DIARY FOR APRIL.

2. SUN..*5th Sunday in Lent.*
3. Mon..County Court Term begins. County Court sittings in trial without Jury.
5. Wed..Canada discovered, 1499. Last day for Secretary of Law Society to receive voting papers for Benchers.
6. Thur..Election of Benchers by Bar (34 Vict., c. 15).
8. Sat....County Court Term ends. Trinity College Lent Term ends. Last day notice primary examination.
9. SUN..*6th Sunday in Lent.*
14. Frid..*Good Friday.* Princess Beatrice born, 1857.
16. SUN..*Easter Sunday.*
17. Mond..Easter Monday.
18. Tues..Easter Tuesday.
22. Sat....Trinity College Easter Term begins.
23. SUN..*1st Sunday after Easter.* Princess Alice born, 1843.
24. Mond..Earl Cathcart, Governor-General, 1846.
25. Tues..University of Toronto, Session of Senate begins. Parliament Buildings at Montreal burnt, 1849.
27. Thur..Battle of York, 1813.
29. Sat....Candidates for Attorney to leave papers with Secretary Law Society.
30. SUN..*2nd Sunday after Easter.*

CONTENTS.

THE
Canada Law Journal.
Toronto, April, 1876.

Our readers will notice in this number the first instalment of the "Notes of Cases," directed by the Law Society to be published in this journal. Hereafter they will appear with regularity, and give the profession earlier information of recent decisions than has heretofore been possible.

Probably before this reaches our readers the election for Benchers will have taken place, and the result known. We may have something further to say on the subject by and by; but at present we cannot say that we have much reason to recede from the position we took some years ago, viz.: that "The game is not worth the candle."

We are glad to learn that His Honour Judge Gowan has been added to the Commission for Consolidating the Statutes of Ontario, and is taking an active part in the revision of the work already done, and in suggestions for its future prosecution. Probably no man in Canada could be found who is more familiar with the statute book; and his ripe judgment, and the experience gained by him when on the Commission for the Consolidation of the Statutes of old Canada will be of the greatest benefit. We congratulate Mr. Mowat on securing his services.

We notice in the *Albany Law Journal* a very commendatory notice of Mr. Rogers' book on the "Wrongs and Rights of a Traveller." We are glad to see a work of so much merit, and written by a Canadian author, so well appreciated by such a competent authority. It is spoken of as not only "pleasantly and entertainingly" written, but also "as in

some respects the best law book extant on the subjects treated, thoroughly accurate, reliable, and learned."

A correspondent of the *Chicago Legal News* congratulates the State of Illinois upon throwing open to women the doors of the legal profession. Some little matters of detail seem now to trouble them, however, for the writer propounds the question whether it would not be proper etiquette for "lady lawyers" to take off their hats in court and address the Courts uncovered. A writer in the last number of *Blackwood*, when desiring women to remain covered "because of the angels," advocates the theory that what is meant by angels is loose spiritual characters, who are roaming about without bodies. In a country where spiritualism is as rampant as it is in the United States, we should think a decent covering all the more necessary, although probably in St. Paul's time the "natural" covering was not (to use a Boyle-Rochism) artificial, as it is in these days.

We are indebted to the courtesy of Mr. Cassels, the Registrar of the Supreme Court, for a copy of the General Rules and Orders of the Exchequer Court of Canada in book form. They seem to provide a complete code of procedure. But as we have not yet had an opportunity of examining them fully, we are prepared, knowing the capacity of those who probably have had most to do with them, to take them on trust. When we say that there are no less than 261 rules, the amount of labour involved in their preparation will be seen. The Supreme Court Rules have already been published in this journal. The tariffs of fees in the Supreme Court, and in the Exchequer Court, for attorneys, solicitors and counsel, will be found in another column. We have not space to publish the Exchequer Court Rules, or the tariffs for the officers of the court.

On the third day of the present month the changes in the Court of Chancery which we spoke of as being in contemplation were completed by the appointment of Mr. R. P. Stephens as Referee, Mr. Holmested as Registrar of the Court of Chancery, and Mr. Grant as Registrar of the Court of Appeal.

The following are the names of the recently appointed Queen's Counsel — thirty-five in all. Richard Martin, Hamilton; Thomas Scatcherd, London; Robt. Lees, Ottawa; Francis R. Ball, Woodstock; Alexander Morris, Perth; Frederick Davis, Sarnia; Edward Martin, Hamilton; Henry B. Beard, Woodstock; Thomas Wardlaw Taylor, Toronto; Francis McKelcan, Hamilton; Wm. Kerr, Cobourg; Byron Morgan Britton, Kingston; Edmond J. Senkler, Brockville; Malcolm Colin Cameron, Goderich; Timothy Blair Pardee, Sarnia; Wm. H. Scott, Peterboro'; William Ralph Meredith, London; Warren Rock, London; Wm. Lount, Barrie; John G. Scott, Toronto; James Bethune, Toronto; Jas. Kirkpatrick Kerr, Toronto; Britton B. Osler, Hamilton; Thomas Deacon, Pembroke; James S. Sinclair, Goderich; Thos. Ferguson, Toronto; Jno. Alexander Boyd, Toronto; James F. Dennistoun, Peterboro'; Hugh McMahon, London; David Glass, London; John Idington, Stratford; Arthur Sturgis Hardy, Brantford; Christopher Finlay Fraser, Brockville; Donald Barr Maclennan, Cornwall; Donald Guthrie, Guelph. The old joke is applicable—that as there are so many of them, they should appear in robes of "watered silk."

Not very long ago an application was made in Practice Court to set aside an award, one of the grounds being misconduct on the part of the arbitrator, a County Judge, in that he had during the hearing of the case dined with the counsel of the party in whose favour the

award was subsequently made. Counsel in shewing cause to the rule, spoke very strongly on the impropriety of making an innocent and proper courtesy on the part of the counsel at the hearing (who was "at home," and had asked both his opponent and the arbitrator to partake of his hospitality, though the former was accidentally unable to be present) a foundation for laying a charge of misconduct on the part of the arbitrator. Shortly after hearing the argument we noticed same appropriate remarks in the *Irish Law Times* when speaking of a somewhat similar incident detailed in the *New York Herald*, and thus commented on in the latter sheet:

"An unpleasant report comes to us from Washington, which we mention with some hesitation. It is that shortly after the argument before the Supreme Court on the Union Pacific Interest Case was completed, and before the decision was rendered, the whole Court, including also its clerk, dined with the principal counsel of the railroad, and that later, but still before the decision was given, several members of the Court dined with Mr. Sam. Ward. Of course we do not for a moment pretend to think that the Supreme Court was influenced in its views on this important case by these dinners. But we take the liberty of telling the judges that such dining as we speak of was, under the circumstances, improper. It gives rise to unpleasant remarks about the members of a tribunal which Americans have been accustomed to venerate and look upon with pride. * * * It is certainly an impropriety that members of the Supreme Bench should dine with the counsel or agents in an important case, pending their decision; and, when we consider in this case the immense interests involved—the eagerness of speculators to get in advance at the mind of the Court, and the effect of a dinner to unloose the tongues of even the most prudent men—we do not wonder that Washington gossips are just now retailing stories which would, if they should hear them, vex and mortify the judges, and which certainly should warn them to be more decorous and reserved in the future."

The *Irish Law Times* demurs to this language in the following sensible observation:—

"It is just possible that the editor of the *Herald* is a little too fastidious. In England, where the judges are like Cæsar's wife, above suspicion, every barrister of any respectability attending a session of the Court at circuit, dines with the judge on some day of the term. And what is more, we are credibly informed that it is the practice to talk over the business before the Court at those dinners. But in that country the judges are paid decent salaries, and are therefore enabled to invite the Bar to dine with them. In this country this is not so; and hence, if the judges and Bar would dine together, it must generally be on invitation of the wealthier members of the Bar. The fact that a man is a judge ought not to deprive him of the pleasures of social intercourse. The way to make our judges honour themselves is to pay them well, honour them, invite them out, dine them, keep them in good society, and especially keep them in public as much as possible. The policy which would starve a judge, and at the same time cage him like a criminal, would soon turn him from an honest man into a rogue."

Possibly, however, the Americans are the best judges of what is or is not desirable in the premises as to their own country. Dining out, whether in public or in private, is not such an "institution" with our business engrossed neighbours as it is with the "true Britisher," and when it occurs with the former it seems necessary to give some reason for the novelty.

QUEEN'S COUNSEL.

It is our duty to chronicle the fact that on 11th March eighteen gentlemen, who had already received patents as Queen's Counsel from the Governor-General as representing the Queen, were appointed by the Lieutenant-Governor of Ontario to be Her Majesty's Counsel learned in the law. They are described in the *Gazette* simply as barristers, the patents which they had previously received from the Governor-General being therefore ignored. On the 13th March thirty-five barristers of Ontario were also appointed to the like office by the Lieutenant-Governor. This practically is the creation by the Ontario Government of fifty-three

Queen's Counsel at the one time. Such a wholesale manufacture of "silks" has probably never before been witnessed even in England, where they have about as many thousand barristers as we have hundreds.

It is becoming a matter of little consequence in Canada as to who are entitled to this distinction. If the practice which has grown up of late years continues for some time longer, there will be no inclination to go to the expense of buying silk gowns, except so far as it may be a convenience to the wearer to get an early motion in court.

It may be interesting at this time to review the appointments that have been made during the last thirty-five years in Upper Canada. In 1841 Mr. Draper created two Queen's Counsel; in 1842, five; in 1845, one; and in 1846, five. In 1848 Mr. Baldwin created one; in 1849, one; and in 1850, nine. Mr. Ross afterwards made three. Mr. John A. Macdonald in 1855 appointed one; in 1856, twelve; in 1858, four; and in 1862, two. In 1863 Mr. John Sandfield Macdonald created ten, and in 1867, thirteen. In 1872 Sir John A. Macdonald appointed eighteen; and in 1874, six; and now in 1876, Mr. Mowat appoints thirty-five new men, with eighteen formerly appointed by the Dominion Government, making fifty-three in all. There are now between seven and eight hundred practising barristers in Ontario, and eighty-two Queen's Counsel, being a proportion of a trifle over one to nine. In England the proportion is about one to thirty-five.

The very numbers are condemnatory. That which is common is never very highly valued. To be a Queen's Counsel is rapidly ceasing to be an honour, and an honourable distinction is becoming a by-word; that which had been lowered by previous Governments has been made valueless, and that by a Government at the head of which is one of whom the profession had a right, from his recent high position, to expect better things. We claim the right to think that he must feel that a great mistake has been made, perhaps owing to great pressure, and that pressure, it is openly asserted and we cannot otherwise account for it, of a political nature. Queen's Counsel have been appointed before now that have tended to bring the order into disrepute, but the climax has been reached by the list that has just been published.

We do not mean to say that some of these gentlemen are not entitled to the distinction, nor but that some of the rest would possibly be so in the course of years. But most certainly a large number are not now entitled to it. Some who were quite as much entitled to the distinction as the best of those appointed, and vastly more so than the majority of them, have been left out. The standard in this country has for many years been too low, much lower than in England, and far lower than even the different circumstances of the two countries warrant. As long ago as 1863 we drew attention to this subject, and deprecated some appointments that had then been made; but if there was cause of complaint then, and occasionally since then, there is ten times more cause for censure now. We then drew a distinction between *requirement* for the position and the *incidents* that should attend it. Respectability and a certain length of standing at the Bar are necessary incidents, but the requirement is *merit*. The position, in our judgment, is such that it should only be held by those who are, in the opinion of their brethren, on the high road to the Bench. The appointments should, in fact, be made with so much discrimination, that not only should we look to the ranks of Queen's Counsel for Judges, but the former should be so superior to their

brethren that they should be looked upon as a class holding a position half-way between the Bench and the Bar. We admit that this standard would vastly reduce the number of silks; be it so, but silks would then be worth having, and there would be some inducement for men to excel amongst their fellows, and to gain the homage of their brethren, which to a true lawyer is vastly better worth having than the possession of a large practice or the popularity gained by victories at *nisi prius*.

