DIARY FOR JUNE.

1. Mon..Paper Day Q. B. New Trial Day C. P. Last day not trial for C. C. Recorder's Court sits.
2. Tues..Paper Day C.P. New Trial Day Q.B.
3. Wed..New Trial Day C. P.
4. Thurs.Re-hearing Term commences.
5. Frid..New Trial Day Q.B.
6. Sat....Easter Term ends.
7. SUN..*Trinity Sunday.*
9. Tues..Quarter Sessions and C. C. sittings in each Co.
11. Thurs.*St Barnabas.*
14. SUN..*1st Sunday after Trinity.*
20. Sat. ..Accession of Queen Victoria, 1837.
21. SUN..*2nd Sunday after Trinity.* Longest Day.
24. Wed..*St. John Baptist.* Appeals from Chancery Cham.
28. SUN..*3rd Sunday after Trinity*
29. Mon..*St Peter.*
30. Tues..Half-yearly School Returns to be made.—Dep. Registrar in Chancery to make returns and pay over fees.

THE

Canada Law Journal.

JUNE, 1868.

STATUTE BOOK OF ONTARIO.

The Statutes of the first Session of the first Parliament of Ontario have at length been issued — we may perhaps add, distributed, though, it does not appear to be the intention of the Government to supply them to Magistrates and others in the same lavish way that the General Statutes used to be. The tenth Section of the Interpretation Act makes a general provision for the distribution of the printed Statutes, directing copies to be sent to members of the Legislative Assembly in such numbers as may be ordered by resolution of the house or by order in council, and to such of the public departments, administrative bodies and offices, throughout the Dominion, as may be specified by order in Council.

Under the provisions of this Section the Statutes have been, and are to be disposed of as follows:—

One copy is to be sent free to each member of the Senate, and of the Commons of Canada, and four copies to every member of the Legislative Assembly of Ontario. Every official in each County in Ontario and heads of governmental departments are also to have a copy. Magistrates have to buy their copies at the reduced price of fifty cents each, but it is only duly qualified magistrates that are allowed this privilege; and to carry out this arrangement the Clerks of the Peace are to be supplied with copies for this purpose. The trade have to pay one dollar each for the statutes, which they again retail at any advance of twenty-five cents.

We understand the actual cost of the statutes, including binding, has been very small, and that the government will not be losers even at the reduced rate at which magistrates are supplied. This being so, we would respectfully ask why lawyers should not enjoy the same privilege as magistrates. Their profits are not now-a-days so immense that they can fairly be further taxed to provide a source of revenue to the country. Nor, do we think, there should, on principle, be any unnecessary restriction upon the widest diffusion of knowledge as to laws which all are supposed to know by heart as soon as they receive the Royal assent. The profession must buy the statutes at any price, and it may be said that it is from their contents that we partly derive the knowledge which is, to use a mercantile expression, our stock in trade, but by all rules of trade the benefit and profit are at least mutual as between us and the public, and whatever we pay extra is so much indirectly and unfairly added to their profits on the "transaction." If magistrates did their duties without fee or reward, they should certainly be at no expense for the statutes (and whether or not, they should in any case be provided free of charge, we are not now enquiring), but as they do not, in what respect, so far as the government is concerned, do we, in this particular differ from them. Our remarks, we beg leave to say, are quite disinterested, as we have to acknowledge the receipt of a copy of the book in question, courteously sent us by the Attorney General.

The acts which are of special interest have already been referred to by us, and many of them copied at length in a former number.

As to the general appearance of the volume now before us, notwithstanding the warning given in the 13th sec. of the act already referred to, we confess to having been rather startled at the gorgeous display of red and gold which it presents. We might be almost induced to say that the edition had been "got up regardless of expense," were it not that the proverbial economy of our present local administration precludes the possibility of such a thing. A closer examination would lead one to think that the new binding is very good in its way, the material being similar to that used in the less imposing statute books of the Dominion

and the Province of Quebec, (which latter is by the way the same in appearance as the old volumes, with the exception of the colour of the label on the back.) We fear, however that the red colour will be apt to become shabby sooner than the old kind. We should recommend a change in the lettering on the back of the next volume, as that on the present one is too much like that used for cheap editions of city directories and the like.

We regret that the very common difficulty of obtaining a good index has not been overcome in this case. There was a warning given by the most defective index to the Consolidated Statutes. But the compiler of the one before us appears to have forgotten one of the most obvious requisites of an index. This mistake will doubtless be avoided in future.

NEW CHANCERY ORDERS.

It is very generally known to the profession, that the Judge's Secretary, Mr. Taylor, has been for some time past engaged, under the supervision of the Chancellor and Vice-Chancellors, in consolidating the orders of the Court of Chancery.

It is supposed, when this most useful work shall have been accomplished and the accumulated mass of disconnected orders, which even the most industrious can scarcely keep track of, put into an accessible shape, that we shall at length have a respite from the shower of rules and orders that have fallen upon us for years past, as well as a breathing time wherein may be settled a little more definitely the practice of the Court of Chancery, which, by the way, uncertain and harassing as it is certainly sometimes found, is essentially progressive and expansive, and must, from the very nature of things, vary with the wants and circumstances of the country, and cannot in every respect be compared with the course of practice in the Common law Courts, which is necessarily more conservative in its nature and not affected by such a variety of outside and individual circumstances.

The very efficient Secretary of the Judges is also engaged, with indefatigable industry, in the preparation of a new and enlarged edition of his former work, with especial reference to the new orders. It will, we are told, contain all the new, or newly arranged orders and the acts affecting the Court of Chancery, with full notes on doubtful points and a variety of forms.

Judging from the past, and from the unrivalled opportunities which Mr. Taylor has of becoming familiar, not only with the orders themselves, but with the rules of practice, (imperfect, unsatisfactory and unknown as they are, which are supposed to guide, but often mislead practitioners), we may rely upon obtaining from the labour and learning of the Secretary a most useful auxiliary to the reading of the new orders, and valuable information as to Chancery practice in general.

In connection with this subject we may mention that Mr. Leggo, the Deputy Master at Hamilton, also proposes to publish a book on the practice of the Court of Chancery, with especial regard to proceedings in the Master's office. Such a publication, if carefully prepared, would be found most useful, and particularly so to country practitioners.

LAW EXAMINATIONS.

Law students and articled clerks are referred to the advertisement of the Law Society which appears in another place, in reference to examinations for call to the bar, or for certificates of fitness.

Very important changes have been made. The books for the first and second examinations for articled clerks under Mr. Blake's act, (the principle of which as to the increased number of examinations, has been adopted by the Benchers for students) are most of them new, but, so far as we can judge, carefully chosen and most desirable, as leading the reader by degrees, from the elementary to the higher branches of the profession.

The Law School and Lectures in Term are hereafter to be discontinued. We are sorry that it should have been thought advisable to give up the former, but probably it was found that the advantages to be derived from it were not commensurate with the expenses, particularly under what promises to be a more effective system for the majority—(though less satisfactory to the hard working minority) that is, frequent compulsory examinations. The benefits of the lectures in Term have proved to be at least questionable, and productive of little but disorder and "skylarking."

It will be noticed as features of this system, that the second examination includes a re-examination on the subjects and books of the first examination; also that there are only

two fresh books in the third examination of articled clerks, from which we argue that there will be a corresponding strictness and thoroughness in the examination as to the statute law and pleading and practice of the Courts. Of the desirability of this, there can be no question.

CONFLICTING DECISIONS IN LOWER CANADA.

We may be excused for expressing a little surprise at a decision in *Ex parte Smith* which we see reported in a recent number of the *L. C. Jurist*, where Judge Short held that a voluntary assignment made by an insolvent under 29 Vic. cap. 17, sec. 2, to an official assignee is valid, although the assignee is not resident within the district within which the insolvent had his place of business.

It is not that we object to a judge, by whose decisions we in Ontario can be affected only so far as we feel interested in the beneficial administration of the law in every part of the Dominion, deciding a question under a recent act of Parliament according to his own view of its proper construction, even though such interpretation may be contrary to the decision of judges here, whose opinions we may safely accept as the true rule in such a case,—but it is that it appears to us to be subversive of that uniformity so essential to the due administration of justice, and a source of harm and inconvenience to the public and annoyance to the profession, that a judge not sitting in appeal, and not so far as we are aware coming within those cases when he would be entitled to express his own views in opposition to decide cases, should give a judgment directly at variance with a decision upon exactly the same point, given by a court sitting in appeal (at least we are led by the report of the case so to understand it, but if wrong in this beg to be corrected), by which, at least according to our rules, he should be bound.

The learned judge did not even refer to the two cases cited by counsel in direct opposition to the decision he arrived at. One of these (*Douglas* v. *Wright*, 11 L. C. Jurist, 310) was a judgment of the Superior Court (*In Review*) in which three judges sat, one of whom certainly dissented from the majority, if that would make any difference. The other case (*Whyte* v. *Short*, *per* Loranger, J., Circuit Court of Richelieu) was also in point, and entitled to some weight, agreeing as it did with the case in Review.

The cases on the point in our own Courts (*Hingston* v. *Campbell*, 2 U. C. L. J., N. S., 299,— copied by the way into one of the Lower Canada legal publications, — and *White* v. *Cuthbertson*, 17 U. C. C. P. 377) may also in a question of this kind be said to be in point, and entitled to the consideration of judges in the sister Province.

It is in cases of this kind, where a statute applies to the whole Dominion or to any two or more of the Provinces, that a general court of appeal would operate so beneficially, by deciding authoritatively the law upon doubtful questions of construction, even though the question may be in itself of little moment, except that it should be definitely settled in *some* way.

DEATH OF MR. HEYDEN.

It is with much regret that we announce the death of Lawrence Heyden Esq., Clerk of the Crown and Plea, Queen's Bench, at his residence on Bloor Street, Toronto, on Saturday last the 20th inst., in the sixty-fifth year of his age.

His health had been failing for some months past, but none expected that his death was so near at hand.

The loss of such an estimable man and efficient officer will be felt by numbers both inside and outside the profession, and it will be long before those who had the pleasure of knowing him will forget his courteous and kindly manner, his uprightness and integrity in the discharge of his duties, and the attentive way in which his duties were performed.

R. G. Dalton, Esq., Barrister, has been appointed to fill the vacancy. We are happy to be able to congratulate the Ontario government on the happy selection they have made, and their promptitude in making it.

SELECTIONS.

PRESUMPTION OF LIFE AND DEATH.

(*Re Benham*, V. C. M., 15 W. R. 741, L. J. R., 16 W. R. 180.)

We are not surprised at finding that the decision in this case has been reversed on appeal, as it apeared to us to involve a misconception of the mode in which certain rules of presumption should be applied.

The rules in question are, first, that a person once living will, in the absence of evidence to the contrary, be presumed to continue alive,

at least until such a period as may be looked upon as a superior limit of the duration of human life; and the second, extended apparently by analogy from the Bigamy Act, 1 Jac. 1, c. 11, and the 19 Car. 2, c. 6, enabling reversioners or lessors to re-enter without proof of the death of the *cestuis que vient* on the lands held by tenants for lives—that after an absence of seven years without communication through any likely sources, the absentee will be presumed to be dead, so as to justify distribution of property in which he is interested on that assumption.

The question in *Re Benham's Trusts* was as to the practical result of these two rules. A great number of cases having established the principle that this presumption of death at the end of seven years is totally irrespective of the *date* of death, and that the *onus* of proving death at any particular date lies on those who allege it; the Vice-Chancellor stretched this a little further, and on the failure of this proof dealt with the fund on the opposite hypothesis. It does not, however, follow in these cases that because the *onus* of proof is on one claimant the Court will, on his failing to adduce proof, award the fund to the other.

A more correct view is to regard the Court as requiring a particular claimant to adduce a certain proof before it will act in his favour, but not necessarily, in default, acting for the oppposing claimant.

In *Re Benham*, a legatee under the will of a testator who died in 1860, had disappeared in 1854, and his representatives were held entitled as against those of the testator.

Such a decision is evidently inconsistent with the rule laid down by the Court of Exchequer Chamber after an elaborate discussion in *Nepean* v. *Doe*, 2 M. & W. 913, that "presumption relates only to the fact of death, and the time, whenever material, must be a subject of distinct proof." The action in that case was in ejectment, and the cause of action arose on the death of a person who had disappeared twenty-five years before action brought, so that it was material with reference to the Statute of Limitations whether the death could be presumed to have occurred at the end of the seven years.

Judgment was given for the defendant on the ground that proof of death within twenty years had not been shown.

Assuming the authority of this case, it would be necessary to hold that under circumstances like those in *Re Benham* no claim could be made through the missing legatee. But then the question arises how could the next of kin claim on the hypothesis of a lapse, as for that purpose they must prove that the legatee predeceased the testator, and there seems to be no escape from the conclusion that the fund must remain *in medio*. This the Courts have been reluctant to decide, as the following cases show.

Dowley v. *Wingfield*, 14 Sim. 277. A. disappears (we use the words in the sense of being last heard of) twenty months before his father's death intestate. His only brother was treated as sole next of kin on his giving security to refund. *Ex parte Creed*, 1 Dr. 235. A legacy is bequeathed to A. by a testator who died less than seven years after A.'s disappearance, on condition of A.'s surviving a person who predeceased the testator by a few weeks, and in default to A.'s issue. The latter were not allowed to receive the legacy. *Lambe* v. *Orton*, 8 W. R. 111. A., who disappeared four years before the death of an intestate, held to have survived him, and that the *onus* was on persons disputing the claim of A.'s representatives of showing that A. was not one of the next of kin. *Dunn* v. *Snowden*, 11 W. R. 160. Property was distributed on the supposition that a legatee who had disappeared three year's before the testator's death survived him and died afterwards. The same was done in *Thomas* v. *Thomas*, ibid. 298, the Vice-Chancellor objecting to the form in which the rule was expressed in the marginal note to the former case, namely, that a person not heard of for seven years must be taken to have lived to the end of the seven years, but substantially re-asserting it in the form that a person must be taken to have lived until the lapse of a reasonable time from his disappearance.

It must be admitted that we have here, if not a strong concurrence of authority, a series of decisions by an able judge, establishing a rule practically equivalent to that asserted by Vice-Chancellor Malins, for we do not see how they can be otherwise explained, but we cannot discover a sufficient foundation for such a rule, and we have good authority for saying that a person claiming under a will or intestacy must prove his title. Accordingly, in *Re Benham's Trusts*, Lord Justice Rolt discharged the Vice-Chancellor's order, observing that the case was one, not of presumption, but of proof, and as there was not proof for the Court to act upon, further inquiries must therefore be made. No doubt, in a case where a person has disappeared *more* than seven years before the death of the testator or intestate, the claimant may rely upon the presumption of such person's death at that date, but he will not be allowed to establish his title by insisting (as was in effect done in *Dunn* v. *Snowden*) on a presumption of life for three years and death in the remaining four. Even in the former case we think the time on which the presumption arises too small, at least, in the case of personal estate, which, if delivered to the wrong person, may be irrecoverably lost, and we should prefer a rule that the property claimed should be secured in court and the income only, until further years had elapsed, dealt with. On the other hand it is desirable that some provision should be made towards quieting the possession of those who are allowed to receive the property, and we believe that ours is the only one of the European States in which, in the event of the return of the absentee, after an interval however long, the posses-

sor of his property is obliged to account, not only for the *corpus*, but for the past income, except so far as he may be protected by the Statute of Limitations.—*Solicitor's Journal.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

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

Marten v. Brumell and Richardson.

