THE

Canada Law Journal.

OCTOBER, 1868.

THE PRESIDENT OF COURT OF APPEAL.

We make space at the last moment of going to press, to state, that Hon. W. H. Draper, C.B., having resigned his seat, as Chief Justice of Upper Canada, has been gazetted President of the Court of Error and Appeal.

It is understood that the Chief Justice of the Common Pleas takes his place.

CONSOLIDATED GENERAL ORDERS OF THE COURT OF CHANCERY.

Now that a sufficient time has elapsed since the promulgation of these orders, and the tariff of fees and charges, to enable practitioners to judge of the merits of the work by the test of practical experience of their efficiency, it may not be amiss briefly to enquire how far a work of this kind was necessary, and how far the end it was designed to accomplish has been attained.

Of its necessity, no practitioner who has had any experience of the state of things just previous to the issuing of these consolidated orders can entertain a reasonable doubt. Since the last partial consolidation in 1853, many alterations and additions had been made by subsequent orders, promulgated as the necessities of the business of the Court required. The large and steady increase of business in the Court, the progress of more enlightened views respecting procedure, the determination of the judges to expedite the final disposal of causes, and take away the reproach of unnecessary delays to suitors, which, whether well or ill founded, was constantly directed against the Court, and the action of the Legislature in from time to time conferring new jurisdiction—all these circumstances combined (or appeared to do so) to render necessary the repeated issue of fresh orders; and certainly cannot be said that any such necessity ever passed unheeded, for the fertility of resource and untiring energy of the learned judges of the Court seemed equal to any emergency in providing for the settlement of "new points." The occasion for further directions in matters of practice and procedure appeared to be so constantly arising, that the practitioner at length came to expect a new "batch" every month, with nearly the same certainty as he might expect his number of the *Law Journal*. Not only were wholly new orders promulgated—as under the "Act for quieting Titles"—but many old ones were abrogated in whole or in part, emendations and alterations were made in others, while some, though neither abrogated nor altered, had become practically obsolete.

Such a condition of things could not but prove more or less perplexing to all. Judges, practitioners and suitors alike were reduced to a state of rather bewildering uncertainty as to what were and what were not existing orders. For remedy a revision and consolidation was proposed, and has been carried into effect. The chief part of the work was, we believe, entrusted to the Judges' Secretary, whose well-known ability, practical experience and industry well fitted him for the task; but the whole work was, we understand, from time to time submitted to, and received a careful supervision from the Judges before it was given to the professional public.

It was to be expected, of course, that in a work of some considerable magnitude, where a great deal of old matter had to be got rid of, and a good deal of new introduced, without at the same time trenching any more than was absolutely necessary upon long established rules of practice, or unsettling well-considered decisions, some errors would creep in. A few "declaratory orders," as they are termed by the Judges, have been issued, for the purpose of setting right those errors which have been discovered; and a reference to them (printed in another place) will show how comparatively trifling were the errors to be rectified.

Taken as a whole, the work has been done in a thorough and satisfactory manner. One great point gained, and one on which practitioners ought to congratulate themselves, is that for some time to come (but for how long it is hard to say) they may feel pretty confident that all the existing orders of the Court, except the declaratory orders above mentioned, are to be found between the covers of this work, by which, to use the words of the first order, "from and after the first day of July, 1868, all the general orders of this Court which have been at any time heretofore made," are abrogated. But while thus uprooting all pre-

existing orders, the judges have taken care that they shall not be understood as intending to unsettle or disturb the rules of practice unnecessarily, and accordingly we find the second order providing that the abrogation before spoken of "shall not affect any practice of the Court * * * which originated in or was sanctioned by any of the orders hereby abrogated, except so far as the same may be inconsistent with anything hereinafter contained."

A number of useful and sensible changes have been made; much circumlocution has been got rid of; the length and consequent expense of some proceedings has been reduced, and a more simple plan of procedure in several cases adopted. Thus we find the old, unnecessary and practically inconvenient system of transmitting answers for filing, done away with; one short form of jurat substituted for the various prolix forms which had to be adopted when an answer or affidavit was sworn to; præcipe decrees in mortgage cases, which were seven folios in length, now scarcely extend to three; and the issuing of them in certain cases is entrusted to the Deputy Registrars, and final orders for sale or foreclosure are reduced to a minimum of verbiage. Formerly an order for committal for contempt for non-production of documents in the office of the Registrar or of a Deputy Registrar, could not be obtained except on personal service of the notice of motion: it is now sufficient, in case of non-production in the office of the Clerk of Records and Writs, to serve the solicitor of the defaulting party, if he has one, with the notice to commit; but it is questionable whether, in case of non-production in the office of a Deputy Registrar, personal service of the notice to commit is not still necessary. In addition to the remedy by committal for non-production, a plaintiff may now move to take the bill *pro confesso* against the defaulting defendant, and a defendant may move to dismiss the bill of a plaintiff who has neglected to produce. The business of the various Court days has been regulated in a different manner, and a new mode of signing, entering and issuing orders made in Chambers instituted. An office new in our Court of Chancery—that of Clerk of Records and Writs—has been created, and a new procedure in alimony suits introduced.

Nor has the important matter of fees escaped attention. The sheriffs have been liberally provided for by giving to them the service of all papers requiring personal service on parties within the jurisdiction, and providing that their mileage fees shall be paid before they can be allowed on taxation, as has long been the practice at common law. In a few instances an allowance has been made to solicitors for work which it was well understood they were constantly obliged to do, but for which the tariff did not warrant any change; but for the greater part, solicitors' fees have been left as they were.

We have thus briefly indicated a few of the changes introduced, though more remain to be noticed, did our space permit. In conclusion we think we may fairly say that the labours of the Judges and of their Secretary have proved a great boon to practitioners, and one which they must thoroughly appreciate. Neither the Judges nor the Secretary can be said to have too much spare time on their hands, and the undertaking and accomplishment of the work of consolidation and revision, in addition to their other duties, must have been no light task. The generally satisfactory manner in which the Consolidated Orders have so far worked in practice, proves how thoroughly the task has been executed; and if we might be permitted to offer an humble suggestion, it would be, that time should now be given to allow something of a settled practice to grow up under the orders *as they stand*, to be moulded by the care, experience and intelligence of those who have accomplished so good a work.

LEGISLATION.

Some remarks which lately fell from a learned Judge—no mean authority in such matters, and himself a careful, far-seeing lawmaker—are somewhat appropriate, in connection with the approaching session of the local Parliament. In remarking upon the confusion arising from the frequent passing of amending acts, and the difficulty in construing their often discordant provisions, he contrasted the difference between the mode of effecting legal reforms in England and in this country. There, the general practice was to give the law as it stood a fair trial, of sufficient length to ascertain its defects, and then to pass an act which should in itself remedy those defects.

But in this country there was an undue haste, to alter something in the existing law, which might appear at first to be defective, without waiting to see whether the actual working of the law might not show that this apparent defect was unavoidable, or in what way it could best be remedied; and without a sufficient consideration of other enactments touching the case. This amended act would be then again amended, and then another bit of the original act, and so make confusion worse confounded, and raise a dozen difficult questions for one before; until, at length, it would become absolutely necessary to consolidate all those conflicting provisions, with divers explanatory clauses perhaps added, then there would be another series of explanatory acts, and so on. The danger of this sort of legislation is increased where there is only one legislative body, as in this Province; one great safeguard of hasty legislation having been removed.

There is another matter in connection with this subject, which it is of importance to keep in view, and we have already spoken of it with reference to proposed changes in the law of Division Courts.

In all matters relating to the administration of justice in England the law officers of the Crown assume the responsibility of measures introduced in the House of Commons, and the bill, if not actually prepared by them, has their approval and sanction, and is submitted under their auspices. So it has been with legislation in Canada, and from the course taken last session by the Premier, and the information he has called for with reference at least, to one subject requiring reform, we doubt not the wholesome rule will be followed in the legislature of Ontario.

It is only those who are familiar with the administration of justice that can estimate the evils which spring from crude or party legislation, particularly in reference to the inferior courts—how extremely difficult it is in these courts, and by people that are not lawyers, to become accustomed to any change in the laws, or to adapt their business transactions to it. And we are strongly of opinion that the sooner it is understood that legislation on such subjects is to be under the sanction of the Attorney General the better will it be for that portion of the business community.

There is, of course, a natural desire with members of the legislature to have their names connected with statutes for the improvement of the law, but a little reflection will shew that it would be unwise and unsafe to relieve the law officers of the Crown of responsibility on this head. It is a wise rule which requires that legislation on any question of procedure in the Courts of civil jurisdiction, should not be undertaken on the individual responsibility of private members—unless indeed they have lost all confidence in the government for the time being, and have become antagonistic to them.

A new edition of "Harrison's Digest" is in course of publication in England, and will, it is said, be issued from the press early in 1869. Having some experience in such matters, we can scarcely hope that the expectations of the compilers will be fulfilled as to time, but however that may be, the Digest will be a great convenience to the profession, as it will bring down the cases to the present year.

When we are in actual possession of this late English Digest and long promised consolidated digest of Upper Canada cases, we may indeed, for a few years at least, hug ourselves with the supposed possession of the busy practising lawyer's *ignis fatuus* a *multum in parvo*.

DECLARATORY ORDERS OF THE COURT OF CHANCERY.

October 17, 1868.

550. In orders 88 and 120, the word "month" is to be read as lunar month; in order 260, the word "shall" is to be read as permissive; in order 288 the words "with the Registrar" are to be struck out; and in schedules C, D, N and S, the word "Registrar" is to be struck out wherever the same occurs, and the words "Clerk of Records and Writs" inserted in lieu thereof.

551. In accordance with the practice heretofore prevailing in the office of the Registrar, the fee of $2 payable on setting down a cause with the Clerk of Records and Writs, is to be payable only on the setting down of causes for examination and hearing, on motion for a decree, or, on bill and answer; in all the other cases the fee for setting down causes is to be 50c.

The following fees, which, before the naming of a Clerk of Records and Writs, were payable to the Registrar, are now to be payable in the office of the Clerk of Records and Writs:

Every Certificate of Registration.....	$0 50
Enrolling Order	0 50
Drawing Order, per folio.....	0 20
Entering same when necessary, per folio..	0 10
Entering Certificate of Title or Conveyance, per folio	0 10

552. A notice of motion under order 467 is to be served upon all proper parties at least fourteen

days before the day named for hearing the application.

(Signed) P. M. VanKoughnet, *C.*
J. G. Spragge, *V. C.*
O. Mowat, *V. C.*

SELECTIONS.

LORD CHIEF JUSTICE OF ENGLAND AND MR. JUSTICE BLACKBURN.

Few members of the bar who were present in the Court of Queen's Bench on June 8, 1868, are likely speedily to forget the memorable scene which then took place. Those who for thirty years had been accustomed to witness the stream of justice flowing in unruffled calmness through those hallowed precincts, felt for a moment as if the idea of Euripides had been realised, and the fountains were flowing up the sacred rivers. But it soon appeared that it was only a temporary obstruction which had occurred; and after the Chief Justice had vindicated himself and the law of which he is the guardian, and Mr. Justice Blackburn had offered his explanation of his apparently wayward course, it became obvious that "the fountains of justice" were undisturbed, however clearly it had been shown that the streams that are derived from them are liable at times to flow unevenly, as well as to "take tinctures and tastes from the soil through which they run." But the strangeness of the event which then took place calls for some comment from us; and we shall state the views we have formed with reference to it and the circumstances out of which it arose, with all respect for the eminent personages concerned, but without any attempt to conceal our own deliberately-formed opinion. We think there can be little doubt, however much it was to be regretted that any necessity should have arisen for the Chief Justice to repudiate the views stated by Mr. Justice Blackburn in his charge to the grand jury of Middlesex in the case of *Reg.* v. *Eyre*, that the former did no more than his duty in publicly expressing his disapproval of the charge of the senior puisne judge. Every one who read the report of the charge in the newspapers must have seen at once its inconsistency with the views stated in the charge of the Chief Justice in the case of *Reg.* v. *Nelson and Brand;* and when Mr. Justice Blackburn stated twice during the course of his charge that he had the concurrence of the Chief Justice in what he said, it certainly seemed at first that the only inference that could be adopted was that the Chief Justice had materially modified his opinions on a question of great importance. Logical as this inference for a moment appeared to be, we confess that we struggled against it. The views which the Chief Justice had laid down had been so clear, and his conclusions so well grounded, his opinions on martial law had been so consistent with themselves and with the whole of our legal system, and he had spoken with such a full conviction of their truth, that we could scarcely suppose that he had abandoned the strong position which he had formerly occupied. Sober reflection, therefore, has led us to the conclusion, that "Some one had blundered:" and where the blame lay has now become tolerably clear and intelligible.

After comparing what was said in court by the Chief Justice on the occasion referred to, with the explanation then given by Mr. Justice Blackburn, and after reading the letter of the former, and that of Mr. Justice Lush, the facts are obvious enough, and supply sufficient grounds on which a correct judgment may be formed. Before charging the grand jury in *Reg.* v. *Eyre*, Mr. Justice Blackburn had embodied the substance of the law he intended to law down in a paper. The view of the law therein contained, and which was assented to by the other judges of the Court of Queen's Bench, may be considered from the statement of the Chief Justice to have been as follows:—

"There was undoubtedly a proposition of law which seemed to us sufficient for the guidance of a jury, and which we understood was the form, if I may so express myself, the basis of the charge, on which proposition we were all agreed, viz., that assuming the governor of a colony had, by virtue of authority delegated to him by the Crown, or conferred on him by local legislation, the power to put martial law in force, all that could be required of him, so far as affecting his responsibility in a court of criminal law, was that in judging of the necessity which, it is admitted on all hands, affords the sole justification for resorting to martial law—either for putting this exceptional law in force or prolonging its duration—he should not only act with an honest intention to discharge a public duty, but should bring to the consideration of the course to be pursued, the careful, conscientious, and considerate judgment which may reasonably be expected from one vested with authority, and which, in our opinion, a governor so circumstanced is bound to exercise before he places the Queen's subjects committed to his government beyond the pale and protection of the law. Having done this he would not be liable for error of judgment, and still less for excess or irregularities committed by subordinates whom he is under the necessity of employing, if committed without his sanction or knowledge. Furthermore, we considered that a governor sworn to execute the laws of a colony, if advised by those competent to advise him that those laws justify him in proclaiming martial law in the sense in which Governor Eyre understood it, cannot be held criminally responsible, if the circumstances called for its exercise, even though it should afterwards turn out that the received opinion as to the law was erroneous. On the other hand, in the absence of such careful and conscientious exercise of judgment, mere honesty of intention would be no excuse for the reckless, precipitate, and inconsiderate exercise of so formidable a power, still less for any abuse of it in regard to the lives and persons of Her Majesty's subjects, or in the ap-

plication of immoderate severity in excess of what the exigency of the occasion imperatively called for. Neither could the continuance of martial law be excused even as regards criminal responsibility when the necessity which can alone justify it had ceased by the entire suppression of all insurrection, either for the purpose of punishing those who were suspected of being concerned in it, or for striking terror into the minds of men for the time to come. This was the substance of what we all concurred in thinking was the proper direction to be given to the jury as to the responsibility of a governor in applying or continuing martial law. This was all that appeared to us necessary to lay down in point of law."—*Daily News, June* 9, 1868.

