DIARY FOR JUNE.

1. Sat... Open Day.
2. SUN.. *1st Sunday after Trinity.*
3. Mon.. Paper Day, Q. B. New Trial Day, C. P.
4. Tues.. Paper Day, C. P. New Trial Day, Q. B.
5. Wed.. Open Day, Q. B. New Trial Day, C. P.
6. Tues.. Open Day.
7. Fri... New Trial Day, Q. B. Open Day, C. P.
8. Sat... Easter Term ends.
9. SUN.. *2nd Sunday after Trinity.*
11. Tues.. General Sessions and County Court Sittings in each county.
14. Fri... Last day for Courts of Revision finally to revise assessment roll.
16. SUN.. *3rd Sunday after Trinity.*
20. Thur. Accession of Queen Victoria; 36th year of her reign commenced.
21. Fri... Longest Day.
23. SUN.. *4th Sunday after Trinity.*
29. Sat... *St. Peter.*
30. SUN.. *5th Sunday after Trinity.*

CONTENTS.

The Local Courts'
AND
MUNICIPAL GAZETTE.

JUNE, 1872.

The Legislature of California has passed an Act compelling persons who commence suits for libel to give security for costs.

In Virginia, whipping is said to be the favourite mode of punishing petty convicts. An exchange reports that "Every county and city has its post, its thongs, and its whipper." No rogue there goes "unwhipt of justice."

A bill has been introduced into the Legislature of Illinois, with reference to the management of railway trains. It provides that an engineer or conductor who is found drunk while on duty, shall be fined $100; and if, by his negligence, any injury occurs to person or property, he may be imprisoned, and fined $1,000.

An Act has been passed by the Pennsylvania Legislature, extending the competency of persons to be witnesses in criminal cases. It provides that in proceedings where the crime is not above the grade of misdemeanor, the person charged shall, at his own request, but not otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, or comment made upon, such neglect or refusal, by the counsel in the case, during the trial. Proceedings in forgery and perjury are excepted from the operation of the Act.

Statutes similar to this are already in force in some of the other States; for example, New York and Maine. Attempts have been made, chiefly by Lord Brougham, to introduce such a law into the English system, but hitherto in vain. We should like to know how the clause which lays it down that "no presumption shall be created against any person withholding his testimony," is to be carried out practically. It would puzzle even the traditional "Philadelphia lawyer" to prevent such a course of conduct from raising a prejudice in the mind of the jury against the person incriminated. We apprehend, however, that no serious injury will result in such a case, as almost every innocent person will

seize the opportunity of clearing himself upon oath. Much might be said both for and against this enlargement of the law of evidence, but it is not necessary now to dwell upon the subject.

Lawyers are often blamed by their clients for giving wrong opinions on points of law, or rather for expressing views which are not sustained when the cases come before the courts, and this, in the minds of the suitor, means the same thing. We should recommend complaining litigants to read the judgment of the Court of Appeal in *Forsyth* v. *Galt et al.*, where a question arose on the construction of a will as to the estate taken under it by a devisee, one C. It was held by Draper, C. J., and Gwynne, J. that the gift to C. was an estate in fee simple, subject to an executory devise over in the event of his dying without issue; by Wilson, J., and Morrison, J., that C. took a fee simple absolute; and by Strong, V. C., that C. took an estate tail, with remainder over in the event of his dying without issue.

There would be, however, the advantage in this case, that it would be scarcely possible to have given an opinion that would not have received the support of at least *some* of the Judges on the Bench.

EQUITY IN COMMON LAW COURTS.

When Sir John Richard Quain was lately called to the dignity of Serjeant-at-law, preparatory to his elevation to the Queen's Bench, he gave rings with the motto, "*Dare, facere, præstare.*" Inasmuch as Mr. Quain was one of the most active and efficient members of the Judicature Commission, the English *Law Journal* predicts that his adoption of the motto of the Roman *prætor* indicates that he expects to administer equity as well as law. A marvellous prospect this, as compared with a characteristic scene of former days, when Erskine's joke pretty fairly represented the value of equity in the eyes of common law men. On one occasion, when Lord Kenyon, after deciding against the plaintiff's action, observed that he might resort to a court of equity for relief, Erskine was heard to ejaculate, in a tone of inimitable simplicity, "My Lord, would you send a fellow-creature there?" The spirit of Erskine is still alive, though without such justification as he had, among the common law Bench and Bar. Division of jurisdiction, leaving the two systems of law and equity to run in distinct channels, will, at least until a perfect system of fusion is discovered, secure more satisfactory results than the turbid admixture which even now is manifest as a result of the equitable clauses of the Common Law Procedure Acts. Judging by the experience of the past, the administration of law and equity by one and the same court, and by one and the same set of judges, is not very encouraging. When the English Court of Exchequer possessed equity jurisdiction, it was of all courts the most unsatisfactory, so far as the causes on the equity side were concerned. The ability of even an Alderson was taxed to the uttermost to fulfil the diverse duties devolving upon him; and it is not to be expected that by Darwinian or other selection, there will be a succession of such Judges in new courts of multifarious jurisdiction. The constitution of our own Court of Error and Appeal, where a preponderance of common law Judges entertain appeals from the Court of Chancery, is another and nearer example of the unfairness of submitting pure questions of equity to a common law tribunal.

Our attention has been called to this subject by the case of *Shier* v. *Shier*, 22 C. P. 147, where, upon the validity of an equitable plea, Mr. Justice Gwynne dissented from the other two members of the court. Ever since the right to plead equitably at law has been given, the majority of common law Judges have sought to restrict the right within the narrowest bounds and by the sheer weight of numbers, not of reason, they have prevailed. It is now, it seems, a cast-iron rule in England that a plea on equitable grounds can only be supported at law in cases where a court of equity would, under similar circumstances, decree an absolute, unconditional and perpetual injunction. Yet at the first, such Judges as Jervis, C. J., and Crowder, J. (in *Chilton* v. *Carrington*, 16 C. B. 206; and see S. C. 3 Com. L. R. 606), raised their voices in dissent, and in favour of a more liberal construction of the statute. In this Province, Mr. Justice Gwynne may be ranked among the number of able dissentients who have been outnumbered by their judicial brethren. Yet professional opinion is in favour of the minority. We cite what is perhaps the most remarkable expression of this opinion from an able article published in the *Law Magazine*, vol. vi. N. S. 252, part of which is as follows:

"The admission of equitable pleas and replications was the result of a laudable desire to save expense to both parties in cases wherein a suit at law would certainly be stopped in equity—in a word, to make the principles of one tribunal co-operative with, and no longer antagonistic to, the other. The words of the Act on this subject are large enough to let in any defence which shows matter for injunction; but the alleged necessity, or rather supposed convenience of the case, has induced the Judges to limit equitable defences to those cases in which the plea shows that an injunction absolute and unqualified would be granted in equity against the prosecution of the suit; but wherever something more would have to be done in equity than staying the action—as for instance a reforming of the contract, or taking an account—the courts of law have refused to allow an equitable plea, because they say that they have no machinery for working complete justice. If there be no machinery, however, it could be supplied readily and naturally by a proper development of the Master's office. At present, by repudiating the powers which were given to them, that they may do complete justice in any cause, the courts have either stultified the meaning of those who designed the provision for equitable jurisdiction, or have evaded a duty."

Shier v. *Shier* was an action for breaches of covenant in a farming lease. The covenant, as drawn, provided that the defendant should, during the term of five years, use in a proper manner upon the demised premises all the straw which should be raised thereon, and that he should not cut any standing timber, except for rails, buildings or firewood; and that he should not allow any timber to be removed from the demised premises. The defendant's pleas, on equitable grounds, were in substance that before the execution of the lease, the agreement of both parties was that the defendant should be allowed to remove straw from the demised premises to his own lot adjoining, provided he should use on the demised premises every second year, all the manure made on his own farm and the demised premises; which term, as to the manure, was expressed in the covenant: that through error of the conveyancer who acted as agent for both parties, and by mutual mistake, it was omitted to limit the covenant as to the straw; and that one of the alleged breaches was the defendant's removing the straw to his farm adjoining: that as to the timber, it was the agreement, &c., that the defendant should be allowed to cut down standing timber on the demised premises to burn at his own house on the farm adjoining, and that by mistake of the said conveyancer, he omitted to qualify the covenant accordingly, and the alleged breach was occasioned by the defendant cutting and removing wood from the demised premises for his own house on the farm adjoining. The majority of the court held, upon demurrer, that as the term was still current and the contract executory, complete justice could not be done between the parties in a court of equity without a reformation of the covenant, which, as a court of law, they had no power to enforce. Gwynne, J., dissenting, held that complete justice could be done between the parties to that action without any reformation of the covenant.