Composition and discharge—Assignment of judgment to a surety.

On 2nd May, 1867, defendant B. made an assignment under the Insolvent Acts; on 27th May, 1867, a deed of composition and discharge was made and executed by B. and R., (who had been sued as B.'s surety) and other creditors, as well as by the plaintiff, who, however, reserved his rights against any surety for his debt. On 10th Feb., 1868, plaintiff obtained judgment. On 13th Feb. R. took an assignment of the judgment for plaintiff, paying part only of the amount of the judgment debt.

On an application by defendant B. to have his name struck out of the proceedings and the judgment stayed as against him, on the ground that the plaintiff was a party to the deed of composition and discharge,

Held, that B. was entitled to this relief as well against the plaintiff as against R., and that he had accounted for his delay by a reasonable supposition that plaintiff was proceeding on the judgment to recover the balance of the debt from defendant R.

Semble, that the assignee of a judgment cannot enforce it, if his assignor could not.

[Chambers, March 11th, 1868.]

A summons was obtained on behalf of defendant, Brumell, calling on the plaintiff to show cause why the judgment signed, and *fi. fa.* issued, and all proceedings subsequent to the judgment should not be set aside and satisfaction entered on the roll, or why the name of the defendant, Brumell, should not be struck out of the judgment and all subsequent proceedings—or why all proceedings on the said writ or against Brumell, should not be stayed, and the plaintiff prohibited from further proceeding upon the judgment as against Brumell, or why proceedings should not be stayed till the fifth day of next term, and why the plaintiff should not pay the costs of the application, upon the grounds that the plaintiff's claim herein was paid and satisfied before the signing of the said judgment, and that he had no right to sign his name, and that proceedings herein are contrary to the agreement between the plaintiff's atttorney and the attorney of the defendant, Brumell, and that Brumell had, between the time of the signing of interlocutory judgment against him and the signing of final judgment, been released and discharged by the plaintiff's deed from all claim in respect to the matters in question in the said action, and upon grounds disclosed in affidavits and papers filed.

A deed of composition made 27th of May, 1867, between the defendant Brumell of the first part, and the other persons executing these presents, creditors of Brumell (and being a majority in numbers and representing at least three fourths in value of the liabilities of Brumell, subject to be computed in the execution of a deed of composition and discharge under the Insolvent Acts of the Province of Canada) of the second part, was put in and filed.

It recited that Brumell on the 2nd of May, 1867 executed an assigument of the estate, to James Watson for the benefit of his creditors to be administered according to the Insolvent Acts; and that Brumell had proposed to pay his creditors 6s. 8d. in the £, upon their respective claims in full discharge, and that the creditors had agreed to accept the same.

Brumell then covenanted to pay the said sum upon the execution of the said deed by the majority in number and three fourths in value of his creditors, and the parties of the second part agreed to accept the same, as far as they could, on behalf of all the other creditors or claimants of Brumell or other persons entitled to rank on the estate, and release Brumell from all claim, liability, cause of action, judgment, or suit which any such person or persons, creditor or creditors, may, can or otherwise might have against Brumell or his estate. And the parties of the second part released Brumell in respect of their own claims, &c., &c., reserving nevertheless to each of his creditors any security which they may respectively hold for the remaining 13s. 4d. in the £, and not thereby releasing any surety therefor. And it was declared that the deed was a deed of composition and discharge under the Insolvent Acts, and was intended to operate thereunder, and was also intended to have full effect as to the parties executing the same independently of the said acts. It was executed by the plaintiff as follows: "Henry O. Marten reserving, and without prejudice to my rights and remedies against any surety for my debt," and it was also executed by the defendant and Richardson.

This action was commenced by a summons, specially endorsed, on the 11th of May, 1867, and judgment for want of an appearance by Brumell was signed against him on the 22nd of the same month.

Mr. Scott, the attorney of Brumell, made affidavit that, subsequent to the signing of the interlocutory judgment, the plaintiff agreed to accept and execute the said deed of composition, as he was informed, and afterwards, as he believed, executed the same in the early part of June, 1867. Mr. Scott then stated "I remarked to Mr. Cameron (who was acting for Marten) to the effect that I presumed it would not be necessary to take any steps to have the deed pleaded, and he replied to the effect, that it would not be necessary, as nothing would be done in the action against Brumell, and it was accordingly so understood between myself, acting on behalf of Brumell and said Hector Cameron." That being in February, 1868, informed by Brumell that he feared Richardson intended to enforce the judgment against Brumell, as Brumell had been informed that Richardson had procured an assignment thereof from the plaintiff, "I thereupon called upon Mr. Cameron for an explanation of the matter. He did not seem to be aware previous to my informing him that such judgment had been signed or an assignment executed, and appeared surprised to hear that the same had been done. I requested he would give me a memorandum stating the understanding, but he declined to do so until he had made enquiry from persons in connection with his office as to what had taken place, but promised to write me at once: that on the 27th of February, instant, I received the

annexed letter from Mr. Cameron, by which it appears, as my belief is, that his recollection is at fault with respect to what took place" Of this letter the only material part is the following: —'The only circumstance with you on the subject, which I recollect, took place before the time for appearance expired, when, I think, the composition had been proposed and assented to by some creditors, but not by all. You then spoke of the necessity for your appearing for Brumell, and said that if the composition arrangement was completed, you supposed your client would not be prejudiced by the judgment against him in the suit and that if it were not completed and he went into Insolvency it would not matter in which opinion I concurred.'"

Mr. Scott then stated that final judgment was signed against the defendants on the 10th of February last for $430 04 damages and $125 89 costs; that all but about $13 50 were costs occasioned by Richardson's defence: that he believed the amount of $564 was paid by Richardson, before judgment was entered, to the plaintiff's attorney, and that Mr. Whitley (acting for Richardson) informed Mr. Scott that the judgment had been assigned by the plaintiff to Richardson. Mr. Scott then set out a letter he wrote on 26th February, informing Mr. Whitley, that Brumell had been discharged by the deed before mentioned, and requesting him to consent that Brumell's name should be struck out of the judgment—otherwise he would apply for relief; that this letter had not been answered, and that a *fi. fa* against Brumell's goods had been sued out.

James Watson, the attorney of the creditors, made affidavit, that when he paid Mr. Cameron the composition for the plaintiff he said "he would proceed against Richardson for the balance, but that nothing should be done by the plaintiff against said Brumell."

Brumell stated that before Richardson took an assignment of the judgment and immediately after the execution of the deed of composition he was aware the plaintiff had accepted the composition and had executed the deed and relieved Brumell from all claims in respect of the pleadings mentioned.

The defendant Richardson, though not called on by the summons, filed certain documents:— The assignment of the judgment to himself, dated the 13th of February, 1868; the original bond signed by Brumell to the plaintiff, upon which Richardson was surety, and an undertaking by the plaintiff's attorney to assign the judgment to him and to allow him to enter it up.

Mr. Whitley made affidavit "that except so far as Richardson has been informed by me, I believe he has no knowledge of any of the circumstances which have taken place with reference to this action since the commencement thereof, that until the last few days, I had no knowledge of any agreement between Mr. Scott and Mr. Cameron, but such as is alleged on the affidavits filed in support of this application.

Whitley, for Richardson, shewed cause; no one appearing for the plaintiff. He referred to 26 Vic., ch. 45; *Sharp* v. *D'Almaine*, 8 Dowl, 664; *Gresley* v. *Gibson*, 12 Jur. N. S., 319; *Brooke* v. *Jennings*, 12 Jur. N. S., 341; *Evans* v. *Gill*, 1 B. & P., 52; Ch. Arch. Prac., 11 ed. 907–978.

Dalton supported the summons, referring to *Lister* v. *Mundell*, 1 B. & P., 427; *Shaw* v. *Shaw*, 6 O. S. 458; *Schofield* v. *Bull*, 3 U.C. L.J., 204; *Turner* v. *Davies*, 2 Saunders, 137 n.

Adam Wilson, J.—I must first consider this case as if it were between the plaintiff and Brumell alone. And so considered I should decide, on the affidavits of Mr. Scott and Mr. Watson, that the plaintiff was not to prosecute the suit against Brumell, in consequence of his protection under the deed of composition and discharge, to which the plaintiff is an express, assenting and executing party, and by which, for the composition agreed upon, he has absolutely discharged Brumell. Any proceedings taken after the deed in question would be set aside, if the application were made within a reasonable time after knowledge of proceedings being carried on.

In this case, proceedings were still continued by the plaintiff to the knowledge of Brumell, for two trials were had after the making of the deed, and Brumell would certainly be excluded from all relief, if he were now applying for the first time.

But the continuation of these proceedings is explained by the fact, that there was another defendant to the suit, against whom the plaintiff desired to obtain judgment; and therefore when Brumell saw this suit still going on, he believed, as he had reason to believe, it was going on not against himself, excepting formally, but against Richardson his co-defendant, who was still liable to the defendant.

If the agreement set up by Brumell, that the suit was not to be prosecuted against him for the purpose of enforcing payment or satisfaction, but formally only, for the purpose of reaching Richardson be established, he is not too late now in claiming relief as against the plaintiff. And I think this agreement is proved by Mr. Scott and Mr. Watson, whose statements are not opposed by what Mr. Cameron states in his letter.

But it is said although Brumell may be entitled to be relieved as against the plaintiff, it is different when he applies against Richardson, because he was no party to the agreement with the plaintiff, and he had no notice of it.

The deed shows that Richardson was a party to it, and that he thereby released Brumell "from all liabilities in respect to any claim, cause of action, judgment or suit, which he might have against Brumell, on account of any matter or thing whatsoever, whether such claim is direct or indirect, exigible, or accruing, reserving nevertheless to each of the creditors any security they may respectively hold for the remaining 13s. 4d. in the £, of their claims, and not hereby releasing any surety therefor." And although he signed the deed before the plaintiff did, and may therefore not have seen the reservation by the plaintiff of his rights, "against any surety for any debt," he must be taken to have had notice of what he signed himself; and of what he knew the plaintiff also signed, namely, that Brumell, as just stated, was released by the payment of 6s 8d in the £, but "not hereby releasing any surety therefor."

Richardson therefore knew that the plaintiff released Brumell from the debt, for which Richard-

son was surety, on getting 6s. 8d in the £. And that he (Richardson) was expressly held bound to the plaintiff for the remaining 13s. 4d. in the £.

Then Richardson knew also that he himself released Brumell from all liability, reserving any *security* he had, and his rights also against any surety there was; but he has no security, and certainly none that was of any value to him, after Brumell himself was released—there was no mortgage, or lien, or collateral documents which he held. He had nothing whatever but the instrument, on which Brumell was liable, for this particular debt; and he could never hold that against him. At that time too, he did not hold this bond, for he did not pay it till a long time afterward. How had he any surety for this defendant, who was not to be released?

So far as the bond was concerned, the plaintiff was expressly discharging Brumell from it; and Richardson knew it, and concurred in it. But whether he concurred or not, would have made no difference, for whatever the proper majority in numbers and value of the creditors chose to do would have bound Richardson and the plaintiff too, even against their will.

I think here that Richardson must have known the plaintiff could not after this release, and have prosecuted the suit against Brumell's consent, for the purpose of obtaining satisfaction against him. And that he must have known further that the plaintiff was prosecuting the suit solely for the purpose of obtaining a recovery against himself as surety for the remaining 13s. 14d. in the £, under the express reservation, which was contained in the deed, of his rights against sureties. And that after such recovery was had against himself he could not enforce any remedy against Brumell, whom he also had expressly released.

Neither the plaintiff nor Richardson should therefore be allowed to enforce this judgment against Brumell, his delay in applying for protection being satisfactorily explained, certainly as against the plaintiff, and, in my opinion, as against Richardson too.

Even if it appeared that Richardson had no kind of knowledge of Brumell's position in the suit after the execution of the deed, and had no knowledge either of the bargain between him and the plaintiff as to the way in which it was to be carried on, I should doubt exceedingly his right to enforce a judgment by assignment which the plaintiff himself could not enforce, for he must take that only which the plaintiff has a right to transmit. Suppose the plaintiff had recovered or received payment in full from Brumell, unknown to Richardson, it could scarcely be argued that, on Richardson afterwards paying the plaintiff a second time, he could enforce payment over again from Brumell.

He must take the plaintiff's rights or nothing, and he must deal with the plaintiff, as well after as before the judgment, at his peril.

It is not necessary I should decide this point, nor the further point that was adverted to, namely, that Richardson could not take an assignment as he had not paid the whole judgment but two thirds of it, or 13s. 4d. in the £, only. It may be true a defendant who does not pay the whole judgment debt cannot compel the plaintiff under the Statute to assign the judgment to him, but if the plaintiff chose to do so, I do not see why a surety should not enforce against the principal any amount the surety has been compelled to pay and could justly recover from the surety in an action at law, by execution issued upon the judgment.

There is another reason why this judgment should not be used against Brumell for the full amount for which the execution has issued, even if it could be acted on at all, and it is that the whole costs were incurred but to a trifling amount in trying the special defence of Richardson applicable to his own position, and not in any way affecting the liability of Brumell, the principal—and these costs should not be recovered from Brumell under any circumstances, for he could not demand them in an action at law.

In every view of the case it appears to me Brumell should be relieved from this judgment and execution. I must therefore order the execution and all proceedings under it to be set aside, and satisfaction to be entered on the roll in such form that Brumell shall be discharged from it, with costs to be paid by Richardson to Brumell. And I further order that no action shall be brought in respect of the issuing of the execution, or of any proceedings that may have been taken under it against Richardson or against any other person.

See *Bartlett* v. *Stinton*, 12 Jur. N. S. 342; L. R., 1 C. B., 483.

Re Barton.

Summons to shew cause not referring to the papers filed upon which it was founded.

[Chambers, February 20, 1868].

A motion being made to make absolute a summons calling upon an attorney to deliver his bill of costs.

Curran objected, that as the summons did not refer to any affidavits or papers as having been filed, they could not be read in support of the summons, which must therefore be discharged.

W. S. Smith, contra, argued that the summons was sufficient, but if not, he asked that he might be allowed to amend it.

Adam Wilson, J.—I do not feel inclined to give any weight to this objection, and unless some authority to the contrary is produced I shall allow the summons to be amended at once.

Corrigan v. Doyle.

Interlocutory judgment on default of plea—Notice to plead—C. L. P. Act, sec. 56.

Sec. 56 of C. L. P. Act, taken in connection with secs. 91, 92, and Rule 132, is to be read thus, "the plaintiff may file *and serve* a declaration endorsed with notice to plead, &c."

