DIARY FOR JUNE.

1. Wed. New Trial Day, Common Pleas.
3. Frid. New Trial Day, Queen's Bench.
4. Sat.. Easter Term ends.
5. SUN. *Whit Sunday.*
6. Mon. Last day for notice of trial for County Court.
11. Sat.. *St. Barnabas.* Last day for service for County Court, York
12. SUN. *Trinity Sunday.*
14. Tues. General Sessions and County Court Sittings in each County except York Last day for Court of Revision finally to revise assessment rolls.
19. SUN. *1st Sunday after Trinity.*
20. Mon. Accession of Queen Victoria, 1837.
21. Tues. Longest Day.
22. Wed. Declare for County Court York.
24. Frid. *St. John Baptist.*
26. SUN. *2nd Sunday after Trinity.*
29. Wed. *St. Peter.*
30. Thur. Half-yearly School returns to be made. Replications County Court York to be filed. Deputy Registrar in Chancery to make return and pay over fees.

The Local Courts' AND MUNICIPAL GAZETTE.

JUNE, 1870.

STAMPS ON BILLS AND NOTES.

As the law regulating Stamps on Bills and Notes is governed by several statutes which affect distinct periods of time, we think it will not be amiss, and may save time to some of our readers, to give a general epitome of the statute law of the Province bearing upon the subject.

The matter may be divided into four heads or periods; 1st. The period before legislation on the subject; 2nd, Under the Statutes of 1864, 27 & 28 Vic. cap. 4; 3rd, Under the Act amending the last Act, viz.: 29 Vic. cap. 4; and lastly, under the Act at present in force, 31 Vic. cap. 9.

1st. With reference to the period before the first of August, 1864, we need only say, that any Bill, Draft or Note, accepted, drawn or made before that date required no stamp to be affixed to it, or duty levied on it.

2nd. The Statute of 27 & 28 Vic. cap. 4, required that duty should be paid on all promissory notes, drafts or bills of exchange for $100 or upwards (this act does not affect notes, drafts or bills, under that amount), and it provides that the duty shall be levied and collected as follows:

On each note, draft or bill, executed singly, a duty of three cents for the first $100, and a further duty of three cents for each additional $100 or fraction of $100:

When a draft or bill of exchange is executed in duplicate, a duty of two cents on each part for the first $100, and a further duty of two cents on each part for each additional $100 or fraction:

When such draft or bill is executed in more than two parts, the duty shall be one cent on each part, in the same manner and ratio as when drawn in two parts:

The duty shall be paid by affixing an adhesive stamp:

The stamps shall be obliterated by the signature or initials of the maker or drawer, or some integral or material part of the instrument written upon the stamps:

The stamps shall be affixed by the maker or drawer when the instrument is made or drawn in this Province, and by the acceptor or first indorser within the Province where the instrument is made or drawn without the Province:

In case the duty has not been paid as before mentioned, any subsequent party to such instrument, or person paying the same, may render the same valid by affixing stamps to double the amount of duty required, and writing his signature or initials on the stamp or stamps so affixed.

This Act governs the period of time from 1st of August 1864 to 1st of January 1866.

3rd. The Act 29 Vic. cap. 4 amends the last Act. It makes a duty payable on all notes, drafts and bills, even if less than $100, as follows: if the note, draft, or bill does not exceed $25, that is, for $25 and under, a duty of one cent is imposed, when over $25 and not exceeding $50 a duty of two cents, and a duty of three cents if over $50 and less than $100. This portion of the amending Act came in force on the 1st of January, A.D. 1866, and continued to regulate payment of duty on notes drafts, and bills, under $100 until the first day of February, A.D. 1868.

29 Vic. c. 4 also amends 27 & 28 Vic. c. 4, by providing that it shall not be necessary to obliterate any stamp by writing the signature or initials upon it, but that the person affixing such stamp shall, at the time of affixing, write or stamp thereon the date when it was affixed. This last amendment regulates obliteration of stamps, from 1st October, 1865, to 1st February, 1868.

4th. We now come to the Act regulating the law as it now is, and has been since the first day of February, A.D. 1868. We would

premise, first, that this Act does not affect notes, drafts, or bills under $25, and, that as regards such notes, drafts and bills, no duty is now payable. The duties payable by this Act are, for notes, drafts, or bills which *amount to* but *do not exceed* $25, a duty of one cent; over $25 but not exceeding $50, two cents; over $50 but not exceeding $100, three cents; when drafts or bills are executed in more than one part, the duty is payable in the same ratio as provided by the Act of 1864, 27 & 28 Vic. cap. 4, before set out. The duty shall be paid by stamps, which are to be obliterated by signature, initials, or some material or integral part of the instrument written thereon, in the same way as mentioned in reference to the Act of 1864, or they may be obliterated by writing or stamping thereon the date of affixal?

