownership of the soil, under the sole, exclusive and supreme control of the Dominion Parliament. Construing then the term "Fisheries" as used in the B. N. A. Act, as this franchise or incorporeal hereditament apart from and irrespective of the title to the land covered with water in which the fisheries exist, it seems to me to be free from all doubt that the jurisdiction of Parliament over all fisheries, whether sea coast or inland, and whether in lakes or rivers, is exclusive and supreme, notwithstanding that in the rivers and other waters wherein such fisheries exist, until Parliament should legislate upon the subject, private persons may be seised and possessed of the right of fishing in such waters either as a right inci-

dent to the ownership of the beds and soil covered by such waters, or otherwise * * *

[After reviewing the nature, condition and title of the particular property in question, and referring to a number of cases, the learned Judge continued.]

The principles to be deduced from all these cases seem to be that—in the estimatien of the common law all rivers are either navigable or not navigable ; and rivers are only said to be navigable so far as the ebb and flow of the tide extends. Rivers may be navigable in fact, that is, capable of being navigated with ships, boats, rafts, &c., &c., yet be classed among the rivers not navigable in the common law sense of the term, which is confined to the ebb and flow of the tide. Rivers which are navigable in this sense are also called public, because they are open to the public use and enjoyment freely by the whole community, not only for the purposes of passage, but also for fishing, the crown being restrained by Magna Charta from the exercise of the prerogative of granting a several fishery in that part of any river. Non navigable rivers, in contrast with navigable or public, are also called private, because although they may be navigable in fact, that is capable of being traversed with ships, boats, rafts, &c., &c., more or less, according to their size and depth, and so subject to a servitude to the public for purposes of passage, yet they are not open to the public for purposes of fishing, but may be owned by private persons, and in common presumption are owned by the proprietors of the adjacent land on either side, who in right of ownership of the bed of the river, are exclusive owners of the fisheries therein opposite their respective lands on either side to the centre line of the river. Magna Charta does not affect the right of the Crown, nor restrain it in the exercise of its prerogative of granting the bed and soil of any river above the ebb and flow of the tide, or granting exclusive or partial rights of fishing therein as distinct from any title in the bed or soil, and in fact, crown grants of land adjacent to rivers above the ebb and flow of the tide, notwithstanding that such rivers are of the first magnitude, are presumed to convey to the grantee of such lands, the bed or soil of the river, and so to convey the exclusive right of fishing therein to the middle thread of the river opposite to the adjacent land so granted. This presumption may be rebutted, and if by exception in the grant of the adjacent lands the bed of the river be reserved, still such reservation does not give to the public any common right of fishing in the river, but the property and ownership of the river, its bed and fisheries remain in the crown, and the bed of the river may be granted by the crown, and the grant thereof will carry the exclusive right of fishing therein ; or the right of fishing exclusive or partial may be granted by the crown to whomsoever it pleases, just as any person seised of the bed of a river might dispose thereof. This right extends to all large inland lakes also, for although in their case the same presumption may not arise as does in the case of rivers, namely that a grant of adjacent lands conveys *prima facie* the bed of the river, still the prerogative right of the crown to grant the beds of rivers above the ebb or flow of the tide, not being affected by the restraints imposed by Magna Charta, cannot be questioned, for all title of the subject is derived from the crown, and so if a bed of a river or right of fishing therein be reserved by the crown from a grant of adjacent lands, the right and title so reserved remains in the crown in the same manner as it would have vested in the grantee, if not reserved, and is not subject to any common right of fishing in the public, for as was said by Lord Abinger, in *Hull* v. *Selby Ry Co.*, 5 M. & W. 327, as all title of the subject is derived from the crown "the crown holds by the same rights and with the same limitations as its grantee." So in *Bloomfield* v. *Johnson*, 8 I. L. R. C. L. 68 it was held that a grant by the crown of a free fishery in the waters of Lough Erne did not pass a several or exclusive right of fishery therein, but only a license to fish on the property of the grantor, and that the several fishery remained in the crown subject to such grants or license to fish as it might grant. In old Canada the right of the crown to make such

grants of the bed of the great lakes is recognised by Act of Parliament.