SUITS "BENEATH THE DIGNITY OF THE COURT."

(First Paper.)

The maxim "*de minimis non curat lex*" is one peculiarly applicable to matters in controversy which, because of their insignificance, the Courts refuse to entertain. The reason of this is based on the principle of jurisprudence that it is the duty of judges to discourage litigation unimportant and mischievous in itself, and also detrimental to the interests of other suitors, whose causes are thereby delayed: *Eltham* v. *Kingsman*, 1 B. & Ald., 687.

The business of the Courts, as has been well said by Story, is to administer justice in matters of grave interest to the parties, and not to gratify their passions or their curiosity, or their spirit of vexatious litigation. Rolfe B. explains what is meant when it is said that causes are beneath the dignity of the Court. It does not mean that the Courts lose dignity by entertaining questions involving a small pecuniary amount, but it expresses what every one must feel the force of—namely, that a large sum of money would be spent in carrying on a proceeding which would not be worth the expense: *Stutton* v. *Bament*, 3 Exch. 834.

No doubt there are classes of cases (more common in former times than now) wherein the Courts were in the fair way of losing their dignity, when condescending to entertain them. These were commonly disputes about wagers; and under this head of law a very curious and amusing chapter might be written. Lord Kenyon allowed an action to be tried before him to recover a small sum of money lost by the defendant to the plaintiff at the game of all-fours: *Bulling* v. *Frost*, 1 Esp. 235. In *Pope* v. *St. Leger*, 1 Salk. 344, an action was tried by Lord Chief Justice Holt on a wager whether a person playing at backgammon, having stirred one of his men without moving it from the point, was bound to play it; and, according to some authorities, the venerable judge called in the assistance of the groomporter to decide the controversy: (see *Hussey* v. *Crickitt*, 3 Camp., at p. 171). In this very case of *Hussey* v. *Crickitt* there is perhaps more humour than in any of the others. The full Court there with some hesitation determined that an action may be maintained upon a wager of "*a rump and a dozen*" whether the defendant be older than the plaintiff. The witnesses at the trial proved that *a rump and a dozen* meant a good dinner and plenty of wine for the persons present. Sir James Mansfield said: "I am inclined to think I ought not to have tried this case. While we were occupied with these trifling disputes, parties having large debts due to them, and questions of great magnitude to try, were grievously delayed." Mr. Justice Heath, however, regarding the question rather in a social point of view, saw nothing immoral in a wager about a good dinner, and thought the parties entitled to come to the court.

In *Henkin* v. *Guerss*, 12 Ea. 247, the judges refused to try an action on a wager upon an abstract question of law or judicial practice not arising out of cir-

cumstances really existing. A wager by a student that he would not pass the examination of persons applying to be admitted as attorney, was held to be insufficient as a foundation for an action in *Fisher* v. *Waltham*, 7 Jur. 625.

Lord Ellenborough laid down the principle in this class of cases in a manner more consonant to common sense than in some of the other cases above cited. In *Squire* v. *Whisken*, 3 Camp. 140, he refused to proceed with a case of money had and received for a wager on a cock-fight. "This must be considered," he said, "a barbarous diversion which ought not to encouraged or sanctioned in a court of justice. There is likewise another principle on which I think such an action on such wagers cannot be maintained. They tend to the degradation of courts of justice. It is impossible to be engaged in ludicrous inquiries of this sort consistently with that dignity which it is essential to the public welfare that a court of justice should always preserve. I will not try the plaintiff's right to recover the four guineas." So Lord Tenterden, on the same principle, refused to try a case involving an inquiry as to the powers of a once celebrated dog named Billy. Sir Vicary Gibbs also, when Chief of the Pleas, stopped a case in course of trial before him, on a wager that Joanna Southcote would be delivered of a male child before a certain day. "So! I am to try the extent of a woman's chastity and delicacy in an action on a wager. Call the next case:" *Ditchtown* v. *Goldsmith*, Annual Register, vol. 57 (1815) p. 289. This case, moreover, trenched upon the objections that prevailed in *Da Costa* v. *Jones*, Cowp. 729. There the Court held that an action could not lie upon a wager as to the sex of the Chevalier D'Eon, on the ground that an inquiry therein would involve the reception of indecent evidence, and on the further ground that such an inquiry would tend to disturb the peace of the individual and of society. But, the Court went on to say, the indecency of the evidence is no objection to its being received, where it is necessary to the decision of a civil or criminal right: *Anon.* 29 U.C.Q.B., 456.

There are again other classes of cases at law, in regard to which the sum claimed determines the jurisdiction. The general rule, well established at law, is that it is beneath the dignity of the superior courts to hold conusance of pleas under forty shillings. There is indeed an express statute prohibiting jurisdiction in trespass for goods below this amount: 6 Edward I., cap. 8. In Chancery, as we shall presently more fully consider, the limit of the jurisdiction was declared to be ten pounds. The course is to move to stay the proceedings upon affidavit, if the objection does not appear on the face of the record. But if there is any dispute as to the facts, the Court is slow to interfere summarily: *Oulton* v. *Perry*, 3 Burr 1592; *Branker* v. *Massey*, 2 Pri. 8; *Lowe* v. *Lowe*, 1 Bing. 270, where the Court gave no relief in an action of trover.

The exceptions from this class of cases may be ranked under two heads: 1. The Court will not stay the proceedings if it appears that the debt is not recoverable in any inferior court. This is for the obvious consideration that the smallness of the sum is no reason why the plaintiff should lose his claim: *Eames* v. *Williams* 1 D. & R. 359; *Tubb* v. *Woodward*, 6 T. R. 675; *Harwood* v. *Lester*, 3 B. & P. 617. 2. In matters relating to injuries to realty the Court holds that the maxim *de minimis* does not apply. In *Clifford* v. *Hoare*, 22 W. R., 831, Brett J. says, "I desire to guard myself from lending authority to the contention that this maxim can be held to apply to land

as well as to other descriptions of property, in reference to which actions to recover for damages for injury may be brought. On the contrary, ever so little an encroachment on the soil would entitle the plaintiff to seek protection by the interference of the Court."

(To be continued.)

THE HERO OF ENGLISH LAW REFORM.

"'Have I a genius for legislation?' I gave myself the answer, fearfully and tremblingly, 'Yes.'" At the early age of twenty Jeremy Bentham came to this decision. The mode in which he arrived at it, is strikingly illustrative of the earnestness of purpose that marked his life from its beginning. He had been asked to define genius for the entertainment of his friends, before whom he was displaying his youthful precocity. At the time he was unable to do so, but subsequent reflections on its etymology convinced him that its proper meaning was "production." He then set himself to consider what was the most important earthly pursuit, and adopted the opinion of Helvetius, that it is legislation. His life was thenceforth devoted to that work, and he amply justified the decision which his self-knowledge had led him to arrive at so early in life. He was called to the bar, but the natural disgust of a mind inspired by an intense love of justice with the irrational mode in which it was then administered, quickly drove him from the profession. On one occasion, he found that an opinion he had given, which was right according to all the accessible authorities, was proved wrong by the production of a decision, recorded only in a secret manuscript. Such an occurrence was not infrequent before the system of official reporting was introduced. In his twenty-second year, he happily discovered a phrase which served as a guiding star to his labours and the watchword of his faith. "The greatest happiness of the greatest number," a phrase found in the writings of Priestley, had as great an influence upon his mind as the sentence "*securus judicat orbis terrarum*" had subsequently in determining the direction and ultimate goal of Newman's opinions. Sir Roland Wilson, in his excellent "History of Modern Law," justly observes that Bentham's phrase, which has been the subject of so much ridicule by Carlyle and others, substantially denotes the same thing to which others prefer to apply such terms as right, duty, justice, will of God.

Bentham, in his sixteenth year, had listened to a few of the lectures of Sir William Blackstone, and his first work was an attack on that author's theory of government, contained in the introductory chapter of his "Commentaries." This "Fragment on Government," in its retranslation from the French of Dumont, is now perhaps the best known of Bentham's works, and at the time of its anonymous publication in 1776, attracted great attention, and was attributed by some to Lord Mansfield. His next appearance was on Blackstone's side, in an endeavour to make his Hand Labour Bill intelligible to the public, and to excite public interest in the objects it had in view. After the termination of his relations with Lord Shelburne, he withdrew into the strictest privacy for the remainder of his life, which reached the mature age of eighty-three, avoiding society and all personal contact with his opponents. The obvious disadvantages of this plan of life greatly marred his work. "Paying little attention to the labours of others, and working out every problem for himself, he occasionally announced things generally known with the air of an original discoverer. The seclusion

which saved him from personal bitterness made him sometimes unjust to whole classes, leading him to impute to bad motives what was really the result of a very natural ignorance, and to fancy that what was plain to him from his lofty tower of speculation, must be equally so to those who were toiling in the labyrinth below; for *tact* cannot exist without *contact*."

His style suffered a fatal change from the same cause. Abandoning the clear and simple style of his earlier writings, he adopted a mode of expression which caused him to be popularly regarded, to use the words of Sir William Taylor, "as a gentleman who wrote bad English and delighted in paradox." His eccentricities of style, his ignorance of other men's labours, and his appetite for flattery, provoked needless antagonism. Nor could the independence and economy of time which his strict seclusion secured, counterbalance the evil effects indicated. But in spite of all drawbacks, his work proved more immediately beneficent than perhaps that of any other writer the world has seen. Law reform is inseparably associated with his name, and the force of his exertions in that direction has not yet been exhausted.

His views on some points, which have not yet been embodied in legislative enactments, are worthy of notice. The principles of evidence he laid down have been to a great extent adopted, and if logic had its habitation in parliaments, would be carried to their logical conclusions. Bentham would not exclude any person from giving testimony, and in his opinion the reasons which he urged for the admission of the evidence of parties in civil cases, applied equally to the accused in a criminal prosecution. He would not protect witnesses against questions imputing crime, nor reject confidential communications between husband and wife, for it is not in the interest of justice to encourage wrongdoers; nor between solicitor and client, as such disclosures would prevent lawyers from lending themselves to schemes of injustice. He would have the suffering party in every case compensated, and his costs paid, if necessary, out of the public exchequer. For judicial positions he would not select successful advocates, but fill them with men specially trained for such functions. We are gradually approaching a state of things in which, as he recommended, the field of distribution of justice is local not logical, and have even advanced some steps toward making the courts accessible at every hour of the day or night; and many a vice-chancellor dragged from his dinner-table to hear an injunction motion, or magistrate roused from his slumbers to grant an order for an arrest, has recognised the beauty of the principle, that "justice should sleep only when injustice sleeps also."

The progress of law reform has been rapid since Bentham's death, and its pace shows no sign of slackening. The conclusion which Bentham's examination of the law of his day and the mode of its administration, led him to, was that the provisions of Magna Charta—"We will sell to no man, we will deny to no man, justice or right,"—had been forgotten, and that justice was "denied to nine-tenths of the people, and sold to the remaining tenth at an unconscionable price." Thanks to the labours of Bentham and of the men who received and handed on the torch of law reform, the administration of justice in our day is not open to this reproach.

