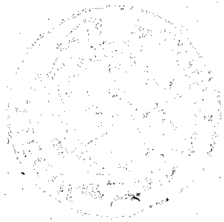
THE

# CANADA LAW JOURNAL,



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## DIARY FOR JANUARY.

1. Wed.. *Circumcision.* Taxes to be computed from this date.
2. Th. .. Error and Appeal Sittings.
5. SUN.. *2nd Sunday after Christmas.*
6. Mon.. *Epiphany.* County Court and Surrogate Court Term begins. Municipal Elections. Heir and Devisee Sittings commence.
7. Tues.. Last day for Township, Village and Town Clerks to make returns to County Clerk.
8. Wed.. Election of School Trustees,
11. Sat .. County Court and Surrogate Court Term ends.
12. SUN.. *1st Sunday after Epiphany.*
13. Mon.. Election of Police Trustees in Police Village.
15. Wed.. Treasurer and Chamberlain of Municipality to make return to Board of Auditors. School Reports to be made to Local Superintend't.
18. Sat .. Articles, &c., to be left with Secretary of Law Society.
19. SUN.. *2nd Sunday after Epiphany.*
20. Mon.. Members of Municipal Councils (excepting Co's) and Trustees of Police Villages to hold first meeting.
21. Tues.. Heir and Devisee sittings end.
25. Sat. .. *Conversion of St. Paul.*
26. SUN.. *3rd Sunday after Epiphany.*
28. Tues.. 1st meeting County Council.
29. Wed.. Appeals from Chancery Chambers (except in all cases during Examination Term).
30. Th. .. School Financial Report to Board of Auditors.
31. Fri. .. Last day for Counties and Cities to make returns to Provincial Secretary.

THE

# Canada Law Journal,

JANUARY, 1868.

## 1868.

Great changes have taken place in the political aspect of this country during the past year. These changes call for notice from us only so far as they affect ourselves. Upper Canada and Lower Canada are, in name, no more. Nova Scotia and New Brunswick have cast in their lot with us, and *Canada* as a unit, comprising four provinces, has become a dominion.

As the oldest legal periodical in the four provinces, and as the organ of the profession in the largest and wealthiest of them, we may claim, without fear of contradiction, or, we think, without the danger of being considered presumptuous, the right of representing not only the profession of Ontario, but that of the Dominion at large.

Earnestly desiring to increase as well the usefulness as the sphere of usefulness of this journal, we shall spare no exertion on our part to do what lies in our power to effect the desired end. We at the same time think we have the right to call upon all those interested in their profession to assist us in our exertions, and the more so as our work has hitherto been almost entirely a labour of love. We are willing that it should so continue, if need be, but we hope nevertheless that the good sense of the profession will induce them to do their part of the work with more regard to our right to an increased measure of support (not only as to the number of our subscribers, but as to the payment of what they owe after they have subscribed), and with more regard to their own interests, by furnishing us with such information as may be interesting and instructive to our readers in general.

In this latter respect we have to thank many earnest friends for material assistance, and amongst these several rising men who will hereafter, we doubt not, be ornaments to their profession.

## MEMORIALS AS SECONDARY EVIDENCE

It is hoped that the following remarks may be of service in those very numerous cases wherein evidence has to be given of conveyances which are not forthcoming. The subject is treated of, 1st, as to the search requisite to let in secondary evidence; 2nd, how far a memorial executed by a grantor is evidence of the matters therein stated; 3rd, how far it is evidence if executed by a grantee; 4th, the distinction between the evidence furnished by a memorial in ejectment, and as between a vendor and purchaser, or under the act for quieting titles; and 5th, as to proof of execution.

It frequently happens that secondary evidence of a missing document or title deed is rejected in consequence of the insufficiency of the search for the original.

Parties who search for a missing conveyance with a view to let in secondary evidence should bear in mind that the person entitled to the first immediate estate of freehold is the person entitled to retain the custody of the title deeds as against those entitled to ulterior estates in remainder or reversion; and that the deeds are presumed to follow the title and to go into the custody of those entitled. (*Moriarty* v. *Grey*, 12 Ir. C. L. Rep. 141, per O'Brien, J.; Sug. Vendors, ch. 11, s. 4; see also *Marvin* v. *Hales*, 6 U. C. C. P. 211, post; but see Sug. ch. 11, sec. 4, cl. 23, as to the right to the deeds of the mere grantee or releasee

to uses.) When the land descends to real representatives, they, and not the personal representatives, are entitled to the deeds, though for greater certainty a search with the latter would be advisable, especially in the case of a missing mortgage. The presumption that the deeds follow the title and go to him entitled may be destroyed; as for instance, by the fact that they covered other lands retained by the vendor (*Yeo* v. *Field*, 2 T. R. 708), or that some prior owner on sale of a portion gave a covenant to produce. Where a vendor on sale of a part of his lands retains the deeds and gives a covenant to produce, it does not follow that on conveyance of the residue the title deeds remain with him to answer his covenant to produce; on the contrary it would seem that in the absence of stipulation the vendee of the residue will be entitled to the deeds even against the prior vendee, and be bound by the covenant to produce as running with the lands (Sugden Vendors, ch. 11, s. 4, cl. 5). On sale of part of an estate without any stipulation as to the deeds, the holder of the portion of the highest value is entitled to the custody, whether seller or purchaser, giving a covenant to produce (Sugden Vendors, ch. 11, s. 4, cl. 5). Of joint owners, or tenants in common, coparceners and joint tenants, whichever of them obtains possession of the deeds is entitled to retain them, and the presumption would be that they would go to the grantee or heir at law of the possessor, except in the case of joint tenants, whose heir at law would not be entitled.

Where the instrument, if subsisting, should be in possession of a party to the cause, who desires to give secondary evidence, the proper course is that he should search with a witness, and that it should be "so conducted and in such places as to afford a reasonable ground for concluding that it was made *bona fide*, both as regards the witness and as regards the party, by giving and using all possible facilities to make it effectual." If he should himself have searched accompanied by a witness, but the witness should have made no search, and have accepted the statement of loss of such party as true, the search will not be sufficient (*Bratt* v. *Lee*, 7 U. C. C. P. 280).

It may sometimes be that as against a person claiming the freehold mere notice to him to produce may suffice, without evidence of search, on the presumption above referred to, that the deeds follow the title and are in the possession of the party to whom notice is given (but see *Marvin* v. *Curtis*, 6 U. C. C. P. 212); for search would be useless with prior owners when the law would presume the title deeds were not with them, but passed from each prior owner to his grantee. That notice to produce alone should suffice, there must be nothing to destroy the presumption that the deeds followed the title, as, for instance, a covenant to produce given by a prior owner.

On a question of sufficiency of search, and proof of loss to let in secondary evidence, Richards, C. J., in a recent case *Russell* v. *Fraser*, 15 U. C. C. P. 380; (see also as to search *Ansley* v. *Breo*, 14 U. C. C. P. 371; *Gathercole* v. *Miall*, 15 M. & W., 319; *Doe Padwick* v. *Willcomb*, 6 Ex. 601, 5, 6; S. C. 4, H. L. Ca. 431,; Taylor on Evidence; *Smith* v. *Nevilles*, 18 U. C. Q. B. 473; Best on Evidence, 4 ed. 606; *Marvin* v. *Hales*, 6 U. C. C. P. 203; *Marvin* v. *Curtis*, id. 212; *Bratt* v. *Lee*, *supra*, 7 U. C. C. P. 280) expressed himself as follows:

"In *Reg.* v. *The Inhabitants of Kenilworth* (7 Q. B. 642), Lord Denman, in reference to a general rule established as to what is a sufficient search to let in secondary evidence said, 'I think that no general rule exists. The question in every case is whether there has been evidence enough to satisfy the Court before which the trial is had that, to use the words of Baily, J., in *Rex* v. *Denis*, 'A *bonâ fide* and diligent search was made for the instrument where it was likely to be found. But this is a question much fitter for the Court which tries than for us. They have to determine whether the evidence is satisfactory, whether the search has been *bonâ fide*, whether there has been due diligence, and so on. It is a mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted, if such matters are to be brought before us as matters of law? The Court below must exercise their own judgment as to the reasonableness of the search, taking into consideration the nature of the instrument, the time elapsed, and numerous other circumstances, which must vary with every case.'

"As to the diligence in the search necessary to let in secondary evidence, the following quotation from Taylor on Evidence seems to lay down the proper principles to be acted on by the courts: 'What degree of diligence is necessary in the search cannot easily be defined, as each

case must depend much on its own peculiar circumstances; but the party is generally expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and as this is a preliminary enquiry addressed to the discretion of the judge, the party offering secondary evidence need not on ordinary occasions have made a search for the original document as for stolen goods, nor be in a position to negative every possibility of its having been kept back.'"

In a recent case (*Reg.* v. *Hinckley*, 8 Law Times, N. S. 270) the following remarks were made:

"I think the only question is, if sufficient search has been made for the original. Now to determine this it must be shown that search has been made where the instrument would most probably be. It is for the presiding judge to decide whether reasonable evidence has been given to satisfy his mind that the document has been lost. But it is also a mixed question of law and facts which the court can subsequently review."

When sufficient evidence has been given of destruction of the original document, or of search and loss to let in secondary evidence, memorials afford, in cases of conveyance, a frequent means of furnishing such evidence, and are admissible or not, according to the circumstances.

When the plaintiff sought to make the defendant liable as assignee of a term on the covenants contained in a lease, and gave notice to produce the assignment, and then evidence by a memorial signed by the assignor, and further evidence that the defendant had taken proceedings in Chancery as assignee, the Court held that the memorial alone was not sufficient, but that coupled with the other facts of the case there was sufficient evidence to go to a jury (*Jones* v. *Todd*, 22 U. C. Q. B. 53).

Sir J. B. Robinson, C. J., in an ejectment suit (*Smith* v. *Nevilles*, 18 U. C. Q. B. 473) wherein the plaintiff sought to give in evidence a memorial signed by a *grantor*, under whom he claimed, but with whom the defendant who shewed no title *was not in privity*, after stating that there was not sufficient evidence of search to dispense with production of the original deeds, thus expresses himself:

"I have sometimes thought that such evidence as was offered in this case might without danger be admitted to prove the fact of the conveyance being made which is recited in the memorial, especially as against a defendant who has no title in himself; but the Legislature has not thought proper to make such evidence admissible without accounting for non-production of the deed, as is done with respect to bargains and sales enrolled under St. 10 Anne, ch. 18, s. 3."

Where the non-production of the original instrument was satisfactorily accounted for, a memorial signed by a *grantor*, who was not shewn to have had more than mere constructive possession by force of the conveyance to him, has been held to be evidence not merely against the grantor, and all claiming under or in privity with him, but also against third persons not appearing to have any title whatever except a bare possession of insufficient duration to confer a title, as being a statement and act by the party in possession against his own interest as reputed owner of the land (*Russell* v. *Fraser*, 15 U. C. C. P. 375, and cases there referred to; *Cathrow* v. *Eade*, 4 DeG. and Smales, 531; *Moriarty* v. *Grey*, 12 Irish C. L. Rep. 129; *Moulton* v. *Edwards*, 29 L. J. Ch. 181; see as regards third persons *Doe d. Loscombe* v. *Clifford*, 2 C. & K. 452; *Hayball* v. *Shepheard*, 25 U.C.Q B. 536). This case is important as shewing that the memorial is evidence even though the grantor executing it never had more than constructive possession (for the lands were wild lands, and no evidence was given as to possession); and that under such circumstances it is evidence even against one not proven to claim in privity with the grantor.

The weight of authority is in favor of taking a memorial executed by a grantor as good secondary evidence even against strangers, without corroborative evidence; but it is not clear that this would be so if at the time of the conveyance sought to be proven someone were in possession adversely to the grantor.

If the memorial were rejected as evidence of the conveyance set forth in it, and the memorial shewed a bargain and sale for money paid, the party tendering it might perhaps as a last resource admit that the instrument set forth did not exist, and contend that the memorial itself was a good conveyance by way of bargain and sale. At common law a mere verbal bargain and payment to the bargainor raised a use, and he

held for the use of the bargainor. The Statute of Uses executed this use, and gave the legal estate bargained for to the bargainee. The Statute of Enrolments, it is true, required that a bargain and sale of a freehold should be by deed indented and enrolled; but neither enrolment, or registry to supply enrolment, are required here (Con St. c. 90, s. 14; *Rogers* v. *Barnum*, 5 U. C. Q. B. O. S. 252; *Doe d. Loucks* v. *Fisher*, 2 U. C. Q. B. 470), and a deed poll suffices (*Rogers* v. *Barnum*, *supra*). The requirements of the Statute of Frauds are complied with. The chief difficulty as to the operation of such a memorial *per se* as a conveyance would be on the question of intention.

Many of the principles whereon a memorial signed by a grantor is admissible, as evidence of a conveyance by him, do not apply where it is executed by a grantee. In the latter case it is a statement, not against, but in support of interest, and by a person not then in possession. Still such a memorial, if coupled with other facts confirmatory of the instrument set out in it, is admissible as parcel of the evidence towards proof.

A memorial executed by a *grantee* through whom a person claims, coupled with possession taken under the instrument to which it relates, and enjoyed for a length of time in a mode such as to preclude the probability of the instrument being other than as set forth by the memorial is good evidence, even against strangers, especially if accompanied by other corroborative facts, but the mere memorial would be evidence only against those claiming under or in privity with the grantee.

On this head a recent case (*Gough* v. *McBride*, 10 U. C. C. P. 166) affords most useful information. The plaintiff in ejectment claimed under a deed from one Arnold to one Gough, which he did not produce, and of which he offered as secondary evidence a memorial produced from the Registry Office, executed by Gough, the alleged grantee, with an affidavit of execution of the original deed by Arnold endorsed. The following is the judgment of the Court, delivered by Hagarty, J.:

"No possession appeared to have been taken under the alleged conveyance, and the title is now for the first time after a lapse of 53 years, sought to be established to a valuable property on this evidence.

The plaintiff's proposition may be thus stated, that on a witness proving that he saw a deed apparently answering the description contained in the memorial, and its loss, without further proof of hand-writing or genuineness, a memorial in the county registry executed by the grantee only, and proved by an affidavit endorsed of a witness who swore that he saw the conveyance duly signed by the grantor is, in the absence of any act done or possession taken, good secondary evidence of the original conveyance, and that a court and jury should be reasonably satisfied of the fact of such a deed having been duly executed, and that the estate duly passed thereunder. The proposition is startling, and can hardly be adopted except on the surest basis of reason and authority.

The first case I would refer to is *Scully* v. *Scully*, 10 Irish Eq. Rep. 557, appealed from the Irish Chancery to the Lords, 1825.