Admitting that the weight of authority is with the majority of the court, as they state the case, yet in one point of view they seek to be more equitable than the Court of Chancery itself. The effect of a reformation of the covenant would be to limit it, to curtail the plaintiff's legal rights in such a way that it is not supposable he would ask as a condition of relief, upon bill filed to restrain his action, that the covenant should be reformed. The covenant as it stands covers every stipulation intended to be made between lessor and lessee, and something more: the suit is in respect of that something more, which it is admitted is an unjust claim. The covenant as it stands protects the lessor against every possible breach by the lessee both in respect to what was agreed between them, and as to other matters not so agreed. It would not benefit the plaintiff to have the covenant reformed as to these other matters; it would not in any way enable him more effectually to assert his proper rights in any subsequent suit.

Under these circumstances, it is manifest that a court of equity would restrain the suit in question; but it is not at all manifest that the lessor would ask a reformation of the unlimited instrument, or that a court of equity would impose a reformation upon him "in spite of his teeth," to use the vigorous judicial expression of Ventris, J., in *Thompson* v. *Leach*, 2 Ventr. 206. This point is adverted to by Gwynne, J., when he says, "for the doing which (*i. e.*, the reformation by a court of equity), for any practical purpose, no actual necessity appears to exist" (p. 159). On this point we should like to see the case go to appeal; but perhaps "*la jeu ne vaut pas la chandelle.*"

SELECTIONS.

THE LEGAL IMMUNITY OF LIBELLERS AND IMPOSTORS.

The recent scandal which has ended so disastrously for one of the most eminent and respected members of the Bar, draws attention to the present position of the law of libel, which it seems to us is not so satisfactory as it might be. In the first place the old saying, "the greater the truth the greater the libel," would appear to have been based upon a most just estimate of human character. A great truth may prove to be maliciously defamatory in the very highest sense of the term; the truth may be one which concerns only the persons implicated; it may be spoken or published to gratify private animosity of the most detestable kind. How then does the law say that it shall be dealt with? Putting aside the civil action to which a plea of the truth of the libel is a complete defence, the 6 & 7 Vict., c. 96, s. 6 enacts that, on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such a plea as thereinafter mentioned—that is to say, a plea of justification on the ground of the truth of the libel, and that it was for the public interest that it should be published—the truth of the matters charged may be inquired into, but the plea shall not amount to a defence, unless it was for the public benefit that the matter should be published.

Now upon this statute this condition of things appears. A person actuated by the worst motives may publish the most gross and scandalous libels, and may add to his iniquity by pleading in justification that they are true. And these libels are to be inquired into; the torture of public inquiry, which means the investigation of private character before the domestic forum of every household in the kingdom by means of the public press, is to be endured, with what results, whether to the innocent or the guilty, we have lately seen. It would be difficult for the most upright amongst us to stand a searching public examination into our lives, such an examination being conducted by a malignant and utterly unscrupulous enemy. Therefore it strikes us as a mistake in the enactment referred to to say that the matter shall be inquired into, and that subsequently, when all the torture of a preliminary inquiry has been endured, and private character made the sport of a coward, then the law shall say whether the truth, if proved, shall amount to a defence, by applying the test whether the publication was for the public benefit. Why not provide that at the very outset a libeller shall prove to the satisfaction of a magistrate that it is for the public benefit that the libel was published? If there had been such an enactment on the statute book could Chaffers have enjoyed for so many days his detestable notoriety? On the contrary he would now have been undergoing the punishment which he so richly deserves.

But we pursue the same lenient course towards all persons who can establish even a presumption of legal right. Our Continental critics laugh at us for permittting the Tichborne claimant to make the possessions of an ancient family and a lady's fair fame the sport of an audacious and villainous ambition. Why, they ask, did not the Attorney-General, as the only public prosecutor we have, at once fix upon some point and break the neck of an imposture, and consign the claimant to the police? We can reply that had such a course been attempted, the Attorney-General would have been hounded down by the lovers of "fair play," for at the present time there are advocates in the Press who wish that the case "had been tried out." And had such a course been possible, the difficulties in the way would have been very considerable—difculties which would not be encountered in adopting our suggestion as to libel. We reach the height of absurdity when we not only do not compel a libeller to justify at the outset, but furnish him with a statutory form for defaming private character.

We have seen it suggested that we should establish courts of preliminary inquiry, but although we approve of the suggestion we very much doubt whether our reverence for the liberty of the subject would allow us to carry it into effect. We now simply deter sham and vexatious actions by compelling security for costs or remitting to County Courts, but this does not prevent trials coming to the surface which ought to have been suppressed at the earliest stage of their career. We admit, however, the difficulties which would attend the attempt to control cases of the Tichborne type, but as regards libels we think the course is plain and simple. We ought at once to adopt measures to stop the foul mouth of the traducer before he makes a public court the vehicle of his calumnies, and if some such steps as we have indicated are not taken, there is no member of society who, is not subject to the caprice of any villain who can, or who thinks he can, hit a blot in his or her character, and who can bring upon his victim life-long ruin and misery. Cases such as those of Sir Travers Twiss ought not to pass without leaving a lesson in legislation as well as in morality.—*Law Times.*

Rumours are abroad that the Government intend to curtail the expenses of the Tichborne prosecution by confining the evidence to that which is obtainable in this country. We may state that two gentlemen are under orders to go to Chili and Australia, but they do not sail for a fortnight, and in the meantime there is to be a consultation of all the counsel engaged. Therefore, it cannot at present be stated positively that the advice of the Attorney-General will not be followed by the Government, but there appears to be some conflict of opinion between persons in authority, which it is quite possible may materially affect the conduct of the prosecution. —*Law Times.*

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

BANKRUPTCY.

The rescission and abandonment by an insolvent firm, of a speculation in which it is interested jointly with another firm, while the result is still uncertain, is in no way a fraudulent preference of the second firm.—*Miller* v. *Barlow*, L. R. 3 P. C. 733.

CRIMINAL LAW.

Held, following *Regina* v. *Bird*, 2 Den. C. C. 94, and *Regina* v. *Phelps*, 2 Moo. C.C 240, that on an in dictment for murder the prisoner cannot be convicted of an assault under 32 & 33 Vic. ch. 28, sec. 5. — *Regina* v. *Ganes et al*, 22 U. C. C. P. 185.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES

ANCIENT LIGHT.

To obtain an injunction restraining the building of a house, because of its diminishing ancient light and air, a substantial diminution must be shown. It appears that in such case a house is entitled not merely to a certain quantity of light sufficient for it, and no more, but to the quantity that has been anciently enjoyed. —*Kelk* v. *Pearson*, L. R. 6 Ch. 809.

CHARITABLE INSTITUTION.

A testatrix left property, consisting of pure and impure personalty, to the Dominican Convent at C., and to the Sisters of the Charity of St. Paul at S., payable to the superior for the time being in each case. The convent was an institution of Roman Catholic females, living together by mutual consent in celibacy, under a common superior, for the purpose of sanctifying their souls by prayer; and said Sisters of Charity formed an institution consisting of women living together by mutual consent, whose primary object was personal sanctification, and who as a means thereto employed themselves in works of piety and charity. *Held*, that the gift to the convent was good as to both the pure and impure personalty; and that the gift to the Sisters being to a charitable institution, was good only as to the pure personalty.—*Cocks* v. *Manners*, L. R. 12 Eq. 574.

COLLISION.

A collision occurred between two vessels, the G. and the E., by fault of the former, and the latter's main and fore mast soon went by the board. Afterward a pilot-boat fell in with the E., and attempted to tow her, but failed; the seaman of the E. might have got on board this vessel at great peril, but they stayed by the E., which was subsequently wrecked. Two of the E.'s men were drowned, and the others were injured. One of the drowned men left a widow with a child *en ventre sa mere*. *Held*, that the deaths and injuries were the natural and proximate consequences of the collision. That it was the seamen's duty to stay by the ship while there was reasonable chance of preserving her, but that if they would have been justified in going on board the pilot-boat, the danger therein created an alternative peril, and that therefore there was no negligence, in the seamen, whichever alternative was adopted. Leave was reserved to the infant *en ventre sa mere* to claim damages if born alive within due time.—*The George and Richard*, L. R. 3 Ad. & Ec. 466.

