## DIARY FOR MARCH.

1. Thur..Last day for delivering appeal books in Court of Appeal.
4. SUN..*3rd Sunday in Lent.*
6. Tues..York changed to Toronto, 1834.
11. SUN..*4th Sunday in Lent.*
13. Tues..General Sessions and County Court Sittings for York.
14. Wed .York, Market town, 1814.
15. Tues..Court of Appeal sits. Last day for issuing shop and tavern licenses.
17. Sat...St. Patrick's day.
18. SUN..*Palm Sunday.*
23. Frid..Sir George Arthur, Lieut.-Governor of Upper Canada, 1838.
25. SUN..*Passion Sunday.*
30. Frid..Good Friday. Lord Metcalfe, Gov.-General, 1843.

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THE

# Canada Law Journal.

**Toronto, March, 1877.**

We are glad to be able to announce that arrangements have been made by the Law Society for a more regular and systematic publication in this journal of early notes of cases decided by the Superior Courts of Law and Equity at Osgoode Hall. This was commenced about a year ago, but partially discontinued owing to the press of work which had accumulated upon the Reporters. We are instructed to say that the publication of these notes will hereafter be continued with regularity and all possible promptitude. A want long and seriously felt by the profession will thus be supplied.

As we do not desire to delay the issue of this number, we publish it in two parts. It is intended that the second part shall, in addition to other matter, contain notes of the cases decided last Term.

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It was held lately in Ireland, in the case of *Sheedy* v. *Conelly*, an action against an attorney by his client for negligence, that the presiding Judge before whom the case was tried in which the alleged negligence occurred, was a proper witness to depose to certain matters which had taken place during the trial. The Court put it on the ground that according to the usual practice the Judge's notes might by consent be given in evidence, but that if this was objected to, he could himself be examined. See *R.* v. *Gazard*, 8 C. & P. 595.

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At law, the better opinion appears to be that letters before suit are not taxable if the suit is settled before the issue of the writ. In Chancery it would seem that such a letter is taxable, and that the fee allowed by the tariff "*letter of notice before instituting suit: fifty cents,*" can be claimed by the solicitor: see *Hutchinson* v. *Rapelje*, 2 Gr. 541. In addition to the cases which leave the matter in such a confused state (cited ante p. 15), reference may be had to *Caine* v. *Coulson*, 11 W. R. 239, where Martin, B. says: "I do not at all mean to say it is unreasonable that when a debtor has not paid a debt in the usual course, and the creditor has to employ an attorney for the purpose of enforcing it, the attorney should have a right to say, 'remit me the money and 6*s.* 8*d.* the costs of the letter.' I do not think there is anything unreasonable in that, nor do I think any blame ought to be imputed to an attorney for so writing."

However in the case of a wrongdoer the Courts have never deemed it proper

that any notice should be given before commencing proceedings. In such cases the plaintiff is justified in initiating his suit at once and letting service of the process be the first intimation of the assertion of his rights.

## *JOTTINGS ON THE "ROUGH DRAFT," &c.*

In glancing over what is called "The Rough Draft of the revised statutes of Ontario," we have noticed some matters not of much consequence in themselves, but which may as well be put right, if indeed it has not already been done, before they pass into the printed Parliamentary roll as the final exposition of the mind of the Legislature.

First, we call attention to a curious compound blunder in the schedule of the Common Law Procedure Act, (Tit. iv, c. 48, p. 654). In giving forms of pleas in actions on contracts there is a note to the second form "that he did not promise as alleged" as follows: "It would be objectionable to use 'did not warrant,' did not agree,' or any other general denial." In the C.S. U.C. p. 272, the sentence from which this is altered reads as follows: "It would be objectionable to use, 'did not warrant,' 'did not agree,' or any other appropriate denial." The compiler felt that the term "*appropriate*" was *mal à propos*, and tried his hand at amending the text. But like a good many other emendators, he failed to lay hold of the right word. The schedule to the English Act of 1852, shews the true reading thus: "It would be *unobjectionable* to use 'did not warrant,' 'did not agree,' or any other *appropriate* denial."

The memorandum in the margin of writs of summons, writs of attachment against absconding debtors, &c., to the effect that they are issued from the Clerk of the Crown and Pleas, should be altered to correspond with the fact that they are not issued from that office, but by the Clerk of the Process. The like oversight in the consolidated statutes gave rise to a learned discussion and a solemn judgment in *Wakefield* v. *Bruce*, 5 P. R. 77.

It may be as well also not to encourage the notion which obtains among some practitioners that there is such a verb as "*to garnishee.*" It is bad enough to have the ancient uncouth terms of the law, without adding to them by any modern spurious coinage. The person who owes the debt garnished (from Fr. *Garnir*, to warn) is the garnishee. But in the margin to sec. 124 of the Division Court Act (Tit. vi. c. 45, p. 461) the objectionable word is found, as if it might be used interchangeably with the proper verb "to garnish."

## *CONCERNING COSTS WHERE THE CROWN IS INTERESTED.*

The characteristic difference between Courts of Law and Courts of Equity in the disposal of costs is this, that in no case are costs recoverable at law, except under the provisions of particular statutes, whereas in equity, as Lord Hardwicke puts it, conscience, and not authority, is the source of the jurisdiction. Except in some few special cases the statutes relating to costs omit to mention the Queen's name, and for that reason she is not within their operation, and cannot be called upon to pay costs at law when she is an unsuccessful litigant: *Atkinson* v. *The Queen's Proctor*, L. R. 2 P. & D. 255; *Reg.* v. *Beadle*, 7 E. & B. 492. But this reason does not apply to a Court of Equity, which possesses inherently the right of adjudicating on the question of costs. The duty of this Court to intervene in such a matter is equally imperative whether the Crown is concerned or not. The Court of Chancery has the power to impose costs against the Crown, but how to compel obedience to the order, *hic la-*

*bor, hoc opus est.* Writs of execution under which a decree for costs is enforced, are issued in the name of the reigning sovereign, and they cannot be levelled against their author. Officers of the Queen, to whom in the usual course of administration the affairs of the Crown are entrusted, and who for that reason appear as parties litigant have ordinarily no Crown property in their hands which they can apply or are at liberty to apply to satisfy such a decree, and it would not be conscionable to levy upon their private effects when they have been acting in the discharge of a public duty: *The Lord Advocate* v. *Lord Douglas*, 9 Cl. & Fin. 173. Hence, Courts of Equity will not issue an order which they cannot enforce, and will not award costs against the Crown or its officers which they can neither directly nor indirectly exact by their process.

This being the policy of the Court, it works a corresponding change in the right of the Crown to claim costs in cases where a subject would be entitled to receive them by the *cursus curiæ*. The Court generally applies the principle of reciprocity, and as it is not able to enforce costs against the Crown in favour of a private suitor, neither will it mulct a private suitor in costs when the Crown succeeds. This practice of the Court is conveniently summed up in the familiar maxim that the Crown neither pays nor receives costs: *Rees* v. *Attorney-General*, 16 Gr. 467; *Burney* v. *Macdonald*, 15 Sim. 6; *Attorney-General* v. *London*, 8 Beav. 270, and in appeal 1 H. L. R. 471; see also *Attorney-General London*, 1 Mac. & Gord. 269, where the matter is elaborately and instructively discussed.

The most noticeable statute affecting the right to costs in Crown cases is the Imperial statute 18, 19 Vict. cap. 90, which was soon after introduced into this Province and is now chapter 21 of the Consolidated statutes (U.C.) This statute is limited to cases where the information, suit action or other legal proceeding is by or on behalf of the Crown, (secs. 6 & 7) and it does not extend to litigation in which the Crown is made a defendant. In equity, then, the chief result effected by the statute is that the interposition of a relator is no longer really necessary to enable the Court to give costs to a successful defendant in Crown suits. Otherwise the practice is left as it was: see *Gibson* v. *Clench*, 1 Chan. Cham. R. 69. The proper form of order for the payment of costs under this statute is given in the *Attorney-General* v. *Hanmer*, 4 De. G. & Jo. 305. The position of the Crown and the Court was pointedly and pithily put by Van Koughnet, C., in the *United States* v. *Dennison*, 2 Chan. Cham. R. 263, where he laid it down that the rule that the Crown neither claims nor pays costs is that which the Court favours as most consistent with the dignity of the Crown and the practice of the Court. He perhaps unconsciously recalled the grave humour of Lord Lyndhurst's language in *Hullett* v. *The King of Spain*, 1 Dow 177, when he said that the House of Lords declined to disparage the dignity of the King of Spain by giving him costs.

## *LAW SOCIETY.*

### Hilary Term—1877.

#### CALLS TO THE BAR.

Sixteen students presented themselves for examination. Of these the following were successful. The names are given in the order of merit:

A. C. Killam, T. Hodgkin, C. J. O'Neil, F. Robertson, H. E. Henderson, H. Cassels, F. Love, W. Wyld, and T. Caswell.

The following were also called to the Bar under the Rule of the Society for calls of attorneys under Act of 1876:

Geo. Edminson, Fred. W. Colquhoun, Edward O'Connor, and John Bergin.

ATTORNEYS ADMITTED.

The following articled clerks were admitted to practice. Four were rejected for insufficiency in their examinations:

J. H. Madden, H. Cassels, J. W. Gordon, James Dowdell, C. J. O'Neil, M. J. Carthew, T. J. Decatur, J. D. Cowper, A. W. Kinsman, C. Morrison, C. Gor- F. S. O'Connor, and G. S. Hallen.

FIRST IMTERMEDIATE.

H. P. Shepherd, (276 marks), James Gorman, (273 marks), W. Macdonald, J. Haverson, W. R. Hickey, and J. T. Parkes, without oral. J. C. Ross, W. B. Simpson, F. Case, J. J. Scott, C. E. Hewson, E. C. McKenzie, R. Strachan, H. S. Lemon, G. W. Greene, M. Munro, J. A. Kerr, W. E. Higgins, J. B. Rankin, and W. Fletcher, after an oral. Nine were rejected.

SECOND INTERMEDIATE.

D. M. Christie, (295 marks), K. Dingwall, (291 marks), J. A. Aikins, (283 marks), C. Glass, J. A. Wright, J. J. Wadsworth, H. T. Beck, and T. R. Slaight, *æq.*, and A. B. Aylesworth, without an oral. W. L. Walsh, J. K. Dowsley, P. C. McNee, A. Zimmerman, E. S. Scatcherd, M. J. Doyle, and F. W. Harcourt, after an oral. Two were rejected.

The maximum of marks was 300. Several of the papers in the Intermediate Examinations were remarkably good, notably those of Mr. Christie and Mr. Dingwall.

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PROCEEDINGS IN CONVOCATION.

The following is the *resumé* of the proceedings of the Benchers during this term, published by authority:

*Monday, February 5th, 1877.*

The gentlemen whose names appear in the usual list were respectively called to the Bar, received certificates of fitness and were admitted into the Society as Students-at-Law and as Articled Clerks.

The petition of Mr. John Folinsbee asking for re-examination was refused.

The petition of the Osgoode Literary and Debating Society, asking that prizes, to be competed for by students, might be awarded by the Law Society, was presented by Mr. Maclennan and was referred to the Committee on Legal Education to report upon.

The petition of David Steele was presented by Mr. Robertson, asking that his final examination may be had in Easter Term next and be allowed:

*Ordered*, To stand over until Easter Term.

Mr. Maclennan gave notice for the 6th instant for the appointment of a committee, to consider and report upon a complaint by some members of the profession of the intended arrangements for access to the new Chambers for the Master in Chancery.

Mr. Hodgins gave notice that he would on the 6th instant, move that a select committee be appointed to prepare rules regulating the order of business at the ordinary meeting of the Benchers.

*Tuesday, February 6th, 1877.*

Mr. Senkler was elected a Bencher in the place of Mr Armour, resigned.

Mr. Maclennan moved, seconded by Mr. Robertson, that the Benchers who are members of the legislature be a committee to procure an amendment of the law, to the effect that, henceforth the Chancery Judges and Judges of the Court of Appeal be ex-officio visitors of the Law Society, and that any member of Convocation hereafter appointed to be a Judge or Junior Judge of a County Court thereby vacates his seat as a Bencher.

Mr. Maclennan laid before Convocation the report of the special committee appointed to examine Messrs. O'Connor

Bergin, Edminson, and Colquhoun, which was adopted.

*Ordered*, That the above named gentlemen be called to the Bar.

The petition of Mr. Symons asking that the fee of two hundred dollars paid by him on his call be refunded, was presented and read.

*Ordered*, That Mr. Symons petition be refused.

*Ordered*, Upon the motion of Mr. Hodgins, seconded by Mr. Meredith, that the Treasurer and the Chairman of the several standing committees be a select committee to prepare rules regulating the order of business at ordinary meetings of Convocation.

The statement of receipts and expenditures for the year 1876 was laid before Convocation.

Mr. Osler moved, seconded by Mr. Hodgins, that Mr. Maclennan, Mr. Hodgins, Mr. Benson, Mr. Mackelcan, Mr. Hoskin, Dr. McMichael, Mr. Martin, and the mover, be appointed a Committee of Discipline to consider and frame rules relating to the interior discipline and practice of Attorneys.

*Ordered*, That Mr. Osler's motion be adopted.

*Saturday February 10th, 1877.*

The report of the Committee on Legal Education in reference to the preliminary examinations was read.

*Ordered*, That the report be adopted.

The report of the Library Committee in reference to the purchase of English and American books, was adopted, except as to the American reports, and as to these was referred back to the Committee for reconsideration.

*Ordered*, That Mr. Bethune be added to the Library Committee.

Mr. Maclennan brought in the report of the Committee on Reporting recommending the payment of the arrears of salary of the reporter of the Queen's Bench and the publication of early notes of cases in the *Canada Law Journal.*

*Ordered*, That the report be adopted.

Mr. Robertson was called to the Bar.

A letter complaining of the conduct of a member of the Bar was referred to the Committee on Discipline.

The petition of Mr. Dexter for the allowance of his examination without a further payment of fees by him, under the special circumstances of his case, was granted on his furnishing a proper bond of indemnity.

*Resolved*, That the fine for not taking out certificates in due time be as follows: "If such certificate be not taken out before the first day of Hilary Term, in addition to the usual fee for certificates, the further sum of two dollars for each Court; if not taken out before the first day of Easter Term, the further sum of three dollars for each Court, in addition to the usual fee for certificates; and if not taken out before the first day of Trinity Term, the sum of four dollars for each Court, in addition to the usual fee for taking out certificates."

*Ordered*, That fifty dollars be paid Mr. Clarke for making out certified copies of the Barristers and Attorneys Rolls from the original Rolls in the custody of the Clerks of the Crown.

*Resolved*, That the examiners, Mr. Patterson and Mr. Kingsford be each paid seventy-five dollars for their services as examiners.

The letter of Mr. Williams was considered, and his application for a refund of his primary fee as articled clerk was refused.

The petition of Mr. Proudfoot was received and allowed to remain over till he presents himself for final examination, the application being now premature.

Mr. Hodgins gave notice that he would on Friday, the 16th instant, move that a representative to the University of Toronto be appointed by this Society.

The intermediate examinations of Messrs. Meyers and Miller were not allowed.

The plans and estimates for increased library accommodations were referred to a joint committee composed of the Finance and Library Committees.

*Friday, February 16th, 1877.*

Mr. D. B. Read, Q.C., in the absence of Treasurer was appointed Chairman.

The petition of Mr. David Robertson was received and refused.

The petition of Mr. J. A. Loughheed was granted.

The petition of Mr. Langtry was granted.

The petition of Frederick Sheppard O'Connor was refused, not being in accordance with the rules for special cases.

The petition of W. H. Deacon was granted, on petitioner furnishing to the Secretary a statutory declaration verifying the petition.

The petition of George Martin was read.

*Ordered*, That on proper proof of his contract of service and the loss thereof, and of his service under the contract according to the rules of the Society, he be permitted to present himself for examination.

The petition of Charles McDonald was received and ordered to stand over.

The joint report of the Library and Finance Committee on additional accommodation in the Library was received and adopted.

The report of the Library Committee on the subject of American reports was adopted.

In the matter of a member of the Bar, a letter of complaint addressed to the Secretary of the Society. and by him laid before Convocation, was referred to the standing Committee on Discipline.