In 1816 a bill was filed setting up a marriage settlement executed in 1760, of which a memorial was registered in 1763. James Scully was alleged to have thereby covenanted with Lyons, father of the plaintiff, to settle on her (his intended wife) either by deed in his lifetime or by will, one-third of his estate. The memorial was only executed by Lyon the trustee. No deed was executed in grantor's lifetime. He died in 1816, and by his will left a large annuity to plaintiff "in full satisfaction of her claim on his property under her marriage articles or otherwise." She filed a bill asking to have her one-third under the articles. The defendant induced her to sign a memorandum on the will agreeing to confirm and abide by it. She charged that one Mahon, who took largely under the will, and was residuary devisee, had possession of the articles or knew where they were, and evidence was given to prove search, and that Mahon had declared he had either burned or thrown them away. The defendant admitted that they knew she claimed some right to testator's property in his life-time, but that she had solemnly assured him that she would waive all her rights and abide by his will on receiving the annuity of £1000, and testator on the faith thereof made his will.

Lord Chancellor Manners decreed in her favor, and considered the articles proved. In the Lords the case is argued at great length by Mr. Sugden and Sir C. Wetherall. Lord Eldon says: "The question in every case of this sort is whether all the testimony taken together offered as secondary evidence, is or is not sufficient to enable you to say that as you have not the writing itself you will act upon it as if you had it before you, and with an absolute certainty of what these articles contained. It is strongly the inclination of my opinion that this memorial does contain what were the articles of agreement between the parties." Again he says: "There is not a single

witness who speaks to conversations between testator, who does not characterise him as proposing to her a choice of what was in the will, or a one-third of the property as stated in the articles."

The defendant's counsel admitted in argument, "that the husband executed an article, I cannot deny, for I cannot deny what the will says." The decree was affirmed.

In 1837, the case of *Peyton* v. *McDermott*, 1 Drury and Walsh, 189, was decided by Lord Chancellor Plunkett. It was attempted to set up marriage articles executed in 1765. The Chancellor says: "I find possession going along with these articles. Again, I have strong evidence under the will of H. O'Rorke (the settlor) of the existence of these articles, as by a reference to them, the otherwise the apparent obscurity and confusion in that will and its limitations are explained and rendered plain." This was a very peculiar case in its facts.

The case of *Sadlier* v. *Biggs*, decided in Ireland, in 1847, 10 Irish Eq. Reports, 522, enters very fully into the law on this head. It came before the House of Lords in 1853, 4 H. L. 435. A memorial signed only by grantee was recorded in 1746. For one hundred years possession had gone in accordance with the facts it recited. The question was whether the original lease, of which it professed to be a memorial, contained a clause for perpetual renewal on the dropping of lives. Many renewals had been made under it from time to time. Proceedings had been taken to enforce a renewal in 1799, and a renewal obtained.

Lord St. Leonard says: "It has been made a great question in reference to the memorial, which is signed only by the party who takes the interest, whether that of itself by its own force shall be considered as binding the estate of the grantor? That is a totally different question from that which is now before your lordships, because here the question is, whether or not the memorial can be considered as secondary evidence of the contents of the instrument of 1746, and considering the length and nature of the deeds by which it has been recognized, and considering the statute itself under which that memorial was enrolled, and the proof which accompanies that memorial, and bearing in mind too that of course every memorial is signed by the person who takes the interest, because it is he, and not the grantor, who wants the protection of the register, I certainly am of opinion, and I think the authorities will not impeach that opinion, that this memorial is good secondary evidence of the contents of the deed of 1746, it being proved upon search, that the deed has actually been lost."

After noticing the formal proof required by the Registry Act, he continues; "Then the question is, the deed being lost and the possession having gone for a century, according to that deed, whether or not that memorial is secondary evidence of its contents. I confess I should be ashamed of the aw of England, if such evidence as that could not be received from necessity as secondary evidence."

In *Doe Loscombe* v. *Clifford*, 2 C. & K., 452, Alderson, B., rejected the memorial as any secondary evidence. He says: "The memorial is only evidence against the persons who register. I think that if there is no clause in the act of parliament, making the memorial evidence, it is only evidence against the persons registering, and those who claim under them." See also *Wollaston* v. *Hakewill*, 3 M. & G., 297.

In Buller N. P. 254, it is said, "When posession has gone along with a deed for many years, (the original being lost or destroyed,) an old copy or abstract may be given in evidence without being proved to be true, because in such a case it may be impossible to give better evidence."

Lord Redesdale says, in *Bullen* v. *Michel*, 4 Dow. 325, "When a record is lost from accidental injuries, an inference is always drawn from the secondary evidence of other circumstances, from which a jury is called upon to presume that of which no direct evidence can be shewn."

In Taylor on Evidence, vol. 1., 362, it is said: "On one or two occasions the memorial or even an examined copy of the registry has been received as secondary evidence of the contents of an indenture, not only as against parties to the deed who have had no part in registering it, but also as against third persons; but in all these cases the evidence has been admitted under special circumstances, as for instance, where parties have been acting for a long period in obedience to the provisions of the supposed instrument, or where the deed has been recited or referred to in other documents admissable in the cause."

I am not aware that our Canadian courts have pronounced any opinion supporting the plaintiff's proposition, or at all at variance from the rule to be deduced from the authorities above referred to.

The solitary fact that fifty years ago a memorial appears duly registered by Gough, the grantee, apparantely proved by a witness as referring to a deed, which he swears he saw executed by the grantor, shews to us that Gough then apparently asserted title to these premises. The land is not in any remote situation, but in York township, close to the capital of Upper Canada. Had the evidence shewn that possession was taken within any reasonable time after, and that Gough and his descendants acted as the owners of land in apparent accordance with the title as-

serted in the Registry Office, and to the knowledge of the grantor, who allowed long years to elapse without objection, the strong presumption might be raised that the title was as the memorial asserts. The conclusion drawn by Pigot, C. B., in *Scully* v. *Scully*, would be applicable: "I think the inference is so cogent as to be almost irresistible that the possession of the land was influenced by a contract corresponding in import with that contained in the articles of which the document purports to be a memorial."

But when we find the Gough family abstaining for half a century from doing any act to gain possession of valuable land, and late in 1859, for the first time, bringing ejectment on a title said to be acquired in 1807, the inference to my mind at least "is so cogent as to be almost irresistible," that the claim is utterly lacking in all those evidences of good faith, and substantial right required by courts of justice in the formal proof of title to landed property.

A long undisturbed possession by the Goughs to the knowledge of the alleged grantors, who thus acquiesced in the long enjoyment of this estate by another, naturally suggests the presumption that such possession is of right. If we found the additional fact that the possessor affected to be the absolute owner, as by conveying to another in fee, &c., &c., it would heighten the presumption.

Our minds are first led to the belief that there was a right for all this, and then we are led on to infer from all the circumstances that the right was as is set forth in a memorial publicly placed on record with all statutable requirements, as a formal assertion of title by the grantee. We thus are led to believe that the long undisturbed possession and acts of ownership were based on this foundation of right.

Such a conclusion strikes my mind as analogous to that class of cases in which inferences are drawn from the silence of persons who listen without objection or dissent to the assertions of title by another derived from them, and who afterwards permit such other to obtain possession, and use the property so claimed for years without objection.

In this way the facts all combine to make up evidence directly affecting the alleged grantor, and making the presumption convincing that the claim is as the grantee asserts.

My opinion is that the plaintiff wholly failed to make out any case for a jury—that his evidence only proves that his ancestor fifty years ago asserted a claim to this land by his own written declaration and the oath of a witness in the registry office, that he never pursued his alleged right—and that it would be contrary to all authority, and tending to established a most dangerous precedent if such evidence be held sufficient to give title to an estate.

I think the nonsuit was right. In the view I have taken, it is unnecessary to notice at length the further strange feature in the case, that the Barrett family seemed to have claimed the land for many years, and that Montgomery states that he received a deed from young Barrett, purporting to be from T. B. Gough to his mother, which deed was not produced or accounted for.

The evidence (in a case of *Fields* v. *Livingstone*, 17 U.C. C.P. 15) to support a conveyance from a sheriff under execution to one McCrea, was as follows:—Searches for the deed, which the Court held sufficient; proof of the *fi. fa.* against lands; the receipts thereon endorsed by sheriff 6th December, 1823; memorandum attached thereto in the sheriff's handwriting signed by him, "Lot 17, Con. 1, Harwich, sold at sheriff's sale 11th December, 1824, to William McCrea, for £125, sheriff's fees paid by William McCrea;" the *Gazette*, and publication therein dated 9th December, 1823, reciting a seizure of the land by the sheriff and notice of sale for 11*th December then next;* a memorial signed by the grantee, produced by the registrar, registered 17th December, 1820, purporting to be of a conveyance by the sheriff dated 16th December, 1830, in consideration of £125 paid him by McCrea, whereby he granted the land to McCrea, and all the interests of the execution debtor therein; it was therein stated that the deed was witnessed by two witnesses, gentlemen, residents of the Town of Sandwich. This memorial was signed by the *grantee*, in presence of but one witness. It was also proved that the execution debtor died in 1824 and under an ejectment suit his widow was turned out of possession in 1825 by the deputy sheriff, and possession given to McCrea. The material objections on the question of evidence were, that there was no sufficient secondary evidence, that the memorial signed by one witness only was void as such under the Registry Act, that it bore date 20th December, 1830, was registered 17th December, 1830, and the affidavit of execution appeared to have been made 22nd December, 1830.

The following is part of the language of the Court on giving judgment:

"Are the facts, then, in the present case consistent, and more consistent with the fact of the

sheriff having made a deed to McCrea, the purchaser, than with the fact that he did not make one? The sheriff was commanded by process to sell the land. He advertised it for sale, and *received* £125 from McCrea, and, as appears by the sheriff's memorandum, which is good evidence, because it is an entry in the usual course of business, and against interest, he received this money as the price of this particular lot which McCrea had purchased. It was the sheriff's duty also to have made a deed. Admittedly, however, he did not make it for several years after the sale. A memorial, or a document professing to be a memorial, was executed in December, 1830, by the grantee, of what is alleged to have been this particular deed, and it was registered at that time. Possession was not taken under this supposed deed until about eighteen years after the making of it, and about twenty-three years after the actual sale; but possession has been held for the last eighteen years under this alleged deed, and the defendant now maintains his possession by virtue of it." *

The Court held that there was sufficient evidence of the conveyance, but they relied on the other facts beyond the memorial, and it is probable that if they had been wanting the evidence would not have sufficed. It is to be remarked that the subscribing witnesses were not called, nor any reason given why they were not.

There would seem to be some danger in allowing mere length of possession and dealing with the property to be sufficient corroborative evidence whereon to adopt as evidence of a conveyance in fee simple absolute a memorial executed by a grantee. Take the case of a conveyance to such grantee for life only, or of a grant to uses to the use of some person in fee, but with a shifting use over, or of a devise in fee with an executory devise over on the happening of an event, and a memorial thereof executed by the grantee, referring to an instrument in fee simple absolute. Here the life tenant, or first taker, might have destroyed the instrument (to the custody of which he is entitled), and have conveyed in fee simple absolute, and the property have passed in fee *bonâ fide* through various hands during the life of tenant for life, or before the event whereon the shifting use or executory devise over is to take effect, for fifty years or more, and the possession and dealing with the property have thus been consistent with right of possession, and with the conveyance in fee as set out in the memorial. The reversioner, or other person entitled, or his heirs, are not supposed to enquire till their right accrues, and when it does they have to contend against evidence offered of the fraudulent memorial and the possession and dealing said to be consistently with it. Again, those entitled on the death of the life tenant, or on the event happening whereon their right accrued might have been under disability. It may be urged that it may always be assumed that a false memorial as above suggested could not be registered, on the ground that the registrar, as a public officer, would be presumed not to register the instrument if incorrect. It is known, however, that practically this assumption affords no safeguard, that as a general rule the registrars are quite incapable of placing a construction on an obscure will, or on any but the most common instruments, and are unwilling to incur the risk of declining to register on the ground of a supposed variance. Moreover, until the recent Registry Act, it was not necessary to set out in the memorial the quantity of estate, *i.e.*, the interest, conveyed, and therefore it was held that a memorial varying from the original in that respect, and so registered, was not defectively registered (*Lessee McDonald* v. *Murphy*, 2 Fox & Smith, 304 *in notis; Mill* v. *Hill*, 3 H. L. Ca. 828; *Wyatt* v. *Barwell*, 19 Ves. 435). The evidence therefore afforded by the mere fact of registry is, it may perhaps be urged, not so strong in regard to those particulars which need not be set forth as to those which must.

The cases when examined hardly go the length of shewing that mere length of possession, though for considerable time under an alleged grant in fee coupled with a memorial executed by the grantee, is sufficient evidence. There are either other facts which lead to the belief of, or are confirmatory of the instrument; or, if mere length of possession alone has been considered sufficient, it has been in cases other than on a question of whether the conveyance was in fee simple absolute to the grantee, and where the possession had was quite inconsistent with the instrument being otherwise than as set out in the memorial. I have pointed out that there may have been possession for fifty years or more under a conveyance or will alleged by the grantee or devisee to have been in fee, which possession was quite consistent with a lesser or conditional estate having in fact passed.

If mere length of possession in those claiming under the memorial executed by a grantee is to be the only circumstance corroborative of the memorial, as evidence of a conveyance in fee as therein stated, the question at once arises what length of possession is required. Considering the cases above alluded to of a life estate only being in fact granted, and of limitations by way of shifting use, or by executory devise, and of disabilities, it may be said that the only safe guide would be that length of possession which the courts have established as that from which a title must be shewn to a purchaser, namely, sixty years. That rule is based on grounds applicable to the present question. The ordinary duration of human life is assumed to be sixty years: taking, therefore, as the root of title a conveyance sixty years old, from some one shewn to have been then in possession, but whose title is not otherwise shewn, and conveyances thence in a proper chain of title to the vendor, there is good reason to believe he has good title. It is fair to assume the grantor in the first conveyance was of age when he conveyed: taking him to be then only twenty-one, and to have died at the age of sixty, the right of those in remainder or reversion then accrued; twenty years would in ordinary circumstances bar them, and thus the sixty years possession would confer a title, but only barely so.

It will be observed, however, that after all the safety of the purchaser of the title under these circumstances would rest more on the Statute of Limitations, than on the presumption that the conveyance is in fee simple absolute.

