DIARY FOR DECEMBER.

1. Fri. New Trial Day, Q. B. Open Day, C P. Last day of determining by Councils of appeal from value of land. Clerk of every municip. except Counties, to return res. rate-payers.
2. Sat. Open Day.
3. SUN. *1st Sunday in Advent.*
4. Mon. Paper Day, Q. B. New Trial Day, C. P.
5. Tues. Paper Day, C. P. New Trial Day, Q. B. Last day of notice of trial in Co. Courts. Consolidated Statutes came into force 1859.
6. Wed. New Trial Day, C. P. Open Day, Q. B.
7. Thur. Open Day. Re-hearing Term in Chancery com.
8. Fri. New Trial Day, Q. B. Open Day, C. P.
9. Sat. Open Day. Michaelmas Term ends. Last day for Attorneys to take out certificates.
10. SUN. *2nd Sunday in Advent.*
12. Tues. General Sess. and Co. Court Sitt. in each Co.
14. Thur. Grammar and Common School assessment payable. Collector's roll to be returned unless time extended.
17. SUN. *3rd Sunday in Advent.*
18. Mon. Nomination of Mayors, Aldermen, Reeves, Co. and Police Trustees.
21. Thur. *St. Thomas.*
24. SUN. *4th Sunday in Advent.*
25. Mon. *Christmas Day.* Christmas vacat. in Chan. beg.
26. Tues. *St. Stephen.*
27. Wed. *St. John the Evangelist.* Nomination of School Trustees in Toronto.
31. SUN. *1st Sunday after Christmas.* Last day for School Trustees to make half-yr. report to Loc.Sup.

THE

Canada Law Journal.

DECEMBER, 1871.

LAST AMENDMENTS OF THE COMMON LAW PROCEDURE ACT.

SECOND PAPER.

It remains now to advert to the provisions contained in the last nine sections of 34 Vic. cap. 12.

The 9th section is valuable as defining the law in regard to the exclusion of witnesses, and parties who propose to make themselves witnesses, which had theretofore been in a remarkably fluctuating state. It would be unprofitable to review these changes; it will be enough to state the result of the cases sanctioned by the best judges, in order to manifest that this section is certainly an "amendment" of the law. There was always the right to require that the unexamined witnesses should withdraw from court; but parties could not be ordered out, as long as they behaved with propriety. If either party or witness remained in court after being ordered out by the presiding judge, there was no power to exclude his evidence on that account. All that the judge could do was to observe upon such perversity to the jury, and to recommend them to weigh well the credit due to testimony given under such circumstances. Reference may be made to the following cases, which contain most of the law on the subject: *Constance* v. *Brain*, 2 Jur. N. S. 1145; *Parker* v. *Williams*, 6 Bing. 683; *Attorney-General* v. *Bulpit*, 9 Pri. 4. The case of *Cobbett* v. *Hudson*, 1 E. & B. 11, is very instructive; and it shows that at common law the judge had the power to fine a witness for disobeying his order to leave the court. The present Act leaves it to the judge's discretion as to directing the witnesses to go out (see *Taylor* v. *Lawson*, 3 C. & P. 643), and also leaves the punishment for disobedience to his discretion. It has been urged by some that this section should have declared in express terms that a witness or party refusing to withdraw should be *ipso facto* rendered incompetent to give evidence in the case. This, however, would seem to be involved in the last proviso, if the judge considers it advisable to exclude the testimony of such persons, and probably will answer all the purposes intended.

Section 10 of the Act is framed to get over the ruling of the court in a late case, the reference to which we have mislaid. The same point was held in *McGuire* v. *Laing*, 19 U. C. Q. B. 508, not cited in the later case; and it is no doubt a provision in furtherance of a laudable desire to shorten litigation.

Section 11, providing for the service of papers on the agents of certain corporations, and defining who are such agents, is a very beneficial enactment, and effectuates to a legitimate extent what was contemplated in section 17 of the Consolidated Common Law Procedure Act. The case of *Taylor* v. *Grand Trunk Railway Company*, 4 Prac. R. 300, and others of a similar kind not reported, but well known in the profession, show the necessity for such an amendment in the law, in order to avoid the needless expense of effecting service in the common law courts. It would be well if the Court of Chancery were to adopt the provisions of this section, as they have already done, in General Order 91, the clause we refer to of the Common Law Procedure Act.

Section 12, extending for two clear additional days the time for service of pleadings and notices in country causes when the Toronto agent is served, seems to be lessening the expenses of interlocutory proceedings in the suit, *e. g.*, by applications for

time to plead; and, as to notice of trial and countermand, may be a consequence of the decision of the Court of Common Pleas in *Morell* v. *Wilmott*, 20 U. C. C. P. 378.

Section 13 carries the amendments beyond the title of the Act, and into the Act respecting Attorneys-at-law. The effect of this change is to limit the reference to taxation of an attorney and client bill of costs to the proper officer of the county where the work was done; and this not only with regard to applications by the party chargeable, but also to those by the attorney himself. The law is also changed in this respect as to solicitors in Chancery. It strikes us that this being so, it will need some rules of court to prevent some very absurd circumlocution that may be devised by ingenious lawyers to bother their adversaries upon the present mode of procedure in reference to taxations before officers in the country.

The taxation of these bills in the outer offices should be final, except in case of appeal to the judge; but at present, by section 331 of the C. L. P. Act, there is the right to have a revision of the bill so taxed in the principal office. The late Judge Burns thought that there should be an order obtained for such revision, but the language of the section is too explicit to permit of such a course of procedure. And the same anomaly may occur in Chancery under General Order 311. After the solicitor and client bill has been taxed by the local master, he is by this order required to transmit the same for revision at Toronto. Of course this is quite a meaningless provision in a contested taxation such as the one in question: the rule was framed for quite a different purpose; yet we understand that the Clerk of Records and Writs has refused to issue execution on the local master's finding of what was due upon such a taxation, because the bill had not been revised at the head office. The possibility of this circuitous procedure will doubtless be remedied either by rule of court or the decisions of the judges of the different courts.

At a recent meeting of the Law Reform Commissioners, Mr. F. C. Draper, Barrister, of this city, the youngest son of the learned President of the Court of Appeal, was appointed Secretary to the Commission. The appointment is a good one, and we heartily congratulate Mr. Draper on his obtaining it.

LAW SOCIETY, MICH. TERM, 1871.

CALLS TO THE BAR.

During this Term, the following gentlemen were called to the Bar:

Messrs. Hector Mansfield Howell, Belleville; William Frederick Walker, Hamilton; Henry Bleecker, Belleville; Duncan John McIntyre, Lindsay; Henry H. Smith, Peterboro'; Daniel McCraney, Bothwell; Allan Cassels, Toronto; Jonathan Brown Dixon, Peterboro'; Henry A. Ward, Port Hope; John Williamson Jones, Brantford; James Henry Burritt, Brantford; Thomas Maitland Grover, Peterboro'; Harry H. Hill, Toronto; John A. W. Hatton, Peterboro'.

The two first gentlemen were not required to pass an oral examination.

ATTORNEYS ADMITTED.

The following were admitted as Attorneys, without oral examination:

Messrs. Duncan John McIntyre, Lindsay; Hector Mansfield Howell, Belleville; Henry Bleecker, Belleville; John Rowe, Guelph; Davidson Black, Toronto; William Macdonald, Toronto; John Badgerow, Toronto; Jonathan Brown Dixon, Peterboro'; Thomas Maitland Grover, Peterboro'; Allan Cassels, Toronto.

And the following gentlemen, after an oral examination:

Messrs. John White, Hamilton; J. Bleecker Powell, Guelph; John H. Metcalfe, Merrickville; Jas. Henry Burritt, Pembroke; James Fletcher, Brampton; John Winchester, Toronto; R. R. Lang, Stratford.

STUDENTS AT LAW.

The following gentlemen passed their primary examination, and were admitted to the Law Society:

University Class.—Messrs. J. G. Robinson, B.A.; George Hughes Watson, B.A.; Michael Kew, B.A.; William Henry McFadden, B.A.; Wm. Rufus Burnham, B.A.; Michael Hector Brethour, B.A.; Heber Archibald, B.A.; Jas. Stewart Tupper, B.A.; Edwin H. Dickson, B.A.; David Ormiston, B.A.; William Hall Kingston, B.A.

Junior Class.—Messrs. Edward Mahon, Andrew Dickson Patterson, Wm. McWhinney, John Denison Lawson, David Steele, Victor Alex. Robertson, Ernest Crombie Mackenzie, Richard Thomas Steele, Frederick Geo. Smart, Thomas Mercer Morton, Silas Carbelle Locke, Richard Dulmage, Geo. Whitfield Grote, John Creighton, Albert Ernest Smythe, John Stock Fraser, John Wallace Nesbitt, T. C. W. Haslett,

Robert Pearson, T. S. Wade, Albert Ogden, Alexander Ferguson and E. S. Malone.

INTERMEDIATE EXAMINATIONS.

Owing to the number of candidates, the oral examination was postponed until Friday, November 25th.

The following passed in the fourth year:

Maximum, 210.

Without an oral: — Messrs. J. Killmaster, 175; Robert Sedgwick, 169; Thomas Langton, 159; William R. Mulock, 157.

And the following after an oral examination:

Messrs. W. Hector, J. B. McArthur, H. J. Macdonald, G. B. Jackson, John McMillan, J. A. Paterson, David Robertson.

The following passed their first intermediate examination:

Maximum, 210.

Without an oral:—Messrs. John Winchester, 200; John Small, 193; E. B. Edwards, 178; H. M. Ellis, 170; Arthur H. Colville, 167; Arthur W. Coleman, 165; W. D. Hogg, 164; John H. Bell, 160; A. S. Ball, 157; A. R. Creelman, 157.

After an oral examination, also—

Messrs. C. W. Ball, A. D. Cameron, S. R. Crickmore, H. M. Deroche, T. D. Grover, John McGregor, C. Egerton Ryerson.

The Scholarships were awarded as follows:

Maximum, 320.

4th Year: Not awarded.
3rd Year: Mr. Barber, Simcoe, 236 marks.
2nd Year: Mr. McMillan, Toronto, 272 "
1st Year: Mr. F. E. P. Pepler, Toronto, 276 marks.

ELECTION CASES.

We are indebted to Mr. Brough, Barrister of this city, for a report of the trial of the South Grey Election Petition, of which Court Mr. Brough was Registrar. This report has been very carefully prepared, and we think we can safely vouch for its correctness. It is now in type, but want of space prevents our inserting it in this issue.

Mr. Rusk Harris, Barrister and Registrar of the Courts for the trial of the Election Petitions for East and West Toronto, is also preparing for the *Law Journal* reports of those two important cases, which will, we doubt not, be as reliable as that of the Stormont Election Case, also a contribution from him. These gentlemen are thoroughly familiar with the subject, and we are glad to have obtained their assistance in these matters.

We have been requested to announce that Mr. S. R. Clarke, Barrister-at-Law, is publishing a treatise on Criminal Law, as applicable to the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, and Manitoba, which cannot but be most acceptable to the profession. The scope of the work may best be given in the words of the published circular:

"It is intended to cite every *reported* case in the several Provinces, and also the cases in the English Law Reports. These cases have not yet been embodied in any text book. In addition to this, the general design of the author will be to discuss concisely the principles of English Criminal Law, to show how they are modified by our statutes and decisions, and what portions are recognized in such statutes and decisions: to treat of the English Criminal Law prevailing in the several Provinces of the Dominion, the authority for its introduction, and the extent to which it has been introduced: to give a synopsis of every *reported* case in the several Provinces, referring also to Civil cases in which the principles of Criminal Law are incidentally discussed so far as such discussion elucidates the general Criminal Law: to compile a special chapter on extradition from the various decisions on the subject in the several Provinces: to annotate all Canadian Statutes on which decisions have taken place in this country or in England (on analogous Statutes), by giving all English and Canadian decisions thereon. The work will contain about 600 pages, and no Statutes or superfluous matter will be printed. Statutes will be merely referred to by chapter, section, &c. The author has very carefully and thoroughly searched and examined all the reports published in the several Provinces, and has selected therefrom *all* cases which have any bearing on the subject. The decisions of each Province are important in the others, as the Courts are all guided by the light of English decisions, and there is but little conflict between them. It is not intended to touch on the questions of pleading and evidence further than they are developed in the Canadian cases. In other respects, the work will contain everything of importance to be found in the more expensive English treatises."

We have long been hoping to see some competent person undertake what is here promised, and from what we have been told by those who have seen some of the advance sheets, there is every reason to think that Mr. Clarke will do his work well and thoroughly.

SELECTIONS.

LOCAL COURTS, AND THE BOUNDS OF THEIR JURISDICTION.

BY MR. SERJEANT PULLING.

We all now admit the value of local courts, and the necessity of bringing home justice to every man's own door. Our surprise is, how the principle could be so long successfully defied; how, in civil cases, the quibbles, and dishonest fictions, resorted to in Westminster Hall, to bring our ancient system of local courts into contempt, could be suffered to prevail; how, for justice administered on the spot, our forefathers could tolerate the gradual substitution of a compound of law, doled out at a distance, at a great cost, in a very pedantic form, and of so very artificial a character as to almost defy the detection of the *simple* justice as one of its ingredients. We are apt to forget, in considering our legal institutions, and the reforms to which they have been subjected, how much of good is derived from a remote period, how much of evil and abuse from that which has intervened. In dealing with the subject of local courts, the innovations that were gradually introduced, the reforms which have been effected, and the reforms which are still needed, it is usual to dwell only on the question of civil jurisdiction, whereas there is hardly anything that is applicable to this part of the subject which cannot, with equal force, be brought to bear on the question of criminal jurisdiction.

The principle of Alfred's Code of Laws was, that all matters, both of civil and criminal jurisdiction, should be disposed of in the locality in which they occurred, by local judges, and by a jury chosen from the immediate locality. If the County Court, before the innovations of the Norman lawyers, was the universal Court of First Instance in civil cases, its other chamber, the Sheriff's Tourn, had a similar jurisdiction in criminal cases. If it was through the subterfuges of Westminster Hall that the old County Court lost its importance as a civil tribunal, it was by means also of its legal subterfuges that its criminal jurisdiction became a dead letter. The usurpation of the civil jurisdiction of the old County Courts by the Courts at Westminster Hall, was not a greater innovation than the narrowing the criminal jurisdiction of the Sheriff's Tourn by a succession of *judge-made laws*, and the substituting for this jurisdiction the authority conferred by the royal commissions of oyer and terminer and gaol delivery, and that much slighter guarantee for judicial efficiency, the mere commission of the peace. We express wonder at this day how such unwarrantable encroachments on the constitution could have been effectually made; how the Legislature could have remained silent or ineffective in dealing with such innovations; how it could be endured that an arbitrary test of the limit of jurisdiction in civil cases, the amount of 40*s.*, fixed at a time when it represented at least forty times the present value of that sum, should have continued till twenty-five years ago to have been adhered to, in defiance of the notorious changes in the value of money, and how, for the legal recovery of all sums exceeding 40*s.* it became competent to the suitor, if not compulsory, to resort to the cumbrous, costly, and dilatory machinery of an action or suit in the Superior Courts at Westminster. But it is not the less true that during the 568 years which elapsed between the date of the Statute of Gloucester, and the passing the County Court Act of 1846, the only remedy afforded by the Legislature against the abuses that had crept into our system of administering justice in small debt cases, was the institution by special favour in some towns, of *Small Debts Courts*, of a worse description than the old institutions so unnecessarily laid aside, and rapidly productive of so many evils, that the scant and costly justice of the Courts of Westminster Hall was preferred to the injustice which was so frequently the produce of these eccentric tribunals.

The want of an effectual substitute for the old system of local courts of criminal jurisdiction led, as we all know, to that chaos of legal enactments, giving the jurisdiction of justices of the peace, who, originally appointed as conservators of the peace, came at the whim of every fresh Parliament to have gradually heaped upon them judicial functions more extensive and varied, confused and unintelligible, than perhaps have ever been conferred on any honorary official body of men expected by a fiction of law to understand their duties.