Held therefore, that it was not a valid objection to an interlocutory judgment, that the copy of declaration filed was not endorsed with a notice to plead.

[Chambers, March 20, 1868.]

The defendant obtained a summons, calling on the plaintiff to show cause why the interlocutory judgment signed herein for want of a plea, and the issue book and notice of assessment, and all other proceedings had therein, should not be set aside on such terms as to the judge in Chambers might direct, for irregularity, on the following grounds:

1. That the writ of summons and affidavit of service were not filed before the declaration, and that the affidavit of service now attached to the writ, is not marked or filed by the clerk, nor is it stamped according to the statute.

2. That no notice to plead is endorsed on the declaration filed, or filed therewith.

3. That the declaration was not served as of the day on which it bears date, and the declaratson served is not a copy of the declaratson filed.

4. That the issue book does not contain, or is not a copy of the declaration filed or served, and on the grounds disclosed in affidavits, and papers filed, and why in the meantime all proceedings should not be stayed.

W. Sidney Smith, shewed cause.

C. W. Paterson, contra.

Hagarty, J.—The summons is to set aside the interlocutory judgment, issue book and notice of assessment, &c., on alleged irregularities.

As to the writ of summons, affidavit and other earlier proceedings, I think it is too late to object to them, and the motion is not directed to set aside anything prior to the judgment.

The chief objection to the judgment is that there is no notice to plead endorsed on the declaration filed therewith. Section 56 of C. L. P. Act says, "plaintiff may file a declaration endorsed with a notice to plead in eight days, and in default of a plea, may sign judgment by default at the expiration of the time to plead so endorsed."

If this stood alone, it would almost seem that a defendant is bound to plead merely on the filing of notice. But Rule 132 directs that a copy of declaration shall be served on defendant. Section 91 of the Act says, "the time for pleading shall be eight days, and a notice requiring defendant to plead in eight days, otherwise judgment, may be endorsed on the copy of the declaration served, or be delivered separately." By section 92 a notice requiring the opposite party to plead, &c., within eight days, otherwise judgment, shall be sufficient without any rule or other demand, and such notice may be delivered separately, or be endorsed in any pleading which the other party is required to answer.

Reading those sections and the rule of court together, I am not prepared to hold that the mere omission to endorse a notice to plead on the declaration filed, must necessarily defeat the plaintiff's right to sign judgment after duly serving aa copy of the declaration with such notice endorsed.

Perhaps the fair way to read clause 56, by the light of the subsequent clauses and rule, is, that "the plaintiff may file *and serve* a declaration endorsed with a notice to plead in eight days, and and in default of a plea may sign judgment by default at the expiration of the time to plead so endorsed." This would appear the most natural construction so as to give full weight to clause 92, "such notice may be delivered separately or be endorsed on any pleading which the other party is required to answer."

Under section 56, it might be endorsed on the pleading which defendant is required to answer. Under section 92, it may also be delivered separately.

It seems to me the objection fails.

Fountain v. McSween.

Appearance—Infant—Prochein amy.

An appearance entered by attorney for an infant defendant (no *prochein amy* having been appointed) is a nullity, not an irregularity. Interlocutory judgment cannot be signed till after *prochein amy* appointed.

[Chambers, March 21, 1868.]

This was an action brought by the plaintiff against an infant defendant, who entered an appearance by attorney and not by *prochein amy*. Declaration was filed and served with notice to plead. No plea being filed, judgment was entered for want of a plea on the 15th of March, 1868.

On the 13th of March, 1868 after declaration served and before judgment entered, a notice was served on the plaintiff's attorney stating that the defendant was an infant and that an application would be made to appoint a *prochien amy*. And on the same day a summons for further time to plead was obtained from the judge of the County Court, which was however discharged upon which judgment was signed and notice of assessment served and accepted for the Walkerton assizes.

On the 16th March 1868 a summons was taken out to set aside the appearance, declaration, the judgment entered in this suit and all subsequent proceedings, with costs, on grounds disclosed in in affidavits and papers filed.

It was contended on the part of the plaintiff that the appearance &c., were irregularities and that the grounds ought to have been disclosed in the summons; and that the taking out of the summons for further time to plead and the acceptance of notice of assessment acted as waivers of the notice. That the application was too late on account of the defendants laches, in this, that the application should have been made immediately after discovery that the appearance was irregular.

For the defendant it was argued that the appearance, &c., were nullities and, as such, that the grounds for setting them aside need not be set forth in the summons, and that there is no waiver of a nullity. That it was incumbent on the plaintiff, when the mistake was discovered, to apply to have it set aside.

Hagarty, J.—It seems to me that the appearance entered for the infant defendant by attorney is a nullity, and if judgment be entered by plaintiff, error in fact will lie. I also think, contrary to my first impression, that defendant can be heard to move to set aside the proceedings, and that he will not be left necessarily to his writ of error. In *Oliver* v. *Woodroffe* 4 M. & W. 650, a cognovit and appearance entered for defendant were set aside on his motion on grounds of infancy. The plaintiff here could have applied to set aside this appearance with costs as irregular, and, at least after notice of the infancy of plaintiff, still proceed. I think the proceedings may be moved against.

The latest case that I have seen is *Carr* v. *Cooper*, 1 B. & S., 230, where defendant, an infant, appeared by attorney, and plaintiff after verdict signed judgment, and defendant brought error in fact. The plaintiff applied to amend all the proceedings in error. The Court refused the relief asked, but set aside all the proceedings subsequent to appearance and ordered defendant

to appear by guardian in six days. *Re Jarman* v. *Lucas*, 5 C. B. N. S. 474, may also be referred to.

Nunn v. *Curtis*, 4 Dowl. 729 is an express authority for interfering on motion, instead of leaving the defendant to his writ of error.

I think all the proceedings after withdrawal of appearance must be set aside, but under the circumstances without costs. See Lush's Practice, Vol. 1, 232.

ENGLISH REPORTS.

COMMON PLEAS.

ROBINSON v. NESBITT.

CROW AND ANOTHER, *Approvers*; REEVES AND ANOTHER, *Garnishees*.

Mayor's Court—Attachment—Garnishee—Notice of equitable assignment.

An equitable assignment of property which is subsequently attached, bars the garnishment, though notice of the assignment has not been given to the garnishee before the attachment.

Watts v. *Potter*, 3 E. & B. 743, dissented from.

[16 W. R. 543, Jan. 31, 1868.]

It appeared that Robinson, the plaintiff, had brought three actions in the Mayor's Court against Nesbitt, the defendant, and attached certain railway shares which the latter had deposited by way of security for a loan, with Reeves and Whitburn the garnishees. There were three attachments made respectively on the 6th, the 7th, and the 10th of August, 1867, being the days on which the actions were entered. It seems that £2,700 Consols had been purchased in the name of the defendant, as trustee under the marriage settlement of Frederick Alfred Crow, one of the approvers, and that the defendant, in breach of trust, had sold out this sum and employed the proceeds, or a large part of them, in paying calls on ninety-seven Riga and Dunaberg Railway shares, of which he was possessed, and which previously to June, 1867, he had deposited with the garnishees as security for a loan of £700 advanced by them to him and one Gurney. Mr. Malleson, the approver's solicitor, having learnt that the defendant had dealt with the Consols as above stated, insisted upon the shares being transferred to him, and on the 7th June, 1867, before the date of the attachments, or any of them, obtained the following order from the defendant:—

"Please to deliver my ninety-seven Riga and Dunaberg Railway shares to Mr. Malleson Dated 7th June, 1867. "P. R. NESBITT.

"Messrs. Reeves & Whitburn."

The garnishees had no notice of this order till the 16th August, which was after the last of the attachments. They then, on repayment of the sum advanced, gave up sixty-seven of the shares to Malleson, retaining the others to answer the plaintiff's attachment. In respect of these latter shares the approvers, on the 22nd August, entered a bill of proof, and, the plaintiff having appeared thereto, delivered their probation as follows:—

The said approvers, by John Nesbitt Malleson, their attorney, say that before the said goods and chattels, being thirty shares in the Riga and Dunaberg Railway Company, numbered 16,671 to 16,700, being in the hands and custody of William Reeves and Charles Whitburn, were, or any part thereof was, attached and defended, &c., as aforesaid, to wit, on the 15th day of June, 1867, the defendant, Pearce Rogers Nesbitt, agreed with the said approvers that the said shares, which were, and are, shares transferable by delivery, should or might be received and held by them (after satisfaction of a certain lien thereon of the said William Reeves and Charles Whitburn, which lien has since been fully satisfied and discharged by the said approvers, to wit, on the 16th of August, 1867) as security for the replacing or making good by the said Pearce Rogers Nesbitt of certain Three per Cent. Consolidated Bank Annuities, to wit, £1,357 19s 3d. Three per Cent. Consolidated Bank Annuities which have not, nor has any part thereof, hitherto been replaced or made good, and whereof the said Pearce Rogers Nesbitt has been possessed upon certain trusts, and which then ought to have stood in his name in the books of the Governor and Company of the Bank of England in trust for the said approver, Frederick Alfred Crow, for his life, and after his decease upon trust for the benefit of the said approver, Emma Maria Crow, her executors, administrators and assigns, and which said trust fund had been before then sold and disposed of by the said Pearce Rogers Nesbitt, in breach of the said trust, and the proceeds of such sale applied in the payment of calls on the said shares. And the said defendant then transferred the property of the said shares, subject to the said lien, to the said approvers, *whereof the said William Reeves and Charles Whitburn had notice before any of the times when the said goods, chattels and shares were or any part thereof was, attached as aforesaid.* And the said goods, chattels, and shares so attached as aforesaid were not, nor was any part thereof, the goods, chattels, or shares of the said defendant when attached as aforesaid, and then were the goods, chattels and shares of the said approvers. And the said approvers claim to be admitted to prove the premises according to the custom of the City of London.

Replication.—And the said plaintiff in person, as to the probation of the said approvers, says that the defendant Pearce Rogers Nesbitt did not agree with the said approvers in manner and form as alleged by the said approvers in their said probation, but, on the contrary thereof, the said goods, chattels and shares so attached as aforesaid, were and are the proper goods, chattels and shares of the said defendant, and are not the property of the said approvers; and this the plaintiff prays may be inquired of by the country, &c.

Joinder of issue.

The question was tried in the Mayor's Court on the 29th of November, when the learned Recorder was of opinion that as no notice of the equitable assignment of the shares to the approvers had been given to the garnishees before the attachments, there was no vesting of the property in the approvers so as to bar the garnishment, and the plaintiff had a verdict.

Atkinson having obtained a rule, pursuant to leave reserved, to set aside the verdict and enter it for the approvers.

Butler Rigby now showed cause. He cited *Watts* v. *Porter*, 3 E. & B. 743, 23 L. J. Q. B. 345; Brandon on Attachment, p. 50.

Atkinson, contra, was not called upon.

Bovill, C.J.—The effect of the decision of the Lord Chancellor and the Lords Justices in *Beavan* v. *The Earl of Oxford*, 4 W. R. 113, 24 L. J. Ch. 311, is, that notice of an equitable assignment is not necessary. The defendant here is only a trustee for the assignee.

Willes, J.—No notice was necessary. The decision of the Recorder no doubt proceeded on *Watts* v. *Porter*, but we agree with the Lord Chancellor and the Lords Justices. See also *Kinderley* v. *Jarvis*, 4 W. R. 579, 22 Beav. 1.

Keating and Smith, JJ., concurred.

Rule absolute.

[See *Pickering* v. *The Ilfracombe Railway Company*, 16 W. R. 458.]

CHANCERY.

Stein v. Ritherdon.

Will—Construction—"Estate and effects"—Real estate.

The word "estate," in a will, is to be construed as passing both real and personal estate, even though the accompanying expressions are more applicable to personal estate only, unless the context absolutely negatives such construction.

Pogson v. *Thomas*, 6 Bing. N. C. 337, remarked on.

[V. C. M., Feb. 19, 1868,—16 W. R. 477.]

One of the points which arose in this case was, whether the words "estate and effects" in a will were sufficient to pass a freehold house belonging to the testator, Talbot Ritherdon. The material clause of the will, which was dated June 5, 1866, was the following:—

"I give and bequeath all my household furniture plate linen musical instruments books wine ready money goods and chattels unto my daughter Adelaide Ritherdon for her own use and disposal absolutely and as to all the *rest and residues of my estate and effects* I give and bequeath the same unto Charles Stein and William Sutton and the survivivor of them their or his executors administrators or assigns (and who are hereinafter respectively designated as 'my trustees') upon trust with all convenient speed after my decease to collect get in and receive all debts or other moneys due and owing or otherwise payable to me at the time of my decease and to sell and convert into money any government stocks or shares in public or other companies of which I may die possessed and call in any moneys which at the time of my decease may be out on mortgage at interest or continue the said stocks and shares and mortgage moneys in these their present investments as to my trustees shall in their or his discretion seem most advantageous for the benefit of the said trust estates and upon trust as to all the capital moneys estate and premises which shall respectively come to the hands of my trustees or by virtue of my will to lay out and invest the same in the parliamentary stocks or public funds of Great Britain or at interest on real leaseholds or other security or securities (not being personal nor in Ireland) in their or his names or name with full power from time to time to alter vary transpose and change the same as in their or his discretion shall seem fit. And I declare that my trustees shall stand and be possessed of the interest dividends and annual produce thereof and of such interest and dividends as may be due to me at the time of my decease upon trust, &c."

There was no clause in the will to pass a freehold house in Dover, of which the testator was possessed, unless it was held to pass under the above words.

The heiress at law of the testator contended that the freehold house descended to her, and did not pass by the will.

The trustees of the will filed a bill, praying among other things for a declaration whether the real estate of the testator was devised by the will to the trustees, or was undisposed of and descended to the heiress at law.

Pearson, Q. C., and *Buchanan*, for the plaintiff, cited *Saumarez* v. *Saumarez*, 4 M. and Cr. 331; *O'Toole* v. *Browne*, 3 Ell. & Bl. 572, 2 W. R. 430, to show that the words "estate and effects" include all that a testator has to dispose of: *Stokes* v. *Solomons*, 9 Hare, 75.

Glasse Q. C., and *Begge*, for the defendant, heiress-at-law, cited *Pogson* v. *Thomas*, 3 Bing. N. C. 337; *Meads* v. *Wood*, 19 Beav. 215; *Doe d. Spearing* v. *Buckner*, 6 T. R. 610; *Coard* v. *Holderness*, 20 Beav. 147, 3 W. R. 311; *Molyneux* v. *Roe*, 8 D. M. G. 368, 4 W. R. 539, and argued that the general words "estate and effects" might well be qualified, as in this will, by reason of the trusts declared being applicable only to personal estate.

His Honour said there was no doubt the testator had not present to his mind when he made his will that in fact he was owner of any real property in fee simple. Still, as it is important that wills should be construed on broad general principles, the effect of general words such as *estate and effects* ought not to be cut down by the circumstance that accompanying expressions are applicable to personal estate only. No word could be more proper to pass all that a testator possesses than the word "estate," and though no doubt words of limitation ought to be carefully attended to, where the construction was in other respects doubtful, there was no such even balance of authority here as to require such minute criticism. All the authorities were in favour of including the real estate, except *Pogson* v. *Thomas* in the Common Pleas, and that case was only reported as a reference from the Master of the Rolls to the judges. And no grounds were given for the decision in the certificate. That case would not be probably followed at this time, and he should declare that the freehold house of the testator passed under the residuary bequest.