Although the exercise of the prerogative of the crown to grant a several fishery in waters where the tide ebbs and flows is restrained by Magna Charta, still the right of Parliament in its wisdom, in the exercise of its paramount control in the interest of the public, and as the exponent of the voice of the nation, as regards all property, to authorize such grants there equally as in waters above the ebb and flow of the tide is undoubted. I speak here of the Parliament of the United Kindom, and the like power over all subjects, placed by the B. N. A. Act, under the control of the Parliament of Canada, is vested in that Parliament. As regards then the particular river in question, above Price's bend, notwithstanding that it may be true that it is subject to a servitude to the public for a common right of passage over its waters (as to which I express no opinion, inasmuch as the determination of that point is unnecessary in the case before me); but assuming the river to be subject to such servitude, still, the river there partakes not of the character of a navigable or public, but of a non-navigable or private river in the sense in which these terms are used in law, and the public have no common right of fishing therein.

* * * * * It cannot admit of a doubt that the descriptions of boundaries in every one of the letters patent which have been produced, include and convey to the several grantees of the land therein respectively described, the soil and bed not only of all the streams and rivers which flow into the Rivers St. John's and Nashwaac, but also of the River Miramichi. * * * * It must be concluded as not admitting of a doubt, that every grant which had been made, prior to the 5th of November, 1835, of land lying within the limits of the description of the track described in the letters patent of that date, passed and conveyed to the several grantees of such land without exception, the bed and soil of the Miramichi river, as well as the beds and soil of all the rivers and streams flowing into the St. John and Nashwaac, in accordance with the general presumption and rule of law, where the lands granted abutted on any of the said rivers. * * * *

The only construction which, in accordance with the above principles, can, in my judgment, be properly given to the letters patent of the 5th November, 1835, is—that the exception therein affects the Miramichi river, only in the same manner, and to the same extent as it effected the rivers and streams therein mentioned, namely, all those falling into the Rivers St. John and Nashwaac, and consequently that the exception is limited to the bed and soil of the Miramichi river, as it is to the bed and soil of the said other rivers and streams, namely opposite to the lands which had previously been granted on the banks of the river. * * * * It follows that the Miramichi river, where the lands granted to the N. S. and N. B. Company abut upon it, is excluded from the operation of the Fisheries Act, 31 Vict., c. 60, for there an exclusive right of fishing had passed to the company, their successors and assigns by the letters patent, of the 5th November, 1835.

CHANCERY CHAMBERS.

The Master, Proudfoot, V.C. } [Oct. 2.

DARLING v. DARLING.

Cross interrogatories—Where filed—G. O. 221.

Where a foreign commission issues on the Master's certificate under G. O. 221, cross interrogatories should be filed in the office of the Clerk of Records and Writs, and where they were filed by a defendant in the Master's office instead, and notice of filing given, but by accident the commission issued without them, an application made on the return of the commission executed, to suppress it, was refused, with costs. On appeal, Proudfoot, V.C., upheld the Master's judgment.

J. B. Thompson for applicant (defendant W. Darling).

Barwick contra.

In the same case, on another application, the Master in Ordinary held as set out below:

1. Where the witness could not write and the commissioner certified to that fact, and the interpreter and commissioner signed their names, *Held*, sufficient.

2. The interpreter was not such an agent and correspondent of the complainant on the facts as would justify the suppression of the commission on that ground.

3. (*a*) The commissioner was an Italian. (*b*) The instructions are inapplicable to the case of a commissioner unable to speak or understand English. *Held*, not material, as it did not appear that the commissioner was unacquainted with the English language.

4. There did not appear in the depositions a certificate attached that the commissioner took down the evidence required by the instructions. *Held*, immaterial.

5. That, under the instructions, the commission should be executed by one commissioner only, but, contrary thereto, the depositions of the claimant were taken by one commissioner, and those of Redford, a witness, by the other. *Held*, immaterial.

On appeal, PROUDFOOT, V.C., upheld all rulings.

Ewart for applicant (defendant H. Darling).

Moss, contra.

Referee.] [June 10.

IN RE SELBY.

Life Insurance—Presumption of Death—Practice.