"Let one devil torment the other," said my Lord Keeper Egerton to a question asked him, what should become of the broker; both broker and usurer had conspired to cot in a young gentleman.

THE BALLOT: SECRECY AND PERSONATION.

CHIEF JUSTICE HARRISON, in a judgment recently delivered on an application to unseat an alderman of the city of Toronto *(Reg. ex rel. Riddell* v. *Burke)*, and containing an able review of the questions of facts presented, spoke of two things during the inquiry which struck him as remarkable:

(1) The ability of poll clerks, scrutineers and others to tell for whom voters had voted, notwithstanding the provisions of the Ballot Act; and (2) the facility for personating voters.

As to the first point, the essence of the ballot system is secrecy; if secrecy in voting is not obtained, it is devoid of that which is the redeeming feature of a scheme which contains many inducements to lying and deceit, and is in other ways repulsive to the manly instincts of the Anglo-Saxon race. As to the first point, it will be difficult to prevent scrutineers who know their business, or poll clerks who live, as is generally the case at municipal elections, in the neighbourhood of the polling subdivision, from forming a tolerably correct estimate of how the vote is going from time to time, or even as to how doubtful men record their votes. There are a hundred ways in which this can be done by any one familiar with such matters. For example: the person with whom the voter may be seen before voting, marks opposite the voter's name in the canvass books, the mode in which the opposing scrutineer addresses him, casual observations, and putting two and two together, &c. We happen to know of a scrutineer at a recent Parliamentary election, who (comparatively a stranger in the immediate neighbourhood, but an "old hand"), as the polling went on, marked down privately how he thought each man had voted, and then stated what he believed would be the result; and when the ballots were counted, he was proved to be within one of the correct number. This was, of course, to a certain extent an accident, but it is an example of our proposition that the want of secrecy remarked upon by the learned Chief Justice is not so much attributable to defects in the system or its working as might be supposed.

We quite agree, however, that (quoting from the words of the judgment)

"If personation of votes is to be prevented, the act must be amended so as to furnish machinery for the ready detection and adequate punishment of persons guilty of this vile practice."

The Chief Justice then continues:—

"It is by the English Statute 13 and 14 Vict., cap. 69, ss. 92, 93, for the more effectual detection of the personation of voters at elections, provided that any candidate at any election to serve in Parliament may appoint agents to attend polling booths for the purpose of detecting personation; that if any such agent, at the time any person tenders his vote, or after he has voted, and before he leave the polling booth, declare to the returning officer that he verily believes, and undertakes to prove, that the person so voting is not in fact the person in whose name he assumes to vote, the returning officer is required, immediately after such person shall have voted, by word of mouth to order any constable, or other peace officer, to take the person so voting into custody; and provision is in the same act made for the immediate hearing before Justices of the Peace, and committal for trial or discharge of the person accused, and in the latter case compensation paid for damages and costs.

"The greater the secrecy in vote by ballot, the greater the difficulty of discovering for whom the vote was cast, and the greater the danger of personation. But where it is proved that there was personation, and for whom the personator voted, there is no good reason in a scrutiny against holding such vote invalid, and rejecting it.

"Besides, personation in Parliamentary elections is in England now made a *felony*, and the person convicted thereof is liable to be punished by imprisonment for a term not exceeding two

years with hard labour: Imp. Stat. 35 and 36 Vict., cap. 33, sec. 24.

"There is no act which makes the personator incompetent as a witness, but I think the evidence of such a person should be received with great caution. If there were no corroboration of the evidence of Stanley [whom the Chief Justice found guilty of four distinct acts of personation during this election], I should have some hesitation in giving effect to it. But as it has been corroborated in several material particulars, I cannot disregard it."

EXTRADITION BETWEEN GREAT BRITAIN AND THE UNITED STATES.

The following is the correspondence recently brought before the House of Commons, having reference to the inadequacy of the existing Extradition Treaty between Great Britain and the United States:

Memorandum for the Privy Council by the Minister of Justice.

Department of Justice,
Ottawa, 2nd Dec., 1875.

The undersigned begs to report that his attention has been called to the inadequacy of the existing Extradition Treaty between the United Kingdom and the United States.

By what is commonly called the Jay Treaty, made in 1794 between Great Britain and the United States, there were two extradition offences, viz: Murder and forgery. By the Ashburton Treaty, made in 1842, there were seven extradition offences, viz: Murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and the utterance of forged papers.

In 1870 was passed the Imperial Statutes 33 and 34 Vict., cap. 52, intituled an Act to amend the Law relating to the Extradition of Criminals, by the first schedule to which the following were specified as extradition offences:

Murder, and attempt and conspiracy to murder, manslaughter, counterfeiting and altering money, and uttering counterfeited or altered money, forgery, counterfeiting and altering and uttering what is forged or counterfeited or altered, embezzlement and larceny, obtaining money or goods by false pretences, crimes by bankrupts against bankruptcy law, fraud by a bailer, banker, agent, factor, trustee, or director or member, or public officer of any company made criminal by any act for the time being in force; rape, abduction, child-stealing, burglary and house-breaking, arson, robbery with violence, threats by letter or otherwise with intent to extort, piracy by law of nations, sinking or destroying a vessel at sea, or attempting or conspiring to do so, assaults on board a ship on the high seas with intent to destroy life or to do greivous bodily harm, revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

In 1873 was passed the Imperial Statute 36 and 37 Vict., cap. 60, by the schedule to which the following were specified as extradition offences: Kidnapping and false imprisonment; perjury and subornation of perjury, whether under common or statute law; any indictable offence under the Larceny Act, 1861, or any act amending or substituted for the same which is not included in the first schedule to the Extradition Act of 1870; any indictable offence under the act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter 97, "To consolidate and amend the Statute Law of England and Ireland, relating to malicious injuries to property," or any act amending or substituted for the same, which is not included in the first schedule to the Extradition Act of 1870; any indictable offence under the act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter 98, "To consolidate and amend the Statute Law of England and Ireland, relating to indictable offences by forgery," or any act amending or substituted for the same which is not included in the first schedule to the Extradition Act of 1870; any indictable offence under the Act 24 and 25 Vict., cap. 99, "To consolidate and amend the Statute Law of the United Kingdom against offences relating to the Coin," or any act amending or substituted for the same which is not included in the first schedule of the Extradition Act of 1870; any indictable offence under the Act 24 and 25 Vict., cap. 100, "To consolidate and amend the Statute Law of England and Ireland, relating to offences against the person," or any act amending or substituted for the same, which is not included in the first schedule to the Extradition Act of 1870; any indictable offence under the laws, for the time being, in force in relation to bankruptcy, which is not

included in the first schedule to the Extradition Act of 1870.

In the year 1872 an Extradition Treaty was made between the United Kingdom and Germany, embracing eighteen extradition crimes. In the same year an Extradition Treaty was made between the United Kingdom and Belgium, embracing nineteen extradition crimes. In the same year a treaty was made between the United Kingdom and Italy, embracing nineteen extradition crimes. In the same year an Extradition Treaty was made between the United Kingdom and Denmark, embracing nineteen extradition crimes. In the year 1873 an Extration Treaty was made between the United Kingdom and Brazil, embracing eighteen extradition crimes. In the same year an Extradition Treaty was made between the United Kingdom and Sweden and Norway, embracing eighteen extradition crimes. In the year 1874 an Extradition Treaty was made between the United Kingdom and Austria, embracing twenty extradition offences. In the same year an Extradition Treaty was made between the United Kingdom and the Netherlands, embracing ten extradition offences. In the year 1875 an Extradition Treaty was made between the United Kingdom and the Swiss Confederation, embracing eighteen extradition offences.

The existence of the imperial statutes and treaties to which the undersigned has referred, renders it unnecessary for him to argue for the propriety, and in fact the necessity of enlarging the range of extradition offences in general. The relations in particular of the United States and Canada render applicable with added force to these countries in general considerations upon which these statutes and treaties have been based; the common frontier of about three thousand miles; the facilities for passing from the one country into the other; the condition of things in the sparsely settled but vast tracts of country in the West; the extensive commerce, both by land, by sea, and by the great lakes, and the increased intercourse between two peoples of a common tongue, all point to the conclusion that between them, perhaps, more than between any other two countries, an extensive Extradition Treaty is requisite. One great possible source of difficulty which probably prevented any effort to extend the existing treaty has been of late years removed by the abolition of slavery. All the experience of later years point towards the necessity of extension—cases are of very frequent occurrence, in which persons guilty of serious crimes pass from one country into the other; and almost within sight of their victims and of the country whose laws they have offended, find a secure refuge for themselves and their ill-gotten gains. The facilities so offered for crimes of a particular character tend largely to increase their number, and so at once foster crime and render property less secure.

The undersigned suggests to Council that it is expedient to take such steps as may be best calculated to result in the making of a comprehensive Extradition Treaty between the United Kingdom and the United States, framed with due regard to the exceptional circumstances as between the United States and Canada, to which the undersigned has alluded.

The undersigned has thought it best not to encumber this memorandum by a discussion of the precise crimes to be embraced in such a treaty, or by suggestions as to the phraseology to be used in defining them. These matters would be the subject of negotiation, and in settling them it might be necessary to refer to the Canadian Consolidation of the Criminal Law.

Nor does the undersigned embrace in this report any observations as to the mode of extraditing offenders.

Upon this important subject he proposes, in case steps be taken for the negotiation of a treaty, to lay before the Council a separate memorandum.

(Signed) Edward Blake.

The Earl of Carnarvon to the Earl of Dufferin.

Downing Street
2nd February, 1876.

My Lord,—I have been in communication with the Secretary of State for Foreign Affairs in regard to the Minute of the Privy Council of Canada, enclosed in your despatch, No. 176, of the 11th of December, submitting for the consideration of Her Majesty's Government the inadequacy of the existing Extradition Treaty between this country and the United States, and suggesting the expediency of taking steps for the negotiation of a more comprehensive treaty, due regard being had to the exceptional circumstances of Canada and the United States.

I now enclose for your information and for that of your Government a copy of a letter from the Foreign Office, stating the result of recent negotiations with the United States Government on the subject, and that in the Earl of Derby's

opinion there is at present little hope of concluding a new treaty with the United States.

It will be seen, however, that his Lordship will not fail, should a favourable opportunity occur, to press upon the United States Government the expediency of concluding a more comprehensive treaty than the existing one, an arrangement which, in the opinion of Her Majesty's Government, would be as much to the advantage of the United States as to this country and the Dominion.

I have, &c.,

(Signed), Carnarvon.

Governor-General,
The Right Honourable
The Earl of Dufferin, K.P., K.C.B.

The Foreign Office to the Colonial Office.

Foreign Office,
January 29, 1876.

Sir,—I have laid before the Earl of Derby your letter of the 19th instant, in which you inclose copy of a despatch from the Governor-General of Canada, together with a Minute of the Privy Council of the Dominion, submitting for the consideration of Her Majesty's Government the inadequacy of the existing Extradition Treaty between Great Britain and the United States, and suggesting the expediency of taking steps for the negotiation of a more comprehensive treaty; and in reply I am directed by his Lordship to state to you, for the information of the Earl of Carnarvon, that negotiations for the conclusion of a new treaty with the United States were opened after the passing of the Extradition Act of 1870, and were carried on until May 1874, when they were suspended in consequenee of the Government of the United States objecting to an article in the English Draft which provided, in accordance with section 3 of the Act of 1870, that "no accused or convicted person shall be surrendered, if the offence in respect of which his surrender is demanded shall be deemed by the party upon whom the demand is made to be of a political character, or if he prove to the satisfaction of the magistrate, justice, judge or court before which he is brought, or of the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or to punish him for an offence of a political character."