The Digest of the Law.—We understand that the Law Digest Commissioners have selected the three following gentlemen as the successful competitors in the preparation of Specimen Digests:—Mr. Henry Dunning Maccleod for a specimen digest of the law of Bills of Exchange; Mr. William Richard Fisher for a specimen digest of the law of Mortgage, including Lien; and Mr. John Leybourn Goddard for a specimen digest of the law of 'Incorporeal Rights, including Rights of Way, Water, Light, and other Easements and Servitudes.' We believe that there were more than eighty competitors.—*Law Journal.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR NOV. AND DEC., 1867, AND JAN., 1868.

(*Continued from page* 130.)

Ademption.

1. By will, made in 1824, A. gave all his estate to trustees on trust after payment of his debts, to divide the residue equally between such of his children as should be living at his death, and the issue of such as should then be dead. On the marriage of his son B., in 1849, A. agreed to pay the trustees of the marriage settlement £350 a year during the life of B. and of B.'s wife, should she survive B. On the death of A., in 1865, *held*, that the gift by will to B. was adeemed *pro tanto* by the provision of £350 a year, made for him by the agreement of 1849.—*Dawson* v. *Dawson*, Law Rep. 4 Eq. 504.

2. A., by will, dated April, 1864, gave £500 to his daughter, should she marry, the same to be paid on the marriage-day, or as soon after as convenient. The daughter married in September, 1864, and, in the following November, A. gave the husband £400 towards furnishing. He afterwards promised £600 more, but died before fulfilling the promise. *Held*, that the presumption that the legacy of £500 had been *pro tanto* adeemed by the gift of £400 was not rebutted by the unfulfilled promise.—*Nevin* v. *Drysdale*, Law Rep. 4 Eq. 517.

Administration.

1. A testator gave legacies, some of which were absolute, and others contingent on the legatees arriving at twenty-one, and he gave the residue of his estate to A. for life, remainder to B. *Held*, that, though the executors could pay debts and legacies out of any funds they pleased, yet, as between A. and B., A. was entitled from the death of the testator to the income of his estate, after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay debts and absolute legacies. *Held*, also, that A. was entitled to the income of such part of the residue as was in a proper state of investment *in specie*, and, as to the rest, of so much consols as would have been produced by conversion on the testator's death. *Held*, also, that A. was entitled to the income of the fund set apart to meet the contingent legacies till the happening of the contingency.—*Allhusen* v. *Whittell*, Law Rep. 4 Eq. 295.

2. A debt due from A. was compromised by the payment of a large sum, several years after A.'s death. *Held*, that the amount due for principal and interest at A.'s death must be treated as a debt due from his estate, and the *corpus* reduced by that amount; and that any benefit to the estate from the compromise must, as between those entitled to the *corpus* and income, be apportioned in the ratio of the amount due from the testator, at his death, to the further amount due from his estate at the time of the compromise.—*Maclaren* v. *Stainton*, Law Rep. 4 Eq. 448.

3. A testator directed his executors to convert his personal estate when and as they should see fit, and gave them power to sail his ships till they could satisfactorily be sold. He gave his estate to A. for life, with remainders over, and gave his executors power to invest at their discretion, or allow to remain as then invested, all his funds in certain specified securities. His ships gained considerable earnings after his death; and he had, at his death, large sums invested in the specified securities, and large sums invested in securities of other descriptions, not proper for the investment of trust funds. *Held* (1), that A. was not entitled to the earnings of the ships as income, but was entitled to interest at 4 per cent. an the value of the ships from the testator's death; (2) that A. was entitled to the actual income of the investments in the specified securities; (3) that, as to the unauthorized investments, A. was entitled only to an income, from the testator's death, equal to the dividends of the consols which would have been produced by a sale and investment in consols at a year from the testator's death, and not to an income equal to interest at 4 per cent. on their value.—*Brown* v. *Gellatly*, Law Rep. 2 Ch. 751.

4. Part of the assets of a testator consisted of a debt due from A., one of his residuary legatees. B., another residuary legatee, died, intestate, leaving A. one of his next of kin. A. having become bankrupt, the executor of the testator proved the debt in bankruptcy, and received a dividend. *Held*, (1) that the executor of the testator had not lost the right to retain the debt, less the dividend, out of A.'s share as residuary legatee; (2) that the administratrix of B., who was also administratrix *de bonis non* of the testator, could not retain the debt out of A.'s share of B.'s estate.—*Stammers* v. *Elliott*, Law Rep. 4 Eq. 675.

See Advances; Limitations, Statute of; Trust, 3.

Admiralty.

In a cause of wages, the Admiralty has jurisdistion of a claim by a seaman for compensa-

tion for wrongful discharge before the end of his term of engagement.—*The Great Eastern*, Law Rep. 1 Adm. & Ecc. 384.

Adultery.—*See* Divorce, 1.

Advances.

Under the provision of the Statute of Distributions, which excludes from sharing in the personal estate of an intestate any child who may have been advanced by portion equal to his share, *held*, (1) that a premium of £540, paid on a son's being articled to an attorney, was an advance, though the profession was afterwards relinquished; (2) that the price of a commission in the army for the son was an advance,—whether £288, paid for outfit and horses for the son on entering the army, was an advance, *quære;* (3) that sums from £50 to £550, amounting in all to £2,000, paid in discharge of the son's gambling debts, nonpayment of which would have compelled him to leave the army, were advances.—*Boyd* v. *Boyd*, Law Rep. 4 Eq. 305.

Agent.—*See* Factor.

Agreement.—*See* Contract.

Aider by Verdict.—*See* Pleading, 2.

Alimony.—*See* Divorce, 2.

Ancient Light.—*See* Light.

Annuity.

A testator directed his trustees to invest his property, and "with and out of the annual proceeds thereof levy and raise the annual sum of £100," and pay it to S. for life. "and from and after the payment of the said annual sum of £100, and subject thereto," to stand possessed of the said trust funds on certain trusts. The income was insufficient to pay the annuity. *Held*, that the deficiency must be made up out of the *corpus*.—*Birch* v. *Sherratt*, Law Rep. 2 Ch. 644.

Appeal.

1. The Queen in Council has jurisdiction of an appeal from the colonies in criminal as well as civil cases; but, in a criminal case, an appeal will be granted only under special circumstances.—*The Queen* v. *Bertrand*, Law Rep. 1 P. C. 520.

2. Leave to appeal from a conviction of a colonial court for a misdemeanor having been granted, subject to the question of the jurisdiction of the Privy Council to entertain the appeal, and it appearing that since such leave the appellant had received a free pardon, the Judicial Committee of the Privy Council declined to enter upon the case, and dismissed the appeal.—*Levien* v. *The Queen*, Law Rep. 1 P. C. 536.

Assignment.

1. When a chose in action has been assigned, equity would restrain a debtor from setting off against the assignee a debt which has become due from the assignor since notice of the assignment, though resulting from a contract made previously, unless from the nature of the transaction it appears that the original parties intended that the one should be set off against the other.—*Watson* v. *Mid. Wales Railway Co.*, Law Rep. 2 C. P. 593.

2. A., the tenant for life of a trust estate, mortgaged it, and it was sold by the mortgagee. Afterwards, the purchaser and mortgagee, for a nominal consideration, assigned to A. certain alleged arrears of profits of the trust estate, which, as alleged, the trustees had made in excess of the profits for which they had accounted. *Held*, that A. could not maintain a bill, on this assignment, against the trustees for an account of the profits.—*Hill* v. *Boyle*, Law Rep. 4 Eq. 260.

3. A conveyance by a debtor of his goods to two creditors, for the benefit of themselves and the other creditors, passes the property at once, without any assent by the trustees; but the knowledge of the debtor, at the time of the conveyance, that an execution is out against his goods, is the constructive knowledge of the trustees, within the proviso of 19 & 20 Vict. c. 95, § 1, and therefore the goods are bound by the delivery of the writ to the sheriff.—*Hobson* v. *Thelluson*, Law Rep. 2 Q. B. 642.

Attorney.—*See* Bankruptcy, 2; Champerty.

Bankruptcy.

1. To subject a bankrupt to the penalties of the Bankruptcy Act, as having contracted debts without reasonable expectation of being able to pay them, it is not enough that he contracted in the aggregate a greater amount of debts than he could reasonably expect to pay, but there must be particular subsisting debts, which, at the time when they were contracted, he could not reasonably have expected to be able to pay.—*Ex parte Brundrit*, Law Rep. 3 Ch. 16.

2. A. owed a debt to B., but had a claim against B. for costs. A. became bankrupt. *Held*, that A.'s claim for costs could not, in bankruptcy, be set off against the debt due to B., because A.'s solicitor had a lien on the costs, and that therefore execution might issue against B. for the costs.—*Ex parte Cleland*, Law Rep. 2 Ch. 808.

3. Under 24 & 25 Vict. c. 134, § 73, if the goods of a trader are levied on and sold under an execution for more than £50, he is to be deemed to have committed an act of bankrupt-

cy; and if, within fourteen days from the sale, he is adjudged a bankrupt, the money is to be paid to the assignee in bankruptcy. An execution was levied on the goods of a trader; and he, being insolvent, in consideration of the withdrawal of the execution, assigned to A., the judgment creditor, the whole of his property, and ceased to carry on the trade. The jury found the transaction *bona fide*. *Held*, that, as the creditors generally could have interfered and taken the proceeds of the execution, there was no sufficient consideration for the assignment to A., which was therefore void, and an act of bankruptcy. — *Woodhouse* v. *Murray*, Law Rep. 2 Q. B. 634.

See Administration, 4.

Bill of Lading.

A. was indorsee of a bill of lading, drawn in a set of three, of cotton, which had been lately landed, under an entry by A., at a sufferance wharf, with a stop thereon for freight; on March 4, A. obtained from M. an advance on the deposit of two copies of the bill, M. assuming the third to be in the master's hands; on March 6, the stop for freight being then removed, A. obtained from B. an advance on the deposit of the third copy of the bill, which A. had fraudulently retained. On March 11, B. having been then informed of M.'s prior advance, sent his copy of the bill to the wharf, and had the cotton transferred in his own name, and afterwards sold it and received the proceeds. *Held*, that the bill of lading, when deposited with M., retained its full force, though the cotton had been landed and warehoused; that there was a valid pledge of the cotton to M., and he could sue B., either for conversion of the cotton or for the proceeds of the sale. [By 11 & 12 Vict. c. 17, § 4, goods landed at a sufferance wharf remain subject to the same lien for freight that they were liable to on board the ship.] (Exch. Ch.)—*Meyerstein* v. *Barber*, Law Rep. 2 C. P. 661.

See Negligence; Stoppage in Transitu.

Bills and Notes.

A., through an agent, obtained from a banker in London circular notes, payable by certain correspondents of the banker in various foreign towns mentioned in an accompanying "letter of indication." The agent sent the letter and notes, by mail, to A. in Paris: the letter arrived safe, the notes did not. *Held*, that A., apart from any equitable relief on giving indemnity, could not recover the money paid to the bankers, on tendering the letter of indication only.—*Conflans Stone Quarry Co.* v. *Parker*, Law Rep. 3 C. P. 1.

See Factor.

Bond.—*See* Legacy, 3.

Capital.—*See* Administration, 1, 2; Annuity; Legacy, 1.

Carrier.—*See* Negligence; Railway, 1, 2.

Champerty.

The plaintiff agreed to share with a solicitor the profits arising from the successful prosecution of a suit to establish his title to property, on being indemnified against the costs. *Held*, that though the contract amounted to champerty and maintenance, yet the plaintiff was not disqualified from suing, since his title was vested in him, before the making of the illegal contract. A decree was made in his favor, but without costs.—*Hilton* v. *Woods*, Law Rep. 4 Eq. 432.

Charity.

1. A legacy to a charitable institution, which was dissolved in the testator's lifetime, lapses. —*Fisk* v. *Attorney-General*, Law Rep. 4 Eq. 521.

2. Testatrix gave £1,000 consols to A. and his successors, on trust, to apply so much of the dividends as should from time to time be necessary to keep in repair her family grave, and to divide the residue at Christmas, every year for ever, among the poor of a parish. *Held*, that, as there was a gift to A., the gift to the poor did not fail by reason of its being a gift of residue after a void gift, and that there was a good gift of the whole to the charity, discharged from the obligation to repair the grave.—*Fisk* v. *Attorney-General*, Law Rep. 4 Eq. 521.

3. A testator gave funds to the President and Vice-President of the United States and the Governor of Pennsylvania, and directed that moral philosophy should be taught therein, and a professor engaged to inculcate and advocate the natural rights of the black people, of every clime and country, until they be restored to an equality of right with their white brethren throughout the Union. The trustees declined to accept the trust. *Held*, that, the court having no power to enforce the trust, nor to settle a scheme *cy près*, the object had failed, and the fund fell into the residue.—*New* v. *Bonaker*, Law Rep. 2 Eq. 655.

See Mortmain.

Circular Notes.—*See* Bills and Notes.

Common Carrier. — *See* Negligence; Railway, 1, 2.

Company.

1. A. was induced to take shares in a company by fraudulent concealments in the prospectus. In nine months, the company failed. *Held*, that A. was not then entitled to relief as

against creditors, but was liable as a contributory.—*Oakes* v. *Turquand*, Law Rep. 2 H.L. 325.

2. A., having obtained judgment against a limited company for £11,000, moved for a *scire facias* against a shareholder. The company had no assets in England, but had £500 assets in Ireland. There were other large creditors, one of whom had obtained by consent a rule absolute for a *scire facias*, with immediate execution against same sharehold, but the execution had not issued, nor had the amount been paid. A. had obtained rules, which had not been argued, for writs of *scire facias* against other shareholders, to the amount of £30,000. *Held*, that the *scire facias* should issue.—*Rigby* v. *Dublin Trunk Railway Co.*, Law Rep. 2 C. P. 586.

3. After a rule *nisi* had been obtained by a judgment creditor of a company against a shareholder for a *scire facias*, the shareholder *bona fide* paid the amount due on his shares to another creditor of the company, who had obtained a *scire facias* against him, but had not issued execution. The court discharged the rule with costs.— *Kernaghan* v. *Dublin Trunk Connecting Railway Co.*, Law Rep. 3 Q. B. 47.

See Mortmain.

Concealment.—*See* Company, 1.

Confession.

The prisoner's master called him up, and said, "You are in the presence of two police officers; and I should advise you, that, to any question 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." He afterwards added, "Take care: we know more than you think." *Held*, that a statement then made by the prisoner was admissible against him on his trial for larceny.—*The Queen* v. *Jarvis*, Law Rep. 1 C. C. 96.

Conflict of Laws.—*See* Equity Pleading and Practice.

