DIARY FOR MAY.

1. Mon. *St. Philip and St. James.* Last day for County Treasurer to make up books and enter arrears, and to make yearly settlement. Last day for apportionment of Gram. and Com. Sch. fund.
6. Sat. *St. John.*
7. SUN. *4th Sunday after Easter.*
11. Thur. Examination of Law Students for call to the Bar with Honors.
12. Frid. Examination of Law Students for call to the Bar.
13. Sat. Examination of Articled Clerks for certificates of fitness.
14. SUN. *Rogation Sunday.*
15. Mon. Easter Term begins. Articled Clerks going up for interim-examination to file certificates.
17. Wed. Interim-examination of Law Students and Articled Clerks.
18. Thur. *Ascension Day.* Last day for service for County Courts except York.
19. Frid. Paper Day, Q. B. New Trial Day, C. P.
20. Sat. Paper Day, C. P. New Trial Day, Q. B.
21. SUN. *Sunday after Ascension.*
22. Mon. Paper Day, Q. B. New Trial Day, C. P.
23. Tues. Paper Day, C. P. New Trial Day, Q. B.
24. Wed. Paper Day, Q. B. New Trial Day, C. P.
25. Thur. Paper Day, C. P. Open Day, Q. B.
26. Frid. New Trial Day, Q. B. Open Day, C. P.
27. Sat. Open Day.
28. SUN. *Whit Sunday.*
29. Mon. Paper Day, Q. B. New Trial Day, C. P. Declare for County Courts except York.
30. Tues. New Trial Day, Q. B. Paper Day, C. P.
31 Wed. Open Day, Q. B. New Trial Day, C. P.

THE

Canada Law Journal.

MAY, 1871.

PAYMENT OF EXECUTORS.

THIRD PAPER.

IV. *Privilege of executors and preference accorded to their compensation.*—In England a trustee and an executor will be allowed his expenses, even though he has a legacy as a reward for his trouble: *Wilkinson* v. *Wilkinson*, 2 Sim. & St. 237. In the case of an East Indian estate, where the executor had a legacy for his trouble, he was held disentitled to any commission; and he was not allowed, after a lapse of time, during which he had dealt in a contrary manner, to renounce his legacy and claim the usual compensation: *Freeman* v. *Fairlie*, 3 Mer. 24; see *Cockerell* v. *Barber*, 1 Sim. 23. In accord with this is the rule of the New York Revised Statutes, where it is laid down that when a provision shall be made by any will for specific compensation to an executor, the same shall be deemed a full satisfaction for his services in lieu of the statutory allowance, unless the executor shall renounce in writing all claim to the legacy: Tit. 3, Part ii, cap. 6, sec. 66. This rule has not been observed in this country; on the contrary, in *Denison* v. *Denison*, 17 Gr. 311, it is said that the executor being here entitled to compensation for his services, his acceptance of a legacy by way of compensation does not bar his right to further compensation in a proper case, where it is made to appear that the amount bequeathed is not a fair and reasonable allowance within the meaning of the statute; but if it is a sufficient compensation, then nothing more should be allowed.

Further, the executor is privileged to receive his commission before debts are paid; and in case of a deficiency of assets, he is to be preferred to all the creditors of the estate. This is upon the ground, that the allowance is for services which form part of the expense incurred in administering the estate, forming, therefore, a primary charge upon the assets before the payment of debts: *Harrison* v. *Patterson*, 11 Gr. 105, 112. It was held in *Anderson* v. *Dougall*, 15 Gr. 405, that a legacy by way of compensation to executors, though larger in amount than the sum which the court would have awarded for compensation, was entitled to priority over legacies which were mere bounties; and this for the reason that in cases of deficiency of assets, legacies for which there is valuable consideration are entitled to rank before others which are mere matters of bounty. This decision is, however, only applicable to cases in which the will in question has been made or republished after the passing of the statute giving the right to compensation.

V. *Right of compensation, and manner of allowing and apportioning the same.*

In the earliest case under the statute—*McLennan* v. *Heward*, 9 Gr. 279—it was held that, generally speaking, five per cent. was a fair commission to be allowed on all moneys collected and paid over, or properly applied; but that on all moneys received and paid over only under the compulsion of the decree in the administration suit (however honest the contention as to liability therefor may have been), no more than two-and-a-half per cent. should be allowed.

In fixing the quantum of allowance, regard should be had to the size of the estate, the care, judgment and circumspection required and exercised in its management, and the length of time over which the supervision extends: *Denison* v. *Denison*, 17 Gr. 310. Although the duties do not involve much

manual or physical labour, and although a clerk has been employed, yet if they require and cause anxiety and watchfulness, skill and exactness, good judgment and honesty, all of which are rendered, then the allowance should be liberal: Per Vankoughnet, C., in *Proudfoot* v. *Tiffany*, cited in *Denison* v. *Denison*, 17 Gr. at p. 311. See *Matthews* v. *Bagshard*, 15 Jur. 977.

The present Chancellor has laid it down that regard should be had to the *amounts* passing through the executors' hands. In fixing the poundage payable to sheriffs on levying moneys under execution, the courts, both of common law and equity, have considered the amounts a proper element of consideration, allowing the maximum percentage on small sums, and reducing the scale as the amount increases. This is a principle which may well be applied to executors' compensation. In the case in hand before the court, where it appeared that the estate was very large, and where there was no evidence of any particular trouble in the management, it was deemed reasonable to allow, for collecting and investing moneys upon mortgage up to $600, five per cent.; and for sums above that amount, three per cent. was thought sufficient: *Thompson* v. *Freeman*, 15 Gr. 384. In *Bald* v. *Thompson*, 17 Gr. 154, five per cent. was allowed on the purchase money, principal and interest, of lands collected; and it was said that in a special case, the executor might be allowed more for effecting sales of the property. In *Chisholm* v. *Bernard*, 10 Gr. 479, it was remarked by the court that five per cent. on moneys passing through the hands of the executor may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labour, anxiety and time spent in managing an estate, where five per cent. would be a very insufficient allowance.

Thompson v. *Freeman* also lays down the principle that if the executor deals with the estate and settles claims in such a way that the sums upon which the commission is claimed do not actually pass through his hands, then the remuneration should be fixed, not by a percentage, but by a compensation commensurate to the labour, care and anxiety involved. See, upon this head, *Campbell* v. *Campbell*, 2 Y. & Coll. C. C. 607.

Where there are several executors, the one upon whom the chief burden of management rests may be entitled to twice as much compensation as his co executor, and it will be left to the Master to apportion the commission among the recipients as they severally deserve: *Denison* v. *Denison*, 17 Gr. 311.

When the services extend over a considerable period, the commission should be allowed from time to time as earned, and credited thus upon the accounts, so as to reduce *pro tanto* the interest and perhaps the principal chargeable against the executor. If the account is not taken in this way, which is the strictly correct mode, then in some cases interest may be allowed upon the commission: *Denison* v. *Denison*.

After the Master has fixed the executor's remuneration, the court are very slow to interfere with his finding, unless he has been wrong in principle, or has been manifestly exorbitant or inadequate in his allowance. The general rule is—as laid down in *Knott* v. *Cutler*, 16 Jur. 754, S. C. 16 Beav.—that the quantum being entirely in the officer's discretion, the court will not entertain an appeal therefrom.

THE BENCHERS OF THE LAW SOCIETY.

After a laborious investigation on the part of the scrutineers, the following members of the Law Society, of the degree of Barrister-at-Law, have been declared elected Benchers, under the recent Act:

J. D. Armour, Q.C.	Cobourg.
H. C. R. Becher, Q.C.	London.
John Bell, Q.C.	Belleville.
T. M. Benson	Port Hope.
Edward Blake, Q.C.	Toronto.
G. W. Burton, Q.C.	Hamilton.
M. C. Cameron, Q.C.	Toronto.
John Crawford, Q.C.	Toronto.
John Crickmore, Q.C.	Toronto.
Adam Crooks, Q.C.	Toronto.
S. B. Freeman, Q.C.	Hamilton.
R. A. Harrison, Q.C.	Toronto.
Robert Lees	Ottawa.
J. B. Lewis, Q.C.	Ottawa.
W. R. Meredith	London.
Richard Miller, Q.C.	St. Catharines.
Thomas Moss	Toronto.
D. McCarthy	Barrie.
Rolland McDonald, Q.C.	St. Catharines.
K. McKenzie, Q.C.	Toronto.
Dr. McMichael	Toronto.
James O'Reilly, Q.C.	Kingston.

Miles O'Reilly, Q.C.	Hamilton.
George Palmer	Guelph.
T. B. Pardee	Sarnia.
C. S. Patterson	Toronto.
Albert Prince, Q.C.	Windsor.
D. B. Read, Q.C.	Toronto.
S. Richards, Q.C.	Toronto.
J. S. Sinclair	Goderich.

On analysing this list, so far as locality is concerned, we find that twelve of the thirty reside at Toronto, twelve west of Toronto (including Barrie and St. Catharines), and six to the east. This division is curiously equal, when we remember that six out of seven of the *ex officio* Benchers also come from the east. Twenty of the new Benchers are Queen's Counsel, and nineteen were Benchers under the old *regime*, though two of these declined the nomination, and one had resigned his seat.

The highest name on the list was that of Mr. Becher, of London, a compliment from the profession at large, which cannot but be gratifying to him. The first ten names were, we understand, somewhat in the following order: Messrs. Becher, Patterson, Moss, Read, Harrison, Armour, Crooks, Bell, Richards and Pardee. There were over one hundred and fifty Barristers, who received votes in numbers graduating from nearly four hundred down to one.

Of those who were not elected, but who appeared prominently on the lists circulated before the election, we may mention that, owing to some informality, the names of Mr. Henderson of Kingston, and Mr. Wood of Brantford, were not on the list, and were declared ineligible. We have already stated that the County Judges, and several of the officers of the Courts who do not pay bar fees, were also held ineligible. Others, such as Mr. Robinson, Mr. Leith, &c., being in receipt of salaries from the Society, were not considered and did not look upon themselves as in a position to receive a nomination for the Bench. Mr. Moss, however, had, we understand, signified his intention of giving up his position as Examiner, his time being so occupied with other professional duties.

It will be observed that a fair share of young blood has been infused; but though there have been many changes in the *personnel* of the Bench, many of the most prominent Benchers under the old law will again sit in convocation; and the fact that there is such a large proportion of silk gowns—exactly two-thirds of the whole—speaks well for the desire on the part of the profession to confide their interests to the seniors, and those whom a responsible government has thought most deserving of eminence.

Upon the whole, without, of course, having as yet had time to test the working of the new Act—for it is not the first, nor perhaps even the second election that may show any defects in the system—we may say, at least, that the first election under it has returned a very satisfactory Bench. With confidence, then, in those who have now been appointed by their fellows, let us hope the best for the future.

ELECTION PETITIONS.

The judges will soon be engaged in duties entirely new to them—taking evidence under the recent Acts respecting controverted elections, and reporting the result of their labours to the House of Assembly.

The law though new here is not so in England, as any reader of the English Reports will know. But there are some differences in the Statutes of the two countries which we may have occasion hereafter to refer to in connection with other matters of interest on the subject of these trials. At present, however, we must content ourselves with alluding to a prevalent rumour as to the time when these trials are likely to take place.

Is is said that the trials will take place during the coming Term, the two Chief Justices and the Chancellor, if he should be here at the time, or, in case of his absence, one of the Vice-Chancellors, dividing the contested election cases between them.

Than the chiefs of the three courts no more fitting Judges could be chosen to inaugurate the new system, and that they will do their duty without fear, favor or affection, there will be none to doubt. But it has been suggested that it will be undesirable that the two Common Law Courts should be deprived of their heads during what is generally the heaviest Term of the year, and there is certainly a feeling against such an arrangement in the minds of the profession. It is easy to see that the public business would suffer by any diminution in the number of Judges,

particularly when it may happen, as has often happened before, that one of the Judges may be incapacitated from business by sickness or other causes, and we all feel that such a contingency is not improbable with the amount of labour they have to undergo. Again, each petition will absorb at least two if not more of the leading counsel, and this will take from Term business (if, as is probable there will be, three trials going on at once), from six to ten of those whom clients depend upon in a most important part of their suits. Of course this is all written on the supposition that such an arrangement is contemplated, which may not be the case. Nor do we anticipate that the Judges will take any course but the most advisable under all the circumstances.

There are now eighteen petitions presented, and the trials will take a long time. In one case it is said that there will be nearly two hundred witnesses on each side, though this may be doubted. The consideration of these matters points to the oft repeated suggestions that the number of Judges might with advantage be increased. Mr. Dalton's appointment was a great relief, but if there is to be anything of a periodical crop of election petitions an addition will be a necessity. If Mr. Dalton was given full powers as a Judge by the Dominion Government all that is at present required would be gained. We trust the executive will relieve the Judges from a great deal of manual labour in these cases, and save much of their valuable time by employing for them short-hand reporters, as is done in England.

ENGLISH LAW REPORTS DIGEST.

There seems to be but one opinion as to the value of the Digest of the Law Reports. The *Solicitors' Journal* says, "It is next to impossible to find any thing in it." A correspondent of the English *Law Journal* thus feelingly speaks on the subject:—

"I have often occasion to refer to this book as well as other digests; and so unskilfully is the Council's book executed, that I find the book a perfect nuisance and source of irritation. The thing is a chaos. The authors in preparing it seem to have laboured under a complete derangement of legal ideas of order. When I refer to this 'Digest' I can seldom find the subject I want without first looking under several heads. I will give my last example. A client asked my advice on a claim he had against a person who had sold him the goodwill of a trading business, and who had misrepresented the extent of his trade as being greater than it really was. I have the *Law Journal* Digests, Harrison's, Fisher's, Evans', and that issued by the Council, which unluckily was the first I could lay my hand upon. I looked at the word 'Deceit,' where I found nothing to the point, and indeed only one case noted, namely, 'Action against company for. See Contract for Shares.' I turned to "Fraudulent Misrepresentation,' and found only one case (also not to my purpose), namely, 'Measure of Damages,' being a case of a cow which was not free from infectious disease. I referred to 'False Representation,' where, again, I found one case only, being one as to 'Effect of Baukruptcy upon Right of Action for.' I looked for 'Case,' but there was no such title. At last I looked for 'Goodwill,' and probably you may say 'Why on earth did you not look for "Goodwill" at first?' I can only reply, that when I learned my business, digests were arranged under regular heads, such as I have mentioned above, and I suppose by long habit and association of ideas my thoughts marshal themselves after the same manner; and therefore from habit I pursued my researches in the way I have indicated; and, moreover, although my client's business related to 'Goodwill,' the questions in my mind might just as well have related to 'Good Digest,' or good anything else.

"After all, Mr. Editor, you must not condemn my method of looking out cases; for when I looked at 'Goodwill,' the 'Digest' referred me to 'Sale of Goodwill.' and, on referring to the last-mentioned title, I found one case noted, which, so far as the 'Digest' informs us, did not decide any point relating to goodwill."