As between vendor and purchaser, and under the Act for Quieting Titles, stricter evidence is required than in ejectment, which is not final in its consequences, and in which the more temporary right to possession as between only the claimant and the defendant is in issue. It is evident that though the admission of a grantor by a memorial, or otherwise, that he conveyed in fee, may be evidence whereon a claimant in ejectment may establish mere *prima facie* right to possession, it is quite consistent with such admission that the conveyance is subject to be defeated on payment of money, by a shifting use, or the like matters which in ejectment the claimant is not required to negative, but of which a purchaser must have evidence. As between vendor and purchaser, and under the Act for Quieting Titles, the following remarks from Hubback on Succession pt. 1, ch. 3, p. 62, apply:—"In weighing the insufficiency of evidence, the practice of conveyancers is more strict; in determining its admissibility, more lax than that of Courts of Justice. The former seems to be an effect of the difference in the position of the parties; the latter, of the difference in the powers and functions of those by whom the evidence is judged. The purchaser in *bona fide* transactions, by the mere possession of his purchase money, shews and offers to pass an indisputable to it; whilst the title to land not appearing by possession, he cannot have the same assurance of the vendor's right to the equivalent bargained for. This much seems to be settled; that higher evidence is necessary than such as would merely prevail in ejectment. There are erroneous judgments upon defective or unsound evidence which may be cured by another ejectment; but if the doubts upon a title should, after completion ripen into defects, the purchaser may find it impossible to regain the position which he held before the contract. What Lord Eldon observed of legitimacy seems to be true of any other matter of fact expressly or impliedly alleged on the abstract; that a jury may collect the fact from circumstances, and yet the Court would not compel a purchaser to take the title merely because there was such verdict. The Court will weigh whether the doubt is so reasonable and fair that the property is left on his hands not marketable. The rule applies generally to presumptions of fact, which conveyancers are slower of raising than Courts of Justice. Thus a seven years' absence without tidings, though it prevails as evidence of death in ejectment, is clearly insufficient as between vendor and purchaser. Besides the greater difficulty of retracing an erroneous step, there exists another cause of difference from forensic practice, the more extensive office of conveyancer's evidence, which is to afford reasonable satisfaction to the purchaser, that the title is good against all the world, and not merely like that of evidence in litigation, that it is sufficient to prevail against certain contending parties. In this particular, a vendor's evidence resembles that of a claimant of peerage: it is not to

shew a better or preferable title relatively to any other, but to prove that the title is certainly and exclusively in the party asserting it. Again, conveyancers evidence is for the most part necessarily *ex parte;* a vendor may therefore be required to furnish evidence which would be elicited by adverse proceedings, to prove or disapprove facts, which, if he were a party litigant, it would be the business of his opponent to negative or establish. The heir in ejectment, either by or against him, or as a party to a suit in equity, need not adduce proof that his ancestor died intestate, it resting with his adversary to prove the affirmative fact of a will, if there is one."

The execution of a memorial which is receivable in evidence need not be proved when more than thirty years old (*Doe Maclem* v. *Turnbull*, 5 U. C. Q. B. 129), and it would seem that where a foundation is laid by proper search or otherwise for the admission of the contents of a memorial as evidence, and when requisite, sufficient corroborating circumstances or privity shewn, that such memorial, though not thirty years old, produced from the registry office, need not be proved; and that a copy certified by the registrar as such is also admissible without proof of the execution of the original, or of the instrument to which the original relates (*Marvin* v. *Hales*, 6 U. C. C. P. 211; *Lynch* v. *O'Hara*, 6 U. C. C. P. 267; Buller N. P. 255; 1 Taylor Ev. 362; see also *Doe d. Prince* v. *Girty*, 9 U. C. Q. B. 41. Con. Stat. Can. ch. 80; 29 Vic. ch. 24, s. 19.)

It is difficult to gather any very definite principle from the cases. So far as the ordinary principles of evidence apply, it appears difficult to escape from the conclusion of Alderson, B., in *Loscombe v. Clifford*, that "if there is no clause in the Act of Parliament making the memorial evidence, it is only evidence against the persons registering and those who claim under them;" and indeed this seems to be assumed as the rule in Taylor on Evidence, sec. 389, p. 377, 3rd ed., where the author observes "That in all cases where the evidence has been admitted against third persons, it has been under some special circumstances (drawing no distinction between such memorials as have been executed by the grantor and those which have been executed by the grantee). Perhaps, however, this may not be the rule when the memorial is executed by the grantor, and is in reality against his interest, and not as in the case of *Jones* v. *Todd*, where the grantor was in fact getting rid of a *damnosa hæreditas*, and the memorial was sought to be used against the grantee; though in strictness to render the evidence admissable on this ground, it would of course be essential that the grantor should be proved to be dead at the time the evidence is tendered. When the memorial is executed by the grantee it seems admitted on all hands, (and the same rule must apply, where though executed by the grantor, it is not in reality against his interest,) that it is not necessarily, or in all cases, secondary evidence. And here the distinction must be borne in mind between the admissibility, and the weight of the evidence. It seems in the cases, on which such evidence has been admitted, that the memorials have been rather treated as part of a chain of circumstances given in evidence towards proof of the alleged deed, than as secondary evidence in themselves; and the decisions in effect appear to be, that from the existence of such a memorial coupled with the other proof, the existence of such a deed may be presumed; in other words, that there may be circumstantial secondary evidence, and that such a memorial may form a link.

The remarks of Lord Eldon in *Scully* v. *Scully*, are in accordance with this view—"The question, he observes, in every case of this sort is, whether all the testimony taken together, offered as secondary evidence, is or is not sufficient to enable you to say, that as you have not the writing before you, you will act upon it as if you had it before you, and with an absolute certainty of what that writing contained." And the observations of Lord St. Leonards in *Sadlier* v. *Briggs*, point in the same direction. It may be observed that most, if not all of the English cases in which the memorials have been admitted, have been cases in equity, in which the Court were judges, both of law and fact, of the admissibility and weight of the evidence. Viewed in this light, the effect of a memorial, and the attendant circumstances become a question rather of fact than of law, and its probative effect in each case will depend, to use the words of Lord Eldon, upon whether upon all the facts taken together the Court, or the jury under the direction of the Court, can say

they will act upon the alleged writing as if they had it before them. And this would seem not only to be the only way of reconciling the cases, but the only logical way in which such a memorial can be held to have any probative effect whatever. It is certainly not very logical to say, that the question, whether a memorial is in itself secondary evidence, should depend upon whether from other circumstances, it appears probable that the result of such evidence is true, while by treating it as merely a link in a chain of circumstances, this apparent difficulty is obviated.

Bearing in mind the distinction above referred to as regards the evidence requisite in ejectment, and between vendor and purchaser, or under the Act for Quieting Titles, and that in the two latter cases negative evidence beyond the memorial is requisite to displace existence of matters which is not set forth in it, and of which therefore it affords no evidence, the result on the whole appears to be —

1st. That a memorial, is undoubtedly, secondary, if not primary evidence against all persons claiming under the persons registering.

2nd. That when executed by the grantor, and really against his interest, it is probably evidence against third persons.

3rd. That when executed by the grantee or grantor, when not against the interest of the party executing it, it is not in itself secondary evidence, but may, with other circumstances, form a link in a chain of circumstantial evidence, proving as secondary evidence, the existence of a deed.

A. L.

## LAW SCHOLARSHIP EXAMINATIONS.

To correct any mistake or misapprehension on this subject, we may state shortly that these examinations have hitherto been held on the second day of Michaelmas Term in each year, and any change in this respect, will doubtless be published when made. A week's notice should, for the convenience of the examiners, &c, be given to the librarian, previous to the commencement of the Term by all those who intend presenting themselves for examination. Books to be read for these examinations are those which will be found advertised on the cover of this journal; but what is meant by the first, second, third, and fourth year students, as the case may be. will be seen by a rule passed by the Benchers in Convocation in February, 1865, which reads thus:—

"All students who have been, or who shall hereafter be admitted upon the books of the Society in Easter or Trinity Terms in each year may present themselves for examination for scholarships as follows, that is to say: For the scholarship for first year students, in the Michaelmas Term of their second year. For the scholarship for second year students, in the Michaelmas Team of their third year; and for the scholarships for third and fourth year students, one or both, in the Michaelmas Term of their fourth year, provided always, that nothing herein contained shall authorize or permit any student to present himself a second time for examination for the same scholarship."

It is also to be noted, that graduates of a University are looked upon as students of two years standing, and must make their calculations accordingly. The winter lectures for the benefit of all those who choose to take advantage of them, commence on the first Monday in November, and continue until the end of April.

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Chancery practitioners in Toronto would take it as a favour if those who have such matters under their control, would so arrange, that stamps could be obtained in that department of the Registrar's office which is situated somewhat as Mahomet's coffin is said to have been. The inconvenience of having to go from the top of the west wing to the bottom of the centre wing of Osgoode Hall for a stamp, and then back again, might be endured without complaining, if it were a necessary evil, but this we are informed is not the case, and until a short time ago stamps were kept by Mr. Holmested. We thoroughly appreciate the benefit and pleasure of a fair proportion of muscular exercise, as a relief from the severe mental labour incident to the profession, but it may be doubted whether running up and down stairs is the pleasantest form to take such exercise.

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The following is a summary of business in the Court of Queen's Bench during Michaelmas Term last:

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| Rules Nisi moved | 69 |
| Rules Nisi refused on mot. or af. hearing parties | 14 |
| Rules Nisi or absolute in first instances granted | 65 |
| Demurrers argued | 8 |
| Writ of Error | 1 |
| County Court appeals | 4 |
| Special cases | 2 |
| Judgments given at close of argument | 9 |
| Judgments given 23rd December, 1867 | 30 |
| Still standing for judgment (two from E. T) | 32 |

## JUDGMENTS.

### *ERROR AND APPEAL.*

Present — Draper, C. J.; The Chancellor; Richards, C.J., C.P.; Spragge, V. C.; Hagarty, J.; Morrison, J.; Adam Wilson, J.; Mowat, V. C.; J. Wilson, J.

Thursday, January 2, 1868.

*Mulholland* v. *Williamson.*—Decree reversed.

*Mason* v. *Agricultural Ins. Co.*—Appeal from Common Pleas allowed.

*Harrold* v. *County of Simcoe.*—Appeal from Common Pleas dismissed with costs, the Chancellor dissenting.

*McBeth* v. *Smart.*—Appeal allowed. Appellant declared to be entitled to fund in Court, with costs, subject to bill in court below, dismissed with costs.

*Martin* v. *Martin.*—Argued, and stands for judgment

Friday, January 3, 1868.

*Darling* v. *Hitchcock.*—Appeal from Queen's Bench, heard and stands for judgment.

*Bank of Upper Canada* v. *Wallace.*—Appeal from Chancery heard and stands for judgment.

Saturday, January 4, 1868.

*Stephens* v. *Simpson.*—Appeal from Chancery, heard and stands for judgment.

*Tylee* v. *Cameron*—*Tylee* v. *Strachan.*—Appeals from Chancery dismissed with costs, appellant not appearing.

*Kirkpatrick* v. *Lyster* —Appeal from Chancery, heard and stands for judgment.

Monday, 6th January, 1868.

*Newton* v. *Ontario Bank* —Appeal from Chancery heard and stands for judgment.

### *QUEEN'S BENCH.*

Present—Draper, C. J.; Hagarty, J.; Morrison, J.

December 23, 1867.

*Cloy* v. *Jacques* —Appeal from County Court of County of Lincoln. Appeal dismissed with costs.

*Taylor* v. *McEwen, Sheriff* — Appeal from County Court of the County of Essex. Appeal allowed. Rule to be absolute in the Court below to reduce the verdict to the sum of $25.

*Re Grand and the Corporation of Guelph.*—Rule discharged with costs.

*Harrison* v. *Whimster.*—Rule absolute for new trial, with leave to plaintiff to fyle amended declaration, and defendant to plead thereto. If plaintiff gets a second verdict he is not to tax costs of first trial. If defendant gets a verdict he is to be allowed costs of both sides.

*Buchan* v. *Smith.*—Appeal from the County Court of the County of Wellington. Appeal dismissed with costs.

*Cook* v. *Murphy.*—Rule discharged.

*Crewson* v. *Grand Trunk Railway Company.*—Rule absolute to enter nonsuit.

*Fairbairn* v. *Hilliard.*—Appeal from County Court of County of York. Appeal allowed. New trial without costs in court below.

*Brown* v. *Cline.*—Appeal from County Court of Norfolk. Appeal allowed.

*Gilkison* v. *Elliot.*—Demurrer. Judgment for demandant. Leave to apply to amend granted.

*Corporation of the Township of Burleigh* v. *Hales.* — Rule *nisi*, to set aside verdict, etc. Rule discharged.

*Ostrom* v. *Kincaide.*—Rule discharged.

*Smith* v. *Royal Insurance Company.* — Judgment for plaintiff on demurrer.

*Craske* v. *Huffman.*—Special case. Postea to plaintiff.

*The Queen* v. *Mortsen.*—Rule to quash conviction discharged with costs.

*McNalley* v. *Church.*—Special case. Postea to defendant.

*Smith* v. *Smith.*—Rule discharged.

*Royal Canadian Bank* v. *Brown et al.*—Rule absolute for new trial, without costs. Leave to appeal asked and granted.

*Northern Railway of Canada* v. *Lister.*—Rule discharged. Leave to appeal refused.

*Campbell* v. *The Counties of York and Peel.*—Rule discharged. Leave to appeal asked and granted.

*In the matter of James Moffatt and the Sheriff of County of York* —Rule discharged with costs.

*Trust and Loan Company* v. *Covert & Ruttan.*—Judgment for defendant on demurrer.

*Tolman, Executors* v. *The Mutual Fire Insurance Company of Clinton.*—Judgment for defendant on demurrer.

*The Queen* v. *Hall.*—Rule absolute on payment of costs.

*McMillan* v. *McDonell* —Rule absolute to enter verdict for plaintiffs.

*Re Gibb* v. *Corporation of Township of Moore.*—Rule discharged with costs.

*In the matter of the Queen and Murray, appellant, and W. G. Leonard, respondent.*—Rule absolute without costs.

*McGillivray* v. *Millen.* — Rule absolute for non-suit.

*The Queen* v. *John Patterson.*—Rule discharged.

*Plant, Administratrix,* v. *the G. T. R. Co.*—Rule absolute for nonsuit.

### *COMMON PLEAS.*

Present—Richards, C J., C.P.; Adam Wilson, J.; John Wilson, J.

December 23, 1867.

*Campbell* v. *The Grand Western Railway Co.*—Stands.

*Lyster* v. *O'Lough.*—Postea to plaintiff.

*Brady* v. *Western Assurance Company.*—Rule discharged.

*Eaton* v. *Shannon.* — Appeal dismissed with costs.

*The Queen* v. *McDonald.*—Conviction affirmed, and judgment to be given thereon at the next sitting of Oyer and Terminer, in the County of Brant.

*Murray* v. *Dawson.*—Demurrer. Judgment for the defendant on the exceptions to the declaration.

*Paton* v. *Newberry.*—New trial without costs.

*Stock* v. *Shewan.*—New trial to plaintiff on payment of costs to defendant.

*Chadsey* v. *Ranson.*—Rule discharged.

*Meyers* v. *Winter.*—Rule discharged, with leave to defendant to amend particulars now.

*Doyle* v. *Eccles.*—Ordered that, upon defendant delivering up to plaintiff the books and papers in dispute, if plaintiff shall choose to accept them, the verdict be reduced to one shilling; the defendant to pay the costs of all proceedings to be taxed as Superior Court costs; but may proceed on conditions specified in rule.

*In re Parr* v. *Spencer et al.*—Appeal. Appeal allowed without costs, and case referred back to the Judge for further consideration.

*McMillan* v. *Jelly.*—Rule discharged.

*Killington* v. *Herring.*—Rule discharged.

*Sheely* v. *McCrae.*—Rule discharged.

*Williamson* v. *G. T. R. Co.*—Judgment for defendants on second count. Leave to appeal asked for and granted.

*Jay* v. *Hartz.*—Judgment for defendant on demurrer to declaration, with leave to amend on payment of costs.