Contract.

The plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular parts, the price to be paid on the completion of the whole. After some parts had been finished, but before the whole was completed, the premises were destroyed by an accidental fire. *Held* (reversing the judgment of the Common Pleas), that the plaintiffs could not recover for those parts of the work which had been completed, whether the materials used had become the property of the defendant or not. (Exch. Ch.)—*Appleby* v. *Myers*, Law Rep. 2 C. P. 651.

See Mistake; Partnership; Railway, 2; Sale,

Contributory.—*See* Company, 1.

Conversion.—*See* Administration, 3.

Copyright.

The plaintiff registered, under the Copyright of Designs Act, a piece of cloth having woven on it a chain-work ground, with shaded and bordered six-pointed stars arranged in a quincunx. There was no written description. *Held*, that this was sufficient registration of the entire pattern, as the "design;" but that the whole combination only, and not single parts, though new, were protected.—*Holdsworth* v. *McCrea*, Law Rep. 2 H. L. 380.

Corporation.—*See* Company.

Corpus.—*See* Administration, 1, 2; Annuity; Legacy, 1.

Costs.—*See* Bankruptcy, 2; Champerty; Trust, 4.

Covenant.—*See* Landeord and Tenant, 2, 3.

Criminal Law.—*See* Appeal; Confession; Evidence; Indictment; New Trial; Perjury.

Cross Remainder.—*See* Devise, 2.

Custom.—*See* Support.

Cy prés.—*See* Charity, 3; Devise, 2.

Damages.

1. In a suit to establish the right to coal mines, it appeared that the defendant had worked them *bona fide*, and not fraudulently. *Held*, that, in assessing compensation for coal already gotten by the defendant, he should not be charged the full value of the coals without deducting the cost of obtaining them, but only the fair value of the coal, as if he had purchased the mine from the plaintiff.—*Hilton* v. *Woods*, Law Rep. 4 Eq. 432.

2. The works of a railway company diminished the light to the plaintiff's premises, whereby they were rendered less convenient for the requirements of his trade; but the saleable value of the plaintiff's interest in the premises was not diminished, property in the neighbourhood generally having been enhanced by reason of the works. Under a statute giving compensation to persons whose interest in land was injuriously affected by the works, *held*, that the plaintiff was entitled to compensation. —*Eagle* v. *Charing Cross Railway Co.*, Law Rep. 2 C. P. 638.

See Landlord and Tenant, 2; Railway, 1; Sheriff, 1.

Death.—*See* Presumption.

Deed.

On the marriage of A., tenant for life of X. estate, with remainder in his first and other sons in tail male, personal estate was settled

(in case there should be children, other than a son, for the time being entitled to X., estate, for an estate in tail male in possession, or remainder immediately expectant on A.'s death) on such children, in such shares as A. should appoint, and in default of appointment equally. C., the eldest son of the marriage, joined with A. in barring the entail, and resettling the estate to A. for life, then to C. for life, with remainder to C.'s issue in tail general, remainder to A.'s heirs. *Held*, on A.'s death, that that was the period for ascertaining whether C. should be excluded, and that therefore he was entitled to share in the personal estate; the fact that his being only tenant for life arose from his own act did not exclude him.—*Stanhope* v. *Collingwood*, Law Rep. 4 Eq. 286.

See MISTAKE; PLEADING, 1.

DEPOSITION.

By 1 Wm. IV., c. 22, sec. 4, a judge may issue commissions to examine witnesses abroad, and may give all such directions touching the time, place and manner of the examination, and all other matters and circumstances connected with the examination, as may appear reasonable and just." A judge's order under this statute provided that the deposition of every witness should be signed by him. The commission contained no such clause. *Held*, that the clause was merely directory, and a non-compliance with it did not render the deposition inadmissible.—*Hodges* v. *Cobb*, Law Rep. 2 Q. B. 652.

DEVISE.

1. Testator devised all his "freehold land, situate and being in, or forming the whole or part of" a certain block of buildings. Part of this block the testator owned in fee, subject to a lease; of a second part he had a term for years; of the remaining part (x) he had a term for years, and also the reversion in fee from the expiration of three years from the end of his term. *Held*, that both his leasehold and freehold interest in X. passed under the devise.—*Mathews* v. *Mathews*, Law Rep. 4 Eq. 278.

2. Devise in trust for A. for life, remainder in trust for B., C. and D., and the survivor, for their lives and the life of the survivor, and for the issue of them respectively for their lives for ever, as tenants in common, with a gift over on their death without issue or on the death of all their issue; and a direction that the before-stated entails to B., C. & D., and their respective issues, should be equally divided among the daughters as well as the sons of them an their issue. *Held*, that the doctrine of *cy près* was applicable to such devise; that B., C. and D. took equitable estates in remainder for their lives and the life of the survivor, with cross-remainders between them; and that, on the death of the survivor, all the children of B., C. and D. took equitable estates as tenants in common in tail, with cross-remainders between them in tail.—*Parfitt* v. *Hember*, Law Rep. 4 Eq. 443.

See LEGACY; VESTED INTEREST, 1; WILL, 5.

DISCOVERY.—*See* EQUITY PLEADING AND PRACTICE.

DISCRETION.—*See* TRUST, 4.

DIVORCE.

1. A man, having married a woman of loose character, with whom he had been co-habiting, separated from her against her will soon after the marriage, and sent her to live by herself, in a place where she would be accessible to temptation, and where she committed adultery. There was no evidence of any reasonable cause for the separation. *Held*, that this was conduct conducting to her adultery, and that a petition by the husband for dissolution of marriage should be dismissed.—*Baylis* v. *Baylis*, Law Rep. 1 P. & D. 395.

2. The pension of a retired naval officer, received solely in respect of past services, is liable to sequestration for alimony.—*Dent* v. *Dent*, Law Rep. 1 P. & D. 366.

EASEMENT.

The defendant, the owner of a mill where paper had been made from rags, introduced a new vegetable fibre, and carried on the works on the same scale for making paper from this new material. For more than twenty years before this change, the refuse from the mill had been discharged into a stream that ran past the plaintiff's house. *Held*, that the defendant's easement was to be presumed to be, not a right to discharge into the stream the washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not increasing the pollution, and that the burden lay on the plaintiff to prove any such increase.—*Baxendale* v. *McMurray*, Law Rep. 2 Ch. 790.

See LIGHT.

ELECTION.—*See* MARSHALLING.

EQUITY.—*See* LEASE.

EQUITY PLEADING AND PRACTICE.

To a bill by the United States, praying an account of all moneys received by the defendant as agent in England of the so-called Confederate States, and for consequential relief, the defendant pleaded to the whole of the dis-

covery and relief, that, by an act of Congress, the property of all agents of the Confederate Government was liable to confiscation, and that proceedings *in rem* were pending in the United States to confiscate his property on the ground of such agency. The plea was allowed, on the ground that the plaintiffs were not entitled to the aid of equity to obtain the money held by the defendant as agent, without waiving the forfeiture to which his agency exposed him in the United States.—*United States of America* v. *McRae*, Law Rep. 4 Eq. 327.

See Vendor and Purchaser of Real Estate.

Estate by Implication.—*See* Will, 5.

Estate Tail.—*See* Devise, 2.

Evidence.

1. The prisoner, an attorney, was indicted for perjury in having sworn that there was no draft of a certain paper made by his client. No notice to produce the draft had been given to the prisoner; and, on his trial, it was proved to have been last seen in his possession. *Held*, that secondary evidence of its contents was inadmissible. — *The Queen* v. *Elworthy*, Law Rep. 1 C. C. 103.

2. On a trial for felony in a colony, the jury disagreed; on a new trial, some of the witnesses having been resworn, their evidence on the former trial was read to them from the judge's notes, both the prosecution and the prisoner having liberty to examine and cross-examine. *Semble*, that this was irregular, and could not be cured by the prisoner's consent.—*The Queen* v. *Bertrand*, Law Rep. 1 P. C. 520.

See Confession; Deposition; Easement; Insanity; Master and Servant; Negligence; Perjury; Presumption; Sale, 2.

Execution.—*See* Assignment, 3; Bankruptcy, 3; Company, 2, 3; Divorce, 2; Sheriff, 1.

Executor and Administrator.—*See* Administration; Limitations, Statute of.

Factor.

The Factors' Act (5 & 6 Vic. c. 39) provides in sec. 1, that a pledge of goods by a factor, as well for any original loan, advance, or payment, made on the security of such goods, as also for any further or continuing advance in respect thereof, shall be valid; and, in sec. 3, that the act shall not extend to any pledge for, or in respect of, any antecedent debt, owing from the factor to the pledgee, but that for the purpose of protecting all such *bona fide* loans, advances, and exchanges as aforesaid, and to no further or other intent or purpose, such contracts shall be valid. A., a factor, pledged goods of his principal to B.; first, to secure the payment of an acceptance of A. in B.'s hands, not then due, which had been given to protect B.'s liability on a contract as A.'s broker; secondly, to repay to B. his loss on a resale of goods which B. had purchased for A. in his own name, and which had not been paid for. *Held*, that the pledge was not protected by the Factors' Act; and *semble*, that both liabilities were antecedent debts.—*Macnee* v. *Gorst*, Law Rep. 4 Eq. 315.

Foreign State.—*See* Equity Pleading & Practice.

Forfeiture.—*See* Equity Pleading and Practice.

Husband and Wife.—*See* Ademption, 2; Landlord and Tenant, 3; Trust, 1, 2; Voluntary Conveyance.

Implied Estate.—*See* Will, 5.

Income. — *See* Administration, 1–3; Annuity; Legacy, 1.

Indictment.

An indictment, charging the prisoner with neglect to provide food and clothing for his child, sufficiently avers his ability to provide, it being implied in the word "neglect."—*The Queen* v. *Ryland*, Law Rep. 1 C. C. 99.

Injunction.—*See* Nuisance.

Insanity.

If the disease be once shown to exist in the mind of a testator, it matters not that it is discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, or that the subject on which it is manifested has no connection with the testamentary disposition; and, if a diseased state of mind is proved to have once existed, the burden of proving restored health lies on those who assert it.

The tests of insanity considered.

The question of insanity is a mixed one, within the range partly of common observation and partly of special medical experience; and the court, in searching for a conclusion, must inform itself of the general results of medical observation, and must make a comparison between the sayings and doings of the testator at a time when the disease is alleged to exist, and (1) his sayings and doings at a time when he was sane, or the sayings and doings of those persons whose general temperament and character bear the closest resemblance to his own, and (2) the sayings and doings of insane persons.—*Smith* v. *Tebbitt*, Law Rep. 1 P. & D. 398.

Interest.—*See* Administration, 2, 3; Legacy, 2.

Jurisdiction.—*See* Admiralty; Appeal; License; Perjury, 2.

Digest of English Law Reports.

Landlord and Tenant.

1. An agreement for the sale of a house by S. to E. provided, that, inasmuch as E. was to be let into immediate possession, E. "admits himself to be a tenant from week to week to S." of the premises agreed to be sold, at a certain weekly rent. *Held*, that this created the relation of landlord and tenant between S. and E., with right to distrain.—*Yeoman* v. *Ellison*, Law Rep. 2 C. P. 681.

2. The defendant demised premises to the plaintiff, and covenanted that the plaintiff should occupy during the term, without any interruption from the defendant or those lawfully claiming under him. The plaintiff erected a conservatory on the land. Afterwards, a person claiming under the defendant brought an action of trespass against the plaintiff, who notified the defendant. The defendant paid no attention to the notice, and the plaintiff defended the action. A verdict was found against him, and he had to pay damages and costs. In an action against the defendant for breach of the covenant, *held*, (1) that the plaintiff could recover compensation for his expenses in building the conservatory; (2) (Channell and Pigott, B. B., doubting) that he could recover the damages and costs he had paid, and also his expenses in defending the action.—*Rolph* v. *Crouch*, Law Rep. 3 Ex. 44.

3. Husband and wife seized in fee in right of the wife, in April, 1860, by indenture demised land to C. for seven years, and C., and the defendant as his surety, covenanted to pay rent during the term. The deed was executed by all the parties; but the wife did not acknowledge it, as provided by statute. The lessee entered and occupied till August, 1866, when he left. The husband died in January, 1866, and the wife in January, 1867. The wife's executors sued the defendant on the covenant to recover rent due in June, 1866. *Held*, that the contract must be taken to have been for a term for seven years, terminable, at the option of the wife, after the death of the husband; and that, as the wife had allowed the lessee to retain possession, the lease was subsisting up to her death, and the plaintiffs could recover.—*Toler* v. *Slater*, Law Rep. 3 Q. B. 42.

Lease.

The plaintiff held land under a lease, which it was doubtful whether he had a right to have renewed in 1885. A railway company took the land, paying the price of his present term, and agreeing to pay him a further amount (to be settled by arbitration) in case he should substantiate his right to a renewal. The company afterwards bought the reversion in fee. The plaintiff filed a bill against the company, praying a declaration of his right to a renewal and payment accordingly. *Held*, that the bill was maintainable. — *Bogg* v. *Midland Railway Co.*, Law Rep. 4 Eq. 310.

See Landlord and Tenant; Will, 3.

Legacy.

1. In June, 1865, a dividend on certain shares held by the testatrix was declared, payable in July, 1865, and January, 1866. Testatrix died in December, 1865. *Held*, that the January dividend formed part of the *corpus* of her estate, and did not pass under a bequest of the annual income of such estate.—*De Gendre* v. *Kent*, Law Rep. 4 Eq. 283.

2. A testatrix, having a power to appoint property which was the subject of litigaton, appointed it to A. "on trust, that, so soon as proceedings in law and equity shall be terminated, and the same shall come into his possession, that then he shall pay" certain legacies, "and as to the residue on other trusts." *Held*, that the legacies did not carry interest till the litigation ended, which was not till eighteen years after the death of the testatrix.—*Lord* v. *Lord*, Law Rep. 2 Ch. 782.

3. A testator charged the share of a residuary legatee with money due to him from the legatee on the security of a bond, and all interest thereon. The debt and interest exceeded the penalty. *Held*, that only the amount of the penalty could be deducted from the share.—*Mathews* v. *Keble*, 4 Eq. 467.

4. A testator gave £2,000 in trust for A. for life, remainder to her children; and, if she died without issue, then "to the next personal representatives" of A. A. died without issue, leaving a husband, a brother, a sister, and the child of a deceased sister. *Held*, that "next personal representatives" did not mean "executor or administrator," nor did it mean "next of kin according to the Statute of Distributions," but that it meant "nearest of kin," and that therefore the brother and sister were entitled as joint tenants.—*Stockade* v. *Nicholson*, Law Rep. 4 Eq. 359.

See Ademption; Administration, 1, 4; Charity; Devise; Perpetuity; Trust, 3; Vested Interest, 2; Will, 5.

License.

A. was licensed to sell beer not to be drunk on the premises; A.'s servant handed beer in a mug of A.'s through an open window in A.'s premises to a person who, after paying for it, drank it immediately, standing on the highway, close to the window. *Held*, that A. could not

be convicted of "selling beer to be consumed on the premises where sold.—*Deal* v. *Schofield*, Law Rep. 3 Q. B. 8.

