The Legal News.

Vol. I. NOVEMBER 9, 1878. No. 45.

ASTILL v. *HALLEE.*

Chief Justice Meredith, in this case, decided by the Court of Review, at Quebec, (Meredith, C. J., Casault and Caron, JJ.) on the 31st of December last, and reported at 4 Q. L. R., pp. 120–146, has given an elaborate opinion on the rights of consorts who have been married abroad and subsequently have become domiciled in the Province of Quebec. In answer to a petitory action by the plaintiff as heir-at-law of her father, claiming a lot of land in the Parish of St. Henri, it was contended by the defendant, that although Mr. and Mrs. Astill were married in Vermont, where the law of community is unknown, yet having after their marriage established their domicile in Lower Canada, community existed between the consorts, and the widow was entitled to half of the real estate acquired in this Province after their domicile was established here. In the court of first instance, the Superior Court, Quebec, this contention was maintained by Stuart, J. but this decision was reversed in Review, on which occasion the learned Chief Justice pronounced the careful and exhaustive judgment adverted to. His Honor began by referring to the conflicting opinions of Dumoulin and D'Argentré. The former of these authors supported the doctrine that, in the absence of an express contract, the community is to be considered as originating, not merely from the law, but from the tacit agreement of the parties, on marrying, to adopt the law of the matrimonial domicile, and that such agreement has the same effect as an express agreement with respect to property subsequently acquired by the parties wherever it may be situated. D'Argentré enunciated a different opinion, but Dumoulin was sustained by the great authority of Pothier, concurred in by Duplessis, Guyot, Merlin and others. His Honor reviewed various arrêts which show that the jurisprudence of France was well established, and then noticed the decisions of our own courts on the subject. The most famous of these is *Rogers* v. *Rogers*, decided at Montreal in 1848, and which has since been regarded as an authoritative expression of the law. The terms of that judgment are :— "Considering that there never was or could be a community of property between the father and the mother of the parties in this cause, they having married in England, the place of their domicile, and no contract of marriage having been previously entered into, and that the transferring of their domicile to Lower Canada, where they died, could not have the effect of establishing such a community of property between them, contrary to their presumed intention at the time of their marriage."

Decisions to the same effect have been rendered at different times in other cases, and the judgment of the Court of Review, following the jurisprudence thus established, reversed the decision of the lower Court. The leading points of Chief Justice Meredith's opinion are as follows :

"That according to the well-established jurisprudence of the parliament at Paris, for more than two centuries before that tribunal was abolished, a community of property was held not to exist between persons, who having married without contract, in a place where the law of community did not exist, afterwards established their domicile, and acquired property, in a country where the law of community did exist ;

"That according to the same jurisprudence, the law of community was considered rather as a *statut personnel* than as a *statut réel* ;

"That the same jurisprudence has been invariably observed by the Courts of this Province ;

"That the doctrine upon which that jurisprudence is founded is approved of by the most esteemed commentators on the Code Napoléon."

THE LATE CHIEF JUSTICE HARRISON.

We have to notice this week the premature death of the Hon. Robert Alexander Harrison, late Chief Justice of Ontario, which occurred at Toronto, on the 30th ultimo. Mr. Harrison was one of the most youthful judges who ever held high judicial office, having been born in Montreal on the 3rd of August, 1833, and appointed to the bench, as the successor of Sir Wm. Richards as Chief Justice of Ontario, on the 8th of October, 1875. He was of Irish parentage, and was educated at Upper Canada College and

the University of Toronto. In 1855 he was called to the bar "with honors," but had previously been appointed chief clerk of the Crown Law Department for Upper Canada, an office which he held up to 1859. During this period and subsequently, he was not only a constant contributor to the legal and political press, but edited some works of enduring merit, well known to the profession, among which may be mentioned "Robinson and Harrison's Digest of cases decided in the Queen's Bench and Practice Courts," "The Common Law Procedure Act," and "The Municipal Manual of Upper Canada." From 1868 to the general election of 1872, he represented West Toronto in the House of Commons, and initiated some important measures. His professional occupations were very heavy, being retained on one side or the other in almost every case of note, and during the brief period which has elapsed since his elevation to the Bench, he has dispatched an immense amount of judicial business. His career affords a rare example of successful industry and perseverance, and his premature death cannot but excite the deepest regret that the Province and the country have been deprived of his eminent services.

JUDICIAL EMOLUMENTS.

If there be consolation in the reflection that others are still worse circumstanced than ourselves, the underpaid judiciary of Canada may find a crumb of comfort in the fact that in Vermont the salaries of the Supreme Court judges are placed at the figure of $2,500 per annum, and a bill is actually before the Legislature to reduce this magnificent emolument to $2,000. It is clear that the Vermonters believe in plain living as the best regimen for hard-worked men. Our contemporary, the *Albany Law Journal* pertinently remarks: "A salary of $2,500 is not usually regarded as extravagant for a competent judge of a court of last resort, even in those States where judicial talent is not rated high. The Supreme Court of Vermont has always enjoyed a good reputation for ability, but we much doubt if that reputation can be maintained at the figures proposed. Even the most disinterested judge could hardly afford to serve the State for remuneration so inadequate and so much below what he could make at the bar."

In connection with this topic, we may refer to the scale of remuneration in some other places. An official report which has just appeared in France, states that the salaries of the Court of Cassation, consisting of fifty-six members, are equal in the aggregate to $210,000. The salary of the first president is $6,000 per annum. The other three presidents each receive $5,000 a year. The forty-five councillors have $3,600 each, while the salaries of the six procureurs-généraux, and avocats-généraux vary from $3,600 to $6,000. The cost of the several courts of appeal is estimated at $1,207,260, which is divided amongst 26 first presidents, 92 other presidents, 617 councillors, 94 procureurs-généraux, and avocats-généraux, and 61 substitutes. The salary of the first presidents is usually $3,000, while the other presidents for the most part get only $1,500.