It appears that Mr. Justice Blackburn had read the paper in which his views were stated to the other judges before the arrival of the Chief Justice in the room in which they assemble before going into court, but on the latter coming into the room Mr. Justice Blackburn made a verbal statement to him of what was embodied in the paper; and Mr. Justice Lush, in the letter already referred to, says that the paper contained only the general propositions mentioned by the Chief Justice in court, "adding that the application of the principles to the particular case required him (Mr. Justice Blackburn) to tell the jury what was the law of Jamaica." We gather that this reference to the law of Jamaica was not mentioned by Mr. Justice Blackburn in his verbal statement to the Chief Justice; but after the broad principles which the former had declared that he was prepared to lay down, it could scarcely be very material what he intended to say to the grand jury with respect to the law of Jamaica. We, therefore, attach no importance to what we assume was an omission in his verbal statement to the Chief Justice. Mr. Justice Lush further says of the paper—"In no other way did it refer to that law, nor did it state anything about martial law, or refer to the case of Gordon."

It is clear from this that the points mentioned by the Chief Justice in the passage we have quoted were the only matters of law stated by Mr. Justice Blackburn to the other judges, and the only matters of law, therefore, in which they expressed their concurrence. Now it may be admitted that Mr. Justice Blackburn in his charge to the grand jury did mention these points, and so far directed them in accordance with the views of the rest of the bench, but unfortunately he mentioned a great many more which he had not brought to the attention of the other judges, and which were directly opposed to the views expressed by the Chief Justice in his charge to the grand jury in the case of *Reg.* v. *Nelson and Brand.* With respect to the legality of martial law as applied to civilians, the meaning of the Jamaica statutes, and the removal of Gordon from Kingston into the proclaimed district, Mr. Justice Blackburn expressed opinions in a clear and decided manner which were not stated by him to the other judges, and which were totally opposed to those of the Chief Justice as laid down in the charge just mentioned. Not only was no account made of the views which the latter had stated with the greatest distinctness and force, but he was actually represented as sanctioning doctrines which ran counter to all that he had laid down with so much care as to show how fully he had considered the matter, and with so much clearness as to prevent the possibility of mistake.

The emphatic disclaimer by the Chief Justice of views which he was represented to have sanctioned, but from which he entirely dissented, was therefore not only perfectly justifiable, but imperatively called for. In a manner the most explicit, and in language the most unequivocal, he entered his protest against the opinions which had been expressed by the senior puisne judge in his charge to the grand jury of Middlesex.

"I differ, in the first place, from the learned judge in the conclusion at which he seems to have arrived that martial law, in the modern acceptation of the term, was ever exercised in this country, at all events with any pretence of legality, against civilians not taken in arms. The instance referred to is of most doubtful character. In the second place, while I never doubted that it was competent for the legislature of Jamaica to confer on the governors the power to put martial law in force. I entertain for the reasons I have stated elsewhere, very grave doubts whether the Jamaica statutes have any reference to martial law except for the purpose of compelling the inhabitants of the island to military service and subjecting them while engaged in it to military law. I abstain from expressing any positive opinion on so debatable a question, but I must, at the same time, say that, in my judgment, there is too much doubt on the subject to warrant a judge, in the absence of argument at the Bar and of judicial decision, to direct a grand jury authoritatively that these statutes warrant the application of martial law; nor does such a direction appear to me to be at all necessary, seeing that we are agreed that a governor, giving effect to those statutes in the sense in which they have been understood in the colony, would not be criminally responsible. But above all, I dissent from the direction of Mr. Justice Blackburn, as reported, in telling the grand jury that the removal of Mr. Gordon from Kingston into the proclaimed district for the purpose of subjecting him to martial law was legally justifiable."—*Daily News, June* 9, 1868.

With respect to the explanation given by Mr. Justice Blackburn, we cannot but consider it as unsatisfactory. It was neither a humble apology for what he had done, nor a vigorous defence of himself. It oscillated between the two, and it conveyed therefore the impression of a man who felt himself to be in the wrong, but who had not the generosity to admit it frankly. We are fully alive to the difficulty of the position in which the learned judge was placed; but a little more

boldness, or a little more candour, would have easily extricated him from the embarrassing circumstances which environed him. As it was, he left the matter very much in the same condition as it was when the Chief Justice finished what he had to say, and he did not succeed in the smallest degree in impugning the statements of the latter, far less in vindicating himself.

After carefully considering the matter, we have no hesitation in arriving at the conclusion that Mr. Justice Blackburn made a great mistake. Knowing as he did the opinions of the Chief Justice, it was his duty to explain to the other judges fully and explicitly the views which he intended to lay down to the grand jury. The statement which he made to the other judges did not contain the whole of what he did lay down in his charge, and in this he acted not merely unwisely, but, as we humbly think, unfairly. It was clearly his duty, after consulting the rest of the court, to adhere rigidly and scrupulously to the views which he had brought to their notice, and to which they had assented as sound and just. Even if he had said nothing in his charge as to the sanction which the other judges of the court gave to his views, this was the obvious and straightforward course which he ought to have adopted; but his error was greatly aggravated by his claiming their sanction for views which had never been brought to their attention, and which he must have perfectly well known were opposed to the express declarations of the Chief Justice.

In his explanation to the court, Mr. Justice Blackburn, after referring to the charge of the Chief Justice, said: "I came to the conclusion (it may be an erroneous one, but one which I still entertain) that there was no point on which it was necessary to give the grand jury a direction on which my opinion as to the law was in conflict in any way with any direction contained in that charge." It has been suggested that Mr. Justice Blackburn may have attached some technical meaning to "a direction," and that he did not consider the other parts of his charge touching on legal matters as coming under that category. We acquit the learned judge of quibbling of this sort. Neither do we for a moment suppose that he so totally misapprehended the scope of what the Chief Justice had said, as these words would seem to imply. The declaration seems to us only one of those unmeaning things which a man says when he finds himself in a disagreeable position and must say something, but has not the good feeling to say the right thing.

But the statement of the Chief Justice on one point makes the error of Mr. Justice Blackburn still more serious. It appears that almost on the eve of the delivery of the charge, the opinion of the latter was that the apprehension and removal of Gordon were in point of law unjustifiable. The Chief Justice says: "It certainly was so understood by other members of the court, and I believe I am warranted in saying, that the statement of the learned judge to the grand jury on this head took the other members of the court as much by surprise as it certainly did me." Mr. Justice Blackburn made no attempt to explain his extraordinary change of opinion on this vital matter, and we believe for the very simple reason that it was impossible for him to do so. The feeling of the learned judge seemed to be a dogged determination to brave the whole thing out without explaining. In the circumstances in which he was placed a man of a sensitive mind would have called on the mountains to cover him, or would have turned resolutely on the Chief Justice and fought *à l'outrance*. But Mr. Justice Blackburn did neither, and therefore excited little sympathy on the part of the crowded Bar, who witnessed the strange and painful scene.

We do not ascribe to Mr. Justice Blackburn any unworthy motive for what he did, or for what he failed to do. His whole conduct in this matter has the appearance of a freak—of an *escapade*—of a temporary aberration. The actions of men are in general governed by certain motives, and when these motives are very recondite, it requires a large amount of sagacity to discover their exact nature and operation. But cases occasionally arise which are entirely abnormal, and where things are done which are utterly inexplicable on any of the ordinary principles which regulate human actions. We are inclined to rank the conduct of the learned judge under this class of cases, rather than to ascribe it to any of the causes which have been suggested, and which we think it quite unnecessary to mention. Mr. Justice Blackburn is no doubt an excellent lawyer and an able judge, but he possesses perhaps too much of the *perfervidum ingenium* of his countrymen, and there are times when, even with the wisest of our northern friends, this quality escapes for a short season from the prudence which in general directs its action. We do not think that anything more can be said with respect to the case now before us, and we are happy to believe that this is really the sum of the whole matter. The thing was an untoward accident, and the sooner it is forgotten the better.

We have formed our opinion of the conduct of Mr. Justice Blackburn quite irrespective of the consideration whether the law he laid down, in opposition that contained in the charge of the Chief Justice, was right or wrong. Neither have we been influenced by the importance of the question involved, but have endeavoured to treat the matter as if the bill presented to the grand jury had been for the non-repair of a highway, or for refusing to serve the office of petty constable. But we cannot conclude without expressing our dissent from the views stated by Mr. Justice Blackburn, and our full concurrence in the opinions of the Chief Justice. In the charge of the latter in the case of *Reg.* v. *Nelson and*

Brand, the question of martial law was fully discussed, and the views arrived at supported by unquestionable authority and irrefragable argument; but Mr. Justice Blackburn rested his opinion on his own mere *ipse dixit*, and assumed certain doctrines as if the whole matter were too clear for argument. Even if the admirable exposition of the Chief Justice had not been in existence, this would have been rather too much for those who, like ourselves, had always considered the law of England as something which could not be set aside on any emergency, or for any reasons of state, or in consideration of any end to be gained, however great that might be. But to proceed in laying down the law on this vital matter, as if all that the Chief Justice had said with so much force of argument and clearness of statement went for nothing, was still worse. In a question of smaller importance this might have called forth only a slight censure, but when the highest points of our law were touched, it must be emphatically condemned.

On the case of Mr. Eyre we do not desire to pronounce any judgment, although we cannot but remark that on the facts Mr. Justice Blackburn exhibited an undue bias in favour of the defendant. The question of the guilt or innocence of the ex-Governor of Jamaica is one thing, but the question of what is the law of England on a subject of primary importance is a very different matter. The charge of a judge as to facts, like the verdict of a jury, however erroneous it may be, does not affect the law applicable to the case. But when the senior puisne judge of the Court of Queen's Bench lays down the law to the grand jury of Middlesex, on a matter of vital moment, according to his own private interpretation, and claims for his peculiar views the sanction of the Court which he represents, the country owes a deep debt of gratitude to one who, like the Chief Justice, boldly comes forward to assert the true doctrines of the law of England, and to vindicate the high Court over which he so worthily presides. Among his many claims to the esteem and admiration of his countrymen, this will assuredly not be regarded as the least.—*Law Magazine.*

CONSTRUCTIVE NOTICE.

We take it to be a principle of English law, that the purchaser of an estate is put upon inquiry into the existence of obligations on his part necessarily arising from the nature or situation of property irrespective of actual notice of those obligations. This principle was fully considered and elucidated by Lord Romilly, M.R., in the recent case of *Morland* v. *Cook*, 16 W. R. 777. The case also involves the consideration of the doctrine of *Spencer's case*, 5 Rep. 16, as to covenants running with the land; but our chief object at present is to address ourselves to the consideration of the foregoing principle.

The facts before the Court in *Morland* v. *Cook* stated as follows:—The owners in fee simple, under a deed of partition, of five adjoining estates in Romney Marsh, covenanted with each other upon the partition in 1792, that a sea-wall, which was for the common benefit of all should be maintained and kept in repair at the expense of the owners of the time being of the estates, that the expenses of repairing the sea-wall should be borne ratably, and that the expense of each owner should be a charge on his estate. The lands in question have been reclaimed, and lie several feet below the level of ordinary high-tides; they would, in fact, but for the protection the wall affords, be covered every day by the sea. People who live above the level of high-water mark, as a rule, concern themselves little with the rights and interests of those who live in levels and marshes under the protection of of sea-walls, and are little acquainted with the law of sewers so quaintly dealt with by Callis in his readings on sewers. That author tells us (p. 114) that there are nine ways whereby the duty of repairing a sea-wall arises—namely, by frontage, ownership, prescription, custom, tenure, covenant, *per usum rei*, assessment of township, and, finally, by the law of sewers. We return, however, to the case before us. The property—the liability of which under the covenant to maintain the sea-wall was the question in dispute—formed part of one of these estates, having been conveyed by the grantee under the deed of partition to a purchaser in 1829, and by him, in 1862, to the present defendant. This gentleman contended that he was a purchaser for value without notice of the liability under the covenant to repair, and therefore exempt from the obligation, because the contract under which he purchased contained a clause prohibiting him from inquiring into the title previous to the conveyance of 1829. There is no doubt that a special condition of sale limiting the extent of title is no excuse for a purchaser not insisting on the production of a deed beyond those limits, of which he had notice: *Peto* v. *Hammond*, 30 Beav. 495. But in this instance the defendant put in evidence to show that neither he nor his solicitor, had any knowledge or belief that such an obligation existed. The main question therefore, before the Court was this, whether, in the absence of actual notice of the obligation, the defendants were bound to repair, upon the obligation of making enquiry arising from the nature of the property so as to amount to constructive notice.

It is hard to imagine a case to which the doctrine of implied or constructive notice applies more nearly than the situation of an owner of marsh or fen land lying below high water mark. It must be obvious to any person of ordinary discernment holding land in such a district to what he owes his protection from the rising tide. No person, indeed, purchasing property of this kind could shut his eyes to the fact that the very existence of his

estate is due to the bank which protects it being properly maintained. Nor, as we think, can a man be heard to say that he is exempted from liability, and which a reasonable person would be bound to make.

The case of *Rex* v. *The Commissioners of Sewers of the County of Essex*, 1 B. & C. 477, where the duty of maintaining a sea-wall was cast on a proprietor by reason of frontage, seems to decide merely this, that where an owner of land in a level is bound to repair a sea-wall abutting on his land, the other owners in the same level cannot be called upon to contribute to the repairs of the wall, although it has been injured by an extraordinary tide and tempest, unless the damage has been sustained without the default of the party who was bound to repair. The case is shortly reported, at least shortly for such laborious reporters as Messrs. Barnewall and Cresswell, and does not appear to us to do much more than explain the circumstances under which one who repairs by reason of frontage is entitled to contributions from his neighbours. The Master of the Rolls, however, treats the judgment of Abbot, C.J., in that case as laying it down as a proposition of unquestionable law, that all persons enjoying the benefit of a sea-wall are bound, and are liable at common law, to repair and maintain it in the absence of any special custom to the contrary, or some special contract exempting them. "That, in my opinion, establishes this proposition as a necessary consequence," the Master of the Rolls is reported to have said, "that where a man buys land below the level of high water, and which would be daily covered by the overflow of sea water were it not prevented by the obstacle of a sea-wall, the purchaser has notice, and is already made aware, that by law he is liable to contribute to its repair."