This was an application by the widow and executrix of the late Mr. Selby to have the proceeds of a policy upon his life paid into court: the assured having disappeared mysteriously in the early part of 1873.

The Court made an order (following orders made by the English Court of Chancery in the same case), directing the money to be paid into court, with leave to the executrix to "apply at Chambers" for payment to her.

On the 3rd of June, 1880, *A. Creelman* applied, on behalf of the executrix, for payment, seven years having elapsed since the disappearance of the assured.

W. F. Burton, for the Canada Life Assurance Company, consented, citing *Hoggerman* v. *Strong*, 4 U. C. Q. B. p. 570.

The REFEREE thought the application should have been made before a Judge in Chambers; but, after consulting with the Vice-Chancellor who made the order, *held* it was not necessary, and granted the order asked for.

Referee.] [June 28.

RE CURRY.

WRIGHT v. CURRY.

CURRY v. CURRY.

Payment by executor into Court—Admission—Practice—Jurisdiction of Referee.

The Referee in Chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands.

Hoyles for plaintiff.

Langton for defendant.

Spragge, C.] [Nov. 1.

DUNNARD v. MCLEOD.

Extension of time for appealing.

Motion before Referee for an order extending the time for appealing from a former order. It appeared by affidavit of the Toronto agents for the defendant's solicitors that a clerk in their office had been instructed at the proper time to set the case down, but that he had forgotten to do so. Order refused.

On application, the CHANCELLOR remarked on the apparent variableness of the recent English practice, and declined to follow *Burgoine* v. *Taylor*, L. R. 9 Chy. Div. 1, and dismissed the appeal, as the ultimate object of the motion was to secure dismissal of plaintiff's bill.

G. B. Gordon for appellant.

Rae for respondent.

NOTES OF CASES.

QUEBEC.

(From *Legal News.*)

QUEEN'S BENCH.

Re Thibaudeau et al. v. Beaudoin.

Bank.

The cashier of a Bank, who has endorsed notes for a customer of a Bank, may, if in good faith, take a hypothec on the debtor's property to protect himself on the endorsements.

Re Dobie, and The Board of Temporalities.

Appeal to Privy Council—Injunction.

An appeal lies to the Privy Council from a judgment of the Queen's Bench dissolving an injunction, where the matter in dispute exceeds £500 sterling.

Re Angers, Atty. Gen., and Murray.

Appeal to Privy Council.

The Court of Queen's Bench will refuse leave to appeal to the Privy Council from a judgment of the Q. B. rejecting an appeal to the Q. B. for want of jurisdiction.

Re Lussier, and Corporation of Hochelaga.

Appeal to the Privy Council—Future rights.

An appeal will not be granted to the Privy Council from a judgment of the Queen's Bench maintaining an action to recover an amount of assessment illegally exacted, where the matter in dispute does not exceed £500 stg. The fact that the roll under which the assessments were collected might exist for three years does not bring the case under article 1178 C.C.P., especially where the total amount for the three years would be under £500 stg.

The Queen v. Jones.

Criminal law—Writ of error—Felony—Discharge of jury, effect of.

The record showed that, on the trial of the indictment, the judge discharged the jury after they were sworn, in consequence of the disappearance of a witness for the Crown, and the prisoner was remanded. On writ of error, *held*, that the judge had a discretion to discharge the jury, which a court of error could not review; that the discharge of the jury without a verdict was not equivalent to an acquittal; and that the prisoner might be put on trial again.

Re Citizens Insurance Co. and the Grand Trunk Railway.

Employee—Liability for money of his employer lost through his negligence— Guarantee bond.

An employee left a large sum of money belonging to his employers in open bags in his room, while he went to lunch, without availing himself of the means of safe-keeping provided for him. On his return from lunch the money had disappeared. *Held*, that he was guilty of negligence, so as to constitute a breach of a guarantee policy, the condition of which was that he should diligently and faithfully discharge his duty as employee.

Dixon et al. Appellants, and Perkins es qual. Respondent.

Sale of insolvent estate—Liability of assignee where a part of the assets sold is not delivered.