It is necessary under all the statutes referred to, when any interest is made payable at the maturity of the bill, draft, or note, that it should be added to the principal amount when calculating the amount on which duty is to be paid.

We might draw attention to the great necessity there is for seeing that the stamps are properly cancelled. A case lately argued in the Court of Queen's Bench (*Young* v. *Waggoner*, 29 U. C. Q. B. 37) decides that even if there are sufficient stamps on the note, draft, or bill, still if they are not *all* cancelled they might as well not be on the note, so that it would be well where one stamp is placed over another, as is often done, (though we think it a bad practice), to see that the under one is cancelled.

Another point to be observed is, that if a note, draft, or bill comes into a holder's hands insufficiently or improperly stamped, the double duty must be paid by affixing the stamps at once, as otherwise it is of no avail: *McCalla* v. *Robinson et al.*, 19 U. C. C. P. 113.

Such defences as want of stamps, or improper cancellation and the like come under the head of statutory defences, and in Division Courts where the defendant wishes to get the benefit of the statutory Act, he must serve the necessary notice that he intends to take such objection at the trial, otherwise he will be unable to avail himself of his defence.

A Bill has been introduced into the English Parliament "with respect to the revesting of Mortgaged Estates in Mortgagors," which proposes to do by a statutory form of receipt what we have for many years done by means of the certificate of discharge under our Registry Acts.

ACTS OF LAST SESSION.

The following acts were passed during the last session of the Dominion Parliament:

AN ACT

To amend the Act imposing Duties on Promissory Notes and Bills of Exchange.

[Assented to 12th May, 1870.]

Whereas, it is expedient to repeal Sections Eleven and Twelve of the Act passed in the thirty-first year of Her Majesty's reign, chapter nine; therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

I. The said Sections are hereby repealed, and the following Sections substituted therefor:

"11. If any person in Canada makes, draws, accepts, indorses, signs, becomes a party to, or pays any Promissory Note, Draft, or Bill of Exchange, chargeable with duty under this Act, before the duty (or double duty, as the case may be) has been paid, by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of one hundred dollars, and, save only in the case of payment of double duty, as in the next section provided, such instrument shall be invalid and of no effect in law or in equity, and the acceptance, or payment, or protest thereof, shall be of no effect; and in suing for any such penalty, the fact that no part of the signature of the party charged with neglecting to affix the proper stamp or stamps, is written over the stamp or stamps affixed to any such instrument, or that no date, or a date that does not correspond with the time when the duty ought to have been paid, is written or marked on the stamp or stamps, shall be *primâ facie* evidence that such party did not affix it or them, as required by this Act: But no party to, or holder of any such instrument, shall incur any penalty by reason of the duty thereon not having been paid at the proper time, and by the proper party or parties, provided at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays the double or additional duty as in the next section provided, as soon as he acquires such knowledge."

"12. Any subsequent party to such instrument or person paying the same, or any holder without becoming a party thereto, may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to

the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his signature, or part thereof, or his initials, or the proper date, on such stamp or stamps, in the manner and for the purposes mentioned in the fourth Section of this Act; and when upon the trial of any issue, or on any legal inquiry, the validity of any Promissory Note, Draft or Bill of Exchange is questioned by reason of the proper duty thereon not having been paid, or not having been paid by the proper party, or at the proper time, and it appears that the holder thereof, when he became holder, had no knowledge that the proper duty had not been paid by the proper party, or at the proper time, such instrument shall, nevertheless, be held to be legal and valid, if it shall appear that the holder thereof paid double duty as in this section mentioned, so soon as such holder acquired such knowledge, or if the holder thereof, acquiring such knowledge at the trial or inquiry, do thereupon forthwith pay such double duty; or if the validity of such Promissory Note, Draft, or Bill of Exchange is questioned by reason of a part only of the requisite duty thereon having been paid at the proper time or by the proper party, and it appears to the satisfaction of the Court or Judge, as the case may be, that it was through mere inadvertence or mistake, and without any intention to violate the law on the part of the holder, that the whole amount of duty, or double duty, as the case may be, was not paid at the proper time, or by the proper party, such instrument, and any endorsement or transfer thereof, shall, nevertheless, be held legal and valid, if the holder shall, before action brought, have paid double duty thereon, as in this section mentioned, as soon as he reasonably could, after having become aware of such error or mistake; but no party, who ought to have paid duty thereon, shall be released from the penalty by him incurred as aforesaid."