If we wish to go where judicial talent seems to have been recompensed on the humblest scale we must betake ourselves to Cyprus, the new acquisition of Great Britain. The salary of the judges who formerly constituted the Court at Larnaca, according to the *Times'* correspondent, was about £2 per month; but it is supposed that "a certain class of fees from suitors, not strictly defined by law, were found evocative of zeal." However this may be, the addition of an English assessor to the Court has caused the collapse of the tribunal. All irregular fees having ceased under the new *régime*, one of the members of the Court has resigned, and another has persistently absented himself on private business, and the authorities are puzzled to devise a means of supplying the vacancies. The *Solicitors' Journal* suggests, in case all other measures fail, that they should resume the system of judicial remuneration which for several hundred years contented the judges of another island within the British dominions. The judges of the Royal Court of Jersey, down to a recent date, were remunerated by a dinner at the opening of the *assize d'héritage*, which was paid for by the Queen's Receiver out of the revenues arising from the crown property in the island.

THE LATE LORD CHELMSFORD.—Lord Chelmsford, (F. Thesiger), an ex-Lord Chancellor, died at London, Oct. 5, aged 84. Sir Frederic Thesiger was one of the most distinguished barristers of the age. The present Lord Justice Thesiger is a son of deceased.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 21, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER, JJ., DUNKIN, J. *ad hoc.*

AITKIN (plff. in the court below), APPELLANT; and THE NATIONAL INSURANCE COMPANY (defts. below), RESPONDENTS.

Insurance—Increase of Risk.

An insurance was effected on a saw-mill, without disclosing the fact that the building contained a planing machine. *Held*, this was a material fact which it was incumbent on the insured to disclose, and the concealment of it rendered the insurance null and void.

The judgment appealed from was rendered on the 7th July, 1877, by the Superior Court, Montreal, Rainville, J., the principal *motif* being as follows :—

"Considering that it is proved there was in the building a planing machine which was in operation before and at the time of the fire, and that this increased considerably the risk and chances of fire."

DORION, C. J., said that the action was brought upon a policy of insurance issued by respondents on a saw mill and machinery, situated at Acton. There were a number of pleas, one of which was that it was not disclosed at the time of the insurance, that the saw mill contained a planing machine, and that this planing machine increased the risk ; that this was a material fact which it was incumbent on the insured to disclose, and that the concealment of it rendered the insurance null and void. Another plea set up that it was one of the conditions of the policy, that the mill, which was a steam saw mill, should not be worked by night without the written permission of the Company being obtained, and that the mill was worked at night without permission. There were also pleas of over valuation, &c. The Court below dismissed the action on the ground that the insured had not disclosed that there was a planing machine in the saw-mill, and that this was a material fact, the risk being thereby increased. It appeared that Mr. Johnson, who owned the mill, had an insurance in the Canadian Mutual, and his agent went to the National, and asked them if they would take it, as the Mutual was giving up business. The National took over the risk, without a new application being filled in. The original application was produced, and the planing machine was there described, but there was no evidence that the Company, defendant, ever saw the application. There was no fraud to be imputed to Mr. Johnson, but where a material fact is not disclosed, the insured could not recover. The Court was of opinion that the risk was materially increased by the fact that the planing machine was in the mill ; and there was also the fact that the mill was worked at night without the consent of the Company. On both grounds the judgment was right, and it must be confirmed.

Doutre & Co. for appellant.
Lunn & Davidson for respondents.

FULTON (plff. below), Appellant; and MCDONNELL et al. (defts. below), Respondents.

Sale—Covenant.

Under a covenant to sell and convey "all the estate right, title, interest, claim or demand" that the vendors had in certain lots specified, an action for damages cannot be maintained against the vendors for failure to deliver the whole of the lots mentioned, where they had included by mistake a lot to which they had no claim.

DORION, C. J., said that the representatives of the late Hon. Alexander Grant, in 1874, agreed by a writing to sell to the appellant, John Fulton, certain lots of land at Cote St. Antoine. The writing was in these terms : "We, the undersigned heirs of the late Hon. Alexander Grant, hereby agree to sell and convey to John Fulton, all the estate, right, title, interest, claim or demand, that we, or either of us have, or may have, as heirs of the late Hon. A. Grant in, to or out of 14 lots of land (numbers of lots mentioned), being part of what is known as the "Fisher Farm." It appeared that when the vendors came to fulfil the contract, it was found that lot No. 16, (one of those enumerated in the agreement) did not belong to the heirs Grant, and that it had been included in the sale by error. The purchaser not being able to get this lot, instituted an action of damages, to which the vendors pleaded that they were not bound to

guarantee the delivery of any of the lots, as they had only sold such rights as they had. They further pleaded that the whole quantity of land that plaintiff bought was there, though lot 16 was not in it. Some proof had been made as to the effect of such an agreement in Ontario. The case, however, had to be decided by the law of this Province, and as to the law here there was no difficulty. The Court below dismissed the action, and the Court here was of opinion that the judgment was right. By the agreement the vendors only sold the rights they had, and there was no guarantee. The only thing that the purchaser would be entitled to would be a deduction of a certain portion of the price, if it had been paid. Upon this ground the judgment would be confirmed.

J. C. Hatton for appellant.

Lunn & Davidson for respondents.