In fact the system adopted, if such it could be called, is to put cases under titles where a layman might look for them, but a lawyer never. The Law Reports, though admirable in their way, have their defects, especially as to the digests, and it yet remains to be proved that they are entitled from their excellence to supersede, which as yet they have by no means done, the excellent reports given in the volumes of reports published in connection with such publications as the *Law Times*, the *Solicitors' Journal*, and the *Law Journal*.

The Assize business throughout the country has been light so far, partly owing to the general prosperity, and partly to the elections having disturbed the current of litigation.

SELECTIONS.

SIR JOHN STUART.

We are compelled at times to discharge the painful duty of publishing memoirs of worthy judges and lawyers whom death has removed from their spheres of action. On the present occasion we are more fortunate. To write some few eulogistic words concerning Sir John Stuart upon his retirement from the bench in a ripe age, yet in the vigour of his mind and body, is a happy obligation, and the only drawback on our pleasure is the fear of not doing justice to our subject. We regret his departure from Lincoln's Inn, but there is one class of persons to whom his resignation will bring joy and gladness. These are the usurers, the extortioners, the fraudulent trustees, who dreaded a bill in Vice-Chancellor Stuart's Court with inexpressible horror, knowing the revelation that awaited their most skilful combinations, and the biting censure which would knaw into the remnant of their withered conscience. Other judges have attempted to emulate Sir John in this respect, but not with equal success. Their castigation has been too rough and ready, and they have melted the gold out of the ore by administering the process to the wrong objects. When Sir John Stuart branded a man as guilty of knavery, it did not happen that the Court of Appeal pronounced the same person to be honest.

When the bar assembled on Saturday last to bid farewell to Sir John Stuart at the close of the sittings of his Court, the intention was not so much to declare him a great judge, as to mark their sense of his high and noble character, his integrity, his gentlemanly demeanour, his courtesy to the bar. There was something wonderfully fine in his faith in the dignity of an English judge. Sir John was above anything like empty personal pride and vanity, but he had an extraordinary belief in the honour of his office, and deemed it one of the first duties to sustain and, if possible, enhance that honour. His peculiar adherence to an ancient and imposing style of dress on the bench was an outward emblem of the sentiment which reigned within him. His authority in Court was assisted by this feeling. While he gave attention to the junior members of the bar in a way which encouraged them to reward him by industrious research and proper preparation of their arguments, he possessed the important faculty of knowing how to check the exuberant audacity of senior members whom prolonged familiarity with the Court might tempt to forgetfulness of its dignity. He was also a good friend to the reporters. He delivered his judgments clearly audibly and precisely. Knowing that judgments were of no value except when reported, he so spoke as to render it easy to record what he said, and thereby set an example which merits imitation in Lincoln's Inn.

His career at the bar and on the bench extended over a vast period of time. It is a huge stride from November 23, 1819, to March 25, 1871, and yet during all those years Sir John was an advocate or a judge. Fifty-two years of Courts prove a rubust frame and a robust mind; and the love of country and country sports, skill with the rod and skill with the gun, go far to explain the immensity of his physical power. For twenty years Sir John practised at the junior bar. In March 1839 he was appointed Queen's Counsel, and in 1852 he was elevated, on the death of Sir James Parker, to the Bench. This nineteen year's tenure of office finds its record in three volumes of Smale and Giffard's Reports, in the Law Journal, and in the Law Reports. But in proportion to the work accomplished by him during those years the number of reported cases is not large. The first reported case was *Flott* v. *Mullins*, 1 S. & G. 1., and was decided by him on the day on which he took his seat as a judge at the commencement of Michaelmas Term 1852.

Sir John Stuart was sworn on Her Majesty's Privy Council on Friday last. This mark of honour was his due, but Sir John has well earned his leisure, and cannot be expected to serve on the Judicial Committee.—*Law Jour.*

CRITERIA OF PARTNERSHIP.

(*From the American Law Register.*)

Although a distinguished writer discourages any attempt to determine questions of partnership by reference to common principles, yet it will hardly be denied that the tendency of recent adjudications lies unmistakably in that direction. The doctrine of *Grace* v. *Smith*, 2 W. Bl. 998, affirmed in *Waugh* v. *Carver*, 2 H. Bl. 235 and in many subsequent decisions, has been emphatically overruled, and the arbitrary notion that a mere participation in the profits of an undertaking or business created a partnership liability as to third persons, has been superseded by the adoption of a new criterion involving the principle of agency: *Cox* v. *Hickman*, 8 H. L. C. 268; *Bullen* v. *Sharp*, L. R. 1 C. P. 85.

Still, it may be doubted even now, whether these decisions furnish a rule of general application and utility. For if, as Lord Wensleydale observed in *Cox* v. *Hickman*, "the maxim that he who takes the profits ought to bear the loss, is only the consequence and not the cause why a man is made liable as a partner," it might, at least, with some semblance of reason, be said that the mutual relation of principal and agent results from the *fact* of partnerships, which is first to be proved, but does not give existence in that fact. "I do not think it proper for us to inquire," said Mr. Justice Blackburn in *Bullen* v. *Sharp*, "whether this rule of law is more or less expedient than the rule laid down in *Waugh* v. *Carver*. This is a question for the legislature, who may alter the law as to them

seems best." And subsequently the statute 28 & 29 Vict. c. 86 was enacted, sanctioning the *ratio decidendi* of *Cox* v. *Hickman*, and defining specifically what conditions should be held not to constitute the liability of a partner.

The want of scientific certainty and uniformity in the older resolutions on this subject, is doubtless the result of misdirected inquiry as to the perception of profits, instead of seeking out the actual contract of the parties as the true foundation of their liability. For a contract either express or implied, is in fact the only just criterion, whether we regard the intentions or the legal liability of the parties, and unless the circumstances of the case are such as to warrant the presumption or to prove the fact of an agreement, there can be no obligation because there is really nothing to originate it. A contract being thus the proper subject of investigation, we have no other guidance than that which is furnished by the doctrines of the common law. For, in the language of Mr. Parsons, "as a very large part of commercial business consists in forming and executing contracts which must be governed by the law of contracts generally—and this is a part of the common law—many of the principles applicable to partnership are the same as those which regulate the common transactions of men; and so far the law of partnership may be said to be founded upon the common law."

But is it true that *any* other principles than those which govern contracts generally ought to be applied in seeking to fix upon a person suspected of being a partner, a liability which he has not expressly undertaken? For as early as 1795, in a case where the partners were *known* to the creditor, it was said that "notwithstanding where the person bringing the action has looked to the faith of several partners, who are in business together, and has relied upon their joint credit, though but one only of the partners acted, the proof of the act of one shall charge them all; *yet it must be made out in an action at common law that such debt or contract was joint, before the other partners shall be charged.* For in assumpsit against several a joint debt or contract must be proved; otherwise the proof would not correspond with the declaration:" Watson on Part. (ed. 1795), 59; Layfield's Case, 1 Salk. 202; 1 Esp. N. P. 267.

The cases in which the want of some definite and general test is most seriously felt, are those where there is no formal agreement among the parties to be partners, but where they do in fact contract to share a joint or common benefit, and there is a question whether the agreement, such as it is, actually constitutes them partners *inter se*.

In cases of secret, silent, dormant or unknown partners, who agree in the common characteristic of secrecy or concealment in respect to creditors of the firm, the only inquiry is as to the person, and not whether he is a partner or not, for this he is already, *ex hypothesi*.

On the other hand, where a person so acts as to induce the belief that he is already jointly bound with those who seek and obtain the credit, as in the case of nominal, public or ostensible partners, it seems hardly necessary to call in aid the principle of agency in order to determine their liability. For example, if in the firm A., B. and C., A. and B. are acting partners, and C. a mere nominal partner, it would appear that C. is responsible to the partnership creditor, not because A. or B. may have contracted a debt as his agent, but because C., by appearing in the firm, addresses himself directly to the creditor who is thereupon authorized to clothe him with the full character of an original and immediate contractor. He is not a partner merely because A. or B. may subject him to a joint obligation with themselves, but because by knowingly permitting his name to appear in the firm, he thereby expressly constitutes himself a partner, or rather is estopped from denying that he is a partner, and thus *being* a partner any member of the firm may bind him as an agent Here it is only necessary to prove that he was *knowingly* represented as a member of the firm, without reference to any agreement made with his copartners. But in the case of one suspected of being a partner, the proof is entirely different, and it is not only admissible but necessary to resort to the common law for the means of establishing the fact of partnership, which being done, the law-merchant comes in to supply the consequences of that relation.

Let us endeavor then to ascertain among the doctrines of the common law, the ultimate principle on which the joint liability of joint contractors is founded, and see if it may not be made serviceable in determining the partnership relation in respect to the creditor. For it must be remembered that we are now called upon to prove the fact of partnership, in the absence of any express agreement to that effect, and perhaps in the face of a denial made under the solemn sanction of an oath. It is therefore requisite to prove a *joint* liability between the party sought to be charged and the party or parties already known to be liable for the debt. And this can be done only by showing that the relations of all the parties to the creditor are identical.

The common law enables us to ascertain this identity of relation by the application of its most familiar elementary principles.

And first there must be a contract.

It may be said generally that wherever the common law gives a remedy for enforcing the payment of money—except in actions *ex delicto*—the right to recover is predicated on the existence of a contract either express or implied. In actions of debt, covenant and assumpsit, it is absolutely indispensable to prove that the parties agreed together either in formal terms or by intendment of law,

before the defendant shall be required to disprove the allegations of the plaintiff. And certainly because a man is supposed or charged to be a partner, there is no reason either in law or in justice to subject him to harder conditions than those which obtain in ordinary cases, so as to render him liable on a contract which as to him has no existence either actual or presumptive.

Having established the contract (supposing a consideration proven) the question next in importance is, who are answerable for its fulfilment, or rather for damages in default of its fulfilment, in other words, who are properly defendants to the action? And here it is manifest that no one ought to be made a defendant who was not a party to the contract either in person or by representation lawfully authorized. Where the contract is *express*, there is no difficulty in determining the question; but where it is implied, it is necessary to ascertain where the *legal liability* rests, for where this is found, then the presence of a contract is presumed. But no one can enforce this liability to whom it is not *directly* given, for "it is a general rule that no person can maintain this action (assumpsit) on an agreement to which he is not a party, for in such case there can be no contract express or implied," 1 Str. 592. Nor is there any magic virtue in the *lex mercatoria*, which can convert a stranger into a party simply because he happens to be called a partner by those whose interest it is to prove that he is such.

The real question then is, did the supposed partner contract with the partnership creditor? and in the absence of any express agreement, the law will infer a contract from certain facts and circumstances.

When A. at his request, either express or implied, obtains the goods of C. without agreeing as to the price or actually promising to pay it, the law imposes on him the obligation of a contract to pay so much as they are worth, and the ground of his liability is the benefit to himself and the corresponding detriment to C. The same is true if A. and B. obtain goods in a similar manner, each one at common law being liable for the whole debt, with the right of demanding contribution.

But the benefit must move *immediately* from C. to A. or to A. and B, and not through an intermediate interest or title, for otherwise the assumpsit cannot be implied, but must be expressly given. For instance, if A. assumes the responsibility of a debt contracted by B., for B.'s benefit, the law can raise no implied undertaking from A. to the creditor, whatever may be the consideration as between A. and B., but goes so far as to require that the promise shall be in writing. The liability of the guarantor is essentially different from that of the principal debtor, and depends upon a totally different principle. For here in fact are two contracts; the debtor's contract to pay for the goods, and the guarantor's undertaking to pay the debt in default of payment by the principal debtor. As to the contract *to pay for the goods*, there is no privity between the guarantor and the creditor, and the only effect of the statute 29 Car. II. c. 3 is that such collateral agreements are now required to be in writing, in order that the guarantee may be more readily proven, but it does not merge the two contracts into one.

So if A. purchases goods on credit and then gives or sells them to B., although the latter has the use and benefit of the property so obtained, yet the creditor cannot go around his immediate debtor and charge the debt upon a stranger, because here is an intermediate title or ownership, and there is *ex vi terminorum*, no privity and consequently no contract between the stranger and the creditor.

The ground of the implied contract is therefore the benefit drawn *directly* from the use of the goods or property purchased, which property has been received *immediately* from the creditor in such a manner as to create a privity of relationship between the debtor and himself; and what is true of one, holds equally good of any number of debtors.

This general reasoning is applicable to all cases of supposed partnership, where an attempt is made to extend the liability beyond its ostensible limits. The problem with the defence is to fix the point at which the liability ceases, for it must cease when no contract can be legally presumed as proven to exist, and if it can be shown to fall short of the person sought to be charged by being intercepted in some intermediate party, it follows necessarily that the former cannot be affected by it.

(*To be continued*)

A Chicago legal paper says that "a case was recently decided in Illinois upon the question of admitting atheists as witnesses in court. The testimony of a well-to-do merchant of that neighborhood was objected to on the ground that the witness was an atheist. This the witness admitted, but affirmed at the same time that he considered an oath binding on him. The judge decided that, under the constitution, no one could be denied any civil right or privilege on account of his religious opinions." A cotemporary remarks that they would have thought the objection was that the witness had *no* religious opinions.

Legal Aphorisms.—The defendant's counsel, in a breach-of-promise suit, having argued that the woman had a lucky escape from one who had proved so inconsistent, the judge remarked that "what the woman loses is the man as he ought to be." Afterward, when there was a debate as to the advisability of a marriage between a man of 49 and a girl of 20, his lordship remarked that "a man is as old as he feels; a woman as old as she looks.—*Bench and Bar.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

The Queen v. Pattee.

Sci. fa. to repeal a patent—Fiat of Attorney General—Who to grant.

A *sci. fa.* to set aside a patent was issued at the instance of a private relator without the fiat of either the Attorney General of the Dominion or of Ontario having been first obtained.

Held, 1. That a fiat was necessary.

2. That the Attorney General of Ontario was the proper authority to grant the fiat in such a case.

[Chambers, January 5, 1871.—*Mr. Dalton.*]

A writ of *sci. fa* was issued at the instance of John Lough, to set aside a patent, granted on the 12th August, 1870, to Gordon Burleigh Pattee; on the ground that the patent was contrary to law, in that Pattee was not the first and true inventor of the invention, for reasons which it is unnecessary to state at length.

Certain proceedings were taken on this writ, the regularity of which was questioned; and finally the defendant obtained a summons calling on John Lough, the relator in this case, and the Attorney-General for Canada, to show cause why the writ of *sci. fa.* in this cause, and the service thereof, and declaration, and rule to plead, should not be set aside on the ground, amongst others, that no fiat of the Attorney-General for Canada, or of the Attorney-General for Ontario, was filed before the issue of said writ, or at any time since, and that said writ issued without authority, and that all subsequent proceedings in this cause have been had without proper authority therefor; or why all further proceedings in this cause should not be stayed until a fiat or warrant of the Attorney-General shall have been filed authorizing the proceedings in this cause.