The assignee of an insolvent estate sold it *en bloc*, by an inventory, in which certain shares of a company were set down at $5,642.76. The purchaser paid the total amount of the purchase on the condition that the assignee would pay for any deficiency in the assets sold, according to the pencil estimates on the inventory. It appeared that the $5,642.76 represented the amount paid on $15,000 of stock, that the balance was unpaid, and that paid up stock could not be delivered to the purchaser. *Held*, that the assignee was bound to return the proportionate value of paid up stock to the amount of $5,642.76, and in the absence of any allegation that $2,000, the pencil estimate on the inventory, was not a fair estimate, the assignee was condemned to return that sum.

Cardinal v. Dominion Fire and Marine Insurance Co.

Fire Insurance—Breach of Condition—Leaving premises unoccupied.

The insured cannot recover upon a policy which contains a condition making the contract void if the premises be left unoccupied for more than fifteen days without notice to the Company, and it appear that the premises were vacant at the time of the fire and had been so for a much longer time than fifteen days without notice.

Laramee et al. v. Evans.

Marriage of Roman Catholics—Jurisdiction—Authority of the R. C. Bishop.

Marriage in the Roman Catholic Church is a sacrament and a spiritual and religious bond, over which the Superior Court has no jurisdiction.

Civil marriage does not exist under our law, the law merely giving civil effects to a religious marriage validly celebrated by regularly ordained ministers authorized to keep marriage registrars.

The Superior Court has power to refer to the decision of the Roman Catholic Bishop of the Diocese the question of the validity or nullity of the marriage of two Roman Catholics celebrated by a Protestant minister, and the decision of the Bishop may and ought to be followed by the Superior Court in deciding as to the civil effects of the ceremony.

Theriault v. Ducharme.

Federal Elections Act—Candidate's personal expenses.

The personal expenses of the candidate during an election, and connected therewith, are election expenses, and a detailed statement must be included in the statement required by law to be filed after the election.

In re De la Durantaye, Beausoleil, assignee, and De la Durantaye, petitioner.

Assignee's fees—Composition—Costs of assignee's discharge.

The assignee is entitled to the cost of obtaining his discharge as assignee, even where the insolvent has obtained from his creditors a deed of composition and discharge.

REVIEWS.

Principles of the Common Law, by John Indermaur. London: Stevens & Haynes, 1880. 2nd Ed.

The first edition was only published in 1876. The present one makes some alterations rendered necessary by changes in the law, but the principal difference is in the fact that the author has added a reference to the Irish cases. This work of "the students' friend," as Mr. Indermaur may well be called, hardly needs at this day any commendation from us.

Stevens on Indictable Offences an Summary Convictions. Toronto: Carswell & Co. 1880.

Mr. Stevens is already favourably known, especially in the sister Province of New Brunswick, as an author and compiler, and his reputation will give a certain stamp of reliability to the work before us.

There is no branch of law which it is more necessary to have made easy of reference than that which relates to the duties of magistrates. Very few of these functionaries have the time to spare, or the necessary training, to enable them to become thoroughly familiar with the Acts relating, wholly or in part, to their duties, as they are to be found in the Statute Book, and any collection of the law which they are called upon to administer, if reliable, must be of great value, both for the time it will save and the feeling of security it will give. It will be of scarcely less value to the practical lawyer, as a means of ready reference, especially in courts where the Statutes are not always at hand.

The work is divided into two parts, one treating of indictable offences, and the other of summary convictions under the general laws of the Dominion. The text of the Statutes is given, and the different clauses explained or commented upon, reference being made to the decisions of the Courts. The author appears to have succeeded in producing a book which gives, in a moderate compass, an excellent compendium of magisterial duties and responsibilities, with

a schedule of forms, and a very full index, which adds much to the value of the work.

The typographical part of the work is exceedingly good, and reflects much credit on the publishers.

The Liberty of the Press, Speech, and Public Worship, being Commentaries on the liberty of the subject and the laws of England, by James Paterson, M.A. London: Macmillan & Co., 1880.

Mr. Paterson is an original thinker and an original writer. We were much struck with this in his Commentaries on the laws of England, in reference to the security of the person. The present work takes up different branches of the same general subject, and they are treated in the same broad and masterly manner.