In the matter of an Attorney and Solicitor, two letters of complaint were referred to the Committee on Discipline, with instructions to communicate with the Attorney and report to Convocation.

Moved by Mr. Mackelcan, seconded by Mr. Hodgins, and

*Ordered*, That the statement of receipts and expenditure of the Society for 1876 be printed, and that in accordance with the statute of Ontario, 35 Vict. cap. 7, sec. 7, a copy of such statement be sent by mail with the first number of the current reports to every practitioner who has taken out his certificate.

Mr. Mackelcan gave notice that he would on the first Tuesday of next term call the attention of the Society to the necessity for superannuating the present steward and appointing another in his place.

Mr. Robertson gave notice that he would on the same day move that the salary of the Secretary and Librarian be re-considered.

*Ordered*, That the committee on the relations of the Law Society to the Government be continued.

## SELECTIONS.

### *PRIORITIES AND ABSTRACTING OF EQUITABLE CHARGES.*

In the pages of a literary periodical, then conducted by one now no more, whose pen had, many a ime, done good service in the cause of legal reform, we remember reading, some twelve or thirteen years ago, a tough piece of legal exposition :—"What *is* an abstract of title." The definition thereof by a certain Mr. Wordy, one of the attorneys, was somewhat in this wise :—An abstract is a history—a concise history I may say—of the title. It generally commences some sixty or seventy years back, and brings the matter by gradations up to the present time. Carefully, carefully—no undue precipitation. It is very apt, we find, to get hold of a gentleman who flourished at a remote period, and to exhaust him and everything connected with him, to say nothing of the leading legal incidents of his life, by a strong dose of "and whereases," as, for instance, "and whereas he intermarried with somebody"—giving the particulars of that event and a slight sketch of the settlement; "and whereas he became, in some way or another, con-

nected with the property under consideration"—very full description of this; and "and whereas he died;" and "and Whereas they (the issue) died, and whereas she (the wife) died." Then, having effected this satisfactorily, it naturally proceeds to perform the same kind office for somebody else. Sometimes, it becomes involved in a Chancery suit, and then it furnishes a short narrative of the facts—as "and whereas a bill was filed," followed by a pretty full summary of the bill; "and whereas somebody else was found to be a necessary party to the suit"—explanation of the circumstances; "and whereas a baby was born, and immediately appeared by its next friend"—full description of baby; "and whereas it was discovered that everybody wasn't before the Court"—lavish explanation of that discovery; "and whereas"—but the description of a Chancery suit is invariably clear and easy. Occasionally, however, continued Mr. Wordy, the legal estate becomes detached from the equitable, and this, I confess, creates a difficulty. I myself, said he, have at present a case of this description in hand, where the legal estate is prospecting either in California or British Columbia—we don't exactly know which.

In other respects, inconvenient equities are but too apt to multiply the folios of abstracts of title, and to involve them in deeper obscurity; and, unfortunately, the tendency of the authorities of late appears very much to conduce to this undesirable result. Of what possible materiality is it to disclose, on the face of the abstract, instruments of trust which are wholly unimportant to a purchaser destitute of notice of their existence? Or, where a good title is shown to the legal estate, and a charge which clearly operated only in equity, and would not affect the legal estate, has been satisfied—whether an equitable charge by deed, or a mere memorandum accompanying an old equitable mortgage by deposit—might not such equities without material risk be suppressed, since they would have no operation as against a subsequent purchaser for value without notice, and his title would in no degree, therefore, depend upon the sufficiency of the release? Or, suppose that a solicitor who is conducting a sale for his client makes him an advance in anticipation, and is secured by an informal equitable charge upon the property or expected sale-proceed, out of which, on completion of the purchase, the debt is satisfied—how can the suppression of this prejudice a purchaser? Certainly, we must allow that practice and convenience would rather seem to sanction the view laid down generally in Dart's "Vendors and Purchasers," that, where an informal equitable charge has been satisfied, its existence may, except under special and exceptional circumstance, be altogether suppressed by the vendor's solicitor. Nevertheless, in *Drummond* v. *Tracy*, Johns. 608, 612, it has been held that a vendor is not justified in suppressing a letter creating an equitable charge which was intended to be paid off; and further, that he would not have been so justified, even though the charge had been actual satisfied. If this rule is to be acted upon, it certainly does appear to be the inevitable conclusion that every defunct equity which, during the preceding sixty years, may have affected the property—whether created by writing or merely by parol—ought to be set out in the abstract; for it would obviously be mere wasts of time to communicate otherwise the past existence of the charges to the purchaser, leaving him to require the abstract to be amended accordingly see 1 Dart's, V. & P. 279:

In a yet more recent case, *Dixon* v. *Muckleton*, 21 W. R. 178, Jan. 4, 1873, it appeared that M., the owner of the P. estate, deposited in 1864 with S. a deed, over one hundred years old, relating to the estate, and wrote a letter telling S. that this was a deed of the P. estate, which was to be a security to S. for 400*l.* then lent, and for previous advances. Subsequently, in 1868, M. deposited with a bank the latter title-deeds of the P. estate (which disclosed a perfect sixty years' title—without notice of the prior deposit of the old deed), together with a memorandum of deposit, charging the P. estate with advances made by the bank. It was held by Lord Romilly, M.R.—and his decision was affirmed on appeal—that S. had acquired a vested equitable estate in the P. estate, and had not, by not inquiring into the nature of the deed and as to the existence of other deeds, been guilty of such gross and wilful negligence that the Court would take away the estate so acquired, and that this equitable

charge, accordingly, took priority of the charge in favour of the bank. "It is impossible," observed Lord Selborne, C., "to see the injustice sometimes done by this class of cases without finding cogent arguments for an improvement in the law as to the title to real estate, in order to get rid of the difficulties arising from there being a legal and equitable title, and of the necessity of deducing title by long and complicated abstracts." It was strongly urged that the result of deciding in favour of the prior charge, and for that purpose resuscitating a venerable instrument bearing date Anno Domini 1774, would be, moreover, that many equitable mortgages might be made of the same estate, and the holder of any one would ever be subject to be turned round by some unsuspected prior charge, unregistered, and it may be from its particular nature incapable of being registered: see *M'Kinney's Estate*, 6 Ir. L. T. R. 179, *passim*. Admitting the indubitable truth of this possible result, Lord Romilly observed that the sole answer to the objection is, that the person who lends money on this species of security must take care to be the first of such incumbrancers; and, if he cannot be sure of this, he must not advance his money without the security of a legal mortgage: 21 L. T. N. S. 753. Certainly, in effect, it would appear to be eminently perilous to lend money upon equitable securities. But, as Turner, L.J., observed in *Cory* v. *Eyre*, 1 De G. J. & S. 169, "if equitable securities are to be made perfectly safe, it must be done by the Legislature. We cannot alter the law." The first question, of course, in such cases will be, did that take place which was sufficient to vest an equitable estate? "It is extremely difficult to determine the question of what it is, provided that it be a material deed, that will create an equitable mortgage," declares Lord Romilly; but, then, "'material' means only that it must be a deed relating to the property," and by no means necessarily a deed upon which the title depends. And the authorities have gone the length of holding that, when the Court is satisfied of the good faith of the party who, between himself and the owner, had a prior equitable charge in point of time—when there has been a positive statement, honestly believed, that he had got the necessary deeds—that he is not bound to examine the deeds, not bound by notice of their actual contents being unexamined, or by any deficiencies which, by examination, he might have found in them, and that this is so even where the depositor was himself acting in the double capacity of borrower of the depositee's money and solicitor for the depositee, as in *Colyer* v. *Finch*, 5 H. L. C. 905, 924, 928, and *Hewitt* v. *Loosemore*, 9 Hare, 449. Many grave considerations are, accordingly, opened up by the decision of *Dixon* v. *Muckleton*. But that, in particular, which we here desire to note that it enforces is, the exigency of looking more strictly than is usual in practice into the remoter history of title, and of not ignoring the existence of muniments no matter how antiquated, and, in one sense, immaterial. And if, in the result, abstracts should come to resemble the "Encyclopædia Britannica" as it might appear in manuscript, and if the archives of the muniment-room should increase and multiply till, as Hamlet observed, pointing to the coffin of the lawyer, "the very conveyances of his lands will hardly lie in this box," the lawyers alone are not to blame, should that result remain unremedied. It lies with the public to expedite redress, and with the Legislature to provide it.—*Irish Law Times.*

## *THE ORIGIN OF PARLIAMENTARY REPRESENSATION IN ENGLAND.*

(*By Edward A. Freeman, D.C.L.*)

When the painter Hayden ended his troubled life, the picture on which he was engaged was "Alfred and the first British Jury." In that day perhaps few were struck by the grotesque incongruousness of the title. It probably struck but few that, if Alfred brought together any jury, it was at all events an English jury. It struck but few that to any Englishman from the days of Alfred till deep into the eighteenth century, a "British jury" would have conveyed no meaning but that of a jury of Welshmen. But this is not the main point. The more wonderful thing is that any body could ever believe that Alfred invented trial by jury, or indeed that, in the sense in which it was meant, any body ever

invented anything. It is no slight historical error to believe that Alfred, out of his own head, called into being an institution of which the germs may be traced ages before his time, but of which the finished shape is not to be seen till ages after his time. Still this is less wonderful than the general misconception of supposing that any institutions are called into being in this way out of the brain of a single man. Yet no belief has been more common in all times and all places. Critical historians have remarked over and over again, that the mythical position of Alfred in English history, as the supposed inventor of everything, is exactly parallel to the mythical position of Servius at Rome, and of Lycurgus at Sparta. It might perhaps have been dangerous to doubt the claims of Servius at Rome, or those of Lycurgus at Sparta; and we would not rashly affirm that it may not be a breach of the law of England to doubt whether Alfred invented the English constitution as a finished work out of his own head. It is certain that such was the belief of Blackstone, and whatever Blackstone says goes with many a lawyer for law. The passage is worth quoting:

"When therefore the West-Saxons had swallowed up all the rest, and King Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as masterly a manner; no less than to new-model the constitution; to rebuild it on a plan that should endure for ages; and out of its own discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well-connected whole." —*Commentaries*, iv. 410. Ed. 1809.

Such were the notions of a West-Saxon king of the ninth century which were held by the legal oracle of the eighteenth, notions which his editors went on reprinting as late as 1857, with the feeblest protest against the venerable fable. In the face of this, it is some comfort that of later years it has almost become a proverb that "constitutions are not made but grow." But it is also very lately that men have begun fully to take in how very slowly they grow. I am writing for American readers, and some American readers may perhaps be inclined to throw in my teeth the fact that the Federal constitution of the United States, though not the work of one man, was the work of one set of men—that it was written down in a single document, and that it has lived on for nearly ninety years without any substantial change. But a wider view looks on the constitutions of the English-speaking nations on both sides of the ocean as simply parts of one whole; and in this wider view the constitutional work of Washington and his fellow-workers was not the creation of anything new. It was the shaping of what was old into such new forms as altered circumstances needed. It was a work answering to the work of the days of Henry the Second, of Edward the First, and of William the Third. It was a work which differed from theirs only in this—that the circumstances of the case required the change to be more formal and systematic, to be recorded in the definate shape a constitution, instead of being left to be gathered from a number of separates tatutes and separate administrative acts. The broad outlines of the old constitution are preserved in the new. The form of the executive is changed; the form of the second chamber is changed; because circumstances called for such a change; but the three great powers of the state remain in the new system as in the old, and, in a wide view of historical politics, the points of likeness are far more striking than the points of unlikeness. The new system, like the old, has one legislative body which is chosen by the direct voice of the people, and another legislative body which is not chosen by their direct voice. That the same system has been imitated over and over again in other lands may be set down as a witness to the practical excellence of the elements which England and America have in common. But the American constitution itself stands on another ground. It is not an imitation of the English constitution; it is the thing itself, with such changes as new circumstances called for. The development of that constitution, the steps by which it grew up out of elements common to the whole Teutonic race, is a historic possession in which the men of the United States have an equal right with the men of Great Britain. The work was the work of the common forefathers of both. The germs which we see in their first rude form in the oldest England on the European continent, have

grown, without any breach of historical continuity, into the political institutions alike of the second England within the isle of Britain and of the third England beyond the ocean.

Let us take for instance one point of which I have already spoken. The legislative bodies of the United States, of most—I believe of all—of the several States, consist of two Houses. The fact is so familiar that we hardly think about it. We almost take it for granted as the natural form of a legislature. It is assumed that there must be one House chosen by a popular election and another which comes in some other way; whether by hereditary succession, by nomination, or by some less popular mode of election, does not matter for the moment. This form of legislature has been imitated in endless states, both monarchies and commonwealths, and we have just seen the greatest of European commonwealths, after trying an Assembly of one chamber, deliberately fall back on an Assembly of two. But it is certain that, in most of the cases where the English and American system of two chambers has been imitated, the second or upper chamber has been found to be the weakest part of the constitutional system. It is ever the first to give way when any violent strain is brought upon it. The reason is palpable. It is weak because it is artificial. It is weak because it does not come of itself, but it is simply an ingenious device which it is thought will tend to the better working of those parts of the constitutional system which do come of themselves. For we may fairly say that in any form of free government the executive branch and the popular branch do come of themselves. That is to say, there may be questions as to the best form to give them; but they must be there in some form or other.

But a second Chamber is not thus a matter of necessity. The State may work better with it, but it can get on without it. Being thus an artificial creation instead of an indispensable element, a luxury of constitutional government and not a necessity, it has not the same firm ground to stand upon as either the executive or the popular branch. But it is at once plain that, while a great number of other second Chambers have risen and fallen around them, the House of Lords of the United Kingdom and the Senate of the United States have gone on untouched. And the reason plainly is because neither of these is an artificial creation in the same sense as the Upper Chambers which have risen and fallen in France and Spain. The English House of Lords in the strictest sense came of itself. A long course of historical causes gave it its present shape; but neither Alfred or any other man invented it out of his own head. The second chambers, both of the United States and of the separate States are, as I have already said, not imitations but continuations. They are at most transplantations of the English constitution in forms modified by new circumstances. But mark this further—a point which I have insisted on in other writings, but which I must here insist on again—that in a Federal State, the Senate or other upper chamber is not a mere artificial institution. It is not a constitutional luxury, but as necessary a part of the constitutional system as the executive or the popular branch. In a single state, whether monarchy or commonwealth, the question of a second chamber is simply the question whether the work of legislation will be better done with it or without it. In a Federal state the two chambers are equally necessary. One is needed to represent the body of the united nation, the other to represent the several States in their separate character. If a Federal legislature consisted only of a Senate or only of a House of Representatives, one or the other of the necessary elements of a Federal system would be overridden. And this truth has been recognized by the close reproduction of the American Senate in the democratic Federation of Switzerland, and by as near an approach to it as monarchic forms will allow, in the Imperial Federation of Germany. These two last may be called imitations; but they are imitations in a good sense; they are reproductions of an institution which experience has shown to be necessary in a Federal state. But though the Senate was thus a necessary feature of the American Federal Constitution, we may be pretty sure that the authors of that Constitution would not have invented it of their own heads. No such institution was to be found in any earlier Federal system, not in that of Achaia itself. Its introduction is in

truth the great point of superiority which the American constitution has over all earlier Federal constitutions. But we may be sure that its existence is directly owing to the existence of the English House of Lords. The authors of the American constitution, in transplanting and modifying English institutions, saw that the English institution of a second chamber was one which, with the needful modifications, was the very thing which was needed in the circumstances in which they found themselves. It makes no difference that the constitution of the American Senate, and many of its duties, are quite different from those of the English House of Lords. Its constitutions and its duties are hardly more different from those of a modern House of Lords, than those of a modern House of Lords are from those of a House of Lords some centuries back. The special functions of the modern House of Lords, the functions which are imitated in so many European second chambers, have all come of themselves. Its constitution, its functions, have gradually been given to it by the events of English history. They were never deliberately invented or ordained by any particular man at any particular time. Circumstances have given the English upper chamber the special duty of acting as a check upon the acts of the popular chamber. Circumstances have given its transplanted American form the further duty of representing the separate existence of the several States. But in each case the new and special functions of the upper chamber have been laid upon it by the force of circumstances. The duty of checking the acts of another assembly would have seemed no less strange to a House of Lords some centuries back, than the duty of representing the separate being of the separate members of a Federal body. There was no moment in English history when men said, "It will be a good thing to have an Upper House to check the acts of the Lower." There was no moment when they said, "It will be a good thing to have an Upper House" for any reason whatever. The system of two Houses was not the result of the design or deliberation of any man or of any body of men. There was no moment when Englishmen voted that two Houses would do the work better than one, or three, or half-a-dozen. The system of two Houses came of itself. It was the result of a series of accidents, of a series of historical causes gave to each House the particular functions which they have in the existing systems of the United Kingdom and of the United States.