The Government of the United States maintained that the Secretary of State alone should decide whether an offence with which a fugitive criminal is charged is of a political character.

On the other hand, the Secretary of State for Home Affairs, to whom this question was referred, reported that it was not possible to agree to the proposal of the United States Government, as any stipulation in accordance with their views would be at variance with section 3 to the act above recited.

Under these circumstances Lord Derby considered that it would be useless to continue the negotiations, which were accordingly suspended until quite recently, when the question was revived in a discussion which took place between Her Majesty's Minister at Washington and the Secretary of State of the United States, relative to the trial of a fugitive criminal named Lawrence, who was surrendered to the United States in April last on a charge of forgery.

As, however, Mr. Fish continues to hold the same views on the point at issue as he held in 1874, and to maintain that the British Government must take the whole responsibility in deciding whether the offence with which a fugitive criminal is charged is of a political character, Lord Derby apprehends that there is at present little hope of concluding a new Extradition Treaty with the United States.

Should, however, a favourable opportunity occur, His Lordship will not fail to press upon the Government of the United States the expediency of concluding a more comprehensive treaty than the existing one, an arrangement which would be as much to the advantage of the United States as to Great Britain and the Dominion of Canada.

I have, &c.,

(Signed), T. V. Lister.

The Under Secretary of State,
Colonial Office.

"Sic utere tuo ut alienum non lædas.' This maxim was once discarded unceremoniously by Mr. Justice Erle. "The maxim," he said, "is mere verbiage. A party may damage property where the law permits, and may not where the law prohibits, so that the maxim can never be applied till the law is ascertained, and when it has been, the maxim is superfluous."—*Bonomi* v. *Backhouse*, 36 L. J. Q. B., 388.

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

MONCK ELECTION PETITION (DOMINION).

GRANT V. MCCALLUM.

37 *Vict. cap* 9, *ss.* 28, 45, 80.—*Effect of neglect of duty by returning officer.—Marking ballot paper.*

The neglect or irregularities of a returning officer in his duties under the act will not invalidate an election, unless they have or might have caused some substantial injustice in the way of affecting the election.

Held therefore, that the neglect of a returning officer to initial the ballot papers, and to provide pen and ink instead of a pencil to mark them, would not void the election.

The following irregularities in the mode of marking ballot papers, *held* to be fatal:—

1. Making a stroke instead of a cross.
2. Any mark which contains in itself a means of identifying the voter, such as his initials or some mark known as being one used by him.
3. Crosses made at left of name, or not to the right of the name.
4. Two single strokes not crossing.

The following irregularities *held* not to be fatal:—

1. An irregular mark in the nature of a cross so long as it does not lose the form of a cross.
2. A cross not in the proper compartment of the ballot paper, but still to the right of the candidate's name.
3. A cross with a line before it.
4. A cross rightly placed with two additional crosses, one across the other candidate's name, and the other to the left.
5. A cross in the right place on the back of the ballot paper.
6. A double cross or two crosses.
7. Ballot paper inadvertently torn.
8. Inadvertent marks in addition to the cross.
9. Cross made with pen and ink instead of a pencil.

[January 8-10, 1876—BLAKE V.C.]

Mr. McCallum was declared elected by a majority of four votes over his opponent, Mr. Edgar. A petition having been filed, claiming the seat for the latter, a scrutiny of the ballots was obtained, which was had before Vice-Chancellor Blake.

Hodgins, Q.C., and *Edgar* for the petitioner.

McCarthy, Q.C., and *Osler* for the respondent.

BLAKE, V.C.— The parties did not desire that I should state a case for the opinion of the full Court in respect of the matters raised, which seemed to me to involve questions that it would have been well to have had settled by the Court on a rehearing. I proceed, therefore, at once to dispose of the petition, so as to enable the party dissatisfied, if he pleases, to appeal the case during the coming month.

The considerations applicable to two of the questions raised appear to me to differ from those which should regulate the disposition of the other points discussed. I refer to those irregularities which arose from the act of the deputy returning officer—the one, the use by the electors, in some instances, of pen and ink, supplied by this officer in place of a pencil; the other, the use of ballot-papers in the election not marked by the deputy returning officer, as contemplated by the act.

The duty cast upon this officer is clearly defined by the statute. The 2nd clause in the "Directions for the guidance of electors in voting," in schedule 1, is as follows: "The voter will go into one of the compartments, and with a pencil there provided place a cross opposite the name or names of the candidate, or candidates, for whom he votes, thus ×;" and sub-section 4 of section 28 enacts that the returning officer is to furnish each deputy returning officer "with the necessary materials for voters to mark their ballot-papers." The latter portion of section 43 deals with the other point: Each elector "shall receive from the deputy returning officer a ballot-paper, on which such deputy returning officer shall have previously put his initials." It is to be regretted that these officers, by their culpable neglect in omitting to observe these plain and simple rules, should cause the difficulties which have arisen in the present case. Having undertaken these duties, they should have fulfilled them with intelligence, care and honesty, and they may be deservedly censured for involving the candidates in the difficulties and expense connected with the present scrutiny. It does not better their position that possibly their irregularities and mistakes may be covered by a healing clause in the act. Section 80 makes the following provision: "No election shall be declared invalid by reason of a non-compliance with the rules contained in this act as to the taking of the poll. . . or of any mistake in the use of the forms contained in the schedules to this act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this act, and that such non-compliance or mistake did not affect the result of the election." The principles laid down by the act seem to be secrecy in voting,

and the removal of difficulties in the way of an elector exercising his franchise.

There seems to be no doubt that the election in question was conducted in accordance with these principles. It cannot be said that the irregularities complained of affected or bore upon the result of the election, nor were they calculated to do so. It was not even argued that any injury of the kind has here arisen—that any other than the provided ballot-papers had been used, or that the vote of any one not entitled to vote had been received. The neglect of the officer should not be visited on the elector or candidate, unless it is apparent that it has, or might have caused some substantial injustice. Of the 132 votes cast in Pelham Division No. 1, it is said 130 are open to the objection that the ballot-papers were not initialed by the deputy returning officer. I do not think I should lightly disfranchise so large a body of the electors, nor should I lightly say the irregularity is of such a nature as to disfranchise, and this disfranchisement being so general, the whole matter must be set at large and a new election ordered.

I am of opinion that, under this clause, irregularities of the nature here relied upon in order to invalidate the election must be substantial and not mere informalities—that the informality must be of such a nature as that it may reasonably be said to have a tendency to produce a substantial effect upon the election. I do not think the irregularities here complained of in any manner interfered with the election being a real one, nor did they in any manner affect the result, and therefore they cannot be raised as grounds for avoiding it. This view is corroborated by the finding in the *Hackney Case*, 31 L. T. N. S. 72. There Mr. Justice Grove says: "An election is not to be upset for an informality or for a triviality. It is not to be upset because the clock at one of the polling-booths was five minutes too late, or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated to affect the result of the election."

It must also be borne in mind that if the Court lightly interferes with elections on account of errors of the officers employed in their conduct, a very large power may thus be placed in the hands of these men. That which arises from carelessness to-day may be from a corrupt motive to-morrow, and thus the officer is enabled, by some trivial act or omission, to serve some sinister purpose, and have an election avoided, and at the same time to run but little chance of the fraudulent intent being proved against him. I therefore disallow the objection taken to votes given by means of ballot-papers marked with the pen and ink provided in the polling-booth, and to those given on the ballot-papers provided by the returning officer but not initialed by him.

There were three other points argued before me: 1. What mark sufficiently expresses the intention of the elector as to his voting? 2. Where must this mark be placed? 3. What additional mark warrants the rejection of the ballot-paper? The following portions of section 45 and of schedule I. deal with the first two of these questions: "The elector . . . shall . . . mark his ballot-paper, making a cross on the right-hand side, opposite the name of the candidate . . . for whom he intends to vote." "The voter will . . . place a cross opposite the name . . . of the candidate . . . for whom he votes, thus ×." It is also to be noted that in the form given the cross is not exactly opposite the word "Roe," or the words "Richard Roe," but appears as follows:—

II.	ROE. Richard Roe, of —— Town in——	×

I think that every reasonable latitude that can be given to an elector as to the form or position of his mark, without a direct invasion of the statute, should be given to him. The act, however, requires that this mark should be a cross, and it also requires that this cross should be on the right-hand side, opposite the name of the candidate. I cannot say, therefore, that, so far as the mark is concerned, the elector has complied with the act when, in its place, he puts a single line. I must rather conclude that the elector, for some purpose, desired to go merely through the form of voting, and expressed this intention by placing such a mark there as evidenced his design of not complying with the requirements necessary to allow his ballot to be counted for either of the candidates. The single stroke does not show a concluded intention of voting, for only a portion of that which is the defined figure is thus made. The voter is told that if he puts a cross in a particular place, which is well defined on his ballot-paper, his vote will be accepted; if he does not choose to do that, he loses his vote. It may be that at first this rule will work hardly; but soon a matter so easily comprehended will be

perfectly known throughout the country. In the meantime, the price paid for obtaining secrecy in voting will be the virtual disfranchisement of a small proportion of voters who have not learned how to vote under the present system.

Until the mark loses entirely the figure of a cross, I think it should be allowed. It may be imperfectly made; there may be additions to it from nervousness, or awkwardness, or by way of embellishment. There may be several lines crossing another line or other lines. The one line may lie upon the other at any angle. The one line may cross the other but a short distance, yet so long as it is possible to say the figure can be taken as that of a cross, it would be the duty of the Court to say the intention of the elector is sufficiently defined to allow his ballot to stand. As with the form of the cross, so with its position. I do not think it necessary that it should be exactly opposite either the word "Roe" or "Richard Roe." It may be above or below a line produced from the name parallel with the end of the ballot-paper. It need not be in the compartment in front of the name, but the moment it ceases to be on the right-hand side, then it is no longer in the place which indicates an intention of voting, and therefore must be rejected. If it be correct that the form of the mark, such as a line or a circle, vitiates the ballot, I do not think it unreasonable to say that the position of the mark may have the same effect. A man who pretends to vote puts a stroke and nothing more, and knows his ballot paper will be rejected; a man who does not want in reality to vote may just as well say, "I will place my mark or cross to the left of the name, and thus, though apparently voting, vitiate my ballot-paper." I think it is safer in a case where the wording of the act is so plain as here, to require a reasonable compliance with that which it lays down as being the requirements of a ballot-paper which is to be accepted, rather than to enter into a minute examination of the position of each cross, and endeavour to assign some reason in each case for that which virtually is an invasion of the plain language of the act.

The third point raised depends on the true construction of section 55 and schedule 1:—

The returning officer shall reject all ballot papers "upon which there is any writing or mark by which the voter could be identified." If the voter places any mark on the ballot paper or envelope by which he can afterwards be identified, his vote will be void and will not be counted." The marks found on the ballot papers are—(*a.*) Additions or embellishments to the figure intended to represent the cross, and by which such figure might be distinguished from other crosses. (*b.*) Marks made inadvertently near the cross, and which have arisen evidently from nervousness or awkwardness. (*c.*) Distinct lines or figures made in various places on the ballot paper.