R. A. Harrison, Q. C., for the relator, John Lough, showed cause.

S Richards, Q. C., for the defendant, supported the summons.

C. Robinson, Q C., appeared for the Attorney-General of the Dominion.

Mr. Dalton.—In the opinion which I have come to, it is not necessary to detail minutely the proceedings. I will assume that there has been an appearance in the suit, or what justified the plaintiff in supposing that there was an appearance. As soon as conveniently could be, after discovering that no fiat of the Attorney-General had been obtained, and without any further step in the defence, the defendant has moved to set aside the *scire facias*. I think that, for such a cause, which goes to the authority for the whole proceeding, he has a right to move, at almost any stage, upon first discovering the defect of authority; and I do not imagine that anything would take away that right but the acquiescence of the defendant himself, either express or implied, which must of course be after he had become aware of the want of authority.

There are two important questions:—first, is a fiat necessary? and, secondly, if so, by what authority should it be granted?

Before the statute of Canada, 1869, cap. 11, the books and the actual practice shew that a fiat was necessary. By the Consolidated Act of Canada, cap. 34, the proceedings to be had upon the writ of *scire facias* were directed to be according to the law and practice of the Court of Queen's Bench in England; and Con. Stat. U. C. cap. 21, sec. 14, also makes the fiat necessary. By the English practice, not only is it necessary to the institution of proceedings, but the Attorney-General has the control of the case throughout, and may at any time enter a *nolle prosequi*: Hindmarch, 396.

But Mr. Harrison contends that section 29 of the Act of 1869 supersedes the former statutes and practice, and is now in itself the complete enactment we must look to, as to this remedy by *scire facias;* and it was with this belief that he issued the present writ without a fiat. That section enacts that any person desiring to impeach a patent may obtain a sealed and certified copy of the patent, and of the petition, &c., and may have the same filed in the particular court according to his domicile, which court shall adjudicate on the matter, and decide as to costs; that the patent, &c., shall then be held as of record in such court, so that a writ of *scire facias* under the seal of the court, grounded upon such record, may issue for the repeal of the patent for legal cause, if upon proceedings had upon the writ the patent shall be adjudged void.

Now Mr. Harrison contends that this clause supersedes the old law, and gives the absolute right to any person desiring to impeach a patent to issue and proceed upon a *scire facias* without the leave of any one; and he intsances several known proceedings where the name of the Queen is used by a private prosecutor as of course.

Mr. Richards, on the other hand, contends that the short terms in which the *scire facias* is mentioned, are used with reference to the known practice as to such a writ, existing at the time when the Act was passed, and that the process is therefore subject to all the old established conditions.

By the use of the name of the Queen, the prosecutor is placed in this position of advantage: he cannot be subjected to a *non-pros.;* he cannobe non-suited; the defendant cannot demur to evidence; it is doubtful whether a bill of exceptions will lie to the charge of the judge; if the defendant obtains judgment, he is not entitled to costs; and—what strikes me as more important still—the prosecutor can go into the box and establish his own case as a witness, but the defendant in a Crown case cannot be examined in his own behalf. When it is considered that this proceeding is very often taken by a person who himself claims the right to the invention in the patent he is attacking, it certainly seems a peculiar state of things that one of the rival claimants can be a witness and the other cannot.

The fiat is not a mere form, then, but a matter of substance; and it is very necessary that some authority should exist to control the exercise of the power which it confers, and to guard against its abuse.

Now, the 29th section of the Act of 1869 does *not*, it seems to me, give the person desiring to impeach a patent the *right* to issue a *scire facias;* it certainly does not do so in terms. It gives him the right to record the patent, "so that a writ of *scire facias may* issue for the repeal of the patent." But on whose authority is it to issue? As the clause does not expressly say that *he* may do it, and it is not only formally but substantially a suit of the Queen, it seems to follow, even without regard to the previous known practice, that it can only be on the authority of the Attorney-General that the writ is to issue. So that I agree with Mr. Richards. Consistent with this is the repealing clause of the act of 1869. It repeals cap. 34 only in so far "as it may be inconsistent with this Act." Now, the provision of sec. 20 of cap. 34, that the proceedings upon the *scire facias* shall be "according to the practice of the Court of Queen's Bench in England," is not inconsistent with the Act of 1869, but in furtherance of it. Therefore, whether Mr. Harrison is right or not in contending that cap. 21, Con. Stat U. C. is inapplicable to a patent issued under the Act of 1869 because it is not issued under the great seal, I think a fiat was necessary for this writ of *scire facias.*

But whose fiat?

It may provoke a smile that an officer of the court, in deciding a matter of practice, should incidentally consider a question under our constitution, which is of some importance in itself, and is a part of larger questions. It is of little matter, however, where it may begin; it must come to the decision of the court. I was told, when I suggested the question on the argument, that it was very doubtful whether the Minister of Justice or the Attorney-General for Ontario be the proper authority to grant a fiat in such a case. I must therefore suppose it is doubtful, though I myself cannot see the grounds for doubt. I cannot think that *two* authorities exist, *either* of whom may grant it. Some one authority, and one *only*, must answer here the position of the Attorney-General in England in respect of this matter.

The British North America Act, section 92, enacts that, "In each Province the Legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated, that is to say [after twelve other heads], 13, Property and civil rights in the Province; 14, The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

These sections express the powers of the Legislature of Ontario.

Then as to the Executive, section 135 enacts, "that until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities or authorities, at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any law, statute or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them." So that, as is consistent and natural, the executive and legislative functions of the Government of Ontario seem to be co-extensive

The words of this statute have been well weighed. But what definition of "property and civil rights" can exclude the right of enforcing a civil remedy in the courts? To lawyers, that seems the practical proof and test of all right: without it, at any rate, no other right is of any real value. And further, there is attributed to the local jurisdiction, "the administration of justice in the Province, * * * including procedure in civil matters." Then if the legislative and executive powers as to "property and civil rights in this Province," and "the administration of justice," and as to "civil proceedings in the Courts," are in the Government of Ontario, can it be thought that any other authority is for the present purpose indicated, than that of an officer of Ontario responsible to its Legislature? For let it be borne in mind that he who has the discretion to grant has also the discretion to withhold, and that it is only by *scire facias* that a subject in Ontario, aggrieved by a patent wrongly issued, can seek the remedy of its avoidance.

I desire not to amplify; but other reasons, in and out of the Act, point to the conclusion that the Attorney-General of Ontario is the authority that must grant or refuse the fiat which is necessary to the real plaintiff here to pursue this remedy. I shall not be understood as speaking of the case where the crown itself seeks to avoid a patent; I speak only of the present case, where a subject domiciled in Ontario seeks to avail himself of the peculiar privileges of the Crown to assert his own private interests.

I think the proper order is that, upon payment of the costs of this application, and filing a fiat of the Attorney-General of Ontario—which may be done *nunc pro tunc*—this summons be discharged. Upon failure to do this within two calendar months, that the writ and all proceedings be set aside with costs, to be paid by the relator.

Order accordingly.

Weaver v. Burgess et al.

Ejectment — Striking out defendant—Terms.

The name of a defendant, who disclaimed all interest in the land, except as dowress, struck out of the proceedings in ejectment.

[Chambers, Feb. 1, 1871—*Mr. Dalton.*]

A summons was obtained on behalf of Ann McWade, one of the defendants in an action of ejectment, calling on the plaintiff to shew cause why her name should not be struck out of the writ and proceedings in this cause, on the grounds that she had no interest in the land in question except a right to dower, which had not been assigned to her.

O'Brien shewed cause:—

This summons must be discharged. This defendant is in possession, and the writ must therefore be directed to her. There is authority to strike out the name of a defendant who is a tenant, but not that of a dowress; *Kerr* v. *Waldie*,

4 Prac. Rep. 138, is founded on two cases which, it is submitted, do not warrant the conclusion arrived at, and the leaning of the learned judge there is against the practice. The principal reason given is that a defendant who claims no interest becomes liable for costs; but here the applicant is a dowress, and claims a certain interest. If no judgment is obtained against her the plaintiff can not get possession. See *Peebles* v. *Lottridge*, 19 U. C. Q. B. 628; *Jones* v *Seaton*, 26 U. C. Q. B. 166; *D'Arcy* v. *White*, 24 U. C. Q. B. 570; *Hall* v *Yuill*, 2 Prac Rep. 242; *Kerr* v *Waldie*, 4 Prac Rep. 138; 3 U. C. L. J. N S. 292.

John Paterson, contra, relied on *Kerr* v. *Waldie*. *ante*

Mr. Dalton.—I shall follow *Kerr* v. *Waldie*. I can see no difference in the position of a dowress and a tenant. But I can only make the order upon this defendant undertaking to be bound by the final judgment in the case, so far as possession is concerned, as though her name had not been struck out, and the order as to costs will be the same as in *Kerr* v. *Waldie*.

COUNTY COURT OF NORFOLK.

(*Reported by* Henry Ellis, Esq., *Barrister-at-Law.*)

Clemens qui tam v. Bemer.

Returns of convictions—C. S. U. C. cap. 124—How affected by the Law Reform Act of 1868, and by 32-33 Vic. caps. 31 & 36.

Returns of convictions and fines for *criminal* offences being governed by the Dominion statute 32-33 Vic. cap. 31, sec. 76, and not by the Law Reform Act of 1868, are only required to be made semi-annually to the General Sessions of the Peace.

Semble, that the right to legislate upon this subject belongs to the Dominion Parliament, and is not conferred upon the Provincial Legislatures by the B. N. A. Act, 1867.

[St. Thomas—*Hughes*, Co. J.]

This was a penal action, brought against a magistrate for not returning a conviction.

The declaration alleged that, before and at the time of the trial and conviction thereinafter mentioned, and from thence hitherto, the defendant was a justice of the peace in and for the said county of Elgin; and that theretofore, and subsequently to the 1st day of January, 1870, to wit, on the 5th day of Febrnary, 1870, the hearing of a certain charge and complaint against the now plaintiff, for unlawfully assaulting and beating one Mary McLoud, and the trial of the now plaintiff upon the said charge and complaint, were duly had and took place within the said county of Elgin, before the now defendant, as and being such justice of the peace as aforesaid; and which trial and hearing were so had and took place under a certain law in force in this Province giving jurisdiction in the premises to the defendant as such justice; and at and upon such hearing and trial, and within the said county of Elgin, the now defendant, as and being such justice as aforesaid, duly and in due form of law convicted the now plaintiff of the said offence so charged as aforesaid; and upon and by such conviction, and within the said county, imposed upon the now plaintiff a certain fine and penalty of, to wit, twelve dollars, for the said offence; which said conviction took place before the second Tuesday in March, 1870: yet the defendant, so being such justice as aforesaid, did not on or before the second Tuesday in the month of March, in the year last aforesaid, make to the clerk of the peace of the said county of Elgin a return of such conviction, or of such fine or penalty, in writing under his hand in the form or to the effect prescribed by the statutes in that behalf, or any return thereof whatsoever, on or before the said second Tuesday in the month of March, in the year aforesaid; but wholly refused and neglected so to do, although a reasonable time after such conviction, for making any and every such return as aforesaid, had elapsed before the said second Tuesday in the month of March, in the year last aforesaid; contrary to the form of the statutes in such case made and provided: whereby, and by force of the said statutes, the now defendant forfeited for his said offence the sum of eighty dollars: and thereby, and by force of the said statutes, an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have of and from the now defendant the said sum of eighty dollars; yet the defendant hath not paid the said sum of eighty dollars, or any part thereof. And the plaintiff claims, as well for himself as for our lady the Queen, eighty dollars.

The defendant pleaded not guilty by statute (21 James I. cap. 4, sec. 4), on which the plaintiff joined issue.

A verdict was found for the plaintiff.

McDougall for the defendant, moved in arrest of judgment, on the ground that the declaration shewed no cause of action under C. S. U C cap. 124, and there was no proof of defendant having incurred a penalty under that or any other statute.

Kains showed cause.

Hughes, Co. J.—At the time of the trial of this cause, and at the argument of the rule nisi, I was strongly inclined to the view that the plaintiff had the right to maintain this action against the defendant, on the grounds that it was not in the province of the Dominion Parliament to repeal Con. Stat. U. C. cap. 124, that being a statute not affecting the criminal law or criminal procedure; and that it was exclusively within the jurisdiction of the Provincial Parliament to alter, amend or repeal that statute, or substitute another in its place; because the fines referred to therein might affect the revenue of the Province, or of the municipalities therein, and it was merely passed to protect the Provincial revenue, by compelling minor magistrates, such as justices of the peace, who are appointed by the Provincial Government, to account for and pay over fines received by them under summary convictions. (*Vide* subsec. 15 of sec. 92, British North America Act, 1867.)

After a more attentive perusal of the British North America Act of 1867. I am induced to come to the opposite conclusion, and to view the matter differently. The intention of the Ontario Legislature, when passing the 4th subsection of the 9th section of the Law Reform Act of 1868 (in the absence of direct expression), may fairly be presumed to have been merely to so amend Con. Stat. U. C. cap. 124, as to relate to cases not criminal, or for enforcing any law of the Province made or to be made in relation to mat-

ters coming within any of the classes of subjects enumerated in section 92 of the B. N. A Act, 1867, over which the Provincial Legislature has exclusive jurisdiction to make laws

By the 14th subsection of section 92 of the B. N A Act, 1867, the administration of justice in the Provinces, including the constitution, maintenance and organization of Provincial courts, both of civil and criminal jurisdiction, is conferred upon the Provincial Legislature.

The declaration in this case sets forth that the conviction referred to, as made by the defendant, the return of which he ought to have made, was the imposition of a fine for an assault and battery; and inasmuch as that cannot be in any sense considered as what the statute means by "the administration of justice," it is in my opinion in every sense to be regarded as appertaining to the criminal law and the procedure in criminal matters. A summary proceeding before a justice of the peace is authorised for a common assault or battery (when it is requested by the prosecutor), *i.e.*, for what would otherwise be triable by indictment as a misdemeanor and be ranked as a criminal offence No authority other than the Dominion Parliament could deal with it. The procedure and forms for the prosecution and conviction of offenders in such cases are laid down, a return of the conviction by a given time is prescribed, and a certain consequence is to follow a neglect of making that return We find the whole subject, from the complaint to the return of the conviction dealt with by the criminal Acts of 1869, passed by the Dominion Parliament (*Vide* 32-33 Vic. cap. 20, sec 43, and cap. 31) I can only regard an assault and battery as a criminal offence, although triable summarily; and therefore, by the 27th subsection of the 91st section of the B. N. A. Act, 1867, anything connected with the prosecution or its consequences must belong to the exclusive authority of the Parliament of Canada, and could not be dealt with by the Provincial Parliament.