DESCRIPTION OF LAND.

P., owning land on both sides of a stream, conveyed a piece on the south side described as extending "to the water's edge of the creek, then keeping along the water's edge of said creek with the stream until," &c.; reserving a road fifteen feet wide along the bank.

Held, to pass the land to the centre of the stream.—*Kains* v. *Turville*, 22 U.C. Q.B. 17.

PAROL AGREEMENT.

An alleged parol agreement said to have been entered into contemporaneously with a covenant under seal, was not permitted to control the covenant, the parol agreement having been proved by one witness only, whose intention to speak the truth was admitted on all hands, but the accuracy of whose recollection was not confirmed by other evidence.—*Lewis* v. *Robson*, 18 Chan. Rep. 395.

TAX TITLES.

1. Land sold for taxes under C. S. U. C. ch. 53, was described in the assessment roll, advertisements, and treasurer's warrant, as the south part of the west half of lot 17, in the 9th concession of Rawdon, 75 acres; and in the sheriff's deed by metes and bounds. *Held*, that according to *Knaggs* v. *Ledyard*, 12 Grant. 320, and *McDonell* v. *McDonald*, 24 U. C. Q. B. 74, such description was insufficient.

Wilson, J., but for these decisions, would have held the description sufficient, as meaning the south 75 acres oi the west half.—*Booth* v. *Girdwood*, 22 U.C. Q.B. 23.

2. *Held*, per Richards, C. J., Wilson, J., Mowat, V. C., Galt, J., and Strong, V. C., that the statute 27 Vic. chap. 19, sec. 4, cures all errors as regards the purchaser at a tax sale, if any

taxes in respect of the land sold had been in arrears for five years; this rule applies where an occupied lot has been assessed as unoccupied: [Draper, C. J., doubting; Hagarty, C. J. and Gwynne, J., expressing no opinion.]

In a suit to impeach a sale of land for taxes, it appeared that about 20 or 30 acres of the lot were cleared and fenced, and a barn was erected thereon, into which hay made on these twenty acres was stored in winter, by the person occupying the adjoining lot under the authority of the proprietor; no one resided on the twenty acres; the owner was resident out of the country and had not given notice to the assessor of the township to have his name inserted on the roll of the township:

Semble, that the lot should have been assessed as occupied.

[Draper, C. J., Hagarty, C. J., and Gwynne, J., dissenting, who were of opinion that the lot was properly assessed as non-resident]—*The Bank of Toronto* v. *Fanning*, 18 Chan, Rep. 391.

CANADA REPORTS.

ONTARIO.

COMMON PLEAS.

MASON (ASSIGNEE) v. HAMILTON.

Insolvency—Prior distress for rent—32 & 33 Vic. ch. 16, sec. 81—Construction.

The 81st section of the Insolvent Act of 1869 (32 & 33 Vic. ch. 16) does not restrict the landlord to one year's rent, where he has distrained for more *before* the insolvency of the tenant, but he is entitled to all that is due within the limitation of six years.

Griffith v. *Brown*, 21 C. P. 12, distinguished.

[22 C. P. H. T. 191.]

This was a special case for the opinion of the Court, the point involved being the construction of the 81st section of the Insolvent Act of 1869, and the question whether, where a landlord distrains for rent on the goods of his tenant before the latter comes under the provisions of the Insolvent Act, by executing a voluntary assignment or by being subjected to an attachment in compulsory liquidation, he is, upon the insolvency proceedings taking place, restricted to the recovery of only one year's rent, although more may be due.

James Maclennan, for the plaintiff, referred to *Woodfall*, L. & T., last ed., 374, 378, 380; *Dor. & McRae*, Bankruptcy, 356–8, 368.

J. H. Cameron, Q. C., contra.

GWYNNE, J., delivered the judgment of the Court.

[After stating the point involved in the case:] It is said there were six years' rent in arrear. In order to put a sound construction upon the Act in question, it is necessary that we should regard the provisions and policy of former Acts, passed in *pari materiâ*, and the decisions thereon.

By the Imperial Statute, 6 Geo. IV. ch. 16, sec. 74, from which the 48th sec. of our Statute, 7 Vic. ch. 10, was taken, it was enacted, "that no distress for rent, *made and levied after an act of bankruptcy*, upon the goods or effects of any bankrupt (whether before or after the issuing of the commission) shall be available for more than one year's rent accrued prior to the date of the commission, but the landlord or party to whom the rent shall be due, shall be allowed to come in, as a creditor, under the commission, for the overplus of the balance due, and for which the distress shall not be available."

In *Briggs* v. *Sowry*, 8 M. & W. 729, it was held that this section only applied to rent which had accrued due before the bankruptcy, and that therefore where the assignees, under the 75th sec. of 6 Geo. IV. ch. 16, had declined retaining the bankrupt's lease, but the bankrupt had not delivered up the lease to the lessor, the property in the demised premises continued vested in the bankruptcy, and his landlord retained, until such delivery up to him, his right to distrain for rent which accrued due *after* the bankruptcy, as well as for that which was in arrear at the time of the bankruptcy.

The Bankruptcy Law Consolidation Act, 12 & 13 Vic. ch. 106, had a section (129) precisely similar, in its provisions, to the 74th section of 6 Geo. IV. ch. 16. It enacted that "no distress for rent, made and levied after an act of bankruptcy, when the goods and effects of any bankrupt, whether before or after the *issuing of the fiat or the filing of the petition* for the adjudication in bankruptcy, shall be available for more than one year's rent accrued prior to the date of the fiat or the day of filing such petition." In *Paull* v. *Best*, 3 B. & S. 537, it was held that to bring a case within this enactment the act of bankruptcy must be one to which the title of the assignees could relate, and consequently, where an act of bankruptcy had been committed by a tenant on 27th March, 1861, under the Act 12 and 13 Vic. ch. 106, but no attempt was made by any creditor to obtain an adjudication upon it, and on the 11th October, 1861, the Bankruptcy Act of 1861, 24 & 25 Vic. ch. 134, came into operation, with which sec. 129 of 12 & 13 Vic. ch. 106, remained incorporated, on which day the bankrupt's landlord distrained for four years' arrears of rent, and on the 17th October the tenant, who was not a trader, was adjudicated bankrupt on his own petition, under 24 and 25 Vic. ch 134, and assignees appointed, it was held that, as the title of the assignees did not relate back to the act of bankruptcy committed in March, but was derived from the filing of the bankrupt's petition for adjudication in bankruptcy, and as the distress was made and levied before that act, although after the act of bankruptcy committed in March, the distress could not be interferred with, nor could the landlord be prevented from recovering thereby his four years' arrears of rent.

It is apparent then, from these Acts, that it was not the policy of the Legislature to impair or in any manner interfere with the common law right of the landlord to levy by distress all rent due to him, not exceeding the six years fixed by the Statute of Limitations, unless the distress should be made and levied after the commission of an act of bankruptcy to which the title of the assignees related back, and so it has been decided in *ex parte Bayly*, 22 L. J. Bank. 26. The Imperial Bankruptcy Act of 1869, ch. 71, has given express legislative sanction to this principle. In

the 34th section it is enacted that "the landlord or other person to whom any rent is due from the bankrupt, may, *at any time*, either before or after the commencement of the bankruptcy, distrain upon the goods and effects of the bankrupt for the rent due to him from the bankrupt, *with this limitation*, that if such distress for rent be levied *after* the commencement of the bankruptcy, it shall be available only for one year's rent accrued due prior to the date of the order of adjudication; but the landlord or other person to whom the rent may be due from the bankrupt, may prove under the bankruptcy for the overplus due, for which the distress may not have been available."

In our Insolvent Act of 1864, there is no provision whatever impairing the right of the landlord to distrain for rent in arrear. So long as the goods were on the demised premises they were equally liable to distress after a voluntary assignment to an assignee, or after the appointment of an assignee in compulsory liquidation, as before. The Act providing that the tenant's property should pass to assignees, did not divest the landlord of his right to distrain the goods upon the demised premises; so that, the Act of 1864 being wholly silent upon the point, the landlord's right to distrain remained unimpaired. The Act of 1865 first introduced the clause which we have now to construe, and which is repeated in the Act of 1869.

