DIARY FOR SEPTEMBER.

4. Sat... County Court of York Term ends.
5. SUN. *15th Sunday after Trinity.*
12. SUN. *16th Sunday after Trinity.*
19. SUN. *17th Sunday after Trinity.*
26. SUN *18th Sunday after Trinity.*
29. Wed. *St. Michael*

THE

Canada Law Journal.

SEPTEMBER, 1869.

A FEW WORDS ON ARBITRATION.

There are two points touching arbitration, one general and the other particular, to which we desire to direct attention. The first is the suggestion of a remedy for the usually interminable length of arbitration proceedings. A case is referred at Nisi Prius or by a judge in Chambers, to some one or three gentlemen of the bar, and from that time forth it is uphill work to get it brought to a conclusion. The convenience of all parties—referee, plaintiff and defendant, plaintiff's and defendant's legal advisers, plaintiff's and defendant's witnesses—has to be consulted, and frequent enlargements result in this endeavour. Then every other piece of business is made to take priority over this: and so the reference drags its slow length along, at an expenditure of time and money, that is anything but soothing to the losing party. Mr. Justice Gwynne, in one of his charges at the Toronto Assizes, referred to the advisability of having official referees, to whom might be referred the assessment of damages in certain cases. So we say (and the matter has also been occupying attention in England). Let there be three or more official arbitrators or referees appointed from gentlemen at the bar, who need not on that account give up their practice, but who shall, when a cause is referred to them, act *pro hac vice* as officers of the court and subject to the rules of the court. These referees can then be made subject to the court's directions for the prosecution of business *de die in diem*, till the reference is disposed of. It may be, however, that the end of expedition and correctness in the despatch of arbitration cases, might be better attained by the appointment of an additional officer for each court, whose business it should be to determine these cases and other references, in the same manner as a master in Chancery.

The other point is with regard to the complex arbitration clauses in the Common School Acts, which have frequently been adverted to by the judges in no very complimentary terms. We have several clauses in the Consolidated Act, which it would require a very skilful lawyer to manipulate, and which almost certainly bring to grief every Local Superintendent and School Trustee, who meddles therewith. The series of cases wherein Kennedy figures as plaintiff, is a standing proof of the folly of these provisions. See *Kennedy* v. *Burness et al* 15 U. C. Q. B., 473; *Kennedy* v. *Hall et al*, 7 U. C. C. P., 218; *Kennedy* v. *Burness et al*, and *Murray* v. *Burness et al*, 7 U. C. C. P. 227.

And again we have a further accumulation of clauses in the Act of 1860 (23 Vic. cap. 49) which have been lately exposed in the courts. Section 9 of that Act is a curious product of legislative skill, and is thus commented on by the Chief Justice of the Common Pleas, in a recent decision: (*Birmingham* v. *Hungerford*, 19 U. C. C. P. 414):—"It is right, however, to notice the wording of section 9 of the Act of 1860, on which defendants claim to have proceeded: 'If the trustees wilfully refuse or neglect, *for one month after publication of award*, to comply with or give effect to an award of arbitrators appointed, as provided by the 84th section of the said U. C. C. S. Act, the trustees so refusing or neglecting shall be held to be personally responsible for the amount of such award, which may be enforced against them individually by warrant of such arbitrators *within one month after publication of their award*.' It would seem to be simply impossible to carry this section into effect. If they refuse for one month after publication they are to be liable, and the award may be enforced against them by warrant *within* one month after publication."

The Chief Justice then proceeds to point out what undoubtedly is the true remedy for this cumbrous mode of procedure:—"This is another of one of those most unfortunate cases which have come before the courts in consequence of errors naturally committed in the exercise of statutable powers to decide claims and issue executions otherwise than by regular legal process. A most arduous and dangerous duty is imposed on arbitrators, by direct-

ing them to issue their warrant for the seizure of property at the risk of being made trespassers for unintentional errors; but it is impossible to leave persons whose goods are forcibly and illegally seized without adequate remedy. The design for the avoidance of litigation and cost is most laudable; but experience demonstrates the almost impossibility of carrying it into successful operation. The substitution of the simple process of the Division Court (irrespective of amount) for the cumbrous and costly machinery of arbitration would remove all difficulty. The cost need only be a few shillings; here the costs mentioned in the award are $25."

What is wanted is a short statute repealing all these sections relating to arbitration, and giving jurisdiction to the Division Courts, with right of appeal to the Queen's Bench or Common Pleas in cases where the claim exceeds, say $50. This is all that is needed to adjust a matter which has frequently proved the occasion of great trouble and loss of money to the officers of our Common School system.

THE CRIMINAL LAWS.

We hope hereafter to speak at further length of the consolidation of the Criminal Laws, which has been so thoroughly done by the labours of the learned gentlemen to whom it was entrusted. We have only space at present to give to our readers two of the Acts as they will appear in the coming volume of Statutes of 32-33 Victoria.

CAP. XXVIII.

An Act respecting Vagrants.

[Assented to 22nd June, 1869.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1.—All idle persons who, not having visible means of maintaining themselves, live without employment,—all persons who, being able to work and thereby or by other means to maintain themselves and families, wilfully refuse or neglect to do so,—all persons openly exposing or exhibiting in any street, road, public place or highway any indecent exhibition, or openly or indecently exposing their persons,—all persons who, without a certificate signed, within six months, by a Priest, Clergyman or Minister of the Gospel, or two Justices of the Peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wander about and beg, or who go about from door to door, or place themselves in the streets, highways, passages or public places to beg or receive alms, all persons loitering in the steets or highways and obstructing passengers by standing across the footpaths or by using insulting language or in any other way, or tearing down or defacing signs, breaking windows, breaking doors or door plates, or the walls of houses, roads or gardens, destroying fences, causing a disturbance in the streets or highways by screaming, swearing or singing, or being drunk, or impeding or incommoding peaceable passengers, —all common prostitutes, or night walkers wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, not giving a satisfactory account of themselves,—all keeper of bawdy-houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves,—all persons who have no peaceable profession or calling to maintain themselves by, but who do for the most part support themselves by gaming or crime or by the avails of prostitution,—shall be deemed vagrants, loose, idle or disorderly persons within the meaning of this Act, and shall, upon conviction before any Stipendiary or Police Magistrate, Mayor or Warden, or any two Justices of the Peace, be deemed guilty of a misdemeanor, and be punished by imprisonment in any gaol or place of confinement other than the Penitentiary, for a term not exceeding two months and with or without hard labor, or by a fine not exceeding fifty dollars, or by both, such fine and imprisonment being in the discretion of the convicting Magistrate or Justices.

2.—Any Stipendiary or Police Magistrate, Mayor or Warden, or any two Justices of the Peace, upon information before them made, that any person hereinbefore described as vagrants, loose, idle and disorderly persons, are or are reasonably suspected to be harbored or concealed in any bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other Justices, all persons found therein so suspected as aforesaid.

CAP. XXXIII.

An Act respecting the prompt and summary administration of Criminal Justice in certain cases.

[Assented to 22nd June, 1869.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1.—In this Act the expression "a competent Magistrate" shall, as respects the Province of Quebec and the Province of Ontario, mean and include any Recorder, Judge of a County Court, being a Justice of the Peace, Commissioner of Police, Judge of the Sessions of the Peace,

Police Magistrate, District Magistrate or other functionary or tribunal invested at the time of the passing of this Act with the powers vested in a Recorder by chapter one hundred and five of the Consolidated Statutes of Canada, intituled "*An Act respecting the prompt and summary administration of Criminal Justice in certain cases*," and acting within the local limits of his or of its jurisdiction, and any functionary or tribunal invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace; and as respects the Province of Nova Scotia or the Province of New Brunswick, the said expression shall mean and include a Commissioner of Police and any functionary, tribunal or person invested or to be invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace, and the expression "the Magistrate" shall mean a competent Magistrate as above defined;

And the expression "the Common Gaol or other place of confinement," shall, in the case of any offender whose age at the time of his conviction does not, in the opinion of the Magistrate, exceed sixteen years, include any Reformatory Prison provided for the reception of juvenile offenders in the Province in which the conviction referred to takes place, and to which by the law of that Province the offender can be sent.

2.—Where any person is charged before a competent Magistrate with having committed—

1. Simple larceny, larceny from the person, embezzlement, or obtaining money or property by false pretences, or feloniously receiving stolen property, and the value of the whole of the property alleged to have been stolen, embezzled, obtained or received does not, in the judgment of the Magistrate, exceed ten dollars; or,

2. With having attempted to commit larceny from the person or simple larceny; or,

3. With having committed an aggravated assault, by unlawfully and maliciously inflicting upon any other person, either with or without a weapon or instrument, any grievous bodily harm, or by unlawfully and maliciously cutting, stabbing or wounding any other person; or,

4. With having committed an assault upon any female whatever, or upon any male child whose age does not, in the opionion of the Magistrate, exceed fourteen years, such assault being of a nature which cannot, in the opinion of the Magistrate, be sufficiently punished by a summary conviction before him under any other Act, and such assault, if upon a female, not amounting in his opinion to an assault with intent to commit a rape; or

5. With having assaulted, obstructed, molested or hindered any Magistrate, Bailiff, or constable, or officer of customs, or excise or other officer in the lawful performance of his duty, or with intent to prevent the performance thereof; or,

6. With keeping or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house;—

The Magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

3.—Whenever the Magistrate before whom any person is charged as aforesaid proposes to dispose of the case summarily under the provisions of this Act, such Magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling upon the party charged for any statement which he may wish to make, shall state to such person the substance of the charge against him, and (if the charge is not one that can be tried summarily without the consent of the accused) shall then say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury at the (*naming the Court at which it could soonest be tried*);" and if the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the Magistrate to try it does not depend on the consent of the accused, the Magistrate shall reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge.

4.—If the person charged confesses the charge, the Magistrate shall then proceed to pass such sentence upon him as may by law be passed, (subject to the provisions of this Act), in respect to such offence; but if the person charged says that he is not guilty, the Magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the Magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he state that he has a defence, the Magistrate shall hear such defence, and shall then proceed to dispose of the case summarily.

5.—In the case of larceny, feloniously receiving stolen property or attempt to commit larceny from the person, or simple larceny, charged under the first or second sub-sections of the second section of this Act, if the Magistrate, after hearing the whole case for the prosecution and for the defence, finds the charge proved, then he shall convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any period not exceeding six months.

6.—If in any case the Magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand, stating the fact of such dismissal.

7.—Every such conviction and certificate

respectively may be in the form A and B, in this Act, or to the like effect.

8.—If (when his consent is necessary) the person charged does not consent to have the case heard and determined by the Magistrate, or in any case if it appears to the Magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such Magistrate shall deal with the case in all respects as if this Act had not been passed; but a previous conviction shall not prevent the Magistrate from trying the offender summarily, if he thinks fit so to do.

9.—If, upon the hearing of the charge, the Magistrate is of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, he may dismiss the person charged without proceeding to a conviction.

10—When any person charged before a competent Magistrate with simple larceny, or with having obtained property by false pretences, or with having embezzled, or having feloniously received stolen property, or with committing larceny from the person, or with larceny as a clerk or servant, and the value of the property stolen, obtained, embezzled or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the Magistrate, sufficient to put the person on his trial for the offence charged, such Magistrate, if the case appear to him to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this Act, shall reduce the charge into writing and shall read it to the said person, and (unless such person is one who can be tried summarily without his consent) shall then put to him the question mentioned in section three, and shall explain to him that he is not obliged to plead or answer before such Magistrate at all, and that if he do not plead or answer before him, he will be committed for trial in the usual course.

11.—If the person so charged consents to be tried by the Magistrate, the Magistrate shall then ask him whether he is guilty or not of the charge, and if such person says that he is guilty, the Magistrate stall thereupon cause a plea to be entered upon the proceedings, and shall convict him of the offence, and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labor, for any term not exceeding twelve months, and every such conviction may be in the form C, or to the like effect.

12.—In every case of summary proceedings under this Act, the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined, by counsel or attorney.

13.—The magistrate before whom any person is charged under this act, may by summons require the attendance of any person as a witness upon the hearing of the case at a time and place to be named in such summons, and such Magistrate may bind by recognizance all persons whom he may consider necessary to be examined touching the matter of such charge, to attend at the time and place to be appointed by him, and then and there to give evidence upon the hearing of such charge; And in case any person so summoned or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, then upon proof being first made of such person's having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the Magistrate before whom such person ought to have attended may issue a warrant to compel his appearance as a witness.

14.—Every summons issued under this Act may be served by delivering a copy of the summons to the party summoned, or by delivering a copy of the summons to some inmate of such party's usual place of abode; and every person so required by any writing under the hand of any competent Magistrate to attend and give evidence as aforesaid, shall be deemed to have been duly summoned.

15.—The jurisdiction of the Magistrate in the case of any person charged within the Police limits of any city in Canada with therein keeping or being an inmate or an habitual frequenter of any disorderly house, house of ill-fame or bawdy-house, shall be absolute, and shall not depend on the consent of the party charged to be tried by such Magistrate, nor shall such party be asked whether he consents to be so tried; nor shall this Act affect the absolute summary jurisdiction given to any Justice or Justices of the Peace in any case by any other Act.

16.—The jurisdiction of the Magistrate shall also be absolute in the case of any person being a seafaring person, and only transiently in Canada, and having no permanent domicile therein, charged, either within the city of Quebec as limited for the purpose of the Police Ordinance, or within the city of Montreal as so limited, or any other seaport, city or town in Canada, where there is a competent Magistrate, with the commission therein of any of the offences mentioned in the second section of this Act, and also in the case of any other person charged with any such offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence, and such jurisdiction shall not depend on the consent of any such party to be tried by the Magistrate, nor shall such party be asked whether he consents to be so tried.

17.—In any case summarily tried under the third, fourth, fifth or sixth sub-sections of the second section of this Act, if the Magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned with or without hard labor for any period not exceeding six months, or may con-

demn him to pay a fine not exceeding, with the costs in the case, one hundred dollars, or to both fine and imprisonment, not exceeding the said period and sum; and such fine may be levied by warrant and distress under the hand and seal of the Magistrate, or the party convicted may be condemned (in addition to any other imprisonment on the same conviction) to be committed to the common gaol or other place of confinement, for a further period not exceeding six months, unless such fine be sooner paid.

18.—Whenever the nature of the case requires it, the forms given at the end of this Act shall be altered by omitting the words stating the consent of the party to be tried before the Magistrate, and by adding the requisite words stating the fine imposed (if any) and the imprisonment (if any) to which the party convicted is to be subjected if the fine be not sooner paid.