Our system of local courts of civil jurisdiction is now thoroughly established. For the success of this institution we are, if the truth must be told, less indebted to Westminster Hall or the woolsack than to wholesome public feeling, which has given earnest welcome to an institution, essentially good, based on the ancient principles of our constitution, and, after unwarrantable restrictions placed on it by the Courts at Westminster, revived to make up for their shortcomings. It is quite unnecessary to dwell upon the ordeal the institution of our modern local courts had to go through. Bigotry, prejudice, and selfish interests pointed out nothing but evil from the experiment, the spread of a spirit of litigation and extortion, the deterioration of judicial character, the destruction of the Bar, and the legal profession generally; and whilst the sudden creation of such a large number of new judicial offices brought into the field a little army of candidates, it certainly cannot be said that, as a rule, the most eligible were selected. It came to be a practice in Westminster Hall to speak of the County Court Judges with disparagement; stupid anecdotes, illustrating their inefficiency, were circulated, and if, by any subterfuge, the jurisdiction

of the County Courts could be excepted to, it seemed justifiable and right. Whether, through actual defects in our system of judicial patronage, or the want of confidence which the profession had in the appointments of County Court Judges, these officials were treated for a long time, both in Westminster Hall and St. Stephen's, as if unfit, to dispose of any but the simplest cases, involving neither large amounts, complicated facts, or serious questions of law.

The Legislature has now gradually increased the jurisdiction of the County Courts, so as to make them certainly something more than what they were originally called. Small Debt Courts and the salaries of the Judges have very properly been augmented. We have a right to expect that, with the large number of really eligible men who now are said to aspire to the office of Judge of County Courts, the appointments will be henceforth in every way free from objection.

Since the original Act of 1846, the legislation upon the subject of the County Courts has been great; the limit in amount and character of their jurisdiction, legal, equitable, and extraordinary, the powers of the Judges, the sittings of courts, the amount of costs, &c., have all been dealt with, and if we are to credit the *on dits* as to the Judicature Commission, greater changes are impending. We pause now, only to refer to the propositions of Mr. Daniel,* who, in his paper, recently read before the Social Science Congress, seems to propose that the County Courts for the purposes for which they were really called into existence (viz., the adjudication of cases of small debts and demands, and the administration of justice in the immediate district where the dispute arose) shall now cease; and that the courts, instead of being held, as now, at short intervals in the places at present appointed shall henceforth be established at *convenient centres:* several of the smaller courts being done away with, and a very considerable portion of the Judge's work being delegated to the Registrar.

We give Mr. Daniel's propositions in his own words:

"(1st.) A reduction in the number of the courts, by doing away with several of the smaller courts. (2nd.) The power to obtain judgment by default extended to all cases of money demand above 5*l.* (3rd.) The period of limitation for the recovery of debts for shop goods should be considerably reduced, in the spirit of the obsolete though unrepealed Statute, 7 Jac. 1, c. 12. (4th.) The principal registrars to have jurisdiction to hear all cases of contract up to 10*l.* and all cases of tort up to 2*l*, and any cases by consent, with power in special cases to refer the hearing to the judge. (5th.) The registrars should hold frequent courts for these purposes, in some places fortnightly, in all others monthly. (6th.) There should be an appeal from the registrar to the judge, whose decision should be final. (7th.) The judge should hear and dispose of all other business, with the assistance, when required, of commercial assessors, after the manner of nautical assessors in the Court of Admiralty. (8th.) There should be an appeal from his original jurisdiction to a Divisional Court of the High Court of Justice. (9th.) The Courts of First Instance should be established in the metropolitan districts as well as throughout the country. (10th.) By a re-arrangement of circuits and concentration of courts, the Courts of First Instance should be established at *convenient centres*, and thus a considerable reduction would be effected in the number of judges and registrars—probably one-half of the judges and three-fifths of registrars. (11th.) There should be a power of removal from one Court of First Instance to another for cause shown. (12th.) The procedure and practice of all the courts should be simple and uniform, and the process of each court should run through all. The Court of Probate and Matrimonial Causes might be taken as a model for the procedure and practice of Courts of First Instance. (13th.) The judges should be appointed by letters patent, and *selected for their fitness*, and take rank according to seniority among themselves, and next after the youngest puisne judge of the High Court. (14th.) There should be a chief registrar to each Court of First Instance, an assistant registrar, when necessary, and a sufficient staff of clerks. (15th.) The existing County Court judges, who have served ten but less than twenty years, should be allowed to resign upon pensions equal to two-thirds of their present salaries; those who have served twenty years at their full salary; and the Lord Chancellor should have full power to require any others to resign upon such pensions, (not being less than two-thirds of their present salaries), as he shall deem just. (16th.) The judges and chief registrars should be ineligible for Parliament, but the judges should be eligible for the High Court, and the chief registrars excluded from practice."

Mr. Daniel adds—

"A set of courts established on this basis would, I believe, be more efficient and economical than the present, and the diminution in the number of judges would allow of judicial salaries being paid of an amount which would secure the services of able and experienced lawyers."

These propositions are somewhat startling. It is difficult to see how the number of Judges of County Courts required in 1847, when the limit of their jurisdiction was 20*l.*, can now, when that jurisdiction has been so greatly extended and expanded, be reduced, with any security for the work being effectually performed. Mr. Daniel's proposition, in aid of this scheme, that a portion of the present judges' work should be delegated to the registrars, and a number of the courts now held be discontinued, seems open to the most serious objections. There is hardly any judicial abuse more frequently complained of, and more carefully to be guarded against, than that of the judge abandoning to others the work which he ought to perform himself.

* "Local Courts, their Constitution and Jurisdiction," a paper read before the Jurisprudence Department of the Social Science Congress, held at Leeds, October 9, 1871—V. Vernon Harcourt, Esq., Q.C., President—by W. T. S. Daniel, Q.C., Judge of County Courts Circuit, No. 11.

When we hear with what bitterness suitors in the Superior Courts complain of the injustice done them, by their being driven to refer to arbitration matters which, at great cost, they had submitted for trial in the ordinary course; when we have heard so much of the evil practice too frequently resorted to at Petty Sessions, of leaving much of the work, legally entrusted to the justices, to be dealt with by the magistrate's clerk, how great is the present dissatisfaction of the suitor where the judicial business in a County Court is neglected by the judge, and, as far as the law allows, delegated to the registrar, it is altogether impossible to justify the Judges of the County Courts, being legally allowed to delegate to the registrars so large a portion of their judicial functions as Mr. Daniel here proposes.

The great object of the institution of local courts is to secure the efficient administration of justice as near as possible to the scene of litigation. It would not be tolerated at this early period of the reformed system of County Courts that, under any such pretext as Mr. Daniel affords, the stream of justice should be allowed to flow back from the course of localization to that of centralization—and it is indeed difficult to make out how it would be any compensation to the community for losing the speedy and effectual administration of justice on the spot to have a lesser number of judges sitting in greater dignity, and with more pay, at a distance.

The suggestion that has been of late so frequently made, and is adopted by Mr. Daniel, that the jurisdiction of the County Courts as Civil Courts of First Instance should be extended, is entitled to far more consideration. The number of civil causes tried on circuit is becoming every year smaller. To make the County Court Judges assistant to, if not substitutes for, the judges of assize, in a large number of cases, reducing the number of circuit towns, instead of, as Mr. Daniel suggests, the number of places for holding local courts, would be an unmitigated advantage. The County Courts, with all the defects inherent in a system built up by patchwork legislation, are a valuable institution—let us increase their jurisdiction, but not on any pretence take away the boon conferred on the public of supplying justice in small cases, as in large, speedily and effectually, in the very district where the litigation arises.

The justice now administered in civil cases, however, forms but an inconsiderable part of that which the community require. To really bring home justice to every man's own door it is necessary to look beyond this. The wrongs that are every day suffered, the grievances to be redressed, especially among the humbler classes, can be but ineffectually dealt with by any mere improvement in our forms of action and civil procedure. The complaint may involve a criminal charge, the character, the happiness, the well-being of individuals or of classes, to whom the redress, by a formal action at law, is a mere mockery. Wherever a criminal charge is involved, the parties who stand as accusers and accused have a more serious issue raised than that which arises in ordinary civil actions. To each of them the dealing with the charge legally, justly, and at once, and on the spot, is of far more importance than the having civil remedies supplied for mere debts or money demands. To the mass of the people the only justice they are accustomed to look to now, is that which is dealt out to them in the magistrates' courts. If the jurisdiction in criminal matters, and in the large range of cases which are now entrusted to the magistrates, were as carefully legislated for as the recovery of debts, the humbler classes would feel more respect for the law, and would more rarely seek to be their own avengers; and the whole community would be altogether more benefitted than by any mere reforms in civil procedure. Is it not practicable to effect reform equally efficacious in the local procedure with respect to the one branch of justice as to the other?—so to reform our system of administering justice in the great range of matters which now come within the jurisdiction of justices of the peace, and in matters of a kindred character, as to make the dealing out law to the masses seem more like the simple administration of justice.

It would be a work of interest to show how the old Anglo-Saxon system of local justice, which in civil cases has in our times been, to a great extent, restored by the revival of the County Courts, and which existed in no less force, certainly with respect to criminal cases, came step by step to give way to innovations, more or less, of Norman growth—how, long after the newer institutions had been generally established, the earlier plant continued to be cherished in our ancient cities and towns, whose charters and ancient customs upheld the privilege of having justice in criminal as well as civil cases administered in local courts; and how, in spite of the spasmodic efforts of the Legislature to provide, by a heap of Statute Law, for the difficulties which the substituted institutions have occasioned, the administration of justice in criminal cases and in our magistrates' courts is still left altogether uncertain, confused, and unsatisfactory. It is not practicable to pursue this topic now—we have only to point out that there seems no good reason which is applicable to the question of reform in the administration of justice in civil cases, which does not, with at least equal force, prevail with respect to criminal cases; no reason why, if the revival of the ancient system of County Courts has answered in the case of the one, a similar reform might not be advantageously effected with respect to the other; why we could not have tribunals of First Instance, for the speedy and satisfactory disposal of the whole criminal business of the country within each of the present County Court districts, as well as the

County Courts in their present form; why a County Court Judge sitting alone, or as president of the assembled magistrates, could not do all this (with a jury, of course, in those cases where a jury is now required), as effectually as a judge or commissioner on circuit, as the chairman of Quarter Sessions, or a Bench of Justices at Petty Sessions. It would, of course, require the appointment of additional County Court Judges, but if the advantage of this were not deemed sufficient to make up for the cost, the deficiency would be amply made up by the saving in the expenses of trial, and the keep of prisoners waiting to be tried, without taking into calculation the personal cost to prosecutors, witnesses, the police, the complainants, and the accused, under the present system. Were such local courts established, there would be no difficulty in leaving to them not only the jurisdiction now entrusted to magistrates, but in many cases this jurisdiction might be enlarged. A summary jurisdiction and power might with great advantage be given to the Court in many cases where magistrates have now no power. Thus it might with advantage be provided that, in case of a criminal charge, the Court should at once dispose of the question of compensation, for a wrongful accusation, prosecution, or false imprisonment, subject, of course, to appeal in certain cases. In the case of disputes between master and servant it would be a great advantage to give the Court power in all cases to finally adjudicate, without restricting, as at present, the jurisdiction to the case of servants in husbandry. It might also with advantage be entrusted to such courts to deal summarily in case of slander and false accusstion, to assess the compensation to the injured person, or to adjust all differences, as in the case of assaults.

The progress of law reform, like the building of the projected Palace of Justice, appears at present to be slow. It may be that the plan of so distinct a change as that here proposed may meet with obstacles—that the institution of an unpaid magistracy is one which, whether it work well or ill, Parliament would hesitate to do away with. There is still a great deal to be done without trenching on such delicate ground.

If we look at the present constitution of our unpaid magistracy, we shall find a great deal which might be remedied, without introducing any serious innovation. The Commission of the Peace for every county, including the names of gentlemen whose legal qualifications consist in the possession of 100*l.* a-year in land, has still the *quorum* clause in it, by virtue of which, in old times, Blackstone informs us, the presence of one of a select number of efficient men was required at every sitting, a requirement which, as he explains, was, and is, evaded by a sort of trick, the names of one and all being repeated in the quorum clause. This quorum clause is still efficacious in other commissions from the Crown, as the Circuit Commissions, where the quorum is constituted, not of the grandees named in it, but only of the judges, serjeants-at-law, and Queen's counsel of the circuit. By simply following the same course with the Commission of the Peace, one substantial improvement would be easily effected; and, in truth, very little is required to make our ordinary magistrates' sessions, if not perfect, at least as efficient as tribunals at once exceptional and honorary can be.

There is hardly a single instance where the Commission of the Peace does not contain the names of men with higher legal qualifications than those legally required of, or ordinarily possessed by, the stipendiary magistrates appointed for the metropolis and elsewhere; *e. g.* men who have served as judges of the Superior Courts at home or in the colonies, Queen's counsel and serjeants-at-arms, judges of County Courts, chairmen or deputy-chairmen of Quarter Sessions, recorders of cities, &c. The existing state of the law tends, in a great degree, to discourage such men from acting as magistrates under the Commission.

By the Statutes now in force, no single magistrate (not being a stipendiary) can, alone, transact the ordinary judicial business of a justice of the peace; any unpaid magistrate, whatever his judicial aptitude, is simply placed on a par with the other justices in the commission. If he attends Petty Sessions he may have to sit under a chairman in whom he has no confidence, and find his brother justices wholly depending on the clerk for knowledge of their duties; and yet he may find himself outvoted in the ordinary business and decisions of the court. After such experience, he may probably be induced to absent himself for the future and to leave the magisterial work wholly to the care of those whom he knows to be less competent, who may be very estimable in private life, perhaps even distinguished in society and in public, but who, being without legal education or experience, are necessarily as much out of place on the judicial bench as men without medical education would be to decide cases at a hospital or an infirmary.

By a very easy amendment of the modern legal provisions which have been referred to, the advantage might be gained, of securing, in every district, magistrates at least as efficient and serviceable as stipendiary magistrates, without their cost, and all this without disparagement to other magistrates in the Commission. Thus, on every justice of the peace, possessed of the judicial qualifications already referred to, let there be conferred the powers and jurisdiction now attaching to the office of stipendiary magistrates. Let a return be at once obtained from each county of the names of all persons in the Commission of the Peace so specially qualified, and their names be included in a new commission as presiding magistrates. It might, without any fear of inconvenience, be provided that such presid-

ing magistrates shall have precedence of all other magistrates, and that one shall act as chairman at every magistrates' court they attend. By a few simple rules as to the time and place of holding Petty Sessions, the attendance of one of such presiding magistrates could always be secured, and thus, without any very radical change, the existing machinery could be made to work till a better were substituted.—*Law Magazine.*

The present deplorable condition of the Bar is illustrated by an application made on Wednesday to Mr. Justice Byles, under the Debtors' Act. A barrister was the debtor, and his Lordship made an order for payment by monthly instalments of £2. On the debtor's behalf it was stated that he had on an average one brief in a twelvemonth—and could not pay £2 a month out of so precarious an income. But to what or to whom is to be attributed the melancholy condition of so many barristers,—for the learned Judge was undoubtedly right when he said that not one in twenty covers his outlay on entering the profession? In the first place numbers of needy men go to the Bar on the merest speculation, without any particular gift of eloquence or special knowledge of law, and what is still more fatal, without connection. Not only this, however, but strange to say, men who both physically and intellectually are unfitted for the practice of the law, crowd the ranks of the Bar. The shortest possible stature is considered no disqualification, whilst woolly-headedness, effeminacy of intellect, defective articulation, and the utter absence of the logical faculty, present no difficulties to the mind of the young aspirant or his guardians. A large number of barristers are, beyond doubt, unsuited in every way to the profession; but, again, many admirably adapted for it are without private means, too frequently have no idea of earning money outside their vocation, and, worn out by the cares of existence, sink into the condition which revealed itself to Mr. Justice Byles. There are, however, hard cases which no foresight could provide against. The increase in the number of barristers, many being the near connections of attorneys, scatters the work already in process of being scattered by legislation relating to County Courts. To such causes is attributable the bare appearance of many a table in the Temple once well covered with profitable business. Sound lawyers of acknowledged capacity and experience are unemployed, and this fact it is to which we would principally call the attention of undergraduates and men already in professions which they desire to leave. A livelihood is not to be got out of sessions where there are, on the average, two counsel to one prisoner, nor out of circuits, save to the favoured few, where there are frequently three times as many (on the Home Circuit we should say ten times as many) counsel as there are causes. London business is in the hands of a score of prominent men, but the cause lists are slowly dwindling to insignificant proportions. This is no exaggerated description of the present condition of the Common Law Bar, whilst in Chancery, although business there is comparatively plentiful, progress is even more difficult without strong connection. It has been suggested that stringent examinations would have a good effect in thining the profession. We believe they would not exclude those who hope to live by the profession, but that they would exclude the wealthy, who largely contribute to keep up its social status. There is really no remedy for the existing condition of things but the prompt action of the Legislature in forming local courts, and so giving scope to local Bars throughout the country, and the wise action of tutors and guardians in directing the minds of their charges, not to impossible aims, the realisation of which is reserved to the highly-qualified few, but to useful if subordinate walks of life, in which they may find work suited to their capacities, producing a means of living honourably.—*Law Times.*

CANADA REPORTS.