As regards the book before us, there seem no special reasons at first sight why the two subjects—The Liberty of the Press and the Security of Public Worship—should be discussed in the one volume. The reason given by the author in his previous work is, that the Security of Public Worship is only another name for the Security of Thought and Speech, when applied to one prominent subject matter. This may be true, but the connection still seems more theoretically fanciful than practical. This, however, is a matter of little moment.

The author's works are not ordinary text books, either as to matter or mode of treatment. They are written in a style peculiarly his own, and bring out new and original views on old and well-worn subjects. They seem to be the result of a very extended range of reading, bringing before the reader unexpected connections and new light from sources apparently unsought before.

The first part of the book is devoted to the law relating to the security of thought, speech, and character, and treats of the freedom of public meetings, addresses, the press and correspondence by post; restrictions as regards blasphemy and immorality; abuse of free speech; libels and their characteristics and remedies, and, finally, copyrights, patent rights, and trade marks. The second part of the work speaks of the tendency to public worship, and the laws as to profane swearing and witchcraft, and a variety of matters relating to Church government, parish law, rights and liabilities of the clergy, toleration, nonconformists, &c., most of them subjects of comparatively little practical use to us in this country.

CORRESPONDENCE.

Can Division Court Clerks be garnished for money collected by them?

To the Editor of The Canada Law Journal.

Sir,—As the above point has received no distinct decision, and as a great diversity of opinion appears to prevail among the profession, permit me to offer a few observations pertinent thereto.

The answer to the above question depends upon the answer to this other question: is there a debt due or owing (see $124 Div. Courts Act) by the Clerk of the Court to the primary debtor? If there is such a debt, then it is surely garnishable, if not then, it is surely not garnishable. On turning to Worcester, we find a debt defined to be "That which is due to a man under any form of obligation or promise." Is the money in the Clerk's hands due to the primary debtor under any form of obligation? See rule of Court 97 also s. 27 of Division Courts Act as to covenant to be given by clerk, and form of such covenant in schedule to the Act—that the clerk "shall duly pay over to such person or persons entitled to the same all such money as he shall receive by virtue of said office of clerk." The statute, as I understand it, puts the clerk in the position of a debtor to the primary debtor. On the other hand, it is maintained that there is no "debt" in the proper sense of the term, that the clerk is the official of the Court, that his existence as a person is merged in the higher entity of the Court, that the Court is not a debtor, that the money paid into Court is paid to the primary debtor theoretically and philosophically, and that therefore, &c.

This reasoning is very refined, very complicated, very ingenious, and I submit, very unintelligible. The interpretation of the Division Courts Act, which will give the highest

satisfaction, is that which will help the creditors to collect their debts, and not that which under shelter of a sort of ratiocination that would do credit to the days of special demurrers, will result in giving the dishonest debtor reason to laud the law as his special aider and abettor in his dishonest withholding of his creditor's due. In the note to Sinclair's Division Courts Acts, s. 124, it is stated that "money paid into court cannot be garnished," and the following cases are quoted in support of that proposition *Jones* v. *Brown*, 29 L. T. Rep. 79, *French* v. *Lewis*, 16 U.C.Q.B. 547. A reference to these cases will show them to be not the slightest authority for such a proposition stated so broadly. It may perhaps turn out to be good law, but the cases quoted are certainly no authority. There is clear authority for garnishing money in the hands of a bailiff see *Lockart* v. *Gray*, 2 L.J.N.S. 163, and why money in a bailiff's hands can be attached, and in a clerk's hands cannot, is, I submit, not very intelligible. If it were not for a late English authority (*Dolphin* v. *Layton*, L. R. C. P. Div. 4, page 130), I would think that the question is hardly on principle debatable. This decision, by Chief Justices Coleridge, on appeal from an English County Court, states that "Proceeds of a Judgment paid into the Court are not attachable by means of a garnishee summons at suit of a third person as a 'debt' due from the Registrar of the Court to a judgment debtor." If this is to be held good law in this country, then it must settle the question that such moneys cannot be garnished. I find that the English County Courts are in most respects indentical with the Canadian Division Courts, and I find that the Registrar of the English County Court has imposed upon him the same statutory duty as the clerk of the Canadian Division Court—I mean that of paying money over to the owner of it on demand. At first sight one would suppose that this decision would at once settle the vexed question, but I submit it only puts an obstacle in the way of its settlement.