19.—When any person is charged before any Justice or Justices of the Peace with any offence mentioned in this Act, and in the opinion of such Justice or Justices, the case is proper to be disposed of by a competent Magistrate, as herein provided, the Justice or Justices before whom such person is so charged, may, if he or they see fit, remand such person for further examination before the nearest competent Magistrate, in like manner in all respects as a Justice or Justices are authorized to remand a party accused for trial at any Court, under any general Act respecting the duties of Justices of the Peace out of Sessions, in like cases.

20.—No Justice or Justices of the Peace in any Province shall so remand any person for further examination or trial before any such Magistrate in any other Province.

21.—Any person so remanded for further examination before a competent Magistrate in any city, may be examined and dealt with by any other competent Magistrate in the same city.

22.—If any person suffered to go at large upon entering into such recognizance as the Justice or Justices are authorized under any such Act as last mentioned to take, on the remand of a party accused, conditioned for his appearance before a competent Magistrate under the preceding section of this Act, does not afterwards appear pursuant to such recognizance, then the Magistrate before whom he ought to have appeared, shall certify (under his hand on the back of the recognizance) to the Clerk of the Peace of the District, County or place (as the case may be) the fact of such non-appearance, and such recognizance shall be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such non-appearance.

23.—The Magistrate adjudicating under this Act shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the deposition of witnesses for the prosecution and for the defence, and the statement of the accused, to the next Court of General or Quarter Sessions of the Peace, or to the Court discharging the functions of a Court of General or Quarter Sessions of the Peace, for the District, County or place, there to be kept by the proper officer among the Records of the Court.

24.—A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein, in any legal proceedings whatever.

25.—The Magistrate, by whom any person has been convicted under this Act, may order restitution of the property stolen, or taken, or obtained by false pretences, in those cases in which the Court before whom the person convicted would have been tried but for this Act, might by law order restitution.

26.—Every Court, held by a competent Magistrate for the purposes of this Act, shall be an open public Court, and a written or printed notice of the day and hour for holding such Court, shall be posted or affixed by the Clerk of the Court upon the outside of some conspicuous part of the building or place where the same is held.

27.—The provisions of the *Act respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders*, and the provisions of the *Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences*, shall not be construed as applying to any proceeding under this Act, except as mentioned in section nineteen.

28.—Every conviction by a competent Magistrate under this Act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this Act shall be attended with forfeiture beyond the penalty (if any) imposed in the case.

29.—Every person who obtains a certificate of dismissal or is convicted under this Act, shall be released from all further or other criminal proceedings for the same cause.

30.—No conviction, sentence or proceeding under this Act shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same.

31—Nothing in this Act shall affect the provisions of the *Act respecting the Trial and Punishment of Juvenile Offenders;* and this Act shall not extend to persons punishable under that Act, so far as regards offences for which such persons may be punished thereunder.

32.—Every fine imposed under the authority of this Act shall be paid to the Magistrate, who has imposed the same, or to the Clerk of

the Court or Clerk of the Peace, as the case may be, and shall be by him paid over to the County Treasurer for county purposes if it has been imposed in the Province of Ontario, —and if it has been imposed in any new district in the Province of Quebec, constituted by any Act of the Legislature of the late Province of Canada passed in or after the year one thousand eight hundred and fifty-seven, then to the Sheriff of such District as Treasurer of the Building and Jury Fund for such Distict, to form part of the said Fund,—and if it has been imposed in any other District in the said Province, then to the Prothonotary of such District, to be by him applied under the direction of the Lieutenant Governor in Council, towards the keeping in repair of the Court House in such District, or to be by him added to the moneys and fees collected by him for the erection of a Court House and Gaol in such District, so long as such fees shall be collected to defray the cost of such erection; And in the Province of Nova Scotia to the County Treasurer for county purposes, and in the Province of New Brunswick to the County Treasurer for county purposes.

33.—In the interpretation of this Act the word "property" shall be construed to include everything included under the same word or the expression "valuable security," as used in the *Act respecting Larceny and other similar offences;* and in the case of any "valuable in the manner prescribed in the said Act.

34.—The Act cited in the first section of this Act, chapter one hundred and five of the Consolidated Statutes of Canada, is hereby repealed. except as to cases pending under it at the time of the coming into force of this Act, and as to all sentences pronounced and punishments awarded under it, as regards all which this Act shall be construed as a re-enactment of the said Act, with amendments, and not as a new law.

34.—This Act shall commence and take effect on the first day of January, in the year of our Lord one thousand eight hundred and seventy.

FORM (A)—*See* sec. 7.

Conviction.

Province of——— City *or* ——, }
as the case may be of, to wit: }

Be it remembered that on the——day of—, in the year of our Lord——, at——A. B., being charged before me the undersigned——, of the said (City), (and consenting to my deciding upon the charge summarily), is convicted before me, for that he the said A. B, &c., (*stating the offence, and the time and place when and where committed*), and I adjudge the said A. B., for his said offence, to be imprisoned in the——— (and there kept at hard labor) for the space of——

Given under my hand and seal, the day and year first above mentioned, at——aforesaid.

J. S. [L. S.]

FORM (B)—*See* sec. 7.

Certificate of Dismissal.

Province of——— City *or* ——, }
as the case may be of, to wit: }

I, the undersigned, ———, of the City *or as the case may be,* of——, certify that on the —— day of —— in the year of our Lord ——, at —— aforesaid, A. B., being charged before me (and consenting to my deciding upon the charge summarily), for that he the said A. B., &c., *stating the offence charged, and the time and place when and where alleged to have been committed*), I did, after having summarily adjudicated thereon, dismiss the said charge.

Given under my hand and seal, this —— day of ——, at —— aforesaid.

J. S. [L. S.]

FORM (C)—*See* sec. 11.

Conviction upon a plea of not guilty.

Province of——— City *or* ——, }
as the case may be of, to wit, }

Be it remembered that on the——day of—, in the year of our Lord——, at —— A. B., being charged before me the undersigned——, of the said City, (and consenting to my deciding upon the charge summarily) for that he the said A. B., &c., (*stating the offence, and the time and place when and where committed*), and pleading guilty to such charge, he is thereupon convicted before me of the said charge, and I adjudge him, the said A. B., for his said offence, to be imprisoned in the —— (and there kept at hard labor) for the space of ——

Given under my hand and seal, the day and year first above mentioned, at——aforesaid.

J. S. [L. S.]

SELECTIONS.

PLAGIARISM.

The question, what is a legitimate use of an author's work, must depend on the circumstances of the particular case. As the Vice-Chancellor remarked in the latest case on this subject (*Pike* v. *Nicholas,* V.C.J., 17 W. R. 842), a man publishing a book gives it to the world, and so far as it adds to the world's knowledge he adds to the materials which any other author has a right to use, and may even be bound not to neglect. In the case of dictionaries and similar publications wherein originality is necessarily excluded, the compiler is entitled, without exposing himself to a charge of piracy, to make use of preceding works, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction, as to produce an original result; provided he does not deny the use of such preceding works, and the alterations are not merely colourable (*Spiers* v. *Brown,* 6 W. R. 352). Merely to copy and re-arrange copyright matter is piracy (*Lewis*

v. *Fullarton*, 2 Beav. 7); and it would seem that the only legitimate use which the compiler of such a work can make of previous works is for the purpose of verifying the correctness of his results (*Kelly* v. *Morris*, 14 W. R. 497, L. R. 1 Eq. 697; *Scott* v. *Stanford*, 15 W. R. 757, L. R. 3 Eq. 720).

The foregoing remarks apply to dictionaries, directories, statistics, and similar publications in which much of the contents must always be identical, if correctly given. In the cases where a compiler must of necessity make use of preceding books, the question will be whether he has made a legitimate use of them; bearing this in mind, that the question whether an author has made an unfair use of another work does not necessarily depend upon the quantity, but the value, of the pirated matter (*Bramwell* v. *Halcomb*, 3 My. & Cr. 736).

But the question before the Vice-Chancellor was not how much paste and scissor work the compiler of a dictionary or similar work may fairly have recourse to. The case takes us into higher fields of literary labour. The plaintiff was the author of an independent literary work, elaborated from a collection of materials, which must have been the result of great investigation and labour, and written in support of a certain theory. The defendant afterwards published a work, in the composition of which (as the plaintiff complained) he had availed himself of the plaintiff's investigations, and the results of those investigations, to the infringement of the plaintiff's copyright.

The Vice-Chancellor dealt with the case as if the defendant had openly borrowed from the plaintiff's book, and had acknowledged the same, instead of contenting himself with putting the plaintiff's book amongst the 168 authorities to whom he had referred. The omission to acknowledge his special obligation to the plaintiff's work made the case worse from a moral point of view, but did not affect the question before the Court. But to borrow without the author's leave arguments, theories, and ideas is a breach of his copyright, whether the words in which those arguments, theories, and ideas are clothed be taken or not. It was be no means a case of mere copying. No two passages in the books were absolutely identical: and the Vice-Chancellor acknowledged that no inconsiderable literary labour and skill had been displayed in the transfusion and transformation which he held to have taken place. The defendant, in the Vice-Chancellor's opinion, had adopted the general plan of the plaintiff's work, many of his arguments and illustrations, and the result of his investigations, and had also copied the plaintiff's references to works which he had in fact never consulted. "The question upon the whole is," said Lord Eldon, in *Wilkins* v. *Aikin* (17 Ves. 422), "whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work." The Vice-Chancellor held that this was not a fair use by the defendant of the plaintiff's publication. If a man, instead of examining the original sources, or honestly exercising his mind on the work, avails himself of the labours of his predecessor, adopts his arrangement, borrows the materials which he has accumulated and combined together, or uses his language with colourable alterations or variations, he is guilty of piracy: *Jarrould* v. *Houlstone*, 3 K. & J. 716; and in the words of Judge Story (cited by Mr. Kerr in his work on Injunctions, p. 456, where this subject is fully treated of), the true test of piracy is to ascertain whether the defendant has in fact used the plan, arrangement, or illustrations of the plaintiff as the model of his own book, with colourable alterations and variations only to disguise the use thereof, or whether his work is the result of his own labour, skill, and use of common materials and common sources of knowledge open to all men, and the resemblances are either accidental or arise from the nature of the subject. This test being applied to the defendant's works, the Vice-Chancellor had no doubt whatever that it was, in the parts complained of, a palpable "crib" from the plaintiff's, though transposed, altered, and added to, and that with considerable skill. This systematic appropriation of the plaintiff's chain of reasoning, illustrations, and references to authorities amounted to an infringement of copyright, though no *verbatim* copying had taken place. It is true that the defendant had expended much skill and mental labour on what he had taken; yet the plaintiff had a right to say that no one had a right to take a substantial part of his work, and deal with it as he pleased, for the pupose of improving a rival publication.

Verbatim coying is the strongest evidence of an infringement of copyright; but the infringement lies in the appropriation of the ideas, and not in the transcription of the words. The real piracy here was of the theories and the arguments of the plaintiff. Once published, they became common property, subject to the author's right, as possessor of the copyright in his book, to restrain anybody from unfairly dealing with them. The case of *Pike* v. *Nicholas* shows the strictness with which the Court will protect authors against the most dangerous, because least easily dealt with, form of piracy—namely, the appropriation of thoughts and ideas. The Court can and does protect authors against those who rob them of the results of their invention and labours, whether the plagiarist simply transcribes their compositions or more insidiously "seizes their best thoughts, and as gipsies do with stolen children, disfigures them to make them pass for his own."—*The Solicitors' Journal.*

NOVEL ARBITRATIONS.

Down to a very short time ago it was an invariable rule that, whatever cases might be settled or referred, there was one kind of case, at least, which could not be dealt with in either of these ways, or in any way whatever except the good old mode of a full trial in open court; and that was a case involving a charge of fraud. A man who brings an action against another founded upon an allegation of fraud, takes the most formal and the most public method that can be taken of charging him with the commission of a fraud. And it used to be well understood among all those conversant with judicial proceedings that such a charge must be met as deliberately and as publicly as it was made. No counsel would, for a moment, have entertained a proposal to refer or settle an action of deceit. And any judge would have been startled at the suggestion of such a thing. But in this as in other matters men have advanced with the times. At the last Guildhall sittings, as some of our readers may remember, in an action against Sir Edward Watkin and another gentleman for alleged frauds, Chief Justice Cockburn, a judge for the most part more than commonly sensitive upon such points, made the most determined efforts to have the case referred, though the firmness of the defendants or their counsel defeated the attempt, and they were rewarded by an unhesitating verdict in their favour. But during the late assizes several actions of fraud were referred by the consent of counsel and with the full approval of the judge, and we know not how many previous instances there may have been of the same thing.

How has this come to pass? How is it that what every honourable man would have recoiled from a very short time ago is done without hesitation to-day? Is it that character is less valued than it was? Is it that such words as dishonesty, misrepresentation, deceit, have from familiarity acquired a less ugly sound than they once had, so that a man can afford to leave it an open question, or a question to be settled by an arbitrator privately and at leisure, whether he is an honest man or not? To some extent there is reason to fear that this may be so. But this is certainly not the whole explanation of the case. The law itself has been to blame. A silent change has been long in progress, and has gradually given an opening, of which the eager alacrity in shirking their work habitually shown by many of the judges and many of the leaders of the bar has not been slow to take advantage. The process has been the usual one, that of pouring new wine into old bottles. Legal forms and legal terms have remained the same, but a new meaning has been infused into them, the law which they embody has changed. Every declaration for fraudulent misrepresentation still charges, as it always has done, that "the defendant falsely and fraudulently represented" so-and-so, which so-and-so was false "as the defendant knew." And if judicial decisions can establish anything, there was a time, and not long ago either, when it was perfectly clear law that in order to sustain such a declaration, in other words, in order to establish any right of action for the misrepresentation, it was necessary to show the defendant's knowledge of its falsehood, and his intention to deceive. "Moral fraud" was the favourite expression. But it was soon held that to make a statement recklessly and without regard to its truth or falsehood was the same thing in law as to make it with knowledge of its falsehood. And, the thin edge of the wedge being thus inserted, it has been pushed further and further, until the old doctrine about moral fraud and actual knowledge has been practically frittered away. We are far from regretting the change; we think it a change decidedly for the better. We only desire to call atteniton to the confusion of landmarks which arises from concealing a change of substance by the retention of old forms and old names. What the law upon the subject is at this moment it might be difficult to define with accuracy. But it is clear that the term "fraud" now includes anything from the grossest swindling down to that which an ingenious counsel eager to hurry off to another case, and a judge anxious to escape a troublesome inquiry, when gracefully consigning the case to a reference, can describe to the jury and the newspaper reporters as "fraud in law," "fraud in the technical sense," involving nothing inconsistent with the strictest integrity or the highest honour.—*Solicitors' Journal.*

ONTARIO REPORTS.

INSOLVENCY CASES.

(Before the Judge of he County Court of the County of Wentworth.)