ONTARIO.

PRACTICE COURT.

In the matter of Arbitration between Lewis Hotchkiss and William Hall.

Arbitration—Setting aside—Shewing cause to rule—Misconduct of arbitrator—Reception of improper evidence.

On applications to set aside awards for misconduct of arbitrators, the facts which are relied upon to establish charges of partiality and unfairness on the part of an arbitrator must be clearly averred.

Quære as to right on such application to shew cause on last day of term.

The decision of an arbitrator being binding on the parties in matters of law as well as in fact, an award will not be set aside because letters are put in as evidence by one of the parties, which are not legal evidence, if the circumstances and the conduct of the arbitrators are consistent with the supposition that they only read the letters for the purpose of judging of their admissibility as evidence, and it not appearing that they actually received them as evidence.

A taxation by a deputy clerk of the crown of costs under an award, on a reference to arbitration of two causes in different courts, together with all matters in difference, is not a nullity, as being beyond his jurisdiction, and probably not even an irregularity.

[Prac. Ct., E. T., and June 24, 1871.—Gwynne, J.]

On the 1st day of April, 1870, there being two cross-actions pending between the above parties, they, by an agreement of that date, signed by them, agreed to refer the said actions, and all matters in difference between them, to the award, order, final end, and determination of Thompson Smith and Stephen T. Peckham; and in case the said arbitrators should not agree in the determining any matter or thing or matters or things thereby referred to them, the matter or thing in which they should not agree should from time to time be referred to and determined by such person as they should appoint in writing, before entering upon the consideration of the matters referred; so as the award or umpirage

should be made, ready to be delivered, on or before the first day of May, then next, or on or before any other day not later than the first day of July, then next, to which time the said arbitrators were empowered to enlarge the time for making the said award and umpirage.

Nothing having been done under this submission, the above parties, Hotchkiss and Hall, by an agreement signed by them, endorsed on the agreement of reference, and dated the 18th February, 1871, enlarged and extended the time for making an award under the terms of the agreement until the first day of May, 1871. Thereupon, and before entering upon the consideration of the matters referred, the arbitrators, by an appointment endorsed on the agreement of reference and signed by them, appointed Henry Stark Howland as umpire, under the terms of the reference.

The arbitration was thereupon proceeded with throughout in the presence of the arbitrators and the umpire.

The arbitrators, Smith and Peckham, made their award in the premises, signed by them, upon the 17th March, 1871; a copy of the award so made was served upon Hotchkiss, at the instance of Hall, upon the 28th day of March last.

By the submission it was agreed that the same should be made a rule of the Court of Queen's Bench, and early in Easter Term last it was made a rule of that court. On the 22nd May a rule *nisi* was obtained, at the instance of Hall, calling upon Hotchkiss to shew cause why the money directed to be paid by the award should not be paid in pursuance of it. Upon the 30th of May this rule was made absolute, no cause being shewn to the contrary, and all the conditions entitling the applicant to such an order having been fulfilled.

On Friday, the 2nd June, *McCarthy*, on behalf of Hotchkiss, moved for a rule *nisi* to set aside the award on various grounds.

C. Robinson, Q. C., being present in court, intimated his intention to shew cause in the first instance, and Mr. McCarthy proceeded with his motion, but at the rising of the court had not concluded. In the course of his argument he mentioned certain matters which, he said, appeared on affidavit. Being requested to read that affidavit, he found that he had it not with him in court, and upon leaving court at its rising, the learned Judge said that he would hear the affidavit in the morning.

On the following morning it appeared that after the rising of the court two affidavits had been filed, including the one which had not been in court during the argument. After citing a case, Mr. McCarthy desired that it should be considered that his motion had been closed on Friday, and insisted that under an old rule of the Court of King's Bench in England, 36 Geo. III., cause cannot be shewn on the last day of term, to an application to set aside an award. But, by leave of the learned Judge,

C. Robinson, Q. C. (*O'Brien* with him), now showed cause, subject to this objection.

D. McMichael and *McCarthy* supported the rule.

Gwynne, J.,—In the latest editions of Mr. Archbold's work, although this old rule cited by Mr. McCarthy, that cause cannot be shown on the last day of term, is referred to, it is stated that in modern times the practice is sometimes departed from; and in this case, if it is competent for me, I esteem it my duty to relax the rule. When the court rose upon the Friday, the motion had certainly not been concluded—a material affidavit, which was relied upon, was not in court, and I consider it to have been well understood by all parties, as it was by the court, that the motion should be renewed in the morning. I must therefore consider that the motion is too late, as having been carried into and made upon the last day of term, or I must give to Mr. Robinson the benefit of being considered to have opened his case on the Friday, and continued it only on the Saturday. A rule which must be considered as having been established to promote convenience cannot, I think, be permitted to be appealed to for the purpose of effecting what would manifestly be an injustice. I consider therefore, that I am not only not prevented by rigid rule from considering the argument as heard, but that it is my duty in the particular circumstances to prevent the objection prevailing.

The grounds stated in the motion paper for setting aside the award are: 1st, That Thompson Smith, one of the arbitrators, to whom the said matters were referred was partial and corrupt in his conduct as such arbitrator, and acted throughout in an unfair and unjust manner towards the said Lewis Hotchkiss.

2nd. That the said Thompson Smith heard the statements and examined the papers of the said William Hall with reference to the matters submitted, behind the back of the said Lewis Hotchkiss, and at times when the said Lewis Hotchkiss had no notice or knowledge of such statements being made, and when no meeting for the prosecution of the said reference had been appointed.

3rd. That the said Thompson Smith and Wm. Hall had consulted together with reference to the matters pending before the said arbitrators, from time to time, during the time that the said reference and hearing were being had.

4th. That the said arbitrators improperly admitted and received as evidence letters alleged to have been written to one Wood by persons unknown to the said Lewis Hotchkiss, alleged to be in respect to the way the lumber said to be manufactured by the said William Hall for the said Lewis Hotchkiss, was manufactured, and as to whether the same was merchantable or not, which were the chief matters in dispute between the said parties, and in respect to which the said submission was made.

5th. That the said Thompson Smith acted improperly in refusing, during a portion of the time that the said reference was being heard and proceeded with, to permit or allow the said Lewis Hotchkiss to have notes made by a third person, although the said Lewis Hotchkiss was unable to take or make notes himself of the evidence of the witnesses examined on behalf of the said William Hall.

6th. The motion paper also asks that the rule made ordering payment of the amount of the said award and the costs taxed in pursuance thereof, and the execution issued thereupon, may be set aside or rescinded on the grounds aforesaid, and on the further ground, that the said costs purporting to be taxed in pursuance of the said award were taxed irregularly and improperly by

the deputy clerk of the Crown and Pleas for the County of Simcoe, who had no power to tax the same.

The first, second, third and fifth of the above grounds attack the conduct and motives of one only of the arbitrators, Mr. Smith. The affidavits upon which the application is based, impute to him partiality and corrupt conduct in this, that, as is charged, he acted throughout in an openly partial and unfair manner, and as the advocate of Hall, and not as an arbitrator, and to this conduct the applicant Hotchkiss imputes the result that an award unfavorable to him has been made, and which he considers as unjust.

The first ground, taken by itself, is altogether too vague to be entertained as an accusation against a person filling a judicial office: *Barr* v. *Gamble*, 4 Grant 626. In *Bedington* v. *Southall*, 4 Price, 231, cited by McLean. J., in *Slack* v. *McEathron*, 3 U. C. Q. B. 184, it is laid down that "the court requires *strong facts* and to be *distinctly* stated, in cases of setting aside awards and that a denial of any such is conclusive." Charges of corruption should not be imputed upon slight grounds. The facts which are relied upon as establishing the charges should be clearly, unequivocally and positively averred. Judges of the parties' own choice must not be permitted to be exposed to accusations of corruption based upon loose surmises, suspicions and conjectures of disappointed suitors, or upon insinuations of corrupt inuendoes attached to words innocent in themselves and naturally capable of an honest interpretation. In this case the charges of partiality and corruption made against Mr. Smith are, in my judgment, wholly displaced by the affidavits filed in answer.

Mr. Howland, the umpire, who was present during the whole of the arbitration, says that he has read a copy of the affidavit of Lewis Hotchkiss proposed to be used, as he is informed, in an application to set aside the award, and he says that the statements and insinuations of said Hotchkiss as to partiality and unfairness on the part of Thompson Smith, one of the arbitrators, at the said arbitration, *are unjust and unfounded:* that the whole conduct of said Smith during the said arbitration was only that of an arbitrator desiring to elicit the truth from the witnesses without reference to whom they were called by, and he acted throughout with great fairness to both parties and not as an advocate for either, and the arbitration was conducted in a fair, open and proper manner; and he says that the award was concurred in by the two arbitrators, and having been present as umpire during all the proceedings, he adds, that the award was a fair and equitable adjustment of the matters in difference between the parties. Four other persons who were examined as witnesses before the arbitrators, and one of them as a witness for Hotchkiss, swear that Mr. Smith shewed no partiality to or preference for the said William Hall, and that both he and his arbitrator, Stephen T. Peckham, acted throughout fairly and impartially, and fairly, honestly and justly endeavoured to elicit the truth with regard to the matters in dispute.

With reference to the second and third grounds of objection, I cannot find a single fact alleged in support of the grave charges comprehended under these heads. Mr. Hotchkiss says that he *charges* and verily *believes* the accusations to be true, but offers not a particle of evidence upon which his charge and belief is founded, except that he alleges that the documents, books and papers used by Hall in evidence, were from time to time produced by the said Smith and handed to the said Hall for the purpose of being used in evidence in the said matter before said arbitrators.

Now the only foundation for the above grave charges is explained by the affidavits of Hall and of Mr. Howland, the umpire, in this manner —The arbitration was held at the Queen's Hotel, Toronto, and continued seven days; at the commencement of the arbitration, Hall produced a large bundle of books and documents which he required to refer to during the arbitration, and handed them in to the arbitrators. All those papers, and all papers and vouchers produced at the arbitration were kept in a desk belonging to Smith, locked up when the arbitrators rose from day to day, and the key was kept by the umpire or Smith, and the desk placed in the safe of the Queen's Hotel: constant reference was made to these papers in said desk during the arbitration, and the papers were handed to the parties by Smith from it when asked for or required. As to the charges themselves, Hall in his affidavit unequivocally denies them, and says that the only statements that he ever made of his case to Mr. Smith (except on the arbitration), were such as it was necessary to make for the purpose of explaining the points in dispute generally, in order to obtain Mr. Smith's consent, to act as arbitrator, which position he was averse to undertaking, owing to his other engagements.

The fifth ground of objection, although containing a charge pointed at Mr. Smith only, does indirectly assail the conduct, not only of the arbitrator, Mr. Peckham, who it is stated was a partner in business of Mr. Hotchkiss, although not interested in the matters which have given rise to this arbitration, but also of Mr. Howland, the umpire, for these gentlemen could not possibly have sat by and permitted Mr. Smith to control the matters referred to in the manner which is imputed to him, without sharing in the guilt of whatever misconduct is properly attributable to him in respect of the matter complained of. The explanation, however, which is given of the transaction, satisfactorily shews that it is not susceptible of the colouring and complexion given to it by the applicant Hotchkiss, and that what in fact was done, so far from amounting to corruption or misconduct, cannot be characterised even as an irregularity or an error of judgment.

I have noticed that Mr. Peckham, one of the arbitrators, although not interested in the subject matter in dispute, is said to have been a partner in business of Mr. Hotchkiss. Mr. Smith, the other arbitrator, is sworn to have been selected as an arbitrator as being known throughout the Province as one of the most, if not the most extensive, experienced, honourable and fair men in the timber business in the whole Province. Now so anxious do the parties, Hotchkiss and Hall, appear to have been to submit the matters in difference to the absolute uncontrolled judgment of these gentlemen, or in case they should differ, of an umpire chosen by them, that in the agreement of reference they contract with

each other as part of the terms upon which the submission to arbitration is made: "That the said parties are not at liberty to appear or be represented before the said umpire or arbitrators or umpire by counsel, attorney, solicitor, or agent, but are to conduct the hearing of the said matters referred, in person, but the said arbitrators or umpire may employ legal assistance in framing or drawing up their or his award when settled upon."

At the opening of the arbitration, Mr. Hotchkiss brought with him his bookkeeper, a Mr. Hilborn, and he desired to be assisted by him in taking down the evidence. Hall, and not Mr. Smith the arbitrator, objected to this arrangement as contrary to the above terms of the agreement, and he claimed, if the privilege should be granted to Mr. Hotchkiss, that it should be granted to him also. Hall's objection was upheld. However, during the course of Hall's examination, which I understand to have been on the first day of the arbitration, it appearing that Mr. Hotchkiss, from some injury in his hand, could not take down his notes sufficiently well, the arbitrators, with Hall's consent, allowed him to avail himself of Hilborn's services, which he from thence did until the close of the arbitration, which lasted for seven days, although no similar privilege was granted to Hall. It is preposterous that a motion to set aside an award should be based on a transaction of this nature, and it is singular, that the person to complain is the one in whose favor his own agreement for submission to arbitration was released with the consent of his opponent.

With respect to the fourth objection, what I find, upon comparison of the affidavits, to be the facts in relation to the matter which is made the subject of this objection, is as follows: Hall shipped the lumber which was the subject of dispute, after Hotchkiss refused to receive it, to one Peter Wood, at Chicago; the latter sold it to divers persons, and Hall being desirous of proving the quality of the lumber by Wood, and by the persons to whom he sold it, wrote to Wood to come over himself, and to bring some of the other parties with him. These parties it would seem, being unwilling to come over, wrote letters to Wood approving of the lumber; these letters Wood transmitted to Hall, and he, before Wood arrived, appears to have desired to use the letters as evidence before the arbitrators. This was objected to by Hotchkiss, and his objection prevailed, and the letters were not received in evidence or read; they had however, been marked when first produced, and were laid aside unread. At a subsequent stage of the arbitration Wood was called as a witness to give his evidence, and during the course of his examination he referred to the letters, read them, and said he had received them from the parties to whom he sold the lumber. I do not find that Hotchkiss during Wood's examination objected to the letters being read by him, or to his making statements as to how he received them; on the contrary, I arrive at the conclusion that it is established that Hotchkiss cross-examined Wood upon these points, and that he had full opportunity then of seeing the letters, and that he heard them read, and from Hotchkiss' affidavit, and that of Hilborn, I gather that he elicited from Wood the fact that the letters were writen by the parties in reference to this arbitration.