On looking into the report of the case, we find a well reasoned logical judgment of the English County Court Judge finding in favour of the garnishee on the ground that the relation of the Registrar to the owner of the money is merely that of banker and customer, or that of debtor and creditor.

The primary debtor then appeals to the Queen's Bench, and we find neither the garnisher nor garnishee represented in the argument. Lord Coleridge stops the counsel for the primary debtor in his *ex parte* argument and says "I am clearly of opinion that money in the hands of the Registrar as an officer of the County Court is not subject to process of attachment," and Denman J. follows—"I am of the same opinion, I see no destinction in this respect between the Registrar of the County Court and the Master of one of the Superior Courts." Now this decision may perhaps for some occult reason be good law, but I must demur to the *ratio decidendi*. If it means anything, it means by parity of reasoning that Mr. Dalton, the Master of the Court of Queen's Bench, bears the same relation to money paid into his Court, as Mr. Howard, the clerk of one of the City Division Courts, bears to money paid into his Court. If this is so, it is somewhat startling. Mr. Dalton has no authority to pay money over to the client on demand, he has no such statutory duty imposed upon him—in other words, he owes nothing to the client. He is, as I understand, the personification of the Court for certain definite purposes; if a client wants money paid out to him, he must get a judge's order countersigned by the Master, upon production of which the Court or the Court's Bank pays over the money. The Master has no control over that money. The clerk of the Division Court is in a different position; so soon as the money is paid into his hands, he becomes *dominus pecuniæ* he owes the client; no judge's order, nor other proceeding to create a debt is necessary.

The Division Court is by statute a Court of Equity. A reference to the principles and practice of attaching money paid into the Court of Chancery is useful to assist in interpreting the equitable functions of the Division Court. It has been decided in *Wilson* v. *McCarthy*, 7 P. R. 132, that

a creditor with a *fi. fa.* can on his *ex parte* motion obtain a stop order on funds in court. He can then by notice of motion obtain payment out to him of his debtor's money or share of money. This is nothing but garnishment of money in court. Of course the Chancery Orders and practice do not apply to the Division Court. But I mention the above point to show that there is nothing so very shocking or iniquitous in garnishing the clerk of the Division Court. There is no Court in the land where the doctrines of trusts are so well understood or so carefully applied as in the Court of Chancery, and when we find that Court not only approving, but aiding a creditor, to reach his debtor's money, in the hands of the court it should rather unsettle the complacency of those who talk learnedly and impressively of moneys in Court being impressed with a trust, and not being legal debts, &c., &c. It has been urged that asking a clerk to issue a garnishee summons against himself puts the clerk in a dilemma, as he owes a duty to the primary debtor, and should perform his earlier duty first, or, in other words, remit the money before he issues the garnishee summons. The answer to this is evident, for if the garnisher chooses, he may under s. 65 Division Courts Act (see also s. 16 Division Courts 1880) issue the summons from the next adjoining court. I take it that under the above section, that although the word *garnish* is not used, the primary creditor may issue his summons either in the garnishee's own court or in the adjoining court. This is at any rate the effect of Judge's Galt's judgment in *Bland* v. *Andrews* (not reported). We may, however, hear more of that, as the same case is to be argued before the full bench.

In conclusion, I would submit that reason and principle point strongly to the legality of such a garnishment, and that those whose legal acuteness leads them to different conclusions, must have learned so much law that they have forgotten their common sense and departed from their original purity of reasoning.

P.

Judicature Act—Unlicensed Conveyancers.

To the Editor of The Law Journal.