COURT OF REVIEW.

Montreal, Oct. 31, 1878.

TORRANCE, PAPINEAU, JETTÉ, JJ.

[From S. C., Montreal.

In re HATCHETTE, Insolvent, and HATCHETTE, Petitioner, and ROBERTSON et al., Contestants.

Insolvency—Composition—Reconveyance of Estate.

Held, that so soon as a deed of composition and discharge has been executed in accordance with the provisions of sec. 52 of the Insolvent Act of 1875, the assignee is bound under section 60 of the Act, to reconvey the estate to the insolvent, without waiting for the confirmation of the deed by the Court or Judge.

Judgment confirmed.

Macmaster & Co. for Contestants.

Davidson & Co. for the Insolvent.

COLLISIONS ON THE HIGH SEAS.

The following paper on the necessity of an International concert to punish criminally the non-observance of the international rules of navigation for the prevention of collisions on the high seas, was read before the recent Frankfort Conference of the Association for the Reform and Codification of the Law of Nations, by Sir Travers Twiss, D.C.L., Q.C., vice-president of the association.

The application of steam-power to sea-going vessels has worked so great a change in the conditions of ocean navigation as to render it necessary for nations to concert a common system of rules for the navigation of vessels on the high seas, with a view to prevent accidents from collision. It is obvious that the two ancient cardinal rules of navigation, which had hitherto sufficed for the guidance of sailing vessels on the high seas, namely, that vessels going free should give way to vessels on a wind, and that the vessel on the port tack should always give way to the vessel on the starboard tack, are insufficient for the safe guidance of vessels navigated under steam-power, and not under sail. Although the same principles of navigation might still be properly maintained in the case of steamers where applicable, it has been found requisite that the rules of navigation should be extended to other cases, seeing that the course of steamers is not governed exclusively by the wind, and that a steam vessel is enabled by a skillful use of her steam power to manœuvre in a manner, which is impracticable for a sailing vessel. Great Britain was amongst the leading states to set the example. She commenced by laying down formal rules for the navigation of steam vessels on her own rivers, and after some experience extended the rules to her own vessels on the high seas, and she included her sailing vessels under a reciprocal system of obligation when approaching steam vessels. British admiralty courts were also authorized by British statute law to regulate their judgments in cases of collision between British vessels on the high seas in accordance with the new rules. In due course of time, after experience had given its sanction to those rules, Great Britain entered into treaty arrangements with foreign powers, that their vessels should be navigated on the high seas under the same system of rules, and she has authorized her admiralty courts to apply the new rules to every vessel, whose flag has been brought, with the consent of its government, within the operation of the new rules. Cases of collision on the high seas have thus been brought by a common international concert under a new system of law, which has been built up on the lines of the ancient customs of the sea as far as possible, the steam vessel being regarded as a vessel going free, and able to get out of the way of a sailing vessel more readily than a sailing vessel can get out of the way of

a steam vessel. I do not propose to discuss the details of the international sailing rules. Modifications have had to be made in them from time to time to meet new difficulties, which experience has discovered, and such modifications have been the result of a common concert between the maritime powers. My object at present is to consider how the observance of the sailing rules on the high seas can be best secured, and how the neglect of them, if it be the result of carelessness or willfulness, may be most effectively punished.

Under the ancient law of the sea, every collision on the high seas may be the subject of a civil action for damages in any admiralty court; but however culpable may have been the conduct of those in charge of either vessel, British admiralty courts, which exercise their civil jurisdiction indiscriminately between vessels of all nations, carefully abstain from exercising any criminal jurisdiction over the crews of foreign vessels in respect of their neglect to observe the sailing rules, nor has Great Britain been empowered by any treaty arrangement with foreign States to authorize her courts to exercise any such criminal jurisdiction. Yet it would seem to be in accordance with reason that, where States have agreed upon a common system of rules of navigation for the prevention of collisions on the high seas, they should agree upon a common system of penalties for the non-observance of those rules on the part of the persons, who may have been in charge of the navigation of any vessels which have come into collision on the high seas. This common concert is the more necessary, because the modern theory of a ship being the territory of the nation, under whose flag it sails, would otherwise be in the way of the tribunals of any other nation exercising corrective jurisdiction over those on board of the ship in respect of any misconduct on their part whilst the vessel is on the high seas. The personal responsibility of mariners who navigate the high seas remains, in regard to foreign nations, precisely such as it was before any sailing rules were agreed upon amongst the maritime powers; in fact the mariner had no personal responsibility toward the owner or crew of any foreign vessel with which he may bring his own vessel into collision on the high seas, unless his act should be done with a malicious intention to destroy the other vessel, which may clothe it with a piratical character.

The ancient law of the sea, which is universally received amongst civilized nations, regards ships as chattels, the management of which on the high seas is not so thoroughly under the free control of the owner or his servants, inasmuch as the sea is a treacherous element, that he or they should be held criminally responsible for any damage caused by one ship to another ship in the course of navigation. The owner of the ship, however, in the case of collision, is not allowed by the law of the sea to escape scot-free, if his servants mismanage his vessel on the high seas, and through their unskillfulness bring about the collision with another vessel. The ship itself in such a case may be arrested by the process of an admiralty court, and if the servants of the owner are found to have mismanaged her navigation, and by such mismanagement to have brought her into collision with the other vessel, the owner may be amerced in the value of his ship, which may be sold by an order of the admiralty court, if the owner is otherwise unable to satisfy the judgment of the court. This result is brought about by what is termed an "actio in rem," a tradition of the ancient Roman law. It is totally opposed to the territorial theory of a ship, which is of modern origin, and has been devised as a convenient fiction to explain the subjection of a ship and its crew to the municipal law of the country under whose flag it is navigated. But this theory, like everything else which rests on a fiction, has its inconvenience. Whilst it is useful for maintaining discipline on board of a ship when it is on the high seas, which are *nullius territorium*, it is mischievous as securing territorial impunity to the master and crew in the management of their vessel, in its relation to other vessels on the high seas.

