The Lower Canada Law Journal.

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CONTEMPT OF COURT.

In our previous notices of the LAMIRANDE case, we have mentioned the proceedings taken against Mr. T. K. RAMSAY, and also against Mr. LUSIGNAN, for contempt of Court. When the argument on the rule against Mr. RAMSAY at last came on, in the end of October, Mr. RAMSAY contended that the letters which he had written to the *Gazette* were merely answers to charges made against him by Mr. Justice DRUMMOND, contained in certain reports printed in the *Herald*, for which he held the judge responsible. Mr. Justice DRUMMOND having denied that he intended to charge Mr. RAMSAY with being one of the conspirators in the LAMIRANDE affair, or with having been a party to the alleged falsification of the GOVERNOR'S warrant, Mr. RAMSAY replied that he, on his part, would consent to withdraw what was offensive in his letters, in consideration of Mr. Justice DRUMMOND having disavowed any intention to criminate him, in making use of the expressions complained of.

On the 3rd of November, final judgment was rendered. As a writ of error has issued, and the case will be heard before the full Court of Queen's Bench, we shall not take up space here with the remarks made by Mr. Justice DRUMMOND in giving judgment. Suffice it to say that he made the rules absolute, and fined Mr. RAMSAY in the sum of £10. Mr. LUSIGNAN was also fined in the sum of 20s., which was paid. Mr. RAMSAY immediately procured the issuing of a writ of error to the Appeal Side of the Court of Queen's Bench. The following reasons, extracted from the record, are the grounds relied on by the plaintiff in error:—

"T. K. RAMSAY *and* THE QUEEN. — And now, that is to say, on the —— day of ——, in the year of Our Lord, 1866, comes the said T. K. Ramsay in person into Court, and says that in the record and proceedings aforesaid, and also in the rendering of the judgment in the said case, there is manifest error, in this, to wit, that the said rule does not contain any contempt or offence which, by the laws and statutes of this Province, a justice sitting in and holding the Court of Queen's Bench, without the assistance of a jury, had any authority or jurisdiction to hear and determine; wherefore in this there is manifest error.

"There is also error in this, that the learned judge who gave the judgment, to wit, the Hon. Mr. Justice Drummond, was himself a party to the prosecution, being complainant as to the contempt of the Court of Queen's Bench alleged, which did not take place in view of the said Court, or in view of the said judge; wherefore in that there is manifest error.

"There is also error in this, that there was no affidavit in support of the said complaint; wherefore in that there is manifest error.

"There is also error in this, that the letters mentioned in the rule taken in this cause are not alleged to have been written by the said plaintiff in error, nor does it appears by the record that they were written by him; wherefore in that there is manifest error.

"There is also error in this, that if the said letters have been written by him, they do not contain any contempt of the Court of Queen's Bench, being such answers as plaintiff in error had a right to make to certain public reports therein referred to, and the said answers were the legitimate defence to the slanders contained in the said reports; wherefore in that there is manifest error.

"There is also error in this, that even if they did contain any contempt of the said Court, the said contempt was condoned and passed over by the said Court long previous to the taking of the said rule; wherefore in that there is manifest error.

"There is also error in this, that in and by the said rule, it is not alleged, nor does it appear, that the alleged contempt was committed within the jurisdiction of the Court which adjudicated thereon; wherefore in that there is manifest error.

"There is also error in this, that it appears that the said judge was not acting in his judicial capacity at the time the remarks made by him, and reported in the *Herald*, were

made; wherefore in that there is manifest error.

"Wherefore he prays the judgment of the Court here upon the premises, and that the judgments and proceedings aforesaid should be reversed and made void; and that the said T. K. Ramsay should be restored to all things which by reason of the judgments and proceedings aforesaid he could have lost."

We understand that the case will not be in a position to be argued before the full Court till the March Term.

THE QUEEN AGAINST JAMES MACK.

The case of JAMES MACK, who was convicted of murder at the last term of the Court of Queen's Bench, and executed on the 23rd of November, may well arrest our attention for a few moments.

The prisoner was a young man, a driver in one of the Batteries of Royal Artillery, stationed at Montreal, bearing a fair character, not addicted to intemperance, who, one evening in July last, cut the throat of Corporal SMITH, of the same Battery, and then proclaimed himself the doer of the deed, in the hearing of those who hastened to the spot. It appears from the evidence of a comrade, named BURTON, the only one in the Battery who seems to have been in the confidence of the prisoner, and to have sympathised with him in his troubles, that the corporal was in the habit of reproving and reporting MACK, for alleged acts of negligence, and breaches of discipline; that he would frequently take advantage of an officer being within hearing to find fault with the prisoner, for something wrong about his horses or his harness, though in the opinion of his comrade, MACK kept everything in as good order as any other driver in the Battery. It must be difficult, nay, impossible, for persons mixing in active life, and having their sensitiveness dulled by contact with men of all classes and characters, to conceive the degree of irritation created in the mind of a man bound down to the routine of a monotonous service, with no escape from the petty tyranny of one only a step above him. We can but judge of its intensity by the terrible results. Not to speak of the hideous suspicions entertained that in battle many officers fall by the hands of their subordinates, we have the constantly recurring fact of non-commissioned officers being murdered by their men, for causes inconceivably trifling—murdered recklessly, by men not caring for escape, like the murderer who springs with his victim from the height of a precipice, and perishes with him in the fall. And where this gnawing rage and exasperation do not end in murder, there is ample room to believe they frequently lead to suicide.

In the case before us, the driver MACK had been labouring under a sense of wrong and injury for many weeks previous to the commission of the deed. While out with the "flying column," during the Fenian raid, the prisoner was, in his own opinion, led the life of a dog. He had the care of six horses, and Corporal SMITH, by constantly finding fault, and subjecting him to punishment, seems to have harassed him beyond endurance, though the corporal was probably ignorant of the deadly hatred he was exciting. Half an hour before the murder, MACK had just been ordered to do extra pack drill. The evidence of BURTON, to which we have already referred, shows that the prisoner reasoned with himself that if he struck the corporal, the punishment sure to follow would be so disproportioned to the pain inflicted on his persecutor, that it would be no satisfaction to him, and thus at length he came to the dreadful resolution to be on equal terms with his adversary, by taking his life, and allowing his own to be the forfeit.

This is one view of cases of this class. But there is another possible view. We all know that it is a common, every-day occurrence, when a man cuts his own throat, or terminates his existence in any other way, for the Jury to say that he did it while labouring under temporary mental derangement. This verdict passes unquestioned in the case of a soldier, as well as of any other person. And it is by no means an unfrequent occurrence for a soldier to commit suicide. We have heard of several cases in this city within a few years; and, rather strange to say, the very day we were writing these lines, our eye was attracted by the following paragraph, in a newspaper, of date October 17th. "Quebec,

Oct. 16.—A private of the 30th Regiment, named Swallow, committed suicide at the camp at Levis yesterday, by cutting his throat with a razor. No reason assigned for the deed." No doubt the stereotyped verdict was rendered in this case; and yet if SWALLOW had taken a fancy to cut some other person's throat instead of his own, would he not have surely suffered death as a wilful murderer?

We make these observations without the slightest disposition to impugn the fairness of the prisoner's trial, or to complain of his sentence. The forms of justice were, no doubt, carefully observed. The plea of insanity was urged by the prisoner's counsel—counsel, however, assigned to him by the Court only on the morning of the trial. The learned judge, we believe, referring to this defence, laid some stress upon the fact, as bordering on insanity, that the prisoner during the night after the murder, expressed his satisfaction at what he had done, and said there were three or four more in the Battery, that he would like to do the same to. But the judge added that this was too slender a basis for such a defence to rest upon, and that were we to enter into a fine analysis of human acts, nine-tenths of our fellow men would seem to be insane.

It must be observed, however, that the plea of insanity being an affirmative plea, the proof of which lies upon the prisoner, and the very truth of which prevents the prisoner from doing anything for himself, it is highly improbable that a reckless, unhappy man, generally without means or friends, should be successful in establishing it. His comrades would expose themselves to imputations of disaffection, and sympathy with the crime, if they displayed too lively an interest on his behalf; and however strangers may commiserate, they are generally either ignorant of how the case really stands, or satisfy themselves with the reflection that their interposition could do no good.

When the community is startled by the intelligence of a ferocious crime like that committed by MACK, the exigencies of military discipline, the laws of the state, the blood of the murdered man, cry aloud for summary vengeance upon the murderer. But no punishment will be sufficient to deter men from crimes of this description. The murderer counts the cost, and is willing to pay the penalty. In this case, so suddenly and stealthily was the act committed, that the first impression was that Corporal SMITH had committed suicide, but MACK disabused the minds of the bystanders, and avowed himself the criminal. It is manifest that we must look for other means of prevention. Whether these can be found in rendering it possible for a soldier to exchange his regiment or company, or in facilitating the purchase of discharges, when men find themselves unhappily circumstanced, it is hardly within our province to discuss. These are suggestions for the philanthropist rather than for the lawyer.

THE BAR OF LOWER CANADA.

Most of our readers are probably aware that an Act amending the Act respecting the Bar of Lower Canada was passed last session, and that new By-laws in conformity therewith have been made by the General Council, and also by the Councils of Sections. One of the new regulations is that a list of the advocates entitled to practice in Lower Canada shall be made and posted up. A notice has been issued by Mr. GONZALVE DOUTRE, secretary-treasurer to the General Council, that this general list will be made and completed on the 15th December, to be homologated and posted up according to law on the 1st January, 1867. Advocates admitted since the 30th of May, 1849, whose diplomas have not been registered in the Registers of the General Council, are requested to send them to the secretary before the 15th of December for registration. It is important that this list should be as accurate and complete as possible; and we therefore trust that members of the bar will endeavor to second Mr. DOUTRE in the carrying out of his task, which, we may add, is performed without any pecuniary remuneration.

The following is a list of Diplomas registered in the Registers of the General Council, from the nomination of the members of the Council, viz., 5th October, 1866, up to the 21st November, 1866.

