DIARY FOR NOVEMBER.

4. SUN..23*rd Sunday after Trinity.*
5. Mon ..The John A. Macdonald Ministry resigned,'73.
6. Tues..Law Society primary examination.
9. Fri. ...Prince of Wales born, 1841.
11. SUN..24*th Sunday after Trinity.* Battle of Chrysler's farm, 1813.
13. Tues..Battle of Windmill Point, 1838. 1st intermediate examination.
14. Wed..2nd intermediate examination.
15. Thur..Attorneys examination.
16. Fri. ..Examination for call. Joseph Guibord buried at Montreal, 1875.
17. Sat....Examination for call with honours.
18. SUN..25*th Sunday after Trinity.*
19. Mon ..Michaelmas term begins. Law Society convocation meets.
20. Tues..Law Society Convocation meets.
24. Sat....Law Society Convocation meets.
25. SUN..26*th Sunday after Trinity.*
27. Tues..Frontenac died at Quebec, 1698.
30. Fri. .St. Andrew's Day.

CONTENTS.

THE
Canada Law Journal.

Toronto, November, 1877.

DEATH OF THE CHIEF JUSTICE OF APPEAL.

The Hon. William Henry Draper, C.B., died at his residence in Yorkville on the 3rd inst., in the 77th year of his age. Last month we alluded to the painful and lingering nature of his illness. The sometimes kind hand of death has released him from a life of toil, and years of occasionally acute suffering; but whilst in his last illness, he looked forward to his approaching change as a release from bodily pain, his heart was steadfastly fixed upon that sure and certain hope of the Christian, which banishes fear and robs death of its sting. His gain, however, would be our irreparable loss were it not for the monument he has left behind him, created by his honorable career, his brilliant intellect, his vast legal attainments and his devotion to the public service.

Time, however, does not now permit us to say all that we should wish in relation to this distinguished man. We therefore postpone our remarks until next issue. The daily papers have in the meantime supplied the main incidents of his eventful life.

THE gentleman who has published in our columns a number of letters on the subject of Dower, concludes the present series this month. As he has made the subject his own, we would again suggest that he should supply a want to the profession by publishing either an annotated edition of the statutes on the subject now under revision, or a treatise in a more extended form. Mr. Draper's handbook on Dower is now out of date, and we think a new work on the subject would be well received.

FUSION OF LAW AND EQUITY.

We direct attention to the letter of "Q. C.," which will be found in another place. It is the production of a gentleman of experience and ability, and represents views which, are to a great extent (we refer to the principles involved, and not entirely to the attendant remarks) in unison with our own, and which are also entertained by a number of thinking men in the profession. We are glad to see the subject again coming up for discussion in our columns; and use the expression "again," for in this, as in many other matters, we may take the credit of being amongst the first who called attention to this most important matter of fusion.

The feeling that there was ground for some material change in a direction similar to that pointed out by our correspondent, gave rise to a commission which issued some years ago, and though no result followed therefrom, the feeling still remains. Combined with this, or perhaps, partly the cause of it, is a desire for completeness and rest. Whilst we admit the value of many recent enactments, there is undoubtedly a desire, amounting to a craving, to be let alone, to have done with this everlasting tinkering, amending and re-amending. Many think that before the desired haven of rest can be reached there must be uniformity as well as completeness in our judicial system.

"Q. C." makes some sweeping statements as to Chancery practitioners, but they are perfectly able to defend themselves, and we shall be glad to hear from them. Our correspondent very properly gives due credit to the early Chancellors and Mr. Mowat for their efforts to improve the Court of Chancery, and we may add without fear of contradiction, that the energy, hard work, and practical common sense of the present senior Vice-Chancellor has of late years done good service in raising his court in the public estimation. No amount of work or learning, however our correspondent argues, can accomplish that which should be done and could only be done by legislative enactment.

A full and temperate discussion of the subject cannot fail to prepare the public mind for a consideration of it upon its merits; and now, as in times past, our columns are open to any letters which would throw further light upon it.

JOHN WALPOLE WILLIS.

The *Law Times* of a recent date contains an obituary notice of John Walpole Willis, who died at his residence, in England, on the 10th September, at the age of 84. This gentleman was appointed one of the judges of the King's Bench in Upper Canada in 1827, in the same year as James Buchanan Macaulay. He was a barrister of Gray's Inn and was called to the Bar in England in 1816, practicing in the court of chancery. In 1820 he published a book of Precedents of Pleading in Equity, illustrative of Lord Redesdale's Treatise on Pleading, which was well thought of by the profession. Seven years afterwards he published a small work entitled "A Practical Treatise on the Duties and Responsibilities of Trustees." Both these books are to be seen in Osgoode Hall Library.

The name of this judge is not very familiar to the profession of this day, although he must have been a man of considerable character, as we shall presently see. None of his judgments during the brief time that he was judge here, have been preserved in the reports, there having been an interregnum in the series between Trinity Term, 8 Geo. IV. which concludes Mr. Taylor's volume, and Michaelmas Term, 10 Geo. IV. when Mr. Draper's volume began, and it was dur-

ing this period that Mr. Willis was on the Bench. There is a preface to the original edition of Mr. Taylor's Reports, which, however, refers to Mr. Willis. Speaking of the Court of King's Bench, then the only superior court in Upper Canada, the Reporter says: "The following Chief Justices have presided in it since its establishment: Chief Justices Osgood, Alcock, Elmsley, Scott, Powell—Judges, Cochrane, Thorpe, Russell, Scott, Powell, Boulton—Attorneys and Solicitors General, Scott, White, Weeks, Firth, Boulton, McDonell. The Bench is at present filled by Chief Justice the Hon. William Campbell—Judges, the Hon. Levius P. Sherwood and John Walpole Willis."

This preface is not reprinted in subsequent editions. This is a mistake. It contains much that is of historical interest to the profession. The editor takes occasion to deprecate the conjunction of the profession of barrister and attorney, and enumerates some of the disadvantages of, and objections to, that system. He tells us that the number of actual practitioners in his time was about seventy-five. He alludes to the then growing necessity for some simple court of equity, which up to that time had not been required, owing to the simple nature of transactions and absence of trusts, that fruitful parent of litigation and aggravation of spirit.

We venture to assert that a large proportion of those at present practising in our Courts never heard even of many of the early occupants of the Canadian Bench. It would be very interesting if some lover of his country and his profession would devote some spare time to a collection of reminiscences as to these old worthies of the law. We would gladly open our columns for something of the sort. It is now fifty years since Mr. Willis presided at the Court of King's Bench in "muddy little York." He outlived not only his brother judges, but all those who practiced before him. Not one of the counsel mentioned in Taylor's Reports is now living, and several of them died Chief Justices years ago, before numbers of those now at the Bar commenced their studies.

Some of the incidents in the life of Mr. Willis are referred to in Sir Francis Head's Reminiscences. He and Lady Willis are also alluded to in Dr. Scadding's Toronto of Old. Mr. Willis not only held a judicial appointment in Canada, but was for some time a colonial judge in the supreme courts of British Guiana, and New South Wales; and he was the first resident Judge of Victoria. The *Law Times* in speaking of him says: "Mr. Willis' career as a colonial judge was signalized by two remarkable episodes. Whilst acting as judge of the supreme court of Upper Canada [King's Bench] a judgment was given by him to the effect that certain political prisoners were illegally detained in custody. In consequence of this the Governor of Canada [Sir John Colborne] peremptorily dismissed Mr. Willis from the Bench. The Judge appealed to the King in Council, and it was decided that his judgment was right, and he was reinstated in his office. Afterwards Mr. Willis was sent to the West Indies to adjust compensation claims under the Slavery Emancipation Act, and held other judicial offices. When Victoria was first erected into a separate government Mr. Willis was appointed judge of the district, but in 1843, in consequence of a judgment he gave against the legality of the proceedings of the Colonial Government with regard to waste lands, Sir George Gibbs, the Governor of New South Wales, dismissed Mr. Willis from his post of judge of the supreme court. The colonists generally sided with the judge, who appealed again to the Privy Council, and again, after a protracted litigation, with success. Sir

G. Gibbs was ordered to pay damages and costs. Mr. Willis, however, did not return to Australia. He was twice married, first in 1824, to Lady Mary Isabella, eldest daughter of Thomas, eleventh Earl of Strathmore, which marriage was dissolved in 1833, following a verdict for £1,000, in a suit of Willis v. Bernard, in the Common Pleas in England. He afterwards married, in 1836, Ann Susannah Kent, daughter of the late Colonel Thomas Bund, by whom he has left a family.

SELECTIONS.

THE COURT OF STAR CHAMBER.

Few things are more intimately associated with the despotism of the times of the Tudors and the Stuarts, in the history of England, than the name and transactions of the *Star Chamber Court*. It has become a generic term to denote a system of arbitrary measures, where the forms of judicial proceedings are made the means of perpetrating acts of injustice, or of consummating schemes of oppression and wrong. And yet comparatively few, at this day, have ever taken the trouble to trace the history of this court, or to inquire why its very name has excited the odium of successive ages.

It is proposed in the following pages to attempt to sketch, as briefly as the nature of the subject admits, an outline of the history, character, and powers of this court, commencing, as it did, with no bad purposes, and, after being perverted to an instrument of despotic power through a succession of administrations, being extinguished at last as one of the acts of concession made by Charles to the demands of an injured and indignant nation.

In order to understand the history of this court, and the grounds upon which it became so odious to the English people, through its acts of cruelty and injustice, we must go back to a condition of the government whose very history is but little better than traditional.

From a very early period there were certain high officers in the State, and men of influence and power, who were called upon by the king to act as his council or advisers in matters of government. One of these bodies, which seems to have stood in more confidential relation to the crown than the others, was known as the Privy Council, including a portion, if not all, of the peers of the realm, with the Chancellor and other civil and judicial officers of the State. The king being considered the fountain of justice, it was a common thing for persons who felt themselves aggrieved by others to apply to him for redress by way of petition. In this way matters of judicial inquiry, as well as those of royal discretion, came to be submitted to the action of this council, and a jurisdiction was thus exercised which properly belonged to the courts of justice only.

The forms of proceeding in such cases were such as were in use in the Court of Chancery, the Chancellor being the principal officer in the council, and questions were determined without the intervention of a jury. In this, however, the sense of the people was disregarded, if not actually outraged, since trial by jury was one of those traditional rights to which they resolutely clung through all the changes in their government. Attempts were accordingly made, from time to time, to retain the administration of justice within the known and defined channels of the common law and the principles of Magna Charta. In the 25th of Edw. III., an act of Parliament, which, among other things, defined the crime of treason, forbade that any should "be taken by petition or suggestion to the king or his council, unless it be by indictment or presentment, or by writ original at the common law; nor shall be put out of his franchise or freehold, unless he be duly put to answer, and forejudged of the same by due course of law." But in the unsettled state of the government, and the inability of the people to contend against combinations of men in power, these efforts to restrain the exercise of judicial functions by the Privy Council not only proved unavailing, but it was deemed politic to clothe them with greater and more defined powers under a somewhat modified form of organization.