The international responsibility of mariners, under which term I include all persons engaged in the navigation of a ship, is thus in fact of a negative character; they are taken to be the agents of the owner or of the charterer of the ship, as the case may be, and their employer is responsible for any mismanagement on their part of the navigation of his vessel. The owner or the charterer, on the other hand, under the modern system of marine insurance, is able to shift his risk, which is strictly pecuniary, on

to the shoulders of the underwriter: and the underwriters are the parties in the present day who institute and defend actions in *rem* in most causes of collision, which are brought into the admiralty courts. There is thus no direct *solidarité*, to use a convenient French phrase, between those who are employed in the navigation of a vessel on the high seas and those upon whom the burden of compensation falls, in case the navigation is mismanaged and a collision takes place with another vessel. The question becomes still more complicated where loss of life ensues, of which several painful instances have occurred of late, in which the magnitude of the calamity has been so appalling, as to awaken a general demand for some legislation on the subject, by which the feeling of personal responsibility may be brought home to the mariner, and may stimulate him to greater watchfulness and greater care in avoiding all chances of collision with other vessels.

I beg leave to suggest to the consideration of this conference the important question of criminal jurisdiction in cases of collision, how best it may be exercised, and under what safeguards, where the collision has happened on the high seas. It seems to me, that States which have formally agreed that certain rules of navigation shall be observed by their respective subjects in navigating the high seas, and which have intrusted to their courts of admiralty or to maritime tribunals of equivalent authority within their respective dominions civil jurisdiction, in respect of damage to property resulting from the neglect of those rules, may properly authorize the same courts to punish mariners, who transgress those rules and thereby bring about the damage. The measure of punishment, however, in such cases ought not, in my judgment, to be determinable by the municipal law of the state before whose tribunals the parties happen to be convened, but by a *common law* concerted by the same states, which have adopted the revised rules of navigation as the common law of the sea. There is something peculiar to accidents on the sea, something which gives to every collision on the high seas a tinge of misfortune. The navigation of the high seas is in some respects dependent on "the snares of fortune," to use a phrase familiar to Bracton. That great master of the common law of England draws a wide distinction between homicide with a purpose and homicide as a result (*ex eventu*), and according to this distinction homicide is either felony or a misfortune. Our ancestors seem to have thought that any homicide in former days, which was the result of a collision on the high seas between sailing vessels, where there was no felonious intent on either side, might be properly regarded as a homicide by misfortune (*homicidium per infortunium*). The question in the present day is whether the application of steam power to ocean navigation has so altered its conditions, as to warrant us in introducing a new category of punishment in cases, where steam vessels have come into collision with one another on the high seas. The collision between the German steam vessel *Franconia* and the British steam vessel *Strathclyde* in the open sea within a marine league of Dover pier has been thought by many persons to establish the necessity of some international arrangement for the punishment of those who have transgressed the rules of navigation in cases where the vessels brought into collision are of different nationalities. The degree of culpability, however, will always be a very delicate question to determine; witness the loss of H. M. steamship *Vanguard* by a collision with a consort steamship in a fog, and the loss of the Imperial German steamship *Kurfurst* by a collision with a consort steamship in broad daylight. Still such anomalous collisions, although they may bespeak caution, are not dissuasive of all legislation, and the subject is one which is likely to attract every day more attention, if collisions between steamships on the high seas continue to multiply at their present rate.

CURRENT EVENTS.

EUROPE.

CONGRESS OF SCANDINAVIAN JURISTS.—After an interval of three years, says the London *Law Times*, a congress of Scandinavian jurists, comprising representatives from Denmark, Sweden and Norway, has again been held at Christiana. The principal question brought on the tapis for discussion was that of the advisability of adopting a jury system, somewhat similar to that obtaining in England, in the three countries above referred to. For some considerable

time, in the case of Sweden, the lay element has been represented in the administration of justice; but the tendency is to repress rather than to extend any further development in this direction. A partial adoption of the system, viz., in political and criminal cases, has long been promised by the Danish Rigsdag, but has never been practically fulfilled, and, so far as we can gather from the views expressed by the members of the congress, a complete introduction of the jury system is highly improbable. As to Norway, a practical difficulty—sparseness of population and the consequent impossibility of convening a sufficient quorum—has in spite of the strenuous endeavors in this direction of some of her politicians, proved an insurmountable obstacle to the establishment of the system. These countries seem anxious to incorporate into their respective legal polities a system somewhat analogous to our own English jury system. But they should bear in mind that the jury system, as it exists in England, is not the creation of a moment, or the creature of positive enactment. In this country trial by jury has been part and parcel of the Constitution, and the system has insensibly adapted itself to the growth and development of the Constitution. We would further remind these countries, that in spite of the cogency of its claim to our consideration on account of its long-tried merits, and though its excellence has been only lately acknowledged by our Legislature by an express provision in the Judicature Act, 1873 (§72), "that nothing therein contained . . . should affect the law as to jurymen or juries," the system is at present being subjected to severe criticism, and may before long be considerably modified. Let these countries, then, bide their time, and watch what further developements trial by jury may undergo in the home of its birth before they adopt a system which is avowedly novel and unknown to themselves.