By the Law Reform Act of 1868 (sub-section 4 of section 9), the Con. Stat. U. C. cap 124, was only amended, not repealed: the returns of summary convictions and fines by justices of the peace were required to be made quarterly to the clerk of the peace, instead of to the Courts of General Sessions of the Peace. I therefore consider the reasonable construction to be placed on that amendment, as expressive of the intention of the Legislature, to have been to confine the 4th subsection of the 9th section of the Law Reform Act of 1868 to convictions and fines for the classes of subjects enumerated in sub-section 15 of section 92 of the B. N. A Act, 1867, as to cases, not criminal, over which the Provincial Legislature has control, and that that Legislature did not thereby assume to act beyond the scope of its powers, or to legislate concerning returns of convictions in criminal cases.

If it were competent for the Dominion Parliament to legislate concerning the summary trial of criminal offences, and lay down the procedure therefor, I apprehend it was also competent for them to deal with the return of the convictions and its results, to prescribe their legitimate conclusions, and to affix or impose any penalty for non-observance of what was laid down. With that power, as a necessary consequence, must follow the jurisdiction to alter, amend or repeal any existing law affecting the same subject, for the purpose of assimilating the criminal laws of the whole Dominion. I cannot therefore understand that the Dominion Legislature has jurisdiction over a given subject up to a certain point, and that the Provincial Legislature has the right to step in and begin legislation where the Dominion Parliament has left off The jurisdiction to legislate and deal with any given subject must be entirely under the control of the one or the other, and not under the piecemeal authority of both. If it were otherwise, the statute law of the country would assume such a fragmentary character that in a few years we should find it difficult to wend our way through its perplexities.

By referring to the Dominion statute of 1869, 32, 33 Vic cap 36, schedule B, we find cap. 124 of the Con. Stat. U C. wholly repealed, except section 7 (which section 7 relates to returns to be made by sheriffs): with this saving, however, in the second paragraph of section 1, "such (repeal) shall not extend to matters relating solely to subjects as to which the Provincial Legislatures have, under the B N. A. Act, 1867, exclusive powers of legislation, or to any enactment of any such Legislature for enforcing, by fine, penalty or imprisonment, any law in relation to any such subject as last aforesaid." So that until the passing of 32 & 33 Vic. caps. 31 and 36, by the Dominion Parliament, the Con. Stat. U. C. cap. 124, for all purposes of the subject in controversy in this suit, remained unrepealed and unchanged, in so far as any return of a conviction or fine for a *criminal* offence was concerned, or for any offence dealt with by the criminal law of the Dominion Parliament, or whereby the procedure in criminal matters was prescribed. None but the Dominion Parliament could amend, alter or repeal it, and that for all purposes set forth in the 15th subsection of the 92nd section of the B. N. A. Act. 1867; and as to any subject referred to in the second paragraph of section 1 of the Dominion statute 32 & 33 Vic. cap 36, the Con. Stat. U. C. cap. 124, and the Law Reform Act, 1868, remained unrepealed.

The Con. Stat. U. C. cap. 124, required the return of the conviction to be made to the next ensuing General Quarter Sessions of the Peace, and the 76th section of the Dominion statute, cap 31, prescribed that a return of convictions should be made by the justices of the peace to the next ensuing "General Sessions of the Peace;" and as the Law Reform Act, 1868, limited the number of sessions of the Court of General Sessions of the Peace to two in each year, instead of four, as formerly, I think the defendant was only bound by law to make a return to the General Sessions of the Peace next after the conviction, which would be the 14th day of June, 1870; and as the allegation in the declaration is that he did not make the return before the second Tuesday in March, 1870, and as there was no allegation made which would bring the case within the provisions of the Dominion statute of 1870, 33 Vic cap 27, sec 3, I think the judgment should be arrested.

The defendant was not bound to return the conviction or fine so soon as the second Tuesday

of March, 1870, or before the 14th day of June, in that year.

But supposing the foregoing not to be the correct view of the respective powers of our Legislature, and supposing Con. Stat. U. C. cap. 124 not to be fitly classed with the criminal law or criminal procedure, then I should assume the position, that by the 91st section of the B. N. A. Act, 1867, general powers of legislation are conferred upon the Dominion Parliament, "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces;" and without restricting those general terms, it is therein declared, "for greater certainty," to what the exclusive legislative authority of the Parliament of Canada extends. I think, therefore, that by that general power, the Dominion Parliament had the exclusive right to alter, amend or repeal Con. Stat. U. C. cap. 124, and to substitute other enactments in its place; because there is no subsection of the 92nd section, under which it may be held that the exclusive power to legislate upon that subject is conferred upon the Provincial Legislatures; for I cannot see how it belongs to the subject of "property and civil rights" (subsec. 13), or to "the administration of justice" (subsec. 14), or "the imposition of punishment, by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matters coming within any of the classes of subjects enumerated in that section" (subsec. 15); nor is it concerning a matter of a merely local or private nature in the Province (subsec. 16). The rule to arrest the judgment must therefore be made absolute.

Rule absolute to arrest judgment.

ENGLISH REPORTS.

EXCHEQUER CHAMBER.

Makin v. Watkinson.

Lessor and lessee—Covenant to repair—Notice to lessor of want of repair.

In an action by a lessee against his lessor for breach of covenant to repair the main timbers and roofs of the demised premises.

Held, that the lessee could not recover against the lessor for breach of covenant without having given him notice of repairs being required; that being a matter within the knowledge of the lessee, and not of the lessor (Martin, B., *dissentiente*).

[Nov. 22, 1870.—19 W. R. 286.]

Declaration—That defendant by deed let plaintiff a mill. Defendant covenanted to keep the main walls, main timbers, and roofs in repair, which he neglected to do, whereby plaintiff incurred great loss.

Third plea—That no notice was given by plaintiff to defendant of any want of repair, or that the main walls, main timbers, and roofs were not in good order.

Demurrer and joinder in demurrer.

Wills, for the defendant, contended that the plea was good, and that the plaintiff being the lessee, and having exclusive possession of the premises, was bound to give the lessor notice of any repairs that were required. He cited the case of *Moore* v. *Clark*, 5 Taunt. 96, where Mansfield, C J., and Gibbs, J., said the lessor may charge the lessee without notice, for the lessor is not on the spot to see the repairs wanting; the lessee is, and therefore the lessee cannot charge the lessor for breach of repairs without notice, for the lessor may not know that the repairs are necessary. He also cited *Harris* v. *Ferrand*, Hardres, 42, and *Vyse* v. *Wakefield*, 6 M. & W. 442, and contended that the defendant could not enter the premises to see what repairs were wanted, as there was no such right of entry reserved to him by the lease.

Kemplay, for the plaintiff, contended that the defendant had a clear right of entry on the premises to see what repairs were necessary in accordance with the maxim, *quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud*, Broom's Maxims, 5th ed. 485; and argued that as the knowledge of what repairs were wanted was not, or, at any rate, need not have been in the exclusive knowledge of the plaintiff, there was no necessity for any notice from the plaintiff, for which he cited *Cole's case*, Cro. Eliz., p. 97, where Anderson, C. J., says:—"If one be obliged to make such assurance as J. S. shall advise, he ought to take notice of the assurance advised at his peril, because a certain person is appointed to do it. But if it be such assurance as my counsel shall advise, I ought to give notice of the assurance, for he cannot take notice who is my counsel." He also cited *Coward* v. *Gregory*, 15 W. R. 170; L. R. 2 C. P. 153.

Channell, B.—In my opinion this is a good plea. The declaration is good upon the face of it, and states in a compendious way that the defendant had been requested to repair. The question then is whether the plea is good. I agree that the observations which have been cited from the case of *Moore* v. *Clark*, 5 Taunt. 96, cannot be considered as more than *obiter dicta*, and that those observations do not carry the weight they would have borne had they been made with reference to any ascertained materials present to the mind of the Court; but looking at the case upon principle, I think that *Vyse* v. *Wakefield*, 6 M. & W. 442, is an authority for the doctrine that where a covenant is unreasonable or unconscientious, there you must supply words to make it reasonable and conscientious, although I quite agree that where a covenant is simply absurd, you cannot remedy that absurdity by introducing words which are not found there.

The covenant in this case was to repair the roof, and the main timbers. It might perhaps be possible for the defendant to ascertain the condition of the exterior portion of the roof without entering the premises, but it is clear that he could not ascertain the condition of the interior timbers without going into the premises, and I do not see that he had any power reserved to him by the lease to enter and view the condition of the premises. It appears to me, therefore, there being no authority against my view of the case, that the plea is good.

Bramwell, B.—I think that the plea is good, and, of course, to hold it good, we must in effect insert the words "upon notice" in the covenant, and I agree that, as a general rule, it is objectionable to interpolate words in a contract which the parties themselves have not made use of.

It seems to me to be clear that these two persons cannot say that they have entered into such an unreasonable covenant as this—that, although the one party is in possession of the premises, and the other party cannot enter to view the state of repairs, yet that the latter is to be bound at its peril to keep the premises in repair, though he have no notice of, and no means of knowing, the repairs that are wanted; and it is worth while remembering that this is an action to recover damages that have been caused by reason of the non-repair, and not merely to recover such amount of damages as would suffice to put the buildings in repair. In my opinion the parties did contemplate that the lessor should not be bound to repair until he had received notice from the lessee that repairs were necessary, and my opinion as to the necessity of such a notice is much strengthened by the *obiter dicta* of the two learned judges in the case of *Moore* v. *Clark*, 5 Taunt. 96.

The cases are by no means clear; some seem to incline one way and some the other. The case of *Fletcher* v. *Pynsett*, Cro. Jac. 102, was an action on a covenant to assure a copyhold to the plaintiff if he married the defendant's daughter; and in that case it was held that the plaintiff need not allege that he had given the father notice of the marriage having taken place, for the defendant was bound, at his peril, to take notice thereof. The true rule may be that where the happening of the particular event is in the exclusive knowledge of the plaintiff, the defendant being only able to guess or speculate as to what has happened, there the plaintiff is bound to give notice thereof. One always must have some doubt as to whether it is right to introduce words which the parties have not themselves made use of; but, for the reasons I have given, I think notice was required in this case.

Martin, B.—In my opinion this plea is bad; it seems to me that we differ very much as to what is good sense, and that to introduce words in order to give effect to what we suppose may be the meaning of the parties would give rise to great uncertainty. This is an action upon a covenant in a lease whereby the defendant undertook to maintain and keep the roof and the main walls and timbers of the demised premises in good repair at all times during the term. The only defence the defendant sets up in his plea is that he had no notice of the need of any such repairs, but as the lease is silent as to the necessity of any notice, the plea is, in my opinion, a bad one.

The case of *Vyse* v. *Wakefield*, 6 M. & W. 442, has been relied on by the defendant; but to apply that decision to the present case it is necessary to assume that the defendant could not ascertain what repairs were wanted—an assumption which I am not prepared to make. Mr. Cowling, in arguing that case, stated the general rule of law correctly when he said that the general rule of law is that a party is not bound to do more than the terms of his contract oblige him to do; and if the different judgments be looked at it will be seen that they all confirm that rule, for Lord Abinger says that the rule to be collected from the cases seems to be this—that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the particular knowledge of the opposite party, then notice ought to be given him. So Baron Parke lays it down as a general rule that a party is not entitled to notice unless he has stipulated for it, but says that there are certain cases in which, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for; and Baron Rolfe says, where the law casts an obligation upon a man it says that it shall be reasonable, but that is not so where a party contracts to do a particular act, for then it is his own fault for entering into such a contract. In my opinion, then, this is not a case in which notice is required, and I think the plaintiff is entitled to judgment.

Judgment for the defendant.

CHANCERY.

Colmer v. Ede.

Lien—Solicitor and client—Deeds delivered for a special purpose—General lien on—Mortgage—Foreclosure.

Deeds delivered to a solicitor for a specific purpose only are subject to a general lien for costs incurred previous to such delivery, unless such lien be limited by a special agreement.

Ex parte Sterling, 16 Ves. 258, followed.

[Dec. 19, 1870.—19 W. R. 318.]

This was a suit for foreclosure, which involved the question whether deeds which had been delivered to a solicitor for a specific purpose only (but without any special agreement), were subject to a general lien for costs which had been incurred previously to such delivery.

In January, 1868, Mr. Phelps mortgaged certain leaseholds and all the machinery, plant, carts, waggons, and everything upon the premises, to the plaintiff, but the deed was not registered under the Bills of Sale Act. In November, 1868, Mr. Phelps became a bankrupt, and the defendant Ede was appointed assignee. Mr. Phelps had effected the mortgage through his solicitor, the defendant Stretton, and had delivered to him the deeds relating to the property, for the purpose of preparing the mortgage deed. Mr. Stretton claimed a general lien upon the title deeds for costs incurred while acting as Mr. Phelps's solicitor, and previous to the deeds being delivered to him as above mentioned, but admitted the priority of the plaintiff.

Dickinson, Q. C., and *Begg*, for the plaintiff.

Greene, Q. C., and *J. T. Prior*, for the defendant Ede, contended that as the deeds had been delivered to the defendant Stretton for a specific purpose only, there could be no lien beyond that purpose. They cited *Young* v. *English*, 7 Beav. 10; *Colyer* v. *Clay*, 7 Beav. 188; 1 Fisher's Law of Mortgages, 168, 2nd ed.; *Balch* v. *Symes*, Turn. & Russ. 87; *Ex parte Sterling*, 16 Ves. 257; *Ex parte Pemberton*, 18 Ves. 282; *Re Broomhead*, 5 Dowl. & L. 52. They also contended that as the mortgage deed was not registered under the Bills of Sale Act, it was void as against the assignee in bankruptcy as to the

personal chattels. They asked that the decree might therefore be limited to a decree for foreclosure of the leaseholds.

Wickens, for the defendant Stretton.

Stuart, V. C., without calling for a reply, said that Lord Eldon, in *Ex parte Sterling* (*ubi sup*), had laid down the rule that if the intention was to deposit papers for a particular purpose, and not to be subject to the general lien, that must be by special agreement; otherwise they were so subject. But there was no special agreement in the present case, and there was no doubt that it was a case in which the defendant Stretton had a right to a general lien until his costs were paid. With respect to the objection that some of the property did not pass by the mortgage deed, there was no evidence to justify the insertion in the decree of any particular direction respecting it. The ordinary form of decree was to give a right to foreclosure all the property comprised in the mortgage deed; but if a part of the property did not pass by the deed it would not be foreclosed. There would be the common decree of foreclosure, and an account of what was due to the plaintiff upon his security, and also of what was due to the defendant Stretton for costs; if nothing was due to Stretton, his lien would be at an end and he would have to pay his own costs, but if anything were due to him he would have a right to redeem, and if he did not redeem would be foreclosed.

Simons v. Bagnell.

Practice—Motion to dismiss for want of prosecution after decree.

Where a decree was made in an administration suit, directing the usual accounts and inquiries, and the plaintiff took no steps to prosecute the decree.