It is plain, however, that this is a doctrine, which, unless guarded in its application, according to the view of it taken by his Lordship, may readily be carried too far. To allow liabilities not mentioned or referred to in the deed of grant to be implied against the purchaser would, in our judgment, be against public policy as tending to affect the security of possessions. The only exception that ought to be allowed is in cases where liability is, as it were, necessarily appendant to the estate, as in the case of an estate having a sea-wall for its frontage, where if a person took it without notice of the obligation to repair, the inference would be irresistible that it was incumbent on the owner for the time being to repair the sea-wall to the extent of his frontage for the benefit, not of himself merely, but of all the owners of land in the same level. We think that no stronger case can be conceived than this. The principle, in the opinion of Lord Westbury, C., and of the Master of the Rolls, was carried too far in *Pyer* v. *Carter*, 1 H. & N. 916, 5 W. R. 371. The Court of Exchequer held, in that case, that even in the absence of any reservation in the deed of grant the right to drain is reserved by implication of law over the part granted in favour of the part maintained, inasmuch as the grantee must have known that the water from the house must drain somewhere, and was therefore put upon enquiry. Now, an implication of this kind, in our humble judgment, is by no means so strong as the implication in the former case. Drains are under ground, and do not meet the eye of an intending purchaser in the same way as a sea-wall. And it is by no means a necessity that a house should be drained in any particular direction, or should be drained otherwise than into a cesspool situate on the premises; and the exact state of things could perhaps only be asceatained after a more careful inquiry than an intending purchaser is usually able to make. But when a piece of land is below the level of the sea, which is excluded from it by a sea-wall, the truth of the matter is obvious to the capacity. Lord Westbury, C., evidently thought that the doctrine of inferential notice had been carried too far when he so pointedly disapproved of *Pyer* v. *Carter*, in his judgment in *Suffield* v. *Brown*, 12 W. R. 356. We hope we shall not be thought presumptuous if we submit that *Suffield* v. *Brown* goes a little too far upon the other side of the true principle of equity. It will be seen, if we mistake not, that Lord Westbury held that if a grantor intends to reserve any right possessed by him over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant by the fiction of an implied reservation. Where the existence of the right is so obvious that it is inconceivable that its existence should be disputed, the omission to reserve it will sometimes occur, and when this is so it must surely be unreasonable that the vendor should lose a right which he would doubtless have reserved had its existence been less obvious. The doctrine of the American Courts on this subject will be found in Mr. Kerr's recent work on injunctions, p. 365, from which we make the following extract:—"The doctrine of *Pyer* v. *Carter* was also disapproved of by the Supreme Court of Massachusetts in *Carbrey* v. *Willis*, 7 Allen (Amer.), 354, and the true rule was there laid down to be in accordance with an earlier decision of the same Court in *Johnson* v. *Jordan*, 2 Metc. (Amer.), 234—that if the owner of two adjoining messuages or lots of land sells one of them, retaining the other, no reservation of the right of drain will be taken as reserved by implication of law over the part granted in favour of the part retained, unless it is *de facto* annexed, and is in use at the time of the grant, and is necessary to the enjoyment of the part retained. The principle laid down in *Pyer* v. *Carter* may be stated thus: —that if an easement be apparent and continuous, no express reservation is necessary in a grant of the servient by the owner of the dominant tenement. That the easement should be apparent and continuous is treated by Lord

Chelmsford, C., in *Crossley & Sons* v. *Lightowler*, L. R. 2 Ch. 478, as an immaterial circumstance: for *non constat* that the vendor does not intend to relinquish it unless he shows the contrary by reserving it. His Lordship grounded his decision on the rule that the law will not reserve anything out of a grant in favour of the grantor except in cases of necessity, which we take to be the case here. It seems that *Crossley & Sons* v. *Lightowler* was not referred to in argument. Had it been so we think that Lord Romilly would have considered it to express his own views of the law.

The case was in part argued upon the theory that the covenant of 1792 bound the land in the hands of the purchaser, being a covenant running with the land according to the first resolution in *Spencer's case*. And the Court was of opinion that the covenant which we have stated above was a covenant which extended to a thing in *esse*, the thing to be done being annexed and appurtenant to the land conveyed, which goes with the land and binds the assignee, although he be not mentioned in express terms; and even if this were not so, the Court was of opinion that it being manifest to the defendant when he bought his land that it was protected by the sea-wall in question, he was bound to enquire by whom that sea-wall was maintained, and must, therefore, be held bound to have had notice of all that he would have learned had he made such inquiry; and that, as by so inquiring he would have ascertained the existence of the covenant, he could not then repudiate that covenant, or refuse to perform the condition subject to which, virtually, he took the land. Whether or not the other parties to the covenant could enforce it at law, there is a class of cases of which *Tulk* v. *Moxhay*, 2 Ph. 774, is one, which establishes the principle that the right in equity to enforce performance of such a covenant does not depend upon whether the right can be enforced at law. The Court, in *Tulk* v. *Moxhay*, held that a covenant between vendor and purchaser on the sale of land that the purchaser and his assigns shall use, or abstain from using, the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land. The recent case of *Wilson* v. *Hart*, 14 W. R. 748, L. R. 1 Ch. 463, where the covenant was that the building was not to be used as a beershop, may be referred to on this point.—*Solicitors' Journal.*

ENGLISH AND AMERICAN LAWYERS.

We have had the pleasure of an interview with a member of the legal profession in New York, who unfortunately has come over at the commencement of our Long Vacation, and is thus disappointed in his expectation of seeing the courts sitting. Some points arose in our conversation which are particularly interesting at a time when the Profession in our own country threatens to assimilate itself to the Profession as it exists on the other side of the Atlantic.

In the first place we were anxious to know from a busy practitioner in New York, how the system of a single body, undivided as it is in England, works. We were not surprised to learn that the Bar, as it is called, is not very highly esteemed by the Americans. Entry into the Profession is easy; ejectment difficult. A few dollars for a diploma are all the costs necessary to incur before an aspirant may commence practice. The examinations are tolerably strict, and their stringency is not abated without good and reasonable cause.

When writing upon the suggested amalgation of the two branches of the Profession, we said that, practically, there would continue to be two classes of practitioners, although there would be an alteration of status. So we find it in America. Members of particular firms become eminent advocates, and thus obtain the business which belongs in England to the Bar. They are still, however, general practitioners, and when not engaged in court practice turn their attention to any general business of their office.

We showed our visitor two bills of costs which happened to be in our possession. They were, admittedly, very extraordinary specimens, and elicited some surprise, both on account of their intrinsic demerits and by reason of the fact that in America no costs are sent in to a client unless there be a suit. They are matter of agreement between attorney and client. Then with regard to taxation no costs whatever are allowed in connection with it. The officer does it as a matter of course, and each party is bound to appear without fee.

We then inquired of our visitor whether the absence of vestments on the bench operated adversely to its dignity. It was admitted that it did, but the remark was drily added that dignity was not accounted much of in America. The only distinguishing garment worn is a black gown, and that is confined to the Judges of one state only.

In the next place, knowing that much inconvenience is caused in this country by the difference of law and procedure prevailing in England, Scotland and Ireland, we inquired concerning the condition of America in this respect. We learned that a lawyer of one state rarely or never practises in another—that is, if he be conscientious, law and procedure both differing to so very considerable an extent. Thus we find that our acute cousins have managed to blunder in their legal arrangements in the same manner as the old mother country.

We cannot say that on the whole we are disposed to wish to see American legal forms and institutions introduced into England.—*Law Times.*

THE FRENCH BAR.

Sketches of two eminent French barristers, members of the Corps Legislatif, have been furnished to an evening contemporary. This is M. Berryer:—"It is singular that this great master of the art of oratory never addresses an audience without being seized during the first few moments of his speech with the same kind of trembling which Mirabeau confessed he invariably experienced under similar circumstances. No sooner, however, is he fairly embarked in his subject than this nervous feeling vanishes, and instead of quailing, as it were, before his audience, he appears to hold them in complete subjection. He rarely notices an interruption, but when he does it is with a disagreeable rejoinder, which at once insures silence. However intricate the question under discussion may be, he never refers to either documents or notes. His memory is the sole storehouse whence he draws his facts and illustrations, always apposite and always produced at the proper moment. He is perfectly indifferent as to the way in which his speeches are reported, and never has any intercourse with the short-hand writers of the Chamber, and, least of all, never troubles himself, like many of his colleagues, to read a proof of the report of his speech which is to appear in the *Moniteur* of the following morning." Of M. Jules Favre it is said that his "insinuating voice, eloquent academic language, gracefully rounded periods, and persuasive style of delivery, distinguish him alike at the Bar and in the Tribune. There is no man in France of whom the Democratic party are more proud, and there is certainly no man among the party of the same extreme opinions who are listened to with such attention and respect by his opponents in the Corps Legislatif. When, perhaps, some conversational discussion is going on which does not oblige the speaker to address the Chamber from the tribune, you may chance to see rise up from the fourth row of benches a man of commanding and well-developed figure, whose grey hair and white pointed beard give character to his grave-looking countenance. No sooner does he open his lips, even though he may be speaking on the most ordinary topic, than you feel interested, and it is impossible to listen to him for any length of time without being fascinated by his eloquent language, and calm, insinuating voice and manner.—"*English Paper.*

INTERRUPTION BY JUDGES.

A good story is going the round of the Chancery Bar. An eminent counsel recently spoke for two hours before one of the Vice-Chancelors, and the proceedings were reported *verbatim* by a short hand writer. It appears from his notes, that the judge interrupted the barrister precisely one hundred and thirteen times,—almost exactly once in every minute. This practice of interruption, at least in two of the equity courts, has now reached such an excess, that those tribunals are almost incessantly the scenes of indecorous wrangling or gossip, and the administration of justice is seriously impeded. The established rule with respect to the hearing a cause is logical, convenient and just. First, the party on whom the *onus probandi* lies is heard; next, his opponent; then there is a right of reply; and lastly, the court delivers judgment. That rule has prevailed for centuries; and it exists as a matter of right in every tribunal in the kingdom, whether of legal, equitable, criminal or ecclesiastical jurisdiction. It may be presumed, therefore that a usage so well established has been found beneficial. If counsel might not be heard without interruption, the next step would be not to hear at all. The evil has now grown so great in the two courts to which we refer, that counsel find connected and close argument nearly impossible, and hence they are forced into the bad habit of substituting short exclamatory sgggestions. Considering the difficulty and intricacy of the subjects with which the Court of Chancery has to deal, it is obvious that this virtual prohibition of close forensic reasoning is a serious loss to the suitors. Nor should it be forgotten that the right of audience belongs to the suitor, and not to the counsel, who is his mouthpiece.—*English Paper.*

TELEGRAMS.

Vice-Chancellor Giffard has held in *Coupland* v. *Arrowsmith*, 18 L. T. Rep. N. S. 755 that a telegram is admissable in evidence as a letter, if it be properly authenticated. It was objected that, as an advertisement was inadmissible as not being under the signature or in the hand-writing of the party, so also should be a telegram, which is neither written nor signed by the sender. But it was answered that a telegram is a message by A. to B.; unlike an advertisement, which is a general notice, it differs from a letter only in this, that the sender writes it by the hand of the telegraph clerk, as he might write a letter by his secretary. But it must be authenticated, of course.

The question, therefore, arises, what is a sufficient authentication of a telegram?

To answer this, let us see what is required to be proved. It is that the message came from B. the alleged sender of it. The written instructions for messages are, we believe preserved at the telegraph offices. The first step will be to procure this document, and ascertain by whom it was written. If by B. himself, the production of it, with proof of handwriting, will suffice; but if written by another, that other must be found, and his authority, and so backward until it is traced to B. But if, as must frequently happen, it is impossible to ascertain whose hand wrote the message, or who brought it, there remain only two courses; either to call B. himself to prove it, and when

in the box he is so for all purposes—or to connect him with the telegram by other evidence; as the recognition of its contents by answers and replies, or by acts done in pursuance of, or in connection with, it. Manifestly, a telegram could not be proved merely by its production; but then it may and ought to be proposed for admission by the other party, refusing which, he would be charged with the costs of proof.

If the telegram instruction paper cannot be found, its loss should be proved by the clerk at the office who had the custody of it, and has made search for it, and then secondary evidence of it may be given by the telegraph clerk by whom the message was transmitted, who must prove that the message delivered was that sent.

As telegrams come more into use, this question of their admissibility in evidence, and the manner of proving them, becomes more important; therefore we have invited attention to it in the hope that some ingenious reader may suggest some means by which evidence of so much value may be better preserved and proved that it can be by the present arrangements.—*Law Times.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-law, Reporter to the Court.)*

Small v. Haney.

31 Vic. (Ontario), cap. 24, sec. 2, s.s. 2—Motion for full costs.

The above statute does not require that the consideration of granting or refusing a certificate for full costs should be postponed by the Judge *to any specified future time.*

[Chambers, June 29, 1868.]

This was an action on a covenant for the payment of rent, and was sent down for trial before the Judge of the County Court of the County of York. The verdict was for the plaintiff for $190.

Immediately after the verdict an application for full costs was made to the County Court Judge, which he refused, but noted the fact of the motion having been made, but he did not postpone the consideration of the matter to any particular time.

An *ex parte* application was subsequently made to the County Court Judge for a certificate for full costs, which he granted. The defendant afterwards asked him for a summons to rescind his certificate, which he refused.

Ferguson then obtained from Mr. Justice Morrison a summons to shew cause why all proceedings should not be stayed until Term, on the ground that as the consideration of the granting or refusing the certificate was not postponed to any particular time, there was no jurisdiction in a judge afterwards to grant a certificate. He referred to 31 Vic. (Ontario), cap. 24, sec. 2, sub sec. 2.

Blevins shewed cause.

Adam Wilson, J., discharged the summons, as he thought that the statute did not require a postponement to any specified point of time.

Summons discharged.

Carsley v. Fisken et al.

Division Courts—Jurisdiction—Prohibition.

The defendants at Toronto agreed to sell to plaintiff at Kingston certain barrels of oil. Upon the the oil being delivered at Kingston, it was found to run short, and an action was brought for the shortage in the Division Court at Kingston. It was objected by defendants that the action could not be brought in Kingston, but the Judge overruled the objection, whereupon a prohibition was asked for, and it was

Held, that the action should have been brought where the defendants resided.

[Chambers, July 21, 1868.]