ENGLAND.

Perishable Goods.—In *Coddington* v. *Jacksonville, etc. Railroad Co.*, 39 L. T. Rep. (N. S.) 12, the question as to whether bonds of American railway companies were goods of a perishable nature, came up under an application for an order for their sale pending the litigation. Vice-Chancellor Hall refused the application, saying that the bonds were not goods of the nature mentioned. The *Law Times* says, that recent general experience "would appear to point to these securities as of about the most perishable and evanescent species of goods imaginable."

Treatment of Jurors.—A committee of English judges, in a report respecting Circuits, make the following suggestion about juries: "The present system of locking up juries in cases of felony might, we think, be usefully amended, as it does in practice tend unnecessarily to lengthen the time consumed in criminal trials on circuits. The fact that a jury cannot separate during a trial for felony led in former days to sitting on to finish a case half through the night and sometimes longer, when the power of attention on the part of the jury had long been exhausted, and in consequence much injustice was often done. Public opinion would not now tolerate such a practice, and quite rightly; but the result is that a judge often will not begin a long case in the afternoon, from the extreme inconvenience of locking up a jury for the night, and so time is lost. As a rule, we think this, with other distinctions between the procedure in felonies and misdemeanors, may safely be abolished; but we are disposed to think that a judge should be intrusted with the power of keeping a jury together, in his discretion, in all criminal cases, misdemeanors as well as felonies, a power not likely to be often exercised, but one which it may be useful to possess."

The Law of Libel.—The *Law Journal* says that, notwithstanding Fox's Act, the English judges constantly take upon themselves to tell juries point blank, not only "this is a libel" but "this is a libelous publication;" that it is a malicious libel, a malicious publication of defamatory matter. Some of them are honest enough to admit that they do this because they do not accept the law as declared in Fox's Act. Thus the Lord Chief Justice, with characteristic frankness, has repeatedly declared that he believes his great predecessor, Lord Mansfield, was right in respect to the law on the subject, and he and most of the judges still follow the old practice in actions or prosecutions for libel, and tell the jury positively that the publication is libelous. This was done in the last case of criminal information in the Queen's Bench for

libel, and the result was a conviction. It has been generally conceded by the best judges that the rule established by Mansfield was never correct, and that Fox's Act only declared the law of libel as it was, and it is extraordinary that the English judges should return to the old perverted rule at this day, when the whole tendency of the law is and ought to be to widen and enlarge the liberty of public discussion.

UNITED STATES.

A LONG DOCKET.—The Supreme Court of the United States met on Monday, 14th ult. All the judges were present except Judge Field, who was detained in California. The docket contained 849 cases.

CANADA.

ASSIGNEES' DISCHARGES.—A point of vital interest to assignees in insolvency was decided by his Honor Judge Mackenzie, on Wednesday last, viz., that it is not necessary for assignees to apply to the court for a discharge from their position in cases where there has been a composition accepted by the creditors, and the assets reconveyed to the insolvent thereunder. The sections of the present Insolvent Act governing the applications for such discharges, are 47 and 48. As the latter section lays an assignee neglecting to apply within the time limited, liable to a severe penalty, it is obviously a matter of considerable importance that there should be no doubt about the cases to which the statute applies.

The doubts which have surrounded the subject have been occasioned by the peculiar language of the 47th section, which provides that the assignee shall make his application to the court, "after the declaration of a final dividend, or if after using due diligence, the assignee has been unable to realize any assets to be divided;" but further on, when specifying what the statement to be prepared for the assignee shall show, the section enacts that it shall disclose "the amount of dividends or of composition paid to the creditors of the estate." Notwithstanding the use of the word composition here, the learned judge holds that the intention of the Act is to require this application to be made for the protection of the creditors only, and that by taking a matter out of the assignee's hands they render it unnecessary for him to make the application.

The latter clause of the section referred to is explained, by applying it to cases where a composition has been accepted after the estate has been partially wound up by the assignee. This construction of the Act seems reasonable, for surely an assignee should be compelled to bring his accounts before the court only in the case of the concern being wound up by him. When a composition has been accepted, the creditors have nothing to do with the costs or assignee's expenses, which must be borne by the insolvents. One lesson which insolvents can learn from this is that assignees have no right to retain anything out of the assets of the estate for their discharge, at least such must in future be regarded as the law in the County of York.—*Monetary Times.*

RECENT UNITED STATES DECISIONS.

[The references are to the following volumes of State Reports: 82 Illinois; 57 Indiana; 18 Kansas: 67 Maine; 46 Maryland; 123 Massachusetts; 36 Michigan; 54 Mississippi; 65 Missouri; 68 New York; 78 North Carolina; 84 Pennsylvania State; 7 South Carolina; 3 Texas Court of Appeals; and 10 Vroom (New Jersey Law).]

Affinity.—A party to an action before a justice of the peace, had formerly been married to a wife (who had died before action brought) who was related to the justice's wife. *Held*, that the justice was not disqualified to act in the case.—*Trout* v. *Drawhorn*, 57 Ind. 570.

Agent.—Plaintiff, being possessed of a promissory note, indorsed and delivered it to defendant for negotiation; instructing him to return it, or the proceeds of it, on the next day, and not to let it go out of his reach without receiving the money. Defendant delivered the note to a third person, who promised to get it discounted, and did so, but embezzled the proceeds. *Held*, that defendant was liable for a conversion of the note.—*Laverty* v. *Snethen*, 68 N. Y. 522.

Alteration of Instruments.—The alteration of a promissory note by one of its makers, by increasing the amount for which it is made, by the insertion of words and figures in blank spaces left in the printed form on which it was written, avoids the note as to such makers as

do not consent thereto, even in the hands of a *bona fide* holder for value.—*Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196.