The act does not say any mark, or any mark deliberately made, but a writing or mark by which the voter could be identified. I think the mark must contain in itself a means of identification of the voter in order to vitiate the ballot. There must be something in the mark itself, such as the initials, or some mark known as being one the voter is in the habit of using. If there be not this restriction, then it will naturally follow that every peculiarity about every cross should be scanned in order to see whether some of the additions were not put there designedly so as to mark distinctively that particular ballot paper. Any mark in addition to the cross might thus avoid the vote, and, on the same principle, any alteration in the position of the cross from a rigid observance of what is set forth in the act should be taken as a means of denoting the ballot as one marked so as to require its rejection. I think if the Legislature intended this result we should have found different language used from that which we have in this enactment.

I proceed on the above rules to scrutinise the votes objected to on both sides. The petitioner had 1,329 votes and the respondent 1,333, leaving a majority of four votes for the respondent. In Canboro No. 1, there were four ballots for the petitioner rejected, which rejection is objected to. This affords a fair example of the necessity for observing with exactness the rules prescribed by the act. The deputy returning officer here employed pen and ink. The crosses in these four cases were distinctly made opposite the name Edgar, and in the proper position on the ballot paper. The voter folded the paper down at once, and accurately, which made an impression opposite the name McCallum. We have by this means a cross opposite the name Edgar, and another cross identical in form opposite the name McCallum. On a close inspection it is apparent that the upper cross is the original one, and that the lower, or McCallum one, is caused merely by the paper being brought into contact with the mark the ink of which was not dry. These four votes should therefore be allowed to Edgar.

Edgar. Dunnville, No. 1. McCallum.

4 There were four votes rejected for Edgar. One was improperly rejected, the mark being a cross to the right hand and opposite
1 the name. Two were crosses to the left of the name, and the fourth was a single stroke. These three were properly rejected.

Moulton and Sherbrooke, No. 1.

There was a miscount. The numbers returned were thirteen for Edgar and one hundred and fifteen for McCallum, whereas it should have been twelve for Edgar and one hundred and sixteen for McCallum.

Wainfleet, No. 1.

There were four rejected for McCallum, one of which I allow, being a well defined cross with a line running through its centre. 1

Caistor, No. 1.

There was a cross to the left of the name properly rejected for McCallum.

Wainfleet, No. 2.

There were two rejected for McCallum; one properly, as being a cross to the left of the name; the other improperly, there being a well defined cross opposite "McCallum," and a single stroke opposite "Edgar." 1

Dunnville, No. 1.

There is one properly rejected for Edgar, there being simply a stroke with a pen through the figure "1" of the year "1875," which appears on the ballot paper
— to the left of the name. —
5 2

So that up to this point there should be added to the number of votes polled for Edgar, as being improperly rejected, five, and there should be deducted for the miscount one; leaving the total addition to be made four, and thus giving the number of votes polled for him thirteen hundred and thirty-three; and there should be added to the number of votes polled for McCallum, as being improperly rejected, two, and for the miscount one; thus making the number of votes polled for him thirteen hundred and thirty-six. Of the votes allowed by the returning officer, I find the following should be disallowed:—

Edgar. Gainsboro', No. 3. McCallum.

One single stroke disallowed; 1
two single strokes, and two crosses
4 not to the right hand of the name, disallowed.

Dunnville, No. 2.

One single stroke, and one cross not to the right hand of the name, 2 disallowed.

Caistor, No. 3.

One single stroke, disallowed; 1 one cross with a line before it, allowed.

Moulton and Sherbrooke, No. 2.

One with a single stroke, disal 1 lowed; one with three crosses—the one in the proper compartment, the other across the name McCallum, and the third in the left compartment--allowed. These crosses were so placed, I think, because the voter was uncertain where the mark should appear. As there is a cross rightly placed, I do not think the vote should be rejected because of the additional crosses. One single stroke, disal-
1 lowed.

Wainfleet, No. 3.

One single stroke, disallowed; 1 one with a second cross, allowed, it not appearing that the mark identifies the voter.

Wainfleet, No. 2.

Two single strokes and one cross not to the right hand of the name, 3 disallowed; one single stroke, dis-
1 allowed.

Pelham, No. 3.

One single stroke, disallowed. 1

Moulton and Sherbrooke, No. 3.

One single stroke, and two with crosses not to the right hand of 3 the name, disallowed; a fourth, with the cross to the right hand of the name in small letters, al-
2 lowed; two single strokes, disallowed.

Moulton and Sherbrooke, No. 1.

A cross on the back of a ballot paper for McCallum, allowed.

Edgar.	Dunnville, No. 1.	McCallum.
1	A single stroke, disallowed ; a double cross, allowed.	
	Gainsboro', No. 2.	
	One cross not to the right hand of name, disallowed ; a ballot paper inadvertently torn, allowed.	1
2	Two with a cross not to the right hand of name, disallowed ; one ballot paper inadvertently torn, allowed ; one with a cross properly placed, but with an obliterated mark in the McCallum column, allowed.	
	Gainsboro', No. 1.	
	One cross not to the right hand of the name, disallowed ; one with a mark on the cross, allowed ;	1
2	two with single strokes, disallowed ; two with a cross to the	
2	left hand of the name, disallowed ; one ballot paper torn, allowed.	
	Dunnville, No. 2.	
	Two crosses opposite the name, allowed.	
	Pelham, No. 1.	
	Two crosses opposite name, allowed ; an erased mark opposite Edgar's name, in addition to a cross opposite McCallum's name, allowed ; one single stroke, disal-	
1	lowed.	
	Wainfleet, No. 1.	
	Two with a cross not to the right hand of the name, and an additional mark, disallowed.	2
	Gainsboro', No. 4.	
	One ballot paper inadvertently torn, allowed ; one with an inadvertent mark under the cross, allowed.	
	Caistor, No. 1.	
	An inadvertent pencil mark, allowed ; a ballot paper inadvertently torn, allowed.	
	Caistor, No. 3.	
	Four ballot papers inadvertently torn, allowed.	
	Pelham, No. 2.	
	An inadvertent additional mark, allowed.	

Edgar.	Canboro, No. 1.	McCallum.
	A ballot paper inadvertently torn, allowed ; an inadvertent additional pencil mark, allowed ; four marked with pen in place of pencil, allowed ; two with single	
2	lines in place of crosses, disallowed ; one ink cross blotted, allowed.	
	Canboro, No. 2.	
	One cross not to right hand of	1
1	name, disallowed ; one, not a cross—a circle with two lines underneath—disallowed ; one with a cross in the proper place and a second cross erased, allowed.	
	Dunnville, No. 1.	
	One inadvertent additional pencil mark, allowed ; four ballot papers inadvertently torn, allowed.	
	Caistor, No. 3.	
	One cross to the right of the	
—	name in small letters, allowed.	—
19		18

This disposes of all the objections made ; and deducting the votes disallowed Edgar (19) from the votes allowed (1,333), would leave the number of votes polled for him 1,314 ; and deducting in like manner the votes disallowed McCallum (18) from the votes allowed him (1,336) would leave the number of votes polled for him 1,318. This would give him, as the result of the investigation, a majority of 4 votes, and he is therefore entitled to retain the seat. I have therefore to declare that Mr. McCallum has been duly elected and returned, and I shall certify that to the Speaker.

Election sustained.

Glengarry Election Petition (Dominion.

John Ronald McDonald, *Petitioner*, v. Archibald McNab, *Respondent.*

Application to postpone trial—38 *Vict., cap.* 10, *sec.* 2.

The trial of an election petition should not be postponed without the applicant shewing very cogent and almost unanswerable grounds.

In this case the reason given was that the Lieutenant-Governor of Ontario was a necessary and material witness, and that he could not properly leave Toronto during the sittings of the House of Assembly. *Held*, not a sufficient reason.

Held also, that the application to postpone a trial allowed by 38 Vict., cap. 10, sec. 2, is confined to that part of the enactment relating to the proceeding of the trial *de die in diem*, after it has commenced.

[January 19th, 1876—WILSON J.]

Osler moved absolute a summons to postpone the trial of this case on the ground that the Lieutenant-Governor of Ontario was a necessary and material witness, and that it was impossible for him to attend at Alexandria, where the case was to be tried on the 25th January, whilst the Ontario Legislature was in session. Several affidavits were put in showing the injury which the public interests would suffer if his Honour were to leave the seat of Government at this juncture.

Sir J. A. Macdonald, Q.C., shewed cause. It is not competent for a single judge to change a day which has been fixed for the trial by the full Court. The petition was filed in the beginning of August last, and the words of the statute, 38 Vict., cap. 10, sec. 2, rendered it absolutely necessary that the trial should be commenced within six months from that date. This statute enacts that "the trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with *de die in diem*, until the trial is over, unless on application, supported by affidavit, it be shewn that the requirements of justice render it necessary that a postponement of the case should take place." It is plain that the exception introduced by the word "unless" refers only to the proceeding with the trial *de die in diem*, and not to the provision made for the commencement of the trial within six months. The affidavits do not show a case on the merits. They merely state that inconvenience will result from the absence of the Lieutenant-Governor, but they do not show how or why. It is of the highest public importance that election trials should be disposed of at the earliest possible moment. If the trial were postponed it would have the effect of giving the respondent a seat for the next session, for his presence would certainly be required at the trial, and therefore, under the act, it could not take place during the session.

Osler, contra. There could be no question about a single judge having power to postpone the trial, for the Controverted Elections Act of 1874, 37 Vict., cap. 10, sec. 3, declares that the "Court" shall mean certain specified courts, "or any of the judges thereof." The object of the Act 38 Vict., c. 10, is to prevent unreasonable delay in the trial of election petitions, with which object six months from the presentation of the petition has been fixed as the ordinary limit for the commencement of the trial. But this rule is not absolute and unqualified. It is subject to the exception stated in the last clause of that portion of sec. 2 which has been cited. The words "unless on application," &c., must be taken to apply to the limitation of six months, as well as to the proceeding *de die in diem*. According to the construction contended for by the petitioner's counsel, it would be necessary for judge, counsel and witnesses to go to Alexandria, in order to commence the trial formally, before a postponement could be granted, however reasonable and necessary it might be. The affidavits read shewed good ground for the postponement asked. The relations existing between the Queen and her Cabinet are not of so intimate a nature as those between the Lieut.-Governor and his ministers. He understood that in England the sign manual was generally affixed to acts by a commission, while no such provision existed in this country.

WILSON, J. The language of the Act 38 Vict., c. 10, sec. 2, is imperative "that the trial shall be commenced within six months from the time when such petition has been presented," and I cannot, before the trial has commenced, postpone the trial until a day which will be after the six months have expired. The words "unless on application, supported by affidavit, it be shown that the requirements of justice render it necessary that a postponement of the case should take place," are confined apparently to that part of the enactment relating to the proceeding of the trial after it has begun *de die in diem*.

If the construction of the section, however, be even doubtful in that respect, I should not postpone the trial to a day beyond the six months, because that might render abortive the whole of these proceedings, and at any rate it would cast on the petitioner the necessity of maintaining the validity of the delay which had been granted adversely to his desire and interest, and solely at the instance and to meet the necessity or convenience of the respondent. That is quite sufficient to dispose of the application.