In short, when we apply the words "second chamber" to the English Upper House or House of Lords, we are reversing the chronological order of things. In most countries the phrase is quite accurate. The Senate or other body of the kind, if not second in actual date, is at least second in idea. The popular chamber is taken for granted; then comes the question whether there shall be another chamber, and if so, what form it shall take. So during the Protectorate of Cromwell, when the ancient succession of Parliaments stopped for a moment, first came the little Parliament and other such devices; then came the Parliament of 1657 in which, besides the House of Commons, there was "the *other* House." The name was doubtless used to avoid as yet using the words "House of Lords;" but it is not to be forgotten that, according to the older use of the English language, the words "*other* House" exactly translate the more modern phrase of "*Second Chamber.*" But when we go back to the historical origin of English Parliaments, it is most certainly the Lower, the more popular chamber, which is, in point of date, the Second Chamber. It would be using words which are rather too modern to say that the House of Commons was added to the House of Lords or grew up by the side of it. For the beginnings of representation belong to a time when the formal phrases "House of Lords," and "House of Commons" had not yet come into use. But it is perfectly correct to say that the representative element in the English Parliament was added to, or grew up by the side of, the element which is not representative. The non-representative element is undoubtedly the older, and the representative the newer. And in this the way the House of Commons which grew out of this representative element is, in strict historical truth, a Second Chamber alongside of the House of Lords, which grew out of the non-representative element. But the representative body was met added in order to be a check on the acts

of the non-representative body, nor was it devised according to any other theory which might make two Houses seem more fitted to do the work of legislation than one. The whole thing came of itself. It grew bit by bit, according to the immediate needs of successive generations. That there should be two chambers, and not one or more than two, that one of these should be representative and the other not representative, is all the result, not of any abstract theory, not of any set purpose of any kind, but of that web of causes and accidents which makes up the history of England.

I have myself at different times found something to say about the origin and constitution of English Parliaments; but the whole study of such matters is put on quite a new basis since the appearance of the Constitutional History of Professor Stubbs. It has been no small satisfaction to me in a repeated study of his book that, though I have found a vast deal to learn, I have found but little to unlearn. On the only point where there seems to be any important difference between his views and mine, I feel that the difference is more apparent than real. And when apparent or real, it does not affect the matter immediately in hand. If I hold that the Witenagemót, the great national assembly up to the Norman Conquest, and for some time after it, was in theory a gathering of all freemen of the kingdom, this seems at first sight to differ widely from the Professor's doctrine that the Witenagemót was always a select body of the chief men. But when I allow that as a rule, only the chief men attended, and it was only on some special occasions, when the heart of the nation was deeply stirred, that there was any large general attendance. And Professor Stubbs allows that his select council was sometimes enlarged by the presence of large popular bodies. With these admissions on each side, there does not seem to be much practical difference between his view and mine. But be this as it may, in drawing the history of representation, we should both start from the same point. Whatever was the theoretical constitution of the Witenagemòt, it was at least not an elective body, not a representative body of any kind. In popular language an elective and a representative body are held to be much the same; but the two words "elective" and "representative" are not to be used as if they meant the same thing. If a king summons to his councils men taken either from all the orders of the nation, or from all the geographical divisions of the country, such an assembly may be fairly called representative, even though its members are selected by the king himself. The object of such an assembly would be to represent the various orders or districts, to let the king know their wishes, feelings, and grievances. Doubtless representation is far more perfect when the representatives are chosen by those whom they are to represent; still, such a body as I have conceived may fairly be called a representative body. Such a body is quite different from a council, each member of which is summoned in his personal character, without any thought of the representation of particular orders or particular districts. On the other hand, it needs no proof that an elective body need not be a representative body. It may be freely and popularly chosen, but chosen for some other object than that of representation. It is important to make the distinction, because there seems little reason to doubt that the representative element in the English Parliament was not elective in its first beginnings, but that it gradually became so.

Without entering on any question as to the theoretical constitution of the ancient English Assembly, there are two points about it which we may assume with perfect safety. These are, that it was not an elective or representative body of any kind, and that the Norman Conquest made no immediate formal change either in its constitution or in its powers. The practical change was great beyond words; but it was only a practical change. With this last point I have very lately dealt at great length, and I will here assume the results. The ancient Assembly went on changed in its character but unchanged in its form. If it seemed to change its name, it was only because the Old-English names were translated into French and Latin. The *colloquiam*, the *parlement*, was simply the "deep speech" which the king had with his Witan, expressing first merely the fact of meeting, it gradually like most words of the kind, came to mean the Assembly itself and its members. The business of an ancient

Assembly was, according to a phrase often found in early documents, to "talk with the king," to hear what he had to propose or to ask, and to give him an answer. Such a process implies discussion among the members of the Assembly, and we find records of such discussions older than the Norman Conquest. But whatever talk the Witan had among themselves, they were only making ready for their decisive talk with the king. The memory of this earlier kind of speech is kept up in the name of the speaker, the member who speaks least in discussions within the House, but who alone speaks in the name of the House, when the House itself has to speak to the king or to any one else. Parliament, in short, was not a new body which supplanted the Witenagemót; it was simply one name for the Witenagemót which, in the end, supplanted all others.

But, on any theory of the constitution of the Witenagemót, the difference between its constitution and that of a modern Parliament, or a Parliament of any time since the thirteenth century, is clear at first sight. According to any theory, the constitution of the Ancient Assembly was in practice fluctuating and uncertain. According to any rational theory, it contained no element that was formally representative or elective. I say "formally," because a little thought will show that an informal representation, and even election, is quite possible. If I am right in holding that the Witenagemót, the Assembly of the whole kingdom, was, like the smaller Assemblies of the shire, the hundred, and the township, a primary Assembly, in which every freeman had, in theory, a right to attend, the remark which Niebuhr makes about the Roman tribes will no less apply to the ancient gatherings of the English nation. Each Roman tribe had one vote whether all its members or only a handful of them were present in the *Comitia*. Niebuhr remarks that those who actually attended might well be, in practice though not in form, the representatives of those who stayed at home, commissioned by them to give the vote of the tribe in a particular way. This does not apply in all its fullness to any assembly except those where the votes are taken by tribes or other such like divisions. But it does not apply in some measure to every primary assembly. The richer or more zealous man who goes may easily be the practical representative of his poorer or less zealous neighbors who stay away He may easily be their mouth-piece, commissioned by them to set forth their grievances and their wishes. And this in truth applies whichever theory of the assembly we accept. Whether the king's thegn went directly as a king's thegn, or simply because was likely to have wealth and leisure to enable him to go, in either case he might, if he was a popular and most worthy man, be the practical representative of his absent neighbours. But, on showing, was there any formal election or representative. And if they thereby be the right one, there could not be any.

I have therefore always maintained that the non-representative element, the aristocratic element, in the English Parliament, not only represents, but is, by direct and unbroken succession, identical with the old primary assembly of the English people. Its character has wholly changed; but it has changed through very simple causes. It has become aristocratic, because it was once in the extremest degree democratic. It has become the assembly of a class, because it was once open to all classes alike. In a large country a primary assembly is really less democratic than a representative assembly. If the national consists in theory of every man in the nation, it will in practice soon come to consist of a very small part of the nation. It will consist of those only who have wealth and leisure to take long journeys to attend its meetings. A primary assembly works well, and keeps its democratic character, in small communities like those of Uri, Unterwalden, Glarus, and Appenzell; but a primary assembly in all Switzerland, even a primary assembly of the canton of Bern, would soon come to be far less democratic than the present representative assemblies. In this way, as I have often tried to show, the primary assembly of all England naturally shrank up into a mere gathering of the chief men, simply because none but the chief men had time or means habitually to attend. We have evidence that this was the ordinary character of a meeting of the Witan; we have equally evidence that on special occasions when the meeting was held in a great

city, or when some great national excitement drew men together from all parts, the dormant popular character of the assembly became again a reality. To this natural cause we must add another, namely, the working of the practice of summons. In all ordinary circumstances the king would fix the time and place of meeting; and, when attendance was uncertain and fluctuating, it was obviously a wise course on his part personally to command the attendance of those for whose presence in the assembly he specially wished. It is only in the common working of human affairs that a summons of this kind, at first perhaps often looking on as a burden, should grow into a privilege and a right. And it is no less in the ordinary working of things that, when it had once become a privilege and a right, it should become a privilege and a right at once hereditary and exclusive. It was held that the right which had been given to the father could not be denied to the son. It was held that those who had not the right of summons had not the right of attendance, and that no one had a right to present himself in the national assembly except those whom the king specially invited or commanded to come thither. Add to this that every step by which the habitual attendance of the assembly lessened had a natural tendency to lessen it still further. There would be less and less to tempt the ordinary freeman to come; he would be less and less welcome if he did come; and after the Norman Conquest these tendencies would be so strong as effectually to keep him away.

It is in this way then that I hold that the primary assembly of the whole nation gradually and insensibly, without any formal shutting out of any class at any particular moment, shrank up into an assembly of a single class, the hereditary and exclusive House of Lords. The essence of peerage I hold to be the personal summons to Parliament. Round that everything else which distinguishes the peer from the commoner has grown. His formal precedence and titles, his personal privileges of various kinds, the honorary rank, titles, and epithets which courtesy gives to his children, are all accidents which have grown round the essential substance of peerage, the personal summons to Parliament. I have tried to point this out in other writings, and I have tried also to show that, whatever may be the evils of the hereditary peerage of England, it is the one thing which more than any other has saved England from far greater evils. It is mainly because England has had a peerage that she has never had a nobility. The peers are those among Englishmen who have never lost the right, once common to all Englishmen, of personal attendance in the assembly of the nation. Earls and bishops have never lost that right; the more modern orders of peerage have been admitted to it.

A great deal of what I have been now saying I have said before in other shapes. I am concerned with it now only as something which, from my point of view, must be taken for granted in order to understand how the representative element in Parliament grew up alongside of the non-representative element. It must be taken for granted in order to understand how it came that there should be two Houses of Parliament, rather than three, as in France, or four, as in Sweden. We have now to trace out the causes which determined what classes of men should be called to Parliament, either personally or by representation, and which also determined into how many Houses those classes of men should be grouped. For it should be remarked that these two last questions are distinct. The course of events had to settle that, not only Earls and Bishops, but Barons, Knights, Burgesses should all have their place in Parliament. The course of events had also to settle that no other separate classes, the lawyers or the clergy, for instance, should finally keep a place there. It had also to settle how these classes should be finally grouped. It was not in the eternal fitness of things that they should form separate Houses at all; they might have all sat together, like the Estates of Scotland. Or again, there might have been as many Houses as there were classes or orders. Or again, if some classes were to sit together, it was not a matter of necessity that they should be arranged as they actually were. No law of nature ordered that the barons should sit with the earls, and that the citizens should sit with the knights. The course of events, the working of circumstances, the effect of special causes and special accidents,

had to settle all this, as they have settled everything else in English history.

One of the chief sources of difficulty in tracing the early history of parliamentary institutions is that we so rarely get anything like a formal description of the constitution of our national assemblies in their earlier stages. No exact law fixed their constitution, and custom was, in the nature of the case, fluctuating. The ordinary assemblies of the Conqueror's day consisted, according to the English Chronicle, of Archbishops, Bishops, Abbots, Earls, Thegns, and Knights. But the great meeting which he gathered at Salisbury to rule that the King of the English should be the king of a nation, and not merely the feudal lord of his personal vassals, was an assembly of all the land-owners of England, whether they were the king's men or the men of any other lord. There we get the first glimpse of two Houses, the first faint shadow of Lords and Commons, in the distinction which the Chronicle draws between the Witan and "the land-sitting men." By the time of the Grand Charter the assembly has taken the definite shape of an assembly of the king's tenants-in-chief. The greater tenants are to be summoned personally; the lesser are to be summoned in a body by the sheriffs of their several shires. The right, the duty, the privilege, the burthen, of personal attendance clearly belongs, no longer indeed to every freeman or to every freeholder, but to all who hold any landed estate, great or small, directly of the king. And among those who held directly of the king were some who held very small estates indeed. They might come; it was their theoretical duty to come; but were they likely to come? Was there much to tempt them to come? The Charter itself sets forth a principle which is implied in every rational constitution, but whose setting forth is none the less significant. It lays down the rule that those who stay away are bound by the acts of those who come. Those acts largely consisted of grants of money, and the very notion of a grant of money, in form at least a free gift, implies the principle that those only are bound by the grant who consent to it. It was necessary then to declare that the consent of the order bound all its members; that a man could not refuse his contribution to a tax or his obedience to a law, because he was not present at the assembly which decreed it. But the system of representation, above all when election was added to representation, made this principle clearer still, when the tax or the ordinance was agreed to by men acting in the name of the several shires—above all, when those representative men were chosen in the popular courts of the several shires, the right of the present to bind the absent became still less open to dispute.

One of the most instructive features of the constitutional writings both of Sir Francis Palgrave and of Prof. Stubbs, is the way in which they have shown the close connection between our national and our local institutions, between Parliament and the elements which grew into our judicial institutions. The House of Commons and the jury, the elements which grew into the court of justice, in truth sprang from the same sources. The House of Lords is the original popular assembly of the nation shrunk up, through the causes which have already been described, into an exclusive body. The House of Commons consists in truth of the lesser popular assemblies, the assemblies of the shires, brought together by representation. But how then did representation come in? How came it that a few men from each district came to act on behalf of all the men of that district, and how came the assembly of such representatives to act on behalf of the whole nation? Representation plainly arose, not out of any theory, but out of a practical need. In a primary assembly there is always the danger of insufficient attendance. Even in democratic Athens men had sometimes to be driven to the assembly. Domesday and the Old-English laws, absence from a lawful Gemót is not uncommonly dealt with as a legal crime. Here too again the principle of summons comes in. In order to secure a sufficient attendance, some members of the assembly must be specially summoned to attend. And, as before, the summons gradually comes to operate exclusively. When the practice of summons is once fully established, those who are not specially summoned, in the first stage practically stay away, and in a second stage they are held to have no right to attend, even if they wish.

The jury, and the recognitions out of which the jury sprang, are in truth examples of this rule. The judgment, the verdict, is that of the country, of the neighbourhood. But the country, the neighbourhood, is represented by certain selected men—how select does not matter at this stage of the argument—who are commissioned to act on the behalf of the whole. So in the Old-English assembly of the shire, the *Scirgemót*, the reeve and four men of each township were bound to attend. The original object surely was not to exclude any others who had a right to attend, but simply to insure both that there should always be a sufficient attendance, and that the assembly should contain members from all parts of the shire. Without such a rule, either the assembly might have been too small to transact business, or large parts of the shire might have been left unrepresented. The necessary attendance of one official and four non-official members from each township hindered both these evils; but it tended to confine the assembly to those who were thus specially summoned. Others were likely to stay away, or to go only when there was some business which specially concerned themselves. They went as suitors, witnesses, plaintiffs, defendants, rather than as themselves members of the court. So under the Angevin kings, perhaps earlier, a process essentially the same was followed when the king needed to enforce any ordinance. It was followed when he needed information on any matter before putting forth any ordinance. Juries, after exactly the same type as the judicial juries, sworn knights, chosen knights acting for the whole body of men of their several shires, were summoned to declare right and to do right, whether for the enforcing of a forest law, or for the gathering of a tithe against Saladin. Parliamentary representation is nothing but this same principle applied to the national assembly. The greater tenants-in-chief are personally summoned; their attendance is a personal affair between themselves and the king. The lesser tenants-in-chief are summoned in a body by the several sheriffs. But who can insure that they will come? Who can insure that they will be any attendance at all? At any rate who can insure that every shire will have some one to speak in its name? A tax laid on by the men of a few shires only might be received with very little favor in the other shires. When the principle of representation had once been established in the Scirgemót, the remedy was easy. The sheriff might summon the tenants-in-chief in a body; but that summons would be a vain form, unless he took care that some of them actually came. It became therefore the business of each sheriff to provide for the attendance of some of the men of his shire, four knights, two knights, four lawful men, a representative body of some kind. The number and the quality of the representatives settled themselves in the course of time; the main point was that in every national assembly, besides the great men who were summoned personally, there should be some of the lesser men who were summoned in a body, and some of them from every shire. Thus the whole body of the tenants-in-chief was present by representation; every Scirgemót in the land was present by representation; each corner of the land had some one present who knew its interests and wishes, and who, if need were, might speak for them.