2. This Act shall not apply to any suit pending when it comes into force.

AN ACT

To amend the Act respecting the Duties of Justices of the Peace out of Sessions in relation to Summary Convictions and Orders.

[Assented to 12th May, 1870.]

Whereas, it is expedient to amend Sections sixty-five and seventy-one of the Act respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders; Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

I. Section sixty-five of the said Act is hereby repealed, and the following section substituted:

"65. Unless it be otherwise provided in any special Act under which a conviction takes place or an order is made by a Justice or Justices of the Peace, any person who thinks himself aggrieved by any such conviction or order, may appeal in the Province of Quebec or Ontario, to the next Court of General or Quarter Sessions of the Peace; or in the Province of Quebec, to any other Court for the time being discharging the functions of such Court of General or Quarter Sessions of the Peace in and for any district therein; in the Province of Nova Scotia, to the Supreme Court in the county where the cause of information or complaint has arisen; and in the Province of New Brunswick, to the County Court of the County where the cause of the information or complaint has arisen: such right of appeal shall be subject to the conditions following:

"1. If the conviction or order be made more than twelve days before the sittings of the court to which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction, or order, be made within twelve days of the sittings of such court then to the second sittings next after such conviction or order;

"2. The person aggrieved shall give to the prosecutor or complainant, or to the convicting Justice or one of the convicting Justices, for him, a notice in writing of such appeal, within four days after such conviction or order;

"3. The person aggrieved shall either remain in custody until the holding of the Court to which the appeal is given, or shall enter into a recognizance, with two sufficient sureties, before a Justice or Justices of the Peace, conditioned personally to appear at the said Court, and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded; or if the appeal be against any conviction or order, whereby only a penalty or sum of money is adjudged to be paid, the person aggrieved may, (although the order direct imprisonment in default of payment,) instead of remaining in custody as aforesaid, or giving such recognisance as aforesaid, deposit with the Justice or Justices convicting or making the order such sum of money as such Justice or Justices deem sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal; and upon such recognizance being given, or such deposit made, the Justice or Justices before whom such recognizance is entered into, or deposit made, shall liberate such person if in custody;

"And the Court to which such appeal is made shall thereupon hear and determine the matter of appeal, and make such order therein, with or without costs to either party, including the costs of the court below, as to the Court seems meet; and, in case of the dismissal of the appeal or the affirmance of the conviction or order, shall order and adjudge the offender to be punished according to the conviction, or the Defendant to pay the

amount adjudged by the said order, and to pay such costs as may be awarded; and shall, if necessary, issue process for enforcing the judgment of the court; and in any case where, after any such deposit has been made as aforesaid, the conviction or order is affirmed, the Court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the Defendant; and in any case where, after any such deposit, the conviction or order is quashed, the Court shall order the money to be repaid to the Defendant; and the said court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court;

"In every case where any conviction or order is quashed on appeal as aforesaid, the Clerk of the Peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the Clerk of the Peace, or of the proper officer having the custody of the same, be sufficient evidence in all Courts and for all purposes, that the conviction or order has been quashed."

2. Section seventy-one of the said Act is repealed, and the following substituted therefor:

"71. No conviction or order affirmed, or affirmed and amended in appeal, shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant or commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

3. And whereas, in some of the Provinces of Canada, the terms or sittings of the General Sessions of the Peace or other Courts to which, under section seventy-six of the said Act, Justices of the Peace are required to make Returns of convictions had before them, may not be held as often as once in every three months; and it is desirable that such Returns should not be made less frequently: Therefore it is further enacted, that the Returns required by the said seventy-sixth section of the Act hereinbefore cited shall be made by every Justice of the Peace quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, to the Clerk of the Peace or other proper officer for receiving the same under the said Act, notwithstanding the General or Quarter Sessions of the Peace of the County in which such conviction waa had may not be held in the months or at the times aforesaid; and every such Return shall include all convictions and other matters mentioned in the said section seventy-six, and not included in some previous Return, and shall, by the Clerk of the Peace or other proper officer receiving it, be fixed up and published; and a copy thereof shall be transmitted to the Minister of Finance in the manner required by the eighthieth and eighty-first sections of the said Act; and the penalties thereby imposed, and all the other provisions of the said Act, shall hereafter apply to the Returns hereby required, and to any offence or neglect committed with respect to the making thereof, as if the periods hereby appointed for making the said Returns had been mentioned in the said Act instead of the periods thereby appointed for the same.