I have referred above to the apparent anxiety of the parties to submit their differences to the absolute judgment of the arbitrators, unaffected by the legal suggestions of counsel, attorneys, or solicitors, with the view, as it would seem, of having their disputes settled by business men without the aid of lawyers; but whether or not the clause was inserted with the view of excluding legal objections to the decisions of the arbitrators, it cannot be disputed at the present day that the decision of an arbitrator, whether lawyer or layman, is binding on the parties both in matters of law and in matters of fact, unless there has been fraud or corruption on his part, or there be some mistake of law apparent on the face of the award, or of some paper accompanying and forming part of the award. *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189; *Hodge* v. *Burgess*, 3 H. & N. 293; *Severn* v. *Cosgrave*, 2 U. C. L. J. N. S. 13; *Haigh* v. *Haigh*, 8 Jur. N. S. 983; *Hagger* v. *Baker*, 14 M. & W. 9, and many other cases put this point beyond a doubt. In *Hodgkinson* v. *Fernie*, Williams, J., says: "Many cases have fully established that position where awards have been attempted to be set aside on the ground of the admission of an incompetent witness, or the rejection of a competent one."

In *Haigh* v. *Haigh*, 8 Jur. N. S., at page 984, that learned judge, Sir G. J. Turner, says: "An arbitrator being a judge selected by the parties, and chosen to decide without appeal, this court has nothing to do with any mere error in judgment on his part. The parties have chosen him to be their judge, and have agreed to abide by his determination, and by that determination, if fairly and properly made, they must be content to be bound; but on the other hand, arbitrators, like other judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice, and this court when called upon to review their proceedings is bound to see that those rules have been observed. The difficulty which the court has to encounter in determining a question of this nature, is not as to the principles by which its decisions ought to be governed, but *as to whether what has been done falls within the range of the arbitrators' judgment* or contravenes the rules which ought to be observed in collecting the materials on which that judgment is to be exercised."

Now whether a witness be competent or incompetent is a question of law, which, however, falls within the range of an arbitrator's judgment, and his honest judgment on the point, though contrary to law, cannot be questioned. So likewise, whether these letters, referred to as they were by the witness Wood, became by the aid of his testimony admissible evidence, was a question of law, but one which fell within the range of the arbitrators' judgment, and their decision, though not in accordance with law, cannot be questioned; and, with a view to judge of their admissibility, it was necessary for the arbitrators to see their contents; but the case is wholly defective in shewing that the letters were received as evidence, or that the arbitrators in any respect formed their award upon their contents.

In *Hagger* v. *Baker*, 14 M. & W. 9, the admission of similar evidence was held to be no ground for setting aside an award. It may be that Wood referred to the letters simply to prove the truth of what he may have sworn to, namely, that the parties to whom the lumber was sold were satisfied with it, and had so told him, and a proof of this allegation was afforded by the letters.

The case upon this head has been likened to *Hickman* v. *Lawson*, 8 Grant, 386, and *McEdward* v. *Gordon*, 12 Grant, 333; but *Hickman* v. *Lawson* proceeded upon the principle that the rules of natural justice had been violated in the arbitrators examining a witness for one of the parties in the absence of, and without notice to the other; and *McEdward* v. *Gordon* proceeded on the same principle. Mr. V. C. Spragge likened it to the case of *Walker* v. *Frobisher*, 6 Ves. 70, wherein the arbitrator acted in violation of natural justice in receiving evidence from one of the parties in the absence of the other, after he had given notice to both that he would receive no more, in which both acquiesced. In *McEdward* v. *Gordon*, an affidavit of a witness upon one side, upon the most material point, was received against the urgent opposition of the other party to the award. Now that also was a plain violation of a rule of natural justice, that a party should not be examined as a witness without giving to the opposite side in opportunity of cross-examination, and here it has been urged that there is an agreement in the submission that "the witnesses on the reference, and the parties if examined, shall be examined on oath," and it is contended that the reception of the letters is in excess of the jurisdiction conferred by this clause; but this firstly assumes the letters to have been received as evidence of what may have been contained in them, which does not appear; and moreover; the clause in my judgment does not affect such a case as this, it is intended to provide for the examination of the witnesses being taken not only *viva voce* so as to permit of a cross-examination, but that such *viva voce* examination shall be taken only after the administration of an oath: and even in the case of the examination of a witness without oath, although there be such a clause as that above in the submission, all right to object may be expressly or impliedly waived by the acts and conduct of the parties: *Biggs* v. *Hansell*, 16 C. B 572; *Allen* v. *Francis*, 9 Jur. 691. This latter case seems to be a strong authority that the objection, if one of which in this case Hotchkiss could avail himself, was waived by him on his examining Wood, as I find that he did, upon the subject of the letters, and by his permitting them to be read, as I find he did, by Wood in his examination, without any objection *then* made to their being read When the letters were read and referred to by Wood in his examination, and the purpose for which they were written was elicited from him, it became a matter, if the point was then raised by Hotchkiss, upon which the arbitrators had to exercise their judgment, whether the letters should be received or not for the purpose, whatever it may have been, for which they were referred to. Hotchkiss contended that they should have properly exercised that judgment by rejecting the letters, but there was no impropriety in looking at the letters, and, that it was a matter calling for the exercise of their judgment, is admitted. Now there is no evidence to lead to the conclusion that the arbitrators did not exercise that judgment by not receiving the letters as evidence, but the point being, as I think it was, "within the range of their judgment," as expressed by Sir George Turner, and not a matter as to which their jurisdiction was fettered by the term in the reference as to the examination of witnesses upon oath, the award cannot be set aside for anything contained in the fourth objection.

It was urged by Mr. McCarthy, that Mr. Smith should be required himself to answer a passage in Hotchkiss' affidavit, the whole effect of which is to insinuate that under the pronoun *we*, said to have been repeatedly used by him during the arbitration, he meant himself and Hall, so as to impute to him corrupt and partial conduct;—but as I have already said, all pretext for imputing corruption and partiality is, in my judgment wholly removed by the affidavits filed in answer; and I am of opinion that under the circumstances he may be excused for not having thought it necessary to explain that words which if used were naturally capable of a perfectly innocent interpretation and application, as having reference to himself and his co-arbitrators, were not meant to apply to himself and Hall, as insinuated by the unsuccessful party in the litigation.

Mr. McCarthy also asked leave to file affidavits in reply to the affidavits filed in answer to his application, but the points upon which he wished to reply are not, in my judgment, such as to entitle him to that privilege, and the rule for setting aside the award must be refused.

As to so much of the motion as asks that the rule made ordering payment of the amount of the award with the costs taxed in pursuance thereof, it is plain that this cannot be granted upon the grounds urged for setting aside the award, and which I consider to be insufficient for that purpose. Mr. McCarthy's argument was, that these objections could not have been shewn as cause against the granting of the rule, they cannot therefore be entertained upon a motion to set aside the rule ordering payment. Then as to the objection stated in the motion paper, that the costs purporting to be taxed in pursuance of the award, were taxed irregularly by the deputy clerk of the Crown and Pleas for the County of Simcoe,—it is apparent that the applicant and his attorney have not placed much stress upon this as an objection, for nowhere in the affidavits filed on the motion is it stated where the costs were taxed; it was, it is true, stated in the argument, that they were taxed in the County of Simcoe, after notice given according to the ordinary practice, but there is no foundation whatever made in the affidavit for the objection, and in such case I do not think I can notice what was said in argument. However, I am not prepared to say that it was incompetent for the deputy clerk of the Crown and Pleas in the County of Simcoe to tax the costs. No case was cited to me to shew that he had not jurisdiction, and in view of the effectual appeal given in respect of, and the control exercised over taxation by deputies by the 331st section of the Common Law Procedure Act, I do not at present see why the deputy clerk may not exercise his jurisdiction

in the absence of any special provision of law, or decided case limiting his jurisdiction. But further, unless the applicant is prepared to establish that the taxation is a nullity, which I at present fail to see, this is an objection which could have been, and therefore should have been shewn as cause against the making the rule absolute; for all these considerations I must refuse to set aside the rule, judgment and execution, upon this ground,—leaving the complainant, if the costs taxed are excessive, to obtain a revision under the 331st section of the Common Law Procedure Act.

Where a party shews cause in the first instance, the general rule is not to give him costs if successful, but it seems this is not an inflexible rule, it is in the discretion of the court wholly to grant or refuse the costs, and the court will exercise that discretion by giving costs when the rule if unopposed would have operated as a stay of procedings: *Blackburn* v. *Edwards*, 10 Ad. & Ed. 21; *Norris* v. *Carrington*, 16 C. B. N. S. 396.

In this case the applicant having made charges as I think without any foundation, I might perhaps properly subject him to payment of costs, but I shall adhere to what is considered to be the general rule. The rule therefore will simply be refused.

Rule refused.

COMMON LAW CHAMBERS.

Regina v. McNaney.

Con. Stat. U. C. cap. 76—29-30 Vic. cap. 45—Apprentice—Execution of contract—Amendment of return to certiorari.

Upon an application under 29-30 Vic. cap. 45, for the discharge of a prisoner, committed under the Apprentices' and Minors' Act for disobedience to his masters, on the ground, *inter alia*, that the indenture of apprenticeship was not a binding contract, it having been executed by one only of the employers, in the name of the firm.

Held, that the indenture must be considered to be sufficiently executed, as it was binding at all events upon the apprentice and the partner who had signed it, and there was nothing to show that his co-partners had not been present and assented to the execution.

Held, also, that where a *certiorari* simply requires a return of the evidence, the magistrate need not return the conviction or a copy of it.

Semble: If material evidence is unintentionally omitted from such a return, an amendment may be allowed for the purpose of obtaining such omitted evidence, but only with the concurrence of the parties and of the witness by whom the deposition was signed in the correctness of the additions.

[Chambers.—July 27, 1871.—*Wilson, J.*]

O'Donohoe obtained a writ of *habeas corpus* to bring up the body of one Owen McNaney, who had been committed to the common gaol of the county of York under the provisions of the Apprentices' and Minors' Act, Con. Stat. U. C. cap. 76, sec. 10, for disobedience to the orders of Messrs. Beard Bros., his masters; and also a writ of *certiorari*, directed to Alexander MacNabb, police magistrate for the city of Toronto, to send up the evidence had before him, and upon which the warrant of commitment had been founded.

Both writs having been returned, on the 26th July last, *O'Donohoe* moved for the discharge of the prisoner, under 29-30 Vic. cap. 45, on the grounds:

1. That there was no legal contract of service, as the indenture of apprenticeship was not signed by the prosecutors, and was therefore bad for want of mutuality: *Lees* v. *Whitcomb*, 5 Bing. 34.

2. That the contract, being signed by the employers under the name of "Beard Brothers," could not be properly executed by one partner alone without the production of a written authority under seal from the remaining partners: Addison on Contracts (Ed. 1869), 1052; *Gould et al* v. *Barnes*, 3 Taunt. 505.

3. That even if the contract had once been binding, it was terminated by the change in or dissolution of the partnership which had taken place since its execution: *Brook* v. *Dawson*, 20 L. T. N. S. 611.

4. How and in what particulars the apprentice disobeyed the orders of his employers, must be stated: Paley on Convictions, 210; *Colborne* v. *Stockdale*, Str. 493.

5. That the commitment was bad, as no conviction appeared to have been made: *Reg.* v. *Rhodes*, 4 T. R. 220; 32-33 Vic. cap. 31, sec. 42.

M. C. Cameron, Q. C., for the Crown, opposed the discharge of the prisoner, on the grounds:

1. That the *certiorari* did not require a return of the conviction, and therefore the fifth objection must fail.

2. That there was no return of any evidence showing a dissolution or change of partnership, if any had taken place.

3. That there was a valid execution of the indenture of apprenticeship by the member of the firm who had actually signed it, and therefore a binding contract existed between the parties.

He referred to *Ball* v. *Dunsterville*, 4 T.R. 313; and *Bowker* v. *Burdekin*, 11 M. & W. 128.

Adam Wilson, J.—As to the evidence which it is said was given of the change in or dissolution of the firm of employers after the making of the articles of apprenticeship in question, I cannot of course act upon it, as if it had in truth been given before the police magistrate, because no such evidence has been returned by him, and there is no affidavit before myself stating that such evidence was given. It may probably have been given in fact before the police magistrate, and he may have omitted to note it, either unintentionally or because he may have thought it at the time to have no particular bearing on the case. If the evidence were given, but not noted, I think the magistrate might be allowed to amend his return by setting it out as a part of the written evidence, if he remembered what it was, and if both parties concurred in the correctness of the addition. I am not quite clear that the magistrate can amend the notes from his own recollection after the evidence has been returned, but I am disposed to think he might be allowed to do so. It could be done only with the concurrence of the witness, if he had signed the deposition.

If the magistrate did not truly return the proceedings, he would be liable for making a false return. If he omitted to return some matter which he should have returned, I have no doubt he might be allowed to amend his return. Here he has returned truly all he intended and all he had it in his power to return; and now it is suggested he might amend the evidence which

he took by adding to it a fact which was deposed to, but which he did not note at the time. I think, as I have said, that may be done. I do not think the omitted evidence can be supplied by affidavit, though an affidavit is allowable in some cases, to show what has actually occurred before the magistrate: *Re Thompson*, 6 H. & N. 193; *The Queen* v. *Bolton*, 1 Q. B. 66; *Ex parte Baker*, 3 Jur. N. S. 937,

I think the want of the conviction cannot be complained of, as the terms of the *certiorari* do not call for it. If the magistrate should have returned it, and had not done so, I should still allow him an opportunity of doing so; for no doubt there is such a proceeding. If he had already returned it to the clerk of the peace, he might show that fact, or he might transmit a copy of it instead, stating why he could not return the original: *The King* v. *Eaton*, 2 Q. B. 285.

This reduces the objections to the one relating to the mode of execution of the instrument of apprenticeship. The execution, though in that informal manner, is sufficient if all the partners were present at the time and assented to its being so executed: *Ball* v. *Dunsterville*, 4 T. R. 313.

In *Bowker* v. *Burdekin*, 11 M. & W. 128, it was held that the partner who executed an assignment of his goods and effects, though it was intended that his co-partners should also have joined in it, and they were named in it, had passed his own estate, although his partners had not signed it.

It has been argued here that this instrument is binding in that view npon the partner who actually signed it, even if it be not binding on his co-partners, and so there is a valid contract with that partner. That partner, I presume, is bound; but whether the contract produced is therefore valid, is another question.

The case referred to shows the individual share of the partner would pass, so long as he delivered the deed as complete on his part, and not as an escrow. In this case the apprentice bargains for the partnership responsibility to him, and he has not got it unless all the partners were present and assented to the execution by their co-partner. The infant cannot therefore sue them, though he may sue the partner who executed the deed.

In some cases the question has been, whether a person who has not executed the deed can sue the one who has executed it. The rule seems to be that in leases, the lessor who has not executed, and who has not therefore conferred the estate on the other party contemplated and bargained for by him, cannot sue him for not repairing, or for non-payment of rent, or for any such cause, which assumes and is based upon an estate having been granted; but with respect to other covenants in the lease, not depending on the interest in the land, the covenantee may sue the covenantor though the covenantee has not executed the deed, and although the covenant sued on is stated to have been entered into in consideration of the covenants which the other should have executed: *Pitman* v. *Woodbury*, 3 Exch. 4; *Morgan* v. *Pike*, 14 C. B. 473. See also *Millership* v. *Brookes*, 5 H. & N. 797, where the same point as to an apprentice was argued, but no judgment given on it.

I am not prepared to say that this indenture, though it had not been executed by the employers at all, would not have been binding on the apprentice, although he could not have sued upon it. He might, however, have compelled the master to execute it on a proper case for relief made out: *Brown* v. *Banks*, 7 Jur. N. S. 1273. I cannot, therefore, give less effect to this indenture, which has been executed by one partner, and must therefore bind him, than if it had not been signed by any of the members. An agreement of this kind, if not beneficial to the infant, will not be binding on him: *Reg.* v. *Lord*, 12 Q. B. 757. But this agreement is just as beneficial to him as it would be to a person of full age.

It appears that notwithstanding this conviction, the party may be prosecuted a second time under the same agreement, if any further cause of complaint arise; but if the fact be, as has been stated, that the partnership in force at the time has been since dissolved, it may be of very little consequence to the prosecutors that the evidence on that point does not now appear on this return; for it will be sure to be brought out and noted on any future occasion, if that should unhappily arise.* The case of *Brooke* v. *Dawson*, 20 L. T. N. S. 611, referred to by Mr. O'Donohoe on this point, I have not referred to, for the reason already given.