Arbitration.—It is no ground for setting aside an award, that the arbitrator had been counsel in another case for the party in whose favor he found, although the other party did not know this fact, in the absence of evidence to show that it was purposely concealed.—*Goodrich* v. *Hulbert*, 123 Mass. 190.

Assault.—The prisoner pointed a pistol at a man who unlawfully attempted to stop the team which he was driving, and threatened to shoot if he was not allowed to pass. *Held*, that he might be convicted of a simple assault, but not of an assault with intent to kill.—*Hairston* v. *The State*, 54 Miss. 689.

Assumpsit.—One who has paid to a *bona fide* holder for value a note purporting to be made by him and indorsed by the payee, and afterwards discovers either the payee's name or his own to be a forgery, may, if guilty of no laches, recover back from the holder the money paid. —*Carpenter* v. *Northborough Nat'l Bank*, 123 Mass. 66; *Welch* v. *Goodwin*, ib. 71.

Bankruptcy.—One partner in a firm became bankrupt. He did not show that he was a member of any firm, or set forth any assets or liabilities of any firm. *Held*, that his discharge in bankruptcy was no bar to an action against him to recover a partnership debt.—*Corey* v. *Perry*, 67 Me. 140.

Bills and Notes.—A promissory note containing a promise to pay a "collection fee, if not paid when due," *held*, not negotiable.—*Woods* v. *North*, 84 Penn. St. 407. Contra, *Seaton* v. *Scovill*, 18 Kans. 433.

Bond.—S. was Treasurer of the State from January, 1873, to September, 1875. In April, 1875, he gave a new bond, with new sureties. He was then a defaulter to the State. After that time, he received public moneys; part of which he applied to discharge his prior defalcation, and part he failed to account for. In an action on the new bond, *held*, that his sureties were liable for the whole.—*State* v. *Sooy*, 10 Vroom, 539.

Burglary.—Information having been given to the owners of a banking-house that the prisoner intended to rob it, they employed detectives, who, with the owners' consent, pretending to be accomplices of the prisoner, decoyed him into entering the bank, and having entered he was arrested. *Held*, that he was not guilty of burglary.—*Speiden* v. *The State*, 3 Tex. Ct. App. 156.

Charity.—Property was given by will to the magistrates and town council of Dumfries, in Scotland, in trust, to apply the proceeds in such manner as might seem best to them, to promote the cause of instruction in the high school of that town. After the will was made, and before the testator died, the control of the school and its trust-funds was by act of Parliament taken away from the magistrates and town council, and vested in a school-board. *Held*, that the latter could not take the devise; the courts of Maryland having no power to execute trusts *cy-pres*.—*Provost of Dumfries* v. *Abercrombie*, 46 Md. 172.

Check.—At the time of making a check, it was verbally agreed between the drawer and the payee that it should not be presented for payment until a certain time. It was then presented, and dishonoured, of which the drawer had notice. In an action against him by the payee, *held*, that he was liable.—*Pollard* v. *Bowen*, 57 Ind. 232.

Conflict of Laws.—An infant was, by decree of a court in the State of his domicil, made according to the law of that State, relieved of the disability of nonage. *Held*, that the decree had no extra-territorial force, and did not enable the infant to sue in another State his guardian there appointed and residing, for moneys in his hands as such guardian.—*Gilbreath* v. *Bunce*, 65 Mo. 349.

Consideration.—1. A wife separated from her husband, and sued for a divorce on the ground of cruelty. *Held*, that her promise to abandon the suit and return to him was a sufficient consideration for his promissory note made to a third person for her benefit.—*Phillips* v. *Meyers*, 82 Ill. 67.

2. Plaintiffs, in consideration of a royalty, granted to defendants a license to use their patent, the validity of which was in litigation at the time, as defendants knew. In an action to recover the royalty, *held*, that defendants could not set up the invalidity of the patent as

a failure of consideration.—*Jones* v. *Burnham*, 67 Me. 93.

Conspiracy.—Two persons were indicted for conspiracy. Before verdict a *nol. pros.* was entered as to one. *Held*, that no judgment could be rendered on a verdict of guilty afterwards found against the other.—*State* v. *Jackson*, 7 S. C. 283.

Constitutional Law. — A statute making the intermarriage of white persons and negroes a criminal offence, *held* constitutional.—*Frasher The State*, 3 Tex. Ct. App. 263.

Constitutional Law (*State*).—1. The legislature authorized a city to exempt from taxation for six years the property of a water company. The company contracted to supply the city with water for public purposes, free of cost; and the city exempted the company from taxation for five years. *Held*, that the statute giving the city power to exempt was constitutional; (2) that the power was well exercised.—*Portland* v. *Portland Water Co.*, 67 Me. 135.

2. A prisoner convicted of assault and battery was sentenced to five years' imprisonment in the county jail, and to find sureties for $500 to keep the peace for five years more. *Held*, that the sentence was unconstitutional, because excessive.—*State* v. *Driver*, 78 N. C. 423.

3. A constitutional amendment provided that "property shall be assessed for taxes under general laws, and by uniform rules." When this amendment was adopted, there was a general tax-law in force. *Held*, that the amendment was self-executing, without further legislation, and repealed all special tax laws. — *State* v. *Newark*, 10 Vroom, 380.

Contract.—A., who had bought ice of B., ceased to take it on account of dissatisfaction with B., and contracted for ice with C. Afterwards B. bought C.'s business, and delivered ice to A., who had no notice of the purchase until after the ice had been delivered and used. *Held*, that B. could not recover the price of the ice from A. —*Boston Ice Co.* v. *Potter*, 123 Mass. 28.