Here then is representation; but it was representation which did not of necessity imply election. The chosen knight or lawful men were not necessarily chosen by the local assembly. They might be named by the sheriff; they might be taken by seniority, rotation, or lot. In either case the main object was gained; the shire had some of its men in the national assembly. But, as the scholar in whose steps I am following has taught us, though representation does not necessarily imply election, yet it has a great tendency to grow into election. No way of appointment was so obviously fair as that those who were to appear in the place of the whole shire should be chosen by the voice of the whole shire. At an early stage then of the history of representation, the select knights began to be chosen by the Scirgemót, or, as we may now better call it by its French name, the *county court*. And, as soon as election by the county court was established, a great step was taken, a step which, as usual in English history, was at once a step forward and a step backward. Election by the county court was election by a body which was not confined to the king's tenants-in-chief. Without going

off into any doubtful discussion as to the origin and constitution of the county court, we are at least safe in saying that it contained all freeholders, great and small, whether they held of the king or of any mesne lord. Election by the county court was election by as popular a body as could be found at the time; the choice of members of the national assembly by such a body was no small return towards the ancient popular constitution of the Meeting of the Wise.

Thus, step by step, through the reigns of John and Henry the Third, the principle of parliamentary representation went on advancing. Before the accession of Edward the First, it was fully established that knights chosen by the freeholders of each shire was an essential part of that assembly of the nation which had now taken the difinite name of *Parliament*. The steps by which representation grew are easily traced; it is less easy to trace a no less important effect which must have been the direct consequence of representation. We see that all besides the chosen representatives soon ceased to have any claim or right or wish to attend in their own persons. But we can not trace the exact stage in which this claim and right and wish died out. Some traces of a larger attendance than that of the representatives may be seen even under Henry the Third; but the practice was doomed as soon as representation in the form of election was fully established. It must be remembered that, as a rule, men did not wish to attend. Attendance was burthensome and expensive; the chosen knights who appeared on behalf of the whole shire had to be paid for their services at the cost of the whole shire. When the assembly was held in a town, as became more and more the rule, the last traces of personal attendance would doubtles be seen in the appearance of the citizens of that town. And we actually find traces of the personal appearance of the citizens of London down to a very late time. The tumultuous assemblies which elected Edward the Fourth and Richard the Third were doubtless utterly irregular, by that time we may say utterly illegal. Still they kept up the tradition of the days when the citizens of London had taken a direct part in the election of kings and in other national acts, a tradition which was a living and practical thing during the wars of Stephen and Matilda, and which was not wholly forgotten in the time of Henry the Third. But, as anything regular and practical, as representation came in, personal attendance went aut. To appear in Parliament in any character but that of the chosen representative of others became the privilege of those who were personally summoned to appear. It became in short the privilege which distinguishes the Peers of England from the Commons.

Thus the ancient, but for a long time shadowy, right of every freeman to appear in the national assembly of his country was gradually exchanged for what had become the far more practical right of appearing by the representation. The form which that representation had taken was the representation of the assemblies of those local bodies out of the union of which the kingdom had grown. The representation of the nation was a representation of organized bodies, of organized communities. Little as most of us think of so doing, we proclaim that fact every time we utter the familar name of the House of Commons. Every shire was a *commune*, a *communitas*, and it was as a *communitas* that it was represented in the general assembly of all such bodies. But it was gradually found that, besides the shires, as shires, there were other communities growing up within them which had no less claim to be represented in the like fashion in the general assembly of the kingdom. In the course of the thirteenth century the importance of the cities and boroughs of England had become so clear that, first Earl Simon, then King Edward, deemed that a full Parliament of the realm aught to contain citizens and burgesses from the cities and boroughs, as well as knights from the body of each shire. When this great change was wrought, a change whose praises and the praises of whose founders I need not here sing again, all the essential parts of a modern Parliament had come into being. In a Parliament of Edward the First, no less than in a Parliament of Victoria, the Lords Spiritual and Temporal, and the Knights, Citizens, and Burgesses of the Commons, were already brought together in essentially the same shape as they are now.

But this was by no means all. It was

settled that in every Parliament there should be two great orders, those who attended in answer to the personal summons, and those who came as chosen representatives of the shires and boroughs. But a whole crowd of points had yet to be settled. I do not mean such points as have been disputed in later times, some of which are not settled yet. I do not mean such questions as the apportionment of representatives to population, such refinements as giving to a larger shire or town, more members than are given to a smaller one. Points like these were not likely to present themselves to the founders of our first Parliaments. Ideas of this kind could not fail to come in with the course of time; but they were not likely to be thought of till a much later stage of political development. Nor was it any part of those who called together the first Parliament to settle what we now call the elective franchise, to decree how each community was to elect its representatives. That was a question of the internal constitution of each community. In the shires indeed no such question could well arise; the immemorial constitution of the shires was the same everywhere. But in the towns, whose privileges had been gained at different times and in different ways, and internal constitutions were very various. Thus, in course of time, a variety of borough franchises arose, some as oligarchic, others as democratic, as they well could be. But all these question belong to a much later time. The work of the days with which we are now concerned was to settle the relations between the various classes of men of whom an early Parliament consisted. I use the word "classes" advisedly; for, alongside of the idea of the representation of local communities, there was the other idea of the representation of orders or estates. The representation of estates was the leading feature of those continental assemblies of which the States-General of France were the most famous. They consisted, as every one knows, of three estates, clergy, nobles, and commons; and the phrase of the Three Estates, with exactly the same meaning, became a familiar phrase in English parliamentary history. I need hardly stop to refute what has been so often refuted, the notion that the Three Estates of England are king, lords, and commons. The mistake is by no means a new one; but there would be no need to mention it here, were it not that the mistake itself is highly instructive. No such mistake ever arose in France; because there the theory of the Three Estates was thoroughly carried out from the first meeting of the States-General to the last. In England the mistake could and did arise, because the theory of the Three Estates never was fully carried out. I will not stop to explain yet again that in England there never was any estate of nobles in the foreign sense, that the very institution of the peerage hindered such an estate from growing up. The English Commons included not only the citizens of chartered towns, but the knights who, anywhere out of England, would have counted as nobles, and who might actually be the descendants of Peers. The Estate of the clergy we had, but its highest members sat in the national council in another character. The result of these and of other combining causes was that all attempts to make the clergy a regular parliamentary estate of the realm broke down, and left in truth only two estates, Lords and Commons. The peculiar constitution of the English Parliament, the constitution which has been transplanted to, and imitated in, so many countries, was simply the result of an accident. The clergy failed to take root as a separate estate; two estates only remained, and the relations of those two estates gradually settled themselves in a way which no one could have foreseen in the days of Edward the First. Nay more, judges and other lawyers received the summons to Parliament as well as lords, clergy, and commons; and a fourth estate of lawyers might very easily have grown up. Merchants too, as merchants, distinct from the communities of the cities and boroughs, often made grants of money to the king in a way which might easily have been the beginning of a separate estate of merchants. But no estate of lawyers or of merchants ever came into full being. The estate of the clergy died out of all strictly parliamentary life. The Lords and Commons alone lived on and flourished. Certain men, the holders rather of a hereditary office than of a mere hereditary rank, formed one estate, one House of Parliament. The rest of

the nation, including the children of the holders of that hereditary office, formed the estate which was represented in the other House.

We are thus brought round to the phrase from which we started. Historically the Commons are "the other House," the House which has grown up beside the elder House of Lords. It was only step by step that the Commons won their right to perfect legislative and political equality with the older body. This is shown by a thousand incidents, a thousand phrases, in the history of the thirteenth and fourteenth centuries. It is shown most of all by the fact that, among the various changes and fluctuations and reactions of our political progress, a Parliament without Commons was sometimes seen, even after representation had made considerable advances; but a Parliament without Lords was never heard of till the time when there was soon to be a Parliament without a king. It is shown too by a more abiding result, namely that, in some of the powers which the Lords inherit from the primitive Meeting of the Wise, the Commons soon made themselves the equals, and they have in the end become more than the equals, of the Lords, both in their direct legislative functions and in their supervision over the administration of the government. But the other great powers of the primitive assembly have always remained in the hands of the Lords alone. The Lords are judges; the Commons are not. The Commons can act as judges only by a special use, some may think it an abuse, of their legislative functions. They can, in union with the Lords, pass a bill of attainder or a bill of pains and penalties; they can not sit in judgment on an impeachment or on an appeal from the king's courts of law and equity. In this respect, amid all the fullness of their powers in other ways, the Commons still keep in fact somewhat of that lowlier position which they still keep in all matters of outward ceremony. Such anomalies, such fluctuations, from a natural part of the story in any country where constitutions really grow and are not made. While our parliamentary constitution was still a series of experiments, everything was irregular. The bishops and earls sat by immemorial right. But the other peers were for a long time a fluctuating body. Some other prelates of the Church were always summoned besides the bishops. But the number varied; this or that abbot was summoned to one Parliament and was not summoned to another. So some barons were always personally summoned besides the earls. But the number varied; it was one step which ruled that he who had been summoned once was entitled to be summoned for the rest of his days; it was another step which ruled—if we can hold that it is ruled—that the right goes beyond the grave and extends to his heirs for ever. So, when the representation of the shires had been fully established, the knights of the shire became a fixed body like the earls and bishops. A shire, as an integral part of the kingdom, could not be passed by. But, though after 1295 no Parliament was held which did not contain some representatives of cities and boroughs, yet they too were a fluctuating body; a borough was often called on to send members to one Parliament and was not called on to send them to the next. Nor was this always the result of the caprice of the king or the sheriff, whether in the case of abbots or of boroughs. Both abbots and boroughs often begged to be released from an attendance which they looked on as a burthen rather than a privilege. It was only step by step that the constitution and the powers of the two Houses settled down into their final shape. It was only step by step that they settled down into the shape of two Houses at all.

The wonderful thing of all, the thing which is most distintive of English history, the thing which makes the widest gap between the English parliamentary constitution and any constitution which goes purely on the principle of estates, is the position of the knights of the shire. Anywhere else, all or most of them would have been reckoned as nobles. They, the lesser barons, might have thought to have far more in common with the greater barons than with the citizens and burgesses who in the end became their fellows. And sometimes the earls seemed inclined to draw, as they were fully entitled to do, as wide a line between themselves and the barons as could be drawn between the barons and the knights. But the strong power of the Crown, the official character of peerage, the abiding

life of popular institutions in England, all helped to draw the line at the point where it was drawn. Two classes of the ancient Witan kept their immemorial right; beyond their ranks the king summoned whom he would. Where the personal summons was the one privilege, the one distinction, it soon came to be the one mark of nobility, so far as we can speak of nobility at all in a country where all the children of the peer, where the younger children of the king, are simple commoners. The baron received the personal summons; the knight did not. This soon made a wider gap between the baron and the knight than any which could be drawn between the earl and the baron, or between the knight and the citizen. If the baron and the knight had much in common, the knight and the citizen had much in common too. The county court brought them together; for the borough election was in some sort made in the county court. The knights of the shire and the burgesses of the boroughs were alike chosen by virtue of a writ received by the sheriff, and both were included by the sheriff in a single return. For a long time it was by no means clear, what would be the constitution of Parliament, of what classes of men it would consist, and how those classes would be grouped together. In the end, things shaped themselves according to the principle of personal or collective summons; barons sat with earls among the Lords, and knights sat with citizens among the Commons.

Thus there arose a House which I venture to call strictly official, a House composed of the bearers of offices which passed partly by hereditary succession, partly by ecclesiastical election, a House where each man sat in his personal character, and not as the representative of others. This House by direct succession represents, or rather is, the ancient Witenagemót of England. It is the Witenagemót, changed by the working of circumstances from a democratic into an aristocratic body. Beside it arose another House where office, hereditary succession, election in the ecclesiastical sense, had no place, where no man sat in his own personal right, but only as the man whom one of the smaller local assemblies had chosen to represent them in the general assembly of the whole nation. This younger, this lower, House has, step by step, become the chief power in the state. Instead of being "the other House," alongside of a more powerful body, it has reduced that once more powerful body to be a mere revising and checking power on its own acts. It has become itself the true council of the nation, while the House greater in age and dignity has become "the other House" or "Second Chamber." A system which has thus grown up through the complicated and fluctuating course of English history has been by a natural process transplanted to the English-speaking Confederation of North America. Proved there to be absolutely necessary for the right working of a federal system, it has been further transplanted to democratic Switzerland, and even to imperial Germany. In all these lands it has taken real root, as being the result either of historic causes or of proved necessity. In other lands, where it has not been transplanted but artificially imitated, where it has not come of itself, but has been consciously devised, where it is no political necessity but at most a political luxury, it has failed to take the same deep root, and it has shown itself the weakest part of every constitutional system. And, if any one of the federal states the later tie of confederation should ever be exchanged for complete consolidation, that is to say, if the less perfect tie should ever pave the way for the most perfect, the special necessity for the existence of the Senate or the *Ständerath* will pass away with it. The question will then simply be, as in France or Spain, whether the work of legislation is likely to be better done by one House or by two,

I have tried in this article to trace the development of parliamentary representation in a kind of abstract way, to trace out the general course of things, while dwelling as little as may be on particular events, names, and dates. Such a sketch I thought might bring out the real nature of the process more clearly. But such a sketch as this I mean to be taken simply as an introduction to the detailed narrative of the whole process in the Constitutional History of Professor Stubbs. It is there that the whole matter will be found worked out with a power and thoroughness with which it has never been worked out before.—*International Review.*

## ACTS OF LAST SESSION.

The following acts being of importance we publish them at once:

AN ACT TO PROVIDE FOR CERTAIN AMENDMENTS OF THE LAW.

Her Majesty, &c., enacts as follows:

1. [Judges of the Court of Exchequer to have use of Court House, &c.]

Superior Courts of Law.

2. When a vacancy occurs in the office of the Chief Justice of the Court of Queen's Bench, the Chief Justice of the Court of Appeal shall, thenceforth, be called the Chief Justice of Ontario, and the Chief Judge of the Court of Queen's Bench shall be called the Chief Justice of the said Court.

*Practice Court.*

3. The Practice Court held under the ninth section of chapter ten of the Consolidated Statutes for Upper Canada, is hereby abolished, and the said section is hereby repealed; and all the powers of said Court and the business heretofore transacted therein, shall hereafter be respectively exercised by, and transacted in the Court held under the nineteenth section of The Administration of Justice Act, 1874.

4. [Salaries of Officers of the Courts to be paid monthly].

*Trinity Term.*

5. Where, in the opinion of the Judges of either of the Courts of Queen's Bench or Common Pleas, it is not necessary for the dispatch of business pending in such Court, to hold sittings during Trinity Term in any year, the Judges of such Court may in Easter Term of such year, by rule of Court from time to time made, direct that their Court shall not sit during the time appointed for holding Trinity Term, by the fifty-third section of *The Administration of Justice Act of 1873*; and any motion for a rule nisi for a new trial or non-suit, or otherwise affecting any verdict which may be rendered at the sittings of Nisi Prius during the Summer Assizes, may be made before and heard by the Judge sitting for the full Court during vacation, and the rule, if granted, shall be set down for argument before the full Court for the following Term.

Court of Chancery.

*Additional Sittings.*

6. [Judges of Court of Chancery may hold sittings in addition to those appointed by the Circuits].