On the only exception which I have been at liberty to consider, I think the application fails; and that the prisoner must be remanded for the residue of his time of imprisonment.

NOVA SCOTIA.

IN THE SUPREME COURT.

In re E. D. Tucker, an Insolvent.

Insolvency Act of 1869, ss. 36, 55, 83, 97 & 101—Discharge—Confirmation—Dividends.

It is optional with an insolvent whether he will proceed under sec. 97, or under sec. 101 of the Act of 1869; and when there is reason to anticipate that the discharge will be opposed, the latter course is more expeditious.

Where a deed of composition and discharge has been duly executed and filed with the assignee, *it seems* notice of the filing and of the insolvent's intention to apply for a confirmation of his discharge may be given at once under sec. 101, although the month allowed by sec. 36 (Form I.) for creditors to file their claims has not expired.

The assignee may declare a dividend at any time within one month after his appointment, and thereafter at intervals of not more than three months.

[Sup. Ct. N.S., June 2, 1871.—*Sir W. Young, C. J.*]

Sir William Young, C. J., now (June 2, 1871,) delivered judgment as follows:

This is an appeal to me under the Dominion Insolvent Act of 1869, section 83, from an order of the Judge of Probate and Insolvency at Halifax, made on the 18th March last. It was a final order or judgment refusing a discharge to the insolvent under a deed of composition, on preliminary or technical objections arising out of the Act, and without any examination of the insolvent or enquiry into the validity of the deed. I had supposed when I granted a rule *nisi* on

* The point has since come before the Common Pleas in *The Queen* v. *Redden et al* (M. T. 1871), where the court held that such dissolution having taken place, apprentices under indentures to the original firm could not now be indicted for conspiracy at the instance of the present partners.—Eds. L. J.

the appeal, that these were the only objections, but it appeared on the hearing before me on the 28th ultimo, that other objections alleged to be of a more serious kind were behind, with which at present I have nothing to do. An objection also was taken to the regularity of the appeal under section 84, which I think is untenable.

The insolvent made a voluntary assignment, dated the 28th February, 1869, and delivered 1st March to the interim assignee, who forthwith called a meeting of the creditors, under sec. 2, for the 15th. The creditors who had proved their claims under section 122, thereupon appointed the interim assignee to be the assignee of the estate. On the 24th March a deed of composition and discharge was prepared by the insolvent, which was filed with the assignee on the 29th, and the insolvent thereupon published an advertisement of that day, and continued it for one month, that on the 1st of May he would apply to the Insolvency Court for a confirmation of his discharge. The order of the 18th May—the subject of this appeal—was the result of that application.

The first objection was, that the insolvent had not deposited the deed with the assignee for the purposes contemplated, nor had the assignee pursued the course prescribed by section 97. This section is analogous to the 2nd sub-section of section 9 of the parent Act of 1864, and the question is whether it is imperative or optional. If acted on, and no opposition to the composition and discharge is made by a creditor, it saves time and is a great advantage to the insolvent. But where he has reason to apprehend (as was the case here) that opposition would be made, there was neither saving of time nor advantage to either party, and upon the best consideration I can give to this clause, I am of opinion that the insolvent may waive it in all cases if he thinks fit, and proceed under section 101.

The second objection was that one month's notice had not expired from the first meeting of creditors of the insolvent before the deed of composition and discharge had been filed in court, and acted upon as required by section 36 of said Act. By section 36 the assignee, immediately upon his appointment, shall give notice thereof by advertisement in form I, which requires creditors to file their claims before the assignee within one month—that is, in this case, by the 15th or 16th of April. Creditors having by the statute this time to come in, was it legal to file a deed of composition and discharge, and publish an advertisement on it (which is the action referred to in the objection) on the 27th March? There is more in this objection than in the former; and yet, if the deed in point of fact when filed has been executed by a majority of the creditors under section 94 (which is the main inquiry), there is no reason for the delay, as the confirmation itself cannot take place before the month has expired. There seems to have been no decision on this point in Canada, and the commentators there differ upon it, as will be seen upon reference to Mr. Abbott's edition of the Act of 1864, folio 67, and the doubt in Mr. Popham's edition of the Act of 1869, folio 124. The hearing before the judge in this case was on the 18th May, more than two months after the advertisement to the creditors, when the objection in point of time was reduced to a mere technicality, which, as I think, ought not to prevail.

The third objection proceeded, as I conceive, on a misapprehension of the Act. It was assumed that no dividend could have been declared on the 1st of May, nor until three months had expired after notice of the appointment of an assignee. That is not the meaning of section 55. The assignee may declare a dividend, if he have funds, at the end of one month, or as soon as may be after the expiration of such period, and thereafter at intervals of not more than three months. I overrule, therefore, this objection, and regret that the hearing below was confined to these niceties of construction, in place of the main issues. The counsel for the insolvent insisted that these were now excluded, and the opposing creditors having failed on these preliminary points, that the insolvent was entitled to a discharge without further inquiry. But I cannot assent to this view, which would be against the analogy and the practice of all courts, and I content myself with disposing of the points before me, and setting aside the judgment of the 18th May, and the order of the 22nd May thereon, with costs.

ENGLISH REPORTS.

CHANCERY.

Collins v. Collins.

Will—Word "Moneys"—What it includes.

A testator by his will bequeathed "all the moneys, both in the house and out of it." He was possessed of a sum of consols and some shares in a building society; *Held*, that neither passed by the bequest.

[24 L. T. N. S. 780—V. C. B.]

Robert Collins made his will, dated 13th March 1862, as follows;

"As for my worldly goods and chattels, I bequeath them as followeth: first, to my son Thomas 700*l.*, to my son James 100*l.*, to my son Alfred 100*l.*, to my son Frederick 100*l.*, to my son Arthur 700*l.*, to my daughter Susanna 3000*l.*, and if married not to be sold out of the funds without her consent. And I also bequeath to her all things in the house remaining of whatsoever kind, and all the moneys, both in the house and out of it, for her own use. To my granddaughter Helen I bequeath 100*l.*, for her attention to me upon all occasions. And I appoint my son Thomas my sole executor to this my last will and testament."

A bill to administer the estate of the testator was filed by two of the next of kin against Susanna Collins and the other next of kin. The only question was whether a sum of consols and certain shares in a building society passed under the bequest to Susanna of "all the moneys both in the house and out of it."

Eddis, Q.C. and *Edwards* for the plaintiff.—We submit that the consols and building shares did not pass. There is a series of gifts, but no residuary gift. The word "money" will not pass stock in the funds. In the case of *Godsden* v. *Dotterill*, 1 My. & K. 56, the words were, "rest of my money," and it was there held that there being no explanatory context, the money would not pass stock. In *Lowe* v. *Thomas* 5 De G. M.

& G. 315, the words were, "whole of my money," and it was held that there was nothing to show that the word "money" was used in any other than its strict sense. In *Ogle* v. *Knipe*, L. Rep. 8 Eq. 434; 20 L. T. Rep. N. S. 867, the question was whether under the words "money, and securities for money of every description," Bank Stock and canal shares would pass, and it was held they would not. The cases show that unless there is some explanatory context the word "money" will not pass stock or shares. The gift to Susanna is specific, not residuary, there is no word suggestive of residue. They referred also to 1 Jarm. on Wills, 2nd Edit., p. 644.

Cracknall for another of the next of kin. The words, "all my goods and chattels," in the beginning of the will will not carry a residue, unless that is given by the body of the will. If Susanna takes the stock she must take it as specific legatee. He referred to *Collyer* v. *Squire*, 3 Russ. 467.

Willcock, Q.C., *Cottrell*, and *Fellowes* for others of the next of kin.

Fisher for Susanna Collins.—I claim the whole residue. Unless these words dispose of the residue, the testator has, contrary to his clear intention, died intestate as to the residue. The case of *Godsden* v. *Dotterill* does not apply here, and has been considered of doubtful authority: *Dowson* v. *Gascoigne*, 2 Keen 14; *Glendinning* v. *Glendinning*, 9 Beav. 324; *Waite* v. *Combes*, 5 De G. & S. 676. In *Lowe* v. *Thomas* there was no expressed intention of disposing of the whole personal estate. There is such an intention expressed here. That case is in my favour. In *Montague* v. *Lord Sandwich*, 33 Beav. 324; 9 L. T. Rep. N. S. 632, the Master of the Rolls says that the word "money" does not extend beyond actual money, unless those claiming the extended signification can show it. This we do. He also referred to *Grosvenor* v. *Durstan*, 25 Beav. 97; *Pritchard* v. *Pritchard*, L. R. 11 Eq. 232; 24 L. T. Rep. N. S. 259.

Eddis, Q. C. in reply.—*Wait* v. *Combes* and that class of cases are cases where the persons claiming under the will are persons for whom the testator is bound to provide. Here it is one child claiming against the others. The case of *Glendinning* v. *Glendinning* turned on the use of the word "property." *Dowson* v. *Gascoigne* does not lay down the rule that the word "money" by itself will pass stock.

Vice-Chancellor Bacon.—The case of *Wait* v. *Combes* is distinguishable from the present case. The gift to Susanna of all the things in the house, and all the moneys both in the house and out of it, is specific. There is not any mention of residue. There is an intestacy as to the residue of the stock after the payment of the legacies, and as to the building shares, they will go to the next of kin.

COURT OF PROBATE.

(Reported by W. Leycester, Esq., *Barrister-at-Law.)*

Peat v. Peat.

Administration—Personal estate insolvent—Grant to widow in preference to next of kin, who was also heir at law.

The heir at law and next of kin of an intestate objected to the grant of administration being made to the widow, and on the ground that the personal estate was insolvent. The evidence of insolvency was not very conclusive either way, and the court declined to depart from the usual custom, and made the grant to the widow.

[25 L. T. N. S., 108, May 9, 1871.]

The intestate died possessed of both personal and real estate, and it was alleged on the part of the defendant that the debts and liabilities of the deceased exceeded the value of the personal estate, and that they could not be discharged without a sale of some portion of the real estate. The defendant's solicitor filed an affidavit in which he stated, "I believe and my London agents inform me this will be the proper course, the real estate, or a portion of it, will have to be sold to discharge the debts."

Inderwick, for the plaintiff, moved that administration be granted to the widow.

Dr. *Swabey* (*Bayford* with him), for the defendant, the heir-at-law and next of kin, contended that in granting administration, the court should regard the interest. The personal estate is insolvent, and the person most interested in its economical administration, is the heir at law, who is also next of kin. The court has the discretion to make a grant either to the widow or to the next of kin. It is true that the usual practice of the court has been to exercise its discretion in favour of the widow, but where the widow has no interest she must be passed over. They referred to Williams on Executors, vol. 1, pp. 402, 420, 6th edit., and the cases cited there.

Inderwick in reply.—Those cases only apply to where the widow has given up all interest, or has misconducted herself.

Lord Penzance.—There ought to be a very strong case to justify the exclusion of a widow from the administration. The cases which have been cited apply only to the proposition that where a widow has by a deed of settlement, or any other legal method, virtually stripped herself of all interest in the personal property of the husband, the court, by reason of her want of interest, may pass her by to make a grant to the next of kin. The present case depends simply on a question of figures. It is stated on the one side that the estate is insolvent, but notwithstanding that, no very affirmative statement to the contrary has been made on the other side. It may still be otherwise, and it seems to me that it would be difficult to determine positively whether the estate is insolvent or not. The question therefore in the present case is whether the court, by acting on a presumption that the personal estate will turn out to be insolvent, and consequently that the real estate will be charged partly with the payment of the debts should place the plaintiff in the position of a widow who has voluntarily and legally resigned all share she might have in her husband's personal estate. It seems to me that this would be going too far. I cannot be certain that there will be no surplus for her benefit. The defendant's attorney says there will be none, and his statement is partly confirmed by the letter of the plaintiff's attorney, in which, while writing on another subject he asserts that the real estate or a portion of it will have to be sold to pay the deceased's debts. But I do not see my way to an affirmative conclusion that the estate will be absolutely insolvent. There may be a surplus, and if so the widow will be entitled to

one half Under these circumstances, she is entitled to administration. The order may be made peremptory, so that if she does not take the grant within fourteen days, the nephew may claim it for himself.

UNITED STATES REPORTS.

SUPREME JUDICIAL COURT OF MAINE.

Alexander Dunn v. Grand Trunk Railway Company of Canada.

If a person enters the saloon-car of a freight railway train, and, when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, the corporation incurs the same liability for his safety as if he were in their regular passenger train.

On exceptions to the rulings of the Superior Court for the County of Cumberland.

Case for an injury alleged to have been received in July, 1868, while being transported from South Paris to Danville Junction, through the alleged insufficiency of the track and cars of the defendants, and the careless and negligent manner of managing them.

There was evidence tending to show that the plaintiff entered the saloon-car attached to the defendants' freight train, at South Paris station, for the purpose of going to Danville Junction; that the conductor saw him when the train started, and they conversed together; that he paid the conductor the usual fare of eighty-five cents; that the saloon-car was thrown from the track and dumped; that the plaintiff was thereby injured; that the car was thrown off by a broken rail, and that the fare was thereupon paid back.

There was evidence on the part of the defence, tending to show that the conductor notified the plaintiff when the train started that he had no right to carry passengers on the freight train, which was denied by the plaintiff.

It also appeared that the defendants issued a notice on May 23rd, 1866, that after that date "passengers would not be allowed to travel by freight trains on that part of the line between Portland and South Paris." On September 8th, 1868, they issued notice that "no passengers will be carried in the brake-vans attached to freight trains without written authority from the superintendent. * * * Any conductor allowing a passenger to travel in the brake-van, or on any part of the freight train, will be dismissed."

The defendants requested the presiding judge to instruct the jury:

1. That the plaintiff was not entitled by law to be carried in the freight train of defendant's company as a passenger, unless by permission obtained before he entered the train from some authorised agent of defendants; and that if the jury find that plaintiff entered the freight train at South Paris without such permission, then that plaintiff is not entitled to recover for the alleged injury, and their verdict should be for defendants.

2. That if the jury find that the defendant's company, before the time of the injury received as alleged by the plaintiff, had established and published a regulation by which passengers were not allowed to travel by freight trains on that part of the line between Portland and South Paris, and that such regulation was in force at that time, then the plaintiff is not entitled to recover in this action, and their verdict should be for the defendants.

The judge did instruct the jury, *inter alia*, as follows: "I understand that the defence is substantially this, that inasmuch as notices had been issued and published by the directors of the company, prohibiting passengers from riding on freight trains, therefore this passenger being upon a freight train, the company was not liable for the injury that he received, though the company would have been liable if he had been in a passenger train. If there is any other defence, you have noticed it, and of course you will give them the benefit of it.

"I have been requested to give you a number of instructions touching this particular point, all of which I decline to give except this:

"I do instruct you, for the purposes of this case, that the plaintiff was not entitled by law to be carried on the freight train of defendant's company as a passenger, unless by permission obtained before he entered the train from some authorised agent of defendants. I give you that one, and no more. But I also instruct you, that if you find that the plaintiff was allowed by the conductor, upon his entering that car, and upon the starting of the train, to remain as a passenger on that train, in a saloon-car, that on a full knowledge of the facts, the conductor on that train allowed and authorised that man to remain there without directing him to get off, or any attempt to put him off, and that afterwards he received from him pay as a first-class passenger, not only to the next station where the freight train was to stop, but beyond that station to Danville Junction, a further point on the road where the plaintiff desired to go (for I understand the evidence is that he was going to Lewiston, and Danville Junction was the furthest possible point in that direction on this road), then I instruct you that the defendant's company cannot plead their regulation in release of their ordinary legal liabilities, but they are just as liable as if it had been a passenger train, and as if there had been no notices, provided that the plaintiff was not guilty of any fault or want of ordinary care himself."

The verdict was for the plaintiff, and the defendants alleged exceptions.

P. Barnes, for the defendants, cited *Lygo* v. *Newbold*, 9 Ex. 302; *Lucas* v. *New Bedford & Taunton Railroad Co.*, 6 Gray, 64, 70; 2 Redfield, 3rd Ed., 114; *Elkins* v. *Boston & Maine Railroad Co.*, 3 Foster, 275; *Robertson* v. *N. Y. & E. Railroad Co.*, 22 Barb. (N. Y.) 91; *Cleveland, Columbus & Cincinnati R.* v. *Bartram*, 11 Ohio, 457.