*Koster* v. *Holden.*—Rule discharged. Leave to appeal applied for and refused.

*Gore Bank* v. *Tarbot.*—New trial on payment of costs.

*Rowe* v. *G. T. R. Co.*—No rule.

*Fowler P. H. & B. R. Co.*—No rule.

Saturday, December 28, 1867.

*Campbell* v. *G. W. R. Co.*—New trial on payment of costs, on condition of defendant paying £800 into Court, with leave to plaintiff to take that sum out of court without prejudice to her claim for damages *ultra* at another trial; defendants to have liberty to add a plea of such payment into Court; said sum and costs to be paid on or before first day of next term; in default, rule to be discharged.

*Dixon* v. *Farrell.*—Rule discharged.

*Manning et al.* v. *Thompson.*—Rule discharged. John Wilson, J., dissenting.

*Martin* v. *Brumell.*—New trial. Costs to abide event.

*The Queen* v. *Mills.*—Special case. Conviction confirmed.

*Todd* v. *Provincial Insurance Co.*—New trial; costs to abide event. Judgment not finally given. Counsel to be consulted as to whether they wish decision as to effect of warehouse receipt.

*Hesketh* v. *Ward.*—Rule absolute to discharge defendant from custody without costs. Adam Wilson, J., dissenting.

## SELECTION.

### FRENCH CODES, AND ENGLISH DIGESTS.

Now that a Royal Commission is about to work,* the time seems appropriate for stating shortly how the French have *codified*, and how the English have at different intervals, and with varying success, *digested* their laws.

The French operation began with the abolition of feudalities at the earliest stage of Revolution, on the 4th of April, 1789. Next came the extinction of the law of primogeniture, and the adoption of natural equity and presumed affection as the basis for succession. These changes were effected under the superintendence of Merlin, well known to us as the author of the *Rèpertoire* and of the *Questions de Droit.*

The ground being much cleared by these advances, it seemed to those in authority that the time had arrived for a wider undertaking, that of digesting and arranging all the Civil laws of France into one body, introducing also the required alterations, these last having been demanded chiefly by the conflict of local and provincial customs. To execute this great undertaking, Merlin was associated with a lawyer greater than himself, the celebrated Cambacères, afterwards one of the Consuls. These two men, Cambacéres and Merlin, were charged by the Assembly to prepare a sketch of the proposed classification. On the 11th of August, 1793, having performed the task assigned to them, they made their report to the Convention. It is stated that the work had fallen principally upon Cambacères. In the year 1794 that remarkable man published a separate report *sur le Code Civil*, the original, or at all events, the germ of the *Code Napolèon.* For ten years his labours in improving and maturing this production are said to have been incessant. Its merits and defects were discussed from time to time at no less than sixty sittings of the Convention. It was strongly opposed; the chief objection being, that it savoured too much of the practitioner; for Cambacères, though an advocate of improvement, was not an innovator. His project was referred to a committee, who lost themselves in the discussion of first principles, and in empty declamation. Much time was thus wasted; nor was the matter mended by the Council of 500, who ordered the judges of the Superior Courts to deliver their opinions. The judges obeyed, but, as might have been expected, their criticisms increased rather than diminished the existing perplexities; and the codification of the French law would have been postponed indefinitely, had not a strong hand at this period interposed.

After the battle of Marengo the First Consul issued a commission to examine the work of Cambacères, choosing for this purpose, without reference to political opinion, four lawyers of

* A working staff is soon to be put in harness.

the highest reputation; Tronchet, the defender of Louis XVI.; Portalis, a philosophic priest of conservative leanings; and Maleville and Preameneu; all chosen, not only for their learning and experience, but for their judgment and moderation. These were the Rèdacteurs of the *Code Civil*, of which, however, it is always to be remembered that Cambacères was the parent. The revised version, as corrected by the Rédacteurs, and as criticised by the legal profession (among whom it had been circulated,) was submitted formally to the *Conseil d'Etat*, whose committee of legislation framed a new draft from the materials before them. The new draft, thus prepared and thus matured, was discussed article by article in the *Conseil d' Etat*; the First Consul, as M. Theirs informs us, descending from his war horse and not only attending every meeting, but astonishing "the whole world by the novelty and profundity of his suggestions."

In this way, after having received the sanction of the legislative body, a Code of Civil Law was, on the 3rd of March, 1803, presented to the French nation, and it has governed them ever since. The Code of Procedure, principally the work of Cambacéres, appeared in 1806; the Code of Commerce in 1807; the *Code Pénal*, the *Code d' Instruction Criminelle*, and the *Code Forestier* at subsequent periods. These, the result of twenty years' thought and labour, form now the pocket volume known as the *Code Napoléon*. We have said enough to show that it did not originate with the extraordinary man whose name it bears, although it became his glory and his chief boast in after life that he had given it consummation.

The object of the preceding sketch is to show how cautiously the French went to work in framing their code, and how signal is the delusion of those (and they are many) who fancy that it was dictated by Napoleon. The radical alterations were not great. To be satisfied of this we have only to examine the old French treatises; but it seems enough to cite the notorious fact that more than three fourths of the *Code Civil* are extracted from or built upon Pothier.

To the power of seeing everything beforehand the faculty of legislating *ab ante*, the gift of prescienee in fact, the jurists employed by Napolean made no pretension; "thanks," says the Baron de Locré (their editor), "to that admirable good sense which pervades their whole performance.

To turn from France to England, we find that the illustrious Bacon had long meditated what he called "a particular digest or compilement of the laws of his own country." In his latter day of disgrace and depression he actually commenced this arduous undertaking; but he was obliged "to lay it aside" from inability "to muster his pen and forces," and from the want of hands to help him in a work which he truly termed one peculiarly "of assistance." Caution and moderation were the characteristics of his scheme, and order was the object of it. He suggested no startling or abstract innovations. His biographer, Lord Campbell, commends the prudence and sagacity which forbade his attempting a code. What Bacon proposed was "to compile a method and digest of the King's laws;" and the argument he addressed to the regal pedant was, that "great good would come from bringing cases to a text law, and setting them down in method and by titles." He knew that this operation, as it advanced, would necessarily beget substantive improvements; but these, he wisely held, must be left to the legislature. We cannot otherwise understand him, when he says that those employed "should not be with a precedent power to conclude, but only to prepare, and propound to Parliament." And we are confirmed in this construction by the report of Lord Colchester, who as chairman of the Common's committee in 1796, describing the overture of Bacon to King James, stated that its end was "to prepare a digested result for Parliamentary consideration." The immediate effect, however, would have been to unfold the law as it stood, so that all should not only obey, but, by an exercise of reasonable intelligence, understand it.

The formidable task which proved too much for Bacon, was accomplished about a century afterwards (at the suggestion apparently of Burnet), by an obscure and unassisted hard-working barrister of Lincoln's Inn; for such, we believe, was Lord Chief Baron Comyn, when he compiled in Norman French the greater part, if not the whole, of his well known "Digest of the Laws of England;" embracing our entire jurisprudence, civil, criminal, ecclesiastical, and constitutional. This elaborate compilation, though prepared so early, did not see the light till 1762.* more than twenty years after the learned judge's death, and probably not less than forty after the date of the original composition, which, moreover, was published under the disadvantage of a translation by unknown editors, who seem to have been strangers to the author. Much of the law contained in this work had of course become stale. Its arrangement, too, was not always happy. The book as a whole was repulsive; but its matter was good; its law was safe. Its propositions were terse, and its references convenient and copious. In a word, it saved the drudgery of constantly hunting up old and scattered authorities. We therefore cannot wonder that the profession received the Chief Baron's performance as a boon, for it is certain that they still look back upon the donor with gratitude and reverence

If success, so signal and so marvellous, attended the efforts of a single individual in delineating, unaided, the entire body of English jurisprudence, what ought we reasonably to expect from the labours of a Royal Commission engaged in a similar operation—remembering,

* Comyn flourished as a reporter in the reigns of King Wm., Queen Anne, and the first two Georges. His reports begin in 1695.

ae we must, that the compilation of Comyn has become a thing of the past, and that—as Sir James Wilde says—"the structure of our existing law has been raised chiefly within the last century and a half." It is rumoured that Lord Cranworth and his colleagues contemplate the nomination of a phalanx of jurists to work the Commission; an operative staff, composed, not of Ulpians or Tribonians, but of industrious lawyers, reasonably skilled in their profession, reasonably addicted to labour, and—what is not less material—reasonably trained to the austerities of legal composition. These, acting in concert, but with a distribution of duty appropriate to each, will be subject to the direction, supervision, and correction of a board, having in its number some of the first lawyers that England can produce. We feel quite confident that a work prepared under such auspices *must* succeed; and if we had any doubts on the subject. the admirable report already issued would have dispelled them. This Commission will, in fact, realize the dream of Bacon. It will, as he proposed, frame a digest—not a code; although a code may be its fruit when the digest is complete.

In the posthumous continuation of Austin's Jurisprudence (ably edited by his lamented widow, who has recently followed her distinguished husband), what he contemplated and advocated at the outset was "merely a re-expression of existing law, with apt divisions and sub-divisions;" in fact neither more nor less than a digest, which, however, he thinks "will prepare the way for a code." He proposes to extend the work to Scotland and to Ireland. To overlook these countries, he conceives, would be a slight upon both. And we quite agree.

A systematic digest drawn up after profound deliberation, though not binding, would be of instant value to the practising lawyer, and even to the judges. It would give confidence to legal opinions, and prevent litigation in many cases where counsel, after balancing discordant authorities, advise dubiously a suit, or a defence.

The digest would address itself to *all* classes. It might even be sold at a moderate profit, which would contribute to defray the expense of the commission; a consideration not undeserving of attention in this age of economy. The publication would be by instalments, to give evidence of progress and quality; each branch of the law being easily capable of severance from the rest. Every professional person, and we incline to think, a large portion of the educated community, would desire to possess themselves of an exposition, revised, corrected and sanctioned by the first legal intellects of the country; setting forth, in a readable form, the rights and liabilities of the people, and enabling them to comprehend that which, whether they comprehend or not, they are bound to obey.

We have said nothing of Cruise's admirable digest, because it is confined to real property. We have also been silent as to the *Law Journal* digest, which, commencing in 1820, and continued quinquennially, has proved of the greatest use to the profession. Its birth put an end to all renewals of Comyn. It will be of the greatest service to the Royal Commission.

Three months before his death, Lord Lyndhurst, in a letter to the writer of this article (written in his Lordship's beautiful hand), says, "I have never publicly expressed an opinion upon the subject of codification; but I think the utmost that can be done is to form a digest."

Lincoln's Inn, October, 1867.

## ONTARIO REPORTS.

### COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

### Bell v. Cuff.

*Ejectment—Staying proceedings until costs of former actions paid—Same "cause of action"—Vexatious suits.*

Plaintiff in ejectment claimed to recover in a second action the same land as he had sued for in a former action, and under a forfeiture in the same lease, but the forfeiture on which the second action was brought was a new forfeiture, and had been incurred long subsequent to the obtaining judgment in the prior action. On an application by the defendant to stay proceedings until the plaintiff should pay the costs of the first judgment and execution,

*Held*, That as the second action was not brought for the same cause as the first the application must be refused.

*Quære*, If it were shewn that the question involved in the second suit had been involved in and could have been tried by the first, and that the second suit was brought vexatiously.

[Chambers, October 7, 1867.]

*Durand* applied to stay proceedings in this action until the plaintiff should pay the costs of two judgments and executions in ejectment commenced by him in 1866, against the defendant and his then tenant for the same cause of action substantially as the present action; and why, if such costs were not paid in one month, the defendant should not be at liberty to enter judgment of *non pros.* in this action.

*Osler* shewed cause. The fact of the plaintiff having sued the defendant in the former action is not denied, nor that it was brought to recover the same land as is now sued for, upon an alleged forfeiture of the same lease now set out in the notice of claim; but this action is not brought for the same forfeiture for which the prior action was brought, but for a further and fresh forfeiture incurred long subsequent to the obtaining judgment in the said prior action, and the defendant well knows that to be the case.

This action is not founded on the same title as the one previously in question. *Doe Henry* v. *Gustard*, 4 M. & G. 987, shows that a new action may be brought for a new forfeiture, and the action will not be stayed although a former action may be still pending upon the same title; and *Doe Bailey* v. *Bennett*, 9 Dowl. 1012, decides that it is a good answer by the plaintiff that he is not suing on the same title as in the previous action, and he need not state what that title is, and for these reasons the 76th section of the Ejectment Act does not apply.

*Durand* supported the application. The court will stay proceedings where the parties and the title are the same in both actions: Ch. Arch. Prac. 11 Ed. 1039—1041—1370.

Adam Wilson, J.—The principle which applies in such a case is to stay proceedings if the plaintiff is acting vexatiously by bringing a second action: *Short* v. *King*, Strange, 681; *Melchart* v. *Halsey*, 2 W. Bl. 744; *Danvers* v. *Morgan*, 17 C. B. 530; *Pashley* v. *Poole*, 3 D. & R. 53; *Faith* v. *Guppy*, 12 Jur. N. S. 1011; and therefore the court would not stay the second action where the plaintiff had to abandon his first suit by reason of a mistake which he amended in his new action: *Short* v. *King*; *Pashley* v. *Poole*, *ante;* nor would they stay the second suit where the verdict was obtained in the first one by fraud, and perjury: *Doe Kerr* v. *Thomas*, 2 B. & C. 622.

There is no general rule that a plaintiff is compelled to pay the costs of a first action before he is suffered to proceed with the second; *Pashley* v. *Poole*, 3 D. & R. 53; *Doe Kerr* v. *Thomas*, 2 B. & C. 622; *Danvers* v. *Morgan*, 17 C. B. 530; *Prowse* v. *Loxdale*, 3 B. & S. 896.

Some light is thrown also upon the law by the provision which the legislature has made for security for costs being given in such a case, and the 76th section of the Ejectment Act, which is very general in its language, I think should be read in connection with the 1st section of the 29 & 30 V. c. 42, which enacts that security for costs shall be given when the second suit is brought for the same cause as the first one.

Upon a consideration of the authorities, as this second action is not brought for the same cause as the former one was brought for, there is no ground for staying it until the costs of the former action have been paid.

It may be possible, if it were made to appear that the question involved in the present action was involved in and could have been tried in the first action, and that the present one is brought to harass and oppress the defendant, that relief might be given, for I do not think it would be exceeding the powers of the court to interfere in such a case, otherwise a plaintiff might have fifty such actions pending, or forty-nine judgments against him, and a fiftieth action pending in respect of a different alleged forfeiture, the trial of any one of which claims would have settled the rights between the parties, and yet he might forbear to try the question, and thus keep perpetually annoying the defendant with fresh actions and the defendant would have no redress.

I think the present application must be discharged, but I do not think it is a case for costs.

*Summons discharged.*

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## Brooke v. The Bank of Upper Canada.