Light.

To establish the right to an extraordinary amount of light necessary for a particular purpose, the user of such extraordinary amount, as at present enjoyed and claimed, must be shown for the period of prescription.—*Lanfranchi* v. *Mackenzie*, Law Rep. 4 Eq. 421.

See Damages, 2.

Limitations, Statute of.

1. If an executor, in his discretion, pays a debt barred by the Statute of Limitations, he will be allowed the payment, if the personal estate is insufficient, against the devisees of real estate.—*Lowis* v. *Rumney*, Law Rep. 4 Eq. 451.

2. A., a tenant for life impeachable for waste, cut timber without the leave of the court. Afterwards, the remainder-man died, and A. took out administration. *Held*, (1) that the right to the timber when cut passed to the administrator, and not to the heir of the remainder-man; and (2) that, the act of cutting being wrongful, the Statute of Limitations began to run from the time of cutting, but that the running of the statute was suspended during the administration. — *Seagram* v. *Knight*, Law Rep. 2 Ch. 628. [This decision, that the running of the statute is suspended by a debtor taking out administration to his creditor, has excited much surprise and comment in England.]

Maintenance.—*See* Champerty; Marshalling.

Malicious Prosecution.

No action lies for a malicious prosecution unless the prosecution has failed, even though the plaintiff has been convicted under a statute giving no appeal. —*Basebe* v. *Matthews*, Law Rep. 2 C. P. 684.

Mandamus.—*See* Pleading, 2.

Married Woman.—*See* Ademption, 2; Landlord and Tenant, 3; Trust, 1, 2; Voluntary Conveyance.

Marshalling.

A., domiciled in England, settled a Scotch estate in trust, among other things for the maintenance of his children. He then made an English will, not attested so as to pass real estate in Scotland, in which he declared, that the will should not affect the settlement of the Scotch estate. He charged his residuary real and personal estate with payment of his debts, and provided for the payment of his children. He afterwards charged the Scotch estate with £14,000 by a Scotch heritable bond. Still later he purchased other land in Scotland, which passed by intestacy to his heir. *Held*, (1) that the residuary estate should pay the £14,000 in exoneration of the Scotch estate; (2) that the heir could take the after-acquired estate in the same manner as if there was no will, and that he was not put to his election; (3) that the provisions for maintenance in the will were additional to those in the settlement. —*Maxwell* v. *Hyslop*, Law Rep. 4 Eq. 407.

Master and Servant.

An action will lie for enticing away the plaintiff's servant, his daughter, though it be not alleged that the defendant debauched her, or that there was any binding contract of service between her and the plaintiff.

The plaintiff's daughter, nineteen years old, resided with him and assisted him in his business. By a fictitious letter, dictated by the defendant, she procured her mother's consent to leave home for a few days, when she left, and the defendant took her to a lodging-house, where he cohabited with her for nine days. She then returned home. *Held*, that there was a sufficient continuing relation of master and servant, and sufficient evidence of a wrongful enticing away, to maintain the action.—*Evans* v. *Walton*, Law Rep. 2 C. P. 615.

Mines—*See* Damages, 1; Support.

Misrepresentation.—*See* Company, 1.

Mistake.

More land was conveyed by a deed than the vendor intended to convey. Though the mistake was not common to both parties, the court made a decree to rectify the deed, giving an option to the purchaser to annul the contract. —*Harris* v. *Pepperell*, Law Rep. 5 Eq. 1.

Mortgage.

1. Several mortgages of different estates by the same mortgagor had become united in the plaintiff. The mortgagor had conveyed the equity of redemption in some of the estates to purchasers by deeds of various dates. In a suit for foreclosure: *Held*, (1) that no purchaser could redeem his estate without redeeming all the mortgages, whether he had purchased before or after the union of the mortgages in the plaintiff, and whether he had or had not had notice of such mortgages; (2) that the first purchaser of part in point of date had the first right of redeeming all the mortgages, and, in default, the subsequent purchasers had successive rights of redemption. — *Beevor* v. *Luck*, Law Rep. 4 Eq. 537.

2. A., having contracted to purchase an advowson, borrowed from B. £2,500, and covenanted to pay for the advowson, and convey it

to him as security within six months. A. purchased the advowson, but never conveyed it under the covenant. Subsequently, he borrowed £1,000 from C., and covenanted to convey the advowson to him as security, and deposited with him the title deeds, but did not convey the legal estate. *Held*, that the first mortgage must be postponed to the second.—*Layard* v. *Maud*, Law Rep. 4 Eq. 397,

See Marshalling.

Mortmain.

Shares in the A. company, the business of which was purchasing and improving lands, and selling or letting the same, and in the B. Society, established for raising a fund out of which any member should receive the amount of his share "for the erection or purchase of a house, or other real or leasehold estate," are not within the Statute of Mortmain.—*Entwhistle* v. *Davis*, Law Rep. 4 Eq. 272.

Navigable Waters.—*See* Prescription.

Negligence.

Goods were shipped under a bill of lading containing an exception from liability for "breakage, leakage or damage.' The goods were found to have been injured by oil. It was proved that they were sound when shipped, that there was no oil in the cargo, but that there were two engines near where the goods were stowed, in lubricating which oil was used. There was no evidence of how the injury occurred. *Held*, that the ship-owners, notwithstanding the exception, were responsible for their servants' negligence, and that the above facts were evidence on which a jury were justified in finding negligence.—*Czech* v. *General Steam Navigation Co.*, Law Rep. 3 C. P. 14.

See Mortgage, 2; Railway, 2, 3.

New Trial.

The court cannot grant a new trial, on the application of the prisoner, in a case of felony.—*The Queen* v. *Bertrand*, Law Rep. 1 P. C. 520.

Notice.—*See* Assignment, 3; Evidence, 1.

Nuisance.

The collection of a disorderly crowd outside grounds in which entertainments with music and fireworks are being given by A. for profit, is a nuisance, for which A. is liable to injunction at the suit of the owners of the neighbouring premises, though A. has excluded all improper characters from the grounds, and the amusements within the grounds have been orderly. *Semble*, that letting off rockets, and establishing a powerful band of music, which plays twice a week for several hours continuously within a hundred yards of a house, will be restrained by injunction.—*Walker* v. *Brewster*, Law Rep. 5 Eq. 25.

See Easement; Pleading, 2.

Pardon.—*See* Appeal, 2.

Parent and Child.—*See* Indictment; Master and Servant.

Parties.—*See* Vendor and Purchaser of Real Estate.

Partenrship.

A. and B., partners, agreed that if B. wished to retire, he should give notice, and that A. should have the option to purchase within six months after notice; the partnership property, contracts, &c., to be valued "in the usual way," by two valuers, one to be named by A., the other by B., or the umpire of the two valuers. B., wishing to retire, and A. to purchase, the two valuers were appointed, but B. afterwards refused to allow his valuer to proceed. *Held*, that there was no contract which could be specifically enforced.—*Vickers* v. *Vickers*, Law Rep. 4 Eq. 529.

Patent.—*See* Copyright.

Penal Action.

An informer having recovered from the defendant the penalty of £100 for keeping a house for dancing without the requisite yearly license, *held*, that a second action by another informer to recover a like penalty was not maintainable.—*Garrett* v. *Messenger*, Law Rep. 2 C. P. 583.

Penalty.—*See* Legacy, 3.

Perjury.

1. On the trial of S. for robbery, A., in support of an *alibi*, swore (1) that S. was in a certain house at the time of the robbery; (2) that S. had lived in that house for the last two years; and (3) that S. had never been absent from it more than two or three nights together during that time. In fact, S. had been in prison during one of the two years. *Held*, that the second and third statements were material as tending to make the first more credible, and that A. was rightly convicted of perjury assigned on them.—*The Queen* v. *Tyson*, Law Rep. 1 C. C. 107.

2. The prisoner was convicted of perjury, committed on the hearing of an application for an order of affiliation. The information was proved, and it was shown that the putative father appeared, and that evidence was given on both sides. To give the justice jurisdiction, it was necessary that a summons should have been served on the putative father. *Held*, that the father having appeared, and not having raised any objection to the summons, no evi-

dence of its existence need be given on the trial for perjury.—*The Queen* v. *Smith*, Law Rep. 1 C. C. 110.

See Evidence, 1.

Perpetuity.

A testator directed trustees to apply so much as was necessary of the income of his residuary personal estate for the maintenance of A., a lunatic, and to invest any surplus, and treat it as part of the testator's personal estate, which was given over after A.'s death. *Held*, that, under the Thelluson Act, the direction to invest the surplus was void beyond the period of twenty-one years, and that the testator's next of kin were entitled to the accumulations.—*Mathews* v. *Keble*, Law Rep. 4 Eq. 467.

Pleading.

1. By the Irish Registration Act, cap. 2, a registered deed is good and effectual according to the time of registration, and all prior unregistered deeds are void as against the registered deed. *Held*, that under a plea which was in form a bar of the action, and which alleged the time of registration under a *videlicet*, proof of the registration of a deed which really defeated the action might be given, though the deed was not in fact registered till after the commencement of the action, though before plea pleaded. —*Carlisle* v. *Whaley*, Law Rep. 2 H. L. 391.

2. A. complained in a *mandamus* against the trustees of a navigation, that there were sluices near his land under the management of the trustees; that, owing to heavy rains, the water had risen; that the sluices were not raised to such a height to let off the water, as they ought to have been, and, but for possible damage to works of the trustees in another place, would have been; whereby he suffered damage; but he did not allege that the effect of the sluices was to raise the water higher than it would have risen had they not existed. The issue on the return and pleadings was, whether the damage was occasioned on account of the navigation. *Held*, that the allegations, though they might have been insufficient on demurrer, were, after verdict, sufficient to warrant judgment for A.—*Lord Delamere* v. *The Queen*, Law Rep. 2 H. L. 419.

See Equity Pleading and Practice.

Pledge.—*See* Bill of Lading; Factor.

Power.—*See* Trust, 1.

Prescription.

A claim for anchorage dues on a navigable arm of the sea, if it is prssumably capable of a legal origin, and if the dues have been paid time out of mind, will have every intendment made in its favor. It cannot be supported in respect of the mere ownership of the soil; but such ownership, together with the maintenance of buoys from time out of mind, and the benefit to the public therefrom, are a sufficient consideration to support the claim. —*Whitstable Fisher* v. *Foreman*, Law Rep. 2 C. P. 688.

See Easement; Light.

Presumption.

If a man has not been heard of for seven years, there is no presumption of his death till the end of that time; and those alleging his death within that time must prove it. Therefore, a legacy left to a man last heard of in 1854, by a testator who died in 1860, was *held* not to have lapsed, but to be payable to his representatives.—*In re Benham's Trust*, Law Rep. 4 Eq. 416.

See Easement; Insanity; Revocation of Will.

Principal and Agent.—*See* Factor.

Priority.—*See* Mortgage, 2.

Promissory Notes.—*See* Bills and Notes.

Railway.

1. A. was travelling with others in a railway carriage; on the tickets being collected, there was one ticket short. The collector charged A. with being the defaulter, and, on his refusing to pay the fare or leave the carriage, removed him from the carriage, but without any unnecessary violence. A. left behind him a pair of opera-glasses. It turned out that A. had a ticket; and he sued the company for the assault, laying the loss of the glasses as special damage. There was also a count in trover, but there was no evidence that the glasses had come to the possession of any of the company's servants. *Held*, that A. could not recover for the loss of the glasses.—*Glover* v. *London and S. W. Railway Co.*, Law. Rep. 3 Q. B. 25.

2. The plaintiff's goods were carried by the defendants, carriers in India, under a contract with the Government, bywhich the baggage of certain troops (including the plaintiff's goods) were to remain in charge of a military guard, "the company accepting no responsibility;" whilst being so carried, the goods were destroyed by the defendants' negligence. *Held*, (1) that the defendants were liable for a loss occurring wholly from their own negligence; (2) (Kelly, C.B., and Pigott, B., doubting) that, though the plaintiff could not sue the defendants for non-performance of their contract, he could sue for an injury to his goods through their negligence while the goods were in their custody.—*Martin* v. *Great Indian Peninsular Railway Co.*, Law Rep. 3 Ex. 9.

3. A railway, consisting of several lines, crossed a public foot-path near a station; but the crossing was not otherwise dangerous There were sufficient swing-gates, as required by statute. The railway company, as an extra precaution, usually, but not invariably, fastened the gates when a train was approaching. S. found the gate unfastened, and a train standing in front of it. He waited till the train moved off, and then, without looking along the line, commenced crossing, and was killed by a passing train. Had he looked along the line, he would have seen the train in time to stop. In an action by his administrator, under Lord Campbell's Act, a nonsuit was ordered. *Held*, that S. had contributed by his negligence to the accident, and that the nonsuit was right. By Willes, J., that the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate was not an invitation to come on the line; and that therefore the company would not have been liable, even without negligence on S.'s part.—*Skelton* v. *London and N. W. Railway Co.*, Law Rep. 2 C. P. 631.

Registration.—*See* Pleading, 1.

Revocation of Will.

A will which had been in the testator's custody could not be found among his papers after his death; he had recognized its existence up to three weeks of his death, and no change of intention was shown during those weeks; the only person interested in an intestacy had had access to and had searched the testator's papers before any other person, and did not appear in court. The court refused to presume that the will had been revoked, and granted probate of the draft.—*Finch* v. *Finch*, Law Rep. 1 P. & D. 371.

Sale.

1. 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 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 to 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.—(Exch. Ch.) *Azemar* v. *Casella*, Law Rep. 2 C. P. 431.

2. A boiler set in brickwork, and capable, if taken to pieces, of being removed without injury to the premises, had been seized and sold under a distress, bought by the defendant, and sold by him to the plaintiffs at an advanced price, with notice of the circumstances under which he had bought it, the plaintiffs to remove it at their own expense. The mortgagees of the premises having prevented the plaintiffs from carrying the boiler away, the plaintiffs sued the defendant, relying on an alleged implied warranty that he had a good title, and that the plaintiffs should be allowed to remove the boiler. The jury found for the plaintiffs. *Held* (by Bovill, C. J., and Montague Smith, J.; Willes, J., dissenting), that there was no evidence to justify the jury in finding a warranty as alleged. [The judge at *nisi prius* assumed the distress to have been legal, but its legality seems not to have been considered *in banc.*]—*Bagueley* v. *Hawley*, Law Rep. 2 C. P. 625.

See Stoppage in Transitu.

Scire Facias.—*See* Company, 2, 3.

Seduction.—*See* Master and Servant.

Sequestration.—*See* Divorce, 2.

Servant.—*See* Master and Servant.

Set-off.—*See* Administration, 4; Assignment, 1; Bankruptcy, 2.

Settlement.—*See* Deed.

Sheriff.