This was an application for a writ of prohibition to prevent the County Judge of Frontenac from further proceeding in an action in the first Division Court of that County, between the above parties, on the ground that said Judge had no jurisdiction to hear the case.

The facts of the case were that the defendants, who resided and carried on business at Toronto, offered by letter written at Toronto, to sell to the plaintiff, who resided and carried on business at Kingston, a quantity of coal oil at a certain price. The plaintiff at Kingston accepted the offer of the defendants by telegraph to them at Toronto, and they thereupon shipped the oil to him at Kingston. Upon its arrival, however, the plaintiff found, as he alleged, that the quantity of oil stated to have been contained in the barrels ran short, owing, as was supposed, to leakage, which it was sworn must have taken place before it reached Kingston. The plaintiff then sued defendants in the Division Court at Kingston for the shortage.

It was objected at the trial that the action could not be brought at Kingston, on the ground that the cause of action did not arise there within the meaning of the statute, and that it could therefore only properly be brought where the defendants resided, under the further provision of the statute.

The learned judge overruled the objection, and gave judgment for the plaintiff for the full amount of the claim.

The defendants then applied for a prohibition.

McKenzie, Q.C., shewed cause

The following cases were cited: *Watt* v. *VanEvery*, 23 U. C. Q. B. 196; *Kemp* v. *Owen*, 14 U. C. C. P. 432, 10 U. C. L. J. 269; *Aris* v. *Orchard*, 6 H. & N. 159.

Morrison, J.—In the case of the Judge of the County Court of Brant, in *Watt* v. *VanEvery*, the Chief Justice of Upper Canada, in giving judgment, held that the cause of action within the 71st section of the Division Court Act, is not the contract only, but the contract and breach for which the plaintiff claims damages. The sale of the oil in the present case took place where the defendants reside, at Toronto, to be delivered to the plaintiff at Kingston, and the breach is, that the full quantity of oil was not delivered to the plaintiff at Kingston, the barrels being short of measure. On the authority of the cases cited, the cause of action arose partly at Toronto and partly at Kingston, and the plaintiff must therefore sue the defendants in

the Division Court of the division in which they reside, viz., at Toronto.

The rule will go for the prohibition, but under the circumstances detailed in the affidavits there will be no costs.

Prohibition granted.

The Queen v. Patrick Boyle.

31 *Vic. cap.* 16—*Warrant under—29, 30 V. c. 51, sec. 357—31 V. (Ont.) c. 30, sec. 38—When alderman qualified as J. P.—Habeas Corpus—Return to.*

Held, 1. That under the Municipal Acts an alderman is not *ex officio* legally authorized to act as a J. P. until he has taken the oath of qualification required for such.

2. That a warrant of commitment under 31 Vic. c. 16, signed by one qualified J. P. and by an alderman who has not taken the necessary oath, is invalid to uphold the detention of a prisoner confined under it, though it might be a justification to a person acting under it, on an action against him.

3. That the mere fact of the warrant having been countersigned under the statute by the Clerk of the Privy Council does not withdraw the case from the jurisdiction of a Judge on a *habeas corpus*.

4. That the prisoner may contradict the return to the writ of *habeas corpus* by showing that one of the persons who signed the warrant was not a legally qualified J. P.

[Chambers, July 27, 1868.]

The prisoner, Patrick Boyle, was committed to the Gaol of the City of Toronto on the 4th May last, under the provisions of 31 Vic., cap. 16, on a charge of being a member of a treasonable society, called the Fenian Brotherhood.

An order was obtained on behalf of the prisoner from Mr. Justice Adam Wilson, upon which a writ of *habeas corpus* was issued, by virtue of which the Gaoler, on the 22nd July, brought up the prisoner, and returned to the writ that the prisoner was detained by virtue of a warrant of commitment of George D'Arcy Boulton and Geo. McMicken, Esqrs., two of Her Majesty's Justices of the Peace in and for the County of the City of Toronto, and which warrant was to the writ annexed.

The warrant, as stated on its face, was issued under the authority of the Act 31 Vic. chap. 16, and was in the following words:—

"To all or any of the Constables, &c.

"Whereas Patrick Boyle was this day charged before us, two of Her Majesty's Justices of the Peace in and for the County of the City of Toronto, on the oath of Charles Follis, for that he, the said Patrick Boyle, is a member of and hath joined a certain unlawful, illegal and treasonable association, in the said City of Toronto, called the Hibernian Benevolent Society, which Society is connected with and is part of an association in the said City of Toronto by the name of the Fenian Brotherhood; the said association being unlawfully composed of and connected with certain other lawless persons, citizens of the United States of America, being a foreign State, at peace with Her Majesty, for the purpose of making hostile incursions into Canada, and with the intent of levying war against her said Majesty, the Queen, therein, and that he, the said Patrick Boyle, hath joined himself to divers persons who have entered Canada with design and intent to commit felony within the same, and hath been guilty of treasonable practices in the city of Toronto, in said Province, contrary to the laws of the said Province and Dominion, and against the peace of our said Lady the Queen, her Crown and dignity:

"These are, therefore, to command you, the said constables, &c., to take the said Patrick Boyle, and him safely convey to the common gaol of the county of the city of Toronto, and there deliver him to the keeper thereof, together with this precept.

"And we hereby command you, the said Keeper of the said common gaol, to receive the said Patrick Boyle into your custody, in the said common gaol, and there safely keep him until he shall thence be delivered by due course of law; he being committed by us, as aforesaid, under and by virtue of a certain Act of the Legislature of the Dominion of Canada, known as "An Act to authorize the apprehension of such persons as shall be suspected of committing acts of hostility or conspiracy against her Majesty's person or Government."

"Given under our hands and seals, this fourth day of May, A. D., 1868, at the city of Toronto, aforesaid.

"(Signed),

"G. D'Arcy Boulton. [L. S.]

"G. McMicken. J. P." [L. S.]

The prisoner denied, on affidavit, that he was or ever had been a member of the said Fenian society, or connected therewith, or with any secret society whatever.

The warrant and return being read and filed,

O'Donohoe moved for the discharge of the prisoner, upon the ground that the warrant was invalid, as Mr. Boulton, who assumed to act as a Justice, was not authorized or entitled to act as such, or to join in the warrant of commitment, he (Mr. Boulton) being an alderman of the city of Toronto, and not having taken the oath required by sec. 357 of the Municipal Act of 1866, as amended by the 38th sec. of chap. 30 of the Acts of last session of this Province; the Act under which the prisoner was committed requiring that the warrant should be signed by *two* Justices of the Peace. He also moved that the prisoner should be admitted to bail, if the learned judge should hold the warrant good, as it had not been countersigned by a clerk of the Queen's Privy Council, as provided by the 1st sec. of the 31 Vic. chap. 16, above referred to.

James Patterson, for the Crown, took a preliminary objection that the affidavit filed could not be read, being irregularly sworn; and he also stated that he had been instructed by the Minister of Justice that the warrant was duly countersigned within the 30 days by the Clerk of the Privy Council, and, by inadvertence of the gaoler, the proper and true return to the writ of *habeas corpus* had not been made.

It was then agreed that the prisoner should be remanded until the 24th July, when the prisoner was again brought up. The gaoler then stated that he desired to amend his return, and filed an affidavit, shewing that about the 1st of June he received from the sheriff of the county of York a certified copy of the warrant of commitment, duly certified by the clerk of the Queen's Privy Council, which certified copy he produced; and he further swore that when he made his return to the *habeas corpus*, such certified and countersigned warrant had escaped his memory, and that since he made his return he discoverod that he had it in his possession. Affidavits were also filed shewing that such countersigning was done

within the 30 days prescribed, and Mr. Patterson moved that the gaoler be allowed to amend his return; and, after hearing the parties, the learned judge ordered the return to be amended, and upon the same being read,

Patterson, for the Crown, now objected, and contended:

1. That as it appeared that the warrant had been duly countersigned, the provisions of the 31st Vic., chap. 16, deprived the judge of authority and jurisdiction to entertain the motion made on the part of the prisoner, either with a view to his discharge or to his being bailed.

2. That if a judge had authority to examine into the validity of the warrant or detention of the prisoner, Mr. Boulton, being an alderman of the city of Toronto, was also a Justice of the Peace, *ex-officio*, and that the Act of the Province of Ontario amending the Municipal Act did not apply to Mr. Boulton, and that if it did, his acts, nevertheless, as a Justice of the Peace, were not void, although he himself might be liable to a penalty, or perhaps to a criminal information, but the acts of a Justice of the Peace who is not duly qualified are not absolutely void, as he contended: *Margate Pier Co.* v. *Hannam*, 3 B. & A. 267.

3. That it was not competent for the prisoner to contradict the return made by the gaoler, which return set out that the warrant was signed by two Justices of the Peace, &c.

In reply it was alleged, that neither he nor his counsel were aware or could obtain the particulars of the charge against him, or upon what information he was arrested: that no statement was made or taken in his presence, on oath or otherwise, of the facts or circumstances of the case before his commitment, as required by the 30th sec. of the Statute relating to the duties of Justices out of Sessions, in relation to persons charged with indictable offences; and, in order to ascertain what evidence, depositions or proceedings were had touching the restraint of the prisoner's liberty, and to the end that the judge might consider the same, and the sufficiency thereof to warrant such restraint, should he hold that the warrant was not one within the operation of the 31st Vic., a writ of *certiorari* had been issued, requiring a return of the depositions, &c., under the 2th sec. of the Act of 29 & 30 Vic. "for more effectually securing the liberty of the subject." Such writ was served on the committing justice, Mr. Boulton, and on the Clerk of the Peace for the city of Toronto; and he filed affidavits shewing that neither Mr. Boulton nor the Clerk of the Peace had in their possession any proceedings whatsoever touching the commitment of the prisoner; and that upon search at the office of the County Attorney for the county of York, and at the office of the clerk of the Police Court of the city of Toronto, no papers or documents were to be found.

Under the 39th sec. of chap. 102, the information, depositions, &c., should have been delivered by the Justice, without delay, to the County Attorney, or the Clerk of the Peace for the city. No depositions were produced on the part of the Crown.

MORRISON, J.—After carefully considering the whole case, I am of opinion that the prisoner is entitled to be discharged. It appears, as already stated, that he was arrested on the 4th May last under the warrant referred to, purporting to be signed by two Justices of the Peace for the city of Toronto. It is clear that Mr. Boulton (one of them) was not acting under any commission as a justice, but that he was an alderman of the city of Toronto, and it is manifest that he, as such alderman, did not take the oath of qualification, as provided by the 38th sec. of the statute of the Province of Ontario. These are the most important facts appearing and bearing on the case.

Several objections in point of law were taken by the Crown. First, as before stated, that the warrant being duly countersigned by the Clerk of the Privy Council that the subject matter was wholly withdrawn from my jurisdiction. I see nothing in the statute to warrant such a conclusion. The object of the Legislature and the words of the statute indicate that, as some protection to persons who might be charged with any of the offences mentioned in the Act of Canada (31 Vic. chap. 16), they could only be committed upon a warrant signed by two Justices, and such warrant, being countersigned within 30 days, as provided, then, in such case, no Judge should bail or try any such prisoner without an order from the Queen's Privy Council of Canada. The object of the statute, so far as any of the offences mentioned therein, was to suspend the operation of the writ of *habeas corpus*, and to deprive the subject restrained of his liberty of one of the most inestimable of privileges; and it is my duty to see, in favor of liberty, that the provisions of the statute are scrupulously observed. If it appears that the provisions of the statute have been observed, and that the warrant is in accordance therewith, in such case the prisoner's liberty is entirely in the hands of the Privy Council.

It was not attempted to be argued that if the Clerk of the Privy Council countersigned a warrant signed by only one Justice, that such a warrant would justify the detention of a prisoner under the statute, without bail or trial. So here, if Mr. Boulton was not authorized to act, or could not lawfully sign a warrant as a Justice, the prisoner's case would not be within the operation of the statute. Then, as to the second objection, that the affidavit cannot be received to contradict the return, the gaoler returning that the prisoner was detained under a warrant signed by two Justices of the Peace, naming them. The return just amounts to this—the cause of the detention was the warrant annexed. It would be absurd to hold that because the gaoler in his return designated the parties who signed the warrant as two Justices, an investigation into the fact was precluded. In *Baily's case*, 3 E. & B. 614, Lord Campbell allowed the prisoner to use affidavits to shew that the Justices had no jurisdiction. So here, I am of opinion, that it is competent to the prisoner to shew that the persons signing the warrant have no authority to act as Justices. But the point is disposed of by the 3rd sec. of chap. 45 of 29 & 30 Vic., which was not referred to in the argument. That section provides that although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for any Judge before whom such writ shall be returnable to proceed to examine into the truth of the facts set forth in

such return, by affidavit, and to do therein as to justice shall appertain, &c.

The only question that remains upon the present return is, whether the further detention of the prisoner can be sustained by this warrant, upon which two points arise: 1st., whether Mr. Boulton was lawfully authorized to act as a Justice of the Peace for the city of Toronto. 2nd. If he was acting unlawfully, by reason of his not first taking the oath of qualification, was the act of his signing the warrant invalid, so far as the detention of the prisoner is concerned?

By the 357th section of our Municipal Act, as amended by the 38th sec. of 31 Vic. cap. 30 of the statutes of Ontario, passed on the 4th March last, it is enacted that the Reeve of every town, &c., shall be, *ex-officio*, a Justice of the Peace for the whole county, &c., and aldermen in cities shall be Justices of the Peace in and for such cities: *Provided always*, that before any Alderman or Reeve shall act in the capacity of a Justice of the Peace for the city or county, he shall take the same oath of qualification, and in the same manner as is by law required by Justices of the Peace." And the amending Act repealed all Acts or parts of Acts inconsistent with its provisions relating to the Municipal Institutions of Upper Canada. So that, whatever authority Mr. Boulton, being an alderman, had as a Justice of the Peace, previous to the 4th March, was gone, and after that date, the date of the passing of the amending Act, his authority to act as a Justice of the Peace depended upon the 357th sec. as amended. And as it is in fact admitted that Mr. Boulton did not take the oath of qualification, and did not comply with the 357th section referred to, he was acting unlawfully and in contravention of the statute. I do not mean to say that Mr. Boulton was acting wilfully in the matter, because, from the affidavits filed, he appears to have acted in ignorance of the then state of the law. Then, did the neglect of Mr. Boulton to take the oath required, and which the statute makes a condition precedent to his acting as a Justice of the Peace, render his act invalid for the purpose of the imprisonment of the prisoner? It is contended by the Crown that the proviso added to the 357th section did not prevent an alderman from acting as a Justice of the Peace without taking the oath; that by his doing so it only subjected him to be prosecuted; and the case of the *Margate Pier Co.* v. *Hannan et al.*, 3 B. & A. 267, was relied on as an authority. I perfectly concur in that decision and the grounds upon which the judgment is rested, viz., that the acts of a Justice of the Peace who has not duly qualified himself are not absolutely void, so that a seizure under a warrant signed by him would not make the parties who executed it trespassers. And so in the case of the warrant now before me, as in the case alluded to; it might form a good justification to an action brought against any person or officer who acted under it, and that any act done under it, such as the detention of the prisoner in custody, would very properly be sustained. But there, I think, its validity ends; that while it is not absolutely void, yet, upon an application of this nature, it is so far defective that a person detained in custody under it may be discharged. It seems to me it would not be quite consistent to hold that while a magistrate would be liable to be indicted and punished for the act of signing a warrant, a person arrested under it would nevertheless be liable to be detained in custody. On grounds of public policy, I can see good reason why acts done under such a warrant should be justified and sustained, but I cannot bring myself to the conclusion that it is a sufficient warrant for the detention of the prisoner. In doubtful cases the Courts always lean in favor of liberty, and upon this point the prisoner is entitled to my judgment in his favor.