The reason for this, and for departing so far from the genius and prevailing spirit of the common law, as to create an irresponsible court with such powers, in which the common-law forms of proceedings, and above all the right of trial by jury, were discarded, is to be sought in

the troubled state of the times, and the undue prepondèrance which factions and unprincipled nobles and men in power were able to bring to bear upon the administration of justice. There were early laws against champerty and maintenance through unlawful combinations to obstruct the course of justice and deprive suitors in court of their rights by corruption or intimidation, but these were openly violated with impunity. Men dared not to pursue their rights in the ordinary courts of justice. The security of a juror's oath was denied them, in the unblushing manner in which bribes and threats were resorted to by such as had power and influence over the proceedings of these courts. Coke, speaking of this court and the reason of its creation, says: "Seeing the proceeding according to the laws and customs of this realm cannot by one rule of law suffice to punish in every case the exorbitancy and enormity of some great and horrible crimes and offences, and especially of great men, this court dealeth with them, to the end that the medicine may be according to the disease, and the punishment according to the offence; *ut pœna ad paucos, metus ad omnes perveniat*, without respect of persons, be they publick or private, great or small."

To reach a mischief which had grown so intolerable, and to cope with the power and influence of the offenders in high places, with whom it was necessary to contend, a court was created by the act of 3 Henry VII. (about A.D. 1500), made up of the highest officers in the kingdom, embracing theoretically the king himself, who was deemed to be the fountain of justice, to which was confided almost unlimited power and discretion over a large and undefined class of offences of a public, and many of them of a political character, without the check of a jury, and subject to no revision by way of appeal. It was, however, rather the grafting of new powers upon those before exercised by the Privy Council, than the creation of a new court. It was not, in terms, designated the Star Chamber, nor was it spoken of under that name in any act of Parliament until the 19 Henry VII. The preamble of the act creating this court recites, among the causes for such a measure, the combinations which had been formed for the obstruction of justice, the partiality of sheriffs in making panels, and in untrue returns, the taking money by jurors, and the great riots and unlawful assemblies which served to defeat the fair administration of justice. It then proceeds to name the Lord Chancellor, the Treasurer, the Keeper of the Privy Seal, or any two of them, with a bishop and temporal lord of the council, and the Chief Justices of the King's Bench and Common Pleas, or two other justices in their absence; and empowers them to call before them such as offended in the foregoing respects, and to punish them, after examination, in such manner as if they had been convicted by course of law.

A court thus constituted, with powers so broad, and a discretion unlimited by prescribed rules, though called into existence for wise and salutary purposes, was, in the end, like the evoking the spirit of mischief without a corresponding power in reserve to lay it, or check its excesses if inclined to abuse its authority. Instead, therefore, of its power becoming weaker, as the occasion which called it into being passed away, it continued to draw to itself new elements of strength, while it enlarged the extent of its jurisdiction and the sphere of its action. It is not easy at this day to trace the steps through which it attained the summit of its power, though it is not difficult to understand how it could be made a most potent engine of despotic rule and bigoted intolerance in the hands of ambitious leaders and unscrupulous prelates, such as flourished during the reigns of Henry VIII., Elizabeth, and the first two Stuarts. In the 21st of Henry VII., the President of the Council was added to this court, showing that hitherto the two bodies had been kept distinct in their action. It underwent changes during the administration of Wolsey, and in the time of James, we are told, all the peers had acquired a right somehow to sit as members of this court; and Barrington states the number of its judges at from twenty-six to forty-two. Sir Thomas Smith also states that Cardinal Wolsey greatly extended its powers, in order to curb some of the nobility in the north of England, and that in his time those who were prosecuted in this court were generally too *stout* for the ordinary course of justice. It was not, however, a court of exclusively criminal jurisdiction, though it was chiefly in the exercise of its criminal powers that it has come down in

history to the present day. The Lord Chancellor usually presided at its meetings, though instances occurred, especially during the reign of James, when the king himself sat and presided at the trials of cases.

One of the strangest circumstances that gave to the crown a hold and control over the action of this court was, that all its principal officers received their appointment and held their place by the power of the king, while the odium of an unjust judgment before the public was divided among a large and numerous body of judges. Nor were the proceedings of the court so far public as to render the action of any particular member obnoxious to public censure.

The mode of its proceedings, moreover, was particularly well adapted to the purposes of injustice and unfair advantage. One of the most important rights secured to an Englishman by the common law was, that he should not be obliged to accuse himself in a court of justice, if charged with the commission of a crime. Torture, which was in its very nature repugnant to the spirit of the common law, and only to a limited extent obtained a place in the administration of justice in England, was often resorted to to compel confession in the courts of the Continent. But, in utter violation of this cherished right, the Star Chamber required the party charged with an offence to answer fully in relation to the same, upon oath, to interrogatories the most searching and inquisitorial. In the account which we have of the prosecution of Lilburne, a famous Puritan in the time of Charles I., the proceedings seem to have commenced with interrogatories designed to extort from him a confession of the very matters upon which they intended to found the charges upon which he was to be tried. When called before this body, though but a young man, hardly twenty years of age, he was set upon by all manner of threats and suggestions by the various members of the court, to induce him to submit to the oath. He resolutely refused to answer; and was whipped, branded, and committed to close prison, and denied all access to his friends, upon the ground that, by such refusal, he had been guilty of a *contempt* of court.

We may have occasion to recur to this case again, and have referred to it here as illustrating this part of the mode of prosecuting offenders in this court. Another objectionable feature in its mode of investigating causes was in the form of examining witnesses. In carrying out the spirit of trial by jury, all proceedings are in open court, including the examination of witnesses in the presence of the parties and of the jurors, who are to weigh the degree of credit to which they are entitled. Every one familiar at all with the trial of causes knows how vastly superior in eliciting the truth is such an oral examination of witnesses in the presence of the court to an *ex parte* one taken in the form of depositions. And yet the latter was the mode in which all evidence was taken which was submitted to this court. Indeed, so open is such a course of proceeding to censure and reproach, that a writer who was himself a practitioner in this court, and sufficiently disposed to eulogize it wherever it could claim any advantage or superiority over others, remarks: "Now, concerning the persons of witnesses examined in court, it is a great imputation to our English courts that witnesses are privately produced, and how base or simple soever they be, although they be tested *diabolases*, yet they make a good sound, being read out of paper, as the best. Yea, though a lewd and beggarly fellow take upon him the name and person of an honest man, and he be privately examined, this may be easily overpassed, and not easily found out." This obvious violation of the first principle of justice seems to have been tolerated to its full extent for more than a hundred years, when Lord Ellesmere, as chancellor, passed an order by which every witness who was to be examined in court was to be *showed* to the attorney of the other side, and his name and place of abode delivered, to the end that he might be known to be the person, and that the other side might examine him if he pleased. But he might not, at any time, examine as to the *credit* of the witnesses offered against him, or notify the court what their condition was as to credibility; "for that causes being for the king, if witnesses' lives should be so ripped up, no man would willingly be produced to testify." And so far was this principle carried in favor of the crown, that it was held by "many of the circuits of judges," that "a witness for the king, upon an indictment, shall not be questioned for perjury; yea, this court hath

ordered a great reward to witnesses in this court, by yielding their testimonies for the king;" or, in other words, one of the usual modes of corrupting the fountains of justice in this court was by means of hired informers, who might commit perjury with impunity.

The tendency of a court thus constituted, and thus irresponsible, was to extend its jurisdiction and arrogate to itself new powers; and so far was this practically carried, that it was difficult to draw any line short of crimes that were capital, which limited the class or character of offences against the power or prerogative of the government, of which this court did not take cognizance. Nor would it allow any one to question its authority. By the rules of the court, it seems, whoever was charged with an offence was required to put in an answer to the information against him in writing, signed by two counsel; and, unless this rule was complied with, it was deemed to be a confession of the charge, although the defendant was himself in court, and orally denied his guilt. Thus in the case of the famous Prynne, whose treatment in this court will be further noticed, he offered his answer signed by one of his counsel, and applied to the court to have it allowed, with the addition of his own signature, on the ground that his other counsel was afraid to sign it, lest he might thereby incur the censures of the court. But he was denied this privilege, and, for contempt in not filing his reply signed by both his counsel, the information was taken *pro confesso*, and the court proceeded to pass sentence upon him accordingly. It has been the pride and glory of the profession in courts of common law, that, with rare exceptions, counsel have been found willing and bold enough to stand by a party charged with an offence, and to sustain his rights, even against the insolence of power or the exasperated passions of the populace, wherever the right of employing counsel has been recognized by law. Curran's memory is indelibly associated with the bold and eloquent defence of the Irish patriots, and the trial of the British soldiers for the part they took in the so-called "Boston massacre," in 1770, is a memorable influence of the power of argument and persuasion on the part of legal counsel in successfully maintaining the cause of justice against the clamor of the public and the passions of a jury.

There were, as has already been stated, counsel admitted to practice in the Star Chamber, and without their aid, it would seem from the cases reported, a party could not be heard even in his own defence. But the seeming advantage which was thus accorded to the accused, was, at times, more than neutralized by the acts of intimidation by which the court suppressed every thing like a free exercise of this privilege of counsel. Thus it is stated that in Prynne's case, who was complained of in connection with two others, his counsel, Mr. Holt, prepared his answer, but refused to sign it, "saying he had an express order to the contrary." He did, however, sign the answer of one of the parties accused, and, upon its being alleged that it was "*scandalous*," it was referred to the two Chief Justices, Brampton and Finch, when Finch "reviled Holt exceedingly, and told him he ought to have his gown pulled over his ears for drawing it," although, in fact, "it was only a confession or explanation of the charge in the bill, and a recital of acts of Parliament."

This, however, was but in keeping with the general course of dealing of this court with any one who presumed to question their power, or throw obstacles in the way of accomplishing their purposes. Thus we have three instances reported of counsel questioning the jurisdiction of this court, by insisting by way of *demurrer*, as it was called, that the matter upon which they were assuming to act was not within the subject-matter delegated to them by the act of Henry VII. One of these was the case of Mr. Plowden, whose age and standing probably sheltered him from any thing more than a refusal to consider the objection. In another, the counsel was pardoned on account of his youth and inexperience. But in the third, the Sergeant was sharply rebuked by the court for such a flagrant violation of the dignity of the court, as to question the extent of its power. The case of Fuller is still more remarkable. He was a bencher of Gray's Inn, and was employed to sue out a writ of *habeas corpus* to test the validity of a warrant from the High Commission court, by which two Puritans were imprisoned for refusing to take a

certain oath. For this he was, at Bancroft's instigation, imprisoned by the Star Chamber, and lay in jail till his death. Whitelock, a barrister, and afterwards a judge, having given a private opinion to a client, that a certain commission issued by the crown was illegal, was brought before this court for contempt and slandering the king's prerogative, and was only let off upon making a humble submission.

Such, in general terms, were the constitution and powers of this famous court; and, when we come to examine its proceedings in particular cases, we shall find that they were such as might naturally be expected under a corrupt and despotic government, from judges acting directly under the eye of the monarch. But, before considering these, it is proper to say a few words upon the *name* of the court itself. A great deal has been written upon this subject, and writers are, to this day, divided upon the question. The more commonly received notion has been, what is probably true, that it took its name from the chamber in which its sittings were held, the ceiling of which, it is said, was ornamented with stars. Hence the name *camera stellata*. Blackstone, however, states that there were no stars remaining there in the time of Elizabeth. Others have found the origin of the term in the fact that, by a law prior to Edward I., the contracts of the Jews, called "*starrs*," were deposited in the exchequer of the king, in Westminster, in chests or boxes, in the chamber or apartment in which this court used to assemble. Others trace it to the Saxon word *steran*, to steer or rule, "as doth the pilot," in the words of Coke, "because this court doth steer and govern the ship of the commonwealth." Others still applied the term because the chamber was full of windows; and the kind of crimes, *stellianata*, of which the court had cognizance, supplied to others the etymology of the name.