Held, that the defendant was not entitled to move to dismiss for want of prosecution, but ought to apply to obtain the conduct of the cause.

The cases where a bill will be dismissed for want of prosecution after decree considered.

Barton v. *Barton*, 3 K. & J. 512, 6 W. R. Ch. Dig. 101, explained.

[19 W. R. 217.]

This was an administration suit, in which a decree had been made directing the usual accounts and inquiries.

T. Smith Osler, on behalf of White, one of the defendants, now moved to dismiss the bill for want of prosecution, and cited *Barton* v. *Barton*, 3 K. & J. 512, where it was held that after a decree merely directing accounts and inquiries, the bill might be dismissed.

Carlisle for the plaintiff, was not called on.

Lord Romilly, M. R., said that the motion was radically defective, and could not be granted. After decree made, the Court could not dismiss the bill unless something came out in the proceedings under the decree to show that no decree ought to have been made. The ground for dismissing the bill in *Barton* v. *Barton* was, that the defendants had allowed the decree to be taken without discussion, instead of raising the objection at the hearing. It was a radically bad case of misjoinder, and the Vice-Chancellor decided that the bill ought to be dismissed, notwithstanding a decree had been made at the hearing. Another case where a bill might be dismissed after decree was the ordinary case of a suit for specific performance, where it was certified that a good title cannot be deduced; and in that case also the bill might be dismissed after decree. But where the plaintiff had obtained a decree, and took no steps to prosecute it, the proper course was, not to move to dismiss the bill for want of prosecution, but to apply to obtain the conduct of the cause.

Motion refused with costs.

Gardner v. Freemantle.

Club—Power of expulsion—Opinion of committee—Bona fide exercise of power—Jurisdiction.

When the committee of a club have power to expel any member whose conduct is in their opinion injurious to the interests of the club, and they exercise this power, all that is required is that the committee should form their opinion in a *bona fide* way, and the question whether their opinion is just or unjust is immaterial.

Two members of a club concerting together returned to a third member a number of circulars issued by him, sending them back in unpaid envelopes addressed in an annoying way; and one of the two members also sent one of the circulars unpaid to the committee of another club, to which the third member also belonged, and put the third member's initials outside the envelope. The third member complained to the committee of the club, charging one of the two members with the whole offence, and describing the last mentioned act as "forging his initials for an unworthy purpose." The committee having ascertained that the individual charged had only sent half the circulars to the complainant, and that the envelope bearing the complainant's initials was not sent by him nor with his express knowledge, expelled the complainant from the club.

The expelled member filed a bill and moved for an interlocutory injunction to restrain the committee from enforcing their sentence.

Held, that the Court had no jurisdiction to interfere.

[Dec. 15, 1870.—19 W. R. 256.]

The defendants to this bill were the committee of the Junior Carlton Club, who had expelled or affected to expel the plaintiff from the club; the bill was filed to have it declared that the sentence of expulsion was void, and the present motion was made to obtain an interlocutory injunction restraining the defendants from enforcing it.

The material rules of the Junior Carlton Club were as follows:—

1. The Junior Carlton shall be a political club in strict connection with the Conservative party, and designed to promote its objects.

45. In case the conduct of any member, either in or out of the club-house, shall, in the opinion of the committee, be injurious to the character and interests of the club, the committee shall be empowered to recommend such member to resign; and if the member so recommended shall not do so within a month from the date of the letter of such recommendation, it shall be competent to the committee to proceed to expel such member, and to erase his name from the list, and such member shall for ever afterwards be ineligible to enter the club-house: Provided that no such recommendation shall be sent to any member, and no such expulsion shall actually take place, unless the same shall be agreed to by three-fourths of the members of the committee present at a meeting specially summoned for that purpose: Provided also, that if, on the meeting of the committee specially summoned, they should be unanimously of opinion that the offence of a member is sufficient, for the interests of the club, to warrant his immediate expulsion,

they shall be empowered at once to suspend from such member the use and advantages of the club before the expiration of the time within which it may be permitted him to resign in pursuance of such recommendation.

52. The committee shall, if possible, hold an ordinary meeting in every week, or oftener, if necessary, to transact current business, and to audit the accounts. Three of the committee shall form a *quorum* on the days of meeting.

[The facts are here fully set out.]

Sir R Baggallay, *Q. C.*, and *Locock Webb*, for the plaintiff.—Your Lordship laid down, in *Hopkinson* v. *The Marquis of Exeter*, 16 W. R. 266, L. R. 5 Eq 63 that such a discretion as that here affected to have been exercised by the defendants must not be a capricious or arbitrary discretion. In the present case the defendants have exercised their discretion most arbitrarily. They make inquiries, and find that the plaintiff's charges are substantially true, and then tell the the plaintiff that they will not go into the question Then they turn round and call on the plaintiff to substantiate his charges, and call on him to resign before he has had time to do so. Moreover the plaintiff had quite sufficient ground for bringing his charges. They were, in fact, true. When two gentlemen made a conspiracy to play tricks on a third, each must be held responsible for the acts of the other. The facts show that the committee did not exercise an impartial discretion. The formalities required for expelling a member also were not fully performed; the notices are insufficient in not giving information that proceedings were to be taken under rule 45. They ought also to have been sent to all the members of the committee, as the members not summoned, though not sufficiently numerous to have turned the decision, might have persuaded the others to vote differently.

Jessel, *Q. C.*, *Wickens*, and *Kekewich*, for the defendants, were not called upon.

Lord Romilly, M R —I should like very much to hear counsel for the defendants, but I think it would be a useless waste of time, as the view I at present take of the case is probably that which they would wish me to hold. I repeat over again that I assent to the expressions which Sir Richard Baggallay has cited. I point out that these clubs are formed entirely for social purposes, and there must be some paramount authority to keep up their objects. In some cases this Court will interfere with the exercise of that paramount authority, but only where there is a moral culpability, as if the decision is arrived at from fraud, personal hostility, or bias. But in cases of this description all that this court requires is to know that the persons who were summoned really exercised their judgment honestly The Court will not consider whether they did so rightly or wrongly.

In the present instance the rule says that "in case the conduct of any member, either in or out of the club-house, shall, in the opinion of the committee, be injurious to the character and interests of the club, the committee shall be empowered to recommend such member to resign." It is not, if the conduct is really injurious, but if it is injurious in the opinion of the committee: then all that the Court requires is that the committee shall form their opinion in a *bona fide* way. There is no power in this Court to control the judgment or opinion of the committee.

[The learned Ju ge then discussed the merits of the case.]

There is no moral culpability in that from beginning to end. The committee think without going into the merits of the case, that it is best for one gentleman to withdraw from the club. It is impossible for me to form any opinion upon it, nor is it necessary for me to do so But I am satisfied that the gentlemen who sat in judgment on this matter came to a sound judgment And if you see that they have seriously examined the case, this Court cannot go a step further. I am satisfied that I should wrongly apply the functions of this Court if I were to sit in judgment on a set of gentlemen expressly selected for this purpose, who think it better that this gentlem n should cease to be a member. Then, Mr. Locock Webb takes an objection which Sir Richard Baggallay did not take, that there were two members who never came and were not summoned. I can, therefore, dispense with that, and make no order upon this motion.

Sir R. Baggallay.—Does your Lordship hold that the notices give sufficient intimation of the object of the special meetings of the committee?

Lord Romilly, M. R —I am of opinion that the notices were sufficient. There is nothing said on the notice except "Mr. Gardner's case" But I think that was sufficient, for, as Mr. Douglas says, most of the members of the committee knew what it was about. The costs will be costs in the cause.

BANKRUPTCY.

Re Till—*Ex parte* Parsons.

Deed of assignment—Solicitor's lien—Court cannot impound.

The Court has no power to retain a deed which has been produced by a witness merely out of courtesy and to facilitate proceedings.

P., a witness, having a lien upon a deed, was asked by the Court to produce it. The deed was, upon its production, impounded by the Court.

Held, an appeal, that the Court had no power to retain the deed, even though it might be fraudulent.

[Dec. 19, 1870.—19 W. R. 325.]

This was an appeal against an order made in the County Court of Nottingham to the effect that a certain deed of assignment executed by the bankrupt should be impounded, under the following circumstances:—

On the 7th of September, 1870, shortly before the adjudication of bankruptcy, a deed of assignment to one Wild of some unfinished leasehold premises, executed by the bankrupt, was held by Parsons as Wild's solicitor.

Upon the 20th of September Parsons and Wild were each served with a summons to attend before the registrar of the county court for examination under the bankruptcy which had in the meantime taken place.

Wild, during his examination by Cranch, the trustee's solicitor, being asked to produce the deed, stated that it was in the possession of Parsons; an application was then made to Parsons for it, and he, after informing the Court

that he had a lien upon it, nevertheless in all good faith sent for the deed, which was thereupon brought into court.

Cranch then suggested to the registrar that the deed should be impounded, and, notwithstanding a protest by Parsons, an order was made to that effect. Shortly afterwards Parsons made an application to the county court judge for the delivery up to him of the deed, but was refused.

Parsons appealed.

Reed, for the appellant, contended that it was a breach of faith on the part of the county court officials to detain the deed, and that if the trustee had any reason for supposing it to be invalid he should have taken proceedings to have it set aside in the legitimate way. He cited *Re Attwater*, 32 L. J. Bk'cy. 11; *Ex parte Southall*, 17 L. J. Bk'cy. 21; and *In re Moss*, 14 W. R. 814. L. R. 2 Eq. 345.

Winslow, for the respondent, said that the application to the county court judge was an appeal, and, not having been made within twenty-one days (the time limited for such matters), the present proceedings must fail for want of formality.

Bacon, C.J.—The objection that it was an appeal from the registrar fails. The county court judge treated the application of Parsons as an original matter. Moreover any objection of that kind ought to have been made at the hearing in the court below. But it was not an appeal at all; Parsons was merely before the registrar as a witness, not as a party. The Court below had no right whatever to impound the deed, but if the registrar had thought fit a copy of it might have been made upon the spot. The fact that the deed may possibly have been fraudulent does not at all alter the matter; there is a regular course of proceeding provided for such cases. The order of the Court below must be discharged, and an order for the delivery of the deed to Parsons must be made. The trustee to pay the costs of the appeal, and of the application to the county court judge.

Order accordingly.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR NOVEMBER AND DECEMBER, 1870, AND JANUARY, 1871.

(Continued from page 56.)

Account.—*See* Mortgage; Partnership.

Action.

An association, not incorporated, was formed of ship-owners for mutually insuring their vessels, and the premiums charged against the members made the fund for paying losses. The members, by a power of attorney, appointed the plaintiffs managers, with power to ask, demand, sue for, &c., all such sums of money as should become due and payable for premiums. The action was brought for premiums due from a member. *Hsld*, that the plaintiffs were only agents of the persons to whom the money was due, and could not maintain the action.—*Gray* v. *Pearson*, L. R. 5 C. P. 568.

See Conflict of Laws, 2; Principal and Agent, 2.

Advancement.—*See* Trust.

Agreement.—*See* Contract.

Ambiguity.

Devise "to my nephew, Joseph Grant." The testator's brother had a son named Joseph Grant, and the testator's wife's brother also had a son named Joseph Grant. *Held*, that there was a latent ambiguity, and that evidence was admissible to show which nephew was intended.—*Grant* v. *Grant*, L. R. 5 C. P. (Ex. Ch.) 727; s. c. 5 C. P. 380.

Annuity.

Testator gave property in trust, out of the annual profits to pay to P. B. during his life, the annual sum of £400, and the annual sum of £100 to W. B. during his life, and to S. C. during her life the annual sum of £600; the the residue to P. B. and his heirs. The income was insufficient to pay the annuities in full, and was applied ratably. In 1868, W. B. died, and there was due to him a considerable arrear. *Held*, that the annuities were a continuing charge on the rents and profits until paid, and that the increase arising after the death of W. B. should be applied to paying ratably, first the arrears, and then the annuities.—*Booth* v. *Coulton*, L. R. 5 Ch. 684.

See Forfeiture.

Appointment.—*See* Power.

Apportionment.—*See* Annuity.

Appropriation.—*See* Charge.

Arbitration.

An arbitrator made an award; an accidental omission in respect of costs being discovered, he made a new award identical with the first, except that the omission was supplied. *Held*, that when he had signed his award, the arbitrator was *functus officio*, and could not correct any mistake; *also*, that an arbitrator, having power by an order of a Court of Equity to award costs, could award costs as between solicitor and client.—*Mordue* v. *Palmer*, L. R. 6 Ch. 22.

Assignment.

1. The defendant agreed to sell to P. certain leasehold premises, and received part of the purchase-money, the conveyance to be executed in twelve months upon payment of the residue. Afterwards P. agreed to assign to the plaintiff this contract as security for an advance, and the plaintiff gave notice thereof

to the defendant. After the time for completion of the contract, P. paid the residue of the purchase-money to the defendant, and received from him a conveyance of the property, without notice to the plaintiff. Upon a bill to make the defendant liable for the loss occasioned thereby, *held*, that the plaintiff having taken no steps to complete the contract, had no claim on the defendant.—*M'Creight* v. *Foster*, L. R. 5 Ch. 604.

2. A debtor assigned his property for the benefit of his creditors in consideration of their covenanting not to take proceedings against him for three years; the indenture provided that such creditors as should not sign it within six months should be excluded from its benefits. One of the creditors neglected to sign, but acquiesced in it, and abstained from proceedings against the debtor. *Held*, that he was entitled in equity to participate in the benefits of the deed.—*In re Baber's Trusts*, L. R. 10 Eq. 554.

See Estoppel, 1; Landlord and Tenant, 3; Patent, 1.

Assault.—*See* Criminal Law, 1; Master and Servant, 1.

Attornment.—*See* Landlord and Tenant, 1.

Award.—*See* Arbitration.

Bankruptcy.

By sec. 13 of the Bankruptcy Act, 1859, the court has power at any time after presentation of a bankruptcy petition to restrain further proceedings in any action, suit, or other legal process against the debtor in repect of any debt proveable in bankruptcy. *Held*, that this gave no power to restrain an action against the debtor jointly with another.—*Ex parte Isaac*, L. R. 6 Ch. 58.

See Conflict of Laws, 1; Fraudulent Conveyance.

Bill of Lading.—*See* Evidence.

Bills and Notes.

1. A promissory note for £500 payable in eight months was given to a company by B. and a surety. There was a current account between B. and the company, which was continued for three years after the date of the note. The items to the credit of B. were more than sufficient to satisfy all that was due to the company at the date of the note, but on the whole account a balance was due to the company. *Held*, that the presumption was that the note was given for money then due, and that the burden was on the payee to prove that it was intended to be a running security for the balance from time to time.—*In re Boys*, L. R. 10 Eq. 467.