The only other matter for consideration is, whether the warrant, being signed by Mr. McMicken, whose authority as a Justice of the Peace is not objected to, the prisoner should not be held to bail, but in that view of the case I have nothing before me to shew that any charge was made against the prisoner, or that proceedings were had to authorize any such commitment, such as the examination of the prisoner, &c. The prisoner positively denies under oath that he is guilty of any such charge as is mentioned in the warrant. He has taken, as already stated, the usual steps to ascertain and bring before me, by writ of *certiorari*, the grounds of the charge and the proceedings taken against him without effect, and on the part of the Crown nothing is shewn. I therefore see no grounds for the further detention of the prisoner, and he must be discharged.

Prisoner discharged.

Lovell v. Wardroper.

Interpleader—Security for costs—Delay.

Held, 1. That an execution creditor made a defendant in an interpleader issue may be ordered to give security for costs; but that

2. A delay in applying for security from the 2nd July until the 11th August, is fatal to the application.

Chambers, August 21, 1868.]

This was an application by the plaintiff in an interpleader issue for security for costs, on the ground that the defendant resided out of the jurisdiction, the plaintiff being the claimant and the defendant the execution creditor.

On the 16th June the interpleader order was made, on the 20th June demand of security for costs was served, on the 2nd July the interpleader issue was delivered, and on the 11th August the application for security was made.

Draper, C. J.—*Williams* v. *Crossling*, 4 D. & L. 660, shews that an execution creditor, made a defendant in an interpleader issue, and resident out of the jurisdiction, will be compelled to give security for costs. If he had been left to sue the sheriff for not executing his writ, he must have given such security. But this application should, according to the rule of court, be made before issue joined. Here there has been a delay from 2nd July to 13th August, and plaintiff knew on 20th June that defendant resided out of the Province, and demanded security.

Summons discharged.

ENGLISH REPORTS.

CHANCERY.

Re Kershaw's Trusts.

Will—Trustees—Advancement to husband.

A married woman being entitled to the income of a fund for her separate use, and the trustees of the will having power to advance a portion of the capital for her benefit, they were authorised by the Court, under the circumstances of the case, to make the advance for the purpose of setting up the husband in business.

[V. C. M. 16 W. R. 963.]

This was a petition for the advice of the Court under 22 & 23 Vict. c. 35, s. 30. The question turned upon the following clause in a will. After directing the residue of his personal estate to be divided between his daughters in equal shares, the income of each daughter's share to be paid to such daughter for her life, and during coverture for her separate use, and the capital to be held in trust for her children or other issue as she should appoint, with the usual clause as to maintenance and education, the testator proceeded; "And I also empower my trustees notwithstanding the trusts herinbefore declared of the share of each daughter of mine to apply at any period or periods of the life of each such daughter for her advancement or otherwise for her benefit any part or parts not exceeding in the whole one-half of the capital of her share." The husband of one of the daughters was offered a share in a profitable business in London, on condition of bringing £5,000 into the partnership, and it was the desire of himself and his wife that the money should be advanced out of the capital of his wife's share under the above will; but the trustees were advised that they could not safely consent without the sanction of the Court. It was represented that if the money were not advanced the husband would be obliged to return to his former employment in the East Indies, whither his wife and children would be unable to accompany him on account of the climate.

Osborne, Q. C., for the petitioners.

Cotton, Q. C., appeared to consent on behalf of all other parties interested, with the exception of three infant children residing out of the jurisdiction, whom it was not thought necessary to serve.

Malins, V. C., considered that, as a general rule, whatever was for the benefit or the husband was for the benefit of the wife, and therefore sanctioned the proposed arrangement.

IRISH REPORTS.

QUEEN'S BENCH.

Holland v. Eastwood.

Practice—Irregularity—Costs incurred by attorney's neglect.

Where the copy of a plant served was entitled "Court of Common Pleas," but was tested as of the "Court of Queen's Bench," the writ being in fact issued from and the plant being filed in the Queen's Bench, the Court set aside the judgment marked by default on the defendant's affidavit that he was misled, and that he had searched the Court of Common Pleas for a plaint, and had his defence thereto prepared and ready for filing.

As the defendant had let five days pass without giving plaintiff notice of the error, and at the end of that time had served notice of motion, no costs were given.

As the default on both sides was personal neglect of the attorneys, neither was permitted to charge the costs to his client.

[Q. B. (Ir.), May 4, 16 W. R. 934.]

P. Keogh applied on behalf of the defendant in this case to set aside the judgment marked against him. The copy of the summons and plaint served was entitled "Court of Common Pleas," but concluded "Witness the Lord Chief Justice and other Justices of the Court of Queen's Bench."

The action, which was for breach of promise of marriage, was, in fact, in the Court of Queen's Bench.

The plaintiff's attorney made an affidavit stating these facts, and also alleging that he and his counsel were misled by this mistake, and that he searched the Common Pleas, and found no plaint filed there, and that he had counsel instructed, and the defence ready for filing, and that in consequence no defence was lodged in the Queen's Bench.

The plaint bore date the 28th March, was served 31st March, filed 8th April, and judgment marked by default on the 14th April.

On the 22nd April the defendant was served with a notice to assess damages, which was the first he heard of judgment being marked against him, and the first time he noticed the error which misled him. Nothing was done by the defendant, however, till the 27th April, when he served notice of this motion.

The plaintiff withdrew his notice to assess damages on the 2nd May.

R. Ferguson, contra, submitted that the defendant was too late, as this was an irregularity which he might waive. He cited Chitty's Archbold, 11 Ed. 204, 976; *Woodroffe* v. *Dimsdale*, 5 Ir. Jur. 239; *Holmes* v. *Russell*, 9 Dowl. 487.

Whiteside, C. J.—The defendant naturally looks to the head of the document served to see what court it is in, and the plaintiff has no right to issue a writ likely to mislead. The defendant, however, on discovery of the error, says nothing, but waits for five days, and at the end of that time serves notice of this motion. The judgment must be set aside, but both sides must pay their own costs. Where a technical error has taken place, one professional man is bound to give the other notice at once; if that had been done here, the rule as to costs would take a different shape.

O'Brien, J., concurred.

Fitzgerald, J.—There were faults here on both sides, but it is our duty to encourage a fair and candid practice. The first notice the plaintiff got of the error was the notice of this motion, which is a most warlike motion, served five days after the discovery of the defendant, obviously for the purpose of making costs by taking advantage of the slip of the plaintiff. I concur that there should be no costs, but further suggest that it should be added to the rule that neither plaintiff's nor defendant's attorney should be permitted to charge his client the costs incurred by his neglect.

George, J., concurred.

Rule accordingly.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR MAY, JUNE AND JULY, 1868.

(Continued from page 212.)

Account.

Plaintiff agreed to act as defendant's manager, receiving 7½ per cent. per annum of the profits of the business, to be made up to £500 in any year in which the said share of profits should be less than that sum. The works were valued at the same time. Six years later the defendant sold them at a gain of £47,916. In taking the account, under the above agreement, *held*, that the defendant was not entitled to charge interest on his capital, nor interest on old debts, nor the £500 guaranteed to the plaintiff in the profit and loss account. That he might charge them the depreciation, from the waste of machinery and running out of his lease, calculated on the valuation of the works. That the plaintiff could not charge 7½ per cent. on the gain at which the works were sold as profits of that year.—*Rishton* v. *Grissell*, Law Rep. 5 Eq. 326.

See Equity Pleading and Practice, 1; Lunatic; Patent, 1.

Ademption.

A testator bequeathed the income of certain shares specifically, and bequeathed the shares to his residuary legatee. After the date of his will, he was found a lunatic; and, by an order in lunacy, the shares were directed to be sold, and the proceeds were invested in consols. There was no order as to the ownership of the proceeds. *Held*, that the sale was a conversion, and adeemed the legacy of income which fell into the residue.—*Jones* v. *Green*, Law Rep. 5 Eq. 555.

Administration.

1. A testator died domiciled in New South Wales, and the court there granted probate of his will to A. as executrix, according to the tenor. A. was not so by the law of England. *Held*, that the grant of the court of the domicile ought to be followed. Administration with the will annexed was granted to A., not as executrix, but, under St. 20 & 21 Vict. c. 77, § 73, to her as the person entitled to administer under the grant of the court of the country of domicile.—*In the Goods of Earl*, Law Rep. 1 P. & D. 450.

2. A. was appointed executor, and "in case of his absence on foreign duty," B. was made executrix. A. was in England at the death of testator, but was absent on foreign service in the royal navy when the probate was applied for, and was likely to be absent for some years. Probate was granted to B.—*In the Goods of Langford*, Law Rep. 1 P. & D. 458.

See Banker; Estoppel; Exoneration.

Admiralty.

The plaintiff, a British subject, shipped as mate on board a Portuguese vessel, and signed an agreement to be bound by the Commercial Code of Portugal, which requires that all disputes arising between masters and seamen shall be submitted to the Portuguese Consul, in the country where the vessel may be. Without having done this, plaintiff arrested the vessel, and began a suit against the owner in the Admiralty Court. In accordance with the 10th of the Admiralty Court Rules, 1859, notice of the suit was sent to the Portuguese Consul in London, who thereupon protested against the same. On motion of the defendant, the court decreed that the vessel should be released, and condemned the plaintiff in costs and damages. The above rule was not abrogated by 24 Vict. c. 10, § 10, giving jurisdiction to the court over any claim by a seaman of *any* ship for wages and disbursements.—*The Nina*, Law Rep. 2 Adm. & Ecc. 44.

Affirmed on appeal, except as to costs and damages, which were not allowed, as the merits had not been tried. The Admiralty Court has jurisdiction, however, of such cases, and will determine whether, having regard to the reasons of the Consul and the answers of the plaintiff, it is fit for the suit to proceed.—*La Blache* v. *Rangel*, *The Nina*, Law. Rep. 2 P. C. 38.

See Collision; Salvage.

Advancement.

A widow, after making a will in favor of her two daughters, transferred East India stock, which had stood in her own name, into the joint names of herself and the unmarried daughter, and died. While she lived, she always received the dividends, and applied them to her own use. *Held*, that the stock belonged to the unmarried daughter absolutely.—*Sayre* v. *Hughes*, Law Rep. 5 Eq. 376.

Agent—*See* Principal and Agent.

Agreement—*See* Contract.

Allotment—*See* Company.

Amalgamation—*See* Ultra Vires, 2.

Amendment—*See* Award.

Apportionment—*See* Partnership.

Appropriation of Payments.

New trustees proved against the estate of a defaulting trustee for the aggregate amount of the principal trust fund and arrears of interest,

but recovered a sum less than the principal. *Held*, that said sum must be treated as capital. But one having a life estate therein was entitled to the future interest of the same.—*In re Grabowski's Settlement*, Law Rep. 6 Eq. 12.

Arbitration—*See* Award.

Arrest—*See* Assault.

Assault.

The prisoner assaulted a constable in the execution of his duty. The constable went for aid, and after an hour returned with three others, but found the prisoner had locked himself up in his house. Fifteen minutes later the constables forced the door, entered, and arrested the prisoner, who wounded one of them in resisting the arrest. *Held*, that the arrest was illegal.—*The Queen* v. *Marsden*, Law Rep. 1 C. C. 131.

Assets—*See* Execution; Winding Up, 2.

Assignment—*See* Attachment.

Assumpsit—*See* Vendor and Purchase of Real Estate.

Attachment.

1. A prior equitable assignment of railway shares in the hands of the garnishee is a bar to a foreign attachment, although no notice of such assignment has been given to the garnishee.—*Robinson* v. *Nesbitt*, Law Rep. 3 C. P. 264.

2. A railway company assigned, by a deed containing a power of sale, a call which had been made, but was not yet payable, as security for a debt then due to the plaintiff. After the same had become payable, the defendants obtained a garnishee order *nisi* against a shareholder. The shareholder had no notice that the deed of assignment had been sealed at the time of the service of said order upon him, but had presided at the board at which the sealing was directed. *Held*, that the assignment was not *ultra vires;* that it was not made void by the power of sale, as, if said power was invalid, it would be expunged by the Court of Chancery; and that the shareholder had notice. *Quære*, whether notice was necessary as against a subsequent judgment creditor.—*Pickering* v. *Ilfracombe Railway Co.*, Law Rep. 3 C. P. 235; *Watts* v. *Porter*, 3 E. & B. 743, overruled. See *Robinson* v. *Nesbitt*, Law Rep. 3 C. P. 264.

Award.

The plaintiff sued A., B., and C., upon a joint contract, and after plea entered a *nolle prosequi* as to B. and C. Afterwards an order of reference was drawn up, by consent, on a printed form, which contained no power to the arbitrator to amend. Before the arbitrator it was set up that the *nol. pros.* as to B. and C. discharged the defendant, and the plaintiff sought to amend. *Held*, that he could not. Unless there has been an omission by an officer of the court, or an accident or mistake, owing to which it is not in accordance with the intention of either party, or fraud, a consent order will not be altered by the court. (Per Bovill, C.J.) Nor could it be done indirectly by amending the record under § 37 of the Common Law Procedure Act, 1852, by striking out the names of B. and C., at least when they were joined as defendants intentionally, to fix all three with liability.—*Vanderbyl* v. *McKenna*, Law Rep. 3 C. P. 252.

Banker.