The papers announce that Mr. Mowat intends the ensuing session to again take up his "Judicature Act," which, by the way, may be of value, provided further he adopt the clause so urgently asked for by practitioners outside of Toronto as to doing away with the necessity for court applications in Toronto to the extent now necessary. And why could not Mr Mowat insert a clause or more in aid (and I maintain he is in duty bound to do so) of the profession as against the commonly called "unlicensed conveyancers." The writer feels most grievously the loss of fees, which he is justly entitled to receive. Such persons there are, some four in this place—and I can safely say that either of them does more than the subscriber—and why should this be? Have not the Law Society (Mr. Mowat, a member) promised us impliedly if not directly, that we are entitled to the fees which these others take from us. As a means of trying to kill these writers I am much tempted to advertise I will do conveyancing *without fee.* Were I to do so, no doubt your Journal would write me a homily upon "Etiquette," and yet we are to starve in a degree. Would not something like this work? Every Registrar or Court-officer is to charge for every document which law requires him to receive, or enter double or treble fees, which is not endorsed by a duly licensed practitioner. What is the Law Society for?

S.

Chattel Mortgages.

To the Editor of The Canada Law Journal.

There was a reference to the new work of Mr. Barron on Chattel Mortgages in your last issue, and the writer can join with you in extolling the many excellences of the learned gentleman's work.

It may not, however, be amiss to point out to the many readers of that work through your Journal one or two slight errors which have crept in and might possibly mislead some of the younger members of the profession.

The author on page 78 intimates that before a creditor can attack a fraudulent con-

veyance, he must have obtained a judgment on his debt, and quotes a number of cases which were undoubtedly authorities in his favour; but the recent case of the *Reese River Silver Mining Company* v. *Atwell* L.R. 7 Equity, followed in our own courts in *Longway* v. *Mitchell*, 17 Grant, 190, holds that a simple contract creditor may file a bill to set aside such a conveyance, though he might have to obtain a judgment on his debt before securing the fruits of his decree.

The author also at page 95 intimates that registration of an assignment of a chattel mortgage is notice to the mortgagor of such arrangement, and cites two American authorities in support of his statement.

The writer has had no opportunity of referring to the decisions in question, but submits that in principle this "is not good law."

It has been held repeatedly that the registration of an assignment of a real estate mortgage is of itself no notice to the mortgagor, and the same reason would equally apply to chattel mortgages.

Also at page 95 the author intimates that "though a purchaser has notice of an encumbrance on chattels, he may purchase them, and will be protected in his purchase if it be in good faith, and the encumbrance be not registered, or there has been no change of posession."

The same question to a certain degree came up in the case of *Morrow* v. *Rourke*, 39 U.C.Q.B. 500, and as the law then was it was held that a man might acquire goods by *Purchase*, although aware of a mortgage on them.

In that case the fact was that the chattel was in another county, and the mortgage also had run out, and had not been renewed.

An Act was thereupon passed (40 Vict. cap. 9, sec. 29) (Ont.) applying the word "in good faith" to purchasers as well as to mortgagees.

The writer, with a good deal of diffidence, submits that if a person be aware that another has a mortgage on or bill of sale of certain goods, he cannot acquire any title in them by purchase or mortgage from the mortgagor, although the mortgage or bill of sale of which he is aware, is not recorded, or is imperfectly recorded; in other words, that as to such goods he cannot be a purchaser or mortgagee in good faith. It is quite otherwise as to creditors. It would seem repugnant to justice that a person should be able to acquire from "A" that which he well knows "A" sold to "B," and hence the writer submits that his view of the law is correct, nor is he aware of any adverse decision.

Yours, &c.,

Lex.

Married Women.

To the Editor of The Law Journal.

St Catharines, Nov. 26, 1880.

Dear Sir,—If the recent case of *Pike* v. *Fitzgibbon*, L. R. 15 Ch. D. 837—a decision of V.C. Malins—be unreversed, the judgment of our Court of Appeal in *Lawson* v. *Laidlaw*, is largely affected. The case first referred to decides that a married woman is liable to the extent of her separate estate when the judgment is enrolled or decree entered, no matter when acquired. In *Lawson* v. *Laidlaw* the court held that only such separate as she had at time of making the contract, and still has, is liable. This certainly extends the rights of creditors very much.

If you think proper, you might allude to this in your next number, as probably a great many of our County Court judges will not be aware of the decision.

Yours, &c.,

Barrister.

Law Society of Upper Canada.

OSGOODE HALL,

TRINITY TERM, 44TH VICTORIÆ.

During this Term, the following gentlemen were called to the Degree of Barrister at-law.