2. The defendant accepted the plaintiff's bill, and the plaintiff gave him a written promise that, if any circumstances should prevent him from meeting the bill, the plaintiff would renew it. The defendant was prevented from meeting it, and within a reasonable time after it became due applied to the plaintiff to renew it; he refused. *Held* (Cleasby, B., dissenting), that this was a good defence to an action on the bill.—*Millard* v. *Page*, L. R. 5 Ex. 312

See Charge, 1; Security.

Breach of Promise.—*See* Contract, 4.

Broker.—*See* Principal and Agent, 1.

Burden of Proof—*See* Bills and Notes, 1; Master and Servant, 1.

Carrier.

H. represented to the plaintiff that he had obtained an order for goods from C. T. & Co., of 71 George Street, Glasgow; and the plaintiff on the next day sent the goods by a carrier to that address. There was no such firm, but H. had made arrangements to receive at that place letters, &c., directed to it. The carrier following the regular course of business, sent a notice to that address of the arrival of the goods. H. received the notice, indorsed it in the name of C. T. & Co., and so obtained the delivery of the goods, which he applied to his own purposes. *Held*, that the carrier had delivered the goods to the person who represented himself to the plaintiff as C. T. & Co., and, being guilty of no negligence, was not liable for their loss. *M'Kean* v. *M'Ivor*, L.R. 6 Ex. 36.

Charge.

1. The New Orleans Bank drew a bill for £2000 on the Bank of Liverpool in favor of the plaintiffs, who bought it on the faith of representation by the cashier of the N. O. Bank that funds sufficient to meet it were then lying in the Bank of Liverpool, specifically appropriated to that purpose. Before acceptance, the N. O. Bank suspended payment. *Held*, that no charge was created upon the funds of the New Orleans Bank in the Bank of Liverpool.—*Thompsan* v. *Simpson*, L. R. 5 Ch. 659; s. c. L. R. 9 Eq. 497.

2. Testator devised all his real estate upon trust to pay to his housekeeper 12*s.* per week, and the remainder of the rents and profits upon other trusts. He had no freehold estate, but he had leaseholds which he believed to be freehold. *Held*, that the leaseholds were charged with the payment of 12*s.* per week.—*Gully* v. *Davis*, L. R. 10 Eq. 562.

See Annuity; Exoneration; Lien, 1.

Digest of English Law Reports.

Charter Party.

1 A charter party contained a stipulation that the ship should proceed with a cargo to San F., "where the ship shall be consigned to the charterer's agents inwards and outwards, paying the usual commissions . . . . and deliver the same . . . . and so end the voyage," and also that the ship should be reported by the charterer's agents at the custom-house on her return to the United Kingdom. *Held*, that the contract required the owners to employ the agents in case they took in a return cargo, but imposed no obligation on them to take such cargo.—*Cross* v. *Pagliano* L. R. 6 Ex. 9.

2. A charter party gave the freighters the option of sending the vessel on an intermediate voyage, with a cargo at a specified rate; "such freight to be paid as follows: £1200 to advanced the master," and to be deducted with commission and cost of insurance from freight on settlement thereof, and the remainder on delivery of the cargo at port of discharge; the master to sign bills of lading at any current rate of freight required, "but not under chartered rates except the difference is paid in cash." The freighters sent the vessel on an intermediate voyage, and required the master to sign bills of lading at a rate below the rate in the charter party, without paying in advance the difference on the £1200. The vessel was lost on her way to sea. *Held*, that the ship-owner was entitled to the difference and to the £1200.—*Byrne* v. *Schiller*, L. R. 6 Ex. 20.

3. By a charter party the plaintiff's ship was to proceed to Archangel, "and there load . . . a full and complete cargo of oats, or other lawful merchandise," and to deliver the same at destination on being paid at a fixed rate "for oats, and if any other cargo be shipped, to pay in full and fair proportion thereto according to the London Baltic printed rates," which fix the proportions between the rates for different articles. The defendant shipped a full cargo of flax, tow, and codilla, articles which were so light that the ship had to carry a great quantity of ballast; and he paid freight at a rate proportioned according to the tables to the rate fixed for oats. The plaintiff claimed to recover the difference between this sum and that which would have been payable for a cargo of oats. *Held*, that the defendant had a right to ship the cargo which he did ship, and had fulfilled his contract.—*Southampton Steam Colliery Co.* v. *Clarke*, L. R. 6 Ex. (Ex. Ch) 53; s. c. L. R. 4 Ex. 73; 3 Am. Law Rev. 697.

Class.—*See* Will, 6.

Colony.—*See* Conflict of Laws, 2.

Compensation.—*See* Damages, 2; Railway.

Company.

1. The memorandum of association of a company was subscribed by H., a director, for 500 shares; only 250 were allotted to him. The articles provided that the directors might at any time accept from any member the surrender and forfeiture of any shares; the company and directors were prohibited from dealing in shares. Afterwards with the approval of the company, H. was released, under the seal of the company, from all liability in respect of the 250 shares not allotted to him. *Held*, that the transaction was not a surrender or forfeiture, but a dealing in shares and *ultra vires*.—*Hall's Case*, L. R. 5 Ch. 707.

2. By the articles of a loan company, power was given to the directors to make loans, and to delegate any of their powers to committees. A committee appointed to attend to loans employed money of the company to purchase shares, and to conceal the transaction, represented the payments on the books as loans to members of the committee; the transaction was reported to the directors and sanctioned by them. M. was a director, and denied that he had any notice of the real nature of the of the proceeding. A bill was brought against the directors to recover the money so used, and a decree made against them. *Held*, that the bill as against M. should be dismissed.—*Land Credit Company of Ireland* v. *Lord Fermoy*, L. R. 5 Ch. 763; s. c. L. R. 8 Eq. 7.

See Action; Contract, 3: Equity, 3; Executor, 2; Jurisdiction; Novation; Lien, 2; Ultra Vires.

Composition.—*See* Principal and Agent, 3.

Concealment.—*See* Confidential Relation; Insurance, 2.

Confidential Relation.

An estate was settled in strict settlement with power to the trustees at the request of the tenant for life to sell or exchange. The trustees at his request were about to exchange part of the estate, but difficulties in conveyancing arose, and therefore the tenant for life bought it of the trustees and made the exchange himself. *Held*, that the tenant for life was not in a fiduciary relation as to the power, and he having given a fair price, the sale could not be impeached. *Quære*, whether he was in the same position as a stranger as to the

obligation to communicate what he knew.—*Dicconson* v. *Talbot*, L. R. 6 Ch. 32.

Conflict of Laws.

1. By the Dutch Indian law, all the property of husband and wife are brought into community at marriage; this community may be excluded by contract executed before marriage; but no such contracts affect third parties till registered. M. and his wife were married at Batavia and made a contract before marriage by which 75,000 guilders were settled upon the wife for her separate use; this contract was not registered. They came to England where M. became bankrupt and the wife claimed to prove against his estate for 75,000 guilders. *Held*, that the law with respect to registration did not affect the contract, but only the remedy; and that the wife could prove, being entitled to do so by the *lex fori*.—*Ex parte Melbourn*, L. R. 6 Ch. 64.

2. The Governor, Legislative Council, and Assembly of Jamaica, passed an Act indemnifying the defendant and other officers for all acts done in suppression of a rebellion there. The defendant was the governor, and was a necessary party to the passing of the Act. An action was brought in England for trespasses within the Act. *Held*, that it was competent for the Legislature to ratify the Acts which had been done, and that the effect was to take away the plaintiff's right of action in England; *also*, that it was no objection to its validity that the defendant was a party to the Act as governor.—*Phillips* v. *Eyre*, L. R. 6 Q. B. (Ex. Ch.) 1; s. c. L. R. 4 Q. B. 225; 4 Am. Law Rev. 97.

See Divorce.

Conspiracy.—*See* Criminal Law, 2

Construction.—*See* Charge, 2; Charter Party, 1; Contract, 1, 2; Exoneration; Forfeiture; Frauds, Statute of; Guaranty; Insurance, 2, 4, 5; Limitations, Statute of; Partnership; Settlement, 2, 3; Statute; Ultra Vires; Will.

Contingent Remainder.—*See* Will, 7.

Contract.

1. L. leased certain lands with the mines thereunder; the lease contained this clause: "Yielding and paying unto the said L., his heirs, &c., for every quantity of 2520 lbs. of coal, &c., the produce of any lands or mines not intended to be included in the present demise, but which shall be raised within the distance of twenty miles, and shall be brought, over, or under the said lands, &c, the royalty or sum of one half-penny." The lessee underlet the premises to a railway company, which erected sidings upon them, and used them for the purpose of shunting trains till they could be sent forward on the main line; some of the trains contained coal, &c., from other lands within twenty miles. *Held*, that the coals were brought "over" the land within the meaning of the proviso.—*Great Western Railway Co.* v. *Rous*, L. R. 4 H. L. 650.

2. Lease by the plaintiff to the defendant of pits of clay under the plaintiff's lands, with liberty to enter upon such lands and dig for and carry away all such pipe, potter's and and other merchantable clays in such lands, for the term of twelve years, paying in respect of all clays obtained from the lands certain royalties; the defendant among other things covenanted to dig and remove from the lands, "in pursuance of the grant or demise hereby made, an aggregate amount of not less than 1000 tons, nor a larger quantity than 2000 tons, of pipe or potter's clay" yearly. Breach, that the defendant had not dug an aggregate amount of not less than 1000 tons. Plea, that there were not 1000 tons under the lands. *Held*, that the covenant only fixed the rate at which the clay under the land should be worked and that as there was no clay, there was no breach.—*Clifford* v. *Watts*, L. R. 5 C. P. 577.

3. M. was employed by an insurance company as their agent for five years, at a salary of £500 yearly, and a commission of 10 per cent. on the profits of each year. Before the end of the five years the company was wound up. *Held*, that he was entitled to the estimated value of his salary till the end of the five years, but had no claim for commission since the winding up.—*Ex parte Maclure*, L. R. 5 Ch. 737.

4. The defendant promised to marry the plaintiff upon the death of the defendant's father. An action was brought while the father was still alive, but the defendant had positively refused ever to marry the plaintiff. *Held* (Martin, B., dissenting), that there was no breach of the contract.—*Frost* v. *Knight*, L. R. 5 Ex. 322.

See Assignment, 1; Bills and Notes, 2; Carrier; Charter Party; Conflict of Laws, 1; Damages, 3, 4; Estoppel, 1; Frauds, Statute of; Guaranty; Principal and Agent, 4; Specific Performance; Ultra Vires, 1; Vendor and Purchaser, 1, 2.

Contribution.

A bond was given by a principal and two sureties; by its terms neither of them was to be discharged by any arrangement between the principal and obligee either for extension

of time or further security; one of the sureties failed and compounded with his creditors. The debt secured having become payable, the obligee required the principal to furnish another surety, and at his request the plaintiff gave a separate undertaking to the obligee to pay the debt in instalments; having paid it he filed a bill against the other surety for contribution. *Held*, that a co-suretyship was intended, and that the other surety must contribute.—*Whiting* v. *Burke*, L. R. 10 Eq. 539.

Conversion.—*See* Carrier; Estoppel, 2.

Corporation.—*See* Specific Performance, 2.

Costs.—*See* Arbitration; Equity Pleading and Practice.

Covenant.—*See* Contract, 2; Landlord and Tenant, 2.

Criminal Law.

1. An information charged that the defendadt "in and upon L. (a member of the Legislative Assembly of a colony) did make an assault, and him, L., did then beat, wound, and ill-treat, in contempt of the Assembly, in violation of its dignity, and to the great obstruction of its business." Upon demurrer, *held*, that a common assault was charged with apt words, and that this effect was not taken away by the other words.—*Attorney-General of New South Wales* v. *Macpherson*, L. R. 3 P. C. 268.

2. A member of a firm, in order to cheat his partner, agreed with J. and P. to make it appear by false entries in the partnership books that P. was a creditor of the firm, and by these means to withdraw money from the firm, to be divided between them to the exclusion of the other partner. *Held*, that the agreement constituted a conspiracy, being a fraudulent combination to do acts which were wrongful, although not criminal.—*Regina* v. *Warburton*, L. R. C. C. 274.

Damages.

1. The Court of Chancery will interfere to prevent a tenant for life from cutting down trees planted for ornament; but when the trees are cut down, the reversioner has no claim for damages unless some damage has been done to the inheritance.—*Ex parte Hastings*, L. R. 10 Eq. 465.

2. Land subject to restrictions and formerly used as a grave-yard was taken for a street by authority of an Act of Parliament. *Held*, that the measure of the compensation to be given to the owner was the value of the land in its former character, not what would be its value to the person acquiring it.—*Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q B. 37.

3. The plaintiff was a lessee, and assigned his lease to the defendant upon his agreement to indemnify the plaintiff against breach of the covenants therein. The lessor brought an action for a breach against the plaintiff, who proposed to the defendant to come in and defend; the defendant declined, and the plaintiff paid the money into court, and brought this action. *Held*, that the plaintiff was entitled to recover, in addition to the damages paid, all the costs incurred, including every thing that his attorney could recover against him.—*Howard* v. *Lovegrove*, L. R. 6 Ex. 43.

4. A. possessed a lease which could not be assigned without the lessor's consent; he contracted to sell it to the defendants, but the consent was never obtained. The defendants in good faith agreed to sell their interest to the plaintiffs, who paid a deposit. Having failed to obtain the lessor's consent to the assignment, the defendants failed to make a good title. *Held*, that the defendants, having acted in good faith, the plaintiffs could recover only the deposit and expenses, and not damages for loss of the bargain.—*Bain* v. *Fothergill*, L. R. 6 Ex. 59.

See Railway.

Debtor and Creditor.—*See* Assignment, 2; Executor, 2; Fraudulent Conveyance; Principal and Agent, 3.

Delivery.—*See* Estoppel; 2.

Deviation.—*See* Insurance, 2.

Directors.—*See* Company; Ultra Vires, 2.

Divorce.

A woman who was married and domiciled in England, was deserted by her husband; she went to America and resided in Iowa two years and a half; at the end of that time she petitioned the proper court of that State for a divorce by reason of her husband's adultery and desertion, causes which would have entitled her to a divorce in England; in the absence of her husband a notice of the proceedings was advertised by order of the Court and the facts being proved, the divorce was granted. *Held*, that there was no evidence that the woman ever obtained a domicile in Iowa; and that the divorce obtained there did not invalidate the English marriage.—*Shaw* v. *Attorney-General*, L. R. 2 P. & D. 156.

Domicil.—*See* Divorce.

Election.

Real estate was devised in trust for testator's wife for life, and after her decease to sell for the benefit of his children as she should appoint; she appointed to his three sons equally. Afterwards by will she purported

to devise this estate to the eldest son alone, and gave the residue of her own property to the three equally. One of the younger sons dying intestate, she gave by a codicil his share of her property to his children. *Held*, that the children of the deceased son must elect between their interest under the will and the intestate's share under the appointment; and that this share was to be considered as free from his debts if his estate had been settled; otherwise, as subject to a proportion of them. *Cooper* v. *Cooper*, L. R. 6 Ch. 15.