Appellants, bankers, had policies on the life of one deceased as security for money due from him to them. To obtain payment of these, they received the probate of his will from his widow and executrix, promising to make over the balance to her. Said probate showed remainders to children after the widow's life estate. The latter drew a cheque for said balance, payable to a firm composed of herself and her husband's former partner, which banked with appellants, and the amount was placed to the credit of the firm accordingly. In a suit by the children, *held*, by the House of Lords, reversing the decree of the Lord Chancellor of *Ireland*, that the bankers were not liable to replace said balance. To justify a banker in refusing to pay a cheque drawn by a customer as executor, there must be a breach of trust intended by the latter, and the banker must be privy to that intent. Proof that any personal benefit to the bankers themselves is designed or stipulated for, is the strongest evidence of such privity.—*Gray* v. *Johnston*, Law Rep. 3 H. L. 1.

Bankruptcy,

1. R., having a contract to supply meat to a lunatic asylum for six months from April 1, assigned it on that day to H., who delivered his own meat in R.'s name, without the knowledge of the asylum. R. became bankrupt, and his assignee claimed the sum then due for meat as "goods and chattels" in the "possession, order, or disposition" of R. as reputed owner with the consent of H., the true owner. within the Bankrupt Act 12 & 13 Vict. c. 106, § 125. *Held*, that the debt passed to the assignee.

(Per Willis, J., *dissentiente*). The meat never having been in R.'s possession, the debt arising thence was not within his possession,

order, or disposition.—*Cooke* v. *Heming*, Law Rep. 3 C. P. 334.

2. A shareholder under the Companies Act, 1862, who has become bankrupt and received his discharge, but retains his shares, is not discharged from liability to pay subsequent calls, whether made while the company is in operation, or when it is being wound up, either under § 75 of said act, or under the Bankrupt Act, 1861, § 154.—*Martin's Anchor Co.* v. *Morton*, Law Rep. 3 Q. B. 306.

See Appropriation or Payments.

Betting—*See* Gaming.

Bequest—*See* Legacy.

Bills and Notes.

In an action against the indorser, "Pay J. S., or order, value in account with H. C. D.;" *held*, not a restrictive indorsement.—*Buckley* v. *Jackson*, Law Rep. 3 Exch. 135.

See Limitations, Statute of, 2; Stamp.

Bond—*See* Debenture; Vendor and Purchaser of Real Estate.

Call—*See* Attachment, 2.

Canada, Law of.

A *défense d'aliéner pur et simple*, viz., a provision against alienation for twenty years from death of testator in the interest of no one but the devisee, is void by the old French law in force in Lower Canada, founded on the Roman law, and by the general principles of jurisprudence.—*Renaud* v. *Tourangeau*, Law Rep. 2 P. C. 4.

Cancellation—*See* Vendor and Purchaser of Real Estate.

Cause of Action.

A contract was made abroad, but broken in England. *Held*, that the "cause of action" did not arise within the jurisdiction within the meaning of the Common Law Procedure Act, 1852, §§ 18, 19.—*Allhusen* v. *Malgarejo*, Law Rep. 3 Q. B. 340.

Carrier—*See* Railway.

Charter Party.

1. By a charter party the charterer agreed to load "a full and complete cargo of sugar in cases, or other lawful merchandise, with sufficient bags for broken stowage," at a certain rate of freight per ton for sugar, and for "other produce a rate proportionate to sugar in casks, with sufficient bags for broken stowage, agreeably to the custom of the port of loading." The charterer took a full cargo of cotton, with sixty tons of stone for ballast, which would have been unnecessary if sugar had been loaded. By the custom of the loading port, 928 pounds of cotton was to be taken as equal to a ton of sugar. *Held*, that a full cargo had been loaded. The charterers were not bound to ship sufficient bags for broken stowage with any other cargo than sugar in cases.—*Duckett* v. *Satterfield*, Law Rep. 3 C. P. 227.

2. Defendant agreed to load plaintiff's ship with coal in regular turn, "except in cases of riots, strikes, or any other accidents beyond his control," which might prevent a delay in loading. A snow-storm prevented the loading. *Held*, not an "accident" within the above exception.—*Fenwick* v. *Schmalz*, Law Rep. 3 C. P. 313.

3. The case of *Hudson* v. *Ede*, Law Rep. 2 Q. B. 566 (*ante*, 2 Am. Law Rev. 272), was affirmed in the Exchequer Chamber, Law Rep. 3 Q. B. 412.

Cheque—*See* Banker; Limitations, Statute of, 2.

Children, Custody of—*See* Custody of Children.

Chose in Action—*See* Bankruptcy, 1; Vendor and Purchaser of Real Estate.

Collision.

In cross suits between a sailing vessel and a steamer, the Court of Admiralty held both vessels to blame, and decreed the damages to be equally divided between them. As the sailing vessel was sunk, this was, in effect, a severe judgment against the steamer, which appealed. Nothing appeared in the sailing vessel's case why, if she acted wrongly, the steamer should have been held to have been in the wrong also, and, on the evidence, the steamer seemed to have acted rightly. The decree was reversed. That the sailing vessel did not make out her case was *res judicata*, she not having appealed.—*Inman* v. *Rack*, *The City of Antwerp*, and *The Friedrich*, Law Rep. 2 P. C. 25.

See Salvage.

Common Carrier—*See* Railway.

Company.

1. In October, 1865, A. received from a private source what purported to be a prospectus of a company then about to be formed, upon reading which, and from its language, expecting an immediate allotment, he applied for ten shares, and paid the required deposit to the bankers named therein. In January, 1866, A. received the authentic prospectus, which differed materially from the document before received. February 1, the directors met for the first time and allotted the shares, among others to A.; and it was taken, in deciding the case, that A. received the letter of allotment Feb. 3. Feb. 7, A. wrote, declining to take any shares, and requesting a return of

his deposit. His letter was received the next day, on which day the shares were registered. He shortly after wrote again to the same effect. Notices of a call and of a dividend were sent to A., but not noticed by him; and in October, 1867, legal proceedings were threatened in default of his payment of arrears. *Held*, that the allotment not having been made for four months after A.'s application, A. was entitled to a *locus pœnitentiæ*, and had a right to repudiate the shares on the 7th of February.—*In re Bowton, Baily & Co., Baily's case*, Law Rep., 5 Eq. 428.

2. A company, having a line built and at work, began an extension line, the capital to be raised as portions of the general capital, by the creation of new shares, the holders of which were not to have more than six per cent. for the first three years. The directors charged to capital one-half the office expenses, and interest upon debentures for the extension line, and made a dividend to extension shareholders from interest paid by the contractors in respect of the same being unfinished. A dividend on the old stock was declared on this basis. An interlocutory injunction was granted by Wood, V.C., on the application of one who had bought extension stock for the purpose of filing his bill, on the ground that the above charges were wrong. On appeal, Lord Chelmsford, L.C., continued the injunction until final hearing, on the ground that the questions were of importance and doubt, and, if the dividend were paid, it would not be recovered, which would be an irreparable injury to the extension stockholders. But as the balance carried over to the next half year on the revenue account was much larger than the charge for office expenses, even if it was wrong, it was not a ground for the injunction. *Semble*, that if the extension line had been a separate undertaking, not as yet yielding income, the interest of a debt incurred to construct it should have been charged on the capital; but it being part of a general undertaking, yielding profit as a whole, *quære*, whether such debt should be charged to capital or not. The dividend extension shareholders was right; unless, as charged in the bill, the amount was to be refunded to the contractors by the company. If the directors were acting *ultra vires*, it could not be set up that these were matters of internal management, which the court would not disturb. The plaintiff having a real interest, and the suit being *bona fide* his own, he could maintain his bill in spite of his mode of introduction to the company; so, also, in spite of these charges having been acquiesced in by former holders of the stock purchased by him. —*Bloxam* v. *Metropolitan Railway Co.*, Law Rep. 3 Ch. 337.

3. A railway company, with an act limiting the time of its power for the compulsory purchase of land to four years, and allowing five years for completing the line, after which the powers granted to it were suspended as to any uncompleted portion, served a notice to treat within four years on land-owners, whose claim for compensation was not assented to. Nothing further was done till the five years had expired, when the company claimed to proceed under the notice. On a bill for an injunction by the land-owners, *held*, that the company could not so proceed. The notice did not of itself create a contract, and only operated for a reasonable time, which was within the time allowed to finish the line.—*Richmond* v. *North London Railway Co.*, Law Rep. 5 Eq. 352.

4. The defendant company, by the Railways Clauses Act, 1845, § 16, were empowered to divert ways, subject to the Lands Clauses Act. Section 84 of the latter prohibits entry upon lands to be permanently used for the purposes of the act, until the same had been paid for. *Held*, that the former section did not authorize the company to divert a public footpath on to land of which the company had not obtained the ownership. (Per Lord Cairns, L.J.) A highway is not an easement, but the dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing; the public generally assuming the obligation of repairing it. This is a permanent user of the land, within sec. 84.—*Rangeley* v. *Midland Railway Co.*, Law Rep. 3 Ch. 306.

See Attachment, 2; Bankruptcy, 2; Contributory; Debenture; Execution; Negligence, 2; Rent Charge; Ultra Vires; Winding up.

Condition—*See* Canada; Patent, 2.

Conflict of Laws.

1. After an English marriage between two English persons, obtained by the fraud of the husband and never consummated, the husband committed adultery. Some years later he went to Scotland, to found a jurisdiction against himself, for which he was to receive a sum; to be forfeited, however, in case he gave any information which should be prejudicial to a divorce. After a residence of forty days, a divorce *a vinculo* was obtained against him, and a marriage was thereupon duly celebrated between the wife and an Eng-

lishman who was thenceforth domiciled in Scotland. After the death of all the above parties, *held*, that the children of the last marriage were not "lawfully begotten," so as to take English property under an English will. *Lolley's Case* explained and approved.—*Shaw* v. *Gould*, Law Rep. 3 H. L. 55; s.c. *Wilson's Trusts*, Law Rep. 1 Eq. 247 (*ante* 1 Am. Law Rev. 115).

2. B. had left Jamaica, his domicile of birth, for good, and gone to Scotland, where afterwards he acquired a domicile; but it being *held*, that, at the time in question, his mind was not made up to stay there permanently, it was further *held*, that the personal *status* of the domicile of birth remained until a new domicile was acquired.—*Bell* v. *Kennedy*, Law Rep. 1 H. L., Sc. 307.

See Administration, 1.

Confusion—*See* Mortgage, 1.

Consul—*See* Admiralty.

Contingent Remainder.

Devise to A. for life, remainder to the children of testator's grandson, B., "if he leave any him surviving, but, in case he leave no child him surviving," to the children of C. B. survived A., at whose death he had three children, and two had been born since. *Held*, that B.'s children took a remainder contingent during his lifetime, which failed by the dropping of A.'s life estate in the lifetime of B., and that B. was entitled as heir at law.—*Price* v. *Hall*, Law Rep. 5 Eq. 399.

See Will, 5.

Contract—*See* Damages, 2; Sale; Vendor and Purchaser of Real Estate.

Contribution—*See* Marshalling of Assets Power.

Contributory.

1. Before a past member of a joint stock company, limited, can be made a contributory under the Companies Act, 1862, § 38, it must be proved, that, at the date of the winding-up order, there was some debt of the company which was due when he transferred his shares, and also that said shares have not been fully paid up.—*In re Contract Corporation, Weston's Case*, Law Rep. 6 Eq. 17.

2. C., a registered shareholder, sold his shares to S., who had the transfer made out to A., an infant, and A. was registered as holder of the shares. In November, 1865, C. was notified by the company that he was held liable for a call, as holder of said shares. C., finding that A. was registered, and that new certificates had been issued to him, did nothing. In January, 1867, the demand was renewed, after a resolution for winding up the company had been passed. *Held*, that C. was liable as a contributory.—*In re China S. & L. C. Co., Capper's Case*, Law Rep. 3 Ch. 458.

Conversion—*See* Ademption.

Copyright.

1. By the International Copyright Act, 7 Vict. c. 12, § 6, no author or his assigns of any musical composition first published abroad, shall be entitled to the benefit of the act, unless the name and place of abode of the author or composer of said composition are registered in England. N. composed and published an opera in full score at Berlin, and, after his death, B. arranged the score of the whole opera for the piano-forte; in registering this arrangement, N.'s name was inserted as composer. *Held*, that the entry was invalid, and gave no title to the assignee of the registered composition. The said arrangement was an independent musical composition, of which B., not N., was the composer (Exch. Ch.).—*Wood* v. *Boosey*, Law Rep. 3 Q.B. 223; s.c. Law Rep. 2 Q.B. 340 (*ante*, 2 Am. Law Rev. 110).

2. By 25 & 26 Vict. c. 68, § 4, the register of copyrights in paintings, &c., is to contain "a short description of the nature and subject of the work." By § 6, one who shall, without the consent of the proprietor, copy such work, or, knowing that such copy has been unlawfully made, shall sell any copy of the work, or of the design thereof, shall, for every such offence, forfeit not more than £10.

G., owning the copyright of certain works, entered them thus: "Painting in oil, 'Ordered on Foreign Service;' painting in oil, 'My First Sermon;' photograph, 'My Second Sermon.'" The first was a picture of an officer taking leave of a lady; the second, of a child in a pew, listening, with eyes wide open; the photograph represented the same child asleep in a pew. B. sold on two days, in two parcels, knowing them to have been unlawfully made, twenty-six photographic copies of *engravings* of the pictures, in which engravings G. also had the copyright. On a complaint, alleging the sale of a copy of the *picture*, B. was convicted in a penalty for each copy sold. *Held*, that the above descriptions were sufficient under § 4; that the complaint alleged an offence under § 6; and that a penalty was properly imposed for each copy sold.—*Ex parte Beal*, Law Rep. 3 Q. B. 387.

Covenants—*See* Patent, 2.

Costs—*See* Equity Pleading and Practice.

Criminal Law—*See* Assault; Larceny.

Curtilage.

A public-houses was bounded north by a street, and east by a vacant piece of ground not fenced off from the street, and only separated from the house by an unfenced foot pavement used by the public as a thoroughfare, but sometimes closed. Said ground had been treated as passing to the lessee of the public-house since 1802. It was used by customers, and gave the only means of approach for vehicles to the front door of the house. *Held*, that said ground was part of the curtilage to the house, and so part of the "house," within Lands Clauses Act, § 92.—*Marson* v. *London C. & D. Railway Co.*, Law Rep. 6 Eq. 101.

Custody of Children.

The court gave the custody of two infant children—the one being three or four years, the other eighteen months old—to the mother, pending a suit for dissolution of marriage by the father, on the ground that her health was suffering from being deprived of their society, and that they were living with a stranger, not the father.—*Barnes* v. *Barnes and Beaumont*, Law Rep. 1 P. & D. 463.

Custom—*See* Principal and Agent.

Damages.