*Corporation—Forfeiture of bank charter—Effect on tenure of office by president and directors—Service of process.*

Service of process was made upon A. as president of a bank. The last election of officers was in June, 1866, when A. was elected president for one year. No election of directors or president had taken place since then, and A. never in fact resigned his office as president. In September, 1866, the bank suspended specie payment, and before 60 days thereafter they assigned their property and assets to trustees, and from thence had ceased to do business as a bank. It was provided by the charter, amongst other things, that a suspension of specie payment for sixty days, or an excess of the debts of the bank by three times the paid up stock and deposits, &c., should operate as a forfeit of the charter, &c.

*Held*, 1. That the total annihilation of the bank was not contemplated by these provisions, and it does not follow from the loss of the charter that there must be a dissolution for all purposes.

2. That some formal process is necessary finally to determine and put an end to all the functions of a corporation.

3. That notwithstanding the suspension and assignment, the bank was still a corporate body, liable to have its property sold or administered for the satisfaction of debts.

4. That A. must still be looked upon as the president of the bank, and an application to set aside the service upon him was discharged with costs.

[Chambers, October 10, 1867.]

This was a summons to set aside the service of process made upon Mr. Allan, who was served as president of the Bank of Upper Canada, upon the ground that the bank having suspended specie payments for more than sixty days consecutively, a forfeiture of their charter had been created, and that there existed no such corporation as the defendants were represented to be, and that even if there were such a corporation, that Mr. Allan was not the president, or an officer of the bank.

It appeared from the affidavits filed that the last election of officers was in June, 1866, when Mr. Allan was elected president for one year, and that the bank suspended specie payments in September, 1866; and before sixty days therefrom, the bank (on the 12th November, 1866) assigned, with the consent of the shareholders, all their property and assets to trustees, and had ceased from that period to do any business as a bank. That no meeting was held in June, 1867, for the election of directors and president, and that Mr. Allan had never in fact resigned his office of president.

*Maclennan* shewed cause. He contended that the bank did exist in fact as a corporation, notwithstanding the forfeiture of the charter; that properly its corporate powers could not be determined, whether by suspension of specie payments or by the assignment of its assets, except by proceedings taken for that purpose, and that the officers last elected, and who had never resigned, must be considered to be the proper officers of the bank for service of process and other purposes. He referred to the act of incorporation, 19 & 20 V. c. 121, secs. 7, 8, 33, 35, 36; Grant on Banking, 462, 539; *Stewart* v. *Dunn*, 12 M. & W. 655; Grant on Corporations, 283, 295, 301, 305, 306, 309; Angell & Ames, on Corporations, sec. 777.

*G. D. Boulton* supported the application, and argued that the forfeiture of the charter, which, it was expressly declared by statute, should follow in the event of suspending specie payments, was in fact a dissolution, or was equivalent to a dissolution of the corporation; and, in such a case there could be no longer any officers of the corporation, for the corporation itself was utterly gone and determined, and the service itself was therefore irregular. *Slee* v. *Bloom*, 19 Johnston, 456; Kyd on Corporations, 447, 515; 1 Bl. Com. 500, 501; Angell & Ames on Corporations, sec. 779; 19 & 20 Vic. secs. 2, 7, 8, 32.

Adam Wilson, J.—By sec. 7 of the act, ten directors are to be elected annually at a general meeting of the shareholders, to be held annually on the 25th of June, and the directors elected shall be capable of serving as directors for the ensuing twelve months; and at their first meet-

ing after such election the directors shall choose out of their number a president and vice-president, who shall hold their offices during the same period.

By section 8, if an election of directors be not made on the day fixed, the corporation shall not be taken or deemed to be dissolved, but such election may be made at a general meeting of the shareholders, to be called for that purpose; and the directors in office when such failure of election takes place, shall remain in office until such election is made.

By section 33 a suspension by the bank of payment on demand in specie, of the notes or bills of the bank payable on demand, shall, if the time of suspension extend to sixty days consecutively, or at intervals within any twelve months, operate as and be a forfeiture of its charter, and of all and every the privileges granted to it by this or any other act.

By section 35, in case the debts of the bank exceed three times the stock paid in, and the deposits made in the bank in specie and government securities for money, or in case the total amount of the bills or notes of the bank intended for general circulation shall at any time exceed the amount by the act directed, the charter and all the privileges of the bank shall be forfeited, and the directors, under whose administration the excess shall happen, shall be liable jointly and severally in their private capacity; but such action or actions shall not exempt the said bank or its lands, tenements, goods or chattels, from being also liable for such excess.

By section 36, in case the property of the bank become insufficient to liquidate the liabilities thereof, the shareholders in their private capacity shall be liable for the deficiency thereof, but to no greater extent than to double the amount of their respective shares.

By section 38, if the bank shall advance or lend to or for the use of any foreign prince, power or state, any money or security for money, "then and from thenceforth the said corporation shall be dissolved, and all the powers, authorities, rights, privileges and advantages granted to it by this or any other act shall cease and determine."

The section which declares that the charter shall be forfeited in case the debts of the bank shall exceed three times the paid up stock and deposits, expressly provides for *the bank*, as well as the directors individually who are culpable, being proceeded against, and the lands and chattels of the bank being also followed.

The total annihilation, therefore, of the corporation is not contemplated by this section, and I see no reason why it must necessarily be annihilated under the other section relating to the suspension of specie payments, where the same kind of language is used as to a forfeiture of the charter.

The language in both of these sections is different from that used in the 38th section, which prohibits the lending to foreign powers. In this last case, "the corporation is thenceforth to be dissolved, and all its powers, &c., are to cease and determine." It does not follow that there must in all cases be a dissolution for all purposes: *Mayor of Colchester* v. *Brooke*, 7 Q. B. 382; *Woodbridge Union* v. *Colneis*, 13 Q. B. 285, and I think it would require a process of some kind formally to determine the corporation.

It would not surely be permitted to a defendant who was sued on his promissory note to the bank to plead in bar of the action a forfeiture of the charter by reason of the suspension of specie payments for sixty days, or that the bank debts exceeded three times its paid up stock and deposits, or that the bank was dissolved because it had made a loan to a foreign power.

There are appropriate remedies prescribed for each case, and nothing could be more inconvenient, perplexing and dangerous than to try so important a question upon a merely collateral issue, and I think the cases show that this will not be allowed: *The Queen* v. *Taylor*, 11 A. & E. 949; *The Attorney-General* v. *Avon*, 33 Beav. 67; 9 Jur. N. S. 1117; 9 L. T. N. S. 187; *Reg.* v. *Jones*, 8 L. T. N. S. 503.

When all the members of a corporation are dead, so that there is no one to proceed against, and there is no corporate body in fact or in law remaining, there must be an absolute dissolution without any process, from the actual necessity of the case; but as a general rule nothing short of a determination by some judicial power will, it seems, put an end to the existence of the functions of a corporation.

In my opinion the Bank of Upper Canada is notwithstanding the suspension of specie payments for more than sixty days and notwithstanding the assignment made to trustees, still a corporate body, liable to be sued and to have its property sold or administered for the satisfaction of debts, because it has not formally been dissolved, and because, although not formally dissolved, I am not satisfied it might not still be a corporation for the purpose of being wound up, or sued for the purpose of reaching its property and effects in satisfaction.

The general purport of the act is to enable depositors and other creditors, notwithstanding a forfeiture of the charter, to recover their debts, while the argument for the bank is that such persons have absolutely forfeited their claims, or that their only redress is now against the trustees.

I think this is not so. Then it was argued that at any rate the service upon Mr. Allan, fo the reasons before stated, was invalid.

It is clear by section 8 that the directors last elected still remain in office, at any rate until they resign it, and Mr. Allan, it is said, has not resigned; and it is clear by section 7 that the president whom the directors elect is to remain in office as such president *during the same period* as the directors remain in office, so long, at any rate, as they remain in office under the 7th section, which is for the ensuing twelve months from the annual meeting and election of directors on the 25th of June. But I am opinion that on a fair construction of the act the president, who must also be a director, remains in office as such president when a failure to elect directors has taken place, until the new election of directors, and the appointment of a new president has been made.

If this were not so, great difficulty might perhaps be occasioned by the loss of an integral part of the corporation.

If I am in error on either point the application can of course be reversed in the full court.

In the meantime I discharge the summons, and as it was moved with costs I discharge it with costs.

*Summons discharged with costs.*

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### De Blaquiere et al. v. Cottle et al.

*Notice of trial—Irregularity.*

A notice of trial was given for the 21st day of *September* instead of *October*. On an application to set it aside as irregular, the judge, though thinking the notice irregular, declined making an order to set it aside, preferring to let the parties proceed at their own risk.

*Semble*, that a notice intituled in the Queen's Bench "*for the next sittings of this Court*" was irregular.

[Chambers, October 21, 1867.]

Notice of trial intituled in the Queen's Bench was given in this cause "for the next sittings of this court, to be holden at the Court House in the Town of Woodstock, in and for the County of Oxford, on Monday, the 21st day of September, A. D. 1867. Dated the —— day of —— A D. 186—," and was served on the defendants attorney on the 24th of September.

A summons was taken out on the 16th of October, calling upon the plaintiffs to show cause why the copy and service of the paper purporting to be a notice of trial, should not be set aside for irregularity, in that the notice was given for the trial of the cause on Monday, the 21st of September, and no assizes were to be held on that day.

The assizes were fixed for Monday, the 21st of *October*, and the alleged irregularity was in specifying September instead of October.

*W. Sidney Smith*, shewed cause.

*C. S. Givens*, contra.

Adam Wilson, J.—The notice of trial is intituled in the *Queen's Bench*, and it is for the next sittings *of this Court*, to be holden at Woodstock. If the notice had been objected to upon that ground it would most likely have been held to be irregular, for the Court of Assize and *Nisi Prius* is quite a different Court from the Court of Queen's Bench, *Cross* v. *Lang*, 1 Dowl. 342. The only irregularity complained of in the summons is that the month is mistaken.

The notice would have been sufficient if it had been merely "for the next assizes to be holden at the Court House, in the Town of Woodstock, in and for the County of Oxford," without specifying any day, provided there had been a date to the notice, so that the particular sitting might have been clearly known, and perhaps it might have been sufficient even without the date, if the service or delivery can be considered as sufficiently indicating from what period the next assizes are to be computed or are to have relation; see *Henbury* v. *Rose*, 2 Str. 1237. The object of the notice is clearly and unequivocally to inform the party served, that the other party intends to proceed to trial at a certain time and place.

A notice of trial dated in Easter Term, 1856, for the second sittings in Easter Term *next*, was held to be sufficient, "next" being treated as surplusage, and it being considered that the defendant must have known that Easter Term of 1856 was meant, though he swore he thought it to be E. T., 1857, *Fenn* v. *Gunn*, 6 E. & B. 656.

It is said the defendant is not bound to return an irregular notice of trial, and that he does not waive any right by retaining it—that it is merely a matter of courtesy to return it, *Dernam* v. *Ibbotson*, 3 M. & W. 431, 6 Dowl. 547; but see *Brown* v. *Whitfall*, 8 Dowl. 592. Notwithstanding the service of the notice for the 21st of September, the plaintiff might, without withdrawing or countermanding that one, have served a fresh regular notice for the 21st of October, and proceeded upon it, *Fell* v. *Tyne*, 5 Dowl. 246.

I incline to think that in strictness the notice is irregular, but as the assizes take place this day, it will be better not to set aside the notice or service, but leave the parties to proceed at their own risk.

The summons came first before me on Thursday the 17th inst., but as I was engaged at the York Assizes, and was the only judge then in Town, I could not find time to dispose of the case before this day. If the defendants are inconvenienced by the lateness of my judgment, they have brought it on themselves by the delay in their application, whether purposely or not it is of no consequence to say.

I regret the delay on the plaintiffs' account, and I do all I can for them by not interfering with their proceedings, if they choose to run the risk of them. I granted the summons for only one ground of irregularity, but Mr. Givens said he mentioned the ground also as to the *sittings of this court*. I understood him to say his objections were the use of the word *sittings* in place of *assizes*, and not to the sittings *of this Court*. This being so, he should not on account of my misapprehension be prevented from relying on that ground if he have to move the full court hereafter, as he would be if he had not now taken the objection.—*Farmer* v. *Mountford*, 9 M. & W. 100.

I shall at present make no order.

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## CHANCERY CHAMBERS.

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

### Cossey v. Ducklow.

*Practice—Printing bills of complaint—Taking off files for irregularity—Setting aside—Service—Costs.*

Where the office copy of a bill of complaint served upon a defendant was not printed in accordance with the general orders of February 6, 1865, the service was set aside with costs.

It is irregular to move in Chambers to take a bill off the files because the prayer is unintelligible.

Although the Registrar or Deputy Registrar may have filed a bill not printed in compliance with the orders of Court, a motion to take such bill off the files for such non-compliance is regular.

*S. H. Blake* on behalf of the defendant Peter Ducklow moved in Chambers that the bill of complaint filed in the cause at Stratford be taken from the files of the Court for irregularity upon the following grounds: that dates and sums were therein printed in words and not in figures; that it was not printed on paper of the proper size and in the kind of type required by the orders of Court; that the prayer is unintelligible, and that it does not appear what relief is sought thereby, or that the service of the said bill be set aside on the above grounds, and on the ground that in the prayer a foreclosure is asked for, whereas the office copy of the bill

served is endorsed as if a sale only were prayed for.

Mr. Blake, in support of the motion, said that it was not purely a technical motion. It was highly important that the orders of Court in respect of procedure should be strictly observed and performed. The Court of Error and Appeal, the highest court in the land, required appeal books to be printed on paper of a certain size, and with type of a particular sort, and that court had more than once rejected appeal books because they were not so printed. The orders of this court of February, 1865, were explicit and must be observed.

He put in affidavits showing that the bill filed was printed with long primer instead of pica type, and showing that the office copy of said bill produced, and marked as an exhibit, was the office copy served on the defendant Peter Ducklow.

*Moss*, for plaintiff, submitted that there was no sufficient evidence that the original bill on the files was a printed bill, and that the office copy of bill produced is an office copy of the original. The original bill filed may be wholly written for anything that appears in evidence. He contended that the orders of February, 1865, imposed their own penalty, viz., that no costs of any improperly printed proceeding should be allowed. The orders would be inconsistent if such a motion as this were allowed, and the bill ordered to be taken off the files, as the penalty was provided for by the orders themselves. The particular penalty imposed by the orders was the only penalty that the Court would enforce, and it seemed quite heavy enough for the purpose intended.

The orders in question only applied to the Registrar at Toronto, and not to Deputy Registrars.

In any event the bill could not be taken off the files, as the evidence was insufficient to prove any irregularity in the bill filed, and service would be disallowed simply without costs, if the Secretary thought the action a proper one as to so much of it as related to the disallowance of the service.

*Blake*, in reply, said that it was only necessary to produce the office copy itself in order to prove the nature and form of the original bill on the files. The office copy of a bill is in the nature of a record, and proves itself on mere production. A printed office copy till duly certified is to be taken as an office copy of a printed original bill, and not of a bill wholly written, or partly written and partly printed.

The orders referred to all pleadings, whether filed with the Registrar or with the Deputy Registrar.