The object of the Act of 1865 was, it is plain, to remove to a certain extent, for the benefit of the general creditors, the advantage which particular creditors may have acquired before the insolvency by superior diligence. By the 12th section it was enacted that "the operation of the 7th sub-section of section 2, and of the 22nd sub-section of section 3, in the Act of 1864," (namely, those sections relating to the vesting of the property of the insolvent in his assignee), "shall extend to all the assets of the insolvent, of every kind and description, although they are actually under seizure under any ordinary writ of attachment, or under any writ of execution, so long as they are not actually sold by the sheriff or sheriff's officer under such writ."

By the 13th section it was enacted that "no lien or privilege upon either the personal or real estate of the insolvent shall be created for any judgment debt, or for the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing, under such writ, the effects or estate of the insolvent, unless such writ of execution shall have issued and been delivered to the sheriff at least thirty days before the execution of a deed of assignment or the issue of a writ of attachment under the said Act."

And by section 14, it was enacted that "the preferential lien of the landlord for rent in Upper Canada, is restricted to the arrears of rent due during the period of one year, last previous to to the execution of a deed of assignment, or the issue of a writ of attachment under the said Act, as the case may be, and from thence so long as the assignee shall retain the premises leased."

By the Act of 1869 still further provision is made for the benefit of the general creditors, to the prejudice of a particular creditor who may have obtained judgment and execution.

By the 59th section it is enacted that "no lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects and estate of the insolvent, *if before the payment over to the plaintiff* of the moneys actually levied under such writ, the estate of the debtor shall have been assigned to an *interim* assignee, or shall have been placed in compulsory liquidation under this Act."

As relates to landlords, the provision in this Act, namely, section 81, is identical in expression with the 14th section of the Act of 1865, save that it is made to extend to Nova Scotia and New Brunwick, as well as to Ontario. There is however, a proviso to the 10th section of the Act of 1869, which may perhaps be found to throw some light upon the point in debate. In that section, which defines the effect of a voluntary assignment made to an *interim* assignee, it is "*provided* that no pledgee of any of the effects of the insolvent, or any other party in possession thereof, with a lien thereon, shall be deprived of the possession thereof without payment of the amount legally chargeable *as a preferential claim* upon such effects, except in the case, hereinafter provided for, of such pledgee or party in possession proving his claim against the estate and putting a value upon his security."

The question now is, what is the proper construction to be put upon the term, "the preferential lien of the landlord for rent," in the 81st section of the Act of 1869.

The term is used as if it had a well-known meaning recognized by law. Now the only case in which a landlord's right to distrain is spoken of as a lien at all, is in the case of his tenant's goods being taken in execution. In that case, it having been held that a landlord could not distrain the goods of his tenant taken in execution, because of their being *in custodia legis*, it was by 8 Anne, ch. 14, sec 1, enacted that "no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatever, unless the party, at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of any such execution or extent, pay to the landlord of the said premises all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking of such goods or chattels by virtue of such execution, provided the said arrears do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit the execution is sued out, paying the said landlord one year's rent, may proceed to execute his judgment as he might have done before the making of this Act." Chief Baron Gilbert, in his work upon distress, speaks of this Act as giving to the landlord a species of lien upon the goods of the tenant on the demised premises, though seized and taken in execution, and the object and effect of it is to give to the landlord a *preference*, to a certain extent, over the execution creditor: in that sense it may be termed a

preferential lien. Now, if this Act of Anne be the source from which the term is taken and introduced into the Insolvent Act, then the construction and effect given to the expression in the latter Act should be analogous to the construction and effect given to it in the former Act, from which it is taken; namely, that as an execution creditor, *after execution levied*, cannot have the benefit of the seizure without payment to the landlord of the rent for the year preceding the taking in execution, that is, preceding the accrual of the execution creditors' title to affect the goods, so neither can the assignee in insolvency remove the goods or appropriate them to the purposes of the Insolvent Act, without payment to the landlord of the rent for one year preceding the accrual of the title of the assignee in insolvency. It is not in virtue of the lessor *having distrained* that the Statute of Anne gives to the lessor a lien on the tenant's goods preferential to the rights of the execution creditor, but in the absence of any distress made. So, upon the like principle, the lien must exist as against the assignee in insolvency, under the Insolvent Act, although no distress had been made. If a distress had been made and levied before the sheriff came in with an execution, the Statute of Anne availed nothing: the distress levied prevailed over the execution. So, upon the analagous principle, the distress levied before insolvency takes place must prevail over the title of the assignee in insolvency. When a distress has been made and levied, the landlord is in possession of the goods distrained, as a pledgee; before the Statute of 2 Wm. & M. as a bare pledgee, but since that Act, as a pledgee with a power of sale. His position, in that case, seems precisely to correspond with the pledgee of the effects of the insolvent, with a lien thereon, mentioned in the above proviso, extracted from the 10th section of the Act of 1869. Mr. Maclennan's argument was, that this lien, acquired by a *previous* distress, was the only lien designated in the 81st section as the *preferential lien*, which was by that section restricted to the one year's rent. He contended that there could be no lien until the landlord, by distraining, had acquired possession; but that construction appears to be not only inconsistent with the proviso to the 10th section, with the terms of which the condition of a landlord who had distrained before insolvency precisely corresponds, but also inconsistent with the latter part of the 81st section itself; for the preferential lien there referred to is regarded as continuing in respect of rent accruing due after the insolvency, during the occupation of the assignee as tenant. This concluding part of the 81st section would seem to exclude the idea contended for by Mr. Maclennan, that the preferential lien arose in virtue of a distress *made and levied before the insolvency*, and would seem to give some pretext for a construction that the term "preferential lien of the landlord for rent," is used as equivalent to "*the right of the landlord to distrain for rent*," which is restricted to the "arrears of rent during the period of one year last previous to the execution of a deed of assignment, or the issue of a writ of attachment, and from thence so long as the assignee shall retain the premises leased." If this be what was meant, then we must, I think, construe the section as referring to the power of the landlord to distrain *after the insolvency takes place*, and not in any manner as impairing and defeating rights fully, and for good consideration, and *bonâ fide* acquired *before* the insolvency, in virtue of a distress, to which is attached by law the right of retaining possession of the goods distrained as a pledgee thereof, with power of sale, which power nothing can divest, short of payment of all rent in arrear, to the extent of six years' arrears. Of such a right, *bonâ fide* acquired before insolvency, nothing but the most express language can, I think, divest a landlord; and this construction is in accordance with the provisions and the policy of all the bankrupt laws which have from time to time been in force in England, which never professed to deprive a landlord of the rights which he had, in due course of law, acquired by a distress made and levied before the act of bankruptcy; and with us the equivalent to the act of bankruptcy is, the executing a voluntary assignment, or the issuing of a writ of attachment in compulsory liquidation.

The sound principle appears to be that involved in the provision above extracted from the 34th section of the Imperial Bankruptcy Act of 1869 (ch. 71), and what is therein embodied is, I think, the construction we must put upon our Insolvency Act of 1869, in the absence of any language more explicit than that contained in the 81st section. It may be, and no doubt is, very hard upon the general creditors, and most probably was never contemplated as an event likely to occur, or against which it was necessary to make provision, that a landlord should suffer his tenant to fall in arrear for six years' rent, and immediately upon the eve of insolvency execute a distress warrant, and so obtain a preference over the general creditors; but it would be a dangerous precedent, upon language such as is used in the 81st section of the Act, to deprive a landlord of the benefit which a distress made and levied before the insolvency has been always held to give to him, and which has never heretofore been interfered with by any of the Bankrupt Acts which have prevailed in England or in our own country.

I think the landlord is entitled to maintain his distress for the six years' rent, admitted to have been in arrear when the distress was made. In *Griffith* v. *Brown*, 21 C P 12, we held that the landlord was restricted to the one year's arrears of rent accrued due prior to the insolvency; but in that case the title of the assignee in insolvency had been perfected *before* the distress was made

Judgment for defendant.

REGINA V. STAFFORD.

License to sell spirituous liquors—Quashing of by-law under which issued—Conviction for selling quashed.

The quashing of a by-law, under which a certificate has been granted and license issued for the sale of spirituous liquors, does not nullify the license; and a conviction for selling without license cannot, therefore, under these circumstances, be supported.

[22 C. P. H. T. 177.]