1. An action cannot be maintained against a sheriff for negligence in not levying under a *fi. fa.* without showing actual pecuniary damages; and though *prima facie* the measure of damage is the value of the goods which might have been levied on, yet it is for the jury to say, looking at the probabilities of the case, whether or not, if the execution had been levied, the plaintiff would have derived any benefit from it, by reason of the other creditors being in a position to make the debtor a bankrupt.—*Hobson* v. *Thelluson*, Law Rep. 2 Q. B. 642.

2. A., having been arrested by a sheriff's officer under a *capias* to hold to bail against another person, protested that he was not the right person; but, to obtain his release, he paid the sum indorsed, and the officer released him under the 43 Geo. III. c. 46, s. 2. The money having been paid into court by the sheriff, a summons was served on A. to show cause why the money should not be paid to the person at whose suit he was arrested. A. did not appear, and the money was paid to such person. *Held*, that A. could recover the amount so paid from the sheriff, together with damages for the arrest.—*De Mesnil* v. *Dakin*, Law Rep. 3 Q. B. 18.

Ship.—*See* Admiralty; Negligence; Stoppage in Transitu.

Solicitor.—*See* Bankruptcy, 2; Champerty.

Specific Performance.—*See* Partnership.

Statute.

The fifth section of a statute provided, that, if in any of a certain class of actions, "commenced after the passing of this act," the plaintiff did not recover a certain amount, he should have no costs. A subsequent section of the same act provided that "this act shall come into operation on the 1st day of January next after the passing thereof." The act was passed in August, 1867. *Held*, that the fifth section did not come into force till the 1st of January, 1868.—*Wood* v. *Riley*, Law Rep. 3 C. P. 26.

Statute of Limitations.—*See* Limitations, Statute of.

Stoppage in Transitu.

A., in Sweden, agreed to sell goods to B., in London, the price of the goods to be "free on board." payable by B.'s acceptance of A.'s drafts at six months from the date of bills of lading, ships to be provided by A. By a subsequent agreement, a ship was chartered by B., on which the goods were shipped by A., who had the bills of lading drawn in his name as shipper, deliverable "to order or assigns." The bill of lading was indorsed in blank by A., and sent to B. in return for his acceptance of a bill of exchange drawn on him by A. The ship put into Copenhagen in distress, and, while it was there, B. stopped payment, and A. gave notice of stoppage *in transitu*. *Held*, that the effect of the delivery of the goods on board a chartered ship, coupled with the form of the bills of lading, was to interpose the master as a carrier between A. and B., and that A. had an equitable right to stop *in transitu* as against B. —*Berndtson* v. *Strang*, Law Rep. 4 Eq. 481.

Support.

If A. sells land to B., reserving the mines and minerals, with a right of user of the surface for the purpose of working the mines, A. has no right to cause a subsidence of the surface, though he cannot work the mines at all without causing such subsidence, and injunction will be granted accordingly. *Semble*, that a custom as between the owner of the surface and the owner of the mines, entitling the latter to cause a subsidence of the surface, if necessary in working his mines, is bad and void.—*Wakefield* v. *Duke of Buccleuch*, Law Rep. 4 Eq. 613.

Tail, Estate in.—*See* Devise, 2.

Tenant for Life and Remainderman.—*See* Administration, 1–3; Limitations, Statute of, 2.

Timber.—*See* Limitations, Statute of, 2.

Trust.

1. A power for setting up children in business does not entitle trustees to make advances for such purpose to a married daughter, nor for the purpose of paying the debts of a daughter's husband.—*Talbot* v. *Marshfield*, Law Rep. 4 Eq. 661.

2. A married woman consented, before commissioners, to the transfer and payment to her husband of sums of stock and cash standing in court to her separate account. *Held*, that this was not such a declaration of trust but that she might, at any time before the transfer, retract her consent.—*Penfold* v. *Mould*, Law Rep. 4 Eq. 562.

3. A testator gave £2,300. bank annuities, to trustees on trust to pay his debts, if his ready money was insufficient, and to invest the residue, and to pay the interest to his wife for life, and on her death to pay seven legacies, amounting to £1,075, and the residue to A. The testator died in 1832, the estate was completely administered, and, no part being required for debts, the £2,300 was appropriated as trust funds, and transferred into the names of the trustees on the trusts of the will. Both trustees died, and the administrator of the survivor embezzled the greater part of the funds, so that only £716 were forthcoming. The widow died in 1862. *Held*, that there having been a complete appropriation of the fund, awaiting only the period of distribution, and there being no deficiency of assets, the pecuniary legatees must abate, *pari passu*, with the residuary legatee.—*Baker* v. *Farmer*, Law Rep. 4 Eq. 382.

4. If, after the institution of an administration suit, trustees exercise their discretion by making advances, the court will require the clearest evidence that they have acted *bona fide;* and the court being of opinion, in this case, that they had exercised a discretionary power, not *bona fide*, but in order to defeat the plaintiff's interest, ordered the amount of the advances to be restored, and that the trustees should pay the costs.—*Talbot* v. *Marshfield*, Law Rep. 4 Eq. 661.

See Annuity; Assignment, 2, 3; Charity; Devise, 2; Legacy, 2.

Vendor and Purchaser of Real Estate.

A bill was filed by an unpaid vendor against two railway companies, the purchasers, and their lessees in possession, for specific performance and payment, for an injunction against both companies, for a declaration of lien, and that it might be enforced by a sale, and for the appointment of a receiver of the profits of the

land. *Held*, that the lessees were properly made parties.—*Bishop of Winchester* v. *Midhants Railway Co.*, Law Rep. 5 Eq. 17.

See Mistake.

Vested Interest.

1. Testator devised certain land to trustees, on trust for his daughter R. for life, and, after her death, he gave the same to her children; if more than one, as tenants in common, their heirs and assigns; if only one, then to such child and his or her heirs and assigns; and in case R. should die "under twenty-one or afterwards, without leaving any child or children," testator gave the land to his son C., his heirs and assigns. *Held*, that "without leaving" was to be read "without having had," and that R.'s children, at their birth, took indefeasible vested remainders in fee.—*White* v. *Hill*. Law Rep. 4 Eq. 265.

2. Bequest of stock to be divided, after the death of an annuitant, between all the children of A., as they should attain his or her age of twenty-one. *Held*, that the fund was to go to such of the children of A. as were living when the first attained twenty-one, and who had attained or who should attain twenty-one.—*Locke* v. *Lamb*, Law Rep. 4 Eq. 372.

Voluntary Conveyance.

A woman being indebted to the plaintiff at the time of marriage, settled all her property (except jewels and furniture exceeding the debt in value), on failure of issue, in favor of her mother, her sister and two nieces, one of whom she had adopted as her daughter. She died without issue, leaving no assets. *Held*, that the settlement must be set aside to the extent of the plaintiff's debt.—*Smith* v. *Cherrell*, Law Rep. 4 Eq. 390.

Warranty.—*See* Sale.

Waste.—*See* Limitations, Statute of.

Watercourse.—*See* Easement; Pleading, 2.

Will.

1. A testatrix left a will, with a full attestation clause, all in her own handwriting; the only signature was in the attestation clause, and had apparently been inserted after that clause had been written. The witnesses did not know whether or not the signature was on the paper when they signed. The court *held*, that it was at liberty to judge whether the signature was on the paper at the time of attestation, and, being of opinion that it was, granted probate of the will.—*Goods of Huckvale*, Law Rep. 1 P. & D. 375.

2. A testatrix wrote three lists of legacies on three separate sheets; the first was headed, "Codicil to the will of S. P." She signed all three sheets in the presence of the witnesses, but they attested her signature to the first sheet only. There being nothing in the contents to connect the papers with each other, and the first being complete in itself, the court refused to grant probate of the other two.—*Goods of Pearse*, Law Rep. 1 P. & D. 382.

3. An agreement to lease, attested by two witnesses, contained a provision as to the application of the rent, in case of the lessor's death, the lessee being beneficially interested in such application. *Held*, that, as no part of the agreement was revokable, and as it came into operation immediately on its execution, it was not entitled to probate as testamentary.—*Goods of Robinson*, Law Rep. 1 P. & D. 384.

4. A will began thus: "I, W. M., being weak in health, have obtained permission to cease from duty for a few days; and I wish, during such time, to be removed from the brig A. to the hospital ship B., to recruit my health. I desire to defray out of my wages the expenses incurred during my absence from duty, in respect of a substitute; and, in the event of my death occurring during such time, I do hereby will and bequeath," &c. *Held*, not contingent on the event of the testator's death in the illness from which he was suffering when the will was made.—*Goods of Martin*, Law Rep. 1 P. & D. 380.

5. Testator, after giving an annuity and legacies to his wife, and an annuity to his father, left several legacies, which he wished paid after his father's death, and directed that, after his wife's death, the remainder of his property should be divided among his brothers and sisters, if living; if dead, among his nephews and nieces. *Held*, that the wife took a life-estate by implication, in the residue.—*Humphreys* v. *Humphreys*, Law Rep. 3 Eq. 475.

See Ademption; Administration; Annuity; Charity; Devise; Insanity; Legacy; Marshalling; Mortmain; Perpetuity; Revocation of Will; Trust, 3; Vested Interest.

Witness.—*See* Deposition; Evidence; Will, 2.

Words.

"*Drunk on the premises.*"—See License.

"*Freehold.*"—See Devise, 1.

"*Neglect.*"—See Indictment.

"*Next personal representative.*"—See Legacy, 4.

"*Passing of this Act.*"—See Statute.

"*Without leaving.*"—See Vested Interest, 1.

UNITED STATES REPORTS.

Bacon's Appeal.—Mary Ann Bacon's Estate.

Trusts—Executed and Executory

1. A trust to receive and pay over the income of real and personal estate to a married woman for life and at her death to convey to her right heirs in fee simple, is an active trust which does not cease on discoverture, but continues until the death of the *cestui que trust.*
2. The trust to convey to the right heirs is not an active trust, and the legal estate is executed in them.
3. The rule in Shelley's case does not apply, because the *cestui que trust* has only an equitable estate for life, while the remainder to her "right heirs" is a legal estate.
4. The act of 8 April, 1833, sect. 12, providing against a lapse, only applies to cases where a legacy is clearly given by a testator to the ancestor.

[Phil. Leg. Int., May 22, 1868.]

Appeal of George W. Bacon and others from the decree of the Orphans' Court of Philadelphia, confirming the report of the auditor in the matter of the account of the executors of Mary Ann Bacon, deceased.

The opinion of the Court was delivered May 7, 1868.

Strong, J.—There are two controlling questions in this case. The first is, whether the trust created by the will of John Warder, for the use of his daughter Mrs. Bacon, continued during her life, though she survived her husband, and the second is whether the estate given in remainder to her right heirs was legal or equitable. Upon the answers to be given to these questions depends the rightful determination of all the matters in controversy between the parties.

By the disposition first made by the testator his sons were constituted trustees of certain real estate, for the sole and separate use of Mrs. Bacon, during her natural life, and, after her decease, for the use of her husband, in case he should survive her, and, after the death of both Mr. and Mrs. Bacon, for the use of her right heirs, and to be conveyed accordingly. By this disposition, no active duties were imposed upon the trustees during the life of Mrs. Bacon. They were made mere depositaries of the title. The only conceivable purpose of the trust was to maintain a seperate use for a married women, and to protect the property against the interference of her husband. On the accomplishment of that purpose, the estate of the trustees must have ended. Consequently had this disposition of the testator's will remained unchanged, when Mrs. Bacon became discovert by the death of her husband, the legal estate would by operation of law have immediately vested in her. But the testator did not leave the matter thus. By a codicil to his will he revoked so much of it as vested any real estate immediately in either of his daughters, and in lieu thereof, he devised their portions to the same trustees, in trust to receive the income thereof, and pay it over to the daughters respectively, for the sole and separate use of each daughter during life, and then to her husband, in case a husband should survive, and after the decease of the said daughters and their husbands respectively, the said portions to be conveyed to the right heirs of the daughters respectively, in fee simple.

It is obvious that the trust substituted by the codicil is very unlike that set up, at first, by the will. It is what is denominated, an active trust. It imposed upon the trustees duties beyond that of passively holding the title. And they were constant and continuous, not at all dependent upon the coverture of Mrs. Bacon or any of the daughters. The trustees were to receive the income of the property and pay it over. For this purpose the title was given to them, and for this purpose it was necessary they should hold it during the life of the cestui que trust. Had the trust no other object than the special one of protecting the property from the seperate use of the daughters, it might have been left as it was first constituted. The imposition of a duty to receive and pay over the income would have been needless. But the injunction of active duties during the the life of each daughter evinces a purpose beyond that of maintaining separate uses. It involved the necessity of management and care of the real estate, and of preservation for those entitled in remainder. The distinction between an active and a passive trust, so well established in England, is fully recognized with us in many cases, and it is one of much importance. It was well said by Sergeant, J., in *Veaux* v *Parke*, 7 W. & S. 19, that unless the distinction between these two classes of trusts be regarded, their existence cannot be preserved. So long as active duties remain to be performed by the trustees the legal estate must continue in them to enable the performance. It cannot, therefore, be held that the purposes of the trust instituted by the testator were all accomplished when the husband of Mrs. Bacon died, and that the legal estate of the trustees then terminated. Her interest under her father's will was equitable, and the use limited for her was never executed.

The second question to be answered is whether the estate limited in remainder to her right heirs was legal or equitable. If it was legal, the rule in Shelley's case has no applicability, and Mrs. Bacon's estate was but an estate for life though a remainder was given by the will to her heirs. As already noticed the codicil directs that the titles shall be held by the trustees in trust to receive and pay over the income during the life of each daughter, and of her husband, if he should survive her, and then the portion of each to be conveyed to the right heirs of the daughter in fee simple No other duties toward the remaindermen are prescribed, than to convey to them. The trustees were not to receive the income and pay it over to them. They were not at liberty to hold a single hour for the use of those in remainder At most they were but the conduit through which the title was to pass. Yet it must be conceded that in England the mere duty to convey, is sufficient to prevent the execution of an use under the statute of uses. There, under a trust to convey, the legal estate remains in the trustee until he makes the conveyance, the reason given being that it is necessary in order to enable the conveyance to be made. It might be doubted whether there is any such necessity, for a power would answer the requirement as well. But in this State when lands are given by will in trust to be conveyed, when no other power or duty is assigned to the trustee, when he has nothing to do with the enjoyment of the property, and is only an instru-

ment to enable the cestui que use to acquire the legal estate, it has been understood that a conveyance is unnecessary. At most it can be but a matter of form, rather than of substance. In fact such conveyances have not usually been made. Until the year 1836 we had no court of equity to compel a trustee to convey, and therefore that was considered as having been done which the trustee should have done, and with the same effect. The cestui que trust being entitled to the whole beneficial enjoyment, and the trustee having no right to interfere with it, no reason was apparent why a legal title should be held continuing in the latter. A severance of the legal right from the beneficial ownership is not to be maintained without some reason. In the case before us the purpose of the trust was accomplished when Mrs. Bacon died. The testator did not intend that the trustees should hold any estate after her death. He contemplated its immediate transmission to the remaindermen, a transmission by conveyance indeed, but no holding in trust for those in remainder. There was, therefore, nothing substantial to be secured by treating the legal estate as remaining in the trustees, and only an equitable interest in Mrs. Bacon's heirs. It is true that we have in some cases decreed conveyances from a trustee to a cestui que trust, when the purpose of a trust has been fulfilled, but this is not because the legal and equitable title remained apart. It was to dissipate a useless cloud upon the title, and make the property more marketable. We have done this when the trust had expired by limitation, and when without doubt the legal estate had passed from the trustee, though it had been given to him formally in fee simple. It is no more remarkable that a devise to trustees to convey to another should pass the legal title to that other, than a devise to trustees and their heirs for a temporary purpose vests in the trustees the legal estate only until the purpose is accomplished. In both cases the legal title remains severed from the beneficial ownerships so long only as there is any useful purpose or substantial reason for maintaining a separation. Accordingly it has been held that a direction to not continue the legal estate in them, and convey after the termination of a trust, does make them trustees of the persons to whom they are directed to convey. This was noted in Nice's Appeal, 14 Wright, 143, where the question was distinctly raised in the argument and, it was assumed in Barnett's Appeal, 10 Wright, 392. The decision accords with what, it is believed, has always been considered the law in this State.