The rule was plain—nothing had been said or done to alter or vary it. The orders were not confined to the penalty named in them. The Court might, if it thought proper, impose any further penalty, and would take the most stringent means to enforce obedience to its orders. The defendant Ducklow has a right to ask the Court to compel the Deputy Registrar to comply with the order, or to put the defendant in the same position as if the Deputy had refused to comply with it.

The Secretary.—I do not think I can order the bill to be taken off the files, as there is no evidence before me that the original bill filed is printed in improper type, or even that it is printed at all. The argument, that as the office copy is printed I must assume that the original is printed, otherwise the copy served would not be an office copy, is untenable. It is not necessary that an office copy should be a fac-simile of the original.

I must, however, set aside the service upon the defendant Ducklow. The orders are plain and explicit in their terms, that pleadings and all other proceedings may be written or printed, or partly written and partly printed—that when printed, dates and sums occurring therein are to be expressed by figures instead of words—that they are to be written or printed on good paper of the size and form heretofore in use, and if printed they are to be printed in pica type.

Here the office copy is neither printed in pica type nor on paper of the proper size, and though wholly printed, dates and sums are not expressed by figures, but in words. The Deputy Registrar having filed the bill is no bar to the motion. It is true the order is express that he is not to file any bill which does not comply with its requirements, but he having neglected his duty is no reason why the Court should not interfere to enforce obedience of its own rule.

In the course of the argument it was urged that the only penalty for disobedience to the order is that the solicitor filing an irregularly printed bill cannot get the costs. The defendant might have abstained from making the present motion, and then in the event of the plaintiff obtaining a decree with costs, have objected on the taxation to any costs being allowed for the bill or the office copies, and I think the taxing officer would be bound to give effect to the objection, even though the bill had been received and filed by the Deputy Registrar, but I think there is nothing to prevent the defendant making the present motion if he choose to take such a course.

As to so much of the motion as seeks relief on the ground that the prayer of the bill is unintelligible, I cannot, I think, deal with it on a Chamber application. If such applications could be made in Chambers I fear the Chamber business of the Court would be increased to an alarming extent.

The plaintiff must pay the costs of the motion.

## ENGLISH REPORTS.

### CROWN CASES RESERVED.

### Reg. v. Jarvis.

*Evidence—Confession on inducement—Admissibility.*

The prosecutor called the prisoner to his room, and said, "Jarvis, I think it is right I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police, and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue." A letter was then produced which Jarvis said he had not written, and the prosecutor then added, "Take care Jarvis, we know more than you think we know."

*Held*, that the answer of the prisoner in the nature of a confession was admissible in evidence.
[Nov. 23, 1867.—17 L. T., N. S., 178.]

Case reserved for the opinion of this Court by the Recorder of London, at a session of the Central Criminal Court held on the 8th July 1867 and following days.

Frank Jarvis, Richard Bulkley, and Wilford Bulkley were tried upon an indictment for feloniously stealing 138 yards of silk and other property of William Leaf and others, the masters of Jarvis.

There was a second count in the indictment for feloniously receiving the same goods.

William Leaf was examined, and said,

"The prisoner Jarvis was in my employ. On the 13th of May we called him up, when the officers were there, into our private counting-house. I said to him, 'Jarvis, I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police, and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault, you may not add to it by stating what is untrue.' I produced a letter to him which he said he had not written, and I then said, 'Take care Jarvis, we know more than you think we know.' I do not believe I said to him 'You had better tell the truth.'"

Counsel for the prisoner Jarvis objected to any statement of his, made after the above was said, being received in evidence, and referred to *Reg.* v. *Williams*, 2 Den. 433; *Reg.* v. *Warringham*, 15 Jur. 381; and *Reg.* v. *Garner*, 1 Den. 329; *Reg.* v. *Shepherd*, 7 C. & P. 579; *Reg.* v. *Muller*, 3 Cox C. C. 507.

Counsel for the prosecution referred to *Reg.* v. *Baldry*, 2 Den. 430; *Reg.* v. *Sleeman*, Dears. 259; and *Reg.* v. *Parker and others*, L. & C. 42.

I decided that the statement was admissible.

The jury found Jarvis guilty, adding that they so found upon his own confession, but they thought that confession prompted by the inquiries put to him.

At the request of counsel for Jarvis, I reserved for the Court for the consideration of Crown Cases Reserved the question whether I ought to have admitted the statements of the prisoner in evidence against him.

If I ought not to have done so, the conviction should be reversed.

Russell Gurney, Recorder of London.

*Coleridge*, Q.C. (*Straight* with him), for the prisoner.—It is submitted that the prisoner's confession ought not to have been received in evidence. The rule is that every confession must be free and voluntary on the part of the accused: but if it is induced by any promise or threat on the part of the prosecutor, it is not receivable in evidence; *Reg.* v. *Baldry*, 19 L. T. 146. It is incumbent on the prosecution to show that the confession was free and voluntary, per Parke, B. (see note to report of *Reg.* v. *Baldry*, 2 Den. 430). The motive or intention of the prompter is immaterial, the question being what effect the inducement had or was likely to have on the mind of the accused. Different reasons for the rule have been assigned by Eyre, C. J., in *Warickshall's case*, 1 Leach C. C. 298, and by Pollock, C. B., in *Reg.* v. *Baldry*. Now, in the present case, the prosecutors were extremely anxious to get some information from Jarvis to criminate the other two persons, the Bulkleys, and it must be remembered that Jarvis was only a youth. The substance of what passed amounted to this: That the prosecutor intimated that if he did not tell the truth it would be worse for him, and if he did it would be better. If what passed had any influence, however slight, on the prisoner's mind, the confession was inadmissible. In *Reg.* v. *Baldry* the words used left it to the prisoner to speak out or not, as he chose. *Reg.* v. *Garner* is also a clear case on the opposite side of the line to *Reg.* v. *Baldry*. The learned counsel then referred to *Reg.* v. *Williams*, 3 Russ. on Crimes 377; *Reg.* v. *Sheppard*, 7 C. & P. 579; *Reg.* v. *Warringham* (*supra*); *Reg.* v. *Parker*; Leigh and Cave, 42.

*Giffard*, Q.C. (*Grain* with him), for the prosecutor was not called upon to argue.

Kelly, C.B.—I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself, and that we ought to see that no one is induced, either by a threat or a promise, to say anything of a criminatory character against himself. So, on the other hand, I watch jealously every attempt to break in upon those rules and decisions that have been laid down for public justice. In this case I have listened to the very able argument of Mr. Coleridge, but when I look at the question before us I entertain no doubt upon it. Do the words used by the prosecutor, when substantially, fairly, and reasonably considered, import a threat or promise to the accused, according as he should answer? To my mind, they appear to operate only as a warning to put the accused on his guard as to how he should answer, and not as a threat or promise. In the first place, they are not so much an exhortation to confess as advice given, and the reason of the advice is also given. It amounts to this: "We are going to put certain questions to you, and I advise you that if you have committed a fault you do not add to it by stating what is untrue." So far the words used are not within any rule of law that would prevent the answer from being admissible in evidence. Then we come to the rest of the words. A letter was then produced by the prosecutor, which the accused said he had not written, and the prosecutor then said, "Take care, Jarvis, we know more than you think." That was only an additional caution to the prisoner not to add the guilt of falsehood to the other fault. In many of the reported cases the words used seem to have acquired a technical signification; but the words used in this case have no such meaning; they seem to me to import advice only to the accused, and not a threat or promise. The conviction, therefore, must be affirmed.

The other judges concurred.

Conviction affirmed.

# DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

FOR THE MONTHS OF MAY, JUNE AND JULY, 1867.

(*Continued from page* 335, *Vol. III. N.S.*)

Landlord and Tenant.

1. One who agrees to let, impliedly promises that he has a good title to let.—*Stranks* v. *St. John*, Law Rep. 2 C. P. 376.

2. In a lease, the lessee covenanted not to assign without license, and the lessor covenanted not to withhold his license "unreasonably or vexatiously." *Held*, that it was unreasonable and vexatious in the lessor to refuse his license to assign to a person wholly unobjectionable, his object in refusing being avowedly his wish to get a surrender of the lease for the purpose of rebuilding. The court decreed the lessor to concur in the assignment, and directed an inquiry to assess the damages to be awarded to the assignee for refusal of the license.—*Lehmann* v. *McArthur*, Law Rep. 3 Eq. 746.

3. The city council of M. were empowered by statute to order streets to be paved by the owners of the adjoining premises, and, in case of their default, to do the work themselves, and to charge the respective owners with their proportionate part of the expenses; and, as an additional remedy, the council were empowered to require payment from any tenant or occupier, to be levied by distress, and it was made compulsory on the owner to allow such payments to be deducted from the rent. Premises in G. street were demised by the plaintiff to the defendant at a "clear yearly rent," the defendant covenanting to "pay and discharge all taxes, rates, assessments and impositions whatever, which during the term should become payable in respect of the demised premises." Subsequently the council gave notice to have G. street paved. The plaintiff neglecting to do the required work, the council caused it to be done, and the plaintiff paid his proportional share of the expense. *Held*, that the payment having been made by the plaintiff, not for a rate, assessment or imposition, payable in respect of the premises, but for breach of duty imposed on him by statute, he could not compel the defendant, under his covenant, to repay him the amount.—*Tidswell* v. *Whitworth*, Law Rep. 2 C. P. 326.

*See* Illegal Contract.

Legacy.

1. Testatrix, a markswoman, made a will shortly before her death, in which the only bequest was a gift of her "personal property, consisting of money and clothes." Beside cash and clothes, she owned at her death money out on mortgage, money secured on a promissory note, and a reversionary interest in a sum of cash. *Held*, that the words "consisting of money and clothes" did not cut down the preceding general words, and that the whole of her personal estate passed by the will.—*Dean* v. *Gibson*, Law Rep. 3 Eq. 713.

2. A testator gave the money to be received under a life-policy, which, at the date of the will, would have amounted to £6,416, to trustees, on trust, to invest it in government securities, pay the income to his wife for life, and, after her death, to pay thereout two sums of £2,000 each, which he had covenanted to settle on his daughters; and he gave £1,000, part of the residue, to A., £1,000 to B., and "£416, residue and remainder of the moneys to be received under the policy, after payment of the said four several sums of £2,000, £2,000, £1,000, and £1,000, with any future additions that may be made on the policy," to C. $6,532 was received under the policy, and invested in reduced three per cents at ninety-four. At the widow's death, the stock had fallen to eighty-nine. *Held*, that the legacy to C. was a specific legacy of £532, and that, therefore the legacies to A., B., and C., must abate ratably.—*Walpole* v. *Apthorp*, Law Rep. 4 Eq. 37.

*See* Devise; Estate by Implication; Mortmain, 1, 2; Power; Will, 5–8.

Legacy Duty.—*See* Administration, 3.

Letter of Credit.—*See* Bills and Notes.

License.—*See* Negligence, 2.

Lunatic.—*See* Nullity of Marriage.

Maintenance.—*See* Trust, 3.

Manslaughter.—*See* Autrefois Convict.

Marriage. — *See* Cruelty; Desertion; Frauds, Statute of, 2; Nullity of Marriage.

Married Woman.—*See* Husband and Wife.

Marshalling of Assets.

Policies issued by an insurance company provided that the capital of the company should alone be liable to claims in respect of the policies. The company was wound up, and the capital applied in paying dividends on the debts due to policy holders and general creditors, *pari passu*. *Held*, that the doctrine of marshalling did not apply, and no calls could be made on the shareholders for the purpose of recouping to the policy holders the amount of capital which had been paid to the general creditors; but that a call should be made only

to pay the balance due the general creditors, including those shareholders who were general creditors. — *In re Professional Life Ins. Co.*, Law Rep. 3 Eq. 668.

Mines.

A reservation "of mines and minerals within and under" land includes stone used for road-making and paving, and quarries as well as underground mines.—*Midland Railway Co.* v. *Checkley*, Law Rep. 4 Eq. 19.

Misrepresentation—

1. A prospectus of a railway company stated that "the engineer's report may be inspected, and further information obtained, at the office." A. applied for shares on a printed form, which stated that he agreed to be bound by the conditions in the memorandum and articles of association. An examination of these papers would have given him the information, the want of which he alleged as a reason for rescinding his contract. Trusting to the statements in the prospectus, he did not examine them. *Held,* that his neglect to examine them was no answer on a bill by him to be relieved from his contract to take shares on the ground of misrepresentations and concealment in the prospectus.—*Central Railway Co.* v. *Kisch,* Law Rep. 2 H. L. 99.

2. The defendants' manager gave the plaintiff a guarantee, that, if he would supply D., a customer of theirs, with goods to carry out a government contract, they would pay D.'s check in the plaintiff's favor, on receipt of the government money, in priority to any other payment "except to this bank." D. then owed the bank £12,000, but the plaintiff did not know this, nor did the manager tell him. The plaintiff supplied goods to the value of £1,227; the government money to £2,676 was paid by D. into the bank; but the defendants refused to pay the plaintiff, and claimed to retain the whole in payment of D.'s debt to them. In an action for false representation and for money had and received, *held,* (1) that there was evidence for the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed the fact which would make it so; (2) that the defendants would be liable for such fraud in their agent; and (3) that the fraud was properly laid as the fraud of the defendants. Whether the plaintiff could have recovered under the count for money had and received, *quære.*—*Barwick* v. *English Joint Stock Bank*, Law Rep. 2 Ex. 259.

Mistake.

A. agreed to hire a fishery from B., A. and B. both believing that under a private statute it belonged to B. A. afterwards procured a copy of the statute, and found that by it the fishery belonged to himself. On cause petition by A. (in Ireland), praying that the agreement might be cancelled and for other relief, *held,* that the agreement should be cancelled as founded on mutual mistake, and that there should be a declaration of A.'s title.—*Cooper* v. *Phibbs,* Law Rep. 2 H. L. 149.

Mortgage.—*See* Admiralty, 2; Benefit Society; Foreign Court; Priority, 1, 2.

Mortmain.

1. A bequest to the trustees of a chapel in C., to be applied towards the erection of a new chapel in C. *Held,* that the bequest was not void as against the statute of mortmain, if there was land belonging to the trustees at the date of the will, on which a new chapel could be built in substitution for the old one.—*Booth* v. *Carter,* Law Rep. 3 Eq. 757.

2. A., being entitled to moneys secured by bond and mortgage, bequeathed all her property to her daughters, B., C., and D., whom she appointed executrixes. B. died before A.'s death, and C. died intestate soon after A.'s death, and D. became alone entitled to said moneys. The moneys were not called in during D.'s life, who by her will gave legacies to charities, *Held,* that the court would not assume, in favor of the charities, a conversion into pure personalty, which D. was not bound to make.—*Lucas* v. *Jones,* Law Rep. 4 Eq. 73.

3. A testatrix gave her property not applicable under her will for the purpose of mortmain to A., and B., his son, as joint tenants. She gave her property applicable for the purposes of mortmain to certain charities. She died possessed of large property, of which the greater part was realty. A. was her confidential adviser. It appeared from evidence that A. was aware of the gift in the lifetime of the testatrix, and that it was intended by her to be applied for charity, and that either by silence or acquiescence he had led her to suppose that it would be so applied. On bill by the heirs of the testatrix, *held,* that the gift to A. and B. could not be upheld, and that they were trustees for the plaintiffs.—*Jones* v. *Bradley,* Law Rep. 3 Eq. 635.