K. McKenzie, Q C., obtained a rule to quash a conviction for selling liquor without license.

It appeared from the papers and affidavits filed that the defendant resided in the village of Almonte, and was a shop-keeper; that on or

about the 10th July, 1869, the Council of the township of Ramsay, in which township the village of Almonte is situated, passed a by-law prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment within the said municipality; that subsequently to the passing of the said by-law the village of Almonte had been set apart as a separate municipality; that after the separation had taken place, the corporation of the village of Almonte passed a by-law for regulating the granting of certificates for obtaining shop licenses for the sale of spirituous liquors within the said village; that after the passing of the said by-law the defendant applied for and obtained a certificate, and subseqently a license, authorizing him to sell spirituous liquors by retail in his shop, for which he paid the necessary fees, amounting to $75; that after the granting of the said license the said by-law was quashed; that on the 18th November, after the said by-law had been quashed, but during the time when the said license was in force, an information was laid against defendant for selling liquor without the license required by law. The defendant, in answer to such information, relied on his license as a defence, but the magistrate, treating the license as revoked by reason of the by-law, under which the certificate on which it had been issued, having been quashed, convicted the defendant, and against such conviction the defendant appealed.

Osler shewed cause, citing *Regina* v. *Strachan*, 20 C. P. 182: *Regina* v. *King*, 20 C. P. 246; *Regina* v. *Denton*, 18 Q. B. 761, S. C. Dearsley, C. C. 3; *Millbanke* v. *Grant*, 3 Q. B. 690; *Stevenson* v. *Oliver*, 8 M. & W. 234; *In re Barclay* v *Municipality of Darlington*, 5 C. P. 432.

McKenzie, contra, cited *Regina* v. *Ross*, Rob. & Harr. Digest, 127.

The Statutes are referred to in the judgment.

GALT, J.—We are of opinion that this conviction must be quashed. The defendant is in possession of a license properly granted to him, to be in force from the 14th of April, 1871, until the 1st of March, 1872, and it appears to us that a conviction for selling liquor without a license cannot be supported. It is true that the by-law under which the certificate for the license was issued has been quashed, but there is no provision in the Statute 32 Vic. ch. 32, for cancelling any license once issued. Sec. 13 enacts that "any member of a municipal corporation, or officer or other person, who shall, contrary to to the provisions of this Act, vote for, or issue, or cause or procure to be issued, a certificate for a tavern or shop license, shall upon conviction thereof, for each offence, pay a fine," &c., but nothing is said about making the license granted or such certificate null and void, or even revocable. It was argued before us, that because the by-law, under which the certificate had been granted, was quashed, therefore the certificate was void and the license vacated. I can find no authority in the statute sustaining such a view.

HAGARTY, C. J.—The license by the statute is granted by the Lieutenant-Governor, after certain preliminary certificates, &c.

In the case before us everything was done in good faith, and the defendant was duly licensed, in the sense that, when challenged with infringing the law, he was able to produce a formal authority from the proper quarter to act as he had done.

I am very strongly of opinion that magistrates have not the right, when the formal existing license is produced, to go behind it for the purpose of enquiring, not into the simple issue, is the defendant licensed or unlicensed, but whether certain preliminary requisites have or have not been complied with before the license produced had been given to the tavern-keeper. If they could do so the consequences might be serious. If an insufficient or informal bond be given; if too large a number of licenses be issued; that the tavern had only three instead of four bedrooms, or stabling for five instead of six horses; or that the inspector has made a mistake in his report as to the applicant's qualifications, &c., &c.,—in this view the justices might adjudicate and convict.

Sec. 34 of the Ontario Act, 32 Vic. ch. 32, provides: "In case any by-law respecting tavern or shop licenses is repealed, altered, or amended, no person shall be required to take out a new license, or pay any additional sum on his license during the time for which the same has been granted."

This seems to shew the desire of the Legislature to protect the interests of any person actually licensed for the current year. The only provisions in the statute as to invalidating a license seems to be in section 15. The applicant get his license from the issuer of licenses; then it is said, "provided the license shall be invalid, inoperative, and of no effect until the applicant shall have paid the sum fixed," &c.

In the latter case, if the amount were shewn not to have been paid, I have no doubt there could be a conviction, notwithstanding the production of a license; but in any case not so provided for, I think it contrary to all the ordinary principles of law to treat as a nullity a license issued by the highest authority in the Province, on the ground that some preliminary had not been complied with, and therefore that the license ought not to have issued.

GWYNNE, J., concurred.

Rule absolute.

CHANCERY.—MASTER'S OFFICE.

RE BAKER—BRAY'S CLAIM.

Insolvent Act—Double Proof.

1. The doctrine against double proof applies only when both estates are being administered in insolvency.
2. A creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately endorsed the note.

[Master's Office, Dec. 8, 1871.—Mr. BOYD.

Bray, the claimant, held notes made by Dawbarn & Co., and endorsed by Baker, a member of that firm. Baker died and his estate was being administered in Chancery by his widow, his executrix. Dawbarn & Co. went into insolvency, and Bray proved his claim upon the notes in the proceedings in insolvency. He then came in as a creditor to firm in the administration suit, and it was objected that he had elected to proceed against the joint estate of the parties.

S. G. Wood for Bray.

Snelling and *Keefer, contra.*

Mr. BOYD, Master in Ordinary.—Both parties cited and relied upon the decision of the Court of Queen's Bench in *Re Chaffey*, 30 U. C. Q. B. 64; but it was not very much help to a solution of the question discussed on this claim. That decision was upon the effect of certain clauses of the Insolvent Act of 1864 The facts were, that a partnership firm made a promissory note, which was endorsed by one of the partners to a creditor. The firm and the partner both became insolvent, and their joint and several estates were being administered in the Insolvent Court It was held that the endorsement of the partner was a security for the payment of the creditor's claim, but not a security from the insolvent firm or from the estate of that firm within the meaning of sec 5, subsec. 5, of that Act; consequently that that Act did not require the creditor proving on the partnership estate to put a value on this endorsement. In truth the case was not within the Act at all, but was governed by the general law as to securities held by a creditor, viz., that he can prove against the bankrupt estate retaining his security. Then the decision goes one step further—that if the partner's estate is in insolvency, the creditor retaining his security cannot rank upon the partner's separate estate as well as upon the joint estate of the partnership

The case before me was argued as if the question arose entirely under the Insolvent Act of 1869. Assuming this for the moment, then section 60 of that Act supplies words sufficient to include the endorsement of an insolvent partner, *i.e.*, one who has been made an insolvent under the Act, not merely a person unable to pay his debts in full—one of an insolvent firm, under the foregoing state of facts, within the securities which are to be valued and dealt with by the Insolvent Court. In this view the question should have been raised before the Insolvent Court when Bray proved his claim there. But here the partner who endorsed is dead, and his estate is being administered, not in insolvency, but by the Court of Chancery, and the special provisions of the insolvent Act do not apply to the case. The rights of the creditors proving claims in this office are to be measured by the extent of their rights if they had been suing at law the executrix of the partner on his endorsement, after proving upon the partnership estate in insolvency, such procee ings in insolvency being instituted after the partner's death Now, supposing Bray had been suing the executrix on her husband's endorsement, I know of no defence at law which she could set up: see per Mansfield, C. J., in *Heath* v. *Hall*, 8 Taunt. 328.

The rule laid down by Lord Lyndhurst, in *In re Plumner*, 1 Phil. 59, applies here: "If the creditor of a bankrupt *holds a security on part of the bankrupt's estate*, he is not entitled to prove his debt under the commission, without giving up or realizing his security. But if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound." Now, here the insolvent firm of Dawbarn & Co. are the makers, and Baker the deceased partner of that firm is the endorser; the claim of Bray is against the executrix of the endorser, clearly a third party as regards the partnership estate in insolvency. This is the opinion of the court in *Re Chaffey*, p. 70, though not necessary in that case for the decision of the appeal. See also *In re Sharpe*, 20 C.P. 82; and *Beas'y* v. *Beasly*, 1 Atk. 97. My conclusion is, that the creditor is entitled to prove for his full claim, and that my duty is to report the circumstances specially to the court, that they on further directions may impose any conditions that they think advisable upon this creditor, in view of his proving on the Dawbarn estate in insolvency. As to the mere right to prove without being obliged to elect, I may remark that even in Bankruptcy it is held that a joint and separate creditor ought to prove against both estates, but elect which he will be paid out of before he takes a dividend: *Ex parte Beatty*, 2 Cox. 218.