[*Reported by* S. F. Lazier, Esq., *Barrister-at-Law*].

In re Lawson Brothers, Insolvents.

Insolvency—Deed of Composition and Discharge.

Held, 1. That a deed of composition and discharge under sec. 9 of the Insolvent Act of 1864, purporting to be between the majority of the creditors of $100 and upwards of the first part, and the Insolvents of the second part, is valid, though the *non-assenting* creditors were not specially made parties to the deed.

2. A creditor who has accepted the terms of a deed of composition cannot afterwards contest the confirmation of the Insolvents' discharge.

3. The debt of a secured creditor who has elected to accept his security in full of his claim, and obtained the consent of the assignee to such election, is not to be estimated in considering the amount of indebtedness.

[September 7th, 1869.]

This was an application by the insolvents to the Judge of the County Court of the County of Wentworth for a confirmation of the deed of composition and discharge made by the insolvents.

The sections of the deed in dispute were as follows:

"This deed of composition and discharge is made and executed in duplicate under and in

pursuance of the Insolvent Act of 1864, and the Act amending the same, by and between the undersigned persons, parties, corporations and firms, being a majority in number of those of the creditors of John Lawson and Joseph Lawson (insolvents hereinafter named), who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths in value of the liabilities of the said Insolvents (subject to be computed as in the said Acts provided) of the first part, and the said John Lawson and Joseph Lawson the said insolvents, trading and carrying on business by and under the name and style of Lawson Brothers, of the second part.

Whereas * * * the majority in number of the insolvents' creditors for sums of one hundred dollars and upwards, representing at least three-fourths in value of the liabilities of the said insolvents, propose, and the said insolvents have assented and agreed to the proposal, that they, the said insolvents should compound for all their debts and liabilities at the rate of fifty cents on the dollar, such composition to be paid, and payable in six equal quarterly payments at three, six, nine, twelve, fifteen and eighteen months respectively from the date of these presents, and to be secured by the promissory notes of the said insolvents, payable respectively at the periods aforesaid at the Royal Canadian Bank, in the City of Hamilton, and endorsed by Edward Lawson of the City of Toronto, Merchant, and Thomas Lawson of Middlesex County, Farmer.

And the said parties of the first part do hereby agree, that such promissory notes of the said insolvents, amounting in the aggregate to a sum equal to the said composition of fifty cents on the dollar on the liabilities of the said insolvents so endorsed, and made payable as aforesaid, shall be, and be taken and accepted by the creditors of the said insolvents in full satisfaction and discharge of their respective claims * * *

And the said insolvents covenant with each of the said parties hereto of the first part, to deliver the promissory notes so endorsed as aforesaid, and to deposit this deed with the Clerk of the County Court of the County of Wentworth for the benefit of all parties interested herein:—* * * In Witness, &c."

The deed was signed by the insolvents and forty two creditors, including one secured creditor and six other creditors each having claims under $100. A supplementary and amended schedule of creditors was also attached to the deed shewing the total number of creditors to be fifty two, and the total number of liabilities of the insolvents at $54,831 65.

All the firms signed in the partnership name, and several of them by procuration. One firm signed as follows: Wakefield, Coate & Co., per F. W. Coate.

A. Crooks, Q. C. and *N. Kingsmill*, for Geo. Winks & Co., J. G. Mackenzie & Co., W. J. McMaster & Co. and F. J. Clarkson & Co. opposed the confirmation of the insolvents' discharge, upon the grounds:—

1. That the deed is unequal in its provisions, nor being made with the non-assenting creditors, and the non-assenting creditors being unable to sue upon the covenant made with the assenting creditors to deliver the promissory notes as provided for in the deed. The non-assenting creditors should have been made parties to the deed.

2. The deed is not proven to have been executed by the requisite number and proportion in value of creditors.

3. The authority of the agents who execute for their firms in the partnership name should be produced, and the partners should sign the deed in their individual names.

4. The secured claims should be estimated in ascertaining the number and value of the claims of those creditors who have signed the deed

Ex parte Cockburn, 9 L. T. 464; *ex parte Harris*, 9 L. T. 239; Lindley on Partnership, p. 223; *Duggan* v. *O'Connell*, 12 Ir. Eq 566, were cited in favour of these objections.

M. O'Reilly, Q C., and *S. F. Lazier*, for the insolvents. Mackenzie & Co., McMaster & Co. and Clarkson & Co. have accepted the composition notes and the first payment in cash under the provisions of the deed, and are therefore estopped from disputing it. Winks & Co. have not proved their claim and cannot appear to oppose the insolvents' discharge until they file their claim. The objection of inequality in the provisions of the deed cannot be taken under sub-section 6 of section 9 of the Insolvent Act of 1864. There is in reality no inequality in this deed; and affidavits are filed shewing that the insolvents had furnished the Assignee with the composition notes for all the creditors (including Winks & Co.), and money for the first payment under the deed. *Blumberg* v. *Rose*, L. R. 1 Ex. 232; *Gresby* v. *Gibson*, L R. 1 Ex. 112; *Rixon* v. *Emary*, L. R. 3 C. P. 546. The English Bankruptcy Act of 1861 is very different from the Canadian Insolvency Acts of 1864 and 1865.

Debts of secured creditors who elect to retain their securities with the consent of the assignee are not to be estimated in ascertaining the proportion in number and value of creditors who have signed the deed Section 9, sub-sections 1 & 3, and sub-sections 4 & 5 of section 5 of the Insolvent Act of 1864.

The execution by any one partner of a deed of composition and discharge in the partnership name is sufficient, as any one of the firm can release the debt. Lindley on Partnership, p. 234. The affidavits of the principals that their agents had authority to sign for them are sufficient without production of the authority.

Logie, Co. J.,—*Messrs. Crooks, Kingsmill & Cattanach* appear for the following creditors, namely: Geo. Winks & Co., J. G. Mackenzie & Co., W. J. McMaster & Co., and T. J Clarkson & Co., for the purpose of opposing the confirmation of the insolvents discharge.

Of these it appears by the affidavit of the official assignee, and by the production of the cheques for the cash payment indorsed by the creditors respectively, that the composition notes indorsed as provided by the deed, and cheques for the cash payment were sent to J. G. Mackenzie & Co., W J. McMaster & Co., and T. J Clarkson & Co., an apparently accepted by them, at least they have retained the notes and accepted the cash, and I think by so doing they are precluded

from now contesting the confirmation of the insolvents discharge.

Messrs. Geo. Winks & Co. have not proved their claim, and it is contended on their behalf that they have a right to appear and oppose the discharge—on the other hand it is urged that as they have not proved their claim, they are not to be considered as creditors, and have no right to oppose. I think under the Act of 1864 they have a right to come here and oppose. Sub-section 6 of section 9 provides, that "*any creditor* of the insolvent may appear and oppose" the confirmation of the discharge—and sub-section 5 of section 12 defines a creditor to mean "every person to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety." It is admitted that Messrs. Winks & Co. are creditors, the insolvents have inserted their claim in the schedule of their liabilities, and it appears by the affidavit of Joseph Lawson that cash for the first instalment and composition notes for the other instalments, pursuant to the terms of the deed, have been lodged in the hands of the official assignee for Messrs. Winks & Co. I think there can be no doubt as to their right to contest.

The confirmation of the discharge of the insolvents is opposed on the grounds:—

1st. That the insolvents have not procured the requsite proportion in value of creditors to execute the deed.

2nd. That the deed is unequal in its provisions.

Exception is taken to the execution of the deed by R. A. Hoskins & Co., John Macdonald & Co., and A. C. Sutherland & Co., on the ground that being executed by attorney or agent, there is not sufficient proof of the authority to execute, that the powers of attorney should be proved and produced. Even if these three claims are not included among those who assented, there would still be a sufficient proportion of creditors who have executed; but I think the proof of authority is sufficient. Affidavits made by John Macdonald, A. C. Sutherland, and a partner of Hoskins & Co., are filed—proving that the agents who executed for these creditors respectively had authority, and that their acts had been duly confirmed. All that is required, I think, is to satisfy the mind of the Judge with a reasonable degree of certainty that the deed was executed by a proper proportion of creditors, and that the same degree of certainty would not be necessary as on a trial between party and party. I hold, then, that proof of execution and of authority to sign is sufficient in all the cases. There are only two secured creditors, Marcus Holmes and H. A. Joseph, whose claims amount to $4570 00, and it is contended by the opposing creditor that these claims should be included in estimating the amount of indebtedness and proportion in value of those who have executed. Sub-section 5, of section 5, provides for the case of creditors holding security, undoubtedly they are creditors who may prove prior to any election to accept the security in satisfaction of their claims. But if the secured creditor elects to accept the security and not to prove, and the official assignee on behalf of the creditors assents to his retaining the security on these terms he certainly ceases to be a creditor who can prove, and his debt cannot be taken into consideration in estimating the amount of indebtedness. That is the case with these two secured creditors, they both elected to accept the securities they held, and not to prove, and it appears by the affidavit of the assignee that he has assented to the retention by them of their securities.

Exception is also taken to the execution of the deed by Wakefield, Coate & Co., on the ground that it is signed by one for the firm after the dissolution of the partnership, for the purpose of winding up the business and fulfilling engagements made during the existence of the partnership. Each partner has the same authority after dissolution to sign the name of the firm, and execute deeds of composition for debts due to the firm as he had before; Mr. Coate might have signed the name of the firm without signing for them in his own name. The execution by Wakefield, Coate & Co., is sufficient. (See Collyer on Partnership, Story on Partnership, 15 Ves. 227, 1 Taunt, 104.)

The next question to be decided by me, is, whether the deed of composition is unequal in its provisions. It is made between the *undersigned* parties, corporations, and firms, &c., of the first part, and the insolvents of the second part, and contains a covenant by the insolvents with the *parties thereto* of the first part, to deliver the notes mentioned in the deed on request, &c., the covenant being with the parties who have signed and not with the whole body of creditors, it is contended that those who have not executed the deed are not in as formidable a position as those who have, not being in a position to enforce the covenant, and *Ex parte Cockburn*, 9 L. J. Rep. 464, is relied on by the contesting creditor.

There is a wide difference between the English Bankruptcy Act of 1861, under which most of the decisions have taken place, and our Insolvent Act. The 187th section of the English Act contains this clause:—"And if the Court shall be satisfied that the deed has been duly entered into and executed, and that its forms are reasonable and calculated to benefit the general body of the creditors under the estate, it shall by order, &c." There is no such clause in our Act, and there is a great deal of force in the argument of Mr. Lazier for the insolvents, that the grounds of opposition by creditors must be confined to those mentioned in sub-section 6 of section 9, and I think that under our Act the mere fact of the non-executing creditors not being so favourably placed as those who executed, would not be sufficient to avoid the deed or to refuse the confirmation, unless the inequality between the creditors or any other creditors of the insolvents amounted to a fraud upon any of the creditors or a fraudulent preference in favor of some of them. (If the statutes were alike the following cases would bear on this point: *Ilderton* v. *Castrique*, 32 L. J. C. P. 206; *Benham* v *Broadhurst*, 34 L. J. Ex. 61; *Chesterfield Silk Co* v. *Hawkins*, 34 L. J. Ex. 121; *Gresty* v. *Gibson*, L. R. 1 Ex. 112; *Reeves* v. *Watts*, L.R 1, 2, 13, 412; *McLaren* v. *Bapter*, 36 L. J. C. P. 247; *Tetley* v. *Wanless.*, 36 L. J. Ex. 25; *Blumberg* v. *Rose*, L. R. 1 Ex. 232.)

In the case of the deed now under consideration, I think on the state of facts as shewn in the affidavits filed, and on examination of the deed itself, that there is no inequality between

the assenting and non-assenting creditors, even under the English Act, and authorities cited. It may be true that the non-executing creditors could not sue on the covenant to deliver the notes; but the covenant has been fulfilled; money and indorsed notes for the composition, payable to all the creditors assenting and non-assenting, have been placed in the hands of the assignee, and with the exception of Winks & Co., all have received the money and composition notes to which they were entitled, and Messrs. Winks & Co., are entitled at any time to prove their claim and receive the money and 'notes held by the assignee for them. The insolvents have done all in their power to carry out the arrangement made with their creditors; the arrangement itself is fair and equal, and if there is any slight inequality between the assenting and non-assenting creditors, which I think there is not, it is only incident to the position of a non-assenting creditor. In *Blumberg* v. *Rose,* Pollock, C. B., says in his judgment—"It is impossible where there are two sets of creditors, assenting and non-assenting, but that there should be some degree of practical inequality. But to a deed equal in principle, inequality in effect is no objection "

The memorandum attached hereto shows that the insolvents have obtained the execution of the deed of composition and discharge by a majority in number representing three-fourths in value of the creditors whose claims are above $100, and as the deed is fair, and the insolvents have complied with all the requirements of the act, I think they are entitled to the confirmation of their discharge.

Memorandum attached to the judgment.

Total number of creditors		52
Secured creditors who have accepted securities with consent of assignee	2	
Creditors under $100	6	8
		44
No. of creditors over $100 who have executed deed		35
Total liabilties of insolvents		$54,831 65
Less secured claims as above	$4,570 00	
And claims under $100	313 49	4,883 47
		$50,233 42
Proportion of creditors required		$37,675 07
Amount of unsecured claims over $100 of those who have executed the deed		$40,934 58
Proportion in value who have signed, deducting the claims of John Macdonald & Co., Sutherland & Co., and Hoskins & Co		$38,449 71

ENGLISH REPORTS.

CHANCERY.

Baskcomb v. Beckwith.

Vendor and purchaser—Specific performance—Suppression of facts—Plan of estate produced at sale.

Where specific execution of a contract is sought, there *must have been perfect truth and the fullest disclosures* by the vendor in order to entitle him to relief. The Court will otherwise, even where there has been no intentional suppression of fact, relieve the purchaser who has been thereby deceived, provided he has acted throughout reasonably and fairly.

A building estate was offered for sale by auction, in plots, under conditions of sale which stipulated that no public house should be erected thereon. The defendant bought *one of the plots and accepted the title,* but refused to complete on discovering that the whole of the vendor's *estate, as had been the defendant's impression, was not* included in the sale, but that a plot had been reserved, within one hundred yards of the defendant's purchase, to which the vendor contended the above stipulation did not extend. This impression was produced by the conditions of sale being framed as if including the whole estate without any reservation, and also by the reserve plot not being coloured or marked with the vendor's name. The defendant thereupon refused to complete, *unless with covenants on the part of the vendor including* the reserved plot; and in a suit for specific performance instituted by the vendor,

Held, that he could not compel the defendant to execute the contract if he, the plaintiff, insisted on retaining the plot free from any restrictive covenant; but that the plaintiff was entitled, at his option, either to a decree for specific performance with a covenant including the reserved plot, or to have his bill dismissed, and must in *either case pay the costs of the suit.*

[M. R., 17 W. R. 812.]