Equity.

1. A. the secretary of a company, was prosecuted by E., a shareholder, for making a false balance-sheet; the complaint being dismissed, the directors of the company ordered that an action be brought at the company's expense, in A.'s name against E. for malicious prosecution; in this action A. recovered £50 and costs. Upon a bill by E. against A. and the directors for an injunction against issuing execution, and for an order to pay A.'s expenses in that action, *held*, that whether the conduct of the directors amounted to maintenance or not, was a question for a court of law, and that there was no ground for equitable interference.—*Elborough* v. *Ayres*, L. R. 10 Eq 367.

2. A bill for an injunction against the infringement of a patent, and for compensation in damages, was filed four days before the expiration of the patent. *Held*, that as it was impossible to give any equitable relief before the patent expired, the bill must be dismissed. —*Betts* v. *Gallais*, L. R. 10 Eq. 392.

3. A creditor cannot maintain a bill for an injunction against a company, on the ground that he is about to lose his debt by reason of their making way with the assets.—*Mills* v. *Northern Railway of Buenos Ayres Co.*, L. R. 5 Ch 621.

4. The court of Chancery has power, if a proper case should be proved, to restrain any person from making an improper application to Parliament, but it is difficult to conceive or define the cases in which it would be proper for the Court to exercise that power.—*Ex parte Hartridge and Allender*, L. R. 5 Ch. 671.

See Assignment; Damages, 1; Patent, 1; Receiver; Security; Settlement, 1.

Equity Pleading and Practice.

Where a bill has been filed without any dispute having been raised by the defendant, and the defendant offers to submit to the plaintiff's demand, the Court will stop the suit without costs.—*Rudd* v. *Rowe*, L R.10 Eq.610.

Estoppel.

1. The defendants were a body corporate, and were authorized to borrow money upon the security of mortgages which should be transferable; they illegally granted to H. six mortgages in the form prescribed, which were assigned to the plaintiffs for value and without notice. *Held*, that the defendants were estopped from disputing the validity of the securities.—*Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642.

2. Action for conversion. The defendant had a quantity of barley in his granary which was near a railway station; he sold 80 quarters to M., but it was not paid for, and no appropriation was made. While it remained in the granary subject to M.'s orders, M. sold 60 quarters to the plaintiff, receiving payment for it, and gave him a delivery order; the plaintiff sent the order to be confirmed to the station-master, who showed it to the defendant; the defendant said, "All right; when you get the forwarding note I will put the barley on the line." M. having become bankrupt, the defendant as unpaid vendor refused to part with the barley when the plaintiff sent the forwarding order. *Held*, that the defendant, having altered the plaintiff's position by what he had said, was estopped from denying the plaintiff's property in the barley.—*Knights* v. *Wiffen*, L. R. 5 Q. B. 560.

See Lien, 2.

Evidence.

By a collision between the J. B. and the E. for which the J. B. was solely to blame, the E. and her cargo were lost. A cause of damage was instituted against the J B. by S. and others, who described themselves as "owners of cargo, now or lately laden on board the vessel E." It appeared that they were underwriters on the cargo, and had paid the shippers for a total loss, and that the policies and bills of lading containing the names of the shippers had been given up to them. *Held*, that the evidence was insufficient to show that the insured was the owner of the goods, or that the title passed to the underwriters.—*The John Bellamy*, L. R. 3 A. & E 129.

See Ambiguity; Divorce; Privilege; Revocation.

Executor.

1. An executrix assigned all the testator's debts, being a large part of his estate, to a creditor as security for his debt, with power to collect them as her attorney, until the payment of his debt. The estate proved insolvent, and another creditor filed a bill to have the

assignment declared void. *Held*, that the executrix had a right to mortgage assets to a creditor, in the absence of fraud.—*Earl Vane Rigden*, L. R. 5 Ch. 663.

2 The executors of a deceased shareholder in a company paid a legacy under the will. The company subsequently was wound up and the executors placed on the list of contributories, but the estate was insufficient to pay the calls. *Held*, that the executors had committed a breach of trust in paying the legacy without providing for the liability of the testator's estate in respect of these shares, and were liable for the amount.—*Taylor* v. *Taylor*, L. R. 10 Eq. 477.

Executory Devise.—*See* Will, 7.

Executory Trust.—*See* Will, 2.

Exoneration.

1. A testatrix gave one moiety of her real estate to M. for life, remainder to M.'s two sons and their issue; and the other moiety to S. for life, remainder to S.'s sons, and &c. By a codicil reciting that she had incurred debts as surety for one of M.'s sons, she directed that those debts should be "exclusively and in the first instance borne by and paid out of" the moiety of her real estate devised to M. and her sons, and that the other moiety devised to S. and her son should be exempt from the payment of said debts. *Held*, that the direction exonerated the personal estate as well as all other parts of the real estate.—*Forrest* v. *Prescott*, L. R. 10 Eq. 545.

Extinguishment.

In 1825, A. mortgaged real estate to secure £27,000 for one year, with power of sale in case of default. Default was made; and by an indenture between A. and the mortgagee, and K. in 1830, reciting that "the said power (of sale) had not been and is not intended to be exercised," the mortgaged debt was assigned to K., and all remedies for recovering the same and all benefit of the mortgage, and the estate was mortgaged to secure the debt to K. for seven years, without any right in K. to foreclose or compel payment during the term, and with a power of sale in case of default. *Held*, that the power of sale in the mortgage of 1825, was extinguished by the indenture of 1830.—*Boyd* v. *Petrie*, L. R. 10 Eq. 482.

See Power, 1.

Forfeiture.

A wife, having a power of appointment (subject to a life-estate in her mother), by will appointed the property upon trust to pay an annuity of £100 to her husband during his life, with a declaration that if he should become bankrupt, or should assign, charge, or incumber, then the annuity should cease to be payable, as if he were dead; with a further direction that the trustees might, in their discretion, and without assigning any reason, at any time discontinue payment of the annuity during the whole or any part of his life. Before the date of the will, the husband was with the knowledge of his wife, adjudged a bankrupt in a sequestration according to Scotch law, the effect of which was to devest him of any estate which came to him before he obtained a discharge; he obtained his discharge after the death of the tenant for life. *Held*, that the Scotch bankruptcy was not a bankruptcy within the meaning of the forfeiture clause; but that the annuity was subject to the absolute discretion of the trustees.—*Trappes* v. *Meredith* (No. 2), L.R. 10 Eq. 604.

Fraud.—*See* Company, 2.

Frauds, Statute of.

The defendant, being chairman of a local board, asked the plaintiff whether he would lay certain pipes; the plaintiff said, "I have no objection to do the work if you or the local board will give me the order." The defendant said, "You go on and do the work and I will see you paid." The work was not authorized by the board, and they refused to pay for it. *Held*, that the defendant's contract was that he would be answerable for the expected liability of the board, and that this was a promise, within the Statute of Frauds, to be answerable for the debt of the board although the board was never indebted.—*Mountstephen* v. *Lakeman*, L. R. 5 Q. B. 613.

Fraudulent Conveyance.

A creditor, learning that his debtor's business was improperly conducted, pressed him for payment; the debtor not being able to get the money, verbally agreed to convey to him certain real estate in part payment, and instructions therefor were given to a solicitor; owing to the solicitor's illness the conveyance was not made for two months, and six weeks after the conveyance the debtor filed a petition in bankruptcy. *Held*, that the conveyance, being made in consequence of a demand by the creditor, was not fraudulent; *also*, that the rule was not altered by the Bankruptcy Act.—*Ex parte Tempest*, L. R. 6 Ch. 70.

Freight.—*See* Charter Party, 2, 3.

Gift.

S. gave the following memorandum signed by him to M.: "I hereby give and make over to M. an India bond, value £1000," &c.; the bond was not delivered, and there was no con-

sideration. S. died, and the residuary legatees claimed the bond. *Held*, that the memorandum was a good declaration of trust, and that M. was entitled to the bond.—*Morgan* v. *Malleson*, L. R 10 Eq. 475.

See Trust; Will, 4.

Guaranty

S. was admitted as a subscriber to Lloyds', and the defendant gave a guarantee for any debts that he might contract as an insurance-broker until notice of the discontinuance of the guarantee. S. afterwards took H. into partnership with him, and the defendant wrote a letter discontinuing the guarantee, but was induced to write another letter, in which he withdrew the notice and declared that the guarantee should "continue in force upon the same terms and conditions as are mentioned in such guarantees." By the rule of Lloyds, each subscriber is allowed to have one or more substitutes, and S. obtained a ticket for the admission of H as his substitute; the partners continued to transact business at Lloyds for several years after the last letter was written, and always in the partnership name. *Held*, that the guarantee applied to the debts incurred in such transaction.—*Leathley* v. *Spyer*, L. R. 5 C. P. 595.

Husband and Wife.—*See* Settlement, 3.

Indemnity.—*See* Damages, 3.

Indemnity, Statute of.—*See* Conflict of Laws, 2.

Indictment.—*See* Criminal Law, 1.

Injunction.—*See* Bankruptcy; Damages, 1; Equity, 1, 3, 4; Patent, 1.

Insurance.

1. Policy of insurance on a steam-vessel from Montreal to Halifax; the following perils were excepted: "rottenness, inherent defects, and other unseaworthiness; bursting or explosion of boilers, or collapsing of flues, or breakage of machinery." There was a defect in the boiler, which made it unmanagable as soon as the vessel was in salt water; she had to put back to have it remedied, and eventually resumed the voyage, met with bad weather and was lost. *Held*, that the implied warranty of seaworthiness was not excluded by the terms of the policy, and that it was not complied with, the vessel not being seaworthy at the commencement of the portion of her voyage which was to be made in salt water.—*Quebec Marine Insurance Co.* v *Commercial Bank of Canada*, L. R. 3 P. C. 234.

2. Insurance on a ship at and from Buenos Ayres, and port or ports of loading in the Province of Buenos Ayres, to port of call and discharge in the United Kingdom. The plaintiffs knew, when they effected the insurance, that the ship was going to L to load but did not communicate the fact to the underwriters, to whom L. was unknown as a place of loading, and who would have required a higher premium if they had known it. L. is an open bay, and vessels have to load by means of lighters; there is a regular trade between L. and Buenos Ayres, but not between L and Europe. The ship loaded at L, and was lost returning to Buenos Ayres. *Held*, that the plaintiffs had concealed a material fact, which vitiated the policy; *held, also*, by the majority of the court, that L. was a port of loading within the meaning of the policy.—*Harrower* v. *Hutchinson*, L. R. 5 Q. B (Ex. Ch.) 584; s. c. L. R. Q. B. 523; 4 Am. Law Rev. 292.

3 Insurance upon goods, on a voyage from Liverpool to Matamoras, against perils of the seas, men-of-war, takings at sea, arrests, and restraints of kings, princes, and people. The vessel was seized by a United States cruiser by reason of carrying contraband of war, and carried in for condemnation; the Prize Court decreed restitution, and the captors appealed; the goods, having become deteriorated, were sold under an order of Court; the insured thereupon abandoned to the underwriters, who refused to accept it. The owner might have obtained possession of the goods at any time by giving bail, but he never did so; gold was then at a premium of 150 to 180 per cent. *Held*, that the sale of the goods by order of the Court entitled the insured to recover for a total loss.—*Stringer* v. *English and Scotch Marine Ins. Co.*, L. R. 5 Q. B. (Ex. Ch.) 599. s. c. L. R. 4 Q. B. 676; 4 Am. Law Rev. 472;

4. Insurance upon goods against fire "from the 14th February, 1868, until the 14th August, 1868, and for so long after as the said assured shall pay the sum of $225." A condition provided that the policy should not be in force until the premiums were actually paid and persons continuing annual insurance, must pay the premium before the commencement of the succeeding year. The first premium was paid, and on the 14th August, 1868, before any further payment was made, the goods were destroyed by fire. *Held*, that the insurance covered the 14th August.—*Isaacs* v. *Royal Insurance Co.*, L. R. 5 Ex. 296.

5 Insurance against death by accident, "where such accidental injury is the direct and sole cause of death to the insured," but not "against death or disability arising from . . . erysipelas, or any other disease or secon-

dary cause or causes arising within the system of the insured before or at the time of or following such accidental injury (whether causing such death or disability directly or jointly with such accidental injury)." On a Saturday, as the insured was washing his feet in an earthen-ware pan, it broke, and a wound was inflicted on the foot; the wound was properly attended to, but on Thursday following erysipelas set in, and on Saturday he died, The erysipelas was consequent on the wound, and without the wound he would not have had it. *Held* (Kelly, C. B., dissenting), that the insurers were exempted from liability by the exception in the policy.—*Smith* v. *Accident Insurance Co.*, L. R. 5 Ex. 302.

See Action; Evidence.

Intention.—*See* Trust.

Interest.

The owner of iron-works employed the plaintiff as manager, and agreed to give him seven and a half per cent. of the profits. An account being taken, it appeared that in two of the years there was due to the plaintiff a larger amount than he had received. *Held*, that the plaintiff was not entitled to interest on the excess from the end of each year, but only from the time of demand.—*Rishton* v. *Grissell*, L. R. 10 Eq. 393.

Jurisdiction.

The Companies Act, 1862, provides that "any partnership, association, or company, except railway companies, incorporated by Act of Parliament, . . . may be wound up under this Act," &c. *Held*, that the Court had jurisdiction to wind up a canal company incorporated by Act of Parliament, although it could not carry it into complete effect without the aid of Parliament.—*In re Bradford Navigation Co.*, L. R. 10 Eq. 331.

See Bankruptcy; Equity, 1,2,4; Receiver.

(*To be continued.*)

REVIEWS.

The Common Law Procedure Act and other Acts relating to the Practice of the Superior Courts of Common Law and the Rules of Court, with notes. By Robert A. Harrison, Esq., D. C. L., Q. C.—Second Edition — Toronto: Copp, Clark & Co. London: Stevens & Haynes, 1870.

We have noticed the receipt of the various numbers of this work, as they from time to time appeared, and we hailed with pleasure the last one, which, giving us the index and table of cases, &c., enabled us to have the book bound and put in a shape for daily reference.

When the first edition of Mr. Harrison's work was given to the public, it was received as a boon by the profession here, welcomed with words of commendation by our Judges, and called forth the most flattering notices from the legal press in England, where sharp criticism is the rule, and where, though Colonial productions may have a courteous reception, they do not escape the probe of the critic. However, it stood the test, and this was the more creditable to the Editor when it is remembered, that his work was prepared principally before he devoted himself to the general practice of a lawyer's office. Knowing this and knowing the extent of his experience and industry, and the position he has won for himself since the first edition was published, we looked with confidence for even a greater measure of success for the second, and in this we are not disappointed.