4. The Form following shall be substituted for the form of Notice of Appeal against a conviction or order contained in the Schedule to the said Act.

GENERAL FORM OF NOTICE OF APPEAL AGAINST A CONVICTION OR ORDER.

To C. D. of, &c., and—— (*the names and additions of the parties to whom the notice of appeal is required to be given*).

Take notice, that I, the undersigned A. B, of—— do intend to enter and prosecute an appeal at the next General Quarter Sessions of the Peace (*or other Court, as the case may be*), to be holden at——, in and for the District (*or* County, United Counties, *or as the case may be*) of——, against a certain conviction (*or* order) bearing date on or about the ——day of ——instant, and made by (you) C. D., Esquire, (one) of Her Majesty's Justices of the Peace for the said District (*or* County, United Counties, *or as the case may be*) of ——, whereby the said A. B. was convicted of having or was ordered to pay ——, (*here state the offence as in the conviction, information, or summons, or the amount adjudged to be paid, as in the order, as correctly as possible*).

Dated this—— day of ——, one thousand eight hundred and——.

A. B.

MEMORANDUM.—*If this notice be given by several Defendants, or by an Attorney, it can easily be adapted.*

SELECTIONS.

RIGHT OF LANDLORD TO REGAIN POSSESSION BY FORCE.

(*Continued from page* 70.)

It is apparent therefore, as the clear result of English authority, that an entry by force by the landlord, or his forcible expulsion of the tenant, are illegal only to the extent of the penalties expressly annexed to the act by the statute, and no further, and that no color of authority exists for holding the possession so gained generally unlawful, or for founding thereon any common-law action by inference from the statutory prohibition. Still less can the special *qui tam* action of trespass be transmuted into a general action of trespass. The

precise form is given by Fitzherbert, (2 Nat. Brev. 248 F.) and is founded only on the statute. In *Davison* v. *Wilson*, *supra*, the attempt was made to bring the action of trespass *qu. cl.* under the statute, by adding to the declaration in trespass in common form, that the entry and expulsion were "with the strong hand and against the form of the statute;" bnt even these words were held insufficient. It has moreover been uniformly held that the statutory action can only be maintained by one who has a freehold, the action only being given on disseisin; *Rex* v. *Domry*, 1 Ld. Ray. 610; *Cole* v. *Eagle*, 8 B. & C. 409; and does not lie against one who has a freehold and right of immediate entry; Year Book 9 Hen. VIII. fo. 19, pl. 12; 15 Hen. VII. fo. 17, A, pl. 12. And it need hardly be added that the restitution directed by the statutes of 8 Hen. VI. c. 9, s. 3; 21 Jac. I. c. 15, to freeholders and tenants for years, can only be made when and to those to whom it is directed by those statutes, and cannot be waived and replaced by an action of trespass. The restitution moreover is the fruit of a criminal proceeding.

The American cases therefore, which have based an action of trespass, whether *qu. cl. fregit*, for assault, or *de bonis asportatis*, on the supposed authority of the English law, wholly fail of support; and can only be sustained, if at all, on some distinct authority given by the terms of their local statutes. It will suffice if, instead of specially reviewing these enactments, we examine such authorizing clauses, when relied on by the courts to sustain the action in question. Except so far as qualified by such enactments, the doctrine that possession obtained by force is a lawful one, seems as clear on principle as we have seen it to be on authority. The tenant who, after his own possessory right is determined, seeks to hold his lessor as a trespasser for entering upon him with force, must in establishing his own possessory title disclose its defective character as against the title relied on by the lessor in entering; for the common law action of trespass is an assertion of the plaintiff's individual possessory right, and not an action for a public wrong; whereas, as against a stranger, mere possession being sufficient, no title subordinate to the defendant's is in any way disclosed in the action. And this was the ground generally taken by the American courts, when the point actually arose for decision, and an action of trespass was with great unanimity of authority held not to lie. Thus in Pennyslvania, *Overdeer* v. *Lewis*, 1 W. & S. 90; South Carolina, *Johnson* v. *Hannahan*, 1 Strob.313; Kentucky, *Tribble* v. *Frame*, 7 J. J. Marsh. 599; North Carolina, *Walton* v. *File*, 1 Dev. & B. 567; ank in New York in repeated decisons: *Wilde* v. *Cantillon*, 1 Johns. Cas. 123; *Hyatt* v. *Wood*, 4 Johns. 150; *Ives* v. *Ives*, 13 Johns. 235; *Jackson* v. *Morse*, 16 Johns. 197; justifying the emphatic language of Nelson, C. J., in *Jackson* v. *Farmer*, 9 Wend. 201: "Statutes of Forcible Entry and Detainer punish criminally the force, and in some cases make restitution, but so far as civil remedy goes there is none whatever." And these earlier cases have been reaffirmed by recent adjudications: *Livingstone* v. *Tanner*, 14 N. Y. 646; *People* v. *Field*, 52 Barb. 198, 211. So in Vermont, in *Beecher* v. *Parmele*, 9 Vt. 352, Redfield, J., says, "it is now well settled that an intruder, in quiet possession of land, may be forcibly expelled by the owner, so far as the land is concerned. If the owner is guilty of a breach of the peace and trespass on the person of the intruder, he is liable for that, *but his possession is lawful;*" and actions of trespass were accordingly held not to lie in *Yale* v. *Seely*, 15 Vt. 221; *Hodgeden* v. *Hubbard*, 18 Vt. 504.