The plaintiff, George Henry Baskcomb, who was the owner of the Manor House estate at Chislehurst, comprising thirty-five acres, on the 7th of May, 1867, put the greater part of the same up for sale by auction, divided into seventy-four lots. Lot 1 was the Manor House and grounds, of which the defendant became the purchaser.

The 11th condition of sale was to this effect: —"Each of the respective purchasers of building land at this sale shall in the deeds of conveyance to them respectively enter into covenants with the vendor not to build thereon otherwise than in conformity with the plan annexed to the particulars, and for the observance and performance of such conditions relative to the erection of fences modes of building on and using such lots as are mentioned in the general stipulations as to building land annexed to the particulars."

So far as is material, the general stipulations as to building were as follows:—"No purchaser to erect more than one single house, or two semi-detached, on his or their lot, or at a less value than £800 for the one, and £1,200 for the two. No house shall be used as a public-house or place of business or trade, and no trade or manufacture shall be carried on upon the property."

In August, 1868, the defendant discovered that a small adjoining piece of land at the junction of the Bromley and Greenwich roads belonged to the plaintiff, and was not included in the sale. This plot of land lay within one hundred yards of the Manor House gate.

The defendant accepted the vendor's title, but refused to carry into execution his contract unless the plaintiff would in the conveyance enter into covenants to observe the building stipulations not only with respect to the property comprised in the said particulars of sale, and in the plan of the property annexed to such particulars, but also with respect to the adjoining piece of land retained by the plaintiff and never offered for sale by him as building land.

The present suit was accordingly instituted by the vendor and his mortgagees. The plaintiffs charged that all the defendant was entitled to require was that the plaintiffs should enter into covenants with him to require every purchaser from them of the building land mentioned in the particulars of sale to enter into qualified covenants restricting the same to such building land only.

The defendant submitted by his answer that when land is sold in lots subject to building stipulations the vendor is, as between himself and

the purchaser of any one lot, in the position of a purchaser so far as regards other lots, and that if nothing but a covenant to require such covenants from purchasers were inserted in the deed of conveyance, its effect would be to allow the vendor himself to do that which he only stipulates to prevent others from doing, and that any equitable rights arising on the contract would be merged in or extinguished by the terms in the deed, which would be strictly construed.

The piece of land about which the dispute arose was not colored on the plan accompanying the conditions and particulars of sale, nor had it upon it the name of the owner, but it was colourless, like the adjoining property, which had upon it the name of Viscount Sidney. To a person who looked casually at the map, it would appear that the piece of land belonged to that nobleman. On a closer inspection of the plan it would appear to form part of a field divided into three lots, two of which were part of the property put up for sale. The defendant said in his answer "the piece of land so reserved by the plaintiffs was shown on the plan, but without being coloured, and in such a manner as to lead any person examining the plan to the conclusion that the same did not form part of the Manor House estate, but either belonged to Viscount Sidney or formed part of Chislehurst Common, and I myself had no idea from the inspection of the plan that the piece of land belonged to the plaintiffs."

Mr. R. C. Driver, of the firm of Messrs. Driver, surveyors, of Whitehall, deposed that is a frequent occurrence to reserve a few plots on the sale of a building estate, in order that they may be free from any building stipulations or covenants, and that it is not the usual practice of surveyors to mark the name of the vendor on any piece of land reserved from a sale.

It appeared that there had been some intention on the part of the plaintiff to erect a public-house on the plot in question. At any rate, it was looked on as a capital site for a public-house by the plaintiff.

Sir R. Baggallay and *Jason Smith* were for the plaintiff.

H M. Jackson (*Jessel, Q.C.*, with him) for the defendant.

White v. *Bradshaw*, 16 Jur. 738; *Duke of Beaufort* v. *Neeld*, 12 Cl. & Fin. 248; *Lukey v. Higgs*, 3 W. R. 306; and *Webster* v. *Cecil*, 30 Beav. 62, were referred to.

Lord Romilly, M.R.—The question is this—is the defendant bound to complete the contract, leaving the plaintiffs at liberty to erect any building he pleases on the ground, or use it for any purpose whatever? I think that he is not so bound. I am of opinion on the evidence that he bought the property in the firm belief that no public-house or place of trade could be built on any part of the plaintiffs estate. [His Lordship then referred to the correspondence as confirming the statement of the defendant to this effect, and continued:—] This shows clearly that in April, 1868, the defendant laid great stress on the fact that there was to be no public house on the estate; and as on all sides the estate was bounded by Chislehurst Common, Viscount Sidney's estate, and the glebe of the Rector of Chislehurst, it was reasonably certain that no public-house could be placed with any injurious proximity to the residence of the defendant if it was not on the plaintiffs estate. In the next place no intimation was given to the defendant that the covenants would not include everything until August, 1868.

It is said on behalf of the plaintiffs that the premises were inspected, and that the opposite field was made the subject of enquiry and discussion; that it was seen to be one enclosure, and they who looked at it must have perceived that the plot which was excepted from the sale formed part of this field, and that it formed part of the property put up to auction. This does not remove the fact which is sworn to that up to August, 1868, the defendant and his advisers believed that the covenant would overrride the whole property of the plaintiffs at Chislehurst.

Another circumstance has great weight with me. It is the fact that nothing in the shape of colour or of the name of the proprietor appears on this plot to mark that it was part of the vendor's estate. The surveyors, Mr Clark, Mr. Fox, and Mr. Driver, state that it is a common occurrence for a few plots to be reserved on the sale of a building estate, in order that they may be free from the restrictive covenants, and that it is not the usual practice of surveyors to mark the vendor's name on every plot reserved from the sale. I have no doubt of the truth of the evidence before me, nor do I remember to have seen a case, where the vendor proposes to print the names of the adjoining owners, but omits to print his own as an adjoining owner on a plot of land which belongs to him, and does not by the color point out that it belongs to the estate of the vendor, though it be not included in the sale. It is obvious that it would, comparatively speaking, be a slight matter to the defendant if a public house were built at the southern extremity of this property, distant about a third of a mile in a straight line from the Manor House. Yet this distant part of the property is carefully included in and governed by the covenant, while on the high road, which passes in front of the defendant's house at the distance of one hundred yards, a public-house might be established in a neighbourhood where obviously there could not be many, and which seems to be admirably situated for that purpose, at the junction of three roads, and which, therefore, would probably become a place of great and constant resort. If it had been expressly stated in the conditions that the vendor reserved this plot for the purpose of erecting thereon a public-house, I cannot doubt but that it would have had a very injurious effect on the sale of all the lots near to it, and have seriously diminished the prices bid for them. I think that the defendant bought the Manor House in the firm persuasion that no such use was to be made of such plot of ground; and that the acts of the plaintiffs' agent in passing the conditions of sale as if including the whole estate without any reservation, and so framing and colouring the plan as to contribute to that belief, are such that the plaintiffs cannot now compel the defendant to execute the contract if they, the plaintiffs, insist on retaining this plot free from any restrictive covenant whatever.

I think that the defendant cannot prevent the plaintiffs from so retaining and using this plot of

land; but that if they do so they cannot compel the defendant to complete the contract. I think that the plaintiffs are entitled at their option either to a decree for specific performance with a covenant including this reserved plot, or to have their bill dismissed. In either case the plaintiff Baskcomb will have to pay the costs of the suit, as the case has, in a great measure, been the consequence of the peculiar manner in which the map and conditions of sale are drawn up. It is of the greatest importance that it should be understood that there should be perfect truth and the fullest disclosures in all cases where specific performance is required; and if this be not so, even if there have been no intentional suppression of facts, the Court will grant relief to the man who has been thereby deceived, provided he has acted throughout reasonably and fairly.

In re Brookman's Trusts.

Will—Marriage articles—Covenant to devise—Interest vested or contingent.

Marriage articles contained a covenant to devise by will certain property to such child or children as should attain twenty-one, and in default, to the wife, her heirs, and administrators. The property was duly devised by the will according to the covenant, with a direction that if there should be no child who should attain a vested interest, the property should go to the next of kin of the wife. There was one child who attained twenty-one and died in the lifetime of the testator.

Held, that the child took a vested interest on attaining twenty-one.

[V. C. M., 17 W. R. 818.]

Articles were executed on the marriage of Mr. and Mrs. Violett by which Thomas Brookman covenanted that if his daughter, Mrs. Violett, survived him, he would devise to trustees a portion of his property for the use of Mr. Violett for life, or until bankruptcy or insolvency; remainder to the use of Mrs. Violett for life; remainder to the use of their children as Mr. and Mrs. Violett, or the survivor of them, should appoint; and, in default of appointment, to the children equally, with the benefit of survivorship in case any died under twenty-one; and, if there should be only one who should attain twenty-one, to such child, his or her heirs and assigns; and, if there should be no children, or if all should die under twenty-one without leaving issue, to the heirs and administrators of Mrs. Violett.

Thomas Brookman made his will in 1840, and devised the property in accordance with the articles, but the will contained these words,—"In case by reason of the failure of issue of Mrs. Violett there should be no person who under the limitations hereinbefore contained shall attain a vested interest" The testator in that case gave the property to the next of kin of Mrs. Violett at the time of the failure of issue.

One child only attained twenty-one, and died in 1847 intestate. The testator died in 1849. In 1850 Mr. Violett became insolvent. Mrs. Violett died in 1868

The trustees had paid the fund into court under the Trustee Relief Act.

Mrs. Violett's next of kin presented this petition to have the fund paid to them.

Hardy, Q. C., and *Everitt*, for the petitioners, contended that as the child died in the lifetime of the testator its interest was not vested; *Jones* v. *How*, 7 Ha. 267; *Eyre* v. *Monro*, 5 W. R. 870, 3 K. & J. 305; *Kay* v. *Crook*, 5 W. R. 220, 3 Sm. & Giff. 417; *Jones* v. *Martin*, 5 Ves. 265 n.

Glasse, Q. C., and *Jason Smith*, for the assignees of Mr. Violett, who claimed as next of kin of the deceased child, contended that the object of the articles was to provide for the issue of the marriage who took a vested interest. The testator had reserved a power of disposition over the property during his life by deed. There must be a vested interest in the children other than those who survived the testator. Child meant any child of the marriage, not those only who survived the testator. Trusts were declared by the articles in the same way as if a settlement had been executed.

Speed, for the surviving trustee.

Malins, V. C., said he thought the articles bound the testator to leave the property in such a way as that any child or children who attained twenty-one should take a vested interest. This property must therefore be considered to have vested in this child on its attaining twenty-one. The assignees must take out administration to the child's estate, and on so doing are entitled to the fund in court.

Re Phillips (*a Lunatic*).

Lunacy—Practice—Mortgage to lunatic—Re-conveyance—Costs of mortgagor.

Where the committee of a lunatic mortgagee presents a petition that he may be appointed to re-convey the mortgaged estate to the mortgagor, the mortgagor, even though served with the petition, is not entitled to his costs out of the lunatic's estate.

[17 W. R.]

This was a petition in lunacy by Thomas Phillips, the committee of the estate of William Phillips, who was duly found a lunatic by inquisition on the 6th March, 1868

By a report of one of the Masters of Lunacy it was found that the fortune of the lunatic consisted (*inter alia*) of an absolute interest in certain mortgage and other securities.

The mortgages were about to be paid off, and this petition prayed that the petitioner might be appointed to convey the respective mortgaged properties to the respective mortgagors at the expense in each case of the mortgagors

The mortgagors were served with this petition. This petition was heard on the 4th June, when an order was made according to the prayer, and that the costs of all parties should be paid out of the lunatic's estate.

Badnall, for one of the morgagors, now mentioned the matter again to the Court, and stated that, having regard to the authorities, there was some doubt whether the costs of the mortgagors ought to be paid out of the lunatic's estate, even though they had been served with the petition. He referred to *Re Wheeler*, I D. M. & G. 434; *Re Biddle*, 23 L. J. Ch. 23.

Giffard, L J., referred to *Re Rowley*, 11 W. R. 297, 1 D. J. & S. 417, where in a similar case the Lords Justices directed a mortgagor's costs to be paid out of a lunatic's estate, but intimated their opinion that in future mortgagors ought not to be served with such a petition. His Lordship said that he had a strong opinion that the mortgagor's costs ought not to be paid by the

mortgagee, and he desired to have it understood as the settled rule for the future in cases of this kind that a mortgagor, whether served or not, should have no costs out of the lunatic's estate. Under no circumstances ought a mortgagee to bear his mortgagor's costs.

Bulteel v. Plummer.

Marriage settlement—Power of appointment—Will—Defective execution of power.

Under a marriage settlement the survivor of the husband and wife had power to appoint by will to the children of the marriage and the issue of any child who should be dead. One of the children died in the lifetime of the parents, leaving issue. The wife survived the husband, and by her will made appointments in favour of her children and one of her grandchildren, and made one of her children also residuary legatee. It was admitted the power was not an exclusive one.

Held, that so much of the property subject to the power as was comprised in the residuary bequest was unappointed and divisible among the children of the marriage and their representatives.

[V. C. M., 17 W. R. 1058.]

By the marriage settlement of Mr. and Mrs. Plummer, dated in 1809, certain real and personal property was vested in trustees in trust for the husband and wife for life, and upon their decease for the children of the marriage, and the issue of any child then dead as the husband and wife, by deed jointly, or the survivor of them, by will, should appoint; and in default of appointment for individuals of the same class equally. There were five children of the marriage, one of whom attained twenty-one and died a bachelor in the lifetime of Mr. and Mrs. Plummer; another, George Robert Plummer, also died in the lifetime of Mr. and Mrs. Plummer (leaving four children, three of whom survived Mr. and Mrs. Plummer and were living); Henry Plummer; Frances Plummer, a spinster; and Mrs. Westmacott. Mrs Plummer survived her husband many years, and died in 1867, having by her will in pursuance of the aforesaid power appointed out of the trust property a certain freehold house to Frances Plummer, £2,500 stock to Mrs. Westmacott, £500 to Henry Plummer, and £100 to Maria, one of the four children of G. R. Plummer, she then gave and appointed all the residue of her property to Frances Plummer. The bill was filed by the trustees of the settlement of 1809, to obtain the decision of the Court on the validity of the appointments. It was admitted on all sides that the power in the settlement of 1809 was not an exclusive power of appointment.

Glasse, Q. C., and *Waugh,* for the plaintiffs.