1. The defendants, mortgagees of the lease of a house, sold it to plaintiff, possession to be given on completion of the purchase. The plaintiff resold, at an advance of £105, to G., who wanted the house for occupation. The title proved satisfactory; but the mortgagor was in possession, and refused to give it up. The defendants could have ousted him by ejectment, but refused to complete the sale, on the ground of expense. *Held*, that the plaintiff could recover damages for the loss of his bargain to the amount of the profit on the re-sale. *Flureau* v. *Thornhill*, 2 W. Bl. 1078, distinguished.—*Engel* v. *Fitch*, Law Rep. 3 Q. B. 314.

2. The defendant contracted in writing to sell to the plaintiff 500 tons of iron, to be delivered by the 25th of July. Owing to an accident in his furnaces, in that month, the defendant delivered none of the iron by the 25th; but proposed that the plaintiff should take iron of a different quality, at the same time denying his liability, on the ground of the accident. This proposal was declined, after consideration. Dec. 29, the brokers who had acted for both parties, and were still acting for the plaintiff, wrote that the parties who had contracts for the iron were pressing them, and threatened to purchase against the defendant; adding, "when our Mr. T. waited upon you, he was informed it might take three months to put the furnaces into repair, and we informed all our friends to this effect, who have waited considerably over that time. . . . When do you think we may promise deliveries?" The defendant answered, not denying these statements, and only stating that he could not say what would be done with the furnaces. The plaintiff bought in the market, in Feb., and, the price of iron having risen, sought to recover from the defendant the difference between the contract price and the market price in February. The jury returned a verdict for that amount. *Held*, that there was evidence from which the jury might infer that the plaintiff's delay was at the defendant's request; that as the evidence went to show, not a new contract, but simply a forbearance by the plaintiff, at the request of the defendant, the Statute of Frauds did not apply; and that the verdict ought to stand (Exch. Ch.).—*Ogle* v. *Earl Vane*, Law Rep. 3 Q. B. 272; s.c. Law Rep. 2 Q. B. 275 (*ante* 2 Am. Law Rev. 113).

Debenture.

1. Debentures issued by a company, under a general power of borrowing, in part discharge of existing debts, are valid.—*In re Inns of Court Hotel Co.*, Law Rep. 6 Eq. 82.

2. The N. I. Co. gave debentures, in which, after reciting a debt due from said company to C., they covenanted to pay to "C., or to his executors, administrators, or transferees, or to the holder for the time being of this debenture bond," a certain sum; provided, that payment to the holder of the bond should discharge the company from any claim in respect thereof. *Held*, that holders of these bonds could prove in their own names, but (contrary to the decision of the Master of the Rolls) subject to all the equities between the company and C.—*In re Natal Investment Company* (*Claim of the Financial Corporation*), Law Rep. 3 Ch. 355. See *Aberaman Iroworks* v. *Wickens*, Law Rep. 5 Eq. 485, 517.

Dedication.—*See* Company, 4.

Deed.—*See* Estoppel; Way.

Delivery.—*See* Railway, 5; Sale, 2; Stoppage in Transitu.

Demite.—*See* License.

Devise.—*See* Contingent Remainder; Exoneration Illegitimate Children; Marshalling of Assets; Vested Interest; Will.

Dissolution.—*See* Partnership.

Distress—*See* Rent Charge.

Dividend.—*See* Winding Up.

Digest of English Law Reports.

Divorce.—*See* Conflict of Laws, 1.

Domicile.—*See* Conflict of Laws.

Double Portion.—*See* Satisfaction.

Duty.—*See* Negligence, 1.

Easement.—*See* Company, 4; Way.

Ecclesiastical Law.

1. A faculty for the appropriation of a family vault under the chancel of a district church was granted by the ordinary, on the application of the proprietor of the great tithes and of the land adjoining the church, against the objections of the incumbent. The entrance to the vault was from the outside of the church, where there was no consecrated ground. *Held*, that the incumbent had, as such, a *persona standi* to oppose the grant; that, though the grant was within the discretion of the ordinary, it was his duty to prevent the possibility of misuse by the grantee, and the grant was made conditional upon the grantee's allowing a piece of ground in the vicinity of his vault to be consecrated for the sole purpose of burials in the vault, thereby preserving the jurisdiction of the ordinary, *ratione loci*, in case of any impropriety in the burial service.—*Rugg* v. *Kingsmill*, Law Rep. 2 P. C. 59; s.c. Law Rep.; 1 Adm. & Ecc. 343 (*ante*, 2 Am. Law Rev. 275).

2. The right of advowson is a temporal right of property. Although the bishop must reject an unfit presentee, his finding on the question of fitness is not conclusive, but the fact is examinable in a temporal court.

It is not, therefore, a good plea to a *quare impedit*, that the bishop had good reason to believe that the presentee had attempted to commit simony, but it must be alleged that he *had* attempted to do so, with such particularity of allegation as will enable the patron to take issue thereon.

In this case it was further pleaded, that the clerk came from a foreign diocese, and did not bring with him a sufficient testimony, from the bishop of that diocese, of his honest conversation, ability, and conformity to the ecclesiastical laws of England. It was not alleged that the clerk proved unfit, on examination, but that the production of said testimony was a condition precedent to his being examined at all. *Held*, that there was no such condition precedent. The 48th Canon of 1603 did not apply to this case, but only the 39th. Moreover, these canons do not bind the laity, *proprio vigore*, but only when declaratory of the ancient law of the Church. Neither is it enough to show that such a condition was imposed by the canon law of Europe.—*Bishop of Exeter* v. *Marshall*, Law Rep. 3 H. L. 17.

Equitable Assignment.—*See* Attachment.

Equity Pleading and Practice.

1. To a bill by a *cestui que trust* against the trustees of a testator's estate, praying for the administration of the estate, and the usual accounts and directions, and seeking to set aside a release which he alleged had been improperly obtained from him, and to be untrue in its recitals, the defendants pleaded the release by them set forth, one of the recitals of which was, that true and just accounts had been rendered, and averred the said recitals were true, and answered the rest of the bill. They did not set out the said accounts. *Held*, that the plea must stand for an answer, with liberty to except. *Quære* (per Lord Romilly, M.R.), whether a release can ever be pleaded without setting forth the accounts therein referred to.—*Brooks* v. *Sutton*, Law Rep. 5 Eq. 361.

2. A first mortgagee, having notice that A., a second mortgagee, had agreed to transfer his mortgage to B. for £250 and certain costs, and had received £250, but had not executed the transfer, made A. a defendant to a foreclosure suit. Before and just after appearing, A. told the plaintiff that he had no interest in the property, and offered to disclaim; and, being served with interrogatories, he put in an answer and disclaimer. Afterwards he executed said transfer. *Held*, that A., until he executed the transfer, was a necessary party, and that he was not entitled to his costs.—*Roberts* v. *Hughes*, Law Rep. 6 Eq. 20.

See Mortgage, 1; Patent, 1; Production of Documents; Trial by Jury; Vendor and Purchaser of Real Estate.

Estoppel.

A deed of release and indemnity to the executor of a testator contained a recital, that the executor had retained £19 8*s.*, being the amount of the legacy duty on the bequests in the will, but in fact that sum was only part of such duty. *Held*, that the executor, who was afterwards called on to pay the balance of the duty, was not estopped by the above recital, made under a mistake of fact, without fraud on his part, from recovering that sum from the estate of the residuary legatees, under the covenant for indemnity in the deed.

An executor of a testator cannot renounce the executorship of other persons of whom his testator may have been executor.—*Brooke* v. *Haymes*, Law Rep. 6 Eq. 25.

See Collision; Company, 2; Specific Performance, 2.

Execution.

By 8 & 9 Vict. c. 10, § 36, "If there cannot be found sufficient whereon to levy" an execution against a company, then such execution may be issued against any of the shareholders, up to a certain limit. Where there was property of the company which had not been taken on execution, but which was not sufficient to satisfy the plaintiffs' debt, *held*, that the latter were entitled to execution against a shareholder.—*Ilfracombe Railway Co.* v. *Lord Poltimore*, Law Lep. 3 C. P. 288.

Executor and Administrator.—*See* Administration; Will, 6.

Exoneration.

In the will of one dying before 30 & 31 Vict. c. 69 came into operation, a direction, that all his debts should be paid "out of his estate," does not entitle a devisee of mortgaged land to have the mortgage debt discharged out of the residuary real estate, under Locke King's Act (17 & 18 Vict. c. 113).

By a specific devise of one of two estates comprised in the same mortgage, the other being left to pass by a residuary clause, will make the latter first liable in exoneration of the former.—*Brownson* v. *Lawrance*, Law Rep. 6 Eq. 1.

Factor.

By the Factors' Act, 5 & 6 Vict. c. 39, § 1, "Any agent who shall thereafter be intrusted with the possession of goods" may make a valid pledge of the same, although the pledgee know of the agency. A party, to whom the plaintiffs had sent wine for sale, pledged the same to the defendants after his authority had been revoked and the wine demanded of him by the plaintiffs, but wrongfully detained by him. The *bona fides* of the defendants was not questioned. *Held*, that the pledgor was not "an *agent*, nor *intrusted*, within the meaning of the act."—*Fuentes* v. *Montis*, Law Rep. 3 C. P. 268.

False Imprisonment.

Defendant, upon whose premises a felony had been committed, acting on information given him by his own coachman, the most material part of which was derived from R., a neighbor's coachman, gave the plaintiff into custody on the charge, without making any personal inquiry of R. The plaintiff was living openly in the neighborhood, and it was not suggested that he was likely to run away. In an action of false imprisonment, the judge instructed the jury, that, under the circumstances, there was no probable cause; and the verdict being for the plaintiff, the Court of Exchequer Chamber refused to disturb it.—*Perryman* v. *Lister* (Exch. Ch.), Law Rep. 3 Exch. 197.

Foreign Attachment.—*See* Attachment.

Fraud—*See* Mortgage, 1.

Frauds, Statute of.—*See* Damages, 2; Specific Performance, 4; Trust, 1.

GENERAL CORRESPONDENCE.

The duty of a Counsel to the Public and his immediate Client.

To the Editors of the Canada Law Journal.

Messrs. Editors,—The recent state trial of Whelan, at Ottawa, has brought prominently before the public the duty of an advocate to any client who may require his services. The press has very generally alluded to it, and some papers, and even meetings of Orangemen, have condemned the Honourable J. H. Cameron for taking up the defence of Whelan, on the ground of his wicked crime, as well as because he is supposed to be a Fenian. The importance of this matter has induced me to ask you to insert these extracts from Chief Justice Richards' charge, and the opening remarks of Mr. Cameron in his speech in defence of the prisoner, which bear on the question at the head of this article. I also accompany them with some remarks of my own:

Charge of Chief Justice Richards.

"His lordship wished to say a few words with regard to the position and duty of an advocate. If a professional man permitted himself to use his discretion as to what cases he would engage in, the effect would be that he would never be found in a case in which he could not gain by money or by credit. The advocate would be merchandise sold to the highest bidder. This is not the way in which the profession acts. It is the duty of every lawyer to accept every retainer; and any man, whatever his station, has a right to insist that his case be taken up. But if he takes other duties I have nothing to say—that is fair ground or public comment."

Coming, as these remarks do, from such a high authority, I am very diffident to question them. But I must say that it seems to me, after all, that a certain discretion is allowed to the advocate, otherwise not only would the feelings of the advocate be occasionally greatly outraged, but he might even be insulted if not tyrannized over by a client.

It is easy to imagine many cases where this might take place. Suppose an advocate to be distinguished for his ability, and that he has a bitter personal or political enemy. This enemy has slandered or grossly injured a personal friend, or perhaps a relative, or perhaps a society, who or which may be very dear to the advocate. The enemy of the advocate goes and insists upon retaining (perhaps happens first to retain) the advocate against his feelings—his convictions—to defend him, to sustain him in his defence in such a case. Imagine a gross libel or slander committed, or a case of seduction or *crim. con.* Imagine a brutal assault, or trespass, or fraud. Now, would the advocate not have a right to refuse to be retained against his friend, against his feelings and convictions? Take the case before us, of the murder of McGee. Suppose Sir John A. Macdonald had been out of the Government, a practising barrister, with his known friendship for the deceased,—would it be thought wrong for him to refuse to defend Whelan? Mr. Cameron is at the head of a powerful organization of men called the Orangemen. Whelan was supposed to be a Fenian, and guilty of the greatest crime (if the evidence be true) committed in Canada. Might not Mr. Cameron, taking into consideration his position, have fairly declined a retainer?

I now give a long extract from the very able and eloquent speech of Mr. Cameron on this trial:

"I have never," he said, "in the course of a long and varied experience at the bar, been called on to address a jury in any case in which I felt so much responsibility as the present. It is unquestionable that a great crime has been committed—that a great name has been blotted out from the roll of the distinguished men of the age—that a great man, who had endeavoured by his own example to get his fellow-countrymen to love that country by the institutions of which they had been enabled to acquire everything which, as free men, they can prize—has been struck down by the hand of the assassin, whilst the words of patriotism were on his lips; and the country which has shown its gratitude to his memory has demanded an atonement, and with an almost universal shout has pronounced that his murderer should be tracked and brought to justice. You can judge how far the prisoner has been entirely free from the exercise of this influence which must act in the minds of men. We all know well that the press from one end of the country to the other has been filled with comments on the course of the trial; and the manner in which, according to the rules of practice, we have been enabled to exclude witnesses from the court has been really of no value, for every day the press has been enabled to lay before the public the evidence of the day before. You will feel, therefore, that I do not speak lightly when I say that we have had to contend in this defence, not merely with the prejudice endeavoured to be got up against the prisoner at the bar, but that our efforts have had to be extended to every act connected with the case. Prisoner's counsel have been interfered with; their lives have actually been threatened for daring to defend him, and everything has been done to prejudice this man in his trial for life and death. Under these circumstances, I cannot help feeling that while a grave responsibility rests on me as a lawyer, a heavier responsibility rests on you than either the advocates or the judge in this case. Gentlemen, it has been well said that it is perfectly impossible for a man to have a fair defence unless his case can be placed before an unprejudiced jury, and it is further impossible for any one to have a free and fair defence, unless those standing in court as his advocates are allowed, fearlessly, to pursue the course which they deem best for him. It would ill become those who are considered the leaders of the bar in this country to fail in doing justice to any man placing himself in their hands. *It would ill become them to do so either through fear or favour, through the allurements or frowns of those in power.* We, as advocates, have duties to perform which we must perform fearlessly; we, as advocates, have to do our duty. I shall read to you words written and spoken by a man great in the English nation—one whose name is known all over the world. I read them to you because I desire it should go forth through the press that it does not lie in our power as advocates to refuse to defend men requiring our services. *No man's case should be prejudiced by a leading counsel refusing to take it up.* What would be the case if when the prisoner asked my services as one of those looked on as the leading counsel in Upper Canada, I had declined? *I should have been not merely a craven in my profession, but should have forgotten my duty to my God.*" (Here the learned counsel quoted from the author in question, who had laid it down that the duty in question was one which should never be given up, was one never to be given up, was one never to be influenced by public opinion. The advocate should not on these occasions mind being mixed up with the supposed criminal and the crime. He was not to retire one

step before the frowns of power, or to tremble under the dread of misrepresentation.) "That," continued the learned counsel, "is true. A man who takes upon himself the obligations of the profession to which I belong swears that he will be afraid to defend no man from fear, favour, or affection, and the justice of this practice will be apparent if you take the other side of the case, and let the prisoner be a man with a cry in his favour instead of against him—there would be no refusal to champion such a case on the part of an advocate. Why should there be so in the other case? In the present instance, too, the prisoner specially needs the services of an advocate; the entire press of the country, an instrument of immense power, and capable of doing much good, has, for a time, forgotten the glorious mission belonging to it, and, as the press has often done in other countries, has apparently endeavoured to spread a feeling against the accused instead of waiting till the trial was over before they commented on the evidence in that manner; and when you consider, gentlemen, that the prisoner has had to contend against all this, against a feeling abroad against him, even such as might influence the minds of his advocates, can we wonder that each of us in our position, you as those who hear and determine his cause and I as his advocate, should feel deeply the sense of our responsibility? It is your duty to come to the consideration of the case with your *minds*, and as far as you can make them, cleared from all that you have heard outside, and with your minds open to conviction. On the evidence given from day to day it is your duty to consider the case, not merely with the knowledge that the life or death of the prisoner rests on your conclusion, but that the great interests of justice are at stake. So much depends' gentlemen, on your freedom from prejudice in considering this case, that I am sure you will pardon these remarks about the relative positions of advocate and jury."