T. H. Haskell for the plaintiff.

Appleton, C. J.—The defendants are common carriers of passengers and freight. They may carry freight in their passenger trains, or passengers on their freight trains. They have a right to make all reasonable rules and regulations in the management of their business, to which

those in their employ, or those making use of their means of conveyance, are bound to conform when informed of their existence.

By one of the regulations of the defendant corporation, after May 23rd, 1866, passengers were not "allowed to travel by freight trains on that part of the line between Portland and South Paris." The regulation was a reasonable one, and the defendants were authorised to make it. It is, however, fairly inferable from the regulation itself that passengers had been previously permitted to travel by the freight train. By the notice of September 8th, 1868, dated at Montreal, no passengers were to be carried in the brake-vans attached to freight trains "without written authority from the superintendent," and "any conductor allowing a passenger to travel on the brake-van, or any part of the freight train, will be dismissed."

The plaintiff went aboard the freight train, in the saloon-car, and was there with the knowledge of the conductor. It was the duty of the conductor to inform him of this regulation, if it was to be enforced, and request him to leave. If no notice was given of this rule, and no request to leave, but instead thereof the usual fare was received, he had a right to suppose himself rightfully on board, and entitled to all the rights of a passenger. Every one riding in a railroad car is, *primâ facie*, presumed to be there lawfully as a passenger, having paid or being liable, when called on, to pay his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser: *Penn. Railroad Co.* v. *Books*, 7 Am. Law Reg. N. S. 529. If not being rightfully on board, and being advised thereof, the plaintiff neglected or refused to leave, the conductor had a right to remove him, using no more force than was necessary to accomplish that object: *Fulton* v. *G.T. Railway*, 17 U. C. R. 428; *Hilliard* v. *Goold*, 34 N. H. 230; *State* v. *Goold*, 53 Maine, 279.

The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their conduct while in its employ. It alone has the right and the power of removal.

A passenger goes on board a freight train, enters the saloon-car, and remains there when the train starts, against the rules of the company, but with the knowledge of the conductor, and is not directed or requested to leave, but pays the usual fare of a first-class passenger to such conductor, and is injured on his passage by the negligence or carelessness of the railroad corporation: is he entitled to compensation for such injury? If inert matter be injured or destroyed by the negligence or carelessness of a common carrier, its owner can maintain an action, and recover damages as a recompense for such injury. Is the traveller entitled to the protection of the law, when the negligence of the carrier destroys his goods, and is he without its protection, when the same negligence injures his health or breaks his limbs? If any extraordinary danger arises from the violation of the known rules of the company, as by standing on the cars when in motion, the passenger violating the rules assumes the special risks resulting from such violation. But if the act of the passenger in no way conduces to the injury received, the carrier must be held responsible for the necessary consequences of his negligence or want of care: *Baker* v. *Portland*, 10 Am. Law Reg. N. S. 559.*

In *Zemp* v. *W. & M. Railroad Co.*, 9 Rich. (S. C.) 84, there were two cars on the train, and the plaintiff's seat was in the forward car. Near the door on the rearward car was a notice that passengers should not stand on the platform. The train was running over an unfinished part of the road. The cross-ties were too far apart, and were insufficiently spiked, and the accident arose from "the breaking of the cleat at the end of one of the rails." All the other passengers were inside the cars, and none of them injured. The defence was that the injury arose from the plaintiff's own fault in standing upon the platform while the cars were in motion. The verdict was for the plaintiff, which the court refused to set aside, holding that whether the plaintiff had notice that the platform was a prohibited place, and if so, then whether under the circumstances his own act so contributed to the injury as to exonerate the railroad, who were guilty of negligence, were questions for the jury. The plaintiff's seat, "it will be recollected," observes O'Neale, J., "was in the forward car; the notice proved was in the rear car, on the platform of which he was standing when the accident occurred. That such notice is not enough to change the liability of the company to a passenger, is, I think, clear from Story on Bailment, s. 558. If the conductor had said to the plaintiff, as was his duty, 'you are in an improper place,' and he had then persisted in remaining, it might have been that this would have excused the company from any consequences which might have followed." An action was brought against a railroad compsny by a passenger, while travelling in one of its gravel trains. The defendant asked the court to instruct the jury that a railroad company was not liable for an injury which might happen to one taking passage in a gravel train, not engaged in carrying passengers. This requested instruction was held to be properly denied in *Lawrencebnrgh & Upper Mississippi Rilroad Co.* v. *Montgomery*, 7 Porter (Ind.), 475, the court holding that in a suit brought against a railroad for an injury occasioned by a collision, it was not sufficient for the company to show that the plaintiff was acting at the time in disobedience of a proper order to secure his safety, but that it should also appear that the injury was occasioned by such disobedience. In *Watson* v. *Northern Railway Co. of Canada*, 24 U. C. R. 98, the plaintiff travelling in the defendants' train on a passenger ticket, went into the express company's compartment of a car. While there, owing to the negligence of the defendants' servants, the train, which was stationary, was run into by another coming up behind it, and the plaintiff's

* Reported 7 C. L. J. N. S. 274.

arm was broken. No person in the passenger cars was seriously injured. It was proved that notice that the passengers were not allowed to ride in the baggage-car was usually posted upon the inside of the door of the passenger-cars, but it was not distinctly shown that it was there on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out, and so he was not to blame. "In my opinion," observes Draper, C. J., "the jury were warranted in finding that the plaintiff did not so contribute (to the injury) as to deprive him of the right to recover. Giving the fullest weight to the considerations urged for the defence—such as the ticket which the plaintiff had, the notices stated to have been kept up in the cars, conceding the plaintiff saw them, though it is not proved—I do not think they preclude the plaintiff from recovering, when the injury he sustained was occasioned by a collision resulting entirely and directly from the gross negligence of the defendants' servants" In *O'Donnel* v. *Alleghany Valley Railroad Co.*, 59 Penn. 239, in a suit by an employee of a railroad company, who held the relation of a passenger, the court charged that the baggage-car is an improper place for a passenger to ride—whether the rule against it was communicated to him or not, if he left his seat in a passenger-car and went into the baggage-car, it was negligence which nothing less than a direction or an invitation of the conductor could excuse—and such invitation should not be inferred from his having ridden there frequently with the knowledge of the conductor without his objection. Held to be error.

That a railroad corporation cannot repudiate the acts of its agents so as to free itself from responsibility for their negligence, was held in *Lackwanna & Bloomsburgh Railroad Co.* v. *Chenowith*, 6 Am. Law Reg. N. S. 93, when the agents of a railroad company, contrary to the instructions and rules of the company, at the request of the owner of a freight car, attached it to a passenger car, the plaintiff agreeing to run all risks, the plaintiff having sustained a loss by the negligence of the defendant, brought his action for compensation. The same defence was attempted as in the case at bar. The plaintiff was not a trespasser, "for," observes Thompson, J., "he was there by permission, and under the contract of parties competent to give him authority to be there. * * * When, therefore, they (the defendants) consented to hitch on his (plaintiff's) car to the passenger train, even at his urgent solicitation—and we have not a particle of evidence that other inducements were held out to do the act, excepting freedom from responsibility as a consequence of the attachment—we must presume it was done with a view to the compensation to be paid on the one hand, and the usual care to be exercised on the other. The argument, however, is, that the plaintiff was guilty of such a wrong in asking for permitting his car to be attached, that whether the act contributed to the disaster or not, he is to be treated as a trespasser, and not entitled to any compensation for injuries not wilfully done. We think this is not the law, unless, in a case where the will of an agent is controlled and subverted by improper influences, he is induced to do that which is manifestly beyond the scope of his powers. That there was a regulation against running freight trains with passenger-cars may be admitted, although it was not properly proved, yet that neither proved that it might not be safely done, nor that if the company undertook to do it, they might lay aside the duty of care, and commit such cases to the guardianship of chance."

When a railroad company admits passengers into a caboose-car attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coaches at the time of the occurrence of the injury: *Edgerton* v. *N. Y. & H. Railroad Co.*, 39 N. Y. (12 Tiffany) 227. In *Carrol* v. *N. Y. & N. H. Railroad Co.*, 1 Duer, 571-578, "the plaintiff," remarks Bosworth, J., "took a seat in the post-office apartment of the baggage-car. The position was injudiciously chosen, and it may be assumed that he knew it to be a far more dangerous one than a seat in a passenger-car. He took it with the assent of the conductor. He was not there as a trespasser, or wrongfully as between him and the defendants. So far as all questions involved in the decision of this action are concerned, he was lawfully there." His being there was not such negligence as would exonerate the defendants from the consequences of their negligence or want of care.

The plaintiff was not entitled by law to be carried on the freight train contrary to the regulations of the defendant's company. They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain, and receiving from him the ordinary fare, they must be held justly responsible for negligence or want of care in his transportation.

The question before the court was whether the defendants were liable at all as common carriers. The defence was based entirely upon a regulation of the company. There was no question raised as to the general obligations of carriers. Indeed none is raised at the argument. The counsel for defendants rest their defence on the rules of the company. The plaintiff had paid the usual fare of a first-class passenger. The defendants had received it, and had undertaken the transportation of the plaintiff in their freight train, during the course of which he was injured by their neglect or want of care. Under such circumstances, the judge said that they could not "plead their regulation in release of their ordinary liabilities, but they were just as liable as if it had been a passenger train, and as if there had been no notice, provided plaintiff was not guilty of any fault or want of ordinary care himself."

Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, this is all those who embark in it have a right to demand: *The Chicago, B. & Q. Railroad Co.* v. *Hazzard*, 26 Ill. 273. "We have said in *The Galena & Chicago Union Railroad Co.* v. *Fay*, 16

Ill. 568," observes Breeze, J., "that a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance and skill to that particular means; for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords."

If there was any peculiar risk incident to transportation on a freight train, the counsel should have called the attention of the court to such special difference, whatever it may be. But "the responsibility of a railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried, or on the fact of payment of fare by the passenger:" *Ohio & Miss. Railroad Co.* v. *Mahling*, 30 Ill. 9. "The evidence," says Walker, J., in that case, "shows that the road had been carrying passengers on their construction trains, and they must be held to the same degree of diligence with that character of train as with their regular passenger coaches, for the safety of the persons and lives of their passengers."

If the defendants claimed that they might exercise a diminished degree of caution arising from the character of the train, they should have requested a corresponding instruction.

The cases to which our attention has been called, so far as we have been enabled to examine them, are inapplicable. In *Lygo* v. *Newbold*, 9 Ex. 302, the plaintiff contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with his cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her. On the way the cart broke, and the plaintiff was thrown out and injured. *Held*, that as the defendant had not contracted to carry plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. But in that case it does not appear that the defendant was a common carrier—that he undertook to carry, or received, or was to receive, any compensation for the carriage of the plaintiff.

In *Lucas* v. *New Bedford & Taunton Railroad Co.*, 6 Gray, 65, it was held that a person who entered the cars of a railroad corporation, not as a passenger, but for the purpose of assisting an aged and infirm relative to take a seat as a passenger, must, in order to maintain an action against the corporation for an injury sustained while leaving the cars, show that he exercised due care, that the corporation was wanting in ordinary care, and that such negligence was the cause of the injury; and if he attempts to leave the cars after they have started, or, finding them in motion as he is going out, persists in making progress to get out, he cannot maintain such action, if his attempt causes or contributes to the injury, even if the corporation give him no special notice of the time of departure of the cars, and are guilty of negligence in starting the cars, and in a jerk occurring after the first start, which negligence also contributes to the injury. But in that case the plaintiff was not a passenger; he was not there for the purpose of being transported. The servants of the corporation could not know, and were not obliged to know, the purpose for which he came aboard. Besides, the plaintiff must show due care. The implication from the case is, that with due care on the part of the plaintiff, and negligence on the part of the corporation, the action was maintainable, and is adverse to the defendants.

Exceptions overruled.

Kent, Dickerson, Barrows, and Tapley, JJ., concurred.

It cannot be denied that the foregoing case is one of very great interest to the profession; and the opinion of the learned Chief-Justice is drawn up with great care and after very deliberate examination of the cases bearing upon the questions involved. We are all accustomed to accept the opinions of that court with so much deference and respect, that we question whether any comment on our part will be regarded as of much account. But we cannot disguise the impression, made upon our own mind by the reading of the statement of the trial in the court below, that the defendants might very naturally have regarded the instructions of the learned judge as requiring of them a somewhat severe measure of duty. The opinion of the Chief Justice in the Supreme Court seems to escape most of the rigors of the case, as presented in the court below, by way of presumption or inference from the admitted facts in the case. It seems to be assumed, both in the court below and in that of last resort, that the plaintiff was rightfully upon the train, at the time the damage or injury occurred, and that the defendants had made themselves common carriers of passengers so far as the plaintiff was concerned. And if that point is clearly established in the case, there would seem to be no question in regard to the soundness of the views presented in the opinion.

But the case of a passenger injured upon a freight train deserves unquestionably a very different consideration from one, when the injury occurs upon a passenger train. Upon the latter the conductor represents the company to the fullest extent as regards the entire subject of receiving and transporting, as well as the safe delivery of the passengers. That is his regular employment, and in all that pertains to such employment the conductor stands in the place of the company; and his acts, and his declarations accompanying such acts, will bind the company to the fullest extent. And this is true even as to his omissions and the concessions thereby fairly implied. As, for instance, when the passengers are allowed, by the conductor, to pass from car to car, while the train is in motion, or to stand upon the platforms, or to sit in the baggage or express cars, there can be no fair question that the company will be bound by his acts.

And we should not be inclined to doubt, that where this, or any similar freedom, is constantly allowed the passengers upon passenger trains, without objection or remonstrance on the part of the conductors, the company must be regarded as having acquiesced in the practice, although in conflict with their general regulations, properly advertised in the cars. We suppose some such relaxation is found indispensable on the American railways, in order to keep the peace

with the passengers. For among us there is a considerably numerous and influential class of passengers, who insist upon almost perfect freedom of locomotion and observation, in all places and under all circumstances. The propensity proceeds doubtless from different motives, in different persons. Some do it from mere listlessness and unrest; others from curiosity and to satisfy a morbid sense of inquisitiveness; and others still to show they can do it, and not suffer detriment. There are doubtless many other reasons, as to find out friends and acquaintances, &c. But certain it is, no conductor can control or hinder it, if he were ever so much disposed to do so. People, in this country, will insist upon making all the railway tracks common highways for foot passengers; and equally upon climbing about in all directions upon moving passenger trains; and there seems to be no remedy but to submit to it. They all feel that it is unsafe for others, but indispensable for themselves to do so. And if railway companies are compelled to submit to it, all we can say is, that the blame cannot be thrown upon their servants, but must rest upon themselves. But the cases of passengers and strangers are by no means analogous. There is, for instance, no implied permission to a stranger to walk upon a railway track because the road-master does not drive him off, as he doubtless might if he chose. But having no responsibility in the matter, he is not obliged to do so; and no implied assent is the result of his omission to do so. But in the case of passengers it is different. They are, for the time, under the control of the conductors, whose duty it is to put them in a safe place, and keep them there. And if they attempt to violate the rules of the company, by riding upon the platforms, or in the baggage car, or in any other mode out of the ordinary and safe course, it is the right and the duty of the conductors to forbid them, in the most peremptory manner, and if they persist in their course, to compel them to desist, if need be, by force. And if the conductors do not exercise their right and duty in these particulars, they must be regarded as having assented to the course pursued by the passengers, subject, of course, to the increased risk thereby incurred being borne by such passenger. And, subject to this qualification, the act of the conductor, upon a regular passenger train, must be regarded as binding the company to an assent to carrying the passenger in that mode. And the same would be true, probably, if some foolhardy passenger (of whom there are multitudes all over the country, especially during the summer excursions,) in search of new adventures, should insist upon standing upon his head, or lying at full length upon the platform of the cars during the entire passage. The company must be regarded as bound by the act of the conductor, if he did not forcibly prevent it, at least to the extent of stipulating to carry the passengers in that mode, as safely as it was practicable to do in that peculiar mode of transportation. If the passenger was damaged in consequence of his foolhardiness, in persisting in riding in that particular mode, he could not recover, of course. But if he could show that his peculiar mode of riding did not contribute to his injury, but that it resulted *wholly* from the negligence of the company, he might unquestionably still recover.