NAMES.	WHERE ADMITTED.	DATE OF COMMISSION.	DATE OF REGISTRATION.
Butler, Thomas Page..	Montreal..	27 Sept., 1866	15 Oct., 1866
Belanger, Ls. Charles....	St. Francis.	8 Oct., 1866	18 Oct., 1866
Benoit, Gab. Alphonse..	Quebec....	....	.....
Beique, Jos. Tréflé.....	Montreal...	19 Aug., 1863	19 Nov., 1866
Bouchette, A. Frederick..	Quebec....	23 Nov., 1865	21 Nov., 1866
Caron, Onézime.....	Quebec.....	6 Oct., 1866	6 Nov., 1866
Drolet, Gustave A.....	Montreal...	16 Oct., 1866	31 Oct., 1866
Farmer, William O.....	Montreal...	17 Oct., 1866	24 Oct., 1866
Jacques, Alphonse.....	Montreal...	17 Oct., 1866	18 Oct., 1866
Noyes, John Powell.....	Montreal...	17 Oct., 1866	24 Oct., 1866
Pouliot, Joseph N.....	Montreal...	10 Sept., 1866	6 Nov., 1866
Prévost, Oscar.....	.....	30 Oct., 1866	7 Nov., 1866
Pelletier, Honoré Cyrias.	Quebec.....	8 Oct., 1865	20 Oct., 1866
Romayne, Jn.	Montreal...	7 Nov., 1865	19 Oct., 1866
Tellier, Ls..	Montreal...	16 Oct., 1866	26 Oct., 1866
Vallee, Jean Baptiste....	Montreal...	9 Nov., 1865	19 Nov., 1866

HABEAS CORPUS.

On the 25th of September, before Mr. Justice Drummond, in the Court of Queen's Bench, Crown side, Mr. Doutre, Q. C., moved that the rule of practice, requiring twenty-four hours' notice to be given to the counsel for the Crown, of applications for habeas corpus, be dispensed with. He referred to the Lamirande affair as an instance of the danger of delay in certain cases.

On the 20th of October, Drummond, Badgley, and Mondelet, JJ., being on the bench, judgment was given rejecting the motion, on the ground that no rule existed on the subject, the practice being that the writ might be ordered to issue at once, or notice be required, in the discretion of the judge before whom affidavits were laid. The practice of giving notice to the Crown, added their Honors, had always existed, but whether the notice should be given before or after the issuing of the writ, was in all cases matter for consideration. Each case must be judged on its merits.

LORD CRANWORTH.

The following notice of Lord Chancellor CRANWORTH, who retired from the woolsack on the change of ministry in July last, is from the *Times*:—

"The Great Seal will pass to-day, for the second time, from the hands of Lord Cranworth to those of Lord Chelmsford; and, as no man of seventy-five can look forward to the reversion of a laborious office, we may regard the career of the present Lord Chancellor as virtually closed. If it has not been an eminently brilliant, it has been an eminently fortunate and honorable career. Lord Cranworth has not only proved himself *par negotiis*, but has earned the respect of the bar and the public in more various capacities than any one of his legal contemporaries. It is now exactly fifty years since he was first called to the bar, and thirty-two since he became solicitor-general, under Lord Melbourne's government; a post which he resumed after the short administration of Sir Robert Peel, and held until he was made a Baron of the Court of Exchequer, in 1839. Although his practice had been confined to the Courts of Chancery, Baron Rolfe acquired a high reputation as a common law judge; and the manner in which he conducted the famous trial of Rush has been remembered ever since as a signal proof of his judicial ability. Upon the resignation of Lord Cottenham in June, 1850, he was appointed one of the Commissioners of the Great Seal; and, in the same year, succeeded Sir Lancelot Shadwell as Vice-Chancellor, and was raised to the peerage. In October, 1851, he became one of the Lords Justices in Appeal in Chancery; and, at the end of 1852, he accepted the chancellorship, vacated by Lord St. Leonards. This office he retained for more than five years, under Lord Aberdeen and Lord Palmerston successively; nor was it until February, 1858, that he gave place to Lord Chelmsford. During this period, it was Lord Cranworth's misfortune to be unequally yoked, for many official purposes, with an attorney-general whose rare intellectual vigor and zealous advocacy of law reform contrasted with his own slower and more cautious temperament. His patience, however, his honesty of purpose, and his conciliatory disposition, here stood him in good stead; and he carried with him the good-will of the Chancery bar when he quitted the woolsack. Upon the return of Lord Palmerston to power in 1859, Lord Campbell was made Lord Chancellor, and was followed by Lord Westbury;

but, after the memorable fall of the latter, about this time last year, Lord Palmerston, who could ill spare the services of Sir Roundell Palmer in the House of Commons, again offered the chancellorship to Lord Cranworth, who has filled it with credit ever since. No one would venture to claim for the retiring Chancellor such fame as has been won by some of his predecessors, two of whom, and not the least illustrious, are still living at a very advanced age. In depth of learning, he cannot be compared with Lord St. Leonards, nor in versatility of genius with Lord Brougham. Neither learning nor versatility, however, nor both combined, are sufficient to constitute a model Lord Chancellor; and Lord Cranworth has manifested some other qualifications, less remarkable indeed, but hardly less essential. In the first place, he possesses a sound and adequate knowledge of both our legal systems; that is, of common law and equity. This is no small or ordinary attainment for an English lawyer. Lord Brougham, when he was intrusted with the Great Seal by Lord Grey, was chiefly known as an eloquent advocate at *Nisi Prius*, and a powerful debater in the House of Commons; and though his marvellous talents and industry enabled him to master the principles of equity, and even to apply them as no other man could with so little experience, yet his judgments could not and do not command the same authority as those of less gifted Chancellors. On the other hand, Lord St. Leonards, though profoundly versed in the mysteries of real property law, had little, if any, practical acquaintance with common law. Lord Cranworth, before he became Lord Chancellor, had occupied a seat for some years on both the judicial benches, and earned the confidence of both branches of the legal profession. It is to this circumstance too, as well as to his unblemished personal character, that he owes his influence in the House of Lords. Since his accession to office, he seems to have experienced no difficulty in presiding over that assembly, which Lord Westbury sometimes found so unruly. The secret of this, no doubt, is that Lord Cranworth has made no enemies; but his opinion on certain questions, such as those affecting criminal justice, is naturally received with the greater attention, because he is known to be familiar with the duties of a common law judge. The weak point in Lord Cranworth's public life is his want of sympathy with reforms of the law. It is by no means an uncommon failing with those who are plunged early into the details of business, with the prospect of success and wealth, if they will but make the best of the existing system; with the risk, approaching to a certainty, of failure, if they insist on broaching "crotchets" in the hope of amending it. The reason why so few successful lawyers are reformers is, that, until they have succeeded, no one cares to listen to their suggestions; and, after they have succeeded, their own interests are concerned in keeping things as they are; while, had they managed to gain a hearing sooner, they would probably not have succeeded at all. The only two men of our own times who have conspicuously risen superior to these anti-reforming tendencies, or retained energy enough to use the vantage ground of a great position for the sake of initiating organic changes, are Lord Brougham and Lord Westbury; and this is a merit which, in the eyes of posterity, will cover a multitude of sins. It would be ungrateful not to recognize the leading part which Lord Cranworth took in passing the Charitable Trusts Act, whence an important reform in the management of these vast endowments may hereafter be dated. On most other proposals for improving our legal system he has adopted what is called the "safe side," and has done little to realize the vast designs bequeathed to him by Lord Westbury in his valedictory address to the House of Lords. Those designs, involving the formation of a complete digest as the proper basis for a future code, yet remain to be carried out. It would be too much to expect of the new Lord Chancellor, that he should devote himself to the execution of a project which originated with a political opponent; and the honor of accomplishing it will probably be still reserved, as it should be, for a liberal government."

CHIEF JUSTICE LEFROY.

The retirement of the Hon. Thomas Langlois Lefroy, Chief Justice of the Court of

Queen's Bench in Ireland, is one of the noteworthy events of the year 1866. The ex-Chief Justice was born in 1776, and is therefore more than 90 years of age. It is 69 years since he was called to the Irish Bar. He was appointed Baron of the Exchequer in 1841, and promoted to the Chief Justiceship in 1852.

The statements as to his infirmities of late years are very contradictory. Ten years ago, a suggestion that he should retire was moved in Parliament, but was at once put down. The attack was renewed in the early part of the present year, but the old Judge resolved to choose his own time for retiring. To use his own words in a recent address to a Grand Jury, "Such a course," he said, "might "have intimidated a weaker man to fly from "the post of duty, though in my case it only "served to strengthen my determination "never to yield to menace what a sense of "duty had not led me to concede."

Lord Chelmsford, in the debate in the House on the alleged incompetence of the Chief Justice, stated that from 1852 to that time, there had been only four writs of error from the Court of Queen's Bench, and that for twenty-five years the Chief Justice had not missed a single circuit, or town in any circuit, except in 1847, when he was suffering from low fever, and was obliged to be absent for six weeks.

As soon as Lord Derby came into power, the Chief Justice voluntarily resigned his office.

Trial of Fenian Prisoners in Lower Canada.—An extraordinary term of the Court of Queen's Bench on the Crown side, is to be held at Sweetsburg, in the District of Bedford, for the trial of the Fenian prisoners in Lower Canada, beginning Monday, the 3rd of December.

Secret Indictments by Grand Juries.—In noticing, in the last number, the fact that a pamphlet had appeared, bearing the above title, we omitted to mention that answers on the part of the gentlemen referred to by Mr. Hibbard, also appeared immediately afterwards. As we stated before, we desired to guard against the expression of any opinion on the merits of the case, especially as we believe legal proceedings are still pending.

Privy Council.—The Judicial Committee of the Privy Council commenced sitting for the despatch of business on the 1st of November. The only Canadian case on the list was that of Gugy, appellant, and Brown, respondent.

Legal Appointments in England.—Sir Hugh McCalmont Cairns, Knt., has been appointed a Judge of the Court of Appeal in Chancery, in the room of the Right Honorable Sir James Lewis Knight-Bruce, resigned. A later mail has brought the intelligence of the decease of Lord Justice Knight-Bruce.

John Rolt, Esq., Q.C., has been appointed Her Majesty's Attorney General.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

Quebec, Sept. 18.

RENAUD, (plaintiff in the Court below,) Appellant; and PROULX, (defendant in the Court below,) Respondent.

Hypothecary Action—Proof of Ownership.

Held, that the plaintiff in a hypothecary action, must prove that the grantor of the mortgage was proprietor of the immoveable hypothecated at the time when the mortgage was granted.

This appeal was instituted from a judgment rendered on the 6th of June last, in the Superior Court at Quebec, by *J. T. Taschereau*, J.