There is nothing in these speculations to violate probabilities or offend good taste. But the awe with which some writers contemplated this court, and the base and truckling spirit with which they treat even of its name, can hardly be read, in the light of history, without positive disgust. Hudson, of Gray's Inn, who was a practitioner in this court, wrote quite an extended treatise upon its powers and duties, in the time of James I. In speculating upon its name, he remarks, in language which a school-boy now would know better than to adopt: "Stars have no light but what is cast upon them from the sun by reflection, being his representative body." "So in the presence of his great majesty, the which is the sun of honor and glory, the shining of those stars is put out, they not having any power to pronounce any sentence in this court, for the judgment is the king's only; but, by way of advice, they deliver their opinions, which his wisdom alloweth or disalloweth, increaseth or moderateth, at his royal pleasure." And he gives an instance, by the way of illustration of this, where the king, "during the dignity of that court, sat five continual days in a chair of state elevated above the table, about which his lords sat, and after that long and patient hearing, and the opinions, particularly given by his great council, he pronounced a sentence more accurately eloquent, judiciously grave, and honorably just, to the satisfaction of all hearers and all the lovers of justice, than all the records extant in this kingdom can declare to have been, at any former time, by any of his royal progenitors."

The fulsome flattery of this fanciful etymology of the name of this court is quite equalled by another writer, whose work, West's *Symboleography*, was published in the same reign, about the time of the settlement of this court: "The dignity of this court is such and so great as no other kingdom hath ever created the like, being without pair or equal." He refers to the hours of the day when its sittings are held, ordinarily from nine to eleven o'clock, and speaks also of the windows and stars in the roof as giving rise to its name, and then adds: "Yet, emblematically, they resemble the body of the judges of that court, consisting of persons of great eminence, being the principal men of the two great estates of this kingdom, the lords spiritual and temporal, the head of which bodie is our sovereign lord the king, who, when he pleaseth, sitteth there in his own person. But in his absence these judges doe censure and determine all causes there depending, by majority of voices, deriving their light and authority from his majesty, as the stars from the sun." Nonsense like this

might be tolerated from men who knew no better, or had had their common sense blinded by the use of language by others. But this cannot be said of Lord Coke, who knew how, sometimes, to lay aside his sycophancy, though he did not at others hesitate, as in the case of Sir Walter Raleigh, to play the bully and the blackguard in office, if obsequiousness to royalty dictated such a *role*. His language is: "It is the most honorable court, our parliament excepted, there is in the Christian world, both in respect of the judges of the court and of the honorable proceeding according to their jurisdiction, and the ancient and just order of the court." "And it is truly said, 'Curia cameræ stellatæ, si vetustatem spectemus, est antiquissima, si dignitatem honoratissima.' This court, the right institution and ancient orders thereof being observed, doth keep all England in quiet."

The discretionary power of this court, in the matter of punishment, made it, moreover, a most dreadful engine of iniquity and cruel injustice in the hands of unscrupulous men. Instances of this disgrace the history of its administration, especially under the first two Stuarts, James I. and Charles I. It could not, it is true, inflict capital punishments, but it could do worse, by robbing, maiming, torturing, and disgracing its victims. Thus it is stated, in general terms, by the writer already quoted, "In this sentence the court doth punish the offender and relieveth the oppressed. The punishment is by fine, imprisonment, loss of ears, or nailing to the pillory, slitting the nose, branding the forehead, whipping of late days, wearing of papers in public places, or any punishment but death." "Loss of ears was inflicted upon perjured persons, infamous libellers, *scandalors* of the State, and such like." "Branding in the forehead and slitting of the nose was a punishment inflicted upon forgers of false deeds, conspirators to take away the life of innocents, false scandal upon the judges and first personages of the realm." "Wearing papers hath been in all ages, and before the statute of 5 Elizabeth was, the usual punishment of perjury, but since hath been used as a punishment for oppressors and great deceits." "Sometimes the punishment is, by the wisdom of the court, *invented* in some new manner, for new offences, as for Trask, who raised Judaism up from death, and forbade the eating of swine's flesh. He was sentenced to be fed with swine's flesh when he was in prison." "And so tender the court is of upholding the honor of the sentence, as they will punish those which speak against it with severity, as they did Finch and Partridge, for certifying his majesty upon a petition matter which crossed the sentence of the court in the case of one Herlakenden." And it is gravely stated by Barrington, that, during the reign of Charles I., the fines inflicted by this court were so enormous, that the audience gathered around the court room at three o'clock in the morning, in order to secure places to hear the proceedings, as men gather around the table where play is the deepest.

Some of these sentences are collected in Hume's and Hallam's histories, and full reports of the proceedings of the court may be found in the volumes of State Trials, with which many besides lawyers are familiar. We select a few for purposes of illustration. Sir David Foulis was fined £5,000, chiefly because he had dissuaded a friend from compounding with the commissioners of knighthood. Sir Anthony Roper was fined £4,000 for violating a law made in the time of Henry VII., against converting arable land to pasture, and this as late as the time of Charles I. Morley, for reviling, challenging, and striking Sir George Theobald, one of the king's servants, in the court of Whitehall, was fined £10,000. A citizen, when shown a swan in the crest of a man of quality, saying he did not trouble himself about that *goose*, was fined by this court for the offence, and reduced to beggary. Richard Grenville said of the Earl of Suffolk, with whom he had had difficulty, that he was "a base lord," and was condemned to pay a fine of £8,000 for such a slander. Ray, for exporting some fuller's-earth, was set in the pillory and fined £2,000. One of the most remarkable cases was that of Bishop Williams, who had been lord-keeper of the seal, a popular prelate, a man of learning and spirit, and, at one time, a special favorite of James. While enjoying this patronage, he exerted his influence in favor of Laud, afterwards archbishop, who owed his first promotion to his good offices. Some disagreement having arisen between them, nothing

could appease the vindictive spirit of the haughty archbishop but the ruin of the man to whom he owed his elevation. For some frivolous pretence he was brought before the Star Chamber, and fined £10,000, committed to the Tower during the king's pleasure, and suspended from office. In order to levy this fine, the officers seized the furniture and books of the palace of Bishop Williams, and found there, among some refuse papers, some letters from one Osbaldiston, a schoolmaster, directed to the bishop. In these the writer spoke of a *little great man*, and in one place of a *little urchin*. As Laud was diminutive in stature, it was conjectured that these expressions referred to him; whereupon the bishop was tried for receiving such scandalous letters, though he had never shown them to any one, and Osbaldiston for writing them; and the first was fined £8,000, and the other sentenced to pay a fine of £5,000, and to have his ears nailed to the pillory in sight of his own school.

These will suffice to show the nature of the offences of which this court took cognizance, and the character of the punishments which it imposed. The cases of Prynne and Lilburne, already mentioned, will serve to show the spirit and character which pervaded the proceedings, by which the court accomplished its purposes. Both these trials took place in the time of Charles. The Puritans had already obtained a strong foothold in England, and were making themselves felt, by their bold advocacy of civil as well as religious liberty. Whoever, therefore, was in any manner identified with this odious sect, was particularly obnoxious to the vengeance of the Star Chamber. Among the peculiarities of the Puritans was a strict observance of the Sabbath, as well as aversion to stage plays and profane sports generally. To counteract this spirit, the clergy were required by proclamation to read what was called "the Book of Sports" in their churches, by which certain sports and pastimes were to be used by the people on Sundays, after the evening service. Add to this, that Charles and his queen at times were present at the exhibition of stage plays, and that she at times took part herself in masques and other like exhibitions at court.

In this state of public feeling, Prynne, who was a barrister-at-law of Lincoln's Inn, and a Puritan of the straitest sect, published his famous *Histrio Mastyx*, a huge volume of a thousand quarto pages, aimed at stage plays, music, dancing, public festivals, Christmas sports, bonfires, and May-poles. For this "libellous volume" he was arraigned before the Star Chamber. What made it a little more remarkable, he had been licensed by Abbott, Laud's predecessor, as Archbishop of Canterbury, to publish a considerable part of this work. In his address to the court, Mr. Noy, the Attorney-General, states several of the offensive parts of this work, and among other things states what it attacks: "witchery, church ceremonies, &c., indistinctly he falleth upon them; then upon altars, images, hair men and women, bishops and bonfires, cards and tables, do offend him, and perukes do fall within the compass of his themes." The trial occupied three days, and the fourth was consumed in pronouncing sentence against him. Among his judges was Richardson, the Chief Justice of the King's Bench, who began with this significant language: "Since I have had the honor to attend this court, writing and printing of books have been exceedingly found fault withal, and have received sharp censure, and it doth grow every day worse and worse; every man taketh upon him to understand what he conceiveth, and thinks he is nobody except he be in print. We are troubled here with a book,—a monster,—*monstrum horrendum, inform, ingens!*" &c. "I would to God in heaven the devil and all else that had their heads and hands therein, besides Mr. Prynne, were, &c.; for I think they are all ill willers to the State, and deserve severe punishment as well as Mr. Prynne doth." "For the book, I do hold it a most scandalous, infamous libel to the king's majesty, a most pious and religious king; to the queen's majesty, a most excellent and gracious queen,—such a one as this kingdom never enjoyed the like, and I think the earth never had a better." "I say, eye never saw nor ear ever heard of such a scandalous and seditious thing as this misshapen monster is." He then proceeds to read sundry extracts from the book, drawing from them inferences the most forced and unnatural. Thus, in his general sweep for historical illustrations

of the mischief of frequenting stage plays, Mr. Prynne had referred to Nero, and spoke of Flavius and others conspiring to murder him for the influence of his "lewd example" upon the magistrates and people. The Chief Justice concludes from this that the author intends to instigate the people to murder the king. "If subjects have an ill prince, marry, what is the remedy? They must pray to God to forgive him, and not say they are worthy subjects that do kill him." He at last addressed the prisoner: "Mr. Prynne, I must now come to my sentence, though I am very sorry, for I have known you long, yet now I utterly forsake you." The Earl of Dorset, another of the court, was even more abusive. It is not, therefore, to be wondered at, that, in the exercise of their unlimited power, poor Prynne was made to feel the full measure of their indignation. He was deprived of his right to practice as a barrister; condemned to stand in the pillory at Westminster and in Cheapside; to lose his ears,—one at one of these places, and the other at the other; to pay a fine of £5,000; and to be imprisoned during life. Dorset wished to add branding in the forehead, or slitting his nose, and to have his fine £10,000 instead of £5,000.

But a man of Prynne's temperament and nerve was not to be silenced by mere corporal punishment, and some four years afterwards we find him again before this court, for publishing what they chose to call libels. It was at this time he was condemned unheard, as has been before stated, because he could not find counsel bold enough to sign his answer to the information against him. Upon his being placed at the bar to receive his sentence, Finch, the Chief Justice, looking carefully at him, remarked that he thought Mr. Prynne had no ears, but it seemed to him he had. The usher of the court was ordered to raise his hair and show his ears, when the lords were angry to find that only a part of them had been cut off, to which Prynne wittily replied: "There was never one of their honors but would be sorry to have his ears as his were." Laud was particularly bitter and severe in pronouncing sentence. The books alleged to be libellous were religious works, and fell under the Archbishop's special censure; and the sentence pronounced upon him was that he should pay a fine of £5,000, stand in the pillory, lose the remaining part of his ears, be branded "S. L." on each check, and be perpetually imprisoned in what he calls a "nasty dog-hole," at Carnarvon Castle in Wales. All of which was rigidly inflicted until the revolution, which deprived these prelates of their power.