Negligence.

1. The plaintiff being on the premises of the defendant, a sugar-refiner, on lawful business, in the course of fulfilling a contract in which the plaintiff's employer and the defendant both had an interest, fell through an unfenced hole in the floor, without negligence on his part, and

was injured. The premises were constructed in the manner usual in the defendant's business; but the hole could, when not in use, have been fenced without injury to the business. *Held,* that the defendant was liable.—*Indermaur* v. *Dames,* (Exch. Ch.) Law Rep. 2 C. P. 311.

2. The declaration alleged that the defendants were possessed of land with a canal intersecting the same, and of bridges across the canal communicating with certain docks of the defendants, which lands and bridges were used, with the permission of the defendants, by persons coming to and from the docks; that the defendants wrongfully and improperly kept and maintained the land, canal, and bridges, and suffered them to be in so improper a state, as to render them unsafe for persons lawfully passing over the said land and bridges towards the said docks; and that G., lawfully passing over and using the bridges, through the wrongful, negligent, and improper conduct of the defendants, fell into one of the canals, and was injured. *Held,* that the declaration disclosed no actionable breach of duty by the defendants.—*Gautret* v. *Egerton,* Law Rep. 2 C. P. 371.

3. The defendant, under a contract with the Metropolitan Board of Works, opened a public highway for the purpose of constructing a sewer; three or four months after the work was finished, the plaintiff's horse was injured by stumbling in a hole in the road. The defendant had properly filled up the road; and the hole was owing to the natural subsidence which sometimes takes place, sooner or later, after such an excavation. *Held,* that the defendant was not liable for the damage; for that the obligation of the defendant, as between him and the public, ceased as soon as he had properly reinstated the road, it being the duty of the parish to look after the subsequent repairs, whether rendered necessary by subsidence or ordinary wear and tear.—*Hyams* v. *Webster,* Law Rep. 2 Q. B. 264.

4. The defendant, a contractor employed by a board of works to enlarge a sewer, made a dam in the sewer, the water above which was removed by pumping. Owing to his negligence in not working the pumps, the sewage flowed on to and injured the plaintiff's premises. *Held,* that the injury was occasioned by acts "done, or intended to be done, under the powers of a board of works," within 25 & 26 Vict. c. 102, sec. 106, and that the defendant was therefore entitled to a notice of an action.—*Poulsum* v. *Thirst,* Law Rep. 2 C. P. 449.

*See* Carrier, 1–4; Ship, 3.

Notice.—*See* Negligence, 4; Priority, 1, 2.

Nuisance.—*See* Watercourse, 1, 2.

Nullity of Marriage.

1. If the mind of a person entering into marriage appears to have been diseased, the court, on a petition for nullity, will *not* consider the extent of the derangement.—*Hancock (falsely called Peaty)* v. *Peaty,* Law Rep. 1 P. & D. 335.

2. Where a guardian *ad litem* had been assigned to a lunatic, a petitioner for nullity of marriage, the court declined, during the hearing of the petition, to adjourn the case on the respondent's application, suggesting the petitioner's recovery, and her desire for the discontinuance of the suit, or to appoint two medical men to examine her; but, after being satisfied by the evidence that she was insane at the time of the marriage, postponed the decree, to give the respondent an opportunity of establishing the fact of the petitioner's recovery; and intimated, that, if satisfied of her recovery, it would not pronounce a decree except at her instance. After three weeks, the guardian *ad litem* obtained a rule for the respondent to show cause why a decree should not be pronounced; and the respondent not showing cause, a decree of nullity was pronounced.—*Ib.*

Payment.—*See* Principal and Agent, 2.

Penalty.—*See* Benefit Society.

Pilot.—*See* Ship, 3.

Pleading.—*See* Admiralty, 1; Award, 4; Composition Deed, 1; Equity Pleading and Practice, 1–3; Misrepresentation, 2; Release.

Power.

A testator gave all his property to his wife for life, and directed her to pay his debts, and, "at her decease, to make such distribution and disposal of my then remaining property among my children as may seem just according to her discretion." *Held,* a power to the wife, exercisable by will only, to appoint in favor of the children living at her death.—*Freeland* v. *Pearson,* Law Rep. 3 Eq. 658.

*See* Trust, 3; Will, 4.

Practice.—*See* Equity Pleading and Practice Probate Practice.

Prescription.—*See* Watercourse, 1.

Principal and Agent.

1. One J., by the authority of the promoters of a proposed railway company, and by means of a check signed by them, obtained from the plaintiff money to pay parliamentary fees, on an agreement expressing that it was "to be repaid out of the calls on shares." The act incorporating the company was passed, the pro-

moters being named as the first directors; and at a subsequent meeting the directors adopted the acts of J. No shares were allotted or calls made, and the undertaking was not proceeded with. *Held*, that the promoters were personally liable, notwithstanding the subsequent adoption of their acts. — *Scott* v. *Lord Ebury*, Law Rep. 2 C. P. 255.

2. A., having bought goods of B. through a broker, paid for them to the broker, partly by an advance on his general account with the broker before the delivery of goods, and partly by cash on a settlement of accounts after the delivery. The broker did not pay over the money to B., and became bankrupt. In an action by B. against A. to recover the price of the goods, except so much as had been paid in cash, *held* (reversing the judgment of the Court of Common Pleas), that it was a question for the jury, whether payment to a broker in advance was a good payment as against the principal, depending on the custom of the trade; and the question not having been left to the jury, a new trial was ordered.—*Catterall* v. *Hindle*, (Exch. Ch.) Law Rep. 2 C. P. 368.

*See* Bill of Lading; Interest, 1; Misrepresentation, 2; Railway, 1.

Priority.

1. Personal property was settled on such terms as A. should appoint, and was appointed by A. to trustees in trust for S. The property remained under the control of the trustees of the original settlement. *Held*, that a mortgagee of S.'s interest, who gave notice of his mortgage to the trustees under the appointment, but not to the trustees under the original settlement, should be postponed to a subsequent mortgagee, without notice of the prior mortgage, who had given notice to both sets of trustees.—*Bridge* v. *Beadon*, Law Rep. 3 Eq. 664.

2. A testator, in 1832, devised copyhold estate, subject to a mortgage, to his wife for life, and then to his children. The will was never proved, and no notice of it was entered on the court rolls. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851, the son falsely representing himself to be in possession as heir to his father, procured a further advance on mortgage, the original mortgage being transferred to the second mortgagee. The widow died in 1860. *Held*, that the mortgagee, having the legal estate and having no notice of any adverse title, was entitled to tack his further advance.—*Young* v. *Young*, Law Rep. 3 Eq. 801.

3. The 17 & 18 Vict. c. 36, sec. 1, provides that every bill of sale not registered within twenty-one days shall be void as against the assignees in bankruptcy, and the execution creditors of the person making the bill of sale, as to any goods then in his possession. A. made a bill of sale to S., which was not registered; afterwards he made another bill of sale of the same goods to H., which was registered. Execution having issued against A., S. and H. both claimed the goods; and an order was made by which the execution creditors were barred, and the goods ordered to be delivered to H. *Held*, that the order was right, and that S. could not set up his bill of sale against H.; for that the consequence of avoiding an unregistered bill of sale by execution is to displace the security altogether. — *Richards* v. *James*, Law Rep. 2 Q. B. 285.

Probate Practice.

1. Probate will not be granted of a will disposing of real property only, though it appoints an executor, and gives the real estate to him, to be converted into personal estate.—*Goods of Barden*, Law Rep. 1 P. & D. 325.

2. An executor who has proved a will in common form cannot take proceedings to call its validity in question. He cannot, therefore, cite those interested under it to propound it in solemn form, or show cause why the probate should not be revoked. The executor of an executor is in the same position in this respect as the original executor. —*Goods of Chamberlain*, Law Rep. 1 P. & D. 316.

*See* Administration, 1, 2.

Production of Documents.

1. A defendant cannot refuse to produce private and confidential letters from a stranger, on the ground that the writers forbid their production; but the plaintiff will be put on an undertaking not to use them for any collateral object.—*Hopkinson* v. *Lord Burghley*, Law Rep. 2 Ch. 447.

2. On a motion in a cause in admiralty, by the defendants, for leave to inspect certain letters between the plaintiff and his agent, the judge directed them produced for his own inspection before granting the application.—*The Macgregor Laird*, Law Rep. 1 Adm. & Ec. 307.

Promissory Note.—*See* Bills and Notes; Trust, 2.

Proximate Cause.

On the trial of an action for a reward, offered by the defendant, "to any person who will give such information as shall lead to the apprehension and conviction of the thieves" who had stolen watches and jewelry from his shop, it appeared, that, about a week after the theft, R., having brought one of the stolen watches

to the plaintiff's shop, the plaintiff gave information, and R. was apprehended the same day; that, after two or three days, R., being in custody, told where some of the thieves would be found; that there they were apprehended a week afterwards; that they were subsequently convicted of the theft, and that R. was convicted as receiver. *Held*, that the judge had properly left the evidence to the jury, pointing out the remoteness of the information; and that a verdict for the plaintiff ought not to be set aside. — *Turner* v. *Walker*, (Exch. Ch.) Law Rep. 2 Q. B. 301.

Railway.

1. The general manager of a railway has authority to bind the company to pay for medical attendance for a servant of the company injured by an accident on the railway.—*Walker* v. *Great Western Railway Co.*, Law Rep. 2 Ex. 228.

2. A railway company gave a bond to a contractor, who transferred it to the plaintiff, to secure an advance then made to him by the plaintiff. The plaintiff having in the name of the obligee brought an action on the bond, it was compromised before judgment, on the company's transferring to him all their rolling stock as security. The rolling stock was transferred accordingly, but was subsequently seized by the defendant, an execution creditor of the company. On the trial of an interpleader issue before the plaintiff and defendant, *held*, (1) that evidence was not admissible to impeach the original legality of the bond; (2) that the conveyance of the rolling stock to the plaintff was valid as against the defendant.—*Blackmore* v. *Yates*, Law Rep. 2 Ex. 225.

*See* Carrier; Specific Performance.

Release.

To an action of debt the defendant pleaded a release of all "actions, suits, claims, and demands," which release had been given since the commencement of the suit. *Held*, that the release discharged not only the debt, but also damages for its detention and costs, and therefore was properly pleaded as a defence to the whole action. — *Tetley* v. *Wanless*, (Exch. Ch.) Law Rep. 2 Ex. 275.

Repeal of Statute.—*See* Bankruptcy, 5.

Revocation of Will.—*See* Will, 3.

Reward, Action for.—*See* Proximate Cause.

Sale.

1. A. contracted to supply B. with goods, "delivering on April 17, complete 8th May." A. made no delivery on the 17th; and B., on the following day, rescinded the contract, and refused subsequent tenders of the goods. The plaintiffs having brought an action for non-acceptance, *held*, that if, on the true construction of the contract, A. was bound to commence delivery on April 17th, the defendants were entitled to rescind for failure to deliver on that day; *Held*, further, (by Kelly, C. B., and Pigott, B.), that the contract did not bind the seller to commence delivery on the 17th, but only to deliver at reasonable times between April 17th and May 8th; (by Martin and Bramwell, B.B.), that it did bind the seller to commence delivery on the 17th.—*Coddington* v. *Paleologo*, Law Rep. 2 Ex. 193.

2. The plaintiff sold the defendants 128 bales of cotton, marked $\frac{\text{D. C.}}{\text{c.}}$ at 25*d.* per lb., "expected to arrive per Cheviot, the cotton guaranteed equal to sample. Should the quality prove inferior to the guarantee, a fair allowance is to be made." The sample was of "Long-staple Salem" cotton. The 128 bales marked $\frac{\text{D. C.}}{\text{c.}}$ which arrived by the Cheviot, contained "Western Madras" cotton. Western Madras cotton is inferior and of less value than Long-staple Salem, and requires different machinery for its manufacture. *Held*, that the defendants were not bound to receive the cotton, the allowance clause referring to inferiority of quality only, not to difference of kind.—*Azemar* v. *Casella*, Law Rep. 2 C. P. 431.

*See* Frauds, Statute of.

Satisfaction.—*See* Will, 5.

Scire Facias.

The court cannot refuse to issue a *sci. fa.* to obtain execution, on the ground that the judgment is erroneous on its face.— *Williams* v. *Sidmouth Railway and Harbor Co.*, Law Rep. 2 Ex. 284.

Sentence.—*See* Conviction.

Separate Estate.—*See* Husband and Wife.

Ship.

1. Goods were shipped under a bill of lading, containing the usual exceptions of "all dangers and accidents of the sea and navigation of what kind and nature soever." The goods were injured during the voyage by rats, though the ship-owner had taken all possible precautions to prevent it. *Held*, that the ship-owner was liable.—*Kay* v. *Wheeler*, (Exch. Ch.) Law Rep. 2 C. P. 302.

2. By a bill of lading, freight was to be paid, "one-third in cash on arrival at B., and two-thirds on right delivery of the cargo, by bills at four months, or cash, deducting usual interest, at the option of the shippers." The vessel arrived at B. The one-third freight was paid,

and the shipper declared his election to pay the remaining two-thirds in cash less interest. *Held*, that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts; and that the master was not bound to deliver the cargo unless the consignee paid, or was ready and willing at the same time to pay, the balance of the freight.—*Paynter* v. *James*, Law Rep. 2 C. P. 348.

2. To obtain the benefit of the 17 & 18 Vict. c. 104, sec. 388, exempting the owner of a ship having, by compulsion of law, a pilot on board, from liability for damage by default of the pilot, it is not enough to show that the pilot was in fault, but also that there was no default on the part of the master and crew, which might have in any degree been conducive to the damage; therefore, where the master and crew neglected to keep a good look-out, and such neglect conduced to a collision, the owners were *held* liable. The duty of a pilot is to attend to the navigation, and of the master and crew to keep a good look-out.—*The Iona*, Law Rep. 1 P. C. 426.

*See* ADMIRALTY; BILL OF LADING; FOREIGN COURT; INSURANCE; STOPPAGE IN TRANSITU.

SOLICITOR.

An agreement between a solicitor and a client, that the solicitor shall be paid a fixed salary, clear of all office expenses, and including all emoluments, he paying to the client any surplus of receipts over payments, and that the solicitor shall transact no professional business for any other client, is not opposed to the policy of the law.—*Galloway* v. *Corporation of London*, Law Rep. 4 Eq. 90.

SPECIAL PERFORMANCE.

A. made an agreement as to crossings on a railway running through his land, the agreement was not carried into effect. *Held*, that he could not, on the ground of any general right, claim to have the crossings made at the discretion of the court of chancery.—*Earl of Darnley* v. *London, Chatham and Dover Railway*, Law Rep. 2 H. L. 43.

*See* HUSBAND AND WIFE, 2; VENDOR AND PURCHASER OF REAL ESTATE, 1.

STATUTE OF FRAUDS.—*See* FRAUDS, STATUTE OF.

STATUTE, REPEAL OF.—*See* BANKRUPTCY, 5.