Pearson, Q. C., and *Langley,* for Frances Plummer, contended that the appointments other than the residue were good They cited *Coventry* v. *Coventry,* 2 P. W. 222; *Colson* v. *Colson,* 2 P. W. 478; *Wilson* v. *Piggott,* 2 Ves. Jun. 351; *Rowley* v. *Rowley,* Kay, 242; *Ranking* v. *Barnes,* 12 W. R. 565, 10 Jur. N. S. 463; *Trollope* v. *Routledge,* 1 DeG. & Sm. 662; *Warde* v. *Firmin,* 11 Sim. 235.

Cole, Q. C., and *Key,* for Mrs. Westmacott, supported the same view, and contended that where there were two appointments made by separate instruments, one good and one bad, the good one was allowed to stand; so if the two appointments were made by one instrument, as in this case, though, as a general rule, the whole would be void, yet it would be not so here, as the appointments in this case were so distinguishable and separate: *Young* v. *Waterpark,* 13 Sim. 202; *Topham* v. *Portland,* 12 W. R. 186, 1 D. G. J. & Sm. 517.

Cotton, Q. C., and *Bedwell,* for the children of G. R. Plummer other than the legatee of £100, contended that as Mrs. Plummer's will was an appointment to some of the objects of the power in exclusion of others, it was a bad execution of the power, and the trust property should therefore be divided amongst the objects of the power as in default of appointment.

Malins, V. C., said the testatrix's intention was fairly to exercise the power,—there was no undue influence, no fraud. He should endeavour, as far as possible, to carry into effect her intention, by declaring all the appointments good except that of the residue of the trust fund contained in the residuary gift to Frances Plummer: such residue only was unappointed and divisible into fifths among the five children of the marriage, to be paid to them or their representatives.

UNITED STATES REPORTS.

Coulter et al v. Bortner et al.

(From Philadelphia Legal Gazette)

Where a testatrix bequeathed personal property to a trustee "to apply it to the maintenance and support of Ann Coulter, her husband and family, as in his opinion is fit, at such times and in such amounts as he may determine, and the same not to be at any time liable to the debts or contracts of the said Josiah Coulter, in any way or manner whatever," and the trustee took a conveyance of a tract of land to himself, "in trust for the use of Ann Coulter, with Josiah Coulter and family," and placed them on the land, where they resided until her death.

Held, that the trust was a valid one, that there was no conveyance of the land, or delivery of the personalty to the *cesui que trust* by the trustee, and that a conveyance of the land in fee simple by Josiah Coulter and wife was invalid, and passed no title to the vendee.

[*Legal Gazette,* Sept. 10, 1869.]

Case stated.

Opinion by Trunkey, P. J.

The estate of Margaret Campbell consisted of personal property. By her will, Moses Jenkins was appointed executor, and the property given to him as trustee. He took a conveyance, dated March 30th, 1825, of a tract of land in payment of a debt owing to the estate, to himself, as executor of the estate of Margaret Campbell, deceased, in trust for the use of Ann Coulter, with Josiah Coulter and family, and immediately placed them on said land, where she resided until her decease in October, 1867. On May 12th, 1867, Josiah Coulter and wife executed a fee simple deed for thirty acres, part of said tract, to Philip Bortner; a part of the consideration being the note upon which this action is founded. Had they power to convey the land?

The testatrix gave the legal title to the estate to the trustee, who was to perform certain duties for the objects of her bequest. Absolute control over the estate is given him, with power "to apply it to the maintenance and support of Ann Coulter, her husband and family, as in his opinion is fit, at such times and in such amounts as he may determine, and the same not to be at any time liable to the debts or contracts of the said

Josiah Coulter in any way or manner whatever."

A special trust is given to Moses Jenkins, to hold for the use and support of a married woman. This is the motive, and to carry it out the will creates an action and operative trust, not a mere passive or technical one. Since the decision in Burnett's Appeal, 10 Wright, 392, there has been no question as to the validity of such trusts, when for the benefit of others as well as *femes covert.* Although personal estate, it cannot be taken from the trustee—his right and duty are to hold and use it as directed by the will. Where a testator devised an estate to his executors in trust, to invest in stock, or put it at interest and apply the income to William Wilson's use, or pay him the whole or part of the principal at their discretion, it was held that William Wilson, or his committee, he having been found a lunatic, had no right to demand and take the money or trust out of the hands where the testator had placed it, the testator had a right to appoint his own trustee. Wilson's Estate, 2 Barr, 329.

Words in a will, which in relation to land would create an estate tail, give an absolute right to chattels. 11 Harris, 10, 388; 6 Casey, 118, 180. But in this will there is no right of possession given save to the trustee—no power of disposition in the *cestui que trust*—no right of control, unless the trustee in his discretion, determines to give her the property. No one, as of right, could demand any portion of the estate from the trustee beyond such sums from time to time as were necessary for the support of Ann Coulter and family. To this extent, and no farther, was it the trustee's duty to pay. Anything more would be a moral, if not legal violation of the directions in the will. Had he in 1825, or within many years afterwards, given this personal estate to Ann Coulter, it would at once have vested in Josiah Coulter, and have been liable for his debts and contracts, the very thing expressly prohibited.

It was conceded in argument, and correctly, that by reason of prohibition as to Josiah Coulter, no estate vested in him while the trust remained unexecuted. The use was in Ann Coulter, and the trustee could have given her the money in her lifetime if he had thought best, for such is the power. Had he so determined, in good faith, the " family," after her decease, would have no claims upon him. "The word family, when applied to personal property, is synonymous with kindred or relations. This being the ordinary acceptation of the word family, it may nevertheless be confined to particular relations by the context of the will, or the term may be enlarged by it, so that the term may in some cases mean children, or next of kin, and in others may even include relations by marriage."—*Bouvier's Law Dict.* I cannot doubt the word family in this will means children. Perhaps the children of Ann Coulter, as the equitable owners of the estate, whether it be real or personal, are now entitled to its possession, control, and disposition, but this is not material to the question.

The trustee took a conveyance of the land in trust as executor of the estate; he holds it for the purposes and uses stated in the will. He could have been compelled to account for the money invested in this land. The power was not given him, and he had not the legal right to convert personal into real estate. The *cestui que trust* was not bound to acquiesce in such conversion for over forty years, She, with her husband and family, immediately went on the land, and have used it and occupied it as they only could have done had the testatrix owned it at the time of her decease, so that by the will it could have vested in the trustee for her use. Instead of such acquiescence and use, she conld have refused and demanded of, and compelled the trustee to pay her the money necessary for her support. The trustee invested the personal estate to the satisfaction of the *cestui que trust.* so that it was not liable to the debts or contracts of Josiah Coulter, so that she, her husband and family, received the use for their support. Being so long acquiesced in she has the equitable right to the real estate, and without doubt she, if living, or having deceased, her heirs can elect to keep it. She could not dispose of it, however, during coverture, for it is well settled that a married woman cannot convey an estate vested in a trustee for her sole and separate use, unless authorized to do so by the instrument creating the trust. After the death of the husband she may convey.

In reference to the duties of Jenkins, as trustee no reason exists why he should have conveyed the land to Ann Coulter. If it was not his duty to give her the money when not required for her support, certainly it was not to give her the legal title to the land purchased with the money. No presumption even arises that a conveyance was made by a trustee when it was not his duty to convey. Had he conveyed the legal title to her in 1825, a life-estate would have vested in her husband, liable for his debts and contracts.

The trustee holding the legal title for the uses, expressed in the will, permitted the *cestui que trust* to occupy the land. If, at any time becoming disatisfied, she should refuse to occupy, she could not hold it on other terms; nothing but the act of the trustee, as in his opinion he should determine and think fit, could vest the money absolutely in Ann Coulter, or the land as the equivalent for the money. He never gave the one nor conveyed the other.

Whether the land, purchased with the trust funds, stands in the place of, and passes as personal estate, in the hands of the trustee held under the will, or as real estate conveyed to a trustee for the separate use of a married woman, the conclusion is the same, that Josiah Coulter and wife had no power to give a good title for the land attempted to be conveyed to Philip Bortner, and on the case stated, judgment must be entered for defendants.

In an English case it was lately decided in the Court of Exchequer, that a creditor who takes from his debtors agent on account of the debt the cheque of the agent, is bound to present it for payment within a reasonable time, and if he fails to do so and by this delay alters for the worse the position of the debtor, the debtor is discharged, although he was not a party to the cheque.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

(Continued from page 52.)

FOR NOVEMBER AND DECEMBER, 1868, AND JANUARY, FEBRUARY, MARCH, AND APRIL, 1869.

Action.

The plaintiff, in common with other inhabitants of a district, enjoyed a customary right to have water from a certain spout. The defendant, being the owner of the land through which came the stream supplying the spout, on various occasions prevented sufficient water reaching the spout to supply the inhabitants. The plaintiff, however, had never suffered any actual inconvenience. *Held*, nevertheless, that the plaintiff could maintain an action for diverting the water, on the ground that the defendant's acts might furnish evidence in derogation of his rights. *Harrop* v. *Hirst*, Law Rep. 4 Ex. 43

See Bill of Lading; Money had and received.

Administration—*See* Conflict of Laws; Executor and Administrator, 2; Nullity of Marriage; Principal and Surety, 1; Trust, 1; Will, 5.

Adultery—*See* Divorce, 2-4; Injunction, 5.

Advancement—*See* Husband and Wife, 4.

Agent—*See* Principal and Agent.

Agreement—*See* Contract.

Alien—*See* Copyright, 1.

Alimony.

1. Alimony *pendente lite* was allotted on the average annual earnings of a husband, a master mariner, though at the time of his answering the petition for alimony he was temporarily out of employment.—*Thompson* v. *Thompson*, Law Rep. 1 P. & D. 553.

2. Where husband and wife have been living apart for many years, and the wife has supported herself, and is still able to do so, alimony *pendente lite* will not be allowed.—*Burrows* v. *Burrows*, Law Rep. 1 P. & D. 554; *George* v. *George*, *Ib.*

See Divorce, 3.

Ancient Light—*See* Light.

Appeal—*See* Costs; Injunction, 6.

Apportionment—*See* Mortmain; Tenant for Life and Remainder man.

Apprentice—*See* Master and Servant.

Appropriation—*See* Bankruptcy, 4, 6.

Arbitrator—*See* Award.

Arrest.

A person accused of crime, who attends under his recognizances at the hearing of the charge against himself, is privileged from arrest on civil process during his return home, after having been remanded on bail.—*Gilpin* v. *Cohen*, Law Rep. 4 Ex. 131.

Assignment.

A builder assigned to T. £200 of what should be coming to him under a contract with A. The contract provided that if the building was not finished on a certain day, A. might employ another builder to complete it. When the assignment was made, the time for completion had expired. Soon after the builder conveyed his property to a trustee for the benefit of his creditors, and the trustee completed the building with his own money, and was repaid by A. Allowing this repayment as proper, nothing remained due on the contract. T. then filed his bill against A. to enforce payment of the £200. *Held*, that the payment by A. to the trustee was proper, and that the bill should be dismissed.—*Tooth* v. *Hallett*, Law Rep. 4 Ch. 242.

See Conversion; Covenant, 3; Mortgage, 1; Partnership, 2.

Attorney.

1. The plaintiff recovered a verdict for 25*l*. against the defendant. The plaintiff's attorney informed the defendant's attorney that he had a lien for costs to a large amount on the damages recovered by the plaintiff. Subsequently, a rule *nisi* for a new trial was granted on the ground that the verdict was against evidence. The plaintiff and defendant, without the knowledge of their attorneys, settled the action, the defendant paying 10*l*. to the plaintiff, who was very poor, in discharge of all claims for damages and costs. *Held*, that the plaintiff's attorney was not entitled to compel the defendant to pay his costs, as the result of the proceedings was doubtful at the time of the settlement, and there was, therefore, no existing fund on which the lien for costs had attached, and as the settlement was not shown to be fraudulent.—*Ex parte Morrison*, Law Rep. 4 Q. B. 153.

2. Where a solicitor is not the general agent of his client, so as to be able to receive the client's money at all times without his knowledge, but has only received money for him in respect of separate transactions, and his client was aware of these at the time, and knew what was to be received, the solicitor is entitled to have his bill for costs paid, though he has not kept accounts of all the money received.—*In re Lee*, Law Rep. 4 Ch. 43.

3. The plaintiff in a suit became bankrupt, and the suit was revived by his assignee, who employed a different solicitor. A decree was afterwards made. *Held*, that the solicitor of the original plaintiff must produce the documents in his possession which were necessary for drawing up the decree, notwithstanding his lien on them for costs, though the documents were not strictly in evidence in the case.—*Simmonds* v. *Great Eastern Railway Co.*, Law Rep. 3 Ch. 797.

4. An attorney who has been discharged by his client can set up a lien for costs as a reason for not producing or delivering up the papers on which he claims the lien, though his client be thereby embarrassed, and this lien extends to all costs due him from the client. *Secus*, if the attorney discharges himself. *In re Faithful*, Law Rep. 6 Eq. 325.

See Contempt, 1; Husband and Wife, 2; Lunatic, 1.

Average—*See* Insurance, 2.

Award.

1. Evidence of an arbitrator is admissible in explanation of his award, and if it appears that he has mistaken either the subject matter referred to him, or the legal principle affecting the basis on which the award is made, the award will be set aside or referred back to him.—*In re Dare Valley Railway Co.*, Law Rep. 6 Eq. 429.

2. *Semble* (*per* Kelly, C.B., Martin and Channell, BB), that it may be shown by the evidence of an arbitrator that the award includes an amount for something over which he had no jurisdiction —*Duke of Buccleuch* v. *Metropolitan Board of Works*, Law Rep. 3 Ex. 306.

3. The plaintiff agreed to row a race with K., each to deposit a stake with the defendant, and "the decision of the referee to be final." There was a default in the start, and the referee ordered K. to inform the plaintiff that, if he did not start, K. was to row over the course without him. K. rowed over the course without communicating this order to the plaintiff or giving him any opportunity to start, and the referee, without any injury, ordered the stakes paid to K. *Held*, that the referee's order was conditional on its being communicated to the plaintiff; that, never having been communicated, there never was such a start or race as was contemplated; that, therefore, the referee's jurisdiction to award the stakes had not attached; that his decision was not final; and that the plaintiff was entitled to recover his deposit from the defendant.—*Sadler* v. *Smith*, Law Rep. 4 Q. B. 214.

Bailment—*See* Collision, 4.

Bank—*See* Interest, 2.

Benefit Society—*See* Friendly Society.

Bill of Lading.

The assignees for value of a bill of lading can sue ship-owners in the admiralty for neglect in properly carrying the goods, on the grounds, (1) under 24 Vic. c. 10, s. 6, and 18 & 19 Vict. c. 111, s. 1, of breach of contract; (2) under the former section, of negligence.—*The Figlia Maggiore*, Law Rep. 2 Adm. & Ecc. 106.

See Freight, 2, 4; Sale, 1.

Bills and Notes.