The facts of the case were as follows:—At Montreal, on the 11th Sept., 1858, by a notarial deed of obligation, Joseph Paquin, of Grondines, acknowledged to owe to the appellant and C. Fitzpatrick, his partner, the sum of £500, to secure the payment of which sum, with interest, he mortgaged a certain lot of ground, situated in the parish of Grondines. This deed was duly enregistered in the regis-

try office of the county of Portneuf, on the 16th of the same month. On the 27th of January following, (1859) Renaud & Fitzpatrick dissolved partnership, the latter ceding to Renaud all his rights in the partnership concern.

In November, 1865, a balance of $1589.11 of the above sum remained unpaid, according to the appellant's pretensions, and the defendant, Dame Luce Proulx, being then in possession of the lot hypothecated as above, the appellant instituted an action against her, to recover that amount, the conclusions of his declaration being as follows:—"That the said lot of land be declared to be mortgaged and hypothecated to the payment of the said sum of $1589.11, in principal, interest, and costs; and that the defendant, as proprietor, possessor, and holder of the said lot of land, be condemned to pay to the plaintiff the said sum, with interest till paid, and costs; unless the said defendant preferred to abandon (*délaisser en justice*) the said lot of land to be sold by order, &c., which the said defendant should be held to choose between, within fifteen days from service of the judgment to be given in the cause; if not, at the expiration of the said delay, that she should be condemned purely and simply to the payment of the said sum."

To this declaration the defendant replied by a *défense en fait*, and a *défense en droit*, alleging as reasons in support of the latter, 1st, The illegality of the conclusions, which are personal against the defendant, who could only be condemned to abandon unless she preferred to pay; and 2nd, want of signification to Joseph Paquin, the personal debtor, of the transfer of the 27th January, 1859, by which Fitzpatrick ceded to Renaud his part in the amount of the obligation of the 11th Sept., 1858, the foundation of the action, and the want of any acceptance of the said transfer by Joseph Paquin.

Upon these pleadings issue was joined, and the Superior Court, on the 6th June last, rendered judgment, dismissing the action, and maintaining defendant's pleas.

This judgment was confirmed with costs by the Court of Appeals, the ground assigned being that the plaintiff had failed to prove that Joseph Paquin, at the date of the obligation, was proprietor of the land, on which he, the plaintiff, claimed a hypothecary right.

Taschereau & Blanchet, for the appellant.

Montambault & Taschereau, for the respondent.

COURT OF REVIEW.

MONTREAL, May 30.

DORAN *v.* DUGGAN.

Practice—Ejectment—Lessors and Lessees Act.

Held, that an action of ejectment cannot be brought under the Act, C. S. L. C. cap. 40, respecting Lessors and Lessees, unless there be a lease, or a holding by permission of the proprietor, without lease, i. e. unless the relation of landlord and tenant exists between the parties.

2. That where the plaintiff alleges that there is no lease or holding by his permission, the defect cannot be cured or supplied by the allegation of the defendant, in his plea to the merits, that there was a lease.

This was an action of ejectment under the *Lessors and Lessees Act*, brought by Julia Doran, widow of Patrick White, in her quality of tutrix to the children, issue of the marriage. The writ was issued on the 7th March, 1866, and returned on the 9th of March.

The declaration set out that on or about the 21st of February last, the defendant "without any lease verbal or written, entered upon and took possession" of a shop and dwelling-house belonging to the estate of the late Patrick White, "and that he still continues forcibly and against the wish and desire of the plaintiff to hold and occupy the said premises, and refuses to leave the same and deliver the same to the plaintiff, and refuses to allow plaintiff or her tenants to enter or occupy the said premises." The declaration went on to state that the plaintiff had let the same premises to one Ronald Macdonald, but was unable to give him possession, "through the forcible and illegal occupation of the defendant, to plaintiff's very great and serious loss and damage." Conclusions, that *saisie-gagerie* issue, and also for ejectment of the defendant.

The defendant first put in a preliminary plea, or *exception déclinatoire*, alleging that he could not be bound to answer the action, because the plaintiff had no right of action under the act respecting lessors and lessees,

cap. 40, C. S. L. C., under which act the action was instituted.

The defendant, the same day, on the demand of the plaintiff, pleaded to the merits, alleging that he was in lawful possession of the shop and premises in question, under a verbal lease of the same, and delivery of the key to him as tenant, at the rate of $14 per month, for the period of one year from 1st May, 1866, and rent free for the broken period from the 15th February, 1866, when he lawfully entered into possession.

The issue being joined, the parties proceeded to evidence, and the *enquête* having been closed, and the parties heard on the merits,—on the 23rd of March, *Smith*, J., rendered judgment in favour of the plaintiff, "considering that this action falls within the Lessor and Lessee Act, as it is a question of lease or no lease, the defects of the declaration, if any defects exist, being cured by the pleas of the defendant, and that by the issue raised it is a question of lease, and considering that the plaintiff hath proved the material allegations of her declaration, &c."

The defendant then inscribed the case for review, and the following judgment was rendered, May 30.

SMITH, J., dissenting. It appears that the defendant, wanting to lease a certain house, went to the proprietor for permission to go in and view the premises. After seeing the place he said he would not pay more than $14 a month, the rent asked being $15. Sometime after, under pretence of wishing to see the premises, he got into the house and refused to leave, and the present action was brought to eject him from the premises. The action was taken out under the Lessors' and Lessees' Act, but there is not much said about a lease in the declaration. The defendant pleaded by declinatory exception that it was an ordinary possessory action, which could not be brought under the above mentioned act. But in his plea to the merits, the defendant set up that there was a lease. Under the circumstances I considered that the defect in the declaration was cured by the mention made of a lease in the pleas, and I admitted the parties to evidence in the Court below. The question is, whether the pleas can come to the aid of the declaration. I always understood that they can. Another circumstance to be taken into consideration is, that the evidence of the parties plainly establishes the facts between them, and the only defect in the declaration could be remedied by the insertion of these words, that the defendant under a lease entered into possession.

BADGLEY, J. The declaration sets out a forcible entry and detainer, but it concludes very singularly for a *saisie-gagerie*. The facts are, that the defendant, under pretence of looking at the premises, obtained the key, and then persisted in remaining in occupation. As the case stands it is evidently one of forcible entry and detainer, and how can such an action be brought under the Lessors' and Lessees' Act? The judgment must be reversed, but under the circumstances of the case, each party is condemned to pay his own costs.

MONK, J. It is not without some difficulty that I have been able to concur in the judgment. The declaration sets out in express terms that the defendant, without any lease verbal or written, and by violence, took possession of the plaintiff's property, and it contains nothing to show that the case has any connection with the Lessors' and Lessees' Act. It is an elementary principle in all cases under the Lessors' and Lessees' Act, that the relation of landlord and tenant must necessarily exist. The present case does not come under any of the provisions of that act, the possession being one of violence. When this extraordinary declaration was filed, the defendant pleaded a declinatory exception, stating that the action was in the nature of a possessory action, and could not be brought under the act. Then the defendant put in his plea to the merits, setting up that there was a lease, and this would seem to bring the case under the provisions of the statute; but the plaintiff, in his answer, persists in stating that there was no lease, or holding with the permission of the proprietor. The parties have gone to evidence, but there is not a tittle of evidence to show that the relation of landlord and tenant existed between the parties. This, then, was a case in which recourse should have been had to the criminal law or the common law.

The judgment was entered up substantially

as follows:—"The Court, &c., considering that the said action of the plaintiff hath been instituted and prosecuted under the provisions of the Lessors' and Lessees' Act, but does not rest upon any lease or agreement, conventional or legal, between the plaintiff and the defendant; considering that the said plaintiff cannot, for the causes aforesaid, maintain her said action; and that, therefore, in the judgment rendered by the Circuit Court, on the 28th of March, 1866, there is error, doth reverse and set aside the said judgment, and proceeding to render such judgment as should have been rendered by the Circuit Court, doth dismiss the action, and doth condemn each party to pay his own costs, as well in the said Circuit Court as of this Court.

Judgment revised, SMITH, J., dissenting.

Clarke, for the plaintiff.

Day & Day, for the defendant.

SUPERIOR COURT.

MONTREAL, Oct. 27.

IN RE THURBER.

Insolvent—Opposition to Discharge.

An insolvent, within a few months previous to the time he stopped payment, made large purchases from several parties, and at the same time was borrowing at from a half to one per cent. per week. He had made no balance sheet for two years previous to his suspension.

Held, that the Court could not refuse to confirm his discharge on these grounds, in the absence of proof that he made the purchases knowing that he was insolvent, and in contemplation of insolvency.

The insolvent, Alexander Thurber, having obtained the assent of the required majority of his creditors to a deed of composition and discharge, under the Insolvent Act of 1864, petitioned the Court in the usual form for confirmation of his discharge. This petition was contested by a number of creditors who had refused to become parties to the deed of composition.

The following were the principal grounds assigned by the contesting creditors:—That the insolvent was a bankrupt to his own knowledge in 1863, and was so continuously up to the time he declared himself to be so, on the 19th of May, 1866. That not only was he insolvent to his own knowledge, and actually a bankrupt during all the period above mentioned, but his affairs became gradually worse from the date of his balance sheet in 1863, to the time of his actual stoppage on the 19th of May last; so much so, that, in addition to his ordinary discounts at the banks, he was obliged to borrow money during the whole of the above mentioned period at from 14 to 15 per cent. discount; and from July, 1864, to the time of his stoppage, at the rate of a half to one per cent. per week. That the insolvent purposely concealed the actual state of his affairs from his creditors, and even purposely abstained from making a balance sheet at any time since 1863. That all the purchases which the insolvent made from his creditors were so made during the six or seven months immediately preceding the 19th of May last, and some of them within a few weeks of that date. That when the insolvent purchased from the contesting creditors the goods for the price of which they are creditors in this matter, he knew himself to be unable to meet his engagements, and concealed the fact from his creditors with the intent to defraud them. That the insolvent, on or about the 18th of May last, fraudulently disposed of a large quantity of teas, forming part of his estate, to A. W. Hood, for the most part at cost price, and fraudulently employed the proceeds, so that no part of such proceeds have in any way formed part of the assets for distribution in this matter. That on or about the 18th of May last, the insolvent fraudulently preferred Messrs. Prentice, Moat & Co. and P. D. Browne, who were then creditors of the insolvent. That the insolvent, by certain entries made in his books within a few weeks of his insolvency, fraudulently represented his own wife to be a creditor of his estate for the sum of $3000, whereas it is established in his examination under oath that she never was a creditor of the insolvent in any sum of money whatever. That in February last, the insolvent fraudulently procured the destruction of a promissory note, signed by Thomas Davidson, in favour of, and endorsed by the insolvent to Henry Thomas, in order to induce Davidson not to oppose the deed of composition and discharge filed in this matter, and that the effect was to make Davidson withdraw all opposition to the confirmation of the deed.