The case of Lilburne was equally cruel and outrageous with that of Prynne, though, from the temperament of the man and the almost eagerness with which he courted martyrdom, we are not apt to regard it with the sense of indignation that we feel in reading that of Prynne. Lilburne was a young man, only twenty years old, when arraigned for being concerned in printing and publishing certain controversial works upon the Litany and other like subjects alleged to be seditious. He was put to the bar with an old man eighty-five years of age, charged with the same offence. As they refused to take the oath when interrogated by the court, they were for this both sentenced to pay a fine and stand in the pillory; and he, being a young man, to be whipped through the streets from the Fleet prison unto the pillory, wherever the court should erect that. He was kept in prison from February to April, when he was placed in a cart, stripped, and whipped with a treble-corded whip, all the way from the Fleet to Westminster, where the pillory was placed, at least five hundred strokes in all. The tipstaff of the Star Chamber was then sent to know if he would acknowledge his fault. This he refused to do, although by so doing he would have saved standing in the pillory. He was accordingly placed in this, and remained there two hours, with head uncovered, in a hot sun, his back dreadfully lacerated by the blows he had received; and he improved the occasion by addressing the people around him, and scattering pamphlets amongst them. After continuing this at a great length, he says: "There came a fat lawyer,—I do not know his name,—and commanded me to hold my peace and leave my preaching." This, of course, he refused to do, and went on with his discourse to the people. After continuing this a while, the warden of the Fleet came with the same fat lawyer, and commanded him to hold his peace. But he refusing again, they gagged him, and kept him an hour and a

half in that condition, but in no measure subdued or disposed to compromise, but, on the contrary, manifested his feelings by stamping and gesticulations. The Star Chamber then, in order to subdue him, ordered him to be shut up in solitary confinement, with irons on his hands and legs, in the wards of the Fleet, where the basest and meanest sort of prisoners were placed. Here a severe fever seized him; but no physician was permitted to visit him till late the next day, even to dress his wounds. His sickness continued for six months, during which he was still kept in close prison; and, as soon as able to bear them, was again put in irons, and denied any communication with his friends, suffering every indignity the court could inflict upon him. After enduring this for nearly three years, he petitioned Parliament, and was liberated, and became a lieutenant-colonel in the parliamentary army. It will be recollected that this was not in pursuance of a sentence for any crime, since he had never been called to answer to any charge, but for simply refusing to answer interrogatories tending to criminate himself, and that under oath. It was, moreover, "commanded to be executed," in the words of the narrator, "by an eminent court of justice professing Christianity *pessima est injustitia, quæ sit sub colore justitiæ.*"

Want of space forbids extending this account or that of Mr. Prynne, and we have only room to add that the ridding of the body politic of such a plague-spot as this infamous tribunal had grown to be, was one of the early acts of the Long Parliament, so famed in the history of England. A bill for abolishing this court was moved by Lord Andover in the House of Lords, March 5, 1641. It contains a long preamble, referring to the Magna Charta, the act of Edward III., already mentioned, and sundry other acts designed to secure to parties charged with crimes a full and fair trial, together with the act of 3 Henry VII., creating the officers of this court, and recites: "But the said judges have not kept themselves to the points limited by said statute, but have undertaken to punish where no law doth warrant, and to make decrees for things having no such authority, and to inflict heavier punishments than by any law is warranted;" and forasmuch, among other things, as "the proceedings, censures, and decrees of that court have, by experience, been found to be an intolerable burden to the subjects, and the means to introduce an arbitrary power and government," it proceeds to declare that the Court of Star Chamber should be clearly and absolutely dissolved from the 1st August, 1641, and all power and authority thereof absolutely revoked and made void. Almost concurrent with this was an act repealing the Court of High Commission, and one declaring the proceedings touching ship-money void, for which Hampden had suffered.

An English writer, Carr, has embodied this act abolishing the Star Chamber with the Magna Charta, the Act of Treasons of 25 Edward III., the Habeas Corpus, and some other acts of a like character, in what he calls "English Liberties;" and, in commenting upon this act, remarks: "Whatever pretences there were for setting this court at first, 'tis certain it was made use of as a property of arbitrary power, to crush any whom the ruling minister and favorites had a mind to destroy." It violated, as he maintains, the English Constitution in three things: 1st, In proceeding without a jury; 2nd, in examining men upon oath touching crimes by them supposed to be committed, whereas no man is bound to accuse himself; and, 3rd, the judges proceeded by no known rule or law, but acted arbitrarily, according to their own pleasure.

This summary, it will be perceived, justifies every thing which has been said of the character of this court in the preceding pages; and, in view of its history, one can hardly forbear indulging a reflection upon the aims and functions of the common law, as compared with any other system known to modern civilization, and how unsafe it is for a people who have once enjoyed its safeguards and protection to exchange these for any other form of justice, however plausible it may appear, or however seemingly recommended by present expediency. The same men who, as judges of the common law, while surrounded by the checks and limitations which usage and tradition had gathered within the precincts of their courts, had conducted themselves in a manner to escape censure or odium, removing thence into the murky and corrupted air of the Star Chamber, were the first to violate

the fundamental principles of the common law, and were ready to go the farthest in discarding its salutary and time-honored rules. Of all the systems and schemes devised by the wisdom of man for administering justice, there is none, take it all in all, which comes so near perfection as that of the common law, made up of two elements,—judges and jurors,—in a measure independent, and each with its proper function prescribed and understood. That, like all human institutions, it is true, is imperfect and defective, and sometimes not only fails to attain justice, but becomes an instrument of positive wrong. But these are the exceptions. The rule is in every respect in favor of reaching results as near the ends of justice as can reasonably be hoped for in the uncertainty of human testimony, and the difficulty there is in defining and limiting the rules of law, And when, in view of some verdict rendered through the passion or ignorance of a jury, we hear men declaiming against these as a part of our system for determining questions of right in courts of justice, we would only point to them the danger to which suitors would be subjected from narrow, partial, or misguided views of men with like passions, who would undertake to pass upon the rights of others under the name of judges. Especially is this the case where judges are elective. We should, by confiding to these men, without the check of a juror's oath, the rights of the citizen, be going back a great step towards the mischiefs of a Star Chamber, where the law between man and man, and especially between the individual and the public, can hardly fail to be moulded and shaped to suit the will and passions of the power that creates the judges who declare it. No tyranny is more cruel, no injustice more intolerable, than that which is accomplished under the name of administering justice through the medium of a court of law. The lessons left us in the history of the Star Chamber should not be lost upon the world; and if this effort to revive the memory of this court, by borrowing from the records of the past, shall have served to throw light upon its true character in the mind of any one, the labor would not have been in vain.—*American Law Review.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

KIRKPATRICK v. HARPER.

Notice to proceed—Nullity—Irregularity—Laches—Waiver—Judgment—Writs of fi. fa., setting aside.

When in a notice to proceed one of the plaintiffs' named was omitted,

Held, (notwithstanding *Doe Read* v. *Paterson*, 1 Prac. R. 45), under the present state of the law, not a nullity, but merely an irregularity, and that such irregularity had been waived by the defendant's laches, he having taken no objection until over a year afterwards.

Held, also, that the writs of *fieri facias* should be set aside, the words "executors of the last will and testament of J. K., deceased," having been unauthorisedly struck out after the issuing of the writs.

[October 4.—Mr. Dalton.]

In this case the defendants having given the plaintiffs notice to proceed, and they not prosecuting the suit, the defendants entered a suggestion of the notice, signed judgment and issued execution. The plaintiffs took out a summons to set aside the suggestion and judgment, on the ground that the notice to proceed was a nullity, one of the plaintiffs' names having been omitted in the style of the cause; and to set aside the writs on the ground that an alteration in the writs had been made after their issue by striking out the words "executors of the last will and testament of J. K., deceased."

Osler, for defendant, contended that the notice to proceed was only irregular.

Holman for plaintiff cited: *Doe Read* v. *Paterson*, 1 Prac. R. 45, and contended that the notice to proceed was a nullity, and that the judgment must therefore be set aside.

Mr. Dalton held that the notice to proceed, owing to the recent changes in the law as to amendments, was not a nullity but only an irregularity, which the defendants had waived by their laches, more than a year having elapsed between the service thereof and this application. The writs he thought, however, should be set aside. He therefore made the summons absolute to set aside the writs of execution with costs as to that part of the application, but discharged it as to setting aside the judgment for irregularity. He however set aside the suggestion and judgment on the merits on the payment of the costs of the application so far as it applied to this, and the costs of the judgment.

CRAIG v. CRAIG.

Execution—Abandonment—Interpleader—Landlord—Distress.

A sheriff made a seizure on certain goods in the middle of September, but put no bailiff in possession, merely taking the word of the execution debtor that the goods would not be removed, and the goods were distrained for rent on Oct. 2nd. The sheriff thereupon took the goods out of the landlord's hand under pretence of the execution.

Held, that there had been an abandonment by the sheriff as against the distress warrant.

When goods are under seizure for rent they are *in custodia legis*, and the sheriff has no right to seize them under an execution.

On an application by a sheriff for an interpleader order under such circumstances, the landlord's claim being taken to be *bona fide*, the legality of the seizur under the distress cannot be enquired into in chambers, and the sheriff's application for relief by interpleader was therefore refused.

[October 18.—MR. DALTON.]

This was an application by a sheriff for an interpleader order under the following circumstances: The sheriff seized the goods in question about the middle of September, but put no bailiff in possession, merely taking the word of the execution debtor that he would not remove the goods. Rent became due on 1st October when the goods were removed off the premises. On October 2nd, the landlord seized the goods for rent on the ground that this removal was fraudulent within the meaning of the statute On Oct. 3rd the sheriff made a second seizure while the goods were in possession of the landlord's bailiff. The landlord notified the sheriff that he claimed the goods under distress for rent. The sheriff thereupon applied for an interpleader. Affidavits were filed both by the claimant and the execution creditor as to whether or not the removal was fraudulent.

Black, for execution creditor.

O'Brien, for landlord, cited Impey, 4th ed. 105, 110—11; *Castle* v. *Ruttan*, 4 C.P. 252; *Hart* v. *Reynolds*, 13 C. P. 501; *Robertson* v. *Fortune*, 9 C. P. 427; *Wheeler* v. *Murphy* 1, Prac. R. 336.

Osler, for sheriff, cited: *Ackland* v. *Paynter*, 8 Price 95; *Hamilton* v. *Bouck*, 5 O. S., 664. Interpleader Act, 1865.

MR. DALTON thought that (1) under the circumstances the first seizure by the sheriff must be considered to have been abandoned; (2) that the goods being under seizure for rent they were *in custodia legis* and the sheriff had no right to seize them under an execution, and (3) that the question of the validity of the landlord's claim could not be discussed in chambers. The summons was therefore discharged with costs, except as to the costs incurred in respect to the question of fraudulent removal, which were held to have been incurred unnecessarily.

SQUIRE v. DREENAN.

Pleading—Estoppel—Judgment.

When in an action on a promissory note against an endorser the defendant pleaded in estoppel that the note was given as security for the performance of a certain agreement between the plaintiff and one M., that the defendant endorsed as security for M. the maker, and that the plaintiff had brought an action against M. on the agreement, in which action M. had pleaded *non assumpsit* and had judgment on the plea.

Held, that the plea was no answer to the declaration.

[October 18.—MR. DALTON.]