FREDERICK WRIGHT.
EDWARD MORGAN.
WILLIAM HENRY BEATTY.
JOHN CANAVAN.
EDWARD MAHON.
ALEXANDER HENRY LEITH.
JOHN JOSEPH BLAKE.
CHARLES EDWARD HEWSON.
WILLIAM HODGINS BIGGAR.
WILLIAM HENRY POPE CLEMENT.
SKEFFINGTON CONNOR ELLIOTT.
PATRICK MCPHILLIPS.
WILLIAM BRUCE ELLISON.
JOHN STANLEY HOUGH.
MICHAEL ANDREW MCHUGH.
WILLIAM GEORGE EAKINS.
JAMES ROLAND BROWN.
RICHARD WORNALL WILSON.
JAMES EDWARD LEES.
JOSHUA ADAMS.
ROBERT SINCLAIR GURD.

(The names are placed in the order in which the Candidates entered the Society, and not in the order of merit.)

And the following gentlemen were admitted into the Society as Students-at-Law, namely.—

Graduates.

EDWARD LOCKYER CURRY.
WILLIAM ARMSTRONG STRATTON.
GEORGE SMITH.
ALEXANDER SUTHERLAND.
JOSEPH BURR TYRRELL.
WILLIAM JOYNT JAMES.
THOMAS HENRY GILMOUR.
THOMAS VINCENT BADGELEY.
HARRY LAWRENCE INGLES.
JAMES BURDETT.
GEORGE ROBSON COLDWELL.
HARCOURT JOHN BULL.
ISAAC NORTON MARSHALL.
WELLINGTON JEFFERS PECK.
ALVIN JOSHUA MOORE.
WILLIAM ARTHUR DOWLER.

Matriculants.

GEORGE HAMILTON JARVIS.
EDMUND JAMES BRISTOL.
W. K. MCDOUGALL.
ALFRED HENRY COLEMAN.
ARCHIBALD MCKELLAR.
STEPHEN O'BRIEN.
HARRY EARL BURDETT.
JOHN ANDREW FORIN.

Junior Class.

HORACE FALCONER TELL.
RICHARD J. DOWDALL.
DANIEL S. KENDALL.
GEORGE FREDERICK BELL.
ANGUS CLAUDE MCDONELL.
OLIPH LEIGH SPENCER.
SANDFORD DENNIS BIGGAR.
HARRY ANSON FAIRCHILD.
GEORGE CRAIG.
JAMES ARMSTRONG.
ARCHIBALD MCFADYEN.
WILLIAM ALFRED JOSEPH GORDON MCDONALD.
CHARLES MAIN BYGRAVE LAWRENCE.
COOTE NESBITT SHANLEY.
A. C. STEELE.
GUERET WALL.

And the following gentlemen passed the Preliminary Examinations for Articled Clerks:—

DAVID DUNCAN.
PETER YOUNG.
MATTHEW WILKINS.

By order of Convocation, the option to take German for the Primary Examination contained in the former Curriculum is continued up to and inclusive of next Michaelmas Term.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks

notice, pay the prescribed fees, and pass a satisactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bs. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law

Classics.

1880 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.
Paper on Latin Grammar, on which special stress will be laid.

Mathematics.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, B. I., II., III.

English.

A paper on English Grammar.
Composition.
Critical analysis of a selected poem :—
1880.—Elegy in a Country Churchyard and The Traveller.
1881.—Lady of the Lake, with special reference to Cantos V. and VI.

History and Geography.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek :—

French.

A Paper on Grammar.
Translation from English into French Prose—
1880.—Souvestre, Un philosophe sous les toits.
1881.—Emile de Bonnechose, Lazare Hoche.

or Natural Philosophy.

Books.—Arnott's Elements of Physics, 7th edition, and Sommerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

For Call.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Criminal Law, and Books III. & IV. of Broom's Common Law, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

For Call, with Honours.

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

For Certificate of Fitness.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Haynes's Outline of Equity, C.S.U.C. c. 12, C. S. U. C. c. 42, and Amending Acts.

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

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings, Equity Pleading and Practice in this Province,

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the 2nd Tuesday before Hiliary, Easter, Trinity, and Michaelmas Terms.

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