The case of *Ex parte Thornton*, 3 De G. & J. 454, a note of which Mr. Snelling very properly handed me, though it makes against his contention, is quite in point, and confirms the view I have taken, as it establishes the principle that the doctrine against double proof applies only when both estates are being administered in Bankruptcy. I also refer to *Ex parte Baurman*, Mont & Ch. 573; s.c. 3 Deac. 476; *Ex parte Stanborough*. 5 Madd. 89.

NOVA SCOTIA.

SUPREME COURT.

[Before the Chief Justice, Sir William Young, Kt.; Dodd, DesBarres, Wilkins, Ritchie, and McCully, JJ.]

DODGE v. THE WINDSOR AND ANNAPOLIS RAILWAY COMPANY.

The measure of damages where goods are injured in transitu — Payment into Court—Reduction of damages—New trial.

Where defendant, as a common carrier, tenders plaintiff at the place of destination, goods received to be forwarded, but injured so as no longer to be suitable for the purpose designed by the owner, the measure of damages to be recovered is their deterioration in value at the place of destination, in consequence of defendant's negligence, misconduct or neglect.

Plaintiff has no right to refuse to accept a deteriorated article, and claim the full amount of its value uninjured as damages.

[HALIFAX, Michaelmas Term, 1871.]

This cause came on for argument before the full Court in Banco, upon a rule *nisi*, granted by Mr. Justice Ritchie, who tried the same on the Western Circuit

MCCULLY, J., now (15th January, 1872.) delivered the judgment of the Court as follows:—

This was an action brought by plaintiff against defendant, tried before His Lordship, Mr. Justice Ritchie, at Kentville, in the Spring Circuit of 1871, and a verdict found for plaintiff A rule *nisi* to set aside the verdict was obtained by the defendants, and was argued during this present Term. The grounds taken and relied on were that the verdict was against law and evidence, and for misdirection.

The action was brought against the defendants as common carriers, and sets out in the usual way in the first count a contract to carry for hire from Halifax to Middleton, in Annapolis County, goods to be delivered by plaintiff to defendants.

Delivery is averred, and that all conditions performed, &c., and the breach assigned is non-delivery, whereby plaintiff was deprived of his goods for a long time, and the same were diminished in value.

The second count charges defendants as carriers for hire, and with having received of plaintiff a piece of oil cloth for the floor of plaintiff of the value of $30, to be carried from Richmond Station, Halifax, to Middleton aforesaid, and there delivered in good order and condition, &c., but that defendants did not use due care and skill in the carriage of said goods, but broke and damaged the oilcloth, whereby the same was wholly lost to plaintiff.

To this count, defendants pleaded ten pleas in all. First, that they did not promise as alleged. Second, goods not delivered to defendants for purposes, &c., as alleged. Third, goods were re-delivered to plaintiff within a reasonable time, &c. Fourth, goods improperly and negligently packed, which caused the damage and loss, &c. Fifth, goods damaged before they came to defendant's possession. Sixth, goods re-delivered in same condition as received of plaintiff. Seventh, denial that defendants were common carriers. Eighth, did not receive the goods for the purposes, &c, alleged. Ninth, defendants always ready to deliver plaintiff his goods in the same condition as received, and he refused to accept. Tenth, payment of money ($3) into Court under the usual plea. Plaintiff replied, money paid in not enough.

The facts of the case were substantially as follows:—Plaintiff was residing at Bridgetown, and had ordered a piece of oilcloth, 16½ feet square, from Halifax, to cover his dining-room. On its arrival by the defendant's railway, it was found to be broken or cracked, and more or less damaged. Its value was sworn to be nearly $30. Plaintiff, on seeing it and the condition it was in, asked the conductor, being defendant's officer in charge, "If the oilcloth was in as good condition as when received by the Company?" His answer was "No. It had been placed on some barrels of flour in place of putting it on the floor of the car. The barrels were standing on their ends, and they took the barrels from under the ends of the oilcloth, and the package dropped at one end. It was done at Wilmot, and that caused the damage." Plaintiff, thereupon, refused to accept possession. This statement of facts by plaintiff stands uncontradicted Beales, one of his witnesses, estimated the damage at $10. The point was broken and peeled up Morgan, another witness of plaintiff, says it was cracked through nearly at the middle. The acceptance being refused by plaintiff, the oilcloth was sent to Kentville to defendant's warehouse. This was plaintiff's case.

The defence was in no material point contradictory of, or inconsistent with plaintiff's case except as to the extent and amount of damage the oilcloth had sustained.

Vernon Smith, the Manager of the Road, estimated that a quarter of a dollar would repair the damage. Louis Dodge valued the damage at $2 50. S. Pratt had it unrolled, and got Robertson a first-class painter, to inspect it. Witness valued the damage at 50c, but considered that would be a high price to pay for repairing it. Witness was authorized to make plaintiff an offer, and offered him $2 as a compensation (it is to be assumed for the damages). Walker, another of defendant's witnesses, says it could be repaired for 25c, and be equally serviceable. John Dodge, a house joiner, "the damage could be repaired for 50c." Bouth Reid, a cabinet-maker, examined the cloth, and gives a minute description and a diagram, and adds it could be repaired for 50c, so far as durability; it might not look as well. The plaintiff and other witnesses were re-called, but their testimony was not in contradiction to that of defendants' witnesses, and does not affect the issue materially.

His Lordship, on the plea of payment of money into Court, explained to the jury that if they thought the damage sustained by plaintiff did not exceed the sum of $3, they should find for defendant, otherwise for plaintiff. His further direction was that if the article in this case was not seriously damaged, and was repairable, the owner was bound to receive it, and could claim what would compensate him for the damage, but if it was so seriously injured *that it could not be thoroughly repaired, he might refuse to receive it, and claim its value.* That in this case, they would be at liberty to give the whole value of the oilcloth, deducting the amount paid into Court, if they should think that, taking into account the value of the injury and what has been said about its repair, the plaintiff could not reasonably have been required to accept it, having in view the object for which he had purchased it, and the use to which he intended to apply it. The jury found a verdict for $23 50, the full value after deducting the $3 paid into Court.

The main question for the Court to consider in this case is whether the jury were properly directed on the point of law, arising out of the foregoing state of facts. In this Province there being no statutes qualifying the Common Law in reference to the responsibilities and rights of common carriers or railway companies, the naked question presents itself, in case of non-fulfilment by this class of bailees for hire to complete their contract, as to the delivery of goods in the condition in which they received them—what is the law in reference to damage of goods by a common carrier, and in whom is the property of a damaged chattel, as in this case more or less injured, while *in transitu?* In other words is the owner of the goods, being himself the consignee, as in this case, justified in refusing to accept them in their damaged condition, and in claiming from the carrier the entire cost of the article by reason of his failing to perform his contract to deliver in good order; or is the proper measure of damage the mere deterioration in value of the article by reason of the injury, giving no election to the consignee to refuse accepting the property and right of property continuing in himself?

On the part of defendant it was contended that there had been a misdirection. Add. on Torts, 490, and other authorities were cited upon this point, but the cases they contemplate are an entire loss or destruction of the article—loss from non-delivery in time and the like. But if this action is to be sustained and the full value of the goods recovered, because of a partial injury, and that reasoning based upon the fact

as it was put, that defendant has failed to fulfil his contract, the same reason should certainly apply when by carelessness or negligence or other unjustifiable cause, the carrier fails in his delivery as to time, and the plaintiff is injured by a decline of price in the market. Goods delayed may thus become comparatively valueless to the owner or consignee. But while cases as to the point in dispute here are difficult to find, and this may be, and probably is, because the plaintiff is attempting to establish a new principle; in other cases where carriers are in fault, as to delay in delivery, the amount of damage, and the principle as to measure and computation well settled and clear.

In *Simmons* v *S E. R. W. Co.*, 7 Jurist N. S. 849 Ex., Bramwell, B., said if goods are delivered too late by a carrier, the owner ought instantly to sell at market price and realize his loss, and the difference between the price he obtains by the sale at that time, and that which he would have obtained, is the only measure of damage, and see *Wilson* v. *Lancashire & York R W. Co.*, 9 C. B. N. S. 632. What pretence or reason can be urged why if a carrier commits a breach of contract by neglecting to deliver goods in time (intended perhaps for exportation), which in consequence of a ship having sailed, or for other cause the consignee no longer requires, that in that case the damage must be ascertained by sale, and yet if the breach occur by carelessness so that the goods are deteriorated by a slight injury, there must of necessity be another measure of damage.