Corporation.—1. A man purchased land, with actual notice of an unrecorded incumbrance on it. Afterwards a corporation was organized, of which he was chosen an officer, and to which he conveyed the land. *Held*, that the corporation, having no actual notice of the incumbrance, was not affected with constructive notice.—*Wickersham* v. *Chicago Zinc Co.*, 18 Kans. 481.

2. A certificate of stock in a corporation was delivered to an auctioneer for sale, together with a power of attorney purporting to be executed by the owner. The auctioneer having sold the stock, took out a new certificate in his own name, and assigned it to a purchaser for value, to whom the corporation issued a new certificate. The original certificate had been taken without the true owner's knowledge, and the power of attorney was forged; but this was not known either to the auctioneer or the purchaser. On bill by the true owner against the corporation and the purchaser, *held*, that he was entitled to a decree against the corporation to issue to him a certificate for his shares and to pay to him the dividends thereon; but not to a decree against the purchaser.—*Quære*, as to the rights *inter se* of the corporation and the purchaser.—*Pratt* v. *Taunton Copper Co.*, 123 Mass. 110.

Covenant.—A. covenanted to sell to B. a lot of land and banking-house, and further, not to engage within ten years in the business of banking in the same town; and that the covenant should run with the land, and that any person who might own the land might sue on it in case of breach. B. sold the land to C. *Held*, that C. might sue A. for a breach of the covenant.—*Nat'l Bank of Dover* v. *Segur*, 10 Vroom, 173.

Damages.—1. Trespass for taking coal from plaintiff's mine. *Held*, that the measure of damages was the value of the coal as soon as it was severed and became a chattel; that is, its value at the mouth of the pit, less the cost of getting it there from the place where it was dug.—*Illinois & St. Louis R. R. Co.* v. *Ogle*, 82 Ill. 627.

2. Money was sent by carrier to the agent of a life-insurance company, to be applied in payment of a premium due on a policy, which would by its terms lapse if such premium was not paid; of all which the carrier had notice, but failed to deliver the money. *Held*, in an action against him by the administrator of the assured, that the measure of damages was the value of the policy when it lapsed; unless the deceased might by the use of ordinary care, have obtained other insurance before he died, in which case the carrier would not be liable for the loss which the deceased might thus have prevented.—*Grindle* v. *Eastern Express Co.*, 67 Me. 317. And see *Sutherland* v. *Wyer*, ib. 64.

Deceit.—1. In a suit to recover the purchase-money of a plantation on the Mississippi River, *held*, that the vendee might recoup the damages suffered by inundations, which the vendor had fraudulently represented that the plantation was safe from; including the diminished value of the plantation below what was paid for it, by reason of its exposed situation, and also the actual loss of crops, of cattle drowned, and of fences washed away.—*Estell* v. *Myers*, 54 Miss. 174.

2. Defendant, on the sale of a farm to plaintiff, falsely represented that a certain noxious weed did not grow on it; and defendant bought it, relying on such representations. In fact, the weed grew on the farm; and plaintiff had visited the farm, and gone over it freely, and knew the weed by sight, and might have seen it growing on the farm. *Held*, that he could not maintain an action for deceit. (Three judges dissenting.)—*Long* v. *Warren*, 68 N. Y. 426.

Deed.—1. Land was conveyed by deed, the boundary "beginning at" a certain tree. *Held*, that the centre of the tree was not necessarily the boundary, but that evidence of an actual occupation on a line beginning at or near one side of the tree was admissible to show the true boundary.— *Stewart* v *Patrick*, 68 N. Y. 450.

2. Land bounding on a stream was conveyed, the grantor "reserving the right of occupying the pond and shore for the purpose of securing and holding timber taken from his property." *Held*, that he had the right to pile timber on the land, as well as to moor to the land timber floating in the water.—(Two judges dissenting.)—*Lacy* v. *Green*, 84 Penn. St. 514.

Devise and Legacy.—1. Devise to A, for life, and, if she have lawful issue, then to said issue in fee; but, should she die without lawful issue, then over. *Held*, (1) that A. took only an estate for life; (2) that the devise over was good as a contingent remainder.—*Timanus* v. *Dugan*, 46 Md. 402.

3. Devise "to J. S. and family." J. S. had a wife and six children. *Held*, that he and his wife took one-seventh of the estate, as tenants by entireties, and the children each one-seventh. *Hall* v. *Stephens*, 65 Mo. 670.

3. Testatrix gave a certain sum to each of her two sisters, and in case of the death of either "without natural heirs," the bequest to go to the survivor.—*Held*, that "natural heirs" meant issue.—*Miller* v. *Churchill*, 78 N. C. 372.

Divorce.—A malicious prosecution of a husband by his wife, for an alleged assault and battery, *held*, not such cruelty by her as to entitle him to a divorce.—*Small* v. *Small*, 57 Ind. 568.

Emblements.—Land was conveyed in fee simple, "possession to be given at the death of" the grantor, with a very sweeping clause conveying all rents and profits, privileges and appurtenances, with much particularity, and in the fullest manner. On the grantor's death, *held*, that the grantee, and not the grantor's executor, was entitled to growing crops.—*Waugh* v. *Waugh*, 84 Penn. St. 350.

Evidence.—1. In a civil action for maliciously burning a building, *held*, that the defendant could not give evidence of general good character.—*Gebhart* v. *Burkett*, 57 Ind. 378.