But as we understand the settled law upon the subject, in regard to passenger transportation upon freight trains, the rule of implication, as against the companies, resulting from the acts, declarations, and acquiescence of the conductors, is entirely different,—we might say the reverse of what it is upon passenger trains. Upon the freight trains of a railway company the conductors have no implied authority to bind the company by allowing persons to be carried as passengers. Every one is presumed to have notice that railways do not carry passengers upon their ordinary freight trains, and that if one is allowed to travel upon them as a passenger, it is conceded as a favor, and subject to the implied condition that he will incur the additional risk and inconvenience necessarily incident to that mode of transportation. The rule has been often declared and is recognized in the principal case as well as in many others: *Murch* v. *Concord Railway*, 29 N. H. 9, where the question is discussed and very fairly presented by Mr. Justice Bell.

"The stage proprietor is a carrier of passengers by his coaches, but he does not thereby become a common carrier of passengers by his baggage waggons, if he carries on that business at the same time. Both the companies and the individuals, in these cases, are bound to their customers by the same duties relative to their freight trains and baggage waggons, and have the same rights as to the roads over which they travel, as if they had no connection with the business of common carriers of passengers. * * * The first question which arises upon the point is, whether the railroad companies have made themselves common carriers of passengers by the freight trains? * * * It is very clear that a waggoner, who occasionally carries a passenger upon his waggons as a matter of special accommodation and agreement, does not thereby become a common carrier of passengers. He only becomes such when the carrying of passengers becomes an habitual business. * * * Upon the evidence stated in the case that 'both roads had been in the habit of *occasionally* transporting some passengers upon the freight trains, when they were anxious to go,' we think we should not be justified in saying that they were common carriers of passengers upon their freight trains": *Elkins* v. *Boston & Maine Railway Co.*, 3 Foster, 275.

It seems to us that this presents the question in its true light, and we should seriously question whether a conductor of a freight train can fairly be said to have any authority to bind the company, by accepting passengers upon his freight trains. It seems to us that justice to the companies requires that any one who rides upon a freight train should be required to show permission to do so from the superintendent of the road, just as much as if he were riding upon the engine, in order to show himself rightfully upon the train. The conductor of a freight train has no more right to accept passengers for transportation, than has the baggage-master or the engineer upon a passenger train to allow passengers to ride with them in their departments. We have always maintained the neces-

sity of holding railways to the strictest responsibility in regard to passenger transportation. But we should, at the same time, require passengers to submit obediently to all the just requirements of the companies, and if they needlessly and understandingly departed from them, to accept the consequences in patient submission. If railway companies run passenger cars upon their freight trains, or in any other mode invite passengers to accept passage upon them, the company are bound to the same degree of responsibility as if they carried them in regular passenger trains. But where this is only occasional and for the accommodation of the passenger, the rule of construction should, we think, be in favor of the company, and the passenger be required to show clearly that he rode in that mode by the consent of the proper agent of the company, which in this case, it seems to us, the conductor of the freight train was not. But we urge this view with hesitation against so high authority. I. F. R.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR MAY, JUNE, AND JULY.

(Continued from page 312.)

Maritime Lien.

The English Admiralty Court has jurisdiction over claims for necessaries supplied to any ship elsewhere than in the port to which she belongs. In a suit for sums due for work and supplies furnished a ship subject to a mortgage, *held*, that a material-man had not a maritime lien, but only an action *in rem*, with a lien from the time of beginning suit, and that the mortgagee's claim had priority.—*The Two Ellens*, L. R. 3 Ad. & Ec. 345.

Material-man—*See* Maritime Lien.

Merger.—*See* Devise, 1.

Misdescription.—*See* Legacy, 1.

Mortgage.

1. An inn-keeper mortgaged his lease to a brewer to secure £1250 advanced, and any further sum, not to exceed £1500 in all. The same day the inn-keeper charged his lease with £200 to a distiller, "subject only to the security on the premises already given." The distiller had notice of the mortgage to the brewer. The brewer made subsequent advances with knowledge of the distiller's charge. *Held*, that the mortgage to the brewer covered only the advances precedent to notice of the distiller's charge, and that no custom of London to the contrary among brewers and distillers could change this priority.—*Menzies* v. *Lightfoot*, L. R. 11 Eq. 459.

2. A. agreed to advance a certain sum by way of mortgage on certain premises, "at 5 per cent. per annum, and that the same shall not be called in for the next five years." In a suit for specific performance, by executing a mortgage deed in accordance with the agreement, *held*, that the deed should contain a condition for re-entry on failure to pay interest.—*Seaton* v. *Twyford*, L. R. 11 Eq. 591; 7 C. L. J. N. S. 106.

See Decree; Devise, 1, 6; Maritime Lien; Settlement; Voter, 1.

Necessaries.—*See* Maritime Lien.

Negligence.

1. A. travelled daily between L. and H. The train stopped before arriving at the station of H., so as to bring the carriage in which was A. opposite a pile of rubbish. "H." was called out, and shortly after, "Keep your seats." The train then moved on to the station. A., who was very near-sighted, got out when the train first stopped, fell, injured himself, and died in consequence. *Held*, (Kelly, C.B., Willes, and Keating, JJ., dissenting) that there was no evidence of negligence in the railway company to be left to the jury. Even if there were such negligence, the conduct of A. must be considered in deciding whether there was a proper case to be submitted to the jury. (By the whole court)—calling out "H." was not of itself an invitation to alight.—*Bridges* v. *North London Railway Company*, L. R. 6 Q. B. (Ex. Ch.) 377.

2. A company was authorized by Act of Parliament to build a flooring above and over defendant's railway, the defendant having no control over the work. Such work had often been done before over roads without accident. *Held*, that the railway company was not liable for an accident happening in the course of such work, whereby a passenger was killed. The latter company was not bound to assume such work would be done negligently, and guard against possible accident.—*Daniel* v. *Metropolitan Railway Co.*, L. R. 5 H. L. 45.

See Bills and Notes, 2; Landlord and Tenant; Railway.

Nonsuit.

When the judge is of opinion there is no case to go the jury, he should direct a nonsuit, giving leave, if necessary, for the plaintiff to move to enter a verdict in his favor. He should not direct a verdict for plaintiff, with liberty to defendant to enter verdict, should the judges having power to draw inferences of fact, be of opinion there was no case for the jury on the evidence.—*Daniel* v. *Metropolitan Railway Co.*, L. R. 5 H. L. 45; s. c. L. R. 3 C. P. 216, 591.

Novation.—*See* Company.

Parties.—*See* Executors and Administrators, 3, 4.

Partnership.

A. and B. were partners, and indebted to C. B. being indebted to C. on private account, paid C. £1000 of the partnership money, in discharge of his private debt, without A.'s knowledge or consent. B. became bankrupt, and the firm dissolved. A. then gave bills to C. for £5000, the sum apparently due by the books; but before maturity of the bills, discovered the above misappropriation of partnership money. A. paid the bills at maturity, giving C. notice that he paid under protest, and only because his father's name was on the bill as drawer. A. then brought action to recover £1000, paid under mistake of fact. *Held*, that he was entitled to recover.—*Kendal* v. *Wood*, L. R. 6 Ex. (Ex. Ch.) 243.

See Company, 3.

Patent.

1. Where a patentee had a manufactory in both England and France, it was *held* that a purchaser buying in France had an implied license to sell in England. A patentee, bringing suit for infringement, must prove both that the article was sold, and that it was not manufactured by himself.—*Betts* v. *Willmott*, L. R. 6 Ch. 239.

2. Where letters-patent are sought for an invention identical in part with an existing patent, they will not be granted, although the validity of the existing patent is in dispute.—*Ex parte Manceaux*, L. R. 6 Ch. 272.

3. A servant filed a provisional specification for an invention, after which the master filed specifications, and obtained letters-patent; under the circumstances, letters-patent were granted to the servant, bearing the date of his provisional specification.—*Ex parte Scott & Young*, L. R. 6 Ch. 274.

4. Where a design for ornamenting a woven fabric was protected by registering a pattern, an imitation, to all outward appearance identical, though not actually so, was held an infringement.—*M'Crea* v. *Holdsworth*, L. R. 6 Ch. 418. *See* L. R. 2 H. L. 380.

5. Action for infringement of an English patent. Defendant used the article in Scotland, and transmitted it to his agent in England for transhipment. *Held*, that this constituted an infringement.

The burden of proof being upon the plaintiff, courts of equity will grant him limited orders of access to machinery, &c., of the alleged pirate of the invention.

It is not enough that there has been a general disclosure of an object to be attained in a former patent, unless there is a specification pointing out the mode of attaining it.

Evidence of scientific men, experimenting under a first patent, to examine whether thereunder an after-patented article can be produced, and evidence of what was done in the trade between the dates of the two patents, is admissible.

Patent for a material, and a particular use of the material, is no ground for avoiding the patent.

A decree in a patent suit cannot be for inquiry as to damages and account of profits, as the latter would condone the former.—*Neilson* v. *Betts*, L. R. 5 H. L. 1; s. c. L. R. 3 Ch. 429.

Payment.—*See* Appropriation of Payments.

Performance.—*See* Specific Performance.

Perpetuity.

1. Devise in trust "for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age, leaving lawful issue at his . . . decease, . . . which issue shall afterwards attain the age of twenty-one years, or die under that age, leaving issue living at his . . . decaase, . . . but such issue to take only the share which his parent . . . would have taken if living." The daughter left five sons who attained twenty-one. *Held*, that the five children took as a class, and the devise to them did not conflict with the rule against perpetuities, which would only avoid such part of the devise as fell within it.—*In re Moseley's Trusts*, L. R. 11 Eq. 499.

2. A testator devised, on failure of limitations for life and in tail, in trust for the children of A., who shall be then living, and the issue of such of them as shall be then dead, leaving issue, . . . share and share alike, but so as the issue of such of the children" of said A. "as shall be then dead shall have no greater share than their, his, or her deceased parents would have had if living." And a second part to P., and after her decease to her children "then living;" and so on as with A. Proviso, that whatever sums should become payable "to the issue of my late sister A., and my sister P., . . . and any one or more of such issue as shall be then dead having left lawful issue, then the issue of such issue as shall be so dead shall have the share to which their, his, or her parent would have been entitled if living." *Held*, that the proviso was a mere repetition of the divesting clause in favor of the family of P.; and that

"then living," in the devise to the issue of A., meant children living on failure of the previous limitations; and that "then living," in the devise to the issue of C., meant children living at P.'s death. Also, that the two living children of P., and the issue of a deceased child, took one-third respectively as tenants in common; but that said issue took jointly among themselves.—*Heasman* v. *Pearse*, L. R. 11 Eq. 522.

See Legacy, 2.

Possession.—*See* Bailment; Evidence.

Power.

A. purported to appoint by will under a certain power, "and every other power enabling me in that behalf." The power referred to was void; but by a different power, which A. supposed void, A. could appoint by deed. *Held*, the latter power might be exercised by will; and that the court would carry out the intentions of the donee of the power, though in execution of a power not referred to, and not in the mind of the donee.—*Bruce* v. *Bruce*, L. R. 11 Eq. 371.

See Appointment; Trust.

Presumption.

Testator bequeathed to A., making B. his residuary legatee. A went to Australia, and was heard from last in 1859. Testator died in 1860. *Held*, that seven years having elapsed since A. was heard from, the presumption was that he was dead, but that the burden lay on those claiming under A., and against the residuary legatee, to show that A. died after the testator.—*In re Lewes Trusts*, L. R. 6 Ch. 356; s. c. L. R. 11 Eq. 236. *See In re Phene's Trusts*, 6 C. L. J. N. S. 101.

See Age.

Principal and Agent.

T. consigned goods to N., with a price list; and N. sent in a monthly account of the goods which he had sold, and the next month paid the price on the list. N. did not specify to T. the particular contracts, nor names of purchasers, nor price at which he sold; and he frequently changed the goods, by dyeing, &c., before sale. *Held*, that N. did not sell as agent to T., and that the money he received was subject to no trust for T.—*In re Neville*, L. R. 6 Ch. 397.

See Bills and Notes, 2; Partnership; Stock Exchange; Ultra Vires.

Priority.—*See* Mortgage, 1.

Privileged Communication.—*See* Inspection of Documents.

Privity.—*See* Contract, 2.

Promissory Note.—*See* Bills and Notes.

Protest.—*See* Partnership.

Proviso.—*See* Condition.

Proximate Cause.—*See* Franchise.

Publication.—*See* Libel.

Railway.

Plaintiff took a ticket from defendant railway company, from A. to C. At B., between A. and C., said company's line joined the line of another company, over which the defendants had, by act of Parliament, running powers to C. on payment of tolls, the traffic arrangements being with the second company by said act. Defendants' train ran into a train of the other company, through negligence of the latter, and the plaintiff was injured. *Held*, that the defendants were liable for such negligence. *It seems* the contract is that reasonable care shall be exercised by all by whom such care is necessary, for reasonably safe conveyance to the end of the journey.—*Thomas* v. *Rhymney Railway Co.*, L. R. 6 Q. B. 266; s. c. L. R. 5 Q. B. 226.

See Franchise; Negligence.

Remainder.—*See* Devise, 4; Legacy, 2.

Remainder-man.—*See* Appointment.

Rent-charge.—*See* Tax.

Res Adjudicata.—*See* Bankruptcy, 1; Court.

Reservation.—*See* Forfeiture.

Residence.

A. had lodgings at E., where his family resided; but, being employed at M., he was furnished lodging there and slept there, though not obliged to do so, with the exception of one or two nights a week, when he slept at E. *Held*, that A.'s residence was at E.—*Taylor* v. *Overseers of St. Mary Abbott*, L. R. 6 C. P. 309.

Residuary Estate.

A testator domiciled abroad made his will and died in London, and left his estate to trustees to invest in British consols, and from their income to pay two annuities, the trustees to hold in their names a sufficient amount of consols to secure payment of the annuities; subject as aforesaid, his residuary estate in trust for his children. On the death of one of the annuitants, *held*, that the sum reserved to answer the annuity was part of the residuary estate, and not subject to succession duty.—*Callanane* v. *Campbell*, L. R. 11 Eq. 378.

See Devise, 4.

Residuary Legatee.—*See* Devise, 5; Executors and Administrators, 1; Legacy, 2; Presumption.

Sale.—*See* Bankruptcy, 2; Principal and Agent.

Seal.—*See* Bills and Notes, 3.

Seizure.—*See* Bankruptcy, 2; Execution.

Separation.—*See* Jurisdiction.

Set-off.

A bank accepted a bill for £7798 against cotton, the bills of lading of which were delivered to the bank on acceptance. The bank handed the bills of lading to the owner of the cotton, who obtained from his brokers an advance of £6000 thereon, and paid the same to the bank. The brokers subsequently sold the cotton, and retaining £6000, paid a balance of £574 to the holder of the bill of exchange. The bank was ordered to be wound up, and the holder of the bill proved the whole amount against the bank. *Held*, that the bank could not set off the £574 against the dividend payable to the holder, but, *it seems*, that the amount proved should be reduced by that sum.—*Leech's Claim*, L. R. 6 Ch. 388.

See Bankruptcy, 3.

Settlement.

The owner of an estate, worth $1300, made a post-nuptial settlement upon his wife, receiving as an inducement thereto £150, advanced on his promissory note. In the settlement no mention was made of the advance. *Held*, that there was a sufficient consideration to support the settlement under Stat. 27 Eliz. chap. 4, against a subsequent mortgagee.—*Bayspoole* v. *Collins*, L. R. 6 Ch. 228.

See Legacy, 2; Trust; Vendor and Purchaser, 1.

Shareholder.

The plaintiff signed an agreement as follows: "We, the undersigned, hereby agree, upon the passing" of a certain Act, "to subscribe for" certain shares. The act was passed, and shares were allotted to plaintiffs, but with no notice thereof. By another Act, subscribers to the capital of a company are deemed shareholders. *Held*, that the plaintiffs were subscribers, and liable on a call.—*Burke* v. *Lechmere*, L. R. 6 Q. B. 297.