On examining the notes we find that they are more condensed than in the first edition, arising partly from the fact that doubtful points which were then discussed at length, are now settled by judicial interpretation; and this process of expunging matter of discussion and substituting the authoritative decisions of the Courts, will account for the fact that while in the present edition there is *nearly double* the matter to be found in the first edition, the book itself is no larger, and equally if not more convenient for use—and here we may remark that considerable space has been gained and the look of the volume much improved, by making the notes the whole width of the page.

As it now stands, the work is eminently useful for reference as an annotated edition of the acts contained in it, and as compared with other similar works on the same subject, the volume before us is by far the most complete. But is not not merely an annotated edition of an act; it is, in addition, a collection of treatises on different subjects, exhausting the cases decided in the English, Irish and Canadian Courts. To explain this, the reader will find that on page 105 *et seq.*, the practice as to change of venue is fully discussed. Upon reference to note *r*, page 169, there will be found full notes on equitable pleadings, occupying no less than eight pages of closely

printed matter; and again on turning to the Rules, we find on page 630 *et seq.*, a short but comprehensive and compact *resumè* of the law respecting security for costs—and these are only a few out of many instances that could be referred to under this head.

As to the merits of the work itself it is scarcely necessary for us to add our meed of praise to that accorded to the first edition by all parties who have had occasion either to criticise or to use it, but we can say that the present edition is in every respect superior to the first, as well as to the number of acts annotated, as to the number of decisions collected and analysed and the mode of arranging them, the compactness of the information given and the correctness of the citations and authorities, the number of which is immense, there being no less than over 8,500 cases referred to throughout the work. Of one thing the editor may well feel no little gratification, namely, that when in the prior edition he hazarded an opinion as to what the decision would be likely to be on any doubtful point, or suggested an interpretation of any clause in the act, the views expressed have in every instance within our knowledge been borne out by judicial authority.

The contents are: The Common Law Procedure Act (Con. Stat. U. C. cap. 22); Writs of Mandamus and Injunction (Con. Stat. U. C. cap. 23); Absconding Debtors (Con. Stat. U. C. cap. 25); Ejectment (Con. Stat. U. C. cap. 27); The Common Law Procedure Amendment Acts (Stat. Can. 29, 30 Vic. cap. 42, and Stat. Ont. 31 Vic. cap. 24); Executions against Goods and Lands (Stat. Ont. 31 Vic. cap. 25). The Law Reform Act (Stat. Ont. 32 Vic. cap. 6); The Law Reform Amendment Acts (Stat. Ont. 33 Vic. cap. 7, and Stat. Ont. 33 Vic. cap. 8); Regulæ Generales (as to Attorneys, Practice, Pleadings, and Miscellaneous). We should have been glad if the act respecting arrest and imprisonment for debt had been within the limits prescribed to himself by the Editor, so that we might have had the benefit of his learning and industry in respect to an important act not hitherto annotated, but when we have so much it is scarcely fair to expect more, and though it would have made the work more complete, it does not form part of the original Common Law Procedure Act, as annotated by Mr. Harrison in his first edition.

The above observations suggest the question —Why do not some other members of the profession, especially among the juniors, take up this or some other act and collect and arrange the cases bearing upon it. Young men in England bring themselves into notice by such a useful and beneficial occupation of their spare time as this; and now that the profession is filling up so fast, and the competition becoming greater, the industrious and the ambitious will in this, as in other ways, come to the front.

A table that precedes the work gives each section of the English Common Law Procedure Acts and the corresponding section of the Canadian Act. This will be of much use as well to English as to Canadian Subscribers, and adds much to the completeness of the volume.

The Editor in the preface acknowledges the assistance received from Mr. F. J. Joseph, who superintended the passing of the work through the press, and who verified all the cases to which reference is made in the notes; and this has been done with the most commendable care, patience and exactitude. The preparation of the Index was entrusted to Mr. Wethey, and is full and reliable.

This is but a short notice of the second edition of a book of the practical importance that this is to the profession here, but it is really unnecessary to say more, or further to examine the contents of the volume, when it is already in the hands of the bulk of our readers; if any have it not, it is because their business is not sufficient to make it of importance to have the proper material to carry it on with ease or safety; but the workers amongst us have for some years been looking for and hoping soon to see the work now before them, and though expecting much have not been disappointed.

American Law Review. April, 1871. Boston: Little, Brown & Co., 110 Washington Street.

The contents of this number are as follows: The North Eastern Fisheries; Expert Testimony; The Bar Association of the City of New York; Digest of the English Law Reports; Selected Digest of State Reports; Digest of Cases in Bankruptcy; Book Notices; List of Law Books Published in England and America since January, 1871; Summary of Events; Correspondence, &c.

The first is a long and well written, but to our minds not a convincing article, containing some rather startling propositions on a subject which has been already largely discussed in all its bearings.

The reviewer commences by referring to the following provisions of the different treaties relating to the subject:—

Article III. of the treaty of peace, concluded Sept. 3, 1783, is in these words:

"It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coasts of Newfoundland as British fishermen shall use, but not to dry or cure the same on that island; and also on the coasts, bays and creeks of all other His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands and Labrador, as long as the same shall remain unsettled; but as soon as the same, or either of them, shall be settled, it shall not be lawful for said fishermen to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

The writer then goes on to say:—

"The treaty of peace signed at Ghent, Dec. 24, 1814, was silent upon the subject of the fisheries. A correspondence soon thereafter arose, in which the American Government maintained the position that all the rights secured to citizens of the United States in 1783 were still subsisting, notwithstanding the intervening war of 1812; while the British cabinet insisted that all these liberties were swept away at the outbreak of hostilities between the two countries. The convention signed at London, Oct. 20, 1818, was the result of these opposing claims. Article I. thereof is as follows:—

"Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of any kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coasts of Newfoundland from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks from Mt. Joly on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast. And that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, hereinbefore described, and of the coast of Labrador: but as soon as the same, or any portion thereof, shall be settled, it shall not be lawful for said fishermen to dry or cure fish at such portion, so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America, not included within the above-mentioned limits. *Provided*, however, That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as shall be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby secured to them."

Article I. of the "reciprocity treaty," signed June 5, 1854, so far as it is important to quote, is as follows:—

"It is agreed by the high contracting parties that, in addition to the liberty secured to the United States fishermen by the above-mentioned convention of Oct. 20, 1818, of taking, curing and drying fish on certain coasts of the British North American colonies therein defined, the inhabitants of the United States shall have in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind except shell-fish on the sea coasts and shores, and in the bays, harbors, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish. *Provided*, That

in doing so they do not interfere with the rights of private property or with British fishermen."

"Article V. provides that the treaty is to remain in force ten years after it goes into operation, and further until twelve months after either party gives a notice terminating the same. It was terminated in March, 1866, by the United States Government."

After stating his views of the rights of American fishermen upon the basis of the treaty of 1818, the writer goes on to argue that the effect of Article III. of that treaty, which he calls a renunciatory clause on the part of the United States, was removed by the reciprocity treaty of 1854, although the latter was abrogated by the American government itself, as already stated. The argument used is ingenious, but the same reasoning would seem to prove not only that the treaty of 1818 was at an end, but also that of 1783, which would of course be proving rather too much. In fact, considering all the circumstances and the motives leading to the repeal of the Reciprocity Treaty, the position taken on behalf of the Americans, is not altogether unlike that of an individual taking advantage of his own wrong—a course of procedure which has become chronic with the government of the United States, and which they seem to think has become legalized for their benefit, by custom and prescriptive right.

The conclusion at which the writer arrives is doubtless sufficiently satisfactory to his readers in the United States:—

"Article III. of the treaty of 1783, is therefore in the nature of an executed grant. It created and conferred at one blow rights of property perfect in their nature and as permanent as the dominion over the national soil. These rights are held by the inhabitants of the United States and are to be exercised in British territorial waters. Unaffected by the war of 1812, they still exist in full force and vigor. Under the provisions of this treaty American citizens are now entitled to take fish on such parts of the coasts of Newfoundland as British fisherman use, and also on all the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America, and to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, the Magdalen Islands and Labrador."

We trust that the labours of the Joint High Commission at Washington may make the dispute between the countries matter of historical interest rather than a source of irritation.

In this number is concluded an instructive article on Expert Testimony, which we recommend to our readers.

The next article on the Bar Association of New York commences with the following observations on democracy, as it affects and is controlled by the legal profession:

"'If men,' says De Tocqueville, 'are to remain civilized, or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased,'—a truth which lawyers in America have strangely overlooked. It may be a question indeed whether the legal profession and the community both have not lost more than they have gained by the application of modern theories of equality, which strip that calling of the character of a guild. It might be better for itself, and consequently for society, that the bar should retain something of the corporation form it preserves under older governments, with clearly defined obligations, and with enough of privilege for its due protection against attacks from without and decay within. No order that has ever existed has made a less aggressive use of such privileges. When Coke of England asserted the lawful authority of the courts against the pretensions of the prince, and when the robe demanded and enforced justice against the member of the proud French nobility who had wronged one of their rank, they were defending popular liberty in their own cause. In other countries the lawyer still feels himself surrounded by a powerful body which guards his rights, and holds him responsible for his conduct. In America, the legal profession is less protected by statutes and customs than by the traditional respect which yet lingers about it; and its separate members are but little more controlled for good or ill by the force of its authority as a body, than laymen in general are.

"Lawyers are rightly called the most conservative class in a democracy, and their influence in the government pronounced to be the most powerful existing security against its excesses. It follows that the class of politicians who profit by those excesses must be hostile to the legal profession, and the antagonism is none the less real for being unavowed. The people are never jealous of lawyers; they trust the legal profession, because its interest is really the same with their own, and because its intelligence guides them best in pursuing that interest. In so doing it thwarts the demagogue, whose interest it is to flatter passion or vanity. The French publicist held the opinion that lawyers would always maintain the lead in a democracy. He could not forecast the influences which in the last quarter

of a century have so enormously increased the control of mere politicians; he did not foresee that they would master the art of association more thoroughly than any other class in the community, and turn their power of combination to the worst account; that they would crawl up from being the flatterers of the people to being its leaders; and that within a very few years from the date of his studies they would have moulded the brute force of numbers by the aid of general suffrage, and raising association to the height of conspiracy, would have usurped the legislation of the country. And holding that power, the secret instinct of antagonism impels them to use it against the legal profession, by taking advantage of popular distrust of all class distinctions.

"The democratic principle is a slow, strong solvent of forms and symbols,—so strong, that it may even be artfully misdirected to attack the substance and weaken the reality of the thing symbolized. Therefore much of the democratic teaching of the day encourages a sort of unformed notion that the destruction of class peculiarities will have a magical power to efface differences of nature, and make all men alike wise, good, and happy. Such a notion easily breeds the mistake of regarding superior morality and intelligence as an unwarranted privilege. Any eminence is undemocratic, the Cleon of the hour exclaims; superiority of any kind is treason to the great Declaration; and any calling or profession that rests upon such superiority, and maintains and protects itself by cherishing it, is unconstitutional, or we will speedily make it so. And as a result, so far as legislation can effect it, the mere fact of having been born twenty-one years ago, gives a man a right to demand admission to a learned profession. Is the bogtrotter or the Five-Pointer raised by that to the level of worth, or is the profession dishonored by being compelled to stoop to his?"

Canadian Illustrated News. George Desbarats, Montreal.

Amongst the recent numbers of the *Canadian Illustrated News* is one which contains some excellent pictures of the marriage ceremony of Her Royal Highness Princess Louise and the Marquis of Lorne. We are glad to see that a Canadian Illustrated Journal has achieved such a measure of success, and we certainly think that M. Desbarats, the very enterprising Editor, deserves the thanks of the community for having projected and kept up this paper, which bids fair at no distant day to rival the *Illustrated London News* or the *Graphic*. There is no doubt but that M. Desbarats paper far surpasses any of the Illustrated Journals of our American neighbours, and should be well encouraged, which will tend further to its improvement.

APPOINTMENTS TO OFFICE.

REFEREE IN CHAMBERS.

THOMAS WARDLAW TAYLOR, of the City of Toronto, Esquire, Barrister-at-Law, to be Referee in Chambers of the Court of Chancery for Ontario. (Gazetted February 25th, 1871.)

NOTARIES PUBLIC.

PETER PURVES, of the Town of Brantford, Gentleman, Attorney-at-Law. (Gazetted January 14th, 1871.)

FRANK C, DRAPER, and WILLIAM MULOCK, of the City of Toronto, Esquires, Barristers-at-Law, and BENJAMIN V. ELLIOT, of the Village of Exeter, Esquire. (Gazetted January 28th, 1871.)

STEPHEN GIBSON, of the Town of Napanee, JAMES WATSON HALL, of the Town of Guelph, and JOHN ELLEY HARDING, of the Village of St. Marys. (Gazetted February 4th, 1871.)

WILLIAM HENRY BARTRAM, of the City of London, Gentleman, Attorney-at-Law. (Gazetted 18th Feb., 1871.)

WILLIAM LYNN SMART, of the City of Toronto, Esquire, Barrister-at-Law, JOHN McCOSH, of the Town of Paris, Gentleman, Attorney-at-Law, and JAMES W. MARSHALL, of the Township of Euphrasia. (Gazetted 4th March, 1871.)

WILLIAM NORRIS, of the Town of Ingersoll, GEORGE MARTIN RAE, of the City of Toronto, GEORGE DENMARK, of the Town of Belleville, Esquire, Barrister-at-Law, FRANCIS W. LALLY, of the Town of Barrie, WM. BOGGS, of the Town of Cobourg, Gentlemen, Attorneys-at-Law, and DAVID EWING, of the Village of Dartford. (Gazetted 11th March, 1871.)

JAMES LAMON, of the Village of Uxbridge, and GEO. SIMMIE PHILIP, of the Town of Galt, Gentlemen, Attorneys-at-Law. (Gazetted 25th March, 1871.)

WILMOT RICHARD SQUIER, of the Town of Goderich, GEORGE MOUNTAIN EVANS, of the Ctty of Toronto, and JAMES ALEXANDER McCULLOCH, of the Town of Stratford. (Gazetted 8th April, 1871.)

SAMUEL SKEFFINGTON ROBINSON, of the Village of Orillia, Gentleman, Attorney-at-Law. (Gazetted 15th April, 1871.)

EDMUND HENRY DUGGAN, of the Village of Meaford, and MICHAEL HEUSTOF, of the Town of Chatham, Esquires, Barristers-at-Law. (Gazetted 22nd April, 1871.)

THOMAS DAWSON DELAMERE, of the City of Toronto, WM. McKAY WRIGHT, of the City of Ottawa, Esquires, Barristers-at-Law, and JOHN R. ARKELL and FRANCIS CLEARY, of the Town of Windsor, Attorneys-at-Law. (Gazetted 29th April, 1871.)

TO CORRESPONDENTS.

We must remind "Law Student" and "W. O. H." that our invariable rule is not to insert letters unless accompanied with the name of the writer, not necessarily for publication, but as a guarantee of good faith.