*Accountant's Office.*

7. All mortgages, stocks, funds, annuities and securities whatsoever, on the twenty-sixth day of June, one thousand eight hundred and seventy-six, standing in the name of the Accountant of the Court of Chancery, or in his custody or power as such Accountant in respect of his office, together with all the interest and estate of the said Accountant, in the lands and premises embraced in such mortgages or other securities, are hereby declared to be, and from and after the said day to have been, vested in the Referee in Chambers, subject to the same trusts as they were on the said day respectively subject to; and it is hereby declared to have been lawful from and after the said day, and to be hereafter lawful, for the same to be proceeded on by and in the name of the said Referee in right of his office, by any action or suit, or in any other manner, or to be assigned, transferred or discharged by the said Referee, as the same might on the said day have been proceeded on, assigned, transferred or discharged by or in the name of the said Accountant.

8. [With other sureties standing in the name of the Accountant in respect of his office].

9. [C.S. U.C. cap. 12, sec. 72, amended].

County Courts.

10. While sittings of the County Court of any County which has a senior and junior Judge, are being held for the trial of issues of fact and assessment of damages, the Judges of the said Court, or any two persons authorized to hold the sittings of such court, may, in case the General Sessions of the Peace have been adjourned or have terminated, sit separately and concurrently, one for the trial of causes where a jury is required, and the other for the trial of causes to be tried without a jury.

11. The Act passed in the thirty-ninth year of Her Majesty's reign, respecting County Court Judges, is hereby amended by adding to the third section thereof the words following: "And such Judges may also (subject to the approval of the Lieutenant-Governor in Council, to be notified in the *Ontario Gazette*) fix and appoint the times in the months of June and December respectively in each year, for the holding of the County Courts and General Sessions of the Peace in each County of such District, and such Courts shall be held on the days so appointed.

12. [Shorthand writers to be appointed for Local Courts on requisition of county, city and town municipalities].

13. [Retired County Judges may act for County Judges on being requested to do so].

14. [Actions by or against County Judges for amounts within County Court jurisdiction].

Civil procedure.

15. [Judges of Superior Courts of Law and Equity may make general rules and orders].

*Taxation of Superior Court Costs.*

16. In any case in either of the Superior Courts of Law where the plaintiff obtains judgment by default, on a writ specially endorsed, for a sum over two hundred dollars and less than four hundred dollars, it shall not be necessary to obtain an order to enable the Clerk or Deputy Clerk of the Crown, or officer with whom such judgment is entered, to tax Superior Court costs; but such Clerk, Deputy Clerk or Officer may, upon an affidavit being filed showing to his satisfaction that the amount was not liquidated or ascertained by the signature of the defendant, or the act of the parties, tax to the plaintiff Superior Court costs, subject to revision as in other cases.

*Examination of Officers of Corporations after Judgment.*

17. In case any person has obtained a judgment in any Court in Ontario, against a body corporate, or has obtained a rule or order for the payment of money against a body corporate, such person may apply to the Court, or to any Judge having authority in the premises, for a rule or order, that any one or more of the officers of such body corporate, to be named in such rule or order, shall be orally examined upon oath before a Judge or any other person to be named in such rule or order, touching the names and residences of the stock-holders in said body corporate, the amount and particulars of stock held or owned by each stock-holder, and the amount paid thereon; also as to any and what debts are owing to the said body corporate; and as to the estate and effects of the body corporate; and as to the disposal made by the body corporate of any property since contracting the debt or liability in respect of which such judgment, or rule or order for the payment of money was obtained; and the Court or Judge may make such order for the examination of such officer or officers, and for the production, by him or them, of any books or documents, as may seem fit; and in case any such officer does not attend as required by the said rule or order, and does not show a sufficient excuse for not attending, or if attending, he refuses to disclose any of the matters in respect of which he may be examined, such Court or Judge may order such officer to be committed to the common gaol of the County in which he resides, for any term not exceeding six months.

*Garnishee Proceedings.*

18. Chapter twenty-two of the Consolidated Statutes for Upper Canada is hereby amended by inserting after section two hundred and ninety-one, the following as section 291 (*a*):—

291 *a*. If the garnishee suggests that the debt sought to be attached belongs to some third person, or that some third person has a lien or charge upon it, the Judge may order such third person to appear before him, or before some person to be specially named by him, and state upon oath the nature and particulars of his claim upon such debt.

2. After hearing the evidence of such third person, and of any other person or persons whose evidence the Judge may, by the same or any subsequent order, think fit to require, or in case such third person does not appear, the Judge may bar the claim of such third person, or

make such other order for the determination of the matter in dispute, either by the trial of an issue or otherwise, as he thinks fit, upon such terms in all cases, with respect to the lien or charge (if any) of such third person, and as to costs, as he thinks just and reasonable.

*Costs in abated Suits.*

19. Wherever any decree or order has been made for payment of costs in any suit, and the suit afterwards becomes abated, any person interested under the decree or order may revive the suit, and thereupon prosecute and enforce the decree or order, and so from time to time, as often as any abatement shall happen.

*Arbitrations and References of matters of account.*

20. Section five of the Act passed in the thirty-ninth year of Her Majesty's reign, and chaptered twenty-eight, is hereby repealed, and the following substituted therefor:

(5). An appeal shall lie against an award or report made on a reference in pursuance of section one hundred and sixty of the Common Law Procedure Act, in the same way as if the reference had been made in pursuance of section one hundred and fifty-eight of said Common Law Procedure Act.

(5*a*). An appeal shall lie in the same manner from any award made in pursuance of section one hundred and sixty-one of the Common Law Procedure Act.

21. Section seven of said Act passed in the thirty-ninth year of Her Majesty's reign, is hereby amended by striking out the words in the first part of the section, "The appeal from a report or certificate referred to in the second section of this Act," and by substituting the following: "The appeal hereinbefore referred to."

22. Section eight of said Act is hereby amended by striking out the following words in the second line of the section: "under the said one hundred and fifty-eighth section and all the words in said section after the word 'Courts,' in the eighth line."

23. In a case in which an appeal does not lie, a motion to set aside an award may be made as at present.

Commissioners for taking Affidavits.

24. [Commissioners for taking affidavits in Q.B., &c., may take affidavits in suits pending before the Court of Appeal.]

25. [And shall have power to take affidavits in matters pending before any Judge or Court].

Notaries Public.

26. Persons, other than Barristers and Attorneys duly admitted as such in this Province, desirous of being appointed as Notaries Public, shall be subject to examination in regard to their qualification for the said office, by the County Court Judge of the County in which such persons reside, or by such other person as may from time to time be appointed in that behalf by the Lieutenant-Governor; and no person shall be appointed a Notary Public without a certificate from said County Court Judge, or such other person, that he has examined the applicant and finds him qualified for the office, and that he is of opinion that a Notary Public is needed for the public convenience in the place where such applicant resides and intends to carry on business.

2. The Lieutenant-Governor in Council may from time to time make regulations for such examination and certificate; and the Judge or other person examining shall be entitled to receive from the person examined a fee of five dollars for every examination.

Exemption from seizure under execution.

27. Goods by law exempt from seizure as against a debtor shall, after his death, be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the said exempted goods for the benefit of herself and the family of the debtor, or, if there be no widow, the family of the debtor shall be entitled to the said exempted goods; and such goods so exempt as aforesaid shall not be liable to seizure under an attachment against the debtor as an absconding debtor.

28. Section six of the Act passed in the twenty-third year of Her Majesty's reign and chaptered twenty-five, entitled "An Act to exempt certain articles from seizure in satisfaction of debts," is hereby

repealed, and the following substituted therefor:

"6. The debtor, or his widow, or family, or, in the case of infants, their guardian, may select out of any larger number the several chattels exempt from seizure under this Act."

Chattel mortgages.

29. Section nine of chapter forty-five, of the Consolidated Statutes for Upper Canada, is hereby amended by inserting in the line before the last line, after the words "purchasers and mortgagees," the words, "in good faith."

Trustees—Filling vacancies.

30. Wherever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, dies, or desires to be discharged from, or refuses, or becomes unfit or incapable, to act in the trusts or powers in him reposed, before the same have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees, in place of the trustee or trustees dying, or desiring to be discharged, or refusing, or becoming unfit, or incapable to act as aforesaid; and so often as any new trustee or trustees is or are so appointed as aforesaid, all the trust property (if any), which for the time being is vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustees or trustee, shall, with all convenient speed be conveyed, assigned and transferred, so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with surviving or continuing trustees, or a surviving or continuing trustee, as the case may require; and every new trustee to be appointed as aforesaid, as well before as after such conveyance, assignment or transfer as aforesaid, and also every trustee appointed by the Court of Chancery, either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will or other instrument creating the trust.

2. The power of appointing new trustees hereinbefore contained, may be exercised in cases where a trustee, nominated in a will, has died in the lifetime of the testator.

Guardians of infants.

31. Any of the Superior Courts of Law or Equity or any Judge of any of the said Courts, *or a Judge of the Surrogate Court*, upon hearing the petition of the mother of a minor whose father is dead, may ppoint her to be guardian of the person of the minor, notwithstanding any testamentary provision to the contrary by the father or any appointment of another person as guardian by the father, if such appointment of the mother appears to the Court or Judge to be just and proper; and such Court or Judge may also make an order for the maintenance of the minor by payment out of any estate to which the minor is entitled, such sum or sums of money, from time to time, as according to the value of the estate such Court or Judge thinks just and reasonable; and the *sixth*, ninth and tenth sections of chapter seventy-four of the Consolidated Statutes for Upper Canada shall be applicable in such cases.

2. Any of the said Courts shall have power to give effect to a testamentary appointment of a guardian of the person of her infant children made by the mother of such children upon petition of the guardian so appointed notwithstanding a previous testamentary appointment by the father of such infants, wherever, owing to a change of circumstances or other cause, it may seem to such Court advisable in the interests of such infants so to do, and the Court may make an order for the maintenance of the infants as in the last preceding sub-section mentioned, and the said sixth, ninth and tenth sections of said Act shall in like manner be applicable to such petition and the proceedings thereon.

3. Testamentary guardians and trustees shall be removable by the Court of

Chancery for the same causes as other guardians and trustées.

4. Nothing herein contained shall be construed to change the law as to the authority of the father in respect of the religious faith in which a child is to be educated.

Apprentices and minors.

32. Section two of the Act passed in the thirty-eighth year of Her Majesty's reign, and chaptered nineteen, is hereby amended by inserting after the word "Act" in the fourth line the words "and having the care or charge of a minor."

Married women.

*Conveyance of Real Estate.*

33. The affidavits and papers upon which an order under the Married Women's Real Estate Act is obtained, shall be filed in the office of the Clerk of the Court of which the Judge granting the order is a Judge; and for filing said affidavits and papers the Clerk shall be entitled to the same fees as he is entitled to for filing papers in other cases.

*Dower on Sales where wife is a lunatic.*

34. Where an owner of land whose wife is a lunatic, or of unsound mind, and confined as such in a Lunatic Asylum, is desirous of selling the land free from dower, he may apply in that behalf to the Judge of the County Court in which he resides, or to a Judge of one of the Superior Courts, and if the Judge approves, he may, by an order to be made by him in a summary way, upon such evidence as to the Judge seems meet, and either *ex parte* or upon such notice as he may deem requisite, dispense with the concurrence of the wife for the purpose of barring her dower, and also he is to ascertain and state in the order the value of such dower, and order such amount to remain a charge upon the property, or to be secured otherwise for the wife's benefit, or to be paid and applied for her benefit as he shall deem best, and thereupon a conveyance by the husband, expressed to be free from his wife's dower, shall, subject to the terms and conditions mentioned in the order, be sufficient to bar her right thereto, as if she were of sound mind and had duly executed a deed jointly with her husband for that purpose.

2. On every such application the Judge shall be entitled to his own use to a fee of five dollars, and no other fee or charge of any kind shall be payable in respect thereof, either to the Clerk, Fee Fund or otherwise.

3. Sections six, seven, eight and ten of "The Married Woman's Real Estate Act, 1873," shall apply to the order to be made on the said application.

*On certain other sales.*

4. This section shall apply to any case in which an agreement for sale has been made and a conveyance has been executed by the husband, and any part of the purchase money has been retained by the purchaser on account of dower, and to any case in which an indemnity has been given against the dower of the wife.

35. Where the wife of an owner of land has been living apart from him for two years, under such circumstances as by law disentitle her to alimony, and such owner is desirous of selling the land free from dower, he may apply to a Judge of one of the Superior Courts, and if the Judge approves, he may, by an order to be made by him in a summary way, upon such evidence as to the Judge seems meet, and either *ex parte* or upon notice (notice to be served personally unless the Judge otherwise directs), dispense with the concurrence of the wife for the purpose of barring her dower, and thereupon a conveyance by the husband, expressed to be free from his wife's dower, shall, subject to any terms in the order, be sufficient to bar her right thereto, as if she had duly executed a deed jointly with her husband for that purpose.

2. Sections six, seven, eight and ten of "The Married Woman's Real Estate Act, 1873," shall apply to the order to be made on the said application.

*Deeds barring dower before this Act.*

36. Where a husband has duly conveyed land of which he was owner, any deed or conveyance heretofore executed by his wife for the purpose of barring her dower, to which deed or conveyance her husband is not a party, is and shall be taken and adjudged to be valid and effectual to have barred her dower in the lands in which such deed or conveyance professed to bar dower, notwithstanding the absence or want of a certificate touch-

ing her consent to be barred of her dower, and notwithstanding any irregularity, informality, or defect in the certificate (if any), and notwithstanding that such deed or conveyance may not have been executed, acknowledged or certified, as required by any Act now or heretofore in force, respecting the barring of dower.

Contingent interests, &c.—Liability in execution.

37. Section eight of the Act passed in the twenty-fourth year of Her Majesty's reign, and chaptered forty-one, is hereby revived and amended by adding after the word "party" in the seventh line the words, "or over which such party has any disposing power which he may, without the assent of any other person, exercise for his own benefit."

Partition of real estate.

38. In any suit in the Court of Chancery for partition or sale, where any of the persons interested in the lands whereof partition or sale is sought are unknown to the plaintiff, or have not been heard of for three years or upwards, the Court shall have the same jurisdiction, that, in proceedings under the Act passed in the thirty-second year of Her Majesty's reign, and chaptered thirty-three, and the amendments thereto, it possesses for the purpose of binding the interests of such persons and dealing with the estate of such of them as by reason of long continued absence may reasonably be believed to be dead; and the like proceedings may be taken in such suit for the said purpose as might be taken upon a petition under the said Acts, and every deed or vesting order made in any such suit shall have the same effect as a deed or vesting order made in proceedings under the said Act.

Contingent remainders.

39. Section six of chapter ninety of the Consolidated Statutes for Upper Canada, is hereby amended by striking out the word "A" in the first line thereof and substituting the following:

"Every contingent remainder at present existing or hereafter created shall be, and every"

Registration of Orders in Council.

40. [Orders in Council may be registered].

Jurisdiction of Police Magistrates, &c.

41. [Police Magistrate and Stipendiary Magistrate may sit alone].

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AN ACT RESPECTING THE COUNTY COURT AND GENERAL SESSIONS OF THE PEACE AND SURROGATE COURT OF THE COUNTY OF YORK.

Her Majesty, &c., enacts as follows:

1. The sittings of the County Court of the County of York, for the trial of issues of fact and assessment of damages, and the sittings of the Court of General Sessions of the Peace for the said County, shall hereafter commence respectively on the first Tuesday in the months of December and March, and on the second Tuesday in the months of May and September, in each year.

2. While sittings of the County Court of the County of York are being held for the trial of issues of fact and assessment of damages, the Judges of the said court, or any two persons authorized to hold the sittings of such court, may, in case the General Sessions of the Peace have been adjourned or have terminated, sit separately and concurrently, one for the trial of causes where a jury is required, and the other for the trial of causes to be tried without a jury.

3. The Terms of the County and Surrogate Courts of the County of York shall hereafter commence respectively on the first Monday in January and April, and on the second Monday in June and October, in each year, and shall end on the Saturday of the same week.

4. [The Lieutenant-Governor may from time to time appoint a person to fill the office of shorthand writer for the said courts, who shall be subject to the direction of the senior Judge, or, in his absence, to the direction of the junior Judge].

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AN ACT TO AMEND THE ACT RESPECTING MORTGAGES AND SALES OF PERSONAL PROPERTY.