MONK, J. This is an application of an insolvent, under the Insolvent Act of 1864, for a confirmation of his discharge. The insolvent made an assignment, and, subsequently, the required proportion of his creditors signed a deed of composition, under which he was to be discharged on paying 3s. 9d. in the £., for the payment of which he gave security. He now applies to the Court to confirm the discharge, and the application is opposed by Messrs. Law, Young & Co., Holland, John Redpath & Son, and other creditors. There are several grounds of opposition. In the first place, it is alleged that he made several purchases in contemplation of bankruptcy. Thurber had been doing business here for several years back. He had evidently no knowledge of book-keeping. On the 30th Dec., 1863, he took stock. At this time he considered himself perfectly solvent. But the balance sheet shows that his solvency depended upon a great many outstanding debts, some dating four or five years back, which could not be considered of much value. He had little or no capital, but nevertheless, his transactions were very large. During 1864 and 1865, he made purchases from Messrs. Law, Young & Co., and other parties, and the first pretension is that he made these purchases knowing that he was insolvent, and in fraudulent contemplation of bankruptcy. Further, that in 1865, when on the very verge of bankruptcy, and when the clouds were thickening around him, he credited his wife with $3000, with interest. It must be conceded that this had a suspicious look, as well as the circumstance that he made no balance sheet in 1864. But though these circumstances, combined with the fact of his large purchases, and the small amount of his capital, seem to justify the pretensions of the opposing creditors, yet I do not find sufficient evidence to justify me in thinking that at this time Thurber knew himself to be insolvent. During the time he was making these purchases he was borrowing money at heavy interest from brokers, paying from a half to one per cent. per week, and obtaining large discounts at the banks. The evidence respecting these transactions gives a curious insight into the way business is done in Montreal. He thought he would be able to pull through. He seemed to be a man of great resolution, who would struggle to the last. As for the $3000 credited to his wife, it appears that this was done solely at the suggestion of Mr. Montgomery, his book-keeper. The money had been advanced to him by his father-in-law, by his own note for $2000, and $1000 in cash; and it was understood at the time this advance was made that it was to be placed to the credit of his wife. I am firmly convinced, from an examination of the evidence, that Thurber believed he would be able to pull through. I cannot believe that he was aware of his insolvency. Further, it must be taken into consideration that two-thirds of his creditors have consented to his discharge. This is a fact which should have considerable weight, that a number of shrewd business men have signed his discharge, and are of opinion that he should be discharged. There is another fact. A note of his for upwards of $3000 was coming due on the 15th of May. Three days previously, he went to the bank, and offered $2000. The bank said they would not take $2000, but that they would hold the note over for a few days. He struggled to the last to maintain his credit. This does not look like the conduct of a man about to make a fraudulent bankruptcy. In order to maintain the pretensions of the opposing creditors, I would have to go to the extent of saying not only that he was insolvent, but that he was aware that he was insolvent, and that he made the purchases in contemplation of insolvency. Now, I cannot go to that extent. The next ground urged was that there have been fraudulent preferences in favor of various parties; but I see nothing in the transactions complained of, that amounts to fraudulent preference. It is also alleged that an illegal consideration was given to induce one of the creditors to sign the deed of composition. On examination, however, it appears that the estate was not injured by this in the slightest degree, and I do not think the objection well founded. I am of opinion that the opposition to the discharge must be dismissed, and the discharge confirmed.

Abbott & Carter, for the petitioner.

Bethune, Q. C., for the contesting creditors.

Oct. 31.

LOVELL *v.* CAMPBELL ET AL.

Principal and Agent—Liability of Agent—Solidarité.

Four persons, assuming to act as representatives of the Seigniors of Lower Canada, ordered certain work to be executed for them. The names of their principals, individually, were unknown, and the agents did not act under a power of attorney.

Held, that the agents were personally liable, inasmuch as they did not disclose the names of their principals, by producing and acting under a power of attorney; but that they were not liable *in solido*.

The facts of this case are sufficiently set forth in the judge's remarks.

MONK, J. It is unnecessary to say that this case has given me a good deal of trouble, but at length, after an examination of all the pleadings and evidence, I have arrived at a final decision. It appears that the Seigniors of Lower Canada, in 1854 or 1855, becoming very much alarmed about their rights, met in Montreal, and agreed to take defensive measures against the Legislature of the country, and afterwards against the probable decision of what are known in history as the Seigniorial Courts. For the purpose of concentrating their efforts, they selected four gentlemen of extraordinary ability, Messrs. Campbell, Wurtele, Papineau and Pangman, who called themselves, and were generally known as the Seigniorial Committee. These gentlemen acted for all the Seigniors of Lower Canada; they had a representative capacity, but that capacity was not made known by any power of attorney. The precise nature of their powers, however, is pretty clearly defined by the circulars printed by Mr. Lovell, and distributed by the committee. One of their powers seems to have been the retaining of counsel. Messrs. Dunkin, Cherrier, and Mackay, gentlemen of great ability, were retained by the committee. The factums prepared by counsel were printed, and for these factums, Mr. Lovell makes a charge in his account against the Seigniorial Committee. The account also contains a variety of other items. It is admitted on the part of the defendants that the work was done, and that the charges are fair and reasoneabl. Two small sums have been paid on account, but a balance of $1100 remains due, and it is for this balance that the plaintiff brings the present action against the four gentlemen composing the Seigniorial Committee. The defendants have pleaded separately. Mr. Campbell says the Seigniorial Committee are not responsible; Mr. Wurtele alleges that he made certain payments on account. But Mr. Papineau has put in a special plea, saying that he had no interest in the matter; that he was not a Seignior, and merely acted for his father. But it appears that he did not take the quality of an attorney of any one; he acted like the others as a Seigniorial representative.

Upon the issues thus joined, the case comes up for adjudication. The evidence adduced is voluminous, and we have to consider the position in which these gentlemen stood with respect to the plaintiff. As I have already observed, there is no difficulty about the value of the work; the only question is whether the defendants are liable; or whether the plaintiff must bring his action against the Seigniors of Lower Canada. Now, I find in the circulars printed by order of the Seigniorial Committee, that these gentlemen speak of their responsibility, and they seem to say that their authority extended to the retaining of counsel, and expenses connected therewith. In fact, the gentlemen composing the Committee acted imprudently; they went on getting circulars and factums printed, and retained counsel, without taking the precaution of getting their constituents to advance the necessary funds. Mr. Wurtele was appointed Secretary; and in the circular letters issued by him, frequent appeals are made to the Seigniors to contribute, but they do not seem to have paid much attention to them. [His Honour read two of these letters.] While the work was being executed, the members of the Committee were in constant communication with the plaintiff. Mr. Wurtele was frequently at his office, and authorized him to incur the expense. It appears from the evidence that when Messrs. Dunkin, Mackay and Cherrier were ready with their factums, and desired to have them printed, the plaintiff said he would like to have some authority to do the work, as counsel were not liable. Accordingly, on the 30th December, 1855, the following

order was given to him:—"Please print the factums of Messrs. Dunkin, Cherrier and Mackay, and charge the same to the Seigniorial Committee." This was signed by the four members of the Committee, Mr. Wurtele signing as Secretary. Here was a precise direction from the Seigniorial Committee to the plaintiff to print these factums, which make up the bulk of the account, Mr. Dunkin's being $490, Mr. Cherrier's $262, and Mr. Mackay's $44.80, and the charges are undoubtedly fair and reasonable. With respect to the circulars, there can be no doubt that they were also printed at the request of the Seigniorial Committee. Now, there is a principle of law, that if an agent chooses to conceal the name of his principal, and does the thing in his own name, he is responsible; and there is another principle that if a man assumes to act as the attorney of a party, it is not sufficient for him to allege that he was acting as such attorney, but he is bound to show his authority to act, otherwise he is personally liable. The worst of the present case is that neither the one nor the other of these principles is exactly applicable. But, as a matter of fact, the Committee did not disclose the names of their principals. The plaintiff is not supposed to know who all the Seigniors of Lower Canada are, nor in point of fact does any one know. If, on the other hand, the Committee assumed to act as representatives, and were not authorized to act as such, they are personally liable. If I were to dismiss this action, I would have to say that they were not liable because they were acting under a power of attorney. Now, there is no such power of attorney, and I cannot do otherwise than hold them liable. But I cannot condemn them jointly and severally; they can only be condemned jointly. *Solidarité* is never to be presumed.

Now we have to consider whether Mr. Papineau was liable. Mr. Papineau pretends that he had no interest in the matter; that he was only acting for his father. But Mr. Papineau not only signed as Seigniorial Commissioner, but he signed without any qualification. He represented himself to the plaintiff in the quality of Seignior. He never took his quality as representative of his father. On one occasion, Mr. Cherrier wanted a number of copies of his factum. The plaintiff said he could not deliver them without an order from the Committee, and Mr. Papineau signed the order for 200 copies as one of the Seigniorial Committee, without any qualification. So far as the plaintiff is concerned, Mr. Papineau has, therefore, put himself precisely in the same position as the others. It is a hard case for the defendants to have to pay this money now, but they ought to have taken precaution and secured themselves. The plaintiff exercised all the care that could be expected of him, and it was only reasonable for him to rely upon the Committee for payment. The defendants must be condemned jointly to pay the balance of the account, less five items, for which they cannot be held responsible.

Torrance & Morris, for the plaintiff.

R. Roy, Q. C., P. R. Lafrenaye, for the defendants.

April 30.

IRELAND *v.* GREGORY, AND MILLS, T. S.

Saisie-Arrêt.

Held, that the Court cannot, in a contestation upon a *saisie-arrêt*, look into accounts between the garnishee and a party not in the record, in order to determine what may be due from the garnishee to the defendant.