This was an application to strike out a plea, pleaded in terms as above, as being framed to prejudice, embarrass, and delay the plaintiff.

Spencer, for plaintiff. The judgment in the former action is not an estoppel to the plaintiff suing in this action, the parties not being the same and the causes of action not being identical. See DeColyar on Guarantees, pp. 26, 27; *Drake* v. *Mitchell*, 3 East, 251; *Nelson* v. *Couch*, 15 C. B. N. S. 99; *Carter* v. *James*, 13 M. & W., 137.

Osler, for defendant. Plaintiff should have demurred, and should not have moved to strike out the plea. The plaintiffs do not allege that the plea is embarrassing.

MR. DALTON thought that the plea was no answer to the declaration and that it should be struck out.

Order accordingly.

CHANCERY CHAMBERS.

(Reported for the *Law Journal* by H. T. BECK, M.A., Student-at-Law.)

ROWE v. WERT.

Appeal from Master—Report—"Special circumstances"—Delay—Mortgage—Dower.

On an application for leave to appeal from a master's report after the time limited, leave was not granted where there had been a delay of some six months, and no explanation offered.

When a bill was filed by a first mortgagor for a sale of the mortgaged premises, there being also a second mortgage, the mortgagor's wife having barred her dower in the first mortgage, but not in the second mortgage, and the master, on a warrant being taken out after the sale for the purpose of taking accounts, in his report thereon, found the widow entitled to dower as against the second mortgagee.

Held, That under G. O. 220, the master had power in his final report to entertain the question of dower, and report thereon as a "special circumstance," and that

the second mortgagee was not entitled to notice that this point would be considered in settling the report.

Held, Also, that under the above circumstances the widow is entitled to dower, as against the second mortgagee in this country, though this is not so in England.

[October 17.—Mr. Taylor.]

This was an application for leave to appeal from a report of the Master at Belleville after the time limited, under the following circumstances:

A first mortgagee filed a bill for sale of the mortgaged premises, after the death of the mortgagor. The mortgagor afterwards mortgaged the equity of redemption, and subsequently died. His wife joined in the first mortgage, for the purpose of barring her dower, but not in the second. A warrant having been taken out, after the sale, for the purpose of taking subsequent accounts, the Master in making his report thereon, found the widow entitled to dower as against the second mortgagee. From this finding the second mortgagee asked for leave to appeal. The motion was not made until more than six months after the date of the report.

Thorne in support of the application. The Master had no power to entertain the claim. It should have been raised on the first account. There was no account of rents and profits. *Dawson* v. *Bank of Whitehaven*, 37 L. T. N. S. 64, is expressly in point. No one can be prejudiced by the delay.

Hoyles contra. The delay is unreasonable and has not been explained. There is no ground for applying. The case cited is not in point. There is no equitable dower in England, while the law is otherwise here.

The matter was argued before the Master, sitting as Referee *pro tem.*

I refuse the application. The delay is great, and is not accounted for. In some cases leave has been given even after great delay, but in all such cases, some excuse for the delay has been given. Here, two days after the report was filed, the solicitor knew of the report and its contents, and stated in a letter to the defendant's solicitor his intention of applying, yet he took no steps to do so, for at all events six months.

I do not think the Master was wrong in reporting as he has done. It is not beyond his jurisdiction. He has only reported to the Court a special circumstance which under G. O. 220, he had the right to do. He has not taken any account of the amount due the widow, he has simply reported as a fact that her claim to dower comes in between the claim of the plaintiff and that of the subsequent incumbrancer. The amount to which the widow may be entitled has yet to be ascertained and then any question as to her past receipt of rents can be gone into.

At the time the Master made his report, the widow was, under the authorities, clearly entitled to dower. That she is not now entitled to dower can be argued only on the authority of *Dawson* v. *Bank of Whitehaven*, 37 L. T. N. S. 64. I have read that case carefully, and I do not think it is an authority in this country. The reasoning by which the Court of Appeal came to the conclusion that the widow was not entitled to dower was, that the wife having with the husband joined in a mortgage of the legal estate with a power of redemption she assented to her husband's estate being converted from a legal into an equitable estate; having done so, as the Master of the Rolls says, "she knew or must be taken to have known that one of the incidents to the legal estate, the inchoate right to dower, did not attach to an equitable estate. She extinguished her dower at law, and that extinguishment at law operated as an extinguishment in equity, because the dower did not exist in equity at all." Again he says, "the legal right to dower was extinguished, and the right to dower not being an incident to an equitable estate cannot exist for any purpose that can be recognized in this Court." L. J. Cotton took exactly the same ground, though he admitted that when dealing with property which a court of equity recognizes and assists a party in securing, as a mere equity, the general proposition is true that where a wife mortgages her property, she is considered as parting with that solely for the purpose of the mortgage and not further or otherwise. This was the view taken by V.C. Mowat in *Forrest* v. *Laycock*, 18 Gr. 611, and has ever since been in this country considered as the correct one. In another respect *Dawson* v. *Bank of Whitehaven* may be distinguished. The mortgage deed contained a power or trust to sell. That power was exercised in the life-time of the husband and the estate was converted into personalty, the wife assenting thereto by being a party to the deed.

The objection that the existence of a claim for dower should have been made known at the time of the original reference before the Master has no force. Had the defendants in possession of the report then made redeemed, no question as to the dower would have arisen. The widow would, as against the heirs, have been let in to her dower out of the land, freed from all incumbrances. It was only when the land had been sold and it became necessary for

the Master to report to whom the money was payable that it was important to notice this dower claim.

That no account has been taken of the widow's occupation of the land is an objection already disposed of. The Master has taken no account of the amount to which she is entitled for either past or future dower.

The application must be refused with costs.

NOTES OF CASES.

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

QUEEN'S BENCH.

IN BANCO, June 30.

PEARSON v. COUNTY OF YORK.

Municipal corporations—Repairs of road.

Held, under the evidence in this case that defendant's road was out of repair, and that if the action had been brought in time the defendants would have been liable for the injury to plaintiff.

Held, that the action, not having been brought within the three months required by sec. 409, Mun. Inst. Act, was too late.

Delamere, for plaintiff.

J. K. Kerr, Q.C., for defendants.

RE KINGSTON ELECTION.

Controverted Election—Payment out of Court.

One thousand dollars, the deposit required to be paid in on Dominion Election Petitions, was handed to the Clerk of the Election Court, that Clerk being also Clerk of the Queen's Bench. The latter court, no petition having been filed in it, refused an order to pay the money out.

Dr. Stewart, petitioner, in person.

Britton, Q.C., contra.

THIRD NATIONAL BANK v. CORBY.

Note payable in American Currency.

Held, that a note made in this country may be made payable in a foreign country in the money of that country, but it must be in the recognized money of that country. The court, for instance, cannot know judicially what "American Currency" is. The decision of this case by Mr. Justice Wilson, (see ante p. 87), varied.

M. C. Cameron, Q.C., and *Clarke*, for plaintiffs.

Benson, for defendant.

ACHESON v. MCMURRAY.

Lease—Surrender by operation of Law.

The principles under which a lease becomes surrendered by operation of law, considered and discussed, and the authorities reviewed. And *held* that under the facts stated in evidence in this case, there had been such a surrender.

McCarthy, Q.C., for plaintiff.

Osler, for defendant.

BROCKVILLE & OTTAWA RAILWAY v. CANADA CENTRAL RAILWAY.

Bill of Exchange—Power of Co. to endorse.

The defendants, a railway company, wanting money for the purpose of their railway, drew a bill of exchange, which plaintiffs endorsed and paid on the failure of defendants to do so. The defendants in this action contending they were not liable as they had no power to make bills or notes.

Held, notwithstanding, that they were liable to plaintiff as for money paid to their (defendants') use.

S. Richards, Q.C., for plaintiff.

J. K. Kerr, Q.C., for defendants.

GRAHAM v. GREAT WESTERN RAILWAY.

Collision—Negligence.

Action for an injury to a passenger being carried by defendants. Where negligence is shown on the part of defendants, it is not an answer to shew that the accident would not have happened if the colliding train, belonging to another railway, had not been negligently managed, also in not being stopped two seconds sooner.

Rock, Q.C., for plaintiff.

M. C. Cameron, Q.C., for defendants.

POSTMASTER-GENERAL v. ROBERTSON.

Postmaster-General—Assignment of chose in action.

Held, affirming the judgment of GALT, J., that the Postmaster-General in his official capacity may take an assignment of a chose in action for the benefit of the Crown in the discharge of his duties; that the beneficial interest in such a chose in action would vest in the Postmaster-General under 35 Vict. cap. 12, O.; and that he could sue therefor as such.

Beaty, Q.C., for appellant.

Bethune, Q.C., for respondent.

CAHUAC v. COCHRANE.

Statute of Limitations—Acknowledgment in writin.

Plaintiff, having the paper title to a lot of land, obtained, in 1863, a written acknowledgment of

his title from one S., then in possession, and who with others had been in possession over 20 years. In 1867 S. sold to defendant.

Held sufficient to take the case out of the statute of limitations.

Patterson, for plaintiff.

Kerr, for defendants.

Re Attorneys.

Costs—Delivery of bill.

In an order made in chambers for delivery of bills of costs the attorneys having strenuously denied any liability, the order provided "that the costs thereof" (*i.e.* of the delivery of the bills and of the application therefor) "abide the result of the taxation."

Held, on appeal, that the words quoted should be struck out.

Donovan, for applicant.

Osler, for attorneys.

Bullivant v. Manning.

Sci fa—Public Company—Conditional agreement to take Stock.

Action against defendant as a shareholder of unpaid stock of the T. G. & B. Ry., by a creditor of the company. The defendant pleaded that he was only to become a shareholder on his obtaining a certain contract, which he never did obtain, and that he had never been recognized or treated as a shareholder by the Company.

Held, on demurrer, a good defence—affirming the judgment of Morrison, J.

Robertson, for plaintiff.

Ferguson, Q.C., for defendant.

Re Baird & Almonte.

Quashing By-Law to grant a Bonus—Interest of Municipal Councillors.

The village of Almonte passed a by-law granting $10,000 bonus to a Furniture Co., subject to the condition that no debentures should be given the Company till satisfactory evidence was given the Council that the Company was in *bona fide* working operation, and of being an institution otherwise worthy of the bonus, and also evidence of having a paid up capital of $35,000. When first read, four out of the five councillors were shareholders, and when passed the same number of councillors were shareholders.

Held, affirming the decision of Hagarty, C.J., that the by-law was illegal by reason of the interest of the majority of the Council in the Company.

Bethune, Q.C., and *Osler*, for appellants.

J. K. Kerr, Q.C., and *Mulock*, for respondents.

Fitzgerald et al. v. Johnston et al.

Chattel Mortgage—Description of property.

The special case having been amended and the chattel mortgage and schedule referred to in it submitted to the court, the judgment of Galt, J., reported ante p. 87 was reversed.

Meredith, for plaintiff.

H. Ferguson, for defendant.

Turner v. Dewan.

Ejectment—Evidence—Entries in cash book.

The plaintiff proved a paper title at the trial. The defendant claimed by length of possession, and the plaintiff, in proving payment of rent by the defendant, produced a cash book of a former owner T., in which were entries alleged to be of quarterly payments of rent. The entries shewed regular payments of $3 quarterly during two years by one D., under whom defendant claimed, but did not show on what account they were paid.

Held, that the entries in question were, *prima facie*, entries made by T. against his interest, and so admissible to corroborate other testimony on this point.

Held, also, apart from this, that on the evidence the plaintiff was entitled to succeed.