If I had possessed the power beyond all question to extend the time of trial as asked for beyond the period of six months before first entering upon the trial, it is very doubtful if I should have done it in this case. The earliest time which could have been fixed for it would be about the beginning of July next. It is

forbidden to try the petition "during any session of Parliament," "whenever it appears to the Court or judge that the respondent's presence at the trial is necessary;" and it is admitted by all parties that the respondent's presence at the trial will be necessary. That would delay the trial till probably about the middle of May. It is also forbidden to commence or proceed with the trial "during any term of the Court of which the judge trying it is a member, and at which he, by the law, is bound to sit;" and as the Easter term of the court of which I am a member will begin on the fifteenth of that month, and will continue until the third of June, and as for three weeks after that day each judge of the court will be engaged in preparing judgments in the cases which have been argued and remain *en delibere*, there can be no time fixed for the trial of the petition at Alexandria, in the county of Glengarry, sooner than about the end of June or the beginning of July. Now the great delay which has already taken place in the trial of the petition, and which is attributable solely to the respondent, and the still greater delay which must follow if the trial be not now proceeded with at the time which has been specially appointed for it; and considering the nature of the question involved—the right to a seat in the House of Commons—are reasons which make it necessary and obligatory to go on with the trial unless there are very cogent and almost unanswerable grounds for granting the delay. Such grounds I do not think have been established in this case.

The reason for the postponement is that his Honour the Lieutenant-Governor of this province, who is a material and necessary witness in this cause, is unable during the session of the Legislative Assembly to leave the seat of Government, where it is said his presence is daily required. I have no doubt his Honour's presence at the seat of Government is of great importance, especially while the Legislative Assembly is in session; but considering the great delay which must take place if the trial be postponed, the subject which is in dispute in that trial, the short time which his Honour will be absent from the seat of Government while he is attending as a witness, and the almost paramount importance of all matters being laid aside by those who are called upon by courts of the land to aid in the administration of justice as witnesses or otherwise, which would stand in the way of their rendering obedience to the summons, I think it is better I should, fully weighing the advantages and disadvantages which have been alluded to, leave the cause for trial at the time appointed, and not longer delay it; and I trust the injury which it is said the public service may sustain by the temporary absence of his Honour the Lieutenant-Governor for a few days, even while the House is in session, may not be so great as has been conjectured.

I shall therefore discharge the application, and direct that the costs of it shall be costs in the cause.

Summons discharged.

COMMON LAW CHAMBERS.

Turner v. Neill.

Examination of defendant.—Striking out false plea.

[January 25, 1876—Mr. Dalton.]

In this case a summons was obtained to strike out the defendant's pleas, as proved to be false by his examination under the Administration of Justice Act.

Mr. Dalton declined to strike out the plea, although he thought there could be little doubt that it was false. It involved a point which required evidence for its establishment in addition to defendant's admissions, and no matter how clear the case might be, he had not power to strike out the plea unless the defendant, in a proceeding of the Court, admitted it to be false. Costs to be costs in the cause.

City Bank v. Mackay.

Service on principals—Notice to plead.

It is not irregular, under C. L. P. Act, sec. 61, to serve, in Toronto, a country attorney; and ten days' notice is not necessary under such circumstances.

[Feb. 19, 1876—Mr. Dalton.]

The defendant's attorney, who resided in Dundas, had been served with the declaration when he happened to be in Toronto. A summons was obtained to set aside the service, on the ground that the attorney's agent, and not the attorney himself, should have been served under C. L. P. Act, sec. 61, and that, supposing the service good in this particular, ten days' notice to plead should have been given instead of eight, under 34 Vict., c. 12, s. 12.

Monkman shewed cause. The C. L. P. Act, s. 84, provides that declarations and other pleadings may be served in any county. The

service was therefore as good on the principal in York as it would have been in his own county of Wentworth. As to the notice to plead, ten days is only required when the agent is served.

Davidson contra.

Mr. Dalton thought that the service was good under the section of the C. L. P. Act cited in its support, and that the eight days' notice was sufficient. The summons was accordingly discharged with costs.

CHANCERY CHAMBERS.

McAvilla v. McAvilla.

Motion to commit for disobedience of order—Con. Gen. Order, 293.

A motion to commit defendant, or to take the bill *pro confesso* for non-attendance of defendant for examination, pursuant to a special order, was refused where the order had not been previously served.

[January 15, 1876—Referee.]

By an order of the Court, dated the 29th day of September, 1875, it was ordered that the defendant should personally appear within one month before the Master at Belleville, for the purpose of being cross-examined on his answer in this cause by the plaintiff, at such time and place as the Master should appoint, eight days notice thereof to be given to the defendant's solicitors; and that the said defendant, upon then and there being paid his proper conduct money, should submit to such cross-examination.

The plaintiff obtained an appointment from the Master on the 18th Oct., 1875, appointing the 29th Oct., at 3 p.m., for the examination to take place. This appointment was served on the defendant's solicitor on the 18th Oct., 1875. The defendant did not attend at the time and place appointed, although he seemed to have known of the appointment, and called at the office of the plaintiff's solicitor shortly before the hour appointed for the examination to take place.

The plaintiff's solicitor then obtained said appointment on the 1st Nov., appointing the 10th for the examination, which appointment was served on the defendant's solicitor on the 1st Nov. On the return of this appointment his solicitor appeared, but the defendant himself did not attend. On the 16th Nov. the defendant's solicitor waited upon the plaintiff's solicitors, and informed them that he had received a telegram from the defendant, agreeing to attend and be examined on the 17th Nov., and requesting that an appointment might be obtained for that day. It so happened, however, that the Master was unable to give any appointment for that day, and therefore the defendant's solicitors concurred in the 22nd Nov. being appointed for the examination.

On the morning of the 17th Nov. the defendant came to Belleville and offered to submit to examination; but he was told that the examination could not be taken that day, and the plaintiff's solicitor then went with the defendant to the Master's office, when the Master showed him the appointment made in his book for taking his examination on the 22nd, and the plaintiff's solicitor, moreover, notified him verbally that if he failed to attend he would move to take his answer off the files and to note the bill *pro confesso* against him, or move to commit him for contempt.

Nothwithstanding this, defendant did not attend at the appointed time, but went off to the shanties, some fifty miles north of Peterboro', where it would be very difficult to reach him, and from whence he was not likely to return until the spring.

F. Arnoldi for the plaintiff, now applied to commit the defendant for contempt, in disobeying the order of 28th Sept., 1875, or to take the answer of the defendant off the files, and to take the bill *pro confesso* against him, or for such other order as the Court might think fit.

W. G. Cassels for defendant.

Mr. Holmested—Whatever may have been the intention of the Court or the parties, the order of the 29th of September does not in terms dispense with the service of that order upon the defendant, endorsed with the usual notice required by Order 293. Neither does the order itself conform to the provisions of that order. And the order, in point of fact, was not served upon the defendant, or even upon his solicitor, at any time before the alleged default was made. This, I think, is fatal to the success of this application. (See *Wagner* v. *Mason*, 6 Prac. R. 187, and the cases of *Rider* v. *Kidder*, 12 Ves. 202, and *De Manneville* v. *De Manneville*, ib. 203, Daniells, Pr. 5th Ed., p. 903-5, and *Adkins* v. *Bliss*, 2 De. G. & J. 286).

It is not possible for me to, nor do I think the defendant's solicitors could dispense with the provisions of General Order 293; and the omission to serve the order, therefore, is a matter which I do not think they could be deemed to have waived. The object of Order 293 is to

prevent surprise, and to bring home to the party called on to obey the order of the Court the penalty he will incur by his disobedience; the verbal intimation the defendant received from the plaintiff's solicitor, I do not think can suffice.

The motion to commit, therefore, must be refused, and I think the application to take the bill *pro confesso* must also fail, because it is only in cases where the Court finds that a defendant is in contempt, that that remedy can properly be granted to the plaintiff. Although I am of opinion that the defendant has not brought upon himself the penalties of contempt, I nevertheless think he has acted very unreasonably, and I refuse to give him any costs of this application.

I think the proper order to make under the circumstances would be to extend the time for taking the cross-examination, and provide, by the orde I now make, that service of it upon the defendant's solicitor shall be sufficient.

STREET v. HALLETT.

Vendor and Purchaser—Incumbrance created pendente lite*—Consent decree.*

A defendant who claimed to be sole owner of the land in question in the suit, had *pendente lite* sold to one H. the right to cut timber on the land and the purchaser at the sale under decree refused to carry out his purchase until this right was released, which H. refused to do.

Held, that the decree having been made by consent, H. was not bound by it; and that, therefore, the existence of H.'s incumbrance was a valid objection to the title, and had not been waived by the purchaser's merely taking a consent to obtain, without having actually obtained a vesting order, nor by his having under the circumstances had the conveyance settled by the Master, without making H. a party to it.

The party having the conduct of the sale represents, for the purposes of the sale so far as the purchaser is concerned, all the other parties to the suit, and it is his duty to remove, or procure to be removed, any objection which may properly be made to the title.

[January, 1876—REFEREE.]

This was an application by the plaintiff to compel the purchaser, Mr. J. D. Woodruff, to pay that part of his purchase money payable at the time of the application, into court, and to execute a mortgage to secure the balance, in accordance with the conditions of sale. The motion was resisted on the ground that, pending the suit, the defendant, Luke Hallett, who claimed to be sole owner of the land, had sold to one Harris a right to cut timber on the land, which right Harris refused to release, and it was contended that Harris was not bound by the decree, because it was made by consent and because he was no party to the suit.

The sale took place on the 17th May, 1875, when it was expressly stated that Harris had no claim, notwithstanding his assertion to the contrary. The purchase money was payable as follows: 20 per cent. on the day of sale, 80 per cent. in one month thereafter, and the balance to be secured by mortgage, payable in three annual instalments, with interest at 6 per cent. The deposit at the sale was paid to the vendor's solicitors, but no further sum was paid. By mutual agreement between the parties it was subsequently agreed that the purchase money, instead of being paid into court or secured by mortgage, should be paid directly to the parties entitled. According to the affidavit of the purchaser's solicitor, it appeared that he searched the Registry office and found Harris's agreement on record, on 29th July, 1875. On the 30th August he obtained from the solicitors of the plaintiff and defendants a consent to his obtaining a vesting order. Subsequently, on the advice of his solicitor, he decided not to act upon it and required a conveyance, and a conveyance was accordingly carried into the Master's office by the purchaser, and settled by the Master on the 13th September, 1875. The purchaser's solicitor subsequently prepared a release for Harris to execute, and sent it to him for execution; but Harris refused to execute it, and the purchaser's solicitor, on the 21st October, 1875, notified the vendor's solicitor of the fact. Since that time nothing was done to procure the release.

Cassels for the plaintiff.

Ewart for the purchaser.

MR. HOLMESTED.—I think the objection made by the purchaser to the title is well founded.

It was contended that the purchaser had waived the right to take this objection by reason of the great delay, and also by taking a consent to his obtaining a vesting order, and also by having the conveyance settled by the Master without having Harris made a party to it. I am of opinion that none of these circumstances can deprive the purchaser of his right to insist on the removal of the objection.

If he had actually accepted a vesting order or conveyance, the case of *Kincaid* v. *Kincaid*, 6 Prac. R. 93, and *Bull* v. *Harper*, ib. 36, would have been applicable. The mere fact that the parties to the suit consented that he should get a vesting order is a very different thing. With

regard to the delay, it appears by the affidavit that it was expressly stated at the sale that Harris had no claim, notwithstanding his assertion to the contrary. The purchaser's solicitor, moreover, states that he was given to understand that Harris would execute a release when called upon to do so, and from this fact one can understand that he was induced not to make this claim of Harris a formal objection to the title at an earlier date; as soon, however, as he had definitely ascertained that Harris would not execute a release in October last, he notified the vendor's solicitor, and I do not find that he has done anything since which can fairly be said to be a waiver of the objection.