Her Majesty, &c., enacts as follows:

1. Where any mortgage of goods and chattels is registered under the provisions of chapter forty-five of the Consolidated

Statutes for Upper Canada, respecting Mortgages and Sales of personal property, such mortgage may be discharged, by the filing, in the office in which the chattel mortgage is registered, of a certificate signed by the mortgagee, his executors or administrators, in the form given in the Schedule hereto, or to the like effect.

2. The officer with whom the chattel mortgage is filed, upon receiving such certificate, duly proved by the affidavit of a subscribing witness, shall, at each place where the number of such mortgage has been entered, with the name of any of the parties thereto, in the book kept under the eighth section of the said Act, or wherever otherwise in the said book the said mortgage has been entered, write the words, "Discharged by certificate number (*stating the number of certificate*)," and to the said entry such officer shall affix his name, and he shall also endorse the fact of such discharge upon the instrument discharged, and shall affix his name to such instrument.

3. Where a mortgage has been renewed under section ten of the said Act, the endorsement or entries required by the preceding section to be made, need only be made upon the copy filed on the last renewal, and at the entries of such copy in the said book.

4. In case any registered chattel mortgage has been assigned, such assignment may, upon proof by the affidavit of a subscribing witness, be numbered and entered in the alphabetical chattel mortgage book, in the same manner as a chattel mortgage, and the proceedings authorized by the preceding sections of this Act may and shall be had, upon a certificate of the assignee, proved in manner aforesaid.

5. The affidavit required by the tenth section of the said Act may be made by any next of kin, executor or administrator of any deceased mortgagee, or by any assignee claiming by or through any mortgagee, or any next of kin, executor or administrator of any such assignee; but if the affidavit be made by any assignee, next of kin, executor or administrator of any such assignee, the assignment, or several assignments through which such assignee claims shall be filed in the office in which the mortgage is filed, at or before the time of such refiling by such assignee, next of kin, executor or administrator of such assignee.

6. For services under this Act, the said officer shall be entitled to charge twenty-five cents.

7. This Act shall be read as part of the said Act respecting Mortgages and Sales of Personal Property.

SCHEDULE.

To the Clerk of the County Court of the County of

I of do certify that has satisfied all money due on, or to grow due on a certain chattel mortgage made by to , which mortgage bears date the day of , A. D. , and was registered (*or in case the mortgage has been renewed under section ten*, was re-registered,) in the office of the Clerk of the County Court of the County of , on the day of , A. D. , as No. (*here mention the day and date of registration of each assignment thereof, and the names of the parties, or mention that such mortgage has not been assigned, as the fact may be*), and that I am the person entitled by law to receive the money, and that such mortgage is therefore discharged.

Witness my hand, this day of A. D.

*One witness stating residence and occupation.*

## NOTES OF CASES.

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

### *COURT OF APPEAL.*

RE RANDOLPH.

From C.C., Simcoe.] [Feb. 20.

*Insolvency—Partnership.*

Randolph and brother were lumber merchants, and carried on a grocery store and blacksmith's shop for the convenience of the men engaged in their mill. Peckham and Hoag received consignments of lumber from Randolph and brother, and accepted their drafts drawn against such consignments. P. & H. were paid one-half of the net profits of the business by way of commission. No provision was made in case

of a loss, but by a special agreement, P. & H. shared half a loss which occurred in one year. P. & H. had access to the Randolphs' books; and the yearly balancing was done under their supervision. One purchase of timber was made in the joint names of the Randolphs and a member of the firm of P. & H.; the cash having been advanced by the Randolphs alone. Subsequently the Randolphs dissolved. The business was carried on by Randolph the insolvent, and it was agreed between him and P. & H., that they should receive half the profits of the business, instead of a commission as formerly, and the amount due P. & H. at the time was carried to the debit of R.

P. & H. now claimed, as creditors of the insolvent's estate, for a balance due them. Their claim was resisted by the inspectors on the ground that a partnership existed between them and the insolvent.

*Held*, (Burton, Patterson, Moss, J.J.A., and Galt, J.,) affirming the judgment of the County Court, that P. & H. were not partners of the insolvent, and might therefore rank on the estate.

*McMichael*, Q.C., with him *McCarthy*, Q.C., for the appellants.

*W. H. L. Gordon*, for the respondent.

*Appeal dismissed.*

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Re Niagara—Niagara v. Niagara.

From Q.B.] [Feb. 20.

*High schools—37 Vict. cap. 27, O.*

*Held*, (Hagarty, C.J.C.P., Burton, Patterson and Moss, J.J.A.) affirming the judgment of the Court of Queen's Bench, that under 37 Vict. c. 27, O., the High School Board for a district consisting of two municipalities, a town and township, could call upon one of the municipalities, the township, to contribute towards the erection of a school-house in the other municipality, and not merely towards its maintenance.

*M. C. Cameron*, Q.C., for the appellant.

*J. A. Miller*, for the respondent.

*Appeal dismissed.*

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Brown et al v. Shaw et al.

From C.C., Wentworth.] [Feb. 20.

*Implied contract.*

The plaintiffs, living at Hamilton, sold a certain number of chests of tea, through a broker at Toronto, to the defendants, who were merchants at the latter place. Before shipping the goods, the plaintiffs ascertained the net weight of the tea by a mode well known to the trade, and sent an invoice charging the defendants for the number of pounds so ascertained. Some days after the receipt of the goods, the defendants wrote to the plaintiffs, refusing to remit their notes for the amount of the invoice, on the ground that the taring was incorrect, and added, "if you wish we will have more of them tared, or you can send down yourselves, when I will settle." One of the plaintiffs thereupon came down to Toronto, and the goods were retared in the presence of the broker and the defendants' agent, when it was ascertained that the defendants were chargeable with 95 lbs. more than the plaintiffs had originally claimed. The defendants then sent their notes for the amount charged in the original invoice, and refused to pay for the additional 95 lbs..

The Court (Burton, Patterson, Moss, J.J.A., and Galt, J.) *held*, allowing the appeal, that the defendants had bound themselves by their letter and conduct to abide by the result of the retaring at Toronto.

*C. Robinson*, Q.C., for the appellants.

*Rose*, for the respondents.

*Appeal allowed.*

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Gilleland v. Wadsworth.

From Chancery.] [Feb. 20.

*Mortgagor and mortgagee—Assignment—Notice—Payments on mortgage—Registration.*

B., being the owner of Whiteacre, mortgaged the same to C., who sold and assigned the security to J., which assignment was duly registered, and afterwards B. agreed with W., the owner of Blackacre, to effect an exchange of properties, B. agreeing to have the mortgage which he had executed to C., transferred from Whiteacre to Blackacre, which C. assented to, and the arrangement was finally carried out in the manner proposed, C., who was a solicitor, being the party employed to prepare the several conveyances, including the mortgage from B. to himself, upon the newly acquired property (Blackacre). No mention was made of the first mortgage by either party on this occasion, and B. continued to pay C. the interest, and ultimately the principal, when he obtained a discharge of the mortgage on Blackacre, C. all the while continuing to pay J. the interest accruing due upon the mortgage on Whiteacre.

*Held*, (Burton, Patterson, Moss, J.J.A., and Blake, V.C.,) that the payments so made by B. to C. had not the effect of discharging the mortgage on Whiteacre, and that the assignee thereof could enforce it against W.; and (2) that W. was affected with notice of the transfer of the mortgage by reason of the registration thereof;

and (3) that it was not necessary to set up the registration of the assignment in the bill.

TAYLOR v. TAYLOR ET AL.

From Chancery.] [Feb. 20.

*Principal and Agent—Trustee and cestui que trust.*

In 1847, the plaintiff being about to leave Canada, conveyed certain lands in which he had a right of pre-emption, to his brother—one of the above named defendants. Only a small portion of the purchase money had been paid, and no provision was made by the plaintiff for the payment of the balance. In April, 1851, the brother assigned the land to the plaintiff without consideration and without his knowledge, for the purpose either of denying his title to the land in a suit brought by one Canniffe, who was in possession of the land claiming adversely; or to prevent the bringing of a *qui tam* action. The brother paid the residue of the purchase money without the plaintiff's aid or knowledge, and a deed issued in the plaintiff's name. In October of the same year, the plaintiff executed a power of attorney, enabling him to sell the land in question, mentioning it specifically, and a general power to sell or lease any lands which he owned in Canada. In 1856, the brother conveyed the property to W. for the alleged consideration of $1000; who immediately reconveyed one-half the land to the brother for the alleged consideration of $200. The plaintiff returned to Canada in 1873, and filed a bill impeaching the transaction between his brother and W., and seeking to have them declared trustees for him.

At the hearing the plaintiff and his brother compromised their difficulties.

The Court (Harrison, C.J., Burton, Patterson, J.J.A., Hagarty, C.J.C.P. dissenting), *held*, that the defendant Taylor was the beneficial owner of the land at the time of the conveyance to Wallbridge, and refused to set aside the conveyance.

*Bethune*, Q.C., (with him *Dickson*,) for the appellant.

*Wallbridge*, Q.C., and *Fitzgerald*, Q.C., for the respondent Wallbridge.

*Appeal dismissed without costs.*

MONAHAN v. OKE.

From C.C., Northumberland & Durham.] [Feb. 20.

*Assumpsit—Illegitimate children—C.S. U.C. cap. 77, sec. 4.*

*Held*, (Burton, Patterson, Moss, J.J.A., and Galt, J.) affirming the judgment of the County Court, that an action of assumpsit will lie against an executor for the maintenance of an illegitimate child of the testator, under C.S. U.C. cap. 77, sec. 4.

*Benson*, Q.C., for the appellant.

*Osler* for the respondent.

*Appeal dismissed.*

MCARTHUR v. SMITH.

From C.C., Wentworth.] [Feb. 20.

*Bills and notes—Mutual insurance company.*

*Held*, (Burton, Patterson, Moss, J.J.A., and Galt, J.) that a promissory note made to a Mutual Insurance Company, or its officers, under C.S. U.C. 52, sec. 21, is negotiable.

*J. K. Kerr*, Q.C., for the appeal.

*Osler* for the respondent.

*Appeal allowed.*

WALKER v. HYMAN.

From C.C., Middlesex.] [Feb. 20.

*Estoppel.*

The plaintiffs were makers of safes at Toronto. One Hergert of London, gave them a written order for a safe, for which he was to give his promissory notes at four and six months. The order contained a direction to have his name painted on the front of the safe, and it was stipulated on a printed form, furnished by the plaintiffs and appended to the order, that no title to the safe was to pass to Hergert until full payment of the price agreed upon. In compliance with the order, the plaintiffs had Hergert's name painted on the safe, and delivered it to him in August, 1876. Hergert gave his notes at four and six months in payment. In November of the same year, the defendant purchased the safe—after having first searched the office of the Clerk of the County Court for encumbrances against it, and believing it to belong to Hergert.

The Court, (Burton, Moss, J.J.A., and Galt, J., Patterson, J.A., dissenting,) that the plaintiffs were not estopped from asserting their ownership, and that they were entitled to recover the amount due on the safe.

*Merritt* for the appellant.

*MacMahon*, Q.C., for the respondent.

*Appeal allowed.*

MILLER v. HEWITT.

From C.C., York.] [Feb. 20.

*Married woman—Insolvency.*

A married woman transferred certain shares, which formed part of her separate estate, to her

husband, upon a promise of repayment by him of their value.

The Court, (Burton, Patterson, and Moss, J.J.A.,) *held*, that she was entitled to rank on his estate as a creditor, he having subsequently become insolvent, but that such a claim should be submitted to the most rigid investigation, and must be supported by the most clear and convincing evidence when being proved before the assignee.

*W. A. Foster*, with him *J. B. Clark*, for the appellant.

*R. N. Miller* for the respondent.

*Appeal allowed.*

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WOOD v. MCALPINE.

From C.P.] [Feb 20.

*Assignment of chose in action—35 Vict. cap. 12, O.—Meaning of "Assignee"—Amendment.*

The plaintiff, as assignee of one Munro, an insolvent, sold the insolvent's stock and business to one Smith, but without the preliminary advertisement required by the Insolvency Act for sales *en bloc*. Munro who was retained by Smith as his clerk, sold part of the stock to the defendant. Smith being in doubt whether the right of action for the goods so sold was in himself or in the plaintiff, executed a writing before this suit, purporting to assign his claim against the defendant to the plaintiff. No beneficial interest passed, or was intended by this writing to pass to the plaintiff, who sued in this action in his character as the insolvent's assignee, but really for Smith's benefit.

*Held*, (Burton, Patterson, Moss, J.J.A., and Galt, J.,) affirming the judgment of the Court of Common Pleas, that the plaintiff was properly non-suited, as he did not possess the beneficial interest in the debt sued on : 35 Vict. cap. 12, sec 3, O.

An application to allow Smith to be added as a plaintiff, was refused at this stage, as such an amendment could only be upon payment of all costs, and this would be of no practical benefit to Smith, who can sue in his own name.

*C. Robinson*, Q.C., (with him *Foy*,) for the appellant.

*M. C. Cameron*, Q.C., for the respondent.

*Appeal dismissed.*

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# QUEEN'S BENCH.

## HILARY TERM.

(Present, HARRISON, C.J., MORRISON, WILSON, J.J.)

BARNARD'S BANKING CO. v. REYNOLDS.

*"(English) Companies Act 1862"—Order for Calls—Right of action—Liability of past member.*

*Held*, (Wilson, J. dissenting) that an action for calls will not lie in this country on an order made under "The Companies Act, 1862," in England, on the winding up of the company against a past member in respect of shares formerly held by him at the suit of the company.

*C. Robinson*, Q.C., and *L. Gordon*, for plaintiffs.

*S. Richards*, Q.C., for defendant.

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LEPROHON v. OTTAWA.

*Power of Local Legislature—Taxation of income of Dominion officers.*

This was an action brought by plaintiff, an officer of the Dominion House of Commons, for trespass and trover, arising from the collection of taxes from him for income derived from the salary paid him by the Dominion. It was objected *inter alia*, that the Government of Ontario had no power to authorize municipalities to tax the salaries paid by the Dominion to its officers. *Held*, (Harrison, C.J.,) dissenting, that the Local Legislature had such power, and that the plaintiff's income wasproperly assessed.

*C. Robinson*, Q.C., for the plaintiff.

*Bethune*, Q.C., for the defendants.

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HALL v. MERRICK.

*Married woman—Guarantee for husband.*

Plaintiff, who had previously endorsed for J.D.M., husband of defendant, Sarah M., on being again applied to, refused to endorse unless indemnified. J. D. M. proposed to give his wife's guarantee, which was agreed to by plaintiff. J. D. M. obtained his wife's signature to an ordinary blank form of promissory note, without any knowledge on her part of the use to be made of it. This was to be filled up for a large amount, and at the plaintiff's request, the words "This note to be held as collateral security" were inserted before value received at the end of the note. The defendant swore that she gave the blank to be used as a note and never authorized its use as a guarantee.

*Held*, not a guarantee.

*J. K. Kerr*, Q.C., for plaintiff.

*E. Crombie*, for defendant.

## VACATION COURT.

### Re Strachan and the County of Frontenac.

Wilson, J.] [March 2.

*County—Power of.*

A county by-law granting money to aid local municipalities within it in improving roads &c. of a local character is *ultra vires.*

*Ewart* for the applicant.

*Bethune*, Q.C., contra.

### Third National Bank of Chicago v. Cosby.

Wilson, J.] [March 2.

*Promissory note—Uncertainty—'American Currency.'*

A promissory note made in Ontario, payable in the United States, is not void for uncertainty because payable in "American currency."

*McMichael*, Q.C., for plaintiff.

*Benson*, Q.C., for defendant.

### Fitzgerald v. Johnston.

Galt, J.] [March 6.

*Chattel mortgage—Sufficiency of description.*

Special case. Plaintiff held a chattel mortgage upon "all the goods, chattels, furniture, and household stuff whatever," of one H., in and upon a certain hotel, stables, and premises, and referred to the goods, &c., as more particularly described in the schedule annexed.

*Held*, that the description in the mortgage would not, without more, pass a horse of H.'s to plaintiff, as against defendant, a creditor of H.

The schedule contained the words, "yard and stables, 1 omnibus, 2 bay horses aged, the whole of the above named property, goods, chattels, household furniture, horses," and referred to them as being in and upon the hotel premises, &c. It was admitted that the horse in question was not particularly mentioned in the schedule. *Held*, that the horse did not pass.