M. C. Cameron, Q.C., for plaintiff.

C. Robinson, Q.C., for defendant.

Driffill, Assignee, &c. v. McFall.

Promissory Notes—Trover—Vendor's lien.

One C., an insolvent, of whom the plaintiff was assignee, &c., shortly before the issue of a writ of attachment sold his mill property to one G for the sum of $8,500 taking a mortgage on the property for $6,000, and two joint notes of G. and one M. for $1,500 (on which $500 were paid), and $1,000 respectively. These notes were before the issue of the writ of attachment handed by the insolvent to defendant to keep for him, defendant at the time knowing the insolvent to be embarrassed.

To the assignee's demand, defendant denied that he held the notes and disavowed any knowledge of them, but he had meantime sent them to his brother at the insolvent's request. Both makers were worthless.

Held, that there being no special circumstances shewn, there was no vendors lien in respect of the notes. *Held* also that defendant was guilty of a conversion of the notes, but upon their being brought into court the verdict was reduced to one shilling damages.

McCarthy, Q.C., for plaintiff.

Osler, contra.

Re Hamilton & County of Brant.

"Temperance Act, 1864"—By-Law—Defects in submission.

To a by-law passed under the Temperance Act of 1864 it was objected that the notice did not state how long the poll was to be kept open in each polling place.

Held, not necessary.

Held, also, that the aggregate number of names on the assessment roll does not govern in deciding the number of days the poll is to be kept open in each municipality, but that in making up the voters list the names of women, minors and other non-voters might be omitted.

Robinson, Q.C., with him *H. J. Scott*, for applicant.

Smythe, contra.

CHANCERY.

Taylor v. Brown.

Chancellor.] [Oct. 3.

Redemption suit—Money paid for mortgagor.

The plaintiff was indebted to one McLeod, who sued out execution against the lands of plaintiff, and in order to save them he was induced by the promises of Mrs. C. Brown to convey the same to her in security, she undertaking to pay the amount of McLeod's claim. Instead of paying the debt she allowed the Sheriff's sale to proceed, and her son, the defendant, F. Brown, attended and bid in the lands as agent of his mother, and the Sheriff by deed poll conveyed the same to her. $75 was paid on account of the execution debt by or for Mrs. Brown, and a short time afterwards she died, when the Sheriff, in order to obtain the balance of the claim, proceeded again to sell the land, and F. Brown again attended, avowedly on his own behalf, and bid off the land, paying the balance of the debt and costs, and procured a deed in his own name from the Sheriff, and subsequently set up a claim to hold the land as absolute owner under the Sheriff's deed. Thereupon the present suit was instituted. A decree having been made declaring the plaintiff entitled to redeem, accounts were taken before the Master at Windsor, who allowed to the defendants the sum of $75 paid by Mrs. Brown, and also the amount paid by F. Brown on the second sale, charging the defendants with rents and profits received, and found a balance due them of $121.12. The plaintiff thereupon appealed from the Master's finding, contending that he should not have given F. Brown credit for the amount paid on the second sale which was void and ineffectual to pass any interest to the defendant, and that the amount Brown paid or was paid in his own wrong.

The Chancellor, after hearing counsel, dismissed the appeal with costs, observing in the course of his judgment that "it would seem that if the plaintiff had not charged the defendants with rents and profits, &c., F. Brown could not claim against him the amount paid by Brown to the creditor," quoting the words of Lord Romilly in *Teasdale* v. *Sanderson*, 33 Beav. 534, who, on allowing a joint tenant for improvements made by him on the joint estate where he was sought to be charged with rents and profits said, "I think these accounts must be reciprocal, and, unless the defendant is charged with an occupation rent, he is not entitled to any account of substantial repairs and lasting improvements on any part of the property."

CORRESPONDENCE.

Fusion of Law and Equity.

To the Editor of the Law Journal.

Dear Sir,—When we find such a subject, one of so great importance to our profession and the country, used merely as a text for stump speeches, without the slightest desire to make it intelligible either to the profession or the country—merely as an instrument by whose aid one party politician may wound the reputation of his rival, I feel you will agree with me it is high time to have it discussed fairly, thoroughly and impartially in the only place it has any chance of being so treated, viz., in your pages.

That sort of discussion of it has advanced it no further than this—the Hon. Mr. Macdougall twits the Hon. Mr. Mowat with having so long neglected to give us that much needed measure which he contends was always so easily accomplished, that it could be effected simply by passing such an act for Canada as the English Law and Equity Fusion Act, which he, Mr. Macdougall, would immediately do if put in Mr. Mowat's place, to which Mr. Mowat retorts—it will not improve

matters to put you in my place, as however insufficient my acts may be, the English Act works still worse.

Is that the way such a subject should be discussed? Is it not, on the contrary, merely evading discussion of it for some party end? If, as I suppose, we ought to assume, those gentlemen informed themselves as they ought to have done before alluding to it, why could not Mr. Macdougall admit, as the fact is, that such English Act has not accomplished all it aimed at, and shew as he easily could, and as Mr. Mowat probably would not deny, that the only reason that English Act did not accomplish all that is required and prove a complete success was because it omitted to do what Canadian lawyers twenty years ago, in your pages, pointed out was necessary to make such an Act a success, and why could not Mr. Mowat, well knowing that there is no impossibility in the way of passing a thoroughly satisfactory and perfect Fusion Act for Ontario, give some reasonable explanation of his reasons for not attempting to do so?

The partial failure of the English Fusion Act is solely attributable to the following imperfections in it which are easily avoidable, viz.: the English Legislature imagined that it was enough if they enacted per stat., that from and after a given day all their Courts of Law and Equity should be fused, without, after fusion, supplying them with any new and more comprehensive system of practice or procedure, or any better appliances than each of them had before, to grapple with and transact the new enlarged and entirely different volume of business they were expected to administer and adjudicate; a blunder as glaring as if they had enacted that from and after a given day, every ordinary old half inch auger, every time it was used for boring, should make a two inch auger hole, instead of, as theretofore, only a half inch auger hole.

What, however, most astonishes me is that Mr. Mowat should thus place so low an estimate upon his own abilities and those of the rest of the profession, as to take it for granted none of them at this day can do more than merely hunt up ans copy some English statute, changing the word "England" into "Ontario," wherever it occurs; and that if every English statute fails through even such apparent and easily avoided deficiencies to attain its object, that failure while it lasts must estop every one in Canada from attempting, even in the proper way which insures success, anything similar.

Only think how humiliating to us all it would be if that estimate were the correct one. It would shew a woeful degeneration within the last twenty years. Certainly twenty years ago and earlier we had amongst us many who could and did think and act originally, and most usefully, upon the subject of law reform, and who were far in advance not only of the English Law Reformers of their day, but also of the present English Law Reformers. But even if it were true that we can do nothing now but copy, why not copy those of our own instead of the inferior work of foreigners?

And now as to the proof of what I have above written. Any intending Canadian Law Reformer can, and the English Law Reformers also could (if it would not have been beneath their dignity) obtain from your pages enough to insure successful, thorough fusion of law and equity. The full and complete enunciation of the principles upon which the necessary legislation should be based, there to be found, must make the Fusion Act a complete success instead of a partial failure. I shall simply refer your readers to your journal for the years 1857, 1858 and 1859, under the heading "Chancery," in the index of each of those Vols., and particularly to the letters of "A City Solicitor," (3 U.C. L. J. 223 and 4 U. C. L. J. 71). There is there, however, other

matter not highly complimentary to the forms and mode of procedure in Chancery, which need not be imported into the present discussion. Much of what was then complained of has been since remedied, and a proper measure of fusion will remedy all that remains to be rectified. As, however, some, especially of the younger members of the profession, may not have those older volumes of your journal to refer to, for their benefit I insert the following extracts:—Your correspondent in 3 U. C. L. J. 228, says in substance and effect and in almost these words, in speaking of the fusion of law and equity he was then recommending—"give the common law courts what they want, the comprehensible, expansive and summary jurisdiction which chancery possesses in theory, but cannot put in practice—give the court of chancery what they want—the simple practical mode of practice of the courts of common law; let each court have besides its own jurisdiction, all the jurisdiction of the others, so that each and every of them will be courts of co-extensive and universal law and equity jurisdiction; make every superior court, whether of law or equity, use the same identical and no different system of practice and procedure, and give each and all of them a much more comprehensive, simple and perfect mode of administering justice than any or all of them, separately or collectively, now have, and re-assort all their judges so that each court shall have at least one equity and one common law judge, and thus be enabled to intelligently and properly adjudicate all questions of law or equity that can come before them. Again when speaking of the ordinary antiquated procrastination arguments, and deploring the timidity and tardiness of our most unwilling Legislative Law Reformers, he says they were doing nothing but "merely nib-" bling at the outside edges of three or four " of the leaves, instead of striking at the 'root of the evil." In his last letter, 4 L. J. U. C. 71 to 73, he endeavours to rouse them to immediately attempt something sufficiently thorough to have some chance of being practically useful, instead of continually passing crops of petty legislative enactments, each designed to carry out in the minutest possible fractions some, in itself, insignificant measure of reform, thus keeping everything for ever in a state of worry, transition and doubt, without accomplishing any reform worth having. He then uses this language,—"The only question worth con-" sidering is, are we, or are we not, for " ever to continue to proceed as hereto-" fore, with the dilatory removal, piece " by piece, of that immense mass of gross " abuses, which, from time to time, has " grown out of the parent trunk and " taken root, propagated, and spread over " its whole surface until the original is " completely enveloped, and nothing left " apparent but one heterogeneous mass of " useless corroding legal fungi, passing " one whole statute this year to remove " one solitary excresence, which statute " the court next year may pass rules to " carry into effect, which rules if they " have good luck, may apply to cases " which will occur the year after, in the " vague hope that ultimately at some al-" most inappreciable distance of time, " posterity, whose ancestors are yet un-" born, may derive the full benefit of what " we at any time, and now, might accom-" plish at one stroke by simply passing " some such statute as suggested in my " former letter."

Those were not the sentiments of a single man merely. On the contrary, they were then, and still are, the sentiments of the thinking minds in our profession. They are the sentiments of all except those who know nothing but mere chancery law who practiced nowhere else than in the chancery court, and who feel in themselves that they have not the capacity of learning what would enable them

to hold their own if the change occurred, whose occupation would be gone if such an act were passed. We could hardly expect them to permit such an act to pass if they could help it, and consequently it has not yet passed. They, at least, never attempted to controvert any thing that was written under the *nomme de plume* of "A City Solicitor;" they were cunning enough to know that was hopeless, and would only expose the weakness of their case. What they did was to temporize and procrastinate, to appease the then public feeling by granting as much as they dared not, for fear of annihilation, refuse, granting part of what was demanded and promising that the rest would be accomplished by degrees and before long, and omitting to accomplish that residue when the storm subsided, continually putting us off with large promises and the smallest possible measure of performance.