2. In an action by a father to recover for the services of his son, on a *quantum meruit*, the defendant may show that the son embezzled an amount exceeding all wages due him, so that his services were worth nothing.—*Schoenbergh* v. *Voight*, 36 Mich. 310.

3. In an action by the superintendent of a manufacturing company, against the company, to recover his salary, he gave in evidence the certificate of the treasurer of the company that so much was due him. *Held*, that the certificate was not binding on the company as an admission, without proof that the treasurer had authority to make it. *Kalamazoo Manuf. Co.* v. *McAlister*, 36 Mich. 327.

4. A bill of exceptions, agreed to by the counsel on both sides and allowed by the judge, containing the substance only of the testimony of a witness in a capital case, *held* admissible in evidence on a second trial of the case, the witness having died meantime.—*State* v. *Able*, 65 Mo. 357.

5. Assessments of taxes *held*, not admissible to show the value of land.—*Hanover Water Co.* v. *Ashland Iron Co.*, 84 Penn. St. 279.

6. Defendant sold goods by sample to plaintiffs, who sold them by the same sample to a third person, who afterwards sued plaintiffs for breach of an implied warranty of quality, and recovered judgment, which plaintiffs satisfied. In an action by plain-

tiffs against defendant to recover over for breach of warranty, *held*, that the judgment against plaintiffs was not evidence of a breach, though defendant had notice of the action in which that judgment was rendered, and was requested to defend it, and testified as a witness in it.—*Smith* v. *Moore*, 7 S. C. 209.

7. Action by a city against a land-owner, to recover the expense of abating a nuisance on his land. *Held*, that the decision of the city board of health, made without notice to the owner, that a nuisance existed on the land, was not conclusive evidence (and, *semble*, that it was not evidence at all) that such nuisance in fact existed.—*Hutton* v. *Camden*, 10 Vroom, 122.

8.—Action on a policy of fire insurance. Plea, that the assured wilfully burned the property. *Held*, that defendants were not bound to prove the plea beyond a reasonable doubt.—*Kane* v. *Hibernia Insurance Co.*, 10 Vroom, 697 (Court of Errors, reversing judgment of Supreme Court).

Execution.—After an execution had been levied on slaves, but before they were sold under it, they were emancipated. *Held*, that the judgment was satisfied.— *McElwee* v. *Jeffreys*, 7 S. C. 228.

Executor and Administrator. — 1. Bill in equity by residuary legatees, against the sureties on the executor's bond, to recover for a *devastavit* committed by the executor. *Held*, not sustainable, the remedy being at law on the bond.—*Edes* v. *Garey*, 46 Md. 24.

2. Assumpsit against administrators. Plea, *puis darrein continuance*, that they had been removed from office and a new administrator appointed. Replication, that before removal they were guilty of a *devastavit*. *Held*, bad.—*McDonald* v. *O'Connell*, 10 Vroom, 317.

Foreign Attachment. — 1. One summoned as garnishee disclosed that he had given to the defendant a certificate of indebtedness, not negotiable, but which the defendant had sold to a third person. *Held*, that he was not chargeable. *Cairo & St Louis R. R. Co.* v. *Killenberg*, 82 Ill. 295.

2. A railroad company mortgaged all its property now possessed or hereafter to be acquired; and afterwards, while remaining in possession of the road, made a contract to carry freight for an express company. *Held*, that the express company was chargeable, as garnishee of the railroad company, for all moneys earned by the latter under the contract before the mortgagees took possession.—*Emerson* v. *European & North American R'y. Co.*, 67 Me. 387.

3. The State treasurer cannot be held as garnishee, in respect of moneys in his hands due from the State to the debtor.—*Lodor* v. *Baker*, 10 Vroom, 49.

Fraudulent Conveyance. — By statute, a judgment is a lien for seven years on the judgment debtor's land. A creditor having suffered seven years to elapse after recovering judgment, *held*, that equity would not afterwards aid him to set aside a fraudulent conveyance of the debtor's land.—*Fleming* v. *Grafton*, 54 Miss. 79.

Gaming.—Persons who play together at an unlawful game are several and not joint offenders; and therefore they are not accomplices of each other, and one may be convicted on the uncorroborated evidence of another. — *Stone* v. *The State*, 3 Tex. Ct. App. 675.

Homicide.—By the law of Massachusetts, suicide is criminal as *malum in se*, though neither the act nor the attempt to commit it is punishable; and therefore where a person in attempting to commit it, accidentally killed another who was trying to prevent its accomplishment, *held*, that he was guilty of manslaughter at the least; whether of murder, *quære*. — *Commonwealth* v. *Mink*, 123 Mass. 422.

Husband and Wife.—1. Action against husband and wife for the tort of the wife. Verdict, that the wife is guilty. *Held*, that judgment should be rendered against both. — *Ferguson* v. *Brooks*, 67 Me. 251.

2. A wife cannot, after a divorce, maintain an action against her husband for assaulting and falsely imprisoning her as a lunatic, during coverture; nor against third persons who conspired with him and assisted him therein.—*Abbott* v. *Abbott*, 67 Me. 304.

3. An execution was levied on land of which the debtor and his wife were seized by entireties *Held*, that the levy was valid, and passed to the creditor the debtor's estate during his life; but did not divest the wife's right of survivorship. *Hall* v. *Stephens*, 65 Mo. 670.

Insanity.—On an issue of the sanity of a testator, the jury were instructed that illusions or hallucinations, though evidence of insanity, would not avoid the will, unless such delusion or insanity had entered into or affected the will itself. *Held*, error.—*Eggers* v. *Eggers*, 57 Ind. 461.