STOPPAGE IN TRANSITU.

Goods were shipped by the vendor on a general ship, belonging, as the vendor knew, to the purchaser. Three parts of the bill of lading, by which the goods were delivered at G. to the purchaser or assigns, were handed to the vendor, and the fourth retained by the master. *Held*, that the right to stop *in transitu* before delivery at G. was gone.—*Schotsmans* v. *Lancashire and Yorkshire Railway Co.*, Law Rep. 2 Ch. 332.

*See* EQUITY, 1.

SUCCESSION DUTY.—*See* ADMINISTRATION, 3.

SURETY.

A surety who has signed a bond, on the faith of its being signed by the principal debtor also, is bound, though the principal has never signed it, if the principal has executed an instrument on which the creditor may sue him, and become a specialty creditor of his.—*Cooper* v. *Evans*, Law Rep. 4 Eq. 45.

*See* GUARANTY.

THREAT.

Forcing a builder by threats to discharge a workman because he was not a member of a trade's union, is punishable under 6 Geo. IV. c. 129, sec. 3, which prohibits forcing a master by threats "to limit the *description* of his workmen.—*Skinner* v. *Kitch*, Law Rep. 2 Q. B. 339.

TRUST.

1. Money was, without valuable consideration, given to a trustee, to be held on certain trusts then declared, and it was agreed that the transaction should be ratified and completed by a deed; and a deed was afterwards executed wholly inconsistent with the trusts declared by parol. The court ordered the deed cancelled, and the money repaid to the settler who had executed the deed in ignorance of its legal effect—*Lister* v. *Hodgson*, Law Rep. 4 Eq. 30.

2. E., by voluntary deed, in 1858, assigned certain property and "all other her personal estate" to R. absolutely, and appointed R. her attorney, in her name, but for R.'s sole benefit, to sue for the assigned premises, and to do all acts necessary for deriving the full benefit of the assignment. E. owned certain promissory notes, which were not mentioned in the deed. Shortly after E. died. On R.'s death, in 1864, these notes were found in his possession, but not indorsed to him; there was no evidence of any delivery of them by E. to R. *Held*, that the property in the notes passed by the deed to R., on the principle that the deed operated as a complete declaration of trust by E. of all her personalty property in favor of R.—*Richardson* v. *Richardson*, Law Rep. 3 Eq. 686.

3. By a marriage settlement, trustees were to hold £2,000 (coming from the wife's father) on trust, after the wife's death, for her children, their shares to be vested at twenty-one or marriage; with a proviso, that, till the principal should be payable to the children, the

trustees should apply the whole, or so much of the dividends as they should think fit, for the education or maintenence of the children. The wife died, leaving one child. *Held*, that this was a discretionary trust for maintenance, and not simply a power, and that the father was entitled to an allowance for past and future maintenance of his child, without reference to his ability to provide such maintenance, and an inquiry was directed as to the amount to be so applied. — *Ransome* v. *Burgess*, Law Rep. 3 Eq. 773.

*See* Charity; Mortmain, 3; Priority, 1.

Vendor and Purchaser of Real Estate.

1. In a suit by a vendor for specific performance, it was certified that a good title was not shown; the court ordered a return to the defendant of his deposit money, with interest at four per cent, and declared the defendant entitled to a lien on the estate for the same and for his costs.—*Turner* v. *Marriott*, Law Rep. 3 Eq. 744.

2. The plaintiff agreed to sell land to a railway company for a price payable on completion of the purchase, with interest at four per cent from the date of the agreement. The company were to be at liberty to take possession on making a certain deposit. If, from any other cause than the vendor's default, the purchase was not completed in six months, interest from the expiration of the six months was to be at the rate of five per cent. The deposit was made and possession taken. The company, when pressed to complete, more than three years after the agreement, alleged inability from want of funds. *Held*, that the plaintiff was not entitled to an order, on motion for payment of the balance of the purchase money into court.—*Pryse* v. *Cambrian Railway Co.*, Law Rep. 2 Ch. 444.

Voluntary Conveyance.—*See* Trust, 1, 2.

Waiver.—*See* Award, 7.

Warranty.—*See* Carrier, 1, 5.

Watercourse.

1. Where there is a prescriptive right to foul a stream, the fouling cannot be considerably enlarged to the prejudice of others; and the fact that the stream is fouled by others is no defence to a suit to restrain the fouling by one. — *Crossley & Sons* v. *Lightowler*, Law Rep. 2 Ch. 478.

2. C., wishing to prevent a river's being fouled by some dye-works, purchased from the owners of the works some land on the river, without telling them his object. *Held*, in the absence of any express reservation, by the owners of the works, of the right of fouling, C. could maintain a suit to restrain it.—*Ib.*

3. Where dye-works had not been used for twenty years, and had been allowed to fall into ruin, and there appeared no intention of erecting new ones, *held*, that the right of fouling a stream attached to them had been abandoned. and lost.—*Crossley & Sons* v. *Lightowler*, Law Rep. 2 Ch. 478.

Way.—*See* Negligence, 3.

Will.

1. A will filled the first and third pages of a sheet of paper, leaving no room on the third page for the signatures of the testator and witnesses, which were written crossways on the second page. *Held*, that the will was duly executed.—*Goods of Coombs*, Law Rep. 1 P. & D. 302.

2. Some slight alterations and interlineations appear on a holograph will; there was no evidence whether they were made before or after execution, except the affidavit of an expert, who thought them written when the will was. The court admitted them to probate.—*Goods of Hindmarch*, Law Rep. 1 P. & D. 307.

3. A will was found after a testator's death, but parol evidence was given that he had made a later will, which revoked the former, and which had remained in his custody and could not be found, and that he had declared an intention to destroy it. The court pronounced for an intestacy.—*Wood* v. *Wood*, Law Rep. 1 P. & D. 309.

4. A married woman made a will in pursuance of a will therein recited, leaving all the property comprised in the power to her son By a later will, containing no recital of a power and no words of revocation, she left all her property to her son. She had property other than that appointed by the first will on which the second will could operate. Probate was granted of both wills, as together containing the will of the deceased. — *Goods of Fenwick*, Law Rep. 1 P. & D. 319.

5. A., on the marriage of his daughter, M., covenanted to pay to trustees £10,000, with interest till payment, in trust to pay £200 a year to M. for life, the residue of the income to her husband; on the death of either, the whole income to the survivor, and, after the death of the survivor, to the children; if no child, and M. should survive her husband, to her absolutely; if she died in her husband's life, then as she should appoint, and, in default of appointment, to the next of kin. The principal was not demanded in A.'s life, but the interest was paid. A. afterwards made giving

his property to trustees, "in the first place, to pay his debts and legacies," and then to divide the residue into equal moieties, and to pay the income thereof to his daughters, M. and N., respectively, and, on the decease of either, to pay her moiety to such person (exclusive of her husband) as she should appoint. *Held,* that the gift in the will was not a satisfaction of the covenant, and that the £10,000 must be deducted before the division into moieties.—*Lord Chichester* v. *Coventry,* Law Rep. 2 H. L. 71.

6. A testator who had been twice married, and had three children by the first marriage and two by the second, gave his property to the five in equal shares, payable at twenty-one, with a gift over in case of death before the shares became payable; and he directed, that, if his *children* by his first wife, or either of them, should receive any moneys as the children of their mother, such moneys should be considered deducted from their shares, it being his wish that all his children should share, and share alike. After the eldest child had attained twenty-one, but before any of the rest had done so, the children of the first marriage became entitled to a fund as children of their mother. *Held,* that as the share coming to the eldest son could not be deducted from his share of his father's property, and as it was intended that the proviso in the will should affect all the children alike, no deduction should be made from the shares of any of the children of the first marriage.—*Stares* v. *Penton,* Law Rep. 4 Eq. 40.

7. Testator gave £20,000 to A. for life, with remainder, "in case F., the eldest son of A., shall be living," to F. for life, remainder to F.'s children, and, in default of children, to A.'s other sons, successively, in strict settlement. He also gave a share of the residue to A. for life, remainder to "all the children of A., except F." F. died in A.'s lifetime, unmarried, when B. became the eldest son of A. *Held,* notwithstanding, that B. was entitled to a share in the residue, and that the representatives of F. were excluded.—*Wood* v. *Wood,* Law Rep. 4 Eq. 48.

8. A testator gave his real and personal estate to trustees, as to one-fourth, to A. for life, and after her death to her children, and, in default of children, to B., C. and D., and their issue, in the same manner as thereinafter directed respecting their original shares; as to another fourth, to B. for life, and after his death to his children, and, in default of children, to A., C. and D., and their issue, in the same manner as directed respecting the original shares; as to another fourth, on trust for C. and her children, referring to the share of A. with the same expressions as are used in giving the fourth share; and the fourth share he gave on trust for D. and his children on the trusts, and subject to the powers and authorities, and with the like remainders over in default of issue, and similar, and in all respects corresponding with the trusts, powers and authorities expressed and declared concerning the share given to B. and his children as effectually as if the same trusts were there repeated. D. died unmarried. *Held,* that the fourth share went over to A., B. and C.—*Surtees* v. *Hopkinson,* Law Rep. 4 Eq. 98.

Witness.

To impeach the veracity of a witness, witnesses may be called to swear that they would not believe him on oath.—*The Queen* v. *Brown,* Law Rep. 1 C. C. 70.

*See* Administration; Devise; Legacy.

Words.

"*Claims and demands.*"—See Release.
"*Constructive Fraud.*"—See Fraud.
"*Mines and Minerals.*"—See Mines.
"*On*" *a day certain.*"—See Sale, 1.
"*On delivery.*"—See Ship, 2.
"*Suffer.*"—See Forfeiture.
"*Unreasonable or vexatious.*"—See Landlord and Tenant, 2.

## REVIEW.

The Canadian Parliamentary Companion. Edited by Henry J. Morgan. Fourth Edition. Ottawa: Printed by G. E. Desbarats, 1867. Price $1.

This is a new edition of a little work that is now well known to our public men. It appears to have been prepared with great care and attention. The information given is very useful, and is given in a compressed and portable form.

The work consists of two parts. In the first we have a description of the Governor General and Staff, the Privy Council of the Dominion, the Deputy Heads of Departments, and sketches of the Members of the Senate.

In the second part we have an explanation of Parliamentary terms and proceedings, which is not the least valuable part of the work. This is followed by a description of each member of the House of Commons, arranged according to name in alphabetical order. His titles and his politics, whether Conservative or Liberal, are given. There is also a short sketch of his life, the name of his constituency, its population, the name of his opponent, and his majority over his opponent. Some of the sketches are interesting. That of Sir John A.

Macdonald, the Premier of the Dominion, is particularly so. A list of the public measures introduced by him in the Legislature, and now law, and numbering no less than forty-seven, is given. This is a new feature in the work, and one which cannot be too highly commended.

A new edition of the work is promised early in February next. It will include notices of the members of the several local legislatures of the Dominion. In the edition now before us, however, there is a list of the members of the Local Government and Legislatures in each of the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick.

The editor, Mr. Morgan, has already, by his numerous works, acquired a name for industry, and ability which does him much credit. When we reviewed his first work we predicted a useful career for him, and it is satisfactiory to know that already our prediction has been to a great extent realized. We wish him all the success that his energy, ability and industry deserves.

## BOOKS RECEIVED.

The Law Times—(The Journal of the Law and the Lawyers)—and the Law Times Reports — 10 Wellington St. Strand, W. C. London.

The Solicitors' Journal and Weekly Reporter—59 Carry St., Lincoln's Inn, W. C. London.

These publications are received with much regularity. They still maintain the character which their excellent management has acquired for them.

Sessional Proceedings of the Association for the Promotion of Social Science—1 Adam Street Adelphi, W.C., London.

The Lower Canada Jurist—(collection de decisions du Bas Canada) under the Editorial management of S. Bethune, Q. C., P. R. Lafrenaye, F. W. Torrance and J. L. Morris, Montreal.

Lower Canada Reports, Quebec.

Suggestions with reference to the proposed new Act respecting Letters Patent for Invention, by Chas. Legge & Co., Montreal.

Philadelphia Legal Intelligencer. Edited by Henry E. Wallace, No. 607 Sansom Street.

Pittsburgh Legal Journal. Edited by Thos. J. Keenan, 117 Diamond Street.

New York Daily Transcript. Official organ of the Government of the City of New York.

Insurance and Real Estate Journal, New York

## CHANCERY SPRING SITTINGS.

*The Hon. Vice-Chancellor Mowat.*

| | | | |
|---|---|---|---|
| Toronto | Monday | Mar. | 16. |

*The Hon. the Chancellor.*

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|---|---|---|---|
| Goderich | Tuesday | Mar. | 31. |
| Stratford | Friday | April | 3. |
| Sarnia | Tuesday | April | 7. |
| Sandwich | Thursday | April | 9. |
| Chatham | Saturday | April | 11. |
| London | Wednesday | April | 15. |
| Woodstock | Monday | April | 20. |
| Simcoe | Thursday | April | 23. |

*The Hon. Vice-Chancellor Mowat.*

| | | | |
|---|---|---|---|
| Guelph | Tuesday | April | 7. |
| Brantford | Tuesday | April | 14. |
| St. Catharines | Thursday | April | 16. |
| Hamilton | Monday | April | 27. |
| Whitby | Monday | May | 4. |
| Cobourg | Thursday | May | 7. |
| Barrie | Monday | May | 11. |
| Owen Sound | Tuesday | May | 19. |

*The Hon. Vice-Chancellor Spragge.*

| | | | |
|---|---|---|---|
| Kingston | Tuesday | April | 21. |
| Brockville | Friday | April | 24. |
| Cornwall | Tuesday | April | 28. |
| Ottawa | Tuesday | May | 5. |
| Belleville | Tuesday | May | 12. |
| Peterborough | Tuesday | May | 19. |
| Lindsay | Friday | May | 22. |

As enquiries are often made by Barristers in the country for gowns and bags, it may be a benefit to them to call their attention to an advertisement, which appears in another place and speaks for itself.

As a rule, the forensic brotherhood is composed of genial, hospitable, jovial men. There have been some notable exceptions. Lord Eldon is often accused of stinginess, and the accusation was too true; yet he gave good dinners, and was very liberal with his choicest port. Lord Kenyon was always penurious, and became excessively so as he grew older. It was said that his domestic servants justly complained "that they were required to consume the same fare as their master deemed sufficient for himself." One wit said, "In Lord Kenyon's house, all the year through, it is Lent in the kitchen, and Passion Week in the parlor." The wine-drinking habits of the eighteenth century, and the first half of the nineteenth, largely infected the legal profession. The brothers Scott (Eldon and Stowell) were occasionally very heavy drinkers of port wine; and it is said of the former that even in his extreme old age he never drank less than three pints of port daily, with or after his dinner. This, too, is among the vices once prevalent in "society," which the greater refinement and self-restraint of modern times have happily all but eradicated. It would be hard now to find a judge who could confess that on the first day of every term he had drunk more than four bottles of wine. This acknowledgment Lord Stowell made to his son-in-law, dismissing the subject with, "more; I mean to say we had more. Now don't ask any more questions."