In the affidavit of the plaintiff's solicitor, it is stated that any claim Harris may have he obtained from the defendant Hallett, and he believes that the plaintiff is not liable to pay Harris for the release, but that the defendants, other than Street, are the parties who are bound to get the claim released. It is this consideration which has probably induced the plaintiff's solicitor to come to the conclusion that as between the plaintiff and the purchaser he was not bound to procure the removal of this objection to the title, but in this respect the plaintiff's solicitor has, I think, mistaken the practice. It is quite out of the question to suppose that a purchaser at a Chancery sale is to deal individually with each party to the suit, in order to procure the removal of objections to the title. On the contrary, the practice is perfectly well settled that the party having the conduct of the sale represents for the purpose of the sale, so far as the purchaser is concerned, all the other parties to the suit, and it is his duty to remove or procure to be removed any objections which may properly be made to the title; and if, in order to do so, it is necessary that any part of the purchase money should be applied, it may become a question between the parties to the suit as to whose shares it should ultimately be paid out of; that is a matter, however, with which the purchaser has nothing to do, and must be adjusted by the parties themselves, or, if need be, by the Court, on a proper application for that purpose.

As the parties in this case have agreed that the balance of purchase money shall be paid direct to the parties entitled, and not into court as provided by the conditions of sale, an agreement which they were competent to make, being all *sui juris*, I do not think the purchaser is in default, but is perfectly justified in withholding payment until the objection is removed; and if it cannot be removed, then I think the purchaser will be entitled to move to be discharged from his purchase, and to have his deposit refunded, or for the allowance of an abatement in his purchase money.

The present application is premature, and must be refused with costs.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

ONTARIO SALT COMPANY v. LARKIN.

Carriage of goods by water—Mistake by master in delivery—Liability of owner—Vessel chartered for the trip.

Appeal from the judgment discharging a rule *nisi* to enter a nonsuit: see 35 U.C.Q.B. 229.

One H. had chartered a schooner from Goderich to Chicago, and not being able to fill her, told the plaintiffs' agent that they might send 1,000 barrels of salt by her, paying the same rate as he did. This salt was accordingly shipped at Goderich, and this agent signed a bill of lading, by which it was to be delivered to P. & Co., Chicago, care of the Chicago, Burlington & Quincey R. W. Co., Chicago. It had also P. & Co.'s brand on the barrels. There was about 2,400 barrels of salt on board besides, consigned to H. On the voyage about 300 barrels of the deck load, not being part of the plaintiffs' 1,000 barrels, were washed or thrown overboard by stress of weather; and the captain, on arriving, told the freight agent of the railway that it was the plaintiffs' salt which had been thus lost. This freight agent employed one Haines, who was also the shipping clerk for the agents of H., to receive the salt at Chicago, and load it on the cars there; and H. being there, directed about 300 barrels of the plaintiffs' salt to be put with his own, thus making up his own quantity, while the plaintiffs only got 610 barrels.

Held, in the Court of Queen's Bench: 1. That the owner of the vessel, and not H., was her owner for the trip and the contractor with the plaintiffs. 2. That if the master delivered the salt on the dock as H.'s salt when it was in fact the plaintiffs', the defendant would be answerable; that there was some evidence of his hav-

ing done so; and that a verdict for the plaintiffs, therefore, should not be disturbed.

On appeal this judgment was affirmed.

STRONG, J.—It is the duty of the captain not thereby to deliver the goods on the wharf, but as far as possible to separate the different consignments, so as to render them accessible to their respective owners.

S. Richards, Q.C., for plaintiffs.

Robinson, Q.C. and *J. A. Miller*, for defendant.

JONES v. COWDEN ET AL.

29 Vict., c. 24, sec. 57—Retrospective, operation of.

Appeal from the judgment of the Court of Queen's Bench, reported 34 U.C.Q.B. 345, and making absolute a rule *nisi* to enter a verdict for the plaintiff.

The judgment of the Court of Queen's Bench. 34 U.C.Q.B. 345, affirmed on appeal.

Bethune and *J. W. Kerr* for plaintiff.

S. Richards, Q.C., and *Benson* for defendants.

QUEEN'S BENCH.

EASTER TERM, 1875.

SCROGGIE ET AL. v. TOWN OF GUELPH.

Town corporation—Drains—Injury by overflow—Gratings in side-walk.

The plaintiffs sued defendants for negligently suffering the drains on their streets to become choked, whereby the waters and drainage overflowed therefrom into the plaintiffs' cellar, and damaged their goods there.

The jury found, upon the evidence set out in the case, and which was held by the Court to warrant their finding, that the defendants had reason to believe the drains might be choked, and remained negligently ignorant of their condition; and a verdict for the plaintiffs was therefore sustained.

There were gratings and trap-doors in the side-walk opening into the cellars of one P., whose premises adjoined the plaintiffs', which the jury found had been placed there many years before without defendants' permission. *Semble*, that if the water had got into the plaintiffs' premises through the plaintiffs' own gratings, defendants would not have been liable; but that as between them and the plaintiffs they were responsible; as they would be if any one had been injured by such gratings, though the person who placed them there might be liable also.

Harrison, Q.C., for plaintiffs.

M. C. Cameron, Q.C., and *Guthrie*, for defendants.

MCKENZIE ET AL. v. DEWAN ET AL.

Joint Stock Company under C. S. C. ch, 63—Liability of stockholders—Payment of stock—Registration of certificate—Pleading—Departure.

The C. S. C. ch. 63, enacts that the stockholders of any company incorporated thereunder shall be "jointly and severally liable" for all debts and contracts made by the company. *Held*, nevertheless, that a creditor might sue one, or any number more than one, of the stockholders.

In an action by creditors of the company against five shareholders, the declaration, after setting out an unsatisfied judgment recovered, by plaintiffs against the company, alleged that the defendants, before the debt was contracted and before this suit, were stockholders, and had not paid up their shares in full, whereby defendants became liable to pay said judgment.

Three of the defendants pleaded that they were not stockholders when the contracts, in respect of which the notes were given were made, nor from thence until, nor at, the commencement of this suit. The plaintiffs replied that these three defendants were trustees of the company, and omitted to make the annual report required by the statute, whereupon they became individually liable for the debts of the company. *Held*, that the replication was a departure, in alleging a different ground of liability from that taken in the declaration, and a ground which applied only to three out of the five defendants, and that in this latter respect there was a misjoinder.

The second plea, by two of the defendants, alleged that within five years of the incorporation of the company they paid up their full shares, and before this suit, to wit, on the 1st October, 1873, a certificate to that effect was made, &c., and was duly registered, &c. "in the manner required by the statute in that behalf." *Held*, following *pro forma*, the decision in the C.P., in *M'Kenzie* v. *Kittridge*, 24 C.P. 1, that the plea was good, though not shewing that the certificate was registered before the debts, on which the judgment was recovered, were contracted.

This Court, however, did not agree with that

decision, but considered, taking together secs. 33, 34 and 35, that to protect himself from liability a shareholder must register his certificate of payment; and that if registered within thirty days from the payment, the exemption would relate back to the time of payment, but if not, would begin only with the registry.

The fifth replication to the second plea, was that the defendants were original stockholders, and that the whole capital stock had never been paid in, and that the debt in the declaration mentioned was contracted by the company before the payment in full of the defendant's shares, and before registration of the certificate. *Held*, good; and that under sec. 33, a shareholder complying with the requirments is discharged from liability, though the full capital stock is not paid up.

The sixth replication denied that the certificate of payment mentioned was not made and sworn to, nor registered within thirty days after such payment as in the said plea alleged, in the manner by the said act directed. *Held*, bad, for the plea did not allege a registration within thirty days, and if before the contraction of the debt it would discharge the defendants, though not within the thirty days.

Another defendant, O., pleaded that he had paid up his shares in full, and had made and registered a certificate as required by the act, and had done the same in the time and after the manner required by the act to free him from personal liability for the debts of the company. The third replication to it was the same as the fifth replication to the second plea, and was *held*, good.

Held, also, that both pleas were improper in form, in pleading matter of law—that the certificate was duly registered, &c.,—instead of alleging the facts, when it was registered or when he paid up in full, &c.,—which the jury could try.

The fourth replication to O.'s plea was similar to the sixth replication to the second plea. The defendant O. rejoined, on equitable grounds, that before the debt in the declaration mentioned was contracted, and before this suit, he had paid his shares in full, of which the plaintiffs had notice, and that he registered the certificate of payment as soon as he knew that it was required by the act. *Held*, that the rejoinder was bad, and being a departure from the plea; but that otherwise it showed a good answer on the merits.

Burton, Q.C., and *Robertson*, Q.C., for plaintiffs.

Harrison, Q.C., and *Meredith* for defendants.

VACATION AFTER HILARY TERM, 1875.

Osborne et al. v. Pierson.

Promissory Note—Consideration—Pleading.

In an action on a note by payee against maker, a plea that there was never any value or consideration for the making the said note or paying the same, is bad on demurrer; it should state the circumstances under which the note was given, and deny that there was any other consideration than alleged.

Hoyles for plaintiffs.

Meyers for defendant.

Macmath v. Confederation Life Association.

Agreement to furnish security to defendants' satisfaction—Construction—Condition precedent.

The declaration was upon an agreement by defendants to employ the plaintiff as their agent to obtain applications for policies, alleging their refusal to take him into their service as agreed. Defendants pleaded that the agreement was subject to a condition that the plaintiff's appointment should not go into effect until he should have furnished security satisfactory to the defendants' general board for the due performance of his duties: that he did not furnish such security; and that his appointment never went into effect. The plaintiff replied that he did furnish such security as ought reasonably to have satisfied the board, and that the board unreasonably, capriciously, and improperly refused to be satisfied therewith.

Held, replication bad; for the furnishing security satisfactory to the board was clearly made a condition precedent to the appointment, and it was not alleged that defendants were not acting *bona fide* under an honest sense of dissatisfaction.

Gordon for plaintiff.

Beaty, Q.C., for defendants.

Gwatkin et al. v. Harrison.

Corporation—Sci. fa. against shareholders.

The 27-28 Vict., c. 23, sec. 27, incorporating the defendants, enacts that every shareholder, until his stock has been paid up, shall be liable to the creditors of the Company to the amount paid thereon; "but shall not be liable to any action therefor by any creditor" until an execution against the Company has been returned unsatisfied, &c.

Held, that *sci. fa.* would lie by a judgment creditor of the Company against a shareholder, though the general practice here is to proceed by action, for a *sci. fa.* is in fact an action.

F. Osler for plaintiffs.

Ferguson for defendant.

In Re Kennedy, an Insolvent, Mason v. Higgins.

Insolvency—Claim for rent.

A landlord in case of his tenant's insolvency, has no privilege or preference for rent over any other claim; his only protection lies in his right to a preferential lien on property on the demised premises.

On the facts set out in this case, it was held that there was no ground for ordering the assignee to place the claim for rent as a privileged one, there being no proof that he (the assignee) had obtained goods which might have been distrained sufficient to pay it; and such order was therefore set aside on appeal.

J. K. Kerr, for plaintiff.

O'Brien, for defendant.

Potts v. Leask and Ryerse.

Co-contractors—Payment by one—26 Vict., c. 45.