SMITH, J. After obtaining judgment in this case, the plaintiff took out a *saisie-arrêt* in the hands of Mr. Mills, who has made a declaration stating that he owes the defendant nothing, and has no prospect of owing him anything. It is on this declaration that the contestation arises. The plaintiff has entered into a variety of transactions between the garnishee and other people; but before the Court can look into these transactions there is a preliminary point to be considered: Can the Court, under a *saisie-arrêt*, look into transactions and disputed accounts between the garnishee and a party not in the record, in order to ascertain what may be due to the defendant? The object of the *saisie-arrêt* is to touch what may be due in money, not to ascertain what balance may remain after other transactions have been settled. The proper mode of proceeding is by a direct action to account against Mr. Mills. The Court cannot look into a transaction between Mr. Mills and a party not in the record,

under a *saisie-arrêt*. The plaintiff must resort to a direct action. Under these circumstances, the Court cannot proceed further with the case, the contestation by the plaintiff of the declaration of the garnishee being dismissed on this ground.

Abbott, Q. C., for the garnishee.

Morris, for the plaintiff contesting.

May 30.

TRINITY HOUSE *v.* BROWN.

Negligence—Collision.

The persons in charge of the plaintiffs' steamer, supposing the defendant's vessel to be at anchor, tried to pass inside between it and the shore, and in so doing the two vessels came into collision, and the plaintiffs' vessel sustained damage.

Held, that the collision being caused by the plaintiffs' mistake, they could not recover.

This was an action brought by the Trinity House of Montreal, against Mr. John Brown, contractor, and proprietor of the steamer *John Brown*, to recover the sum of $450 damages occasioned to that vessel by collision with the *Richelieu*, a steamer belonging to the Trinity House. The accident occurred on Sunday, the 23d of July, 1865, on the St. Lawrence, near Lavaltrie, and the plaintiffs alleged that it was caused by the want of skill, care and attention of the pilot of the *John Brown*.

SMITH, J. This is an action brought to recover damages occasioned by a collision of the defendant's steamer *John Brown* with the *Richelieu*, belonging to the plaintiffs. The facts are very simple. It appears that one night the *Richelieu* was proceeding to Montreal, when the persons on board spied a light at some distance, and a discussion took place as to what the light was. The *Richelieu* had her lights burning and her pilot on board, and the first question that arises is, Were the lights required by law on board the *John Brown*? On this point the evidence is contradictory. It is stated that the lights were there, but the vessel being low in the water they might not have been perceived on board the *Richelieu*. The collision took place in this way:—The people on board the *Richelieu*, supposing the *John Brown* to be a vessel at anchor, attempted to pass inside, and turned the helm wrong. If the *John Brown* had really been at anchor, the *Richelieu* might have passed inside, but not otherwise. The collision occurred through this mistake, and not through any culpable act, but the law makes no distinction as to damages. The plaintiffs were in error in trying to pass inside. If they had kept on the outside there would have been no collision. The action must therefore be dismissed with costs.

Bethune, Q. C., for the plaintiffs.

A. & W. Robertson, for the defendants.

CIRCUIT COURT.

Oct. 27.

TORRANCE *v.* RICHELIEU NAVIGATION COMPANY.

Common Carriers—Steamboat Company—Loss of Wearing Apparel.

A passenger in a steamboat belonging to the defendants placed his overcoat on a sofa in the eating saloon, before going to supper. He had been told by a waiter that it would be safe if left on a table close by the sofa. The overcoat was stolen while he was at supper.

Held, that the liability of common carriers does not extend to articles of wearing apparel such as an overcoat, which may be thrown off and laid aside, unless specially deposited in the charge of the carriers' servants; and that the defendants in this case were not liable, because no such deposit was made.

MONK, J. This is a case which, though involving a very small amount of money, yet presents a question of considerable importance, and I feel some doubt whether the decision at which I have arrived is right. It appears that in November, 1863, the plaintiff, Mr. Torrance, with two other gentlemen, embarked at Quebec, on the *Europa*, one of the Company's steamers, for the purpose of proceeding to Three Rivers. They did not get state rooms. About twenty minutes after the boat started the bell rang for tea. Mr. Torrance proceeded to the eating saloon, where he threw off his overcoat, and asked one of the waiters if it would be safe. The waiter replied that it would be safe on the table. Mr. Torrance, however, left the coat lying on the sofa while taking tea. On returning to the sofa after supper, he found that the coat was gone. An action has been brought for the value of it, and the question is, are the Company liable? The plain-

tiff's pretension is that they are liable as common carriers. The plea of the Company is that they were not bound to look after the plaintiff's coat, or hat, or overshoes, but only after his baggage or valuables confided to their keeping. They admit that they were bound to carry himself and his baggage safely, but say that they are not liable for articles of wearing apparel not specially placed in their custody. They allege that there were two state rooms for keeping clothing in. They say that if the plaintiff had consigned his coat to the care of a servant, they would have been liable. It was even admitted at the argument, that if Mr. Torrance had left the overcoat on the table where the waiter told him it would be safe, they would have been liable. But the coat was not left on the table, there was no special delivery to the waiter, and the case presents itself in this form :—The plaintiff embarked on the boat; he did not place his overcoat specially under the charge of the waiter; he did not leave it in the place where the waiter told him it would be safe; are the Company liable?

A good deal of stress has been laid on the Roman law, and also on the general law respecting carriers. No doubt the obligations of common carriers extend to the traveller himself, and to any precious articles he may give into their care; but I doubt whether they go to the extent of making the Company liable for an article like an overcoat. It appears to me that a distinction must be made between an article of wearing apparel which may be thrown off, like an overcoat, and precious articles confided to the care of a carrier. A case has been cited which occurred in Upper Canada. (*Gamble* v. *Great Western Railway Co.*, p. 236, Vol. 1, Upper Canada Law Journal, New Series.) A gentleman got on board a train with a carpet bag, which he hung up in the car, in disregard of the rule of the Company, requiring such articles to be checked. On arriving at a station, he placed the bag on his seat, as though to intimate that the seat belonged to him, and went to get his breakfast. During his absence, some fellow loafing about the car walked off with the bag. The traveller brought an action against the Company, and, notwithstanding the absence of any proof that he had conformed to the rules of the Company by checking, or attempting to check, the bag, or had made a special deposit of it in any one's care, the Court, composed of Chief Justice Draper, Justices Haggerty and Morrison, condemned the Company to pay, Morrison, J., dissenting. This decision seems to me to be carrying the liability of common carriers to a preposterous extent. But in any case that decision does not apply here; for in that case it was luggage that was lost and not an overcoat or walking stick. The Court seems to have laid stress upon the fact that it was luggage. I do not think that either this or any other case cited is exactly in point. A number of French decisions have been cited, one of which is as follows:—A man arrives at a hotel. The hotel keeper says, I am crowded, I can only accommodate you with a room shared by another traveller. The man replies that he is not particular, and he is conducted to his room. At night he places his watch with a considerable sum of money under his pillow, and falls asleep. In the morning he finds his fellow-traveller gone, and his watch and money also gone. He brought an action against the hotel-keeper, and, strange to say, the Court condemned the latter to pay the amount. The only explanation of this decision that can be supposed is, that there was no evidence that it was the traveller's bed-fellow that carried off the watch. However, it certainly was going very far to hold the hotel-keeper liable, when there was no intimation to him, no special deposit. But I find nothing in any of these decisions that is exactly to the point. The text of the Roman law might perhaps hold the Company liable. But having no authority exactly in point, by which I am bound, and being left to the consideration of the case apart from precedents, I am inclined to say that the Company are not liable; and for these reasons:—1st. Because the article was not luggage, and did not come under the heading of luggage or merchandize. 2nd. The plaintiff did not take the precaution to put it in the special place set apart for clothing. 3rd. The servant told him it would be safe on the table, and he did not leave it on the table. It is true that when the plaintiff discovered his loss the captain told him it would be made

all right, but when I come to weigh the force of a slang expression like this, I cannot lay much stress upon it. Upon the whole, then, the action of the plaintiff must be dismissed.

Torrance & Morris, for the plaintiff.

Cartier, Pominville & Bétournay, for the defendants.

May 30.

TEES *v.* M'CULLOCH.

Deed of Composition—Novation.

Held, that an agreement in the following terms effects a novation of the original debt:—"We, the undersigned creditors, hereby agree to take 2s. 6d. in the £. for our respective claims set forth in the annexed statement, and on payment thereof within six weeks from date, we hereby undertake to grant him a discharge in full."

This was an action for a balance due on an account for goods sold and delivered. The defendant, in the first place, denied that he owed the plaintiff anything; but proceeded to state that in any case the plaintiff could not recover more than 2s. 6d. in the £. on his claim, inasmuch as about two years previously, the plaintiff, among other creditors of the defendant, had signed a deed of composition *sous seing privé*, agreeing to accept 2s. 6d. in the £. The agreement produced was in the following terms:—"We, the undersigned creditors, hereby agree to take 2s. 6d. in the £. for our respective claims set forth in the annexed statement, and on payment thereof *within six weeks from date*, we hereby undertake to grant him a discharge in full." The plaintiff admitted his signature to the agreement; and the defendant, on his part, admitted that the six weeks mentioned in the agreement had long previously expired, and that he had never paid or offered to pay any part of the debt. The case was submitted on the admissions, without other evidence, the sole question being whether the agreement to take 2s. 6d. in the £. was, on the face of it, conditioned upon payment being made within six weeks, or whether there was novation of the original debt.

BADGLEY, J. The plaintiff can only have judgment for the amount as settled by the composition agreement.

Kirby, for the plaintiff.

M'Coy, for the defendant.

RECENT ENGLISH DECISIONS.

QUEEN'S BENCH.

Master and Servant—Negligence of fellow-servant—Common employment.—The rule, which exempts a master from liability to a servant, for injury caused by the negligence of a fellow-servant, applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one, is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages. Thus, whenever an employment in the service of a railway company is such, as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such employment, and within the rule. The plaintiff was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding, at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown down and injured:—*Held*, on the above principle, that the company were not liable. *Morgan* v. *The Vale of Neath Railway Co.*, 1 Q. B. 149. [Compare *Fuller* v. *Grand Trunk Co.*, 1 L. C. L. J. p. 68, in which case the general rule enunciated above seems to have been stated for the first time in our courts.]

Justice of the Peace—Disqualifying Interest.—Though any pecuniary interest, however small, in the subject-matter disqualifies a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties, does not *ipso facto* avoid the justice's decision; in order to have that effect the bias must be shown at least to be real. *Regina* v. *Rand*, Q. B. 230.