Holding then, as we do, that by the limitations of the testators will the right heirs of Mrs. Bacon took a legal estate at her death, there was no union of their estate with hers, and consequently nothing passed by her will.

Thus far we have considered only the directions of the testator respecting his real estate. The same rule is applicable to the personalty. By his second codicil the testator revoked so so much of his will as gave to either of his daughters directly any part of his personal estate, and in lieu thereof gave it in trust for the sole and separate use of the daughters, in certain proportions; the income to be received and paid over by the trustees, in the same manner as the income of his real estate during their natural lives respectively, and in case of the decease of any of his daughters, leaving a husband surviving, the income to be received and enjoyed by the husband during his life, and from and after the decease of his daughters and their husbands respectively the share of each daughter to go to her right heirs forever. The disposition is very similar to that made of the realty, and if that did not confer a fee upon Mrs. Bacon in the land, it is not easy to see how, under the second codicil, she took an absolute interest in the personalty. The rule in Shelley's case has nothing to do with the question. It is true the principle is well established that were personal estate is bequeathed in language which, if applied to real estate, would create an estate tail or a fee simple, it vests absolutely in the person who would be the devisee in tail or in fee. And this rule applies to cases which come within the rule in Shelley's case. But the words of Mr. Warder's will, we have seen, would not have given Mrs. Bacon a fee, had the subject of the gift been realty. Besides, the principal stated is not entirely without exception. A very important one is asserted in *Knight* v. *Ellis*, 2 Brown Cha. 570; *Ex parte Wynch*, 5 De Gex, McNaughton & Gordon, 129; and in *Emma Myer's Appeal*, 13 Wright, 111. These cases relate, indeed, to verbal construction of wills relative to personalty, but they show that courts are more anxious to support limitations of personal estate than they are of realty The same thing is shown by the greater readiness with which words importing a failure of issue, and introducing a second limitation are construed to refer to a definite failure, when applied to devises of realty It is enough for this case, however, that the second codicil of the will would have given only a life estate to Mrs. Bacon, had the subject of the gift been land. The decreee of the court below was therefore right.

Decree affirmed.

GENERAL CORRESPONDENCE.

Attorney's Act.

To the Editors of the Canada Law Journal.

Mr. Editor,—By Mr. Blake's Bill passed last session in respect of attorney's at law, two additional examinations have been added; but all students who at the date of the passing of the Act are within four years of the expiration of their term are exempt from the first examination.

My Articles are dated the 4th of March, 1867, and the date of the Bill is the 4th of March, 1868. Am I exempt from the first examination or not?

By kindly inserting the above in your journal you will much oblige

Yours truly,

Student.

General Correspondence.

[We cannot undertake to say what view the Benchers may take of our correspondent's case, but we venture to think that he would be so exempt; at the same time we should strongly advise him to get up the books as though the contrary were the case. It can do him no harm, and much good, particularly as under the new regulations the second examination includes a re-examination on subjects and books of first examination.]—Eds. L. J.

Bill Stamps.

To the Editors of the Canada Law Journal.

Gentlemen,—Is a promissory note, draft or Bill of Exchange for an amount less than $25 liable to duty under part 1, Dominion Statutes, 31 Vict. Cap. II. Some of the profession here hold that it is. By inserting this short letter in your next issue and giving your opinion on the subject you will oblige

Yours, &c.,
A Student.

Goderich, June 3rd, 1868.

Our Invaders.

To the Editors of the Law Journal.

Sirs,—You will remember that "*Our Invaders*" has been for a long time past a fruitful topic for correspondents to dwell upon in the columns of "*The Law Times*" nor can there be good cause shewn, I apprehend, why persons in like case offending (and with whom our "New Dominion" is teeming) should not have like attention meted out to them in the columns of "*The Law Journal.*"

I beg to record the fact that there is a Western Town of our Dominion that can boast of a *quartette* of so-called "Lawyers!" Two of these, I am informed, are regularly appointed practising Attorneys! A third, I am told, is a sort of half-taught Law student, who carries on the legitimate business of an Attorney's office under the name of some Attorney or other living many miles away! While a fourth, who has been a student for a little season, sports an office under his own proper name in which cases are received *for or against*, as the case may be, for any of the Courts! Conveyancing attended to in all its branches! proceedings taken under the Power of Sale clause in mortgage! and, in short, every sort and description of Law business done or attempted to be done, just as a lawyer might be expected to do, and for fees such as a lawyer might be expected to charge, merely using the name of *some friendly Attorney* where an Attorney's name cannot be dispensed with. And yet these men call themselves "*Lawyers!*"

This invader pair of our profession are, too, engaged much in speculation of divers sorts (deriving a handsome income therefrom) and by this means may draw much people after them for the exercise of their legal attainments.

Let me ask is not this gross injustice to those who at much expense have fitted themselves for the profession and who naturally turn to it for their stay and support in the great battle of life?

Is not the friendly Attorney guilty of high crimes and misdemeanors for countenancing for a moment so dread an invasion on the sacred rights of brother-practitioners?

If the *Invader* can *not* be reached, may not the *Invader's-for-convenience-sake-Attorney* be reached by the "Law Society" for giving his sanction to a wrong so glaring—to a practice so offensive.

If the gentlemen I refer to have served under Articles for the required time, and have fitness to undergo the usual Examination to qualify themselves for acting a respectable part in the practice of the Law, in the name of all that is honest and fair let them do so first, and no longer seek, to the manifest detriment of those regularly belonging to the profession, to eke out a livlihood by a course so mean, dirty and reprehensible, as *that* that I condemned.

I can only infer that they have not studied long enough; or that they are not fitted to face the examination—*or, both!* for, I am advised, they have ample means to pay for a "*certificate*" or *call.*"

Has the Law Society no power to stop this villianous practice on the part of *mere students* of the profession. If it have *not*, the Law should be altered so as to reach them, for I know it is folly to bark, if you can't bite!

Yours, &c.
June, 1868. Sum.

[We shall have occasion to allude to this matter hereafter.]—Eds. L. J.

Insolvent Act—Effect of discharge.

To the Editors of the Law Journal.

There is a subject which I have dwelt on very much in studying the act; it is this:—

The act as to voluntary assignments does not state what effect the discharge shall have, either as regards the person or property; and I have often thought it was intended to enable the insolvent to stop costs, by assigning all he has, and by letting the creditors at their meeting dispose of it, and, if there is no reason for any misconduct, to withhold a discharge, that the judge grants simply a discharge as to that estate and those debts, so far as that property only is concerned, or annexes a condition or suspends it for a time, and that no further actions can be brought or proceeded with to recover either out of the property then assigned or out of other acquired property, but that the other acquired property may be administered either in the Insolvent Court or in Chancery. I see it has been done in England in both Courts. I merely refer to this, and hope to see an article on the subject from the able editors of the *Law Journal*, as no subject is more discussed by the profession in the country than it.

I am, yours truly,

D.

Insolvent Acts—Assignees, &c.

To the Editors of the Canada Law Journal.

Gentlemen,—Your correspondent "Quinte," in the April number of the *Local Courts' Gazette*, addressed to you a long letter in reference to a communication of mine to your paper, on the subject of the conduct of official assignees and the working of the insolvent laws. Other urgent business has prevented me from replying to it, as I conceive it should be answered. "Quiute," from some cause or other, takes umbrage at my remarkes on assignees. Since I wrote my letter, and since his in answer, another correspondent of yours, signing himself "Union," has corroborated my remarks on assignees in your May number of the Journal. I regret to say that I fear all I have said about assignees is too true. I will mention one instance that has lately come to my knowledge. An assignee in the County of York lately undertook to get a young man in the county a discharge under the insolvent laws. Having some acquaintance with the young man, I asked him, from curiosity, what this assignee agreed to do the work for. He says $78! Now, here is an assignee, not a lawyer remember, actually taking a sum larger than even a lawyer would charge, for what? Not certainly for acting for creditors, as the man has no estate, but for drawing papers, notices, attendances before the judge, drawing final order, &c. *Ex uno disce omnes.* I am well aware that assignees have to give security, as "Quinte" says, but I am complaining of the way assignees act. Assignees in too many cases in Canada are merely broken down tradesmen themselves, and people are beginning to think the whole bankrupt law machinery is a humbug. "Quinte" says the present insolvent law of 1864 is not a bungled affair, and he gets rather witty, if not irate, at me for calling it *bungled.* The fact alone, of the necessity of passing an act in 1865 to define the meaning of the act of 1864, is an answer to "Quinte." But taking the two acts together, there are still many doubtful clauses and meanings in them. Some half a dozen cases have arisen already on the construction of certain sections, and there will be dozens more before the acts are understood. What I mean to say is, that the two acts are not plain, are not comprehensive, are not guarded enough. I believe it is quite possible to add greatly to their legal virtues. Some clauses might be left out or consolidated, others should be added. I believe all the suggestions in my former letter right, and particularly mention that relating to personal notice of the final discharge, which I think should be given to each creditor on the application for the final order. I quite agree with many of "Quinte's" cases about the power to remove assignees, and I dare say that the case of *Re Mew* v. *Thorne*, 31 L. J. N. S., is law. We don't disagree about that, but I believe the judge might very well have the power to add conditions to the final discharge. I understand "Quinte" to say that I am wrong in stating that the "*final order*" does not discharge from any debt not included in the insolvent's schedule. He cites several cases to which I will presently refer. Yet at the end of his letter one would think he actually agreed with me on the point. This part of his letter is so *uncertain* that I shall take it that he disputes my position, for he pretends to say that the cases he quotes, "decided that a final order granted under the English acts, similar to our then bankrupt and insolvent acts, could be set up as a defence to any debt *not included in the schedule.*" I will refer to his quoted cases and prove the reverse in a moment. But before

doing so I will draw attention to the wording of our own act. In the beginning of our act (sec. 2) we find it is required that the insolvent shall file and "swear to a schedule containing the names and residences of all his creditors and the amount due to each." In sub-sec. 6 of sec. 2 again we read of this schedule "of all his creditors." Again, sub-sec. 3 of sec. 9 are these words: "The consent in writing, &c., absolutely frees and discharges from all liabilities whatsoever (except what are hereinafter specially excepted) existing against him and proveable against his estate, *which are mentioned and set forth in the statement of his affairs* annexed to the deed of assignment," &c. Now this is the only effect of the final order. Our act thus requires the insolvent to give in all his debts, but if he does not, the penalty is his liability to pay the omitted debts, notwithstanding his final order of discharge.

Then again to return to "Quinte's" assertions against my law. With respect to the question of whether a debt *not included in the insolvent's schedule is barred or not*, I am referred by "Quinte" to several cases. I am more concerned about this part of his letter than any other, for I have ventured an opinion in a former article that my position is correct. Very much to my delight I find that the *very cases* to which I am referred by this learned Belleville gentleman actually support my opinion and disprove his. It is seldom one sees a legal disputant cite authorities to prove his case against himself.

Philips v. *Peckford*, 14 Jurist, 272, is one of his cases, and which is referred to in his next case, *Stephen* v. *Green*, 11 U. C. Q. B. 457. In *Phillips* v. *Pickford* it is held by the court, "that the final order for protection under 5 & 6 Vict. c. 116, as amended by the 7 & 8 Vict. c. 96, is only a bar to actions brought in respect of debts mentioned in the schedule, and to make a plea of such final order a good plea in bar it must allege not only that the debt *accrued before the filing of the petition* but that it was *named* in the *schedule*. In this case, *Jacobs* v. *Hyde*, 2 Exch. 508, is alluded to and distinguished. Now our bankrupt act and old insolvent law, in speaking of the discharge of the insolvent, always alludes to the list of creditors named in his schedule. *Stephens* v. *Green* is against "Quinte," also *Greenwood* v. *Farrell*, 17 U. C. Q. B. 490. This case, however, turned not upon the point in dispute between us, but upon the case of a man giving a note after his petition or assignment in bankruptcy, and before the final order; and it was held that such a debt was not discharged by the final order. The case militates against "Quinte." It is true Mr. Justice Burns says in his judgment, "In bankruptcy the effect of the certificate is to bar not only debts due and owing at the time of the commission issuing, but also all debts proveable under the commission up to the time of granting the final order." But the decisions in England are under acts worded differently from our bankrupt act. The present act is also different from the law in force in 1843 in Canada, and we must always in considering cases look at the words of the act in force. The policy of our act seems to relate to debts named in the filed schedule of creditors. "Quinte" also refers to *Booth* v. *Coldman*, 1 El. & El. Reports, 414. This case does not support his position, nor does it turn on the point in issue between us, but in its spirit is against him. His other case of *Franklin* v. *Beesley*, in 1st El. & El. Reports, is expressly against him, shewing that the debt to be discharged must be included in the schedule. In this last case, *Leonard* v. *Baker*, 15 M. & W., 202, is referred to (and "Quinte" had better see it), which supports my position. His last case in 8 Jurist is also against him. I observe that there has been a case just decided in the Queen's Bench, *McKay et al.* v. *Goodson*, reported in No. 5 of Vol. 27 of the Queen's Bench Reports, in which Mr. Justice Morrison, holds, that to enable an insolvent to ask for a discharge, if arrested for a debt due prior to his assignment in bankruptcy, he must clearly show that the debt was included in his schedule filed with his assignment. His words are, "Upon an application of this nature it is the duty of the applicant to show specifically that the creditor's debt appears on the schedule."

Now I end this article by saying, "Quinte" has attacked my article to very little purpose, and has caused me to look into cases thoroughly confirming me in my view, that "a debt due from an insolvent before his assignment, to be barred, must be included in his schedule, else the liability remains."

I think, moreover, every lawyer in Canada will agree with me in the opinion, that the insolvent laws of Canada require to be read over a great many times before we can get a proper knowledge of the true meaning of them and that it is difficult to understand some clauses at all. I also venture to say that my remarks as to assignees will be assented to, by the legal profession throughout Ontario.

Scarboro'.

Toronto, June 22, 1868.