In a few States some cases have lately departed from this rule and held trespass *qu cl.* maintainable; but they will be found to rest almost without exception, on the supposed authority of the English law as set forth in the long since exploded cases of *Newton* v. *Harland* and *Hillary* v. *Gay;* though, as will be remembered, no such action was countenanced even by these decisions, and their authority for trespass for assault has, as we have seen, been wholly overruled. *Moore* v. *Boyd*, 24 Maine, 242, and *Brock* v. *Berry*, 31 Maine, 293, frequently but erroneously cited as sustaining this action, do not apply, for in both the tenancy was at will, and the tenant's possessory right had not terminated, and in the latter case, had the tenant been at sufferance, as he was mistakenly called by the counsel, the facts presented exactly the case of *Meader* v. *Stone*, 7 Met. 147; *Mugford* v. *Richardson*, 6 Allen, 76; *Argent* v. *Durrant*, 8 T. Q. 403, where no action was held to lie. In *Larkin* v. *Avery*, 23 Conn. 304, the landlord, having a right of re-entry, entered in the tenant's absence and resisted with force his attempt to repossess himself of the premises, and was held liable in trespass for assault. A clearer case could hardly be put of the landlord's right to use force, as a legal possession had been gained, and force was only employed to defend it; and this point has so been held wherever the case has arisen elsewhere; *Todd* v. *Jackson*, 2 Dutch 525; *Mussey* v. *Scott*, 32 Vt. 82; *Davis* v. *Burrell*, 10 C. B. 821. *Hilbourne* v. *Fogg*, 99 Mass. 11; even by courts which have denied the right of forcible re-entry. The court distinguish the case before them from trespass *qu. cl.*, and seem to think that trespass for assault is supported by the Massachusetts law in *Sampson* v. *Henry*, 11 Pick. 379, being misled by Judge Wilde's *dictum* above cited, that being a case of excessive force, but mainly rely on the exploded doctrine of *Newton* v. *Harland*, which they conceived to be the English law.

In *Dustry* v. *Cowdrey*, 23 Vt. 631, the court which had repeatedly enunciated a different doctrine,* altered their opinion, moved thereto, we presume, by the then recent decisions of

* *Beecher* v. *Parmele*, 9 Vt. 352, and other cases, *supra*.

Newton v. *Harland* and *Hillary* v. *Gay*, and sustained an action of trespass *qu. cl.* As this decision was a very elaborate effort to support this action, including all the grounds which have been urged in its support, and has since been followed as a leading case by the court of another State, it claims a more extended examination. The facts simply were, that the plaintiff, a tenant at will, had agreed at the inception of his tenancy to "leave at a certain day, and that if he did not the defendants might put him out in any way they chose." The day fixed for his quitting passed, and on his refusal then to go the defendants entered peaceably and dismantled the premises, and after a further refusal on his part to go, removed him and his family, but gently and with no more than necessary force. It would seem as if the agreement on the tenant's part for his ejection was an ample warrant for his removal with due and proper force. This point has been expressly so held in England, and in all the American courts where it has arisen, and such removal has been held justifiable under a plea of leave and license and no breach of the statute: *Feltham* v. *Cartwright*, 7 Scott, 695; *Kavanagh* v. *Gudge*, 7 M. & G. 316; *Fifty Assoc.* v. *Howland*, 5 Cush. 214; *Page* v. *Dvpey*, 40 Ill. 506. But the point was neither taken by counsel nor noticed by the court. Having overlooked a ground decisive of the case in favour of the defendant, the court then proceed to pronounce judgment for the plaintiffs, placing their decision mainly on the ground, supposed to be conclusively established by *Newton* v. *