*Semble*, that only property in the nature of household property passed.

## *CHANCERY.*

## RE-HEARING TERM.

### Re White—Kersten v. Tane.

*Undue influence—Bona fides—Mental capacity.*

W., the holder of a policy of insurance on his life, who had fallen into habits of intemperance, which greatly enfeebled his bodily health, although his mental faculties remained sufficiently unimpaired to enable him to understand business, assigned this policy to T., his brother-in-law, a clergyman, for his own benefit; and on the following day executed his will, appointed T. his sole executor, and thereby bequeathed his effects, which were of but trifling value, to several of his relatives. No entry of the assignment of the policy was made in the books of the insurance company, and the premium afterwards paid was paid in the name of W. T., on applying for the payment of the insurance money, represented himself as the assignee and executor of the deceased.

*Held*, on rehearing, affirming the decree of Blake, V.C., as reported in 20 Gr., p. 547, that the circumstances were not such as shifted the onus of proof, and called for evidence on the part of T., that the assignment was *bona fide*, and that he had not exercised any influence over the deceased in obtaining the same.

*Maclennan*, Q.C., for plaintiff.

*Moss* for defendant.

### Adams v. Loomis.

*Husband and wife—Alimony suit—Valuable consideration—Married Women's Property Act*, 1872.

*Held*, affirming the decree pronounced in 20 Gr., page 99, that the compromise of an alimony suit is a sufficiently valuable consideration for a deed from the husband to the wife.

*Held*, also, affirming the same decree, that a wife's conveyance of her equitable estate is valid without the husband joining in the deed; and, the husband having the legal estate vested in him, the wife's vendee could compel a conveyance by the husband.

The Married Women's Property Act, 1872, applies to cases where lands have been acquired by married women after the passing of that Act, although the marriage took place before the Act came into force. [Per Proudfoot, V.C.]

*Boyd*, Q.C., for plaintiff.

*Armour*, Q.C., and *Maclennan*, Q.C., for Loomis.

### Hiscox v. Lander.

*Nuisance — Executive Councillor — Commissioner of Public Works—Parties—Practice—Rehearing.*

By the statute 32 Vict. cap. 28, O., all the public buildings and works are placed under the control and management of the Commissioner of Public Works, but the Act negatives any authority of that officer to "cause expenditure not previously sanctioned by the Legislature, except for such repairs and alterations as the immediate necessities of the public service may demand." The London Lunatic Asylum was

erected under the provisions of an Act of the Legislature, and the drains of it were constructed in such a manner as to discharge into a stream crossing the lands of the plaintiff, thereby causing a serious nuisance to the plaintiff. To remedy this it was alleged that the only effectual means was to carry the sewage to the river Thames, at an estimated cost of $30,000.

*Held*, that the Commissioner of Public Works could not be restrained by injunction from allowing the nuisance to continue. [SPRAGGE, C., dissenting].

Per SPRAGGE, C.—The stream which had thus been polluted had not been acquired by the Commissioner under the Act, and it was not a drain to carry off water from a public work that had been constructed by the Commissioner, and therefore it was not such an act as the statute authorizes, even if it had been properly done.

*Semble*, To such a suit the medical superintendent of the Asylum is not a proper party.

Where a cause is re-heard at the instance of some of the defendants against whom relief has been granted, it is necessary that a defendant against whom the bill was dismissed at the original hearing should be before the Court on the re-hearing.

*Bethune*, Q.C., and *Moss* for plaintiff.

*Mowat*, Q.C., *Maclennan*, Q.C., *Boyd*, Q.C., and *Vidal* for defendants.

### WALKER v. WALTON.

BLAKE, V.C.] [Nov. 29, 1876.

*Mechanics' Lien Acts of* 1873 *and* 1874, *O.—Cancelling lien—Demurrer.*

The effect of the Mechanics' Lien Act of 1874 is, to cancel a lien that had been created under the Act of 1873, although a bill to enforce the claim had been filed within ninety days from the expiry of the period of credit as prescribed by the 4th section of that Act; no proceeding to realize the claim having been taken for more than thirty days after the machinery, the foundation of the claim, had been supplied; the provisions of the Act of 1873 being inconsistent with, and repugnant to the provisions of the later Act, which repeals all Acts inconsistent therewith.

*A. F. Campbell* for demurrer.

*J. H. McDonald* contra.

### BOTHAM v. ARMSTRONG.

BLAKE, V.C.]

*Insolvent—Indorser—Preferred creditors—Sec.* 133 *of the Insolvent Act*, 1875.

A trader being in embarrassed circumstances sold out his business, and out of the proceeds satisfied a promissory note on which his brother was indorser, before it had become due, and shortly afterwards went into insolvency. The evidence did not shew that the indorser was aware or was party to the payment in any way, and it was by no act of his that the note was so paid.

*Held*, under the circumstances, that the assignee in insolvency had no right to call upon the indorser to refund the amount of such note; but,

Where the payment of a note had been procured by the indorser, he was under the 89th section of the Insolvent Act of 1869, [in effect the same as section 133 of the Act of 1875], held liable to make good the amount thereof.

*Gibbons* for plaintiff.

*J. W. Bowlby* for defendant.

### PRINCE v. LOUGH.

BLAKE, V.C.]

*Practice—Demurrer filed—Demurrer ore tenus—Costs.*

Where a demurrer was filed which on argument was overruled, and a demurrer then taken *ore tenus* was allowed, the Court allowed the latter without costs; although costs were given to the plaintiff of the demurrer that was overruled, following the decision in *Roche* v. *Jordan*, 20 Gr. page 373.

*O'Sullivan*, for demurrer.

*Fitzgerald*, Q.C., contra.

### BALL v. CANADA COMPANY.

BLAKE, V.C.]

*Lessor and Lessee—Purchase on condition.*

Where there is a contract between the owner of lands and another person, whether lessee or not, that if such person shall do a certain specified act he shall be at liberty to buy the property, in such a case, time is of the essence of the contract, and until the performance of the act which has been so stipulated for, the relation of vendor and purchaser does not exist between the parties: therefore, where The Canada Company granted the plaintiff a lease of certain lands, whereby amongst other things, they agreed that if the lessee duly paid certain rents and taxes, and should not cut or sell, or suffer, or permit to be cut or sold any timber or other trees growing on the lands, except for the purposes of clearing and the use of the premises, he should be at liberty to purchase the same at a certain named price, and it was admitted that default had been made as well in regard to the payment of rent and taxes as to the cutting of timber, it was *held* that a right

to insist upon a sale was forfeited, notwithstanding the lessee's offer to make good the rent and taxes, and pay the amount of purchase money agreed upon.

*Boyd*, Q.C., and *Stephens*, for plaintiff.

*J. H. Cameron*, Q.C., and *H. Murray*, for defendants.

## NASH v. GLOVER.

PROUDFOOT, V.C.]

*Public Highway—Lengthened possession of original road allowance—Statute of Limitations—Extinction of right.*

The public cannot release their rights; and there is no extinctive presumption or prescription; therefore where an original allowance for road had been taken possession of, and occupied by the plaintiff, and those under whom he claimed, for a period of forty years and upwards:

*Held*, that such lengthened possession afforded no ground for opposing the action of the municipality in resuming possession of the road for the purpose of opening the same.

*R. Martin* and *Lemon* for plaintiff.

*B. Osler*, Q.C., for defendant Flatt.

*Moss* for defendant Glover.

## HELLEM v. SEVERS.

PROUDFOOT, V.C.]

*Will, construction of—Inconsistent words—Executrix beneficially interested—Costs—Inops consilii.*

A testator in a will containing inconsistent provisions, devised certain real estate, after the death of his daughter, to his grandsons, J. & F., "to hold as joint tenants, and not as tenants in common. To have and to hold the same to them during their joint lives; and to the survivor of them; and to their male heirs after their, or either of their decease; and to their heirs and assigns for ever," and in case of the death of F., without leaving lawful issue, then the portion that would have belonged to him if living, the testator gave to another grandson H. for his life, and after his death, to his heirs and assigns forever.

*Held*, that the remainder, after the death of the daughter, went to J. & F. as joint tenants for life, with several inheritances in tail male, and with remainder in fee as to F.'s part to H.

The same will contains the following devise: "My will is that after the decease of my daughter Bridget, and after the decease of all my sons in law, James Esmond, John Emery and John Severs, and not before they are all deceased, then my will is, that the money and mortgages belonging to my estate is to be devised into equal parts and paid to my grand-children, equally amongst all my grand-children; but in case of the death of any of my grand-children before the death of my daughter Bridget, and before the death of all my sons-in-law, leaving lawful issue, then the share that would have belonged to my grand-child, if living, shall go and belong to the lawful issue of such deceased grand-child."

*Held*, that the estate was not to be divided till 21 years from the death of the testator, and not then unless his daughter and three sons-in-law were dead; and that all the grand-children living at his death took an immediately vested interest, subject to be divested *pro lanto* as the number of grand-children should be increased by future births before the period of distribution.

The testator directed that F. should be sent to college and his expenses paid for out of his estate by his executors. The estate consisted of land only, after taking out a specific bequest of the furniture and the expenses of the funeral; *Held*, that the land was charged with the bequest.

Where a testator provided that the executrix was to have the sole management during her life, and the executors were to manage afterwards; and the latter filed a bill against the executrix without sufficient cause they were not allowed their costs; but the matter having been brought to the notice of the court, a decree for an account was made as respected the executrix.

The person who was to have the sole control and management of the estate being entitled beneficially to the interest on the investments, the court refused to order a transfer in court.

When a will, though prepared by a solicitor, was so inconsistently worded, that but little benefit could be derived from his labours in its construction, the court thought that as liberal an interpretation should be made of the language, in order to ascertain the intentions of the testator, as if he had been in fact *inops consilii*.

*Meek*, for plaintiff.

*Hoskin*, Q.C., *Delamere* and *Black*, for the defendant.

## LIFE ASSOCIATION OF SCOTLAND v. WALKER.

PROUDFOOT, V.C.] [Jan. 10.

*Trustees and cestui qui trust—Commission—Practice—Further directions—37 Vict. cap. , Ont.)*

The rule of decision in Equity which requires that the expenses incurred by a trustee in the execution of his office shall be satisfied before the *cestui qui trust*, or his assignee can compel

a conveyance of the trust estate, applies to the commission or allowance to a trustee for his care, pains and trouble under the Act of Ontario, 37 Vict. cap. 9.

Whereon a reference to a Master to take an account of a trustee's dealings with an estate, that officer omitted to ascertain the amount of the trustee's charges, costs, &c., a reference back to ascertain it was directed at the hearing on further directions; and the fact of the Master having reported that the trustee had omitted to keep any regular set of books shewing a debtor and creditor account of his dealings with the estate, but did not state that for that reason he had been unable to ascertain the amount, was not considered a sufficient reason for his having omitted to find the amount of such claim.

*Fitzgerald*, Q.C., for plaintiffs.

*W. Cassels*, for defendants.

### Re Credit Valley Railway Company and Spragge.

Proudfoot, V.C.] [Jan. 10.

*Railway company—Valuing lands taken for railway—Arbitration—Costs.*

Where arbitrators are appointed to award compensation for lands taken for the purposes of a railroad, and assess the damages sustained by the proprietors by reason of the severance of the lands, the arbitrators may properly take into consideration the increased value to the estate by reason of the construction of the railroad, although benefited only in the same way as other farms in the neighbourhood through which the railroad does not pass; as also the increase in value by reason of the probable location of a station at a town in the vicinity of the lands, and which the company had bound themselves to place there in consideration of a bonus paid by such town.

Although the statute (C.S. U.C. cap. 66) directs that when the sum awarded for lands taken for a railroad is less than that tendered, the costs shall be borne by the owners; the same rule does not apply as to the costs of an appeal to this Court, they being then in the discretion of the Court, who, under the circumstances, dismissed this appeal without costs.

*R. M. Wells* for the company.

*O'Brien* contra.

### Billington v. Provincial Ins. Co.

Proudfoot, V.C.] [Jan. 31.

*Fire insurance—Agent of company—Agent of assured—Prior insurance—Notice to agent of company.*

On the 6th February, 1875, the plaintiff applied to the agent of the defendants at Dundas, to effect an insurance for two months from that date, for which he paid the premium demanded and obtained an interim receipt, but, before a policy was issued to the plaintiff, the property was destroyed by fire; and it was shewn that it was not usual to issue policies for short risks—but after the fire occurred, a policy was issued on which were indorsed, amongst other conditions, one, that notice of all previous insurances upon the property should be given to the company and indorsed on the policy, or otherwise acknowledged by them in writing; and another, that if the agent of the company made the application for the insured, he should be considered the agent of the insured, and not of the company; but no intimation of such a condition appeared on the receipt given to the plaintiff. When the insurance was applied for, the plaintiff informed the agent of the existence of a prior insurance on the same property in another company, (the same person was, in fact, agent for both companies), and expressed great anxiety to have the same properly acknowledged by the company; but it appeared that the agent had omitted to communicate the fact of such prior insurance to his principals. It was proved by the manager of the defendants, that it was the duty of the agent to receive applications for insurance, and part thereof would be the existence of other insurances. In an action brought to recover the amount of the policy, the company raised several defences of false representations by, and fraudulent contract on the part of the insured, all of which were either abandoned or disproved at the trial; the defence being finally rested on the want of notice of prior insurance and the question of agency.

*Held*, under the circumstances stated, that the plaintiff was entitled to recover the amount of loss sustained by him together with his costs of suit, the amount of which the company were ordered to pay forthwith.

*B. Osler*, Q.C., and *Moss* for plaintiff.

*Huson Murray* for defendants.

### McKillop v. Smith.

Blake, V.C.] [Feb. 14.

*Demurrer—Pleading.*

Where a bill by a municipality seeking to restrain the defendants from obstructing a highway in one paragraph alleged that the defendants "have fenced or allowed the same to be fenced," and in another paragraph that they were "in the occupation and possession of the said side line * * and have prevented and still prevent the inhabitants * * and the public at

large from travelling on and over the said line * * and have refused and still refuse to open the said line or to allow the plaintiffs to do so," and that the defendants claimed they were entitled to the road.

*Held*, on demurrer for want of equity, that the allegations taken together were sufficient to entitle the plaintiffs to the relief; although had the only allegation been that the defendants had "fenced or allowed the same to be fenced," it would not have entitled the plaintiffs to the injunction prayed for.

*Maclennan*, Q C., for demurrer.

*A. Hoskin*, contra.

### Re Harris—Harris v. Harris.

Blake, V.C.] [March 6,

*Costs of contentious suits in Surrogate Court.*

Where a suit in the Surrogate Court is by order removed into Chancery, and that Court directs any of the parties to receive their costs; the costs to which they are entitled are those fixed by the Court of Chancery tariff —not the costs of the Probate Court in England, or of the County Courts here; no tariff of costs for contentious cases in the Surrogate Courts here having yet been established.

*R. M. Meredith* for the plaintiff.

*Geo. Murray* for defendants.

### Bolckow v. Foster.

Proudfoot, V.C.] [March 14.

*Pleading—Parties.*

*Held*, that to a bill by a surviving partner to foreclose the equity of redemption of defendants in railway mortgage bonds and shares, the mortgage of the bonds and shares being in favor of the partnership firm, the personal representatives of the deceased partner are not necessary parties; in this over-ruling *Sykes* v. *Brockville & Ottawa Railway Co.*, 9 Gr. 9 (1862).

*Crooks*, Q.C., *Smith* and *Rae* for plaintiff.

*Bethune*, Q.C., *Boyd*, Q.C., and *W. Cassels* for defendants.

### Cochrane v. Franklin.

Chancellor.] [March 16.

*Fi. fa. against mortgagee—Restraining disposition of mortgage.*

On a bill filed by a judgment creditor with *fi. fa.* in hands of sheriff, the Court restrained the defendants from selling, assigning, or otherwise disposing of a mortgage held by him, created by one T. in favor of one S., and by S. assigned to the defendant. For the purpose of obtaining a *lis pendens*, the plaintiff was entitled to proceed in equity, notwithstanding the provisions of the Administration of Justice Act.