Is there any reason to doubt that the same game is still being played, and if it is, are we, who do not exclusively practice in chancery, interested in stopping it? I think we are, and for the following amongst other reasons. No matter whether it would or would not have been originally better to have left common law and chancery entirely separate, we have now gone too far with the fusion of them to get back to that position. We must, therefore go on, and *thoroughly* fuse them by making all our Superior Courts, which are not Courts of Appeal, both Courts of Law and Courts of Equity, to all intents and purposes. The sooner we do so the better for ourselves. Until we do, it is impossible to have any settled intelligible system of practice or pleading in any court; whereas, as soon as we shall do so, all will immediately be settled and become certain and intelligible, and we will not be compelled, as we now are, without any remuneration, to learn and keep ourselves up in two dissimilar antagonistic systems of practice, pleading and procedure, instead of only one system. Secondly, because, if effected upon proper principles, it will not only greatly improve the usefulness, practice and proceedure of all the courts, but will also, in the only way possible, without abolishing the Court of Chancery, get its practice and proceedure sufficiently in harmony with modern ideas to make it work satisfactorily, and do away with unnecessary delays, complications, technical obstructions of justice, and a host of petty expenses, impossible to be got rid of while its present system is retained.

I think, however, in carrying out what "A City Solicitor" has recommended, it would be well, in order to get rid of the injurious effects of the old inveterate prejudices which usually cling to old names when all the courts are fused, to abolish all their old names and re-name them. This would fix in the minds of their judges that their respective courts no longer differ from one another in any respect. It would also be well to make the act come into force upon a future day to be named, which day should be far enough off to enable all concerned to be able to study the new practice and proceedure the ac would necessitate before it should come into effect. The act should also provide that a sufficient time before that day, the judges, or chief judges at all events, of all those courts, or a majority of them, should devise a new practice and procedure to be embodied in rules of court, which should apply always until changed, and equally to all the courts, and that no court should have any rule at any time which did not equally regulate every other superior court not being a court of appeal.

Many more details would, of course, be required, but these leading ones are enough to be mentioned in a communication like this, which does not aim at exhausting the subject, but merely to create sufficient interest in it to have it thoroughly discussed. If this discussion be had before the matter comes before Parliament,

as every sign of the times shows it very soon must, our profession at all events, will be thoroughly conversant with it, and able to bring their influence to bear upon it through their respective members. We may then have the proper sort of legislation upon it, which we never yet have had, and I believe without the aid of your journal, never will.

What we want, and at this late day, at all events, have a right to expect, is one really good act, which will settle everything for years to come, or at least put everything in the proper course to accomplish that result, instead of another series of that annually worrying legislation to which we have hitherto been subjected, each act of which reforms so little that the change, uncertainty and disturbance which it necessarily occasions does actually more harm than the miserably small and niggardly dose of legal reform we get does good.

In conclusion—as unexplained, this letter might by some be interpreted as a personal attack on Mr. Mowat, I beg to say nothing is further from my intention. I, in common, with I believe the whole profession, which includes persons of all shades of politics, entertain a very high opinion of Mr. Mowat as a lawyer. As a judge I, and I believe many others, have been accustomed to consider him, together with the late Chancellors Blake and VanKoughnet, as our very best judicial Reformers; men who as judges did all they could to work out justice, regardless of all mere forms and technicalities that fetter weaker men. No one who has practiced in their court can be unaware of the improvements they introduced during their time, or of what the country and the profession have suffered in losing them, but I confess it often troubles me and others of Mr. Mowat's personal friends to reconcile his very satisfactory record as a judge, his judicial courage and determination in pushing aside as far as he could, and so frequently as he did, the many inane technicalities which continually strove to interpose themselves between him and justice—with his far less satisfactory role of a legislative legal reformer. I can only account for it in this way,(which many who ought to know believe is the true one), viz.: that he could not give us all the legal reform he wished (as "A City Solicitor" suggested) without the aid of the Dominion Government; and that he has hitherto been unable to obtain that aid. And that he has been prevented by the exigencies of party discipline from divulging the causes which partially, at all events, excuse his delay.

I have the honor to remain,
Yours, &c.,
Q. C.

The Law of Dower.

To the Editor of the Law Journal:

Pursue we now the enquiry into the second division of this part of our subject, namely, the widow's consummate right to dower.

The husband being deceased, the whole element of contingency which characterized her interest as wife, having therefore disappeared, the widow stands in a new position with regard to her late husband's estate, in that she has an immediate right, consummate and vested in her person, to proceed against that estate for a third portion thereof, to be enjoyed for her lifetime. Whereas, she was a wife; now she is a widow. And whereas, she was, as wife, entitled but to wait for a certain contingency to happen, in order that it might be determined, whether she would ever actually enjoy in its fulness her then inchoate interest; now, that event having happened, consequent thereupon vests in her the power to assert her new right, and to ask for its immediate enjoyment. Whereas, prior to her husband's

death, she must *passively* have awaited that event; now she may *actively* assert her right, thereby acquired. Whereas, as wife, she had corresponding rights incidental to her position; now there exists a totally new relationship, incidental to which, are corresponding new rights. And it is the different relationships between the wife and her interest, and between the widow and hers, and the corresponding enjoyable or assertable rights incidental to each relationship, that we mean when we speak of the different qualities of the two rights. Though the *object* of her rights has been all along the same, she now bears a different relationship to it; and she has, incidental to this new relationship, a new right, viz., one consummate and vested, depending for its full enjoyment, only upon the exercise of her volition. But it has this peculiarity, that "it is probably the only existing case in which a title, though complete and unopposed by any adverse right of possession, does not confer on the person in whom it is vested, the right of reducing it into possession by entry:" *Park* on Dower, p. 334.

We have already seen, in the first of these letters, that she has not any estate in the land before the assignment of dower. She is but entitled "to have one established for her." In fine, as the authorities quoted in my last letter show, she has but a right of action, which she may assert, or not, as she thinks fit; but which she may yet forfeit by withholding the title deeds from the heir. This right, being a *chose in action*, could not at common law, have been assigned to a stranger. For "the common law regards the title of dower, for many purposes, as a mere right of action; and consequently refuses to permit its transfer, except by release to the terer-tenant, by way of extinguishment:" *Rose* v. *Simmerman*, 3 Gr. 600. Thus, it might have been released to the heir; or to the reversioner, or remainder-man, after an estate for life. Shep. Touch. 39; which release would be an effectual bar of her right, not only as against either of these latter, but also as against the tenant for life. *Ibid.* 328. And a release to the tenant for life might also have been taken advantage of by the remainder-man or reversioner. *Ibid.* She might also have released to guardian in chivalry; of which the heir might have taken advantage. *Ibid.* 327. But a release of all *actions* to the reversioner would not preclude her from suing for her dower: for she did not thereby release her *right*; and at the time of the release, she had no right of action against him. *Co. Litt.* 265*a*. *Altham's case*, 8 Rep. 151. But a release of her right of action, in order to be a present effectual bar, must be to the tenant of the freehold; for the immediate right of action was against him. But a release of all actions to the tenant of the freehold will not bar an action against the remainder-man; since; but the action was released, the right still remains. For *jus prosequendi quod sibi debetur* was not released to the remainder-man. See *Altham's Case*, 8 Rep. at p. 152 *a*. At law, then, the right to deal with this interest was restricted to its extinguishment.

In Equity, however, we find that the right was assignable on the principles on which the Court of Chancery always allowed *choses in action* to be assigned. We find it thus laid down in Story's Eq. Jur. 1040: "They give effect to assignments of * * *choses in action*. Every such assignment is considered in Equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt, or reduce the property into possession." This principle is illustrated by *Rose* v. *Simmerman*, cited *supra*. A widow had assigned her right to dower to her co-plaintiff; and a demurrer to the bill,

which asked that the dower be set out, was over-ruled by Blake, V.C. His Lordship in giving judgment, said:—"Such assignments operate, not as actual transfers, but by way of contract, entitling the party interested to come here for specific execution; and, as I can discover no principle upon which an assignment of a widow's title of dower should not have the same effect, I am of opinion that the demurrer must be over-ruled." The widow, then, upon an assignment of her right to a stranger, is in this position, that she, no less by her name's being joined in the proceedings with her assignee as co-plaintiff, than by the agreement or contract itself, evinces her desire to have the dower actually ascertained and set out, being under a contract with her assignee, that upon this being done he shall enjoy it; which contract, Courts of Equity will enforce. It has been asserted that the case of *McAnnany* v. *Turnbull*, 10 Gr., to which we have had occasion to refer before, is a decision conflicting with the former. But in the principle which is the subject of the above remarks, we have the key to this case, which instead of conflicting with *Rose* v. *Simmerman* serves rather to strengthen it. In *McAnnany* v. *Turnbull*, a purchaser at a sheriff's sale of the widow's right to dower, filed a bill to have the dower set out; and his bill was dismissed. Here the Court, finding that there was no such expression of the intention or desire of the widow to ask for that which the law allowed her did she wish it, could not enforce the right, because the element of assent necessary to a contract could not be found. There was no such expression of an agreement or contract between the widow and the purchaser, as would suffice to cause the Court to act upon the principle above enunciated, and declare that she had, either by words or by actions, made a declaration of trust in favour of the purchaser. There was no desire expressed by her to have her dower set out. It was attempted to be done contrary to her wishes. This is plainly the ground of the decision, and not the lack of the quality of negotiability in the interest itself. For Vankoughnet, C., in delivering the judgment of the Court, says: "This right she may never assert. She may not choose to disturb the heir, or interfere with his freehold; and if she does not, who at law caw do it for her?" From which it is to be inferred, that, if the widow had chosen to "disturb the heir," her expression of her will would have been given effect to by the Court, even though, as in *Rose* v. *Simmerman*, she had asked it for another. We may therefore conclude, that the right to dower was not assignable at law to a stranger; though Equity would, in such cases, always enforce an assignment for value.

Such being the state of the law, the statute 35 Vict. cap. 12, O., was passed, which enacted that *choses in action*, arising out of contract, should be assignable at law. The question suggests itself, is this right a *chose in action*, "arising out of contract?" It is submitted that it is. It is said in the books to be claimable by the widow, "as of common right; which would imply a contract. It might not unfairly be argued also, that, being a right arising out of the marriage contract, it should therefore be held to be within the act. For, though not the actual object of the contract, it is still one of the natural and inevitable consequences of it; and must be contemplated as such in every marriage contract. This has been the opinion of many eminent judges, not least among whom is Sir Joseph Jekyll. Mr. Park, in his Treatise on Dower, however, in "adverting more particularly to the fallacies of this notion," assails the argument of Sir Joseph Jekyll on several grounds; with what success the learned (and if he have followed me thus far,

the patient) reader may judge for himself, from the contemplation of the following passage from that learned author's remarks: "This argument confounds the contract itself with the extraneous legal fruits of the contract. It is the very absence of contract for the provision of the wife, which calls into operation the positive law to counteract the injustice which might arise from the omission of such contract. Strictly speaking, the engagement between the parties is nothing more than a contract to enter into the respective relations of matrimonial union; and the law, contemplating the consequences of that contract, by its own silent operation raises a provision for the wife, in the event of her surviving, independent of and without reference to the agreement of the parties." p. 132. While we can readily agree with the learned writer, that the dower is neither the contract itself, nor the actual object of it, we may still make use of his remarks, to show that it is one of the "extraneous legal fruits" of it, or, in other words, that it "arises out of" it.

It also submitted that, failing to be brought within the strict letter of the statute upon the grounds already mentioned, if it be one of those cases where equity would uphold the assignment, then it is such an one as is contemplated by the statute, which appears to have been passed for the purpose of assimilating the jurisdiction of the Common Law Courts and the Court of Chancery, in respect of *choses in action*, imbued, as it is, with the well known doctrines and rules of equity on this subject. This proposition is fortified by a *dictum* of Moss, J. A., in *Wood* v. *McAlpine*, 1 App. R. 241, where his Lordship says:—"We think there is no reasonable room for doubt, that the object of the Legislature was to enable a person, who had become beneficially entitled to a *chose in action*, to sue upon it at law in his own name, instead of being obliged to use the name of his assignee, or to resort to a Court of Equity." Thus intimating, that where Equity would recognize an assignment of a *chose in action* and enforce it, this is a sufficient test of whether the assignment should also meet with recognition in the Common Law Courts, and be governed there by the rules of Equity embodied in the statute. If this view be a correct one, the widow's interest now stands upon the same footing in all the courts, and is an assignable one.