Railway Company—Level Crossing.

The defendants' line of railway was crossed

by a public carriage road diagonally on a level, and there was also at the same spot crossing the railway nearly at right angles a private way leading to C.'s store-yard. There was a gate on C.'s side of the railway opening into his yard, which was a private gate under C.'s control, but nearly immediately opposite, on the other side of the railway, there was one gate across both the private way and the public carriage road, and this gate was under the control of the defendants, there being a gate-keeper stationed there by them, pursuant to section 47 of the Railways Clauses Consolidation Act. Any one going with a carriage, &c., to C.'s yard passed through this gate across the railway, and in at the private gate opposite, and *vice versâ* on leaving the yard. The plaintiff's carman, with his cart and horses, having unloaded in C.'s yard one evening after dark, was about to leave, and having opened C.'s gate, the gate opposite being nearly closed, hailed the defendants' gatekeeper on the opposite side of the railway, to know if the line was clear, and he answered, "yes, come on." The cart and horses accordingly proceeded, and were run into by a train:—*Held*, that though section 47 in terms imposed the duty on a railway company of merely keeping "the gates closed across the public carriage road, except when carriages, &c., shall have to cross the railway," yet the duty was implied of using proper caution in opening them; that, whatever might have been the consequence, had the way which the plaintiff's carman was using been simply the private way, as he could not get across the railway without passing through the public gate, it was the gate-keeper's duty to open or refuse to open it for him; that what the gate-keeper said was equivalent to opening the gate, and he, therefore, was guilty of negligence in connection with his duty, for which the defendants were liable. *Lunt* v. *London & North Western Railway Co.*, Law Rep. 1 Q. B. 277.

Criminal Law—Felony— Discharge of Jury, effect of—Second Trial— Writ of Error.

The record of a conviction for felony showed, that on the trial of the indictment, the jury being unable to agree, the judge discharged them; that the prisoner was given in charge of another jury at the next assizes, and a verdict of guilty returned, and judgment and sentence passed. On writ of error:—*Held*, that the judge had a discretion to discharge the jury, which a Court of Error could not review; that the discharge of the first jury without a verdict was not equivalent to an acquittal; that a second jury process might issue; and that there was no error on the record. *Winsor* v. *The Queen*, Law Rep. 1 Q. B. 289.

We have already noticed this case, vol. 1, L. C. L. J., p. 103, but as it is a case of great importance, it may not be uninteresting to insert here an abridgment of the report in the April number of the Law Reports.

On Friday, the 17th of March, 1865, Charlotte Winsor and Mary Ann Harris, indicted for the murder of one Harris, were arraigned and pleaded not guilty. The trial began on the Friday, and the jury retired about seven o'clock on the Saturday evening. At five minutes before midnight, the jury, not being able to agree, were discharged. At the next session, a motion was made on the part of the Crown, that Charlotte Winsor be tried separately, and that Mary Ann Harris should be admitted to give evidence on her trial. This was allowed by the Court, and Charlotte Winsor was convicted. A writ of error was then issued, and it was contended, before the Court of Queen's Bench, on behalf of the plaintiff in error, 1st, that the discharge of the jury was wrongful; that the judge had power to discharge only in cases of evident necessity, as the death or illness of a juror; and in cases where the discharge has been for the benefit of the prisoner, and at his instance. 2nd. That the verdict could have been taken on the Sunday. 3rd. That though the judge may discharge a jury in a case of misdemeanour, if they do not agree, he has no power to discharge them in a case of felony. 4th. If the judge had a discretion, the Court of Error can review his mode of exercising it. 5th. The second trial was illegal, because the prisoner could not be put upon her trial a second time. Lastly, The evidence of Harris was improperly admitted: before it could have been received, either a verdict of not guilty ought to have been taken, or she should have pleaded guilty, and sentence also should have been passed.

COCKBURN, C.J., in rendering judgment, observed:—"I have no hesitation in expressing my own opinion, that, after the jury have retired to consider their verdict, and have remained in deliberation a full and sufficient time, if they are not agreed, and there is no reasonable expectation of their coming to a unanimous decision, it is within the province of a judge presiding on a criminal trial, in the exercise of his discretion, to discharge the jury."—"Since Blackstone's time, the case has several times arisen in which the illness of a juror, or the illness of the prisoner, has been held a sufficient ground for the discharge of the jury; and nobody has questioned that in these cases a second trial might be had, and the accused put a second time on his defence. We find, in the case of *Rex* v. *Cobbett*, that most excellent and learned judge, Lord Tenterden, discharged a jury of his own act and in the exercise of his discretion, after they had been in deliberation fifteen hours; and other instances have been cited where judges have acted in a similar manner. It appears to me that, if the true principle on which justice ought to be administered is regarded, it is essential in trial by jury not to abridge the judge's discretion, but to leave it unfettered. Our ancestors insisted on unanimity as the very essence of the verdict, but they were unscrupulous as to the means by which they obtained it; whether the minority gave way to the majority, or the reverse, to them appeared to have been a matter of indifference. It was a struggle between the strong and the weak, the able-bodied and the infirm, which could best sustain hunger, thirst, and the fatigue incidental to their confinement. It was said by the prisoner's counsel that it was competent to judges, and the duty of judges, to carry with them in carts a jury, who could not agree, to the confines of the county where the trial was held, or even beyond the county. I doubt whether there is authority for this assertion. The dicta that are to be found in the Book of Assize have been copied servilely by text writers, and that has given rise to this opinion. I question very much whether such a practice ever existed; I am sure it has not in modern times. But suppose it to have been so, we, now-a-days, look upon the principles on which juries are to act, I hope, in a different light. We do not desire that the unanimity of a jury should be the result of anything but the unanimity of conviction. It is true that a single juryman, or two or three constituting a small minority, may, if their own convictions are not strong and deeply rooted, think themselves justified in giving way to the majority. It is very true, if jurymen have only doubts or weak convictions, they may yield to the stronger and more determined view of their fellows; but I hold it to be of the essence of a juryman's duty, if he has a firm and deeply rooted conviction, either in the affirmative or the negative of the issue he has to try, not to give up that conviction, although the majority may be against him, from any desire to purchase his freedom from confinement or constraint, or the various other inconveniences to which jurors are subject. When, therefore, a reasonable time has elapsed, and the judge is perfectly convinced that the unanimity of the jury can only be obtained through the sacrifice of honest conscientious convictions, why is he to subject them to torture, to all the misery of men shut up without food, drink, or fire, so that the minority, or possibly the majority, may give way, and purchase ease to themselves by a sacrifice of their consciences? I am of opinion that so far from the practice of thus discharging a jury being a mischievous one, it is one essential to the upholding of the pure, conscientious, and honest discharge of the duties of a juryman."—"In this case it appeared that the jury had been five hours only in deliberation, but it was within a few minutes of midnight of the Saturday; and, further, on the Monday the judges were bound to be at Bodmin in discharge of their duties, that being the commission day of the assizes. The judge was therefore placed in a position of very great difficulty, in consequence of the Sunday intervening. In the first place, the question arose, whether the judge should not adjourn till the Sunday, and take the verdict of the jury on the Sunday. It is laid down in distinct terms by high authority, that of Lord Coke and Comyns, that Sunday is not a juridical day; and it is idle, I think, to contend that the taking of a verdict, the delivering of a verdict on the part of the

jury, and the receiving it on the part of the judge, and the recording it, which is also, though the act of the officer, the act of the Court, were not judicial acts; and I entertain the greatest doubts whether the verdict would not have been invalid, if it had been delivered, received, and recorded on the Sunday. Then, it is said, that the judge might have adjourned till the Monday, and have kept the jury confined on the Sunday, so as to have received the verdict on the Monday. That, no doubt, could have been done with perfect judicial regularity. But this startling difficulty would arise, that since it would be impossible, because absolutely inhuman, to keep the jury without meat or drink during the whole of the Sunday until the Monday, they having been shut up on the Saturday night, the only alternative would have been to have allowed the jury refreshment in the interval. There is no authority for so doing; I believe the authorities rather point the other way. After once the jury have retired to consider their verdict, there is no authority that I am aware of for saying,—or at least no satisfactory authority, for I do not think that what is said in Doctor and Student goes that length, or, if it did, ought to be considered as sufficient to militate against the whole course of practice,—that a jury can have refreshment during the period of their deliberation. The oath that is administered to the bailiff has a strong tendency to support this view; he is sworn to keep them without meat, drink, or fire, (candle light excepted); and then it goes on, 'nor to speak with them yourself, nor to allow any one else to speak with them without the leave of the Court.' The exception as to the leave of the Court relates to persons speaking to them, not to allowing them meat, drink, or fire; and I question very much whether, inasmuch as this system of coercion has been handed down to us from our ancestors, the judge could take upon himself to alter the practice without the intervention of the legislature; the sooner that occurs the better for the administration of justice."—"It was pressed on us also that the evidence of the accomplice, Harris, had been improperly received. That is a matter which we cannot take into account. It was alleged that the accomplice came forward to give evidence under peculiar circumstances. The plaintiff in error and Harris were both joined in one indictment, and on the first occasion were tried together. On the second, it was proposed, on the part of the prosecution, to sever the trial, with the view to the one prisoner becoming a witness against the other. No doubt that state of things, which the resolution of the judges, as reported to have been made in Lord Holt's time, was intended to prevent, occurred. It did place the prisoner under this disadvantage; whereas, upon the first trial that most important evidence could not be given against her, it was given against her upon the second, so that the discharge of the jury was productive to her of that disadvantage. I equally feel the force of the objection, that the fellow prisoner was allowed to give evidence, without having been first acquitted, or convicted and sentenced. I think it much to be lamented. In all cases where two persons are joined in the same indictment, and it is desirable to try them separately, in order that the evidence of the one may be received against the other, I think it necessary, for the purpose of insuring the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty as to him; or if the plea of not guilty be withdrawn by him, and a plea of guilty taken, to pass sentence; so that the witness may give his evidence with a mind free of all the corrupt influence, which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce. This objection is not set forth upon the record; in a civil case a question as to the reception of evidence may be raised on a bill of exceptions, but in a criminal case it cannot be raised upon the record so as to constitute a ground of error. We cannot, therefore, take it into consideration. Whether this circumstance should have any influence elsewhere, is a matter upon which it is not for us to pronounce an opinion."