It will be seen from the above remarks that the Hon. Mr. Cameron, who is the Teasurer of the Law Society of Ontario and the acknowledged leader of the bar, takes a very strong view of the duty of an advocate; in fact, he says there is no discretion with the counsel—for if he is asked to act as the defender of any prisoner, he must accept the retainer. It matters not that his feelings and inclinations may be for the Crown, and that he may even be awaiting a retainer to prosecute (if not actually spoken to or retained), he must accept the criminal's retainer. I understand the oath of a barrister only to require him to *faithfully* and *fearlessly* advocate his client's cause *when retained*, *when he takes upon himself a retainer*, not that he is absolutely bound if offered a reasonable compensation for his services, to take up every defence or prosecution offered him. If he is obliged to take a retainer to defend, he is equally bound to take one to prosecute. Thus, *nolens volens*, he might be made to prosecute, to use his talents and his tongue against his oldest and best friend, or a cause or principle which he held dearer than his life! Take, for instance, a lawyer professing strict temperance principles, forced to be retained against his favourite ideas, in favour of illicit traffickers in selling liquors. Imagine a religious lawyer, retained to uphold the publication of books or newspapers, in which the truth of the Gospe of Christ is attacked.

Surely there must be a discretion allowed the advocate to refuse a retainer. I do not understand the duty of an English advocate to be stricter than was that of a Roman or Grecian advocate. Suppose Cicero, who spoke against Cataline and his wicked conspiracy against his country, had had his mouth stopped by a retainer from that man—what would the Romans have said? Suppose Demosthenes had taken up (been forced to do so) the cause of some wicked Grecian, what would his countrymen have said? Suppose an eminent American lawyer forced against his will to defend the murderer of Lincoln. Suppose Lord Brougham forced against his will to prosecute Queen Caroline at the instance of King George the Fourth. Suppose Daniel O'Connell forced by a retainer to prosecute some eminent patriot of his country.

It is thus easy *to put a case* where not only the lawyer's enlightened conscience, but his fellow men, holding high moral views of duty, would sustain him in refusing a retainer to advocate a wicked principle or defend a bad man. It may be asked, then, if all lawyers were to act on this principle, how could a defendant obtain counsel? We all know such a case is not very likely to happen. Clients can generally obtain advocates of some sort. Even admitting such a case, I yet cannot admit that the liberty of action and choice with barristers is so restricted as Mr. Cameron's words would indicate. If my view is likely to operate, in some extreme case, prejudicially to a prisoner, the other view, giving an advocate no choice to refuse a retainer, might often

much oftener, outrage an honest and virtuous lawyer's feelings.

M. D.

Toronto, 20th September, 1868.

[We do not agree with our correspondent, either in his arguments or his conclusions, but as we have already expressed our opinion on this subject, merely repeat that we entirely concur with the expressions which fell from the lips of the learned Chief Justice and the eloquent counsel for the prisoner.

We subjoin, for the information of those not familiar with it, the form of the Barrister's Oath:—"You are called to the degree of a Barrister to protect and defend the rights and interests of such of your fellow citizens as may employ you: you shall conduct all causes faithfully and to the best of your ability: you shall neglect no man's interest nor seek to destroy any man's property: you shall not be guilty of champarty or maintenances: you shall not refuse causes of complaint reasonably founded, nor shall you promote suits upon frivolous pretences: you shall not pervert the law to favor or prejudice any man, but in all things shall conduct yourself truly and with integrity. In fine, the Queen's interest and your fellow citizens you shall uphold and maintain according to the Constitution and law of this Province." Weighty words, truly, and not lightly to be frittered away, or weakened by mere considerations of personal feeling.—Eds. L. J.]

Law reporting—Decisions of County Judges.

To the Editors of the Canada Law Journal.

Sirs,—I find by the last number (No. 6) of the Common Pleas Reports, page 446, vol. 18, what purports to be the report of a decision of some importance to the commercial as well as the agricultural and other business men of the country, who may be affected in any way by the Insolvent Act of 1864. I do not find, however, in any part of the case, as reported, the reasons which "*the Judge of the Court below*" gave for the conclusions at which he had arrived; although the Judge who delivered the judgment in appeal says the County Court judgment was very carefully prepared, and fully sustained by the reasoning: nor do I find throughout the whole report the name of the county given in which the decision was had. The latter may be of no importance, but still it is usual to give it. But surely, when a Superior Court sustains in appeal the judgment of an Inferior Court, and the reasons are fully and satisfactorily sustained also, the Reporter might, in view of its probable importance, let the Profession know what those reasons were. He does not explain why the appeal was "*disallowed, excepting that the debtor should be allowed a further time to sustain the allegations of his petition, if he can;*" or what brought about this peculiar judgment. Nor does the judgment itself do this. The 8th paragraph of the 447th page is a very meagre report of what I happen to know, from examining the appeal book, was a very elaborate and lengthy judgment; and if we might not have it *in extenso*, it would have been well to have given us an outline of the Judge's reasoning, because it is not improbable that the same question may be debated hereafter, either in the Court of Chancery or in the Queen's Bench, the present decision in appeal not being binding upon either of those Courts.

From all that appears in the report a stranger might infer from reading it that there is only "*one Court below*," and but one Judge of a County Court for the whole Province of Ontario.

A great deal of redundancy is made use of quite beside the question involved; for instance, although a copy of the first note is given in the 4th paragraph (page 446), the 5th paragraph tells us that the first note was payable to Luce, Brothers, or bearer, the 5th paragraph (page 447) tells us the first note was at eight per cent. generally, and the remaining notes were at eight per cent., payable annually. The 6th paragraph (page 447) tells us the first note was payable in two years, and each of the others at three, four, five, six, seven, eight and nine years. Then the 1st paragraph (page 447) tells us the dates of all six notes, and the dates of the 7th and 8th. Then the 2nd, 3rd and 4th paragraphs tells us minute particulars, which were but of the slightest importance, and if it was necessary to have given a copy of the first note, it was just as necessary to have given copies of the *other* notes; whereas a statement that none of the defendant's notes had matured, after a concise description of their amount, for all purposes of understanding the facts involved in the decision would have been quite sufficient. Or, after giving a copy of the first note, it was quite

unnecessary to say to whom or when it was payable; or its date, or its amount, or the rate at which interest was to be calculated upon its principal. Or, after giving a copy of the first note, one would have supposed that a copy of the others would have been deemed necessary too.

I am told the petition was *not* (as the Reporter alleges) dismissed by the County Judge *with* costs, but *without* costs, the question involved being new; so that, if I am correctly informed, there was here an inaccuracy, or an unnecessary statement at all events.

It is said the petition was dismissed "*as well on the law as on the merits.*" We have no report of what the merits were, except that the petition stated that the defendant's estate had not become subject to compulsory liquidation and the notes mentioned were not due. As to the merits, the Judge in appeal is made to say "*the application to have the proceedings set aside, because the* 'RESPONDENT' was not, in fact, insolvent, or amenable to the Act." Surely there is something wrong here. Who was the "*Respondent?*" Was it the party who appealed? In the Court below, and in the Act of Parliament, the debtor (or supposed insolvent person) is called a "*Defendant,*" not a "*Respondent,*" and he becomes by appealing the Plaintiff in appeal, or the "*Appellant,*" and the Plaintiff below becomes the Defendant, or "*Respondent.*"

Then, again, it is not explained why evidence of the facts were not given in the first instance, so that the Court of Common Pleas ordered that proceeding to be taken afresh. The report should, I think, explain this.

Yours respectfully,

L. L. B.

Ontario, 12th Oct., 1868.

[Whatever may have been the case in former years, the Common Pleas reports have, of late, been such that a temperate criticism of a defective, or supposed defective, report may be looked upon as evidence that, as a rule, the work is now well done.

Reporting is not, as some persons imagine, the easiest thing in the world, nor is every one possessed of those qualities that, combined, make an efficient reporter. We are, therefore, disposed, for our part, to make due allowance for occasional shortcomings.

The gravamen of the complaint of our correspondent is that the judgment of the judge of the court below, which, by the way, was the County Court of the County of Elgin, was not given *in extenso*, or at least sufficient of it to give readers the benefit of the arguments adduced by the Judge of that Court.

Whilst agreeing with our correspondent that it would have been well if the Reporter had exercised his discretion in publishing, as part of the report, the judgment of the court below, because it was, as remarked by the court above, "very carefully prepared, and is *fully and satisfactorily sustained by his* (the County Judge's) *reasoning,*" we cannot admit either the necessity or advisability of publishing, *as a rule*, judgments appealed from. Many judgments appealed from are intrinsically not worth reporting; others again, carefully prepared and evincing learning and research, are either upheld or reversed on grounds which are not the subject of the argument in the court below, or the appeal goes off on some point not affected by the judgment. In such cases it certainly is not the duty of the Reporters to do more than give such a general outline of the effect of the judgment as may make the report of the case case clear and intelligible—for it must be borne in mind that the Reporters are Reporters of decisions in the *Superior Courts*, and not of those in the *County Courts;* and we speak, we think, for the profession at large, when we say that the desire is not for a multiplicity of cases, simply as such, or for opinions either devoid of weight or finality, or only repeating former decisions, or affecting only a particular state of facts without the possibility of general application—but, for binding authorities, elucidating the fundamental principles of law or equity in their application either to the general business of the country, or to the interpretation of ever-recurring doubtful points under Acts of Parliament.

REVIEWS.

The Law Magazine and Law Review, August, 1868. London: Butterworths, 7 Fleet Street. Price 5s. a number.

The last number of this, the great English Quarterly Journal of Jurisprudence, commences, as does its *confrere* in America, with a paper on the life of Lord Brougham. The "Prospects of a Digest" are then discussed. We copy the next short article on "The Lord Chief Justice of England and Mr. Justice Blackburn," rather a memorable incident of the English Bench—also when we have space, the paper on the Judicial Committee of the Privy Council, interesting as a matter with which we have occasionally something to do and know little of, and as likely to shew some of the difficulties to be surmounted in the construction of our Court of Appeal for the Dominion.

The other articles are—The Union of Church and State—The Law of Merchant Shipping—Can a person holding a judicial office sit in the House of Commons? &c., and the usual notices of new Books.

In the Events of the Quarter we notice, amongst other "varieties," the following remarks on a subject trivial enough in itself, *Judges' Dinner*, which speaks for itself:—

"We are delighted to see this good old rule, we cannot, indeed, say kept up, (for it is not!) but reviving. We rejoice to note a remarkable instance of it; because there are few things in the legal profession better calculated to maintain a friendly feeling between the Bench and the Bar (a matter of more importance in the administration of justice than at first meets the eye,) than a convivial meeting now and then. It has many advantages of a social kind; above all, it reduces the distance between the judges and the barristers, which, in the nature of things, exists; and which, in the nature of things, will widen unless it be restrained by the constant renewal of some such reunions as this. It was, probably, to enable the judges to keep up (amongst other things) such laudable customs with a view to an harmonious intercourse, that the legislature granted such liberal salaries to the judges. There are some who seem, from their talk, to look upon their salaries in a very different light. Be that as it may, in many instances, we say it without offence, it would be difficult to find any other reason for so liberal an allowance."

The concluding remarks are, *we must admit*, singularly *mal-apropos* in this country, but it is not necessary to entertain with "a banquet of surpassing elegance," as did the "ever kind and ever generous Chief Baron Kelly," on the occasion spoken of. What we were thinking of was a much more simple matter—an inexpensive, but not therefore any the less pleasant occasional meeting in Assize Towns, where the benefits and advantages above alluded to could sometimes be participated in by the country bar as well as those going "on circuit."

The American Law Review. Boston: Little, Brown & Co., 110 Washington St., Boston. $5 00.

The October number commences with an interesting sketch of the life and times of Lord Brougham, which may be usefully read in connection with the notices of that eminent man, to be found in the English periodicals.

A large space is devoted to the discussion of the "Erie Railroad Row;" certainly a curious name for a legal article, but probably a correct one, if the reviewer is to be credited; of this we may hereafter speak more at length.

This number contains, in addition, the Digest of English Law Reports for May, June, and July, which we continue to extract for the benefit of our readers—A Selected Digest of State reports, which must be invaluable to Americans, and, considering our near proximity, often useful to us—Book Notices—A list of new law books published in England and America since July, 1868, excellent as an easy and reliable reference; and, lastly, a summary of events of professional and legal interest.

We most heartily commend these two magazines, the one English and the other American, to our brethren in Canada. The price is merely nominal, and the contents of both always excellent.

Lower Canada Reports. Quebec: George T. Cary.

Nos. 9, 10, 11 and 12, of Vol. 17, are to hand. This series of reports is edited by Messrs. J. Dunbar and G. H. La Rue, of Quebec—with Messrs. Beaudry & Robertson as contributors from Montreal.