1. *Semble*, that the following document: "July 15, 1865. On 1st of August next, please pay to A. or order £600, on account of moneys advanced by me to the S. company. To Mr. W., official liquidator of the company," is a negotiable bill of exchange.—*Griffin* v. *Weatherby*, Law Rep. 3 Q. B. 753.

2. The following promissory note was signed by the secretary of a corporation: "On demand, I promise to pay A. fifteen hundred pounds. For Mistley Railway Company. John Sizer, secretary." *Held* (*per* Kelly, C. B. and Pigott, B.; Cleasby, B., *dubitante*), that John Sizer was not personally liable.—*Alexander* v. *Sizer*, Law Rep. 4 Ex. 102.

3. The directors of a company gave to J. H., for value, an instrument under the company's seal, headed "debenture," by which the company "undertake to pay to the order of J. H., on 1st July, 1867," £1,000, with interest half-yearly, on presentation of the annexed coupons. *Held*, that an indorsee for value of this instrument was entitled to prove on it against the company free from equities between H. and the company. *Semble*, that the instrument was a promissory note.—*In re General Estates Co.*, Law Rep. 3 Ch. 758.

4. One who takes up an accepted bill *supra* protest for the honor of the drawer can sue the acceptor, and the acceptor cannot plead in defence a right of set-off against the drawer.—*In re Overend, Gurney & Co. ex parte Swan*, Law Rep. 6 Eq. 344.

5. A bank, the holder of a bill of exchange at maturity, commenced actions against B., the acceptor, and C., an indorser. On March 21, C. paid the amount due, and proceedings were ordered to be stayed in the action against him on payment of costs; these were paid on April 13, and the bank then gave the bill to C., who delivered it to the plaintiffs in payment of a debt due from him. Judgment was

signed in the action against B. on March 3, and a *ca. sa.* lodged with the sheriff on March 6. On March 29, B. was arrested, and discharged the same day by order of the bank, on payment of costs. The plaintiffs having sued B. on the bill, *held*, that C. had a vested right of action against B. on C.'s payment of the bill on March 21, for the fact that C. had not paid the costs on March 21 only gave the bank a lien on the bill, but did not affect C.'s right to a remedy on the bill; that neither the taking on execution nor discharge of B. could take away C.'s right, and that therefore the plaintiffs could recover.—*Woodward* v. *Pell*, Law Rep. 4 Q. B 55.

See Gift; Guaranty; Interest, 1, 2; Ultra Vires, 1.

Bond.

1. A. made his will. Shortly after, B. gave A. a bond for £8,000, conditioned to be void if B. should pay £4,000, with interest, within three months after his taking an absolute interest in the residue given by A.'s will, the interest being contingent on A.'s son dying without issue, B. surviving. *Held*, that interest was due on the bond only from the time when B. acquired a vested interest in the residue.—*Mathews* v. *Keble*, Law Rep. 3 Ch 691.

2. 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. *Held*, that the whole debt and interest, though they exceeded the penalty of the bond, must be deducted from the share.—*Ib.*

See Bills and Notes, 3; Bottomry Bond.

Bottomry Bond.

1. A ship, with a cargo of mahogany for England, having suffered sea-damage, put into Key West, and there underwent necessary repairs. The master, not being able to raise money on personal security for the repairs, gave a bottomry bond on ship, freight, and cargo. He did not, before hypothecating, communicate with the owner or the consignees of the cargo, by reason of the great delay and uncertainty in the transmission of letters. *Held*, that the bond was binding on ship, freight, and cargo.—*The Lizzie*, Law Rep. 2 Adm. & Ecc. 254.

2. When the master fails to obtain funds from the owners of the ship or cargo, he is authorized to raise money to pay for necessary repairs and supplies, after such repairs and supplies have been furnished, by giving a bottomry bond on ship, freight, and cargo to persons other than those who have furnished the repairs and supplies, especially when by the *lex loci* these latter persons have a maritime lien on the ship to enforce their demands. *The Karnak*, Law Rep. 2 Adm. & Ecc. 289.

3. A master, being also part-owner of a vessel, had, by a bottomry bond, bound himself, ship, freight, and cargo. He brought a suit against the vessel for his wages and disbursements. *Held*, that the owners of part of the cargo could not oppose his being paid his wages and disbursements in priority to the bondholder.—*The Daring*, Law Rep. 2 Adm. & Ecc. 260.

Broker.

A., an officer of a company formed to carry on the business of stockbroking, bought some stock for a customer in the course of business, and signed the bought and sold notes, the principals not seeing one another, and no one else acting as broker in the transaction. A. had no license to act as broker. *Held*, that he was liable to a penalty for acting as broker. *Scott* v. *Cousins*, Law Rep. 4 C. P. 177.

See Custom; Sale, 2–6.

Burden of Proof—*See* Insurance, 3.

Carrier—*See* Railway, 2.

Charity.

1. Bequest in trust for "such charities and other public purposes as lawfully might be in the parish of T.," is a good charitable gift.—*Dolan* v. *Macdermot*, Law Rep. 3 Ch. 676.

2. Legacies to the Royal, to the Royal Geographical, and to the Royal Humane Societies, are charitable.—*Beaumont* v. *Oliveira*, Law Rep. 6 Eq. 534.

3. Testator bequeathed as follows: "I give to the trustees of Mount Zion Chapel, where I attend, £3,500, and appoint as trustees to the same A. and G.; and I direct that their receipt shall be a discharge to my executors; and the money to be appropriated according to statement appended." There was no statement appended. *Held*, that the gift was not intended for A. and G. beneficially; that the court could not presume a charitable object in the bequest; and, if not charitable, that the object was so indefinite that the gift must fail. *Aston* v. *Wood*, Law Rep. 6 Eq. 419.

4. Under wills dated between 1716 and 1803, various funds were given for the ministers, and otherwise for the benefit of Protestant Dissenters called "Presbyterians," at D. There had existed a Presbyterian chapel at D. since 1662, some Baptists had associated with them, and the Baptist element had so increased, that, in 1863, only a few of the members were Presbyterian, and since 1803 the ministers of the

chapel had been Baptist. An information was filed in 1863, raising the question who were entitled to these funds, which were proved to have been enjoyed by the minister and congregation for the last seventy years; and in 1865 a congregation was formed by persons claiming to be strict Presbyterians, who now claimed the funds as such. *Held*, (1) that the use of the term "Presbyterian" did not amount to a requisition that the particular religious doctrines or mode of church government now claimed to be Presbyterian should be taught or observed; and that, under the 7 & 8 Vict. c. 45, the usage for the last twenty-five years must be held conclusive, and that the congregation who had enjoyed the funds must be declared entitled; (2) that, on the evidence, there had been no strictly Presbyterian congregation at D. for the last century, and that the funds would, if necessary, be applied *cyprès* in favor of the congregation in possession.—*Attorney-General* v. *Bunce*, Law Rep. 6 Eq. 563.

See Mortmain; Will, 5.

Charter Party—*See* Freight, 3; Ship, 1-3.

Cheque—*See* Gift.

Codicil—*See* Revocation of Will.

Collision.

1. The owners of a foreign vessel claimed damages for a collision between their vessel and an English ship, in Belgian waters. The defendants, owners of the English ship, pleaded that the vessel was in charge of a pilot, whom they were compelled by the Belgian laws to take. The plaintiffs pleaded in reply that, by the same laws, the owner of the vessel in fault, though compelled to take a pilot, continued liable for damages. *Held*, that the reply should be stricken out; that an English court would not enforce a foreign municipal law, and give a remedy in damages in respect to an act which by the English law imposed no liability on the person from whom the damages were claimed.—*The Halley*, Law Rep. 2 P. C. 193.

2. The Merchant Shipping Act exempts a vessel from compulsory pilotage in her own port. The defendants' vessel took a pilot outside of her own port at a point where pilotage was compulsory, and the pilot brought her into the port. Through the pilot's negligence, she came into collision with the plaintiff's vessel. It was in dispute whether the collision was inside or outside of the port. *Held*, (*per* Martin, Bramwell and Channell, BB.; Kelly, C.B., *dissentiente*), that even assuming that the collision was within the port, yet that the pilot having been compulsorily put in charge of the ship, and his duty as pilot not having ended, he was not the servant of the defendants, and they were not responsible for his negligence.—*General Steam Navigation Co.* v. *British & Colonial Steam Navigation Co.*, Law Rep. 3 Ex. 330.

3. The owners of a vessel having, by compulsion of law, a pilot on board, are yet liable for the damage caused by a collision, if the master's neglect of duty was conducive thereto.—*The Minna*, Law Rep 2 Adm. & Ecc. 97.

4. The bailees of a barge which has been injured by a collision, can sue *in rem* in the Admiralty; but the court will direct that the money awarded as compensation for damages shall not be paid till it has been satisfactorily established that the payment will release the owners of the vessel sued from all claims by the owners of the barge in respect of the collision.—*Ib.*

5. In a collision cause, the defendant cannot rely on a simple negative, but must state the circumstances relating to the collision.—*The Why Not*, Law Rep. 2 Adm. & Ecc. 265.

See Admiralty, 2; Insurance, 1.

Common, Tenancy in—*See* Tenancy in Common.

Common Carrier—*See* Railway, 2.

Company.

1. T., being a registered holder of five shares in a joint stock company, left the share certificates with her broker. A transfer of the shares to S. purporting to be executed by T., together with the certificates, was left with the secretary for registration. The secretary, in the usual course, wrote to T. that the transfer had been so left, and receiving no answer after ten days, registered the transfer, and removed the name of T., and placed the name of S. on the register, giving S. a certificate that he was the registered holder of the five specific shares. A. bargained for five shares, through brokers in the usual way, and paid the value of the five shares, and the specific five shares were transferred to him by S., and A.'s name was put on the register and the five shares delivered to him. Afterwards the transfer to S. was discovered to be a forgery, and T.'s name was ordered by rule of court to be restored to the register. On a case stated; *Held*, that the giving of the certificate to S. amounted to a statement by the company intended to be acted on by purchasers of shares in the market that S. was entitled to the shares; and that A. having acted on that statement, the company were estopped to deny its truth; and that A. was, therefore, entitled to recover from

the company the value of the shares, at the time the company refused to recognize him as a shareholder, with interest from that time.—*In re Bahia & San Francisco Railway Co.*, Law Rep. 3 Q. B. 584.

2. The articles of association of a company provided that the business should be fixed, determined, and regulated by such rules, regulations, and by-laws as the directors might from time to time make, which should be entered in a book kept for that purpose, and signed by three directors. A by-law so made prohibited certain acts. A resolution authorizing some of such acts was afterwards passed by the directors and entered in their minute book, but not entered in the book of by-laws nor signed by the directors. Per Giffard, L J., that a third person would not be affected by the by-law unless it was proved that he knew it; and, *semble*, that had he known it, the resolution of the directors would have done away with its effect.—*Royal Bank of India's Case*, Law Rep. 4 Ch. 252.

3. A shareholder in a company, in behalf of himself and the other shareholders, may maintain a bill to set aside an agreement by the company as *ultra vires*, without joining as defendants any of the shareholders who have assented to the agreement.—*Clinch* v. *Financial Corporation*, Law Rep. 4 Ch. 117.

See Bills and Notes, 2, 3; Estoppel; Mortgage, 1; Railway; Sale, 2–6; Statute; Ultra Vires.

Concealment—*See* Husband and Wife, 2.

Condition.

A lease contained a proviso for re-entry in case the lessee or any occupier of the premises should be convicted of an offence against the game laws. The occupier of the premises having been convicted of killing game without a game certificate, the assignee of the reversion brought ejectment. *Held*, that he could not maintain the action (*per* Martin, Channell and Cleasby, BB.), because the condition did not run with the land, and therefore the assignee could not avail himself of its breach; (*per* Kelly, C.B.), because killing game without a certificate was an offence, not against the game, but against the revenue laws.—*Stevens* v. *Copp*, Law Rep. 4 Ex. 20.

See Legacy, 1; Vendor and Purchaser of Real Estate, 2.

Confidential Relation—*See* Undue Influence.

Conflict of Laws.

Where an Englishman contracts a debt in a foreign country the provisions of the *lex loci contractus* do not avail to entitle the creditor to payment of his debt out of equitable assets administered in this country, in priority to other creditors.—*Pardo* v. *Bingham*, Law Rep. 6 Eq. 485.

See Collision, 1.

Conspiracy—*See* Indictment, 2.

Contempt.

1. While a suit was pending to restrain the infringement of a patent, in which one of the issues raised was as to the novelty of the plaintiff's invention, a discussion having arisen in a newspaper as to the merits of the invention, the defendant's solicitor wrote, under an assumed name, a letter, which was published in the newspaper, taking part in the discussion, and alleging facts tending to disprove the novelty of the invention. The plaintiff, thereupon, sent to the editor of the newspaper a letter, which the editor refused to insert on account of its personal imputations, in which he referred to the suit, and suggested that the writer of the letter was an interested party. The editor, not knowing that the writer was the solicitor in the suit, but knowing that he was a solicitor, subsequently published a further letter from him disputing the novelty of the invention. *Held*, that the solicitor had been guilty of contempt in publishing letters tending to influence the result of the suit. A motion to commit the publisher of the newspaper for contempt was refused, but without costs.—*Daw* v. *Eley*, Law Rep. 7 Eq. 49.

2. For a newspaper to publish affidavits filed in behalf of the plaintiff in a bill of equity (but not yet before the court), with comments tending to prejudice the plaintiff's case, is a contempt.—*Tichborne* v. *Mostyn*, Law Rep. 7 Eq. 55, note.

3. When there is no collusion, a husband will not be committed for his wife's breach of injunction.—*Hope* v. *Carnegie*, Law Rep. 7 Eq. 254.

See Costs.

Contract.

A. applied for workmen to the Free Labor Society, and filled up and signed a form containing the particulars and terms of employment, and his address at S. This form was read over to B. by the secretary of the society, and B. then signed an agreement headed "Free Labor Society," by which he stated that he had accepted employment at S., and agreed that one-half day's wages, "being his fee to the society for obtaining him the employment," should be deducted from his wages, and that he would not quit "the service of his employer" without just cause. *Held*, that the documents

sufficiently referred to one another to constitute a contract in writing signed by other parties within the meaning of 30 & 31 Vict. c. 141, s. 9, giving summary jurisdiction to justices in cases between master and servant. *Crane* v. *Powell*, Law Rep. 4 C. P. 123.

See Bill of Lading; Covenant; Custom; Damages, 2, 3; Infant; Master and Servant; Money had and received; Sale; Specific Performance; Statute.

Conversion.