Blackburn, Lush, and Mellor, JJ., also stated their opinions, concurring with the Chief Justice in giving judgment for the Crown.

COMMON PLEAS.

Statute of Frauds—Contract to answer for the debt or default of a third person.—The plaintiff had contracted to supply goods to C. & Co., to be paid for in cash on each delivery. C. & Co. being desirous of obtaining the goods at a month's credit instead of cash, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff that, if he would supply the goods to C. & Co., drawing upon them at one month, and would allow him (the defendant) 3 per cent. upon the amount of the invoice, he would pay the plaintiff cash, and take C. & Co.'s bill "without recourse," in other words, buy the bill of him:—*Held*, that this was a contract to answer for the debt or default of another, within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3. *Mallet* v. *Bateman*, C. P. 163.

Entertainment of the Stage—Ballet divertissement.—The respondent represented, at a place of public entertainment in London, called the Alhambra, which was licensed only for music and dancing (under 25 Geo. 2, c. 36), an entertainment called a "ballet divertissement," which was thus described by a police magistrate, in a case stated for the opinion of the Court:—"There is an orchestra with a full band of musical performers, a stage and proscenium lighted by foot and side-lights, a curtain, side-scenes, drops, and flies. There are various platforms so supported and inclined as to enable persons to come down from a considerable height at the back of the building to the stage, painted to represent rocks, with a cascade of water falling among them from a place thirty feet high. On the wings and at the scenes at the back are painted palm-trees: the whole representing an oriental landscape. From sixty to seventy females, in the ordinary costume of theatrical ballet dancers, came through a large opening at the top of the platform painted as rocks, and danced down them to the stage. Those who first descended danced on the stage in a serpentine figure, so as to occupy the whole front of the stage till all had come down. When all were down, they defiled to the right and left. Four were placed on each side in front of the proscenium, with sham musical instruments in their hands, supposed to be played by them to the dancers. The dancers began to dance the pas des poignards (a dance which was originally brought out at Drury Lane Theatre, in an Egyptian scene), each female armed with two daggers, charging through each other's ranks, striking right and left with the daggers, in mimic warfare, then in front as far as the foot-lights. This performance of the dagger-dance ended in several of the females standing over others as if in triumph, and retiring, when others came forward, holding palm-leaves in their hands, and danced, waving them, and formed an avenue, as if expecting an arrival; then a female dancer, who at regular theatres would be called a *première danseuse*, passed down the avenue formed by the other dancers, who retired, while she performed a pas seul with gestures:"—*Held*, that, upon this statement, the Court could not hold, as a matter of law, that the performance thus described was an "entertainment of the stage," (within the 23rd section of 6 & 7 Vict. c. 68.) The majority of the Court, however, thought that, if they were dealing with it as a matter of fact, it would be. *Wigan* v. *Strange*, C. P. 175.

Principal and Agent—Prepayment.—A., a broker, sold some cotton yarn to the defendant. Before its delivery the defendant paid to A. in advance £1000 on his general account. Part of the yarn was sold by A. as agent for the plaintiff on a *del credere* commission. The value of the yarn being more than £1000, the defendant paid the difference to A. in cash, and so balanced the accounts between them. A. did not pay over to the plaintiff the value of his yarn, and became bankrupt:—*Held*, that the defendant was still liable to the plaintiff for the price of his yarn, except to the extent of the cash payment: the advance of £1000 to A. not amounting to a prepayment, because it was on the general account; and the settlement of accounts not constituting payment as against the plaintiff: as an agent, whether acting on a *del credere* commission or not, is only authorized to receive payment in cash, in the absence of any practice or custom to the contrary. *Catterall* v. *Hindle*, 1 C. P. 186. [This seems an extraordinary decision. If the advance of the £1000 could not be con-

sidered a prepayment, surely the settlement of accounts between the defendant and A. had the same effect as though the defendant had paid the whole sum over to A. and received £1000 back.—Ed. L. J.]

Principal and Surety—Increase of the duties of the principal debtor.—Action on a bond conditioned for the due performance by A. of his duties as collector of the poor rates and of the sewers rates for the parish of St. Anne; the bond to continue in force if A. held either office separately. Breach, that A. received money in both capacities, and failed to pay it over. *Plea*, that before breach an act was passed increasing A.'s duties as collector of sewers rates, and under which he was also elected collector of main drainage rates, by the persons under whom he held his other appointments:—*Held*, bad on demurrer, on the ground that the bond was divisible, and that the plea afforded no answer to the defendants' liability for A.'s breaches of duty as collector of poor rates. *Skillett* v. *Fletcher*, 1 C. P. 217.

EXCHEQUER.

Statute of Frauds—Parol Variation of a Written Contract.—The plaintiff made a contract in writing, with the defendant, for the sale of certain goods of more than £10 in value, at specified prices, to be delivered within a specified time. Subsequently, and before the time for delivery had arrived, a parol agreement between the parties was entered into, whereby the time for delivery was extended:—*Held*, that the subsequent parol agreement was not "good" for any purpose under 29 Car. II., c. 3, s. 17, and could not operate either as a rescission of the original written contract, or as a new contract for the sale of goods, and that the original written contract might therefore be enforced. *Noble* v. *Ward*, 1 Ex. 117.

Railway—Carrier—Inequality of Charge.—The defendants, a railway company, were incorporated by an Act which contained an *equality clause*, in the following terms: "All such rates, tolls, and sums shall be so fixed, as that the same shall be taken from all persons alike, under the same or similar circumstances." The defendants were in the habit of charging to the public, on any consignment of goods made to one person, at the same time, though consisting of several distinct parcels, a tonnage rate on the aggregate weight of the whole:—*Held*, that the fact that, of goods so consigned at the same time to one person, and distinctly addressed to him, some articles had also written conspicuously upon them the names of persons to whom the consignee intended to deliver them, did not entitle the defendants to charge separately for those on which such names were different. Therefore the plaintiffs, who were carriers, were held entitled to recover the difference between sums paid under protest on goods so consigned and addressed by them to themselves, but charged for separately on account of such second name appearing on them, and the amount which would have been payable on the aggregate weight of the consignment.

The defendants, in addition to their business of carriers by rail, carried on the business of common carriers off their line. They charged an equal rate to all the public for carriage on their line between their termini. They also undertook to collect at one terminus, to carry on their line, and to deliver at a place distinct from, and at some distance beyond, their other terminus; and for this they charged a through rate to all the public alike:—*Held*, that the carriage beyond the second terminus was not auxiliary to their business as railway carriers, but was done by them in their business as common carriers generally, and that the plaintiffs were not entitled to deduct the cost of this carriage, and of collection at the first terminus, from the through rate, and to claim to have their goods carried between the termini for the difference. *Baxendale* v. *London and South Western Railway Company*, 1 Ex. 137.

[Compare *Attorney General* v. *Grand Trunk Railway Company*, 1 *L. C. Law Journal*, p. 73. In the English case, the second ground of complaint alleged by the plaintiffs against the defendants was in respect of overcharges, in not allowing to the plaintiffs a sufficient deduction or rebate for the collection, delivery, and cartage of goods, both in London and in the country, when those services were not performed by the defendants. This claim, the principle of which was settled by *Re Baxendale* v. *Great Western Railway Company*, 28 L. J. (C. P.) 81, was admitted at the argument by the counsel for the company.]

CROWN CASES RESERVED.

False Pretences—Intent.—The crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it should be in his power to do so. In this case the jury found, in answer to questions put by the Deputy Recorder of the city of Chester, (where the case was tried), that the prisoner's statement, that one Moss wanted some carpets, was false to his knowledge; that the prisoner made the statement to induce the prosecutrix to part with the carpets; that the prosecutrix was induced to part with the carpets by reason of such false pretence; and that the prisoner, at the time he made the pretence and obtained the carpets, intended to pay the prosecutrix the price of them, when it should be in his power to do so. The question for the Court was whether, upon the facts above stated, and the finding of the jury, a verdict of guilty ought to have been entered. The judges were all of opinion that the conviction must be affirmed. *Regina* v. *Naylor*, 1 C. C. 4.

Threat to accuse of an infamous crime—Intent.—The prisoner threatened *A's* father that he would accuse *A.* of having committed an abominable offence upon a mare, for the purpose of putting off the mare and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price: —*Held*, that the prisoner was guilty of threatening to accuse, with intent to extort money, within the meaning of the 24 & 25 Vict. c. 96, s. 47. *Regina* v. *Redman*, 1 C. C. 12.

Receiving—Delivery by Owner.—Four thieves stole goods from the custody of a railway company, and afterwards sent them in a parcel by the same company's line addressed to the prisoner. During the transit the theft was discovered; and, on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it, and then returned it to the porter whose duty it was to deliver it, with instructions to keep it until further orders. On the following day the policeman directed the porter to take the parcel to its address, when it was received by the prisoner, who was afterwards convicted of receiving the goods knowing them to be stolen, upon an indictment which laid the property in the goods in the railway company:—*Held*, by Martin, B., and Keating, and Lush, JJ., (*dissentientibus*, Erle, C. J., and Mellor, J.,) that the goods had got back into the possession of the owner, so as to be no longer stolen goods, and that the conviction was wrong. *Regina* v. *Schmidt*, 1 C. C. 15.

Disorderly House.—The defendants, as master and mistress, resided in a house to which men and women resorted for the purpose of prostitution, but no indecency or disorderly conduct was perceptible from the exterior of the house:—*Held*, that the defendants were guilty of keeping a disorderly house. *Regina* v. *Rice and Wilton*, 1 C. C. 21.

PROBATE AND DIVORCE.

Costs—Unsuccessful Opposition to Will.—The Court refused to condemn, in costs, a next of kin, who had unsuccessfully opposed a will upon information given to him by one of the attesting witnesses, the testator's medical attendant, to the effect that when the will was read over, the testator signified his approval of it by gesture only, and that he (the medical attendant) could not swear that the testator was of a sound mind. *Tippett* v. *Tippett*, P. & D. 54.

Will—Revocation—Two partly inconsistent Wills admitted to Probate.—If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both of the papers are entitled to probate. The following passage from Mr. Justice Williams' book on Executors was cited in support of the judgment: "The mere fact of making a subsequent testamentary paper, does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, (so as they be all clearly testamentary,) may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testa-

mentary paper be *partly* inconsistent with one of an earlier date, then such latter instrument will revoke the former, *as to those parts only*, where they are inconsistent." *Lemage* v. *Goodban*, 1 P. & D. 57.