[In future, however, this will not be the case, as during the last session power was given to the Common Law Courts to grant a *lis pendens*].

*Moss* for plaintiff.

### Stewart v. Lees.

Chancellor.] [March 16.

*Proof of execution of will—Attestation clause—Probate.*

Where probate of a will is produced at the hearing, in pursuance of notice served under the statute 22 Vict. cap. 93, and the opposite party does not serve notice of an intention to dispute the validity of the alleged devise, the probate will be sufficient evidence of such will and of its validity and contents; but if, the notice to dispute having been served, the will does not appear to have been duly executed, the Court will give liberty to adduce further evidence, by affidavit or otherwise, to shew that the several requisites of the 4 Wm. 4, cap. 1, as to the execution of wills had been complied with.

*Fitzgerald*, Q.C., for plaintiff.

*Maclennan*, Q.C., for defendant.

## CANADA REPORTS.

## *ONTARIO.*

### SEVENTH DIVISION COURT—LEEDS AND GRENVILLE.

### Healy v. Carey.

The plaintiff, who was collector of the Roman Catholic Separate School tax, for and in the Township of Kitley, having sued the defendant for the amount of a Roman Catholic Separate School tax, the latter admitted that he was a separate school supporter, but contended that he had leased his real estate to his son who was a supporter of public schools, and who, as between defendant and himself was to pay all taxes and had paid the public school tax.

*Held*, 1. That the defendant was liable.

2. That the action should have been brought in the name of the trustees as a corporation, and an amendment allowed.

[Brockville, February 6, 1877.

This cause was tried before the Junior Judge of the County Court of Leeds and Grenville at Frankville on the 16th January, 1876. The action was brought to recover $8.31, amount due from the defendant as school rates for 1876, embracing the collector's rate for collecting.

The defendant did not dispute the fact of his being a supporter of the Roman Catholic Separate School, and indeed it was proved that he had been one of the trustees during the previous year. But he contended that his real estate was leased to his son who was to pay the taxes and was a supporter of the public schools, and as such was to pay or had paid the public school tax. He also contended that the assessment had not been equalized, but nothing turned upon this.

The Judge reserved judgment and named a subsequent day and hour for the delivery thereof. He also intimated that in his opinion the action should have been brought in the name of the trustees instead of by the collector, but directed that any necessary amendment as to this might be made.

Judgment was subsequently given as follows:

McDONALD, J.J.—I have given the matter most careful consideration and the principal difficulty with which I have been met is this: That if the defendant is compelled to pay this tax, the farm upon which the assessment was made, will have been taxed for the support of two schools. Out of this also arises a possible question of the tenant having to pay taxes towards the support of a public school and of a Roman Catholic Separate School, as he is, under the terms of his lease, obliged to pay taxes.

Again on the other hand if the collector of the public school tax applied to the owner for payment of that assessment the latter could refuse to pay it on the ground that he was a supporter of the Roman Catholic Separate School, and not liable to pay a public school tax.

The 7th section of the Separate School Act, of 1863, 26 Vict. cap. 5, enacts that, "The "Trustees of Separate Schools forming a body "corporate under this Act, shall have the "power to impose, levy, and collect school rates "or subscriptions upon and from persons send- "ing children to or subscribing towards the "support of such schools, and shall have all "the powers in respect of Separate Schools, "that the Trustees of Common Schools have "and possess under the provisions of the Act, "relating to Common Schools."

The 14th section of the same Act of 1863, amongst other things enacts that, "Every per- "son paying rates, whether as proprietor or "tenant, who, by himself or his agent, on or "before the first day of March in any year "gives, or who, on or before the first day of "March of the present year, has given to the "Clerk of the Municipality notice in writing "that he is a Roman Catholic, and a supporter "of a Separate School, situated in the said Mu- "nicipality, or in a Municipality contiguous "thereto, shall be exempted from the payment "of all rates imposed for the support of Com- "mon Schools, and of Common School Libra- "ries, or for the purchase of land or erection of "buildings for Common School purposes within "the City, Town, Incorporated Village, or sec- "tion in which he resides, for the then current "year, and every subsequent year thereafter, "while he continues a supporter of a Separate "School; and such notice shall not be required "to be renewed annually."

In my humble judgment the defendant, being a Roman Catholic, and a supporter of the Separate School, under the provisions of the 14th section above mentioned is wholly exempt from the payment of Public School rates, while under the provisions of the 7th section the Trustees of the Separate School had power to impose school rates or subscriptions upon him and have power to collect the same. My judgment is therefore against the defendant.

In my opinion the action should have been brought in the name of "the Trustees of the Roman Catholic Separate School for the section number seven in the Township of Kitley" and I direct that the summons, particulars of claim, and other papers and proceedings be amended accordingly. No objection was taken by the defendant as to the action having been brought in the name of the wrong plaintiff, but I myself raised the question.

Judgment for the plaintiff.

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## COUNTY COURT—COUNTY OF ONTARIO.

### RIDDELL V. MCKAY.

*38 Vict. cap. 26, O.—Ditches and water courses.—Jurisdiction of fence-viewers.*

The Act respecting Ditching and Water-courses (38 Vict. cap. 26, O.) is only applicable where the lands belonging to *each* of the adjoining owners is benefited by the work.

Where, therefor fence-viewers awarded that R. should pay for and maintain a portion of a drain and water-course, which was only of benefit in draining McK.'s land, the award was set aside.

This was an appeal by Riddell from the award of the fence-viewers of the township of Thorah, which directed him to make and maintain about five rods of ditching, and ordered him to pay the costs or the award, which purported to be made under the Act respecting Ditching and Water-courses, (38 Vict. cap. 26). Riddell is the owner of lot 4, and McKay of lot 5, in the 5th concession of Thorah. Through the land of the former a ravine, or creek, runs in a southerly

direction, and on the land of McKay is a swampy or miry piece of ground. Evidence was conflicting as to whether the natural drainage of this piece flowed to the west, or easterly, towards the creek. McKay cut a drain eastward to drain the swamp, but to reach the ravine had to cross about five rods of Riddell's land. It was in respect of this five rods of ditching that the award was made. The evidence also showed that McKay could have drained to the west or south without crossing Riddell's land; and it was shewn that the drain was of no benefit to the latter.

DARTNELL, J.J.—I think the fence-viewers have misconceived the obvious meaning of the Act, and that they had no jurisdiction at all in the premises. The cases provided for under section are: (1.) The *making* of a ditch or drain. (2.) The *deepening* or *widening* a ditch or drain already made in a natural water-course. (3.) The *making*, *deepening*, or *widening* a ditch or drain for the purpose of taking off surplus water from swamps or low miry land. The section applies this to "adjoining lands which would be benefitted" in any of the above mentioned instances.

Now in this case the benefit is all on one side; and it seems to me not to be contemplated by this Act that B. should be called upon to pay for building a drain for the sole benefit of his neighbour A. I can well understand, that when a swamp or marsh lies partly on the land of A., and partly on that of B., that B. might fairly and properly be called upon to pay his fair proportion of the cost of a drain which would "benefit his land," although the whole of such drain might be on his neighbour's soil. This is not the case here. On the contrary, Riddell has no land which has benefitted by the drain in question, and it is manifestly unjust that he should be called upon, under these circumstances, to contribute anything to the cost of McKay's drain, and still less pay the costs of the award. The language of the 6th section, I think, is confirmatory of this view. In that section it is directed that "the fence-viewers in making their award shall regard the nature of the ditches or drains in use in the locality and generally *the suitableness of the ditch or drain ordered to the wants of the parties.*" Now, however suitable the drain in question may be to the wants of McKay, I do not think it can be said to be suitable to Riddell's wants. In fact he takes the position that he does not want it at all, and that it is of no use or benefit to him whatever. It might be a just and convenient thing that a farmer should be enabled to continue his own drain across his neighbour's land into its natural water-course, but I do not think the Act in question gives him that privilege, or confers on the fence-viewers the power of awarding it.

I made an order setting aside the award with costs to be paid by the respondent to the appellant.

*N. F. Patterson*, for appellant.

*C. C. Keller*, for respondent.

## CORRESPONDENCE.

### *Mechanics' Lien Acts.*

TO THE EDITOR OF THE LAW JOURNAL:

SIR,—I fully concur in your views upon these acts contained in your November number. More wretched specimens of legislative workmanship could not easily be found.

For example, the 4th clause of the Act of 1874, respecting mortgaged lands. The last six lines are clothed in extraordinary verbiage. I have no doubt the attempted meaning was that the claim of the mortgagee should be restricted to the value of the lands irrespective of the improvements made by the mechanic. The clause is too long for insertion, but if any of your readers will take the trouble to turn to the clause he will find the extraordinary method taken to confound the intention.

A decree was issued lately at the instance of a mechanic, for the sale of the lot on which the improvements had been made, on which a previous mortgage existed, and the consideration of the decree and of the acts caused a considerable bewilderment. To add to this the decree declared that the plaintiff should, in the first place, be paid his costs, and then his claims. It happened, however, that another mechanic had a lien, and under the 9th clause it is declared that all lien-holders in their class shall rank *pari passu*, and the proceeds of the sale be distributed amongst

them *pro rata*. Under the decree the plaintiff would take everything and leave nothing for the second lien-holder.

In another case a lien-holder, to the amount of $32, was made a party in the Master's office, although it was scarcely to be presumed from his position, as a workman, that he would be disposed to redeem a mortgage of some $1,200 which was ahead of him.

I think it will be found necessary to repeal the acts *in toto*.

"Scrutator."

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Co. Huron, Feb. 14th, 1877.

Gentlemen,—I have seen in the Law Journal, noticed by you, some strangely worded "country conveyancers' cards," but I think the following beats them all :

—— ——— Conveyancer, Commissioner in B.R., and General Merchant, 12 Main street, ———, Ontario. Deeds, Mortgages, Leases, Wills, Arbitration papers, Letters of Administration, and everything in the line executed carefully and with dispatch. Money always on hand to lend at reasonable rates. Motto—Always at home.

Is it any wonder when such persons are allowed to do such as this person asks to be allowed to do, that there are such large sums expended in law costs, to find out what they intended others should understand by their interesting documents? No wonder you are often asked to construe passages in wills, &c. When such persons are allowed to carry on this sort of work (and there are many of them) it is rather a bad look-out for the last batch of students, as well as those who are practicing. Surely there should be some protection for those who have expended so much time and money in acquiring their profession from the pilfering of such gentry. The medical men have the laugh on us.

Yours, &c.,

Student-at-Law.

## *FLOTSAM AND JETSAM.*

When Mr. Webster visited England, after he had gained fame enough to precede him, an English gentleman took him one day to see Lord Brougham. That eminent Briton received Daniel with such coolness that he was glad to get away and back to his rooms. The friend who had taken him at once returned to Lord Brougham in haste and anger. "My Lord, how could you behave with such unseemly rudeness and discourtesy to so great a lawyer and statesman? It was insulting to him, and has filled me with mortification." Why, what on earth have I done, and whom have I been rude to?' "To Daniel Webster of the Senate of the United States." "Great Jupiter, what a blunder! I thought it was that fellow Webster who made a dictionary and nearly ruined the English language." Then the great Chancellor quickly hunted up the American Senator, and having other tastes in common besides law and politics, they made a royal night of it.—*Exch.*

## CHANCERY SPRING CIRCUITS.

THE HON. THE CHANCELLOR.

| | | |
|---|---|---|
| Toronto .. .. .. | Tuesday .. .. .. | May 15th |

THE HON. THE CHANCELLOR.

*The Eastern Circuit.*

| | | |
|---|---|---|
| Lindsay .. .. .. | Tuesday .. .. .. | March 20th |
| Peterborough .. | Friday .. .. .. | March 23rd |
| Kingston .. .. .. | Wednesday .. .. | March 28th |
| Ottawa .. .. .. | Tuesday .. .. .. | April 3rd |
| Cornwall .. .. .. | Tuesday .. .. .. | April 17th |
| Brockville .. .. | Friday .. .. .. | April 20th |
| Belleville .. .. | Thursday .. .. .. | April 26th |
| Cobourg .. .. .. | Thursday .. .. .. | May 10th |

THE HON. VICE-CHANCELLOR BLAKE.

*The Home Circuit.*

| | | |
|---|---|---|
| St. Catharines .. | Friday .. .. .. | March 16th |
| Simcoe .. .. .. | Tuesday .. .. .. | March 20th |
| Brantford .. .. | Thursday .. .. .. | March 22nd |
| Whitby .. .. .. | Monday .. .. .. | March 26th |
| Hamilton .. . .. | Monday .. .. .. | May 14th |
| Barrie .. .. .. | Friday .. .. .. | May 25th |
| Owen Sound .. .. | Thursday .. .. .. | May 31st |
| Guelph .. .. .. | Monday .. .. .. | June 4th |

THE HON. VICE-CHANCELLOR PROUDFOOT.

*The Western Circuit.*

| | | |
|---|---|---|
| Goderich .. .. .. | Thursday .. .. .. | March 29th |
| Stratford .. .. .. | Tuesday .. .. .. | April 3rd |
| Woodstock .. .. | Tuesday .. .. .. | April 10th |
| Sarnia .. .. .. | Tuesday .. .. .. | April 17th |
| Sandwich .. .. | Friday .. .. .. | April 20th |
| Chatham .. .. .. | Tuesday .. .. .. | April 24th |
| London .. .. .. | Tuesday .. .. .. .. | May 1st |
| Walkerton .. .. | Thursday .. .. .. .. | May 10th |

# LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 40th Victoria.

During this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

Albert Clements Killam.
Thomas Hodgkin.
Cornelius J. O'Neil.
Francis Beverley Robertson.
Henry Ernest Henderson.
Hamilton Cassels.
Francis Love.
William Wold.
Thomas Caswell.
J. A. Loughreed.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

George Edminson.
Frederick W. Colquhoun.
Edward O'Connor.
John Bergin.

The following gentlemen received Certificates of Fitness:

J. H. Madden.
H. Cassels.
J. W. Gordon.
J. Dowdall.
C. J. O'Neil.
T. M. Carthew.
T. J. Decatur.
T. D. Cowper.
A. W. Kinsman.
C. McK. Morrison.
C. Gordon.
F. S. O'Connor.
G. S. Hallen.

And the following gentlemen were admitted into the Society as Students-ta-Law and Articled Clerks:

*Graduates.*

Charles Augustus Kingston.
John Henry Long.
James J. Craig.
William Fletcher.
Leonard Hartstone.
Patrick Anderson Macdonald.

*Junior Class.*

Benjamin Franklin Justin.
John T. Guinlan.
John Williams.
Joseph William MacDowell.
Phillip Henry Drayton.
Thomas A. Gorham.
James R. Brown.
George J. Sherry.
D. Henderson.
Angus McB. McKay.
Alexander Carpenter Brazeley.
John Bertram Humphries.
Lauren G. Drew.
Herman Joseph Everts.
Solomon George McGill.
David Johnson Lynch.
Thomas Henry Loscombe.
John Vashon May.
George Moir.
J. H. Macallum.
Hector McKay.
Hugo Schliefer.
David Robertson.
Charles Rankin Gould.
William James Cooper.
Edward Stewart Tisdale.
Francis Melville Wakefield.
Alexander Stewart.
Thomas Muller White.
John Arthur Mowat.
Henry Bogart Dean.
George Robert Knight.
Humphrey Albert L. White.
John Wood.
George Benjamin Douglas.
Alexander Humphrey Macadams.
Hugh Boulton Morphy.
William Henry Brouse.
George J. Gibb.
Frederick E. Redick.
William Mason.
Edward Guss Porter.
Thomas Robert Foy.
Henry Albert Rowe.
Thomas H. Stinson.
Stewart Masson.
Francis Evans Curtis.
William Stubbs.
Robert Taylor.
Henry M. East.
Armour William Ford.

Wm. Martin McDermott.
Charles W—— Phillips.
Wellington Smaill.
John Clyde Grant.
George Merrick Sinclair.
George Walker Marsh.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Sexsmith.
John Baldwin Hand.
James Barrie.
George Frederick Jeffs.

*Articled Clerks.*

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.

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

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

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional subjects instead of Greek:*

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

*or* GERMAN.

A paper on Grammar. Musæus, Stumme Liebe Schiller, Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

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

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

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.