A testator devised real estate to trustees on trust to pay the profits to his wife till her death or marriage, and on her death or marriage on trust for his children who should be then living, and their respective heirs as tenants in common, with a power to the trustees, in their discretion, to sell the real estate, and in event of such sale to divide the proceeds among his children, who should then be living, in equal shares. During the widow's lifetime, one of the children assigned all his personal estate in possession, remainder or expectancy, to A. On the widow's death, the trustees, in exercise of the power, sold the real estate. *Held*, that the child's share of the proceeds did not pass to A.—*In re Ibbitson's Estate*, Law Rep. 7 Eq. 226.

Copyright.

1. A., a citizen of the United States, published a work in the monthly parts, between January and December, 1867, of a magazine published in the United States. In October, 1867, A. went to Canada, and while there, when the work wanted six chapters for completion in the magazine, an edition of the whole was published in London, under an agreement between A. and the plaintiff, an English publisher. A reprint taken from the pages of the magazine having been subsequently published by the defendant *Held*, that the copyright was divisible, and could be claimed for a portion of the book only, and the publication by the defendant of the last six chapters was enjoined.—*Low* v. *Ward*, Law Rep. 6 Eq. 415.

2. In a trades' directory, the names of those who paid for the privilege were printed in capitals, with additional descriptions of their business called "extra lines." *Held*, that such payment did not make the information common property, so as to entitle the compiler of another directory to reprint it from slips cut from the first, even where the persons whose names were so printed had been applied to, to verify the information, and had paid for the insertion of their names in the second directory with the distinctive features of capitals and extra lines.—*Morris* v. *Ashbee*, Law Rep. 7 Eq. 34.

See Partnership, 2.

Corporation—*See* Company.

Costs.

A motion to commit A. for breach of an injunction was refused, but without costs, and A. appealed. *Held*, that an appeal as to costs in such a case would not be entertained.—*Hope* v. *Carnegie*, Law Rep. 4 Ch. 264.

See Attorney; Landlord and Tenant, 8; Lunatic, 2; Mesne Profits, 2; Vendor and Purchaser of Real Estate, 3.

Covenant.

1. The purchaser of lands below sea-level is bound to inquire how all walls necessary for the protection of his property against the sea are maintained.

Lands below sea-level, previously held in undivided shares, were, in 1794, partitioned by a deed containing a covenant that the expense of maintaining the walls belonging to the lands thereby divided should be borne by the owners thereof, and should be payable out of the lands by an acre-scot. *Held*, that a purchaser of part of the lands was bound by the covenant, though he had no actual notice thereof, and that there was jurisdiction in equity to deal with the case.—*Morland* v. *Cook*, Law Rep. 6 Eq. 252.

2. A. sold part of an estate to B., who entered into restrictive covenants for himself, his heirs and assigns, with A., his heirs, executors, and administrators, as to buildings on the purchased property; but A. did not enter into any covenants as to the land retained. After this A. sold to other persons various lots of the part retained, but nothing appeared as to the contents of their conveyances, nor was there any evidence that they were informed of B.'s covenants. After this A. bought back from B. what he had sold to him. *Held*, that the benefit of B.'s covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A., and that A. could make a title to the repurchased land discharged from the covenants.—*Keates* v. *Lyon*, Law Rep. 4 Ch. 218.

3. A. demised lands to B. for a long term of years, and B. covenanted that neither he nor his assigns would permit any building to be erected on a certain lot. Afterwards a rail-

road company took the lot, and B. was compelled to assign to them by virtue of a statute passed subsequently to the demise. The company built a station on the lot. *Held*, that B. was discharged from his covenant, and that it made no difference whether the company was compellable or only empowered to build the station on the lot.—*Baily* v. *De Crespigny*, Law Rep. 4 Q. B. 180.

See Condition; Husband and Wife, 3; Landlord and Tenant, 5, 6.

Criminal Law.

27 & 28 Vict. c. 47, s. 2, enacts that when any person shall be convicted of any crime punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be for seven years. A. was convicted of a crime punishable with penal servitude. The indictment did not charge a previous conviction of felony; but, after a verdict of guilty, it was proved on oath that A. had been previously convicted of felony, but no record of such conviction was produced. A. was sentenced to penal servitude for five years. *Held*, that the sentence was correct.—*The Queen* v. *Summers*, Law Rep. 1 C. C. 182.

See Admiralty, 1; Arrest; Embezzlement; Indictment; Injunction, 4; Judgment; Jury; Larceny; Rape; Voter, 2.

Cross Remainders.

A. devised a moiety of certain land to and between B., C., and D., in equal shares, and the heirs of their bodies respectively, and in default of such issue of "any of them," to M., her heirs and assigns. *Held*, that "any" must be construed "all," and that cross-remainders were created by implication between B., C., and D.—*Powell* v. *Howells*, Law Rep. 3 Q. B. 654.

Custom.

The usage of the Stock Exchange is, that, in transactions between members, there is an implied understanding that, on the purchase of shares, the buying jobber may, by a given day, called "name day," substitute another person as buyer, and so relieve himself from liability, provided such person is one whom the original seller cannot reasonably except, and that such person accept a transfer of the shares, and pay to the original seller the price. *Held*, a reasonable custom.—*Grissell* v. *Bristowe*, Law Rep. 4 C. P. 36.

See Sale, 2–6.

Cyprès—*See* Charity, 4.

Damages.

1. One who for his own purposes brings, collects, and keeps on his land any thing likely to do mischief if it escapes, *e.g.* water, must keep it in at his peril, and is answerable for all damage which is the natural result of its escape, without proof of negligence on his part.—*Rylands* v. *Fletcher*, Law Rep. 3 H. L. 330.

2. A company contracted with A. to repair a ship within twenty weeks from the 1st of April, 1865. The repairs were not finished, and the ship delivered to A. until May, 1866. The company being ordered wound up, A. claimed to prove (1) for damages for non-delivery at the stipulated time; (2) for depreciation in value by reason of the non-delivery; (3) for damages by reason of the repairs not having been properly completed. *Held*, that A. was entitled to prove (1) for the amount of the net profits he might have made by chartering the vessel, if she had been delivered properly repaired twenty weeks after the 1st of April, 1865, instead of in May, 1866; and (2) for the amount which it would have cost A. to have completed the repairs at the time she was delivered.—*In re Trent & Humber Co*, Law Rep. 6 Eq. 396.

3. If a ship is sent to a ship-builder for repair, and is detained by him beyond the time within which he stipulated that the repairs should be finished, the measure of damages is, *prima facie*, the sum which would have been earned in the ordinary course of employment of the ship during the period she was retained beyond the agreed time.—*In re Trent & Humber Co.*, Law Rep. 4 Ch. 112.

See Action; Landlord and Tenant, 6, 8; Mesne Profits, 2; Railway, 1; Slander.

Death—*See* Divorce, 1.

Demand.

To secure a floating balance, A. conveyed to B. machinery by bill of sale, containing a proviso for redemption if A. should instantly, on demand and without delay on any pretence whatever, pay the sum due; it provided that the demand might be made either personally or by giving or leaving verbal or written notice to or for him at his place of business, or any other place in which any of the property conveyed might be, or at his residence "so nevertheless that a demand be in fact made." In A.'s absence from his place of business, B. made a demand there on A.'s son, and on the son's stating his inability to pay, had immediately seized the property. *Held*, that the

notice contemplated was such as might be reasonably supposed to reach A., and to give him an opportunity of complying with it within a reasonable time, and that, therefore, the seizure was not justified.—*Massey* v. *Sladen*, Law Rep. 4 Ex. 13.

See Interest, 2.

Devise.

1. Testator by will, made in 1865, gavn to trustees certain land held by him on lease, and part of which he described as leasehold, on certain trusts. He also made a residuary devise and bequest of realty and personalty. After the date of the will, the fee of the said land was conveyed to him. *Held*, that this fee passed to the trustees.—*Cox* v. *Bennett*, Law Rep. 6 Eq. 422.

2. A testator directed his debts to be paid. He then gave pecuniary legacies, and gave all the residue and remainder of his real and personal estate to T. for her own use. *Held*, that though the testator's own real estate was charged with debts and legacies, the legal estate in property, of which he was mortgagee, passed under the residuary devise.—*In re Stevens's Will*, Law Rep. 6 Eq. 597.

3. By will made before the passing of the Wills Act, A. devised certain property to his grandson S., "and if he shall die without issue, that property shall return to the E. family; but if he lives to have children, he shall have power to make a will of it to his children." *Held*, that S. took an estate for life only, and not an estate tail by implication. *Eastwood* v. *Avison*, Law Rep. 4 Ex. 141.

4. A testator devised three freehold houses to trustees, in trust, as to the first two, to receive the rents and pay the same to his wife during her widowhood, and on her death or marriage, as to the first, to convey the same to his "daughter A., her heirs and assigns for ever;" as to the second, in similar terms to his daughter B.; and as to the third, "on trust to apply the rents for the advancement and benefit of my grand-daughter C. till she attains twenty-one; but in case C. should die under that age, then I devise the said house to my daughters A. and B., their heirs and assigns as tenants in common." He then gave all the residue of his estate real and personal to other of his children. *Held*, that the trustees had the legal fee of the three houses; and that C. took the equitable fee in the third house, subject to defeasance, if she died under twenty-one.—*Cropton* v. *Davies*, Law Rep. 4 C. P. 159.

See Conversion; Cross Remainders; Illegitimate Children; Legacy; Perpetuity; Power, 3; Vested Interest; Will, 5-7.

Discovery—*See* Production of Documents.

Divorce.

1. A decree absolute for a divorce was made, notwithstanding a suggestion supported by affidavits that the respondent and co-respondent were dead; the evidence not being sufficient for the court to determine whether they were dead or not.—*Dering* v. *Dering*, Law. Rep. 1 P. & D. 531.

2. The "wilful neglect and misconduct" conducing to adultery, intended by 20 & 21 Vict. c. 85, s. 31, is not mere carelessness. To find a husband guilty of such misconduct, it must be shown that there was such an intimacy between the wife and the co-respondeut as to be distinctly dangerous, and that he actually knew so much of the intimacy as to perceive the danger, and that he either purposely or recklessly disregarded it, and forbore to interfere.—*Ib.*

3. The fact that a husband makes his wife an allowance in lieu of alimony while a divorce suit is pending, is not, of itself, evidence of collusion. But evidence that a husband had several interviews with his wife both before and after he presented a petition for dissolution, and gave her money, and urged her not to oppose the petition, and promised that he would do no harm to the co-respondent, and would be a friend to her when the petition was obtained, was *held* to prove collusion, the respondent and co-respondent not having been present at the hearing, and material facts showing that the petitioner had, by his conduct, conduced to the respondent's adultery having been withheld from the court.—*Barnes* v. *Barnes*, Law Rep. 1 P. & D. 505.

4. In a suit by a husband for dissolution of marriage on the ground of the wife's adultery, adultery was charged against the petitioner, and proved, and the petition was dismissed. Afterwards the husband brought another petition, charging his wife with adultery with another man. *Held*, that in this suit the decree in the former suit was evidence of the petitioner's adultery.—*Conradi* v. *Conradi*, Law Rep. 1 P. & D. 514.

See Alimony; Injunction, 5; Nullity of Marriage.

REVIEWS.

On Parliamentary Government in England; its Origin, Development and Practical Operation. By Alpheus Todd, Librarian to the House of Commons of Canada, in two volumes. Vol II., London: Longman, Green & Co., 1869.

This is emphatically one of the books of the day, whether we look at it with reference to the subject treated of, the clearness, comprehensiveness of its arrangement, or the great learning evinced in its preparation.

We may well feel proud that in Canada has been found a writer who has supplied to England a work which, if we can believe cotemporary critics, and if our own humble judgment does not lead us astray, is destined to be, as has been said of it by an English critic, "an authority on the important subject of which it treats, and which ought to have a place along with Sir Erskine May's Parliamentary Practice and Constitutional History, on the shelves of every member of the Legislature." The author is not "without honor in his own country," for who that pretends to know anything of the inside of the Houses of Parliament in Canada but knows, as many have experienced, the ready courtesy and research that has solved and explained so many troublesome doubts on points of Parliamentary Practice or Constitutional Law. But this work will give Mr. Todd a reputation as a writer such as few possess, for wherever the Anglo-Saxon law extends, or wherever exist the principles of Parliamentary Government such as we have it and such as it is in England, this book will be the great authority. Mr. Todd's familiarity with the subject, was known years before he gave the public the benefit of his learning—but it is one thing to be thoroughly conversant with a subject, and another to sit down steadily and methodically to commit that knowledge to paper, in such a way as to bring the whole of an intricate and little understood subject clearly and intelligently before the reader, and that with apt authority and example for each proposition. In this Mr. Todd has succeeded in a way that has called forth the admiration of exacting reviewers in England, and of those who are most competent to form an opinion as to its intrinsic merits. In fact to repeat the first sentence of the review of this elaborate work in *The Law Magazine* (August, 1869), "There could be no better exposition of the theory and practice of Parliamentary Government in England than that contained in the treatise of Mr. Todd, now completed by the volume before us." Or as another reviewer says, "Every Englishman who can read should read this book."

The second volume commences with an enquiry into and description of the councils of the Crown under prerogative governments, and it is curious to remark, though the observation is not novel, the wonderful similarity, taking times and circumstances into consideration between the relative powers of, and interdependence between the sovereign and his Witan or Council in the Saxon period, and the Kings, Lords and Commons of the present day.

The author gives an interesting account of the increasing and encroaching influence of the Sovereigns from the time of the Norman Kings down to the reign of the second Stuart, when the overwhelming power of the kingly office received its death blow; upon which followed the development of constitutional government and the increasing influence of the Council, known afterwards as the Cabinet Council, which since the time of the Saxons and up to the time of Wm. III., had been more or less "a pliant instrument in the hands of the reigning monarch, but was made responsible to Parliament by the Revolution of 1688."

In the second chapter the present position, history, powers and responsibilities of the Privy Council under parliamentary government are discussed, and here the attention of the reader is drawn to the main distinction between the Privy Council and the Cabinet Council:—

"Ever since the separate existence of the Cabinet Council as a governmental body, meetings of the Privy Council have ceased to be holden, for purposes of deliberation. At the commencement of the reign of George III., we find this distinction between the two councils clearly recognised—that the one is assembled for deliberative, and the other merely for formal and ceremonial purposes. It is, in fact, an established principle, that 'it would be contrary to constitutional practice that the sovereign should preside at any council where deliberation or discussion takes place.'

At meetings of the Privy Council, the sovereign occupies the chair. The President of the Council sits at the Queen's left hand; it being noticeable that this functionary 'does not possess the authority usually exercised by

the president of a court of justice." (Vol. I., p. 58.)

The administrative functions of the Privy Council, as a Department of State, are also fully explained in another part of the work.