An action having been brought and a judgment recovered against two defendants on a contract by them to carry certain lumber, the verdict and costs were paid by one defendant, who thereupon, without applying to the plaintiff or tendering him any indemnity, issued an execution in his name against the other defendant for one-half of the debt and costs.

Held, clearly not warranted by the 26 Vict., c. 45, and the execution was set aside.

J. B. Read for plaintiff.

A. Cassels for defendants.

Munro v. The Commercial Building and Investment Society.

Mortgage—Insolvent Act of 1869, sec. 50—Right to distrain for mortgage money.

One M., in May, 1873, mortgaged land to defendants to secure payment of money by instalments, and it was provided that, in case of default, the defendants might distrain. M. made an assignment under the Insolvent Act of 1869, and the plaintiff, as his assignee, entered on the land, which was in M.'s possession, and took possession of certain goods there belonging to him. Afterwards, an instalment on the mortgage being overdue, the defendants distrained therefor on these goods, which were still upon the mortgaged premises. *Held*, that the defendants' only remedy was by application under sec. 50 of the Insolvent Act, and that they had no right to distrain.

Ritchie for plaintiff.

Beaty, Q.C., for defendants.

VACATION AFTER HILARY TERM, 1876.

Bank of Hamilton v. Western Assurance Company.

Insurable interest—Courts auxiliary.

[April 4.]

Declaration on a policy of insurance, whereby defendants agreed with one T. S. to insure him against loss by fire to the amount of $1,500 on wheat &c., owned by the assured, and that the amount of loss, if any, should be paid by the defendants to the plaintiffs: averments, that the policy was delivered to plaintiffs, who thenceforward and at the time of the loss were interested in said wheat; that the wheat was lost; that all conditions were performed, &c., but defendants did not pay plaintiffs.

Harrison, C.J., *held*, that the declaration showed an insurable interest both in T. S. and the plaintiffs.

Held, also, that the plaintiffs might properly sue at law, and that their claim was a pure money demand.

The spirit of legislation is to make courts of law and equity auxiliary to each other, and judges should, as far as in their power, consistently with rules of law, act in a similar spirit.

C. Robinson, Q.C., for plaintiffs.

Lockhart Gordon for defendants.

Harris v. Smith.

Easements—"Appurtenant to."

[March 31.]

The owner in fee of two adjoining closes having leased one to B and the other to A,

Harrison, C.J., *held* that a way, constructed across A's close for the use and enjoyment of B's shop, visible to all when A acquired title, and to which A's deed is made subject, passed by the words "appurtenant to" in the deed to B, which is prior to A's deed.

The law relating to easements discussed, and *Pyer* v. *Carter*, 1 H. & N., 916, commented on and approved of.

Ritchie for plaintiff.

Allan Cassels for defendant.

REVIEWS.

Principles of Contract at Law and in Equity. By Frederick Pollock, of Lincoln's Inn, Esq., Barrister-at-Law, late Fellow of Trinity College, Cambridge. London: Stevens & Sons, 119 Chancery Lane, Law Publishers and Booksellers. 1876.

The title page also states this to be "a treatise on the general principles concerning the validity of agreements, with a special view to the comparison of Law and Equity, and with references to the Indian Contract Act, and occasionally to Roman, American and continental law."

The design of the author is not, as he explains in his preface, to compete with existing works, but rather to supplement them. Coming at the present time, when the division of jurisdiction between Common Law and Equity has to a great extent ceased in England and is gradually disappearing in Canada, a treatise which deals with the inception of contracts, and the more general and broader principles of law on that subject, is especially welcome.

Works on the Law of Contracts, such as those of Mr. Addison and others, admirable and useful though they are, do not give that bird's-eye view of the law (so to speak) which enables one to comprehend at a glance where the roads to Common Law and Equity diverge the one from the other. The object of this author has been to give a concurrent view of the different doctrines of the two jurisdictions; not on the one hand making his work a mere digest of the cases, nor on the other giving a treatise on Chancery procedure in cases where it is sought to rectify the rigour of the Common Law.

The practical advantages of the mode of treating the subject adopted by Mr. Pollock, are as great as the mode is in itself scientific. It is most difficult to get in any available shape the equitable doctrines applicable to a given state of facts as to which, however, the Common Law rules will in all probability be clearly laid down.

The more one examines this work, the more satisfied he must be that the writer must have had a comprehensive knowledge of the subject, and he is certainly most happy in his manner of imparting that knowledge to others. A book of this kind could not in fact be prepared without much research and learning. It would not be possible, in the way Mr. Pollock has done it, to present to the reader in a lucid manner, in parallel lines, the discrepancies between Common Law and Equity, or wherein the latter corrects the former, or wherein the Civil Law may throw light on the discussion, without a thorough mastery of the subject.

Chap. i. treats of agreements, proposal and acceptance; Chap. ii. of the capacity of parties, sub-divided into natural and artificial persons; Chap. iii. as to the form of contract; Chap. iv. consideration; Chap. v., the effects and incidents of contract; Chaps. vi. and vii. as to unlawful agreements and impossible agreements; Chap. viii. as to mistakes in general; as excluding true consent and in expressing true consent. The next three chapters discuss misrepresentation, fraud and recision, duress and undue influence; Chap. xii., agreements of imperfect obligation.

This work will not do away with such a treatise as Addison on Contracts; but the latter should be consulted after examining this scientific treatise of Mr. Pollock's. One is necessary to the other, and both are necessary to any one who desires full information on a subject which is the most important of any to the practising lawyer.

The book, in its general appearance and necessary details, is all that might be expected from such careful and enterprising publishers as Messrs. Stevens & Sons.

FLOTSAM AND JETSAM.

The following curiosity in wills has been sent to us: "In the name of God, amen. September the 28th 1856 being the year of our Lord, Dom anno. I Robert Purtell of Norfolk County and township of Wendham is wake of body but of perfect mind and memery: I doe alsoe detest this to be my last will and testomony: I doe alsoe dis avoy all wills and testimonals made before or after this will: I hope to die the Lord have mercy on me: I am determd to devide my estate acording to what my mind lads me to (that is my loving and afectionate wife and childring seven), I

shall gave on to my wife mary purtell all the Lands that I own Containg fifty acres—50 acres in this township to mannage and have charge and controle thereof ontill death shall await on her then my oldest son Edward Purtell shall own the same fifty acres in the saim township providiing my son Edward purtell does not goe of or lave the Charg of his mother before he is at age of 21 years being this time in his 15th year, alsoe he is to contennue after he is at age in the same other ways my wife mary purtell may gave said lands onto my son James Purtell. I alsoe charge my son Edward purtell to gave on to my son James purtell the sum of Two Hundred dollars in cash this sum being £50, currency alsoe my son Edward purtell shall pay on to my young son Robert Purtill the sum of two Hundred Dollars being £50 pound currency the are 21 years if by sickness or accedence my son edward should Die said lands shall be giving onto my 2 twoe sons James and robert purtell or of my sons 3 may die that the one boys may own the same which he is hear of: Alsoe my daters fore 4 alles, ellan, Briget and Mary Jane purtell shall have a home on said lands and farm house in health or sickness does plevale on them."

A "DIVORCE" lawyer in Chicago has met the fate which all his peculiar species deserve. He was in the habit of advertising in the newspapers in different parts of the country, in terms such as the following: "Divorces legally obtained, without publicity, and at small expense;" "Divorces legally obtained for incompatibility, etc., residence unnecessary, fee after decree." One of the worst phases of the case of the lawyer in question is, that he well knew that incompatibility was not one of the lawful grounds of divorce in Illinois, and that a residence of one year in that state was required prior to filing a complaint for divorce, unless the offence complained of was committed in that state. The advertisement also conveyed the idea that he had the power of manipulating the courts of justice to suit himself. These things being properly presented to the Supreme Court, the "divorce" lawyer was duly disbarred. Breese, J., who delivered the opinion in the case, thus pronounces upon the practices of these parasites of the profession: "It is not denied an attorney may make any one of the branches of the law a specialty, but he must not, in so doing and acting, use undignified means, or low, disgusting artifices, and, least of all, should not withhold his name from his advertisements, nor should they be false or contain libels on the courts. No honourable, high-minded lawyer, alive to the dignity of his profession and emulous of its honours, could stoop so low as this defendant has. That he should embellish his papers, contrived in a spirit of barratry, with the emblem of justice, is singularly inappropriate. We have no patience with one who, bearing our license to practice law in our courts, has shocked all sense of propriety, of professional decorum, and of respect to the courts in which he practises. He is an unworthy member, and must be disbarred.—*Albany Law Journal.*

We trust that strict attention to each of the different kinds of business that appear in the following card will enable the advertiser to make both ends meet. We regret, however, that a Clerk of a Division Court should also be a druggist; there is no saying to what excesses suitors may go in the agony of hatred or disappointment, caused by an adverse judgment. With that eye to business which Mr. M. would seem to possess, he has probably some relation in the undertaking line:—

Edward Matthews,
Druggist, Conveyancer and Commissioner in B.R. Deeds, Mortgages Bonds, &c., *Executed on Reasonable Terms.*
Clerk of the Division Court.
&c., &c.

The nicety and technical precision required in criminal pleading, have often been the subject of remark. The policity and tautology of Equity pleadings likewise have been animadverted upon. "I remember," said the late Lord Chancellor Campbell, "when Bills in Equity told the same story over and over again, and each time more obscurely than on the previous occasion. When the *answer* came, the great object in drawing it up was, that however long it might be, it should form only one sentence, in order that if a part of it had to be read, it should be necessary to read the whole! But I am happy to be able to say, that both the bills and answer, which I have lately read, were simple, reasonable, grammatical, and perspicious." Hansard N. S. vol. 154, col. 1032.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Michaelmas Term, 39th Victoria.

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

No. 1342—Kenneth Goodman.
Thomas Horace McGuire.
George A. Radenhurst.
Edwin Hamilton Dickson.
Alexander Ferguson.
Dennis Ambrose O'Sullivan.

The above gentlemen were called in the order in which they entered the Society, and not in the order of merit.

The following gentlemen received Certificates of Fitness :

Thomas C. W. Haslett.
Angus John McColl.
Dennis Ambrose O'Sullivan.
Daniel Webster Clendenan.
George Whitfield Grote.
Charles M. Garvey.
Albert Romaine Lewis.

And the following gentlemen were admitted into the Society as Students-at-Law :

Graduates.

No. 2585—Goodwin Gibson, M.A.
John G. Gordon, B.A.
Walter W. Rutherford, B.A.
William A. Donald, B.A.
Thomas W. Crothers, B.A.
John B. Dow, B.A.
James A. M. Aikins, B.A.
William M. Reade, B.A.
Edmund L. Dickinson, B.A.
Charles W. Mortimer, B.A.

Junior Class.

Robert Hill Myers.
William Spencer Spotton.
William James T. Dickson.
William Elliott Macara.
James Alexander Allan.
Walter Alexander Wilkes.
William Andrew Orr.
Alfred Duncan Perry.
James Hartey.
Herbert Bolster.
John Patrick Eugene O'Meara.
Charles Augustus Myers.
Charles Crosbie Going.
David Havelock Cooper.
Emerson Coatsworth, Jr.
William Pascal Deroche.
Frederich Wm. Kittermaster.

Articled Clerk.

John Harrison.

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

That a graduate in the Faculty of Arts in any University in Her Majesty's 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.

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

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

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

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows :—

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

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

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

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

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

1*st year.*—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

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

3*rd 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 Vol. II., chaps. 10, 11 and 12.

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

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

J. HILLYARD CAMERON,
Treasurer.