The numerous cases cited as between vendor and vendee, and the right to reject or retain property, have no application here, and I have searched in vain to find a single case to show that negligence, carelessness or misconduct of any kind on the part of a common carrier, does more than entitle the contractor to recover damages for the non-fulfilment of his contract to the extent of the depreciation produced by the carrier's default. There is a large collection of cases in Fisher's Digest, under the sub-section "Damages," p. 1,498, with nice and technical distinctions, touching delivery, falling markets, prospective profits, but nowhere do I find that the consignee or owner has an election that enables him to divest himself of the property or the right of property in goods carried, whether injured or belated, and claim the full value from the carrier. To show how uncertain and capricious the rule would be, if it rested with a jury to find when the consignee might or might not decide to abandon his goods, no better case could be cited by way of illustration than the present. Beales, plaintiff's own witness, spoke of damage as high as $10 or a little over one-third of the value of the article, but if plaintiff had called an auction and sold the cloth, as he might have done, or had the damages appraised by competent judges, judging from what the other witnesses testify, it is by no means certain that the value of the cloth was so much depreciated, even as Beales represented.

If the principle contended for by plaintiff had ever had the sanction of an English Court of Law, viz., the right in special assumpsit to recover as here the entire value, surely some cases to that effect could be found in the books. My research has not rewarded me with any case or any principle that underlies or would countenance such a position, as is sought to be established. The absence of such, I remark, is only to be accounted for, I think, by assuming that the common law carrier, pretty well weighted with liabilities already, is not compellable at the election of the owner to take all goods damaged much or little, and account to him for their full value. I am, therefore, of opinion that his Lordship's direction upon this point cannot be upheld It was then contended on the part of plaintiff's counsel that the payment of money into Court on the declaration *generally* was an admission, not only of the contract as laid, of all conditions fulfilled, and of the breach, but of the total loss as set out in the second count. This position was urged with a good deal of confidence, but the court on the argument expressed a pretty strong dissent from any such position.

The doctrine of payment of money into Court, and its effect upon the pleadings and the case is to be found very ably and clearly discussed in Taylor on Evidence, sec 760 to 765, both inclusive, and it will there be seen that no such consequence follows from payment of money into Court, as that contended for by plaintiff's counsel. At sec. 766, it is said that although payment into Court admits the entire contract declared on, as also the specific breach in respect of which the payment is made, it does not admit any damages on that breach beyond the sum paid in, still less does it admit any other breach to which the payment does not apply. And the writer illustrates it thus, "payment of money into Court upon a count in a valued policy of insurance, which states a total loss by capture, admits the contract and the capture, but not the total loss; and the plaintiff therefore must still prove that he has suffered damage from the capture beyond the sum paid." The law upon this part of the case was properly put to the jury, and before the plaintiff was entitled to recover damages, ultra $3 paid in, it was incumbent on him to prove that he had sustained them.

Having carefully considered such of the cases cited on the argument as have a bearing upon the merits of this controversy, in my view of the matter, it falls within that category of which *Leeson* v. *Smith*, 4 N. & Man. 304, is an exponent. In that case it was decided where upon showing cause against a non-suit or a new trial, it appears that the verdict has been entered for an amount not warranted by the evidence the Court will make the rule absolute, unless the parties consent that the damages shall be reduced, in which case neither party pays to the other costs of the rule. See *Hussey* v. *Met. R. W. Co.*, 20 L T. N. S. 612.*

[* There is a singular absence of cases upon the principal point decided in *Dodge* v. *The Windsor and Annapolis Railway Company*. We find none touching upon it in our own or the English Courts. In *Redfield on Railways*, vol. ii. p. 185, it is laid down in conformity with the judgment of McCully, J., that "when the goods are only damaged, the owner is still bound to receive them, and cannot abandon and go against the carrier as for total loss." The same view of the law seems to be taken in *Angell on Carriers*, 4th Ed., § 482, note A. It would appear that if the goods are so much damaged as to amount to destruction of them, or if the nature of the property is so altered through negligence that it would amount to a conversion, then the owner is entitled to bring his action for the full value, otherwise his damages will be limited to the diminution in value resulting from the carrier's carelessness. *Scoville* v. *Griffith*, 2 Kern. 509.—EDS. L. J.]

ENGLISH REPORTS.

EXCHEQUER CHAMBER.

FROST v. KNIGHT.

Breach of promise of marriage—Repudiation of the contract before the time agreed upon for performance.

The defendant promised the plaintiff that he would marry her on the death of the defendant's father. Before the death of his father, the defendant announced his absolute determination never to fulfil the promise.

Held (reversing the decision of the Court of Exchequer), on the authority of Hochester v. De La Tour (2 E. & B. 678; 22 L. J. 455, Q. B.), that the plaintiff might at once regard the contract as broken in all its obligations and consequences, and sue for the breach thereon.

[Feb. 7, 1872.—26 L. T. N. S. 77.]

This was an appeal from the judgment of the Court of Exchequer, and was an action for a breach of promise of marriage, tried before Martin, B, at the Staffordshire Spring Assizes, 1870 Evidence was given to show that the defendant promised to marry the plaintiff on the death of his father, and also that he refused to perform the promise; while it was proved that defendant's father was still alive.

A verdict having been obtained for the plaintiff with £200 damages. *Powell*, Q C, obtained a rule, which was afterwards made absolute, for a new trial, on the ground that the learned judge ought to have nonsuited the plaintiff, Martin, B., dissenting (39 L. J. 227, Ex.; 23 L. T. Rep. N. S. 714). The plaintiff having appealed, the case was reargued last Trinity Term in the Exchequer Chamber before Cockburn, C.J., Byles, Keating, Lush, and Smith, JJ.

Feb. 8.—The judgment of Cockburn, C. J., Keating and Lush, J.J., was delivered by COCKBURN, C. J.—This case comes before us on error brought on a judgment of the Court of Exchequer, arresting the judgment in the action on a verdict given for the plaintiff. The action was for breach of promise of marriage The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule *nisi* was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event no claim for performance could be made, and consequently no action for breach of the contract could be maintained. A rule *nisi* having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin B. dissenting. And the question for us is whether the judgment of the majority was right? The cases of *Lovelock* v. *Franklin* and *Short* v. *Stone*, which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil the contract, an action will at once lie. The case of *Hochester* v. *De la Tour*, upheld in this court in the *Danube and Black Sea Company* v. *Xenos*, went further, and established that notice of an intended breach of a contract to be performed in future had a like effect. The law with reference to a contract to be performed at a future time where the party bound to performance announced prior to the time his intention not to perform it, as established by the cases of *Hochester* v. *De la Tour* and the *Danube and Black Sea Company* v. *Xenos* on the one hand, and *Avery* v *Bowlen*, 6 E & B. 953, and *Reid* v. *Hoskyns*, 6 E & B. 953, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations under it, and enables the other party not only to complete the contract if so advised, notwithstanding his previous renunciation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand the promisee may, if he thinks fit, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action on the breach of it; in which action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the prescribed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss. Considering this to be now settled law, notwithstanding anything that may have been held or said in the cases of *Philpotts* v. *Evans* and *Ripley* v. *Maclure*, we should have had no difficulty in applying the principle of the decision in *Hochester* v *De la Tour* to the present case, were it not for the difference which undoubtedly exists between that case and the present, namely, that whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, namely, the death of the defendant's father during the life of both the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself before the time of performance arises; but here we have a further contingency, depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise. After full consideration, we are of opinion that, notwithstanding the distinguishing circumstances to which I have referred, this case falls within the principle of *Hochester* v. *De la Tour*, and that consequently the present action is well brought. The considerations on which the decision in *Hochester* v. *De la Tour* is founded, are, that by the announcement of the contracting party of his intention not to fulfil it, the contract is broken; and that it is to the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time, and that an action may be at once brought, and the damages consequent upon nonperformance be assessed at the earliest moment, as thereby many of the injurious effects of such nonper-