See Company, 1.

Shelley's Case, Rule in.—*See* Devise, 9.

Sheriff.—*See* Execution.

Specification.—*See* Patent, 3, 5.

Specific Performance.

A. contracted to repair a vessel, and, in case of failure to complete the work, to allow the owners to enter his ship-yard and complete the same. A. became bankrupt. *Held*, that the court could not specifically enforce the whole contract, and would therefore not enforce performance of a part; and an injunction against the bankrupt's assignee's selling the yard was refused, and the owners denied permission to enter the same and complete the vessel.—*Merchants' Trading Co.* v. *Banner*, L. R. 12 Eq. 18.

See Mortgage, 2; Vendor and Purchaser, 1.

Statute.—*See* Bankruptcy; Foreign Enlistment Act; Forfeiture; Franchise; Husband and Wife; Information; Settlement; Voter.

Status.—*See* Domicile.

Stock Exchange.

Whoever enters into contracts on the Stock Exchange through his broker, is bound by its rules.—*Duncan* v. *Hills*, L. R. 6 Ex. 255.

See Contract, 2.

Stoppage in Transitu.—*See* Bill of Lading, 2.

Subscriber.—*See* Shareholder.

Succession Duty.—*See* Residuary Estate.

Surety.

The sureties on a bond covenanted that they or either of them should not be released by any arrangement which might be made, with or without their consent, between the principal and obligee for continuation or alteration of time of payment, or additional security. On failure by the principal to pay an instalment due on the bond, W. undertook to pay the whole amount due in case the principal should be unable to discharge the bond in a manner provided. W. had to pay the whole amount. *Held*, that each surety was liable to W. for a moiety thereof.—*Whiting* v. *Burke*, L. R. 6 Ch. 342; s. c. L. R. 10 Eq. 539.

Tax.

A covenant in a lease to pay "all taxes and assessments," "except level tax, property tax, and land-tax," does not include a tithe rent-charge.—*Jeffrey* v. *Neale*, L. R. 6 C. P. 240.

Telegraph.—*See* Foreign Enlistment Act.

Tenancy in Common.

A testator devised his real estate to his brother and sister and their heirs, "but in case my said brother should die in the lifetime of my said sister without leaving any issue, his share to my said sister and her heirs." The sister survived the testator, and the brother died leaving a son. *Held*, that the words of the devise created a tenancy in common; and that the share lapsing to the brother's son was chargeable with half the testator's debts.—*Ryves* v. *Ryves*, L. R. 11 Eq. 539.

See Perpetuity, 2.

Tenant for Life.—*See* Apportionment, 1.

Testimony.—*See* Costs; Evidence.

Tithe.—*See* Tax.

Title.—*See* Limitations, Statute of; Vendor and Purchaser, 1, 3.

Trade-mark.

Where a first inventor had for many years called his manufacture the "original," an injunction was granted restraining another manufacturer using the above word.—*Cocks* v. *Chandler*, L. R. 11 Eq. 446.

Trover.—*See* Bailment.

Trust.

If a trustee commits a breach of trust by making improper investments, and such investments are made the subject of a settlement by the Court of Chancery, the *cestuis que trustent* under the settlement are not precluded from charging the trustee with said breach of trust.

A testator gave to his wife and brother, or other the trustees for the time being, property in trust, with power to sell and invest at discretion. *It seems* that the discretion ceased with the death of the brother.—*Zambaco* v. *Cassavetti*, L. R. 11 Eq. 439.

See Bankruptcy, 3; Devise, 4; Principal and Agent.

Ultra Vires.

Plaintiff let money to a society having no power to borrow, and received a certificate, signed by two directors, that plaintiff had deposited the money, and that it would be repaid with interest, on notice. *Held*, that the certificate was an implied warranty of authority to bind the society, and that the directors might be sued for damages for breach thereof.—*Richardson* v. *Williamson*, L. R. 6 Q. B. 276.

Value.—*See* Voter, 1.

Vendor and Purchaser.

1. On bill for specific performance filed by a vendor, who had made a voluntary settlement, the vendee having taken possession as purchaser, paid off a mortgage, and taken conveyance of the legal estate from the mortgagee, with possession of the title-deeds, and being willing to complete the purchase on receiving a good title, *held*, that the plaintiff was entitled to a decree notwithstanding the settlement.—*Peter* v. *Nicolls*, L. R. 11 Eq. 391.

2. By written agreement A. contracted to sell a lot of land to B. It was subsequently agreed between A. and B. that said lot should not be sold without a second lot adjoining. B. agreed to sell the first lot to C., who had knowledge of the above facts, subject to the provisions of B.'s agreement with A. C. refused to purchase both lots, and thereupon A. conveyed them to D., who knew of the agreement between A. and B., and its assignment to C. *Held*, that the conveyance to D. would not be sent aside.—*Crabtree* v. *Poole*, L. R. 12 Eq. 13.

3. A vendor agreed to send a purchaser an abstract of title within a certain time, and the purchaser agreed to make any objections thereto within a period which was made of the essence of the contract. The estate in question was subject to a reservation of minerals. The abstract was not delivered within the time agreed. *Held*, that the above objection to the title was fatal; and that the vendor not having delivered an abstract according to the agreement, the time within which objections might be taken would lie with the court.—*Upperton* v. *Nickolson*, L. R. 6 Ch. 436; s. c. L. R. 10 Eq. 228.

Verdict.—*See* Nonsuit.

Voter.

1. The qualification of a voter is by statute, "free land or tenements to the value of 40*s.* by the year, at the least, above all charges." A. owned tenements subject to a mortgage, upon which he paid yearly, in addition to interest, a further sum, in reduction of the mortgage debt; and these two amounts were more than the annual value of the tenements: but such value was more than 40*s.* greater than the interest alone. *Held*, that the interest only was to be subtracted from the yearly value of A.'s estate, and that he was qualified to vote.—*Rolleston* v. *Cope*, L. R. 6 C. P. 292.

2. "Any part of a house, occupied as a separate dwelling-house," is a "dwelling-house" for the purpose of qualification of voters. A. occupied one room in a house, having use of staircase, privy, and ashpit, in common with other tenants. The owner of the house did not reside on the premises. The court was divided as to whether A. occupied a separate dwelling-house.—*Thompson* v. *Ward*; *Ellis* v. *Burch*, L. R. 6 C. P. 327.

Wages.—*See* Decree.

Waiver.—*See* Ejectment.

Warranty.—*See* Ultra Vires.

Way.—*See* Dedication.

Will.

Testator owing real estate in England and Scotland, devised "all the rest, residue, and remainder of my real estate situate in any part of the United Kingdom, or elsewhere," in trust for his two sons. The will was incompetent to pass the Scotch estate, which descended to the eldest son as heir. *Held*, that the heir must elect between the Scotch estate and the benefits under the will.—*Orrell* v. *Orrell*, L. R. 6 Ch. 302.

See Age; Appointment; Apportionment, 2; Codicil; Costs; Devise; Executor and Administrator, 1, 4; Husband and Wife; Illegitimate Children, 1, 2; Legacy; Perpetuity; Power; Residuary Estate; Tenancy in Common.

Words.

"*And.*"—*See* Devise, 2. "*Assigns.*"—*See* Devise, 9. "*Born or to be born.*"—*See* Devise, 9. "*Issue.*"—*See* Perpetuity, 2. "*Or.*"—*See* Devise, 2. "*Original.*"—*See* Trade-mark. "*Person.*"—*See* Condition. "*Separate Dwelling-house.*"—*See* Voter, 2. "*So far as the rules of law and equity will permit.*"—*See* Legacy, 2. "*Taxes and Assessments.*"—*See* Tax. "*Then living.*"—*See* Perpetuity, 2. "*Yearly Value.*"—*See* Voter.—*American Law Review.*

REVIEWS.

American Law Review. Little, Brown & Co. Boston.

The October number commences Vol. 6. The articles are: I. Estoppel of a Tenant to deny his Landlord's Title: A long and apparently carefully written essay, citing the English and American authorities. II. Misunderstandings of the Civil Law. III. Doubtful points under the Bankrupt Law. IV. Married Women. A review of Mr. Bishop's book on that subject. A very readable article, which shews plainly that Mr. Bishop's book must contain an interesting though quaint discussion of an interesting subject.

Law Magazine and Law Review. Butterworth's: London.

The contents of the August number are: I. The Law of Fixtures, its historical development and present state. Part 2.—II. Sanitary Legislation, considering particularly the recent report of the Royal Sanitary Commission. III. On the Transmission of Bills of Lading and other negotiable instruments by Telegraph. IV. County Court Commitments, which is an appeal for their abolition, founded upon arguments which prove only that the law simply requires a few amendments, or that it (the law) is administered harshly and without discrimination. V. The Law of Landlord and Tenant. VI. The Trial of Algernon Sidney. VII. Bankruptcy Business. VIII. A Critique on the Classification of Rights in the Institutes of Gaius and Justinian. IX. The Law of Distress, which we have reprinted. X. Prison Discipline and Reformatory Treatment, &c. &c.

The articles in the November issue, are: I. The Co-operative Societies' Act of 1871. II. Setting fire to goods in a dwelling-house. III. A Review of Williams' Notes to Saunders' Reports. IV. The Law of Pawnbroking. V. The House of Lords. VI. Legal Education. VII. The Statute of Frauds. VIII. Nationality and Domicile under the Conflict of Laws. IX. The late Right Hon. Sir John Rolt. X. Local Courts and the bounds of their jurisdiction, which we republish. It contains some hints which would occasionally be of use to those in authority; and it shews, on the other hand, that, in some respects, we are in advance of legislation in England. This, however, has happened before.

IMPERIAL AND COLONIAL LEGISLATION.

There is an obvious absurdity in an united empire sanctioning the existence of different laws on important subjects interesting alike to all parts of it. We have recently pointed out that there ought not to be one law permitting marriage with a deceased wife's sister prevailing in Australia, whilst a similar provision has been thrown out of the Imperial Legislature. We print conspicuously in another column a judgment delivered at Halifax, which discloses the fact that whilst we have our Carriers Act in this country, by the provisions of which carriers are protected from liability unless a premium is paid in proportion to the value of goods above £10, no such Act has been passed in our colony, and the Supreme Court has been compelled to hold that the owner of goods may be defeated of his remedy against a carrier if that carrier has declared that he will not be responsible at all.

Another branch of law is in a similar position, as we find from a carefully written paper in the *Canada Law Journal*, treating on Parliamentary Elections. There seems to be a general impression, says the writer, principally outside the Profession, that the Acts of Parliament relating to the law of Parliamentary elections in the Province of Ontario are so nearly identical with the laws of England, that the decisions of the English judges should be guiding rules in the colony. He adds, "A careful comparison, however, of the Imperial and Ontario statutes will show that, although in some instances the different sections of the separate Acts are word for word the same, yet they do differ in some points so very materially, that they might be said to alter the whole scope of the Act in that respect." This is perfectly plain, and this peculiar result is arrived at. Under our statute of 1854, a member loses his seat for bribery, treating, or undue influence. In the Ontario statute of 1868, a member would only lose his seat for offences committed against the sections of the Act prohibiting bribery by him-

self or his agent. Treating and the exercise of undue influence were by that Act punishable only by the infliction of a money penalty. Then two other analogous Acts pass—the Imperial Act of 1868, and the Ontario Act of 1871 (the Controverted Elections Act). By the former Act it is provided that where bribery is committed with the knowledge of a candidate, he is held to be guilty of personal bribery. Thus our English law was carried as far as it would well go. The Ontario Act went in the same direction, and said that any candidate guilty of corrupt practices, which were defined as including bribery, treating and undue influence, illegal and prohibited acts in reference to elections, or any of such offences, as defined by Act of the Legislature, should lose his seat. The result is, that only in cases of bribery can the act of an agent affect the seat: in cases of treating and undue influence, it must be the personal act of the candidate himself. It is familiar to every one that this is not the law of England, and the act of the agent, whether it be connected with bribery, or treating, or undue influence, will equally affect the seat, rendering an election void. Why the law should be different in the two countries, it is very difficult to understand, more especially when it is considered that as regards bribery, the colonists are rather harder on the candidate than we are. It must be assumed, and we think rightly, that treating and undue influence are matters not so thoroughly within the control of a candidate. Bribery is rarely carried on unless the candidate himself supplies the necessary funds; whereas both treating and undue influence may be carried on at very little cost, and without the knowledge or consent of the candidate in any way whatever. But whilst the Ontario Act does not affect the seat of a member by the act of an agent in respect of treating or undue influence, it is very severe on him if he be found to have sanctioned or been guilty personally of any illegal practice.

We need not go more particularly into the distinctions between Imperial and Colonial legislation, and we will merely refer to the inconveniences which any difference at all is calculated to produce. All our now elaborate and important case law on the subject of Parliamentary elections is only applicable in Canada in an indirect way. The decisions are to be looked at carefully, with a view to the distinctions in the statutes of the colony and of the mother country. This ought not to be. The law of the empire on matters of imperial interest should be uniform. So far from this being the case, we find that we have different laws prevailing as regards marriage, the liability of carriers, and Parliamentary elections. No doubt there are other branches of the law, in which there is a want of agreement and uniformity. The extent of the evil should be accurately ascertained, and steps taken to remedy it; otherwise, it may prove to be of more consequence to imperial interests than may be generally supposed.—*Law Times.*

POSTAL CARDS.

May a person with impunity make use of the new postal cards to send his neighbour defamatory and scurrilous language concerning him? According to the daily papers, this question has been answered by a metropolitan magistrate in the affirmative; but we cannot but think there must be some inaccuracy in the report. It is said a tradesman applied to Mr. Newton for a summons against a man who had sent him a libel on a post-card, and that the learned magistrate refused to grant it, on the ground that there was no more a publication of the contents of the card than there would have been had it been a sealed letter. We would caution any evil-disposed person from relying on this supposed decision as providing a safe and cheap mode for abuse and defamation. The first point to be noticed is, that ever since the time of Lord Mansfield it has been admitted law, that the sending a letter containing a libel to the party against whom it is made is a sufficient publication to sustain an indictment, although it would not support an action. In the case of *Reg.* v. *Burdett* (3 B. & A. 717), the court held that a delivery of a sealed letter containing a libel at the post-office is a publication there. The reason why an action will not lie on a libel when the only publication has been to the party libelled is, because the plaintiff could sustain no injury unless he himself communicated the libel, but this reason does not excuse the libeller from being prosecuted for the offence, the gist of the crime being not the injury to the individual, but the provocation and tendency to a breach of the peace. This is no obsolete doctrine. Within the last two years a man was sentenced at the Old Bailey for writing a libellous letter to and of the prosecutor. But we go a step further, and contend that there is a great difference between sending a letter in an envelope and writing a libel on a post-card, which can and probably will be read by clerks, letter carriers, domestic servants and others. It must be remembered that the annoyance caused to the recipient of the libel will arise from the suspicion that others have seen it, and in this way a nervous person's life might be made a perfect burden to him, although in fact he alone might have read the imputations upon his character. If a man wishes to abuse you, and is not anxious that others should see it, it is surely not too much to require him to pay a penny for a stamp, and put the abuse under cover. It was held by Lord Ellenborough that where it was proved that the defendant knew that a clerk of the plaintiff opened his master's letters in his absence, there was evidence for the jury to consider whether the defendant did not intend the letter to come to the hands of a third person: *Delacroix* v. *Thevenot*, 2 Stark. 63. Surely in the same way the fact that a person wrote on a post-card would be some evidence of a desire that the contents should be known by others than the plaintiff. It was only last year that an attorney recovered damages in an action for libel, where the libel was part of the direction of a letter addressed to him, as "Old Perjury Jones, of Goring Place, Llanelly, South Wales:" *Jones* v. *Bewicke*, L. Rep. 5 C. P. 32. It is true that the letter carrier was obliged in the course of his duty to read the direction, but still we submit that the case has a bearing upon the question before us.—*Law Times.*

The Winter Assizes for the County of York will commence on Monday, the 8th January next.

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