Will—Knowledge and Approval of its Contents.—It is essential to the validity of a will, that at the time of its execution the testator should know and approve of its contents. *Hastilow* v. *Stobie*, 1 P. & D. 64.

Will—Codicil.—Where a will and codicil have been in existence, and the will has been revoked, the Court will not grant probate of the codicil, unless it is satisfied that the testator intended it to operate separately from the will. In the goods of *Greig*, 1 P. & D. 72.

Adultery of Husband—Misconduct of Wife—Judicial Separation refused.—In a wife's suit for dissolution the husband was proved to have been guilty of adultery, but of no other misconduct; and the wife was proved to have been guilty of cruelty, and of wilful separation from the husband before his adultery, and without reasonable excuse, and of wilful neglect and misconduct conducing to his adultery. The Court refused to grant a decree of judicial separation on the ground of the husband's adultery, and in the exercise of its discretion, dismissed the petition. *Boreham* v. *Boreham*, 1 P. & D. 77.

Dissolution of Marriage—Prostitution of Wife by coercion of Husband.—In a suit by a wife for a dissolution of marriage, it was proved that the husband had been guilty of adultery and of cruelty, and also that he had by threats and by personal violence coerced the petitioner into leading a life of prostitution, and had lived upon the money which she obtained by prostitution. The Court being satisfied that she had led this life contrary to her own will and desire, and in consequence of the coercion of the husband, exercised the discretion given to it, by dissolving the marriage, notwithstanding the wife's adultery. *Coleman* v. *Coleman*, 1 P. & D. 81.

CHANCERY APPEALS.

Statute of Frauds—Agreement to make Will.—Previously to a marriage the intended husband and wife agreed in writing, that the husband should have the wife's property for his life, paying her £80 a-year pin-money, and that she should have it after his death; and they gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they agreed that they would have no settlement; the husband promising, as the wife alleged, that he would make a will giving her all her property. The marriage took place, and the husband made a will accordingly. After his death a subsequent and different will was found:—*Held*, that, under the circumstances, there was not within the *Statute of Frauds* any contract to make a will, and that there had been no part performance which would take the case out of the statute. The marriage was no part performance. Part performance by the *party to be charged* will not take a case out of the statute. *Caton* v. *Caton*, Law Rep. 1 Ch. 137.

Public Company—Forfeiture of Shares.—The directors of a company made an arrangement with a shareholder who wished to retire from the company, that on payment by him of a sum of money, his shares should be declared forfeited for non-payment of a call which had been made. The money was paid and the shares transferred to the company. Twelve years afterwards the company was wound up, and two years after that an application was made to place the shareholder on the list of contributories:—*Held*, reversing the decision of the Master of the Rolls, that the shareholder ought to be placed on the list, as the arrangement was not within the power of the directors, and was a fraud on the other shareholders. The shareholders in a company are not bound to look into the management, and will not be held to have notice of everything which has been done by the directors, who may be assumed by the shareholders to have done their duty. *In re Agriculturist Cattle Insurance Co.*, Law Rep. 1 Ch. 161.

Bankruptcy—Official Assignees.—Sums of money which cannot be appropriated to any particular bankruptcy may be paid to the unclaimed dividend account. *In re Graham*, Law Rep. 1 Ch. 175.

Trade Mark.—No trader can adopt a trade mark so resembling that of another trader,

that persons purchasing with ordinary caution are likely to be misled, though they would not be misled if they saw the two trade marks side by side. Nor can a trader, even with some claim to the mark or name, adopt a trade mark which will cause his goods to bear the same name in the market as those of a rival trader. *Seixo* v. *Provezende*, Law Rep. 1 Ch. 192.

Joint Stock Company—Shares taken by Executors.—The directors of a Joint Stock Company offered their reserved shares to shareholders and the executors of deceased shareholders, in proportion to the amount of their original shares:—*Held*, that executors who accepted shares must be put upon the list of contributories in their own name, and not in their representative character. The fact that the new shares were offered to, and accepted by, the executors in their representative character, and that the directors had no power to offer the shares to them in any other character, did not preclude the executors from being personally liable as between them and the other contributories. *In re Leeds Banking Co.*, Law Rep. 1 Ch. 231.

Undue Influence—Confidential Relation.—In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is whether the person conferring the benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit, and the nature of the benefit, are of but little importance in such cases: they are important only where no such confidential relation exists. The Court will not undo a trifling benefit conferred by one person on another, standing in a confidential relation to him, unless there be *mala fides*. *Rhodes* v. *Bate*, Law Rep. 1 Ch. 252.

Infant—Religious Education.—A father, being a beneficed clergyman of the Church of England, appointed his widow and a clergyman guardians of his infant children. The widow became a member of the sect of *Plymouth Brethren*. On the application of the other guardian, the Court ordered the children, who were respectively in their fifteenth and twelfth years, to be brought up as members of the Church of England, and restrained their mother from taking them to a chapel of the Plymouth Brethren. In such a case the Court will pay no regard to the fact that the father was well affected towards dissenters, and associated with them; nor will it be influenced by the wishes of the infants upon the subject. *In re Newbery*, Law Rep. 1 Ch. 263.

EQUITY CASES.

Insurance Company—Lost Policy.—An insurance company paying under a decree of the Court the money payable under a lost policy, are sufficiently indemnified by the decree, and are not entitled to any indemnity from the persons to whom the money is paid. *England* v. *Tredegar*, Law Rep. 1 Eq. 344.

Insolvency—Foreign Court.—The plaintiff, a native of one of the colonies, alleged that he had taken the benefit of a Colonial Insolvent Act, in consequence of having had a judgment recovered against him in the Colonial Court, from which judgment he had appealed, but unsuccessfully; that the assignee, now in England, had assets in his hands, out of which, if the judgment were reversed, a large surplus would be coming to him; that the judgment was the result of an erroneous decision, and an appeal would probably be successful; but that the assignee, colluding with the judgment creditor, refused to prosecute such appeal; and prayed that the assignee might be decreed to prosecute the appeal, or that the Court would enable the plaintiff to prosecute the appeal in the name of the assignee. *Held*, that there was no sufficient averment that the plaintiff had failed to obtain justice in the ordinary tribunals of his own country to empower the Court to interfere; and demurrer allowed. *Smith* v. *Moffatt*, Law Rep. 1 Eq. 397.

Specific Performance.—Under an agreement to let a house for three years, at a yearly rent, by which the landlord agreed, at the request of the tenant, to grant him a lease for a term from the expiration of the three years' occupancy, at the same rent, the tenant undertaking to keep the house in repair:—*Held*, that the tenant was entitled, four years after the expiration of the three years' occupancy, to

have the agreement for a lease specifically performed; and that neither an application made by him two years previously for a lease at a reduced rent (which was refused), nor an application to the landlord for payment of an amount expended in repairs (which had been allowed to the tenant), amounted to a waiver of his rights, though the plaintiff was bound to refund the cost of the repairs. *Moss* v. *Barton*, Law Rep. 1 Eq. 474.

Companies Act—Prospectus—Misrepresentation.—A person who would otherwise be entitled to set aside a contract on the ground of fraud, cannot do so if, after discovering the fraud, he has acted in a manner inconsistent with the repudiation of the contract. Where, therefore, a person was induced to take shares in a company, on the faith of representations contained in the prospectus, which he afterwards discovered to be false, and subsequently to the discovery, instructed his broker to sell the shares:—*Held*, that his name could not be removed from the register. *Ex parte Briggs*, Law Rep. 1 Eq. 483.

Trade Mark—Use of particular Numbers—The plaintiff, being a thread manufacturer of repute, the defendant bought in the market thread, wound on spools, not made by the plaintiff, of inferior quality, and cheaper than his, and not bearing his name, but marked with the name of a firm of winders of thread, who were known to be accustomed to purchase of the plaintiff thread in the hank for the purpose of winding, and selling it when wound. Defendant sold the goods to a wholesale customer, with the assurance (given, as he said, without knowledge of any misrepresentation) that they were of the plaintiff's make, and invoiced them to the customer under the description of certain numbers, which the plaintiff had adopted and exclusively used in order to designate his particular manufacture. The customer attached the plaintiff's name and numbers to the spools of thread, and retailed it to the public as of the plaintiff's make:—*Held*, that there was not such a degree of wilful misrepresentation on the part of the defendant as would justify the Court in granting an injunction, and bill dismissed, but without costs. The name of a manufacturer, or a system of numbers adopted and used by him, in order to designate goods of his make, may be the subject of the same protection in equity as an ordinary trade mark. *Ainsworth* v. *Walmsley*, Law Rep. 1 Eq. 518.

Vendor and Purchaser—Fiduciary Relation.—A., a nephew of a former trustee of B.'s property, being commissioned by his uncle to advise B., a young man, aged twenty-three, of intemperate and extravagant habits, in the settlement of his college debts, which amounted to £1000, and to advance him £500 for the purpose, offered to give him £7000 for his undivided moiety of an estate under which there were coal mines, the working of which had been discontinued for fifteen years. Pending the negotiations, A. obtained from C., a mining engineer, an estimate, putting the value of the minerals under the entire estate at £20,000. A separate solicitor was employed for B. A. did not communicate the valuation to B., nor did he suggest to him that he should consult a mineral surveyor before concluding the matter. B. accepted A.'s offer of £7000, and died shortly after executing the conveyance. On bill by B.'s administrator to set aside the purchase:—*Held*, that such a fiduciary relation existed that the suppression from B. of C.'s valuation rendered it impossible for the Court to sustain A.'s purchase. *Tate* v. *Williamson*, Law Rep. 1 Eq. 528.

Partnership—Specific Performance.—Partnership articles provided that no partner should sell his shares except as follows:—That the partner desirous of selling should offer the shares to his copartners collectively; if they should decline, then to the partners desirous of collectively purchasing; and if none such, then to the partners individually; after which he might sell to a stranger. One of four partners offered his shares to the other three collectively (one of whom to his knowledge would not purchase). The remaining two declared their willingness to accept, and were told that no offer was made to them:—*Held*, that the offer to the three enured for the benefit of the two, and specific performance decreed accordingly. *Homfray* v. *Fothergill*, Law Rep. 1 Eq. 567.