formance may possibly be averted or mitigated. It is true, as is pointed out by the Lord Chief Baron in his judgment in this case, that there can be no actual breach of a contract by reason of nonperformance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in *Hochester* v. *De la Tour* proceeds on that assumption—a breach of a contract when the promisor repudiates it, and declares he will no longer be bound by it The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His right acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party and the announcement that it never will be fulfilled must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly. The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of future nonperformance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual nonperformance may therefore by anticipation be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must tend to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in such cases avert, or at all events materially mitigate, the injurious effects that would otherwise flow from the nonfulfilment of the contract; and, in assessing the damages for breach of performance, a jury will, of course, take into account whatever the plaintiff has done or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been or should have been diminished. It appears to us that the foregoing considerations apply to a contract, the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time, and we are therefore of opinion that the principle of the decision in *Hochester* v. *De la Tour* is equally applicable to such a case as the present. It is next to be observed that the law, as settled by *Hochester* v. *De la Tour* and the *Danube and Black Sea Company* v. *Xenos*, is obviously quite as applicable to a contract in which personal status or personal rights are involved as to one relating to commerce or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed in future. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to social status accruing on marriage, but a new status, that of betrothment, arises between the parties. This relation, it is true, has not by the law of England the same important consequences which attached to it by the canon law and the law of many other countries, nevertheless it carries with it consequences of the greatest importance to the parties; each becomes bound to the other; and neither can consistently with such a relation enter into a similar engagement with another person. Each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman more especially it is all important that the relation shall not be put an end to. Independently of the mental pain occasioned to the feelings by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions, nor could she admit of such approaches if made; while the breaking off of the engagement is too apt to cast a slur upon one who has been thus treated. We see therefore every reason for applying the principle of *Hochester* v. *De la Tour* to such a case, and for holding that the contract is broken on repudiation not only in its present but in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that as the desire for marriage and the happiness to be expected from it diminish with advancing years, where by the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished; and that consequently an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We cannot but think that in estimating the amount of injury, and the compensation to be made for it, the wasted years, if the contract were broken when the time for marrying had come and the impossibility of forming any other engagement during the intermediate time, should be taken into account and not merely the age of the parties and the then existing value of the marriage. It appears, therefore, manifest that it is better for both parties—for the party intending to break the contract as well as for the party wronged by the breach of it—that an express repudiation of the contract should be treated as a violation of it in all its incidents, and give a right to the party wronged to bring an action at once and have the damages assessed at the earliest moment No one can doubt that morally speaking a party who has determined to break off a matrimonial engage-

ment acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise is come. The reason is, that giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates the injury to the other party. It has been urged that there must be great difficulty in thus assessing damages prospectively; but this must always be more or less the case whenever the principle of *Hochester* v. *De la Tour* comes to be applied. It would equally exist where one of the parties by marrying another person gave rise to an immediate right of action. It cannot be said that the difficulty is by any means insuperable, and the advantages resulting from the application of the principle of *Hochester* v. *De la Tour* are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages. We are struck by the fact that the majority of the Court of Exchequer, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. But the rights and obligations of the parties arising here entirely out of contract, we are at a loss to see how such an action could be maintained. But be that as it may; as in such an action the damages would have to be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simplest course—the case being, as it seems to us for the reasons we have given, clearly within the decision in *Hochester* v. *De la Tour*—to hold that the present action for breach of contract may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the nonfulfilment of the promise, as though the death of the defendant's father—the event on which the fulfilment was to depend—had actually occurred. We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.

CORRESPONDENCE.

Attorney and Client—Privileged communications.

To the Editors of the Canada Law Journal.

Gentlemen,—I have carefully read over your observations respecting privileged communications between attorney and client in criminal matters, and you will excuse me for saying that I am not satisfied with them, and that they do not appear to bear upon this question at all. So far as such communications apply to matters of a civil nature, I agree with you that they are privileged. But the question is very different when it has reference to transactions affecting the public, and which public policy requires should not be concealed. In other words, such transactions are not privileged. The privilege which you appear to contend for, on behalf of attorney and client, does not extend to the members of any other calling or profession, and why, as a matter of abstract right, should it be granted exclusively to the members of the legal profession? The same arguments which you make use of in favour of the latter, might be used with greater force in reference to ministers of religion, because in the latter case a criminal might claim the right of unburdening his guilty conscience to his spiritual guide with a view of spiritual advice and reformation, while, in so far as members of the legal profession are concerned, such communications are solely made for the purpose of legal defence against a public demand for conviction and punishment. I do not think that the exercise of the privilege which you contend for, would be in any way advantageous, morally speaking, to the members of the legal profession, or that they should exclusively claim the privilege. Members of the legal profession are also members of society, and, as members of society, they cannot, by simply assuming their particular calling, divest themselves of their obligations to the public and claim thereby privileges which, upon considerations of public duty they ought not to possess.

In Taylor on Evidence, 3rd ed., p. 752. "If from independent evidence it should clearly appear that the communication was made by the client for a criminal purpose, as for instance, if the attorney was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence, it is submitted that, on the broad principles of penal justice, the attorney would be bound to disclose such guilty project. Nay, it may reasonably be doubted whether the existence of an illegal purpose will not also prevent the privilege from attaching, for it is as little the duty of a solicitor to advise his client to evade the law as it is to contrive a positive fraud." And in Note 2, same page, reference is made to several cases bearing upon the subject. Also, same note, "In *Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1229, Serjt. Tindall," in argument, lays down the rule thus: "If the witness is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it. No private obligations can dispense with the universal one, which lies on every member of society, to discover every design which may be formed, contrary to the laws of society, to destroy the public welfare.

For this reason, I apprehend, that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a case wherein he is concerned, the obligation to the public must dispense with the private obligation to the client." Two of the learned judges, who tried that remarkable case, Bowes, C.B. and Mounteney, B., expressed the same sentiments, p. 1240, 1243. See also *Gartside* v. *Outram*, 26 L. J. Ch. 115, per Wood, V.C.

In Greenleaf on Evidence, 11th ed., p. 332, note 3: "This general rule, privilege, is limited to communications having a lawful object, for if the purpose contemplated be a violation of law, it has been deemed not to be within the rule of privileged communications, because it is not a solicitor's duty to contrive fraud, or to advise his client as to the means of evading the law." *Russell* v. *Jackson*, 15 Jur. 1117; *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. R. 528.

Other authorities might also be given, but I consider the above sufficiently establish my proposition. A.

[Our correspondent asks why privilege should be granted to members of the legal profession, as a right, respecting communications with their clients in criminal matters? Whole essays have been written upon this subject; at present it is enough for us to reply in the language of Lord Brougham: "It is founded on a regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case." *Greenough* v. *Gaskill*, 1 M. & K. 103. A. cannot surely seriously argue for a return to the old law when prisoners were not allowed counsel—he cannot mean to contend that the Statute granting them this right was a mistake and should be repealed. What proposition of A.'s do his authorities establish? That a counsel, after being retained by a person charged (for example) with murder, after having heard all the details of his story under the seal of professional confidence, is forthwith to tender himself as a witness and convict his unhappy client? The language of Mr. Baron Mounteney, in one of the cases A. cites, confutes this: "Whatever either is or by the party concerned can naturally be supposed necessary to be communicated to the attorney in order to the carrying on any suit or prosecution in which he is retained, that the attorney shall inviolably keep secret." *Annesley* v. *Anglesea*, 15 St. Tri. 1242. The question is not as to whether the retainer is or is not to be accepted, but one in which the professional relationship exists. Now, what is established by A.'s citations is just neither more nor less than what we adverted to in our former article: *ante* p. 75. We said, "If the communication is made not as between client and professional adviser, nor in the usual course of business, or for a fraudulent or illegal purpose, then it is not protected." Now, it is not in the attorney's usual or proper course of business to concoct a fraud or give advice upon the way to evade the law, or to assist a man in contravening the law. In such cases the solicitor is viewed by the court as a co-conspirator, and no privilege attaches. See *Charlton* v. *Coombs*, 4 Giff 380. So in the case from the State Trials, one of the defendant's declarations to his attorney was, (speaking of the plaintiff,) that "he did not care if it cost him £10,000 if he could get him (the plaintiff) hanged." The judges held that this was not such a communication as any man living could possibly suppose to be necessary for the carrying on of the prosecution in question. Therefore, according to Mounteney, B., the attorney was not only at liberty to disclose it, but it was his duty to make it known, as indicating an abominable endeavour to make away with a man's life. According to Dawson, B., the client went beyond what was necessary, and entrusted the attorney with a secret, *not as an attorney, but as an acquaintance*, so that the privilege did not attach. As we said before, the law is well settled on the subject, and may be found in any text book, as A.'s letter demonstrates. If, however, A. is not satisfied, and thinks that an attorney should be a competent witness in criminal trials against his own client upon a matter affecting the guilt charged, we advise him to get the point before the judges, by tendering himself on a suitable opportunity before, say, Chief Justice Hagarty or Mr. Justice Gait.—Eds. L. J.