I understand that the question of its liability to execution is now before the Court of Chancery. I therefore refrain from making any further remarks while the point is *sub judice*; in the meantime, tendering you many thanks for the space you have so generously accorded me,

I am, &c.,

E. D. A.

Toronto, October, 1877.

Alimony—Unreported Decision.

TO THE EDITOR OF THE LAW JOURNAL:

SIR,—I think it is important to draw attention to an unreported decision in the case of *Henderson* v. *Buskin* on the subject of alimony.

In *Hagarty* v. *Hagarty*, 11 Gr., it was laid down by the present Chancellor, that it was contrary to public policy for the Court to grant a decree by consent in an alimony suit for the payment of a sum in gross; and in *Gracey* v. *Gracey*, 17 Gr. 113, it was also ruled by the same Judge, that the Court cannot grant a decree for alimony by consent, but that it was necessary for the plaintiff to prove a case, showing herself entitled to relief.

The principle involved in these cases subsequently came under consideration in *Henderson* v. *Buskin*, heard before V. C. Strong, in May, 1873, at Whitby. And the opinion expressed by the learned V. C. was altogether at variance with

the cases above referred to. The importance of the judgment in *Henderson* v. *Buskin* probably escaped the attention of the learned reporter, as I cannot find that it has ever been reported. So far as I have been able to gain any information about the facts of that case they seem to be as follows:

The plaintiff had filed a bill for alimony, and by consent of the parties, a decree had been made for the payment of $50 to the plaintiff in full of all claims. Subsequently the defendant committed adultery, and the wife filed a second bill for alimony, and a decree was made in the second case, pro-confessed in the usual terms, referring it to the master to fix an allowance. After this decree had been pronounced, the defendant applied to vacate the decree, and for leave to answer, and it appearing that the only question he wished to raise was, whether or not the decree made by consent in the first suit was a bar, V. C. Strong gave him leave to set up that defence by way of plea—which was accordingly done. The plea came on for argument before the present Chancellor who, following his former decisions, held the decree in the first suit invalid, and therefore no bar to the second suit. The decree in the second suit, therefore, was allowed to stand. The plaintiff then claiming to be a creditor under the decree in the second suit, filed the bill in *Henderson* v. *Buskin*, for the purpose of setting aside a transfer of property made by her husband to Buskin. In this latter suit, the defendants again set up the defence that the decree in the first alimony suit was a bar to the second suit, and that question was argued before V. C. Strong who, after taking time to consider, delivered, I understand, a very elaborate and able judgment, in the course of which he stated, that if the plea in the second suit of *Henderson* v. *Henderson* had been argued before him, he should have allowed it, as he considered that the decisions of the Appellate Courts of England were opposed to the prineiple on which that plea had been overruled. As the plea had been upheld, however, he considered it was not open to the defendants in *Henderson* v. *Buskin* again to raise the question.

It will thus be seen, that according to the judgment in *Henderson* v. *Buskin*, the parties to an alimony suit have the same power as parties to other suits to consent to a compromise, and to agree for the payment of a sum in gross, and that the Court may properly sanction by its decree any such arrangement. This view of the law, has of late, been acted upon by the Court, and it is therefore to be regretted, that the only *reported* decisions of our Court of Chancery should be at conflict with what is now its actual practice. It is to be hoped that report of the judgment in *Henderson* v. *Buskin* may be published, for although I believe I have accurately stated the result, still, not having heard the learned judge's judgment, nor having access to any authentic note of it, I have not been so presumptious as to attempt to state the course of reasoning by which the learned judge arrived at his conclusion.. Yours, &c.,

A Junior.

[We have been at pains to ascertain the substantial correctness of the above statement. We understand also, that the authorities on which the learned Vice Chancellor based his judgment in the case of *Henderson* v. *Buskin*, were the following: *Hunt* v. *Hunt*, 4 De G. F. & J. 221; *Wilson* v. *Wilson*, 1 H. L. C. 538, s. c. 5 H. L. C. 40; *Williams* v. *Bayley*, 2 L. R. Eq. 731; *Rowby* v. *Rowby*, L. R. 1 Sc. Div. App. 63.

Although most of these cases are prior in date to *Hagarty* v. *Hagarty* and *Gracey* v. *Gracey*, they do not seem to have

been brought to the attention of the learned judge by whom those cases were decided.—Ed. C. L. J.]

Recent Decisions—Hutchinson v. *Beatty*, 40 U. C. R. 135.

TORONTO, Nov. 5th, 1877.

TO THE EDITOR OF THE LAW JOURNAL :

SIR,—I humbly conceive that you have not "read aright" the decision of *Hutchinson* v. *Beatty*, 40 U. C. R. 135, or you would not in your remarks headed "Recent Decisions and the Current Reports," have said the Court "held apparently that the limitation as to the time for the removal of the timber was bad." According to my reading of the case, the Court did not so hold, but held that the sale having been made before the issue of letters patent was good as against the patentees, although the timber, by the agreement between the parties, was not to be removed for ten years.

Your obedient servant,

LEX.

[The above letter from an esteemed correspondent is received as we go to press. It speaks for itself. As no one in the profession is more competent to give an opinion on the subject, we shall "take time to consider" until next month—EDS. L. J.]

FLOTSAM AND JETSAM.

The following extract from a British Columbia paper shows those judges "who dwell at home at ease" some of the difficulties under which their brethren in the colonies labour in performing their arduous duties. The English Government, when they appointed Mr. Justice Crease, probably did so because he was a sound lawyer; they may not have thought of any necessity for selecting a man of so much nerve and pluck. Mr. Crease at one time resided in Toronto, and some of his relations are still in this country. We trust the learned judge has since quite recovered from the effects of the accident which is referred to in the following extract :—

"While Judge Crease was riding over the trail between Sylvester's Landing to the town of McDame his horse stumbled and fell, the Judge being thrown forward on the pummel of the saddle (Mexican) from which he received very serious injury, which it was feared at one time might be fatal. Notwithstanding the intense suffering resulting from the accident the Judge, with a courage that excited the admiration and amazement of all, proceeded to hold Court while lying on a stretcher, and although physically so helpless that he could not move a muscle, he went through the business of the Court in a manner that showed him in no respect wanting in his wonted mental vigor. The deepest sympathy was manifested by the people of the district for the honorable and learned gentleman We are glad to learn that on his arrival here last evening Judge Crease was rapidly recovering from the effect of the fall. In coming out from the mines Judge Crease was packed over the trail between Deese Lake and Telegraph Creek, a distance of nearly 100 miles, on a stretcher borne by eight Indians. The situation was a trying one for the honorable Judge. No one who has not been over the trail over which he was carried will be able to form an adequate idea of the nature of the undertaking. The descent to and assent from the two forks of the Stickeen River was under the circumstances simply terrific. On more than one occasion the stretcher was necessarily in a perpendicular position with the Judge's head down hill, and had it not been that he was firmly strapped to the stretcher with strong leathern bands it is obvious that the Judge and his couch would oftentimes on the journey have parted company in a rather unceremonious manner. It is worthy of note that notwithstanding his constant suffering the Judge seemed to think more lightly of the dangers of the situation than any other person in the party that accompanied him."

Some years ago an English gentleman bequeathed to his two daughters their weight in £1 bank-notes. The eldest daughter got £51,200, and the younger £57,344.

LAW SOCIETY OF UPPER CANADA.

OSGOODE HALL, TRINITY TERM, 41ST VICTORIA.

DURING this Term, the following gentlemen were called to the Bar:—

JAMES VERNAL TEETZEL.
LYMAN DAVIS TEEPLE.
ALFRED H. T. MARSH.
THOMAS GIBBS BLACKSTOCK.
DUNCAN BYRON MCTAVISH.
J. WILMOT GORDON.
ERASTUS BLAIR STONE.
JAMES HENRY MADDEN.
JOHN CRERAR.
J. ALEXANDER MCGILLIVRAY.
WM. SETON GORDON.
FREDERICK MONTYE MORSON.
CHARLES WESLEY PETERSON.
HENRY AUBER MACKELCAN.
EDWARD H. TIFFANY.
T. MERCER MORTON.
CHARLES STEPHEN JONES.
ELIAS TALBOT MALONE.
DAVID STEELE.
PHILIP SANFORD MARTIN.
JOHN SECORD.
J MELBOURNE KILBOURNE.

The following gentlemen, members of the English Bar, were admitted and called.

RICHARD WILLIS JAMESON.
ISIDORE F HELLMUTH.

The following gentlemen received Certificates of Fitness:

DUNCAN B. MCTAVISH.
J. ALEXANDER MCGILLIVRAY.
ALFRED H. MARSH.
LYMAN DAVIS TEEPLE.
CHARLES WESLEY PETERSON.
PETER CLARK MCNEE.
WM. SETON GORDON.
CHARLES STAYNER WALLIS.
LUTHER KENDAL MURTON.
JOHN MCSWEYN.
DANIEL SPENCER MCMILLAN.
DAVID STEELE.
ROBERT SHAW.
THOMAS WILLIAM HOWARD.
E. D. MCMILLAN.
JOHN HIND HEGLER.
JAMES CROWTHER, JR.
JOHN WILLIAM HECTOR.
HENRY MORTIMER EAST.

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

Graduates:

WALTER TAYLOR BRIGGS, B.A., Trinity College.
RICHARDD WORNALL WILSON, B.A., Victoria College.
GEORGE BEAVERS, B.A., Victoria College.
EDWARD ADDISON EMMETT BOWES, B.A., University of Toronto.
EDWARD BETLEY BROWN, B.A., University of Toronto.
JACOB EDWARD LEES, B.A., University of Toronto.
WILLIAM NESBITT PONTON, B.A., University of Toronto.
PAULUS ÆMILIUS IRVING, B.A., Trinity College.
ALEXANDER MCBETH SUTHERLAND, B.A., University of Toronto.

Matriculants:

ERNEST EDWARD KITSON, University of Toronto.
JAMES MARTIN ASHTON, Albert College.
DAVID BARKER STEVENSON CROTHERS, Albert College.

Junior Class:

CHARLES OLIVER.
ARTHUR VIRGIL LEE.
WM. FREDERICK WILLIAMS.
CHARLES JOSEPH LEONARD.
WALTER ALLAN GEDDES.
COLLIN GREGOR O'BRIEN.
AUGUSTINE FOY.
JOHN CHRISTIE
WILLIAM BANNERMAN.
PATRICK SARSFIELD CARROLL.
ALEXANDER ARMSTRONG HUGHSON.
ROBERT MCGHEE FLOOD.
WM. EVANS SCOTT.
FRANK HOWARD KING.
J. JOHNSTON ANDERSON WEIR.
LOFTUS EDWIN DANCEY.
SAMUEL E. T. ENGLISH.
EDWARD ARTHUR LANCASTER.
ROBERT ALEXANDER PORTEOUS.
FRANCIS PATRICK FORD.
J. RYMAL TAYLOR.
GEORGE TAYLOR WARE.
ROBERT GEORGE BARRETT.

Ordered, 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 nto French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musaeus, 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.