The author in the 3rd chapter, returning from the general survey of the King's Councils under prerogative government, proceeds to discuss the rise, progress, and present condition of the Cabinet Council, the supreme governing body in the political system of Great Britain. The ground occupied in this chapter is entirely new, and the reader will look in vain in any other work for the information which is to be found in this chapter,—and it has been no idle head or hand that has so exhausted the subject and arranged his material in such a lucid shape.

In speaking of the office of Prime Minister he says :—

"The development of the office of Prime Minister in the hands of men who combine the highest qualities of statesmanship with great administrative and parliamentary experience—such as Sir Robert Walpole, the two Pitts, and Sir Robert Peel—has contributed materially to the growth and perfection of parliamentary government. Before the Revolution, the king himself was the mainspring of the State, and the one who shaped and directed the national policy. If he invoked the assistance of wiser men in this undertaking, it was that they might help him to mature his own plans, not that they might rule under the shadow of his name. With the overthrow of prerogative government all this was changed. When the king was obliged to frame his policy so as to conciliate the approbation of Parliament, it became necessary that his chief advisers should be statesmen in whom Parliament could confide. And no ministers will accept responsibility unless they are free to offer such advice as they think best, and to retire from office, if they are required to do anything which they cannot endorse. In every ministry, moreover, the opinions of the strongest man must ultimately prevail. Thus, by an easy gradation, the personal authority of the sovereign under prerogative government receded into the background, and was replaced by the supremacy of the Prime Minister under parliamentary government. In the transition period which immediately succeeded the Revolution, William III., by virtue of his capacity for rule, as well as of his kingly office, was the actual head and chief controller of his own ministries. But the monarchs who succeeded him upon the throne of England were vastly his inferiors in the art of government. George I. was unable to converse in the English language, and, therefore, disabled from a systematic interference in administrative details. His son, though less incapable, was conscious of his imperfect knowledge of domestic affairs, and, like his father, directed his attention almost exclusively to foreign politics. This tended to reduce the personal authority of the sovereign to a very low ebb, and in the same proportion to increase the influence and authority of the cabinet. But with the accession of George III. a reaction, begun in the preceding reign, set in for a time. Anxious to prove himself a faithful and efficient ruler, and being well qualified for the discharge of the functions of royalty, George III. lost no opportunity of aggrandising his office. Whereupon the power of the crown, which had been weakened and obscured by the ignorance and indifference of his immediate predecessors, became once more predominant. Not satisfied, however, with the exercise of his undoubted authority, the king repeatedly overstepped the lawful bounds of prerogative and the acknowledged limits of his exalted station. It was reserved for William Pitt, whose preeminent abilities as First Minister of the Crown empowered him to control successfully the proceedings of the legislature, while retaining the confidence of his sovereign, to vindicate for the Prime Minister the right to initiate a policy for the conduct of all affairs of State, and to urge the adoption thereof equally upon the Crown and upon Parliament, with the weight and influence appertaining to his responsible office, thereby securing the full and entire acceptance by each of the primary maxims of parliamentary government." (Vol. II., p. 136.)

The above, which prefaces the remarks of the author as to the development and present position of the Premier, gives incidentally a short sketch of the growth of Responsible Government, which is also spoken of in the first volume, with reference to the responsibility of Ministers for acts of the Crown, and in other places throughout the work, and in fact "Responsible" or "Parliamentary" Government are now in a measure synonymous terms, and the history of the former is necessarily included in an enquiry into the latter.

Chapter IV. is devoted to the Ministers of the Crown, concluding with the responsibility of such ministers to Parliament.

Chapter V. speaks of the Departments of State, their constitution and functions. With the next chapter Mr. Todd brings his labours to an end. This chapter is especially interesting to professional readers, and treats of the relation of the judges of the land to the Crown and to Parliament. And here again the author is the first in the field to supply information as to the proper course of procedure in Parliament against delinquent judges.

Some time ago, when speaking of the retirement of Chief Justice Lefroy, and the attacks made upon that venerable Judge, not only outside, but in both Houses of Parliament, we had occasion (2 U. C. L. J., N. S., p. 281) to touch upon the constitutional mode of bringing up the misconduct or incompetency of judges. We had at that time the pleasure of hearing Mr. Todd's (then unpublished) views on this subject. The whole matter is now given to the public in a more full and complete manner, not only with reference to the Judges 'Superior and Inferior' of Great Britain and Ireland, but also to Colonial Judges. Speaking with reference to the latter he says:

"So long as Judges of the Supreme Courts of law in the British Colonies were appointed under the authority of Imperial statute, it was customary for them to receive their appointments during pleasure. Thus, by the Act 4 Geo. IV. c. 96, which was re-enacted by the 9 Geo. IV. c. 83, the Judges of the Supreme Courts in New South Wales and Van Dieman's Land are removable at the will of the crown. And by the Act 6 & 7 Will. IV. c. 17, sec. 5, the Judges of the Supreme Courts of Judicature in the West Indies are appointed to hold office during the pleasure of the crown.

Nevertheless, the great constitutional principle, embodied in the Act of Settlement, that judicial office should be holden upon a permanent tenure, has been practically extended to all Colonial Judges; so far at least as to entitle them to claim protection against arbitrary or unjustifiable deprivation of office, and to forbid their removal for any cause of complaint except after a fair and impartial investigation on the part of the crown.

In 1782 an Imperial statute was passed which contains the following provisions:—That from henceforth no office to be exercised in any British Colony 'shall be granted or grantable by patent for any longer term than during such time as the grantee thereof, or person appointed thereto, shall discharge the duty thereof in person, and behave well therein.' That if any person holding such office shall be wilfully absent from the colony wherein the same ought to be exercised, without a reasonable cause to be allowed by the Governor and Council of the colony, 'or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such Governor and Council to remove such person' from the said office: but any person who shall think himself aggrieved by such a decision may appeal to his majesty in council.

This Act still continues in force, and although it does not professedly refer to Colonial Judges, it has been repeatedly decided by the Judicial Committee of the Privy Council to extend to such functionaries. Adverting to this statute, in 1858, in the case of *Robertson* v. *The Governor-General of New South Wales*, the Judicial Committee determined that it 'applies only to offices held by patent, and to offices held for life or for a certain term,' and that an office held merely *durante bene placito* could not be considered as coming within the terms of the Act.

From these decisions two conclusions may be drawn; firstly, that no Colonial Judges can be regarded as holding their offices 'merely' at the pleasure of the crown; and secondly, that, be the nature of their tenure what it may, the statute of the 22 Geo. III. c. 75 confers upon the crown a power of amotion similar to that which corporations possess over their officers, or to the proceedings in England before the Court of Queen's Bench, or the Lord Chancellor, for the removal of judges in the inferior courts for misconduct in office. Under this statute, all Colonial Judges are removable at the discretion of the crown, to be exercised by the Governor and Council of the particular colony, for any cause whatsoever that may be deemed sufficient to disqualify for the proper discharge of judicial functions, subject, however, to an appeal to the Queen in Council. But before any steps are taken to remove a judge from his office by virtue of this Act, he must be allowed an opportunity of being heard in his own defence." (Vol. II., p. 746.)

In connection with this subject we in Ontario must read Con. Stat. U. C. cap. 10, sec. 11, which regulates the tenure of office of the Judges of our Superior Courts, and the recent Act of the Ontario Parliament of 32 Vic. cap. 22, sec. 2, under which County Court Judges hold office during pleasure, subject to removal by the Lieutenant Government for inability, incapacity, or misbehaviour, established to the satisfaction of the Lieutenant-Governor in Council.

Numerous cases are cited to establish and explain the principles laid down by the author with reference to the cases in which Parliament should interfere and the mode of its procedure for the removal of judges. No cases, however, from this Province as yet "point the moral." Long may this continue, even though the two volumes before go through editions enough to satisfy the longing of even the most ambitious or deserving of authors.

This brief recital of the main points treated of by Mr. Todd gives no idea of the interesting and instructive matter of the work; as a mere history it contains information to be met with no where else, and given in the pleasantest and most readable manner. But it is not the historical details so interesting to the

educated reader, that give the great value to the treatise; it will, we apprehend, be even more appreciated by another class of readers—those with a special knowledge of various abstruse political questions will find in it light and assistance. It is, however, only in general terms that we can speak of it in the latter sense, and we only admire at a distance those evidences of deep learning in the science of politics which is possessed by comparatively few men in England, and fewer still in Canada. When judged by those possessing this technical knowledge we think we may venture to predict that the result will be as satisfactory as it has proved to be when examined by the more general reader.

In Canada the value of such a work at this particular juncture cannot be too highly estimated. In England it is possible for leading politicians—with more wealth and consequent leisure, with a greater diffusion of political knowledge, a more liberal education than is obtainable here, and aided by the traditions of Parliamentary Government which seem to pervade the atmosphere of the British Houses of Parliament—without any *lex scripta*, to keep with but little deviation in the beaten path; here, however, it is necessarily and obviously different, and the want of even an elementary sketch has been keenly felt, and this brings to our mind another great feature in Mr. Todd's book, and that is, that it seems as admirably adapted for one class of readers as the other—equally useful as an elementary work for the student and of reference to the more advanced politician.

One more remark and we must reluctantly leave an author that has given us the most unqualified pleasure; the first volume bore evidence of Mr. Todd's strong views as to the propriety of withstanding the democratic tendency of the age, so much so that the only adverse criticism was, that the first volume had a "conservative" bias, however, that may be, the most ardent liberal can find nothing to complain of in the second volume, in fact, for all that appears therein, the learning of the author might reasonably be said to be in favour of the "whigs." But may not all this be explained to one who has read both volumes, by comparing the different subjects treated of in each, and the evident anxiety to see maintained that even balance between the sovereign and his people, so necessary for the integrity of a limited monarchy, such as now exists in the British Isles.

Such a work as this that we have now so inadequately spoken of, is just one that should be made part of the course of education for any man who aspires to any knowledge of how he should govern and how he is governed, it should therefore be made part of the course in colleges and higher class of schools; it would not be even out of place in some one of the examinations intended to test the fitness of students for call to the bar. The fact that it is written by a Canadian author need not alarm those in authority; the reputation of the author as one of the most valuable contributors to the literature of this century is now established, and as such he has already been welcomed in England and Canada by those best able to judge of his merits.

Cases and opinions on Constitutional Law and various points of English Jurisprudence, collected and digested from official documents and other sources, with notes, by William Forsyth, Esq., M.A., Q.C. London: Stevens and Haynes, Law Publishers, 11, Bell Yard, Temple Bar.

We have to thank the publishers for an advance copy of this work, which we have examined with curiosity and interest. The opinions of law officers of the Crown, though not as binding as legal decisions, are of great weight. In England the law officers are generally men of high standing in their profession, and men whose names give weight to any opinions pronounced by them on questions of law. And when men eminent in their profession, in the discharge of their public duties, give well-considered opinions to the Crown on questions of jurisprudence, their opinions are deserving of unusual respect.

In 1814 George Chalmers who, after an eventful life died in London on 31st May, 1825, published a volume of such opinions which, though not well arranged, has been much esteemed both in England and the United States, and in the latter country was re-published by C. Goodrich and Company, of Burlington, as late as 1858. It contains the opinions of such eminent men as Lord Somers, Chief Justice Holt, Lord Hardwicke, Lord Talbot and Lord Mansfield, when law officers

of the Crown. No work of the kind has since been published, and Mr. Forsyth, who is well known as a legal writer, has done good service to his profession by the production of a similar volume, which in some degree bridges over the period of time between the first publication of Chalmers' Opinions and the present time. In this volume, which is elegantly printed and presents a highly creditable appearance, we find opinions of Lord Lyndhurst, Lord Abinger, Lord Truro, Lord Denman, Lord Cranworth, Lord Campbell, Lord St. Leonards, Lord Romilly, Lord Westbury, Lord Cairns, Lord Chief Justice Cockburn, and Lord Chief Baron Kelly.

The collection of these opinions appears to have been a labour of considerable difficulty. The opinions of the law officers of the Crown it is said are scattered over 2,000 or 3,000 volumes of manuscript, without any general index whatever. This is very discreditable to those who, during the time these opinions were given, presided over the departments of Government in which the opinions are recorded. One is at a loss to understand why such gross neglect should be allowed, not merely to exist, but to be of such long continuance. However, in contrast with this exposure of official negligence, it is pleasant to note the assistance given by some of the heads of departments to Mr. Forsyth in the preparation of his work. Fortunately for the value of the work, so far as the Colonies are concerned, Earl Granville, the Secretary of State for the Colonies, was particularly kind in the assistance which he gave; but this cannot be said of the Earl of Clarendon and the Foreign Office.

No opinions given since 1856 have been placed in the series. We regret that the learned author did not publish opinions given since that year. We cannot conceive of any valid reason against their publication, and expect in a new edition of the work to see this want supplied. We should like to be placed in possession of the official opinions of Sir Roundell Palmer, and other law officers of great distinction in our profession.

Several of the opinions published affect Canada. One dated 21st February, 1826, as to the appointment of a Roman Catholic Bishop in Canada, will be perused with much interest. Others of equal interest to us will be found in the volume.

We must not forget to mention the valuable notes of the authors. Some are the result of much thought, great search and display, considerable legal acumen. The notes as to extradition of criminals may be here mentioned. The author shows that the extradition of criminals is a matter of country not of right, except in the cases of special convention, and refers in a clear manner to several special conventions and Acts of Parliament passed to give effect to them.

The opinions which are varied and diversified, are well classified as follows:—The common law and statute law applicable to the Colonies; ecclesiastical law applicable to the Colonies; the powers and duties and civil and criminal liabilities of governors of Colonies; Vice-Admiralty jurisdiction and piracy; certain prerogatives of the Crown; martial law and courts-martial; extra territorial jurisdiction; the *lex loci* and *lex fori;* allegiance of aliens; extadition; appeals from the Colonies; the revocation of charters; the nationality of a ship, and other matters relating to ships; the power of the Crown to grant exclusive rights of trade; the writ of *habeas corpus;* certain points relating to criminal law, and miscellaneous subjects. Our chief regret is that the general index to the volume, though full, is not more full and exhaustive. In a future edition we trust this will be remedied. But upon the whole we are well pleased with the work, and frankly commend it to the patronage of all lawyers and others who take an interest in the relations of the parent state to their Colonies, and at present that interest is wide spread both at home and here. Mr. Forsyth at the present juncture has done good service, not only to his profession but to all men who take any interest in public affairs, and we therefore hope that those for who the book is especially intended will not be backward in giving to it that support which the industry and ability of its author, and the public spirit and enterprise of its publishers so well deserve.

The Legal Gazette (Weekly), 607, Samson Street, Philadelphia.

This adds another to the many journals published in the United States, we may even say in Pennsylvania. It presents an excellent appearance, and would seem to be well and vigorously edited. It is intended to supply a local want, though many of the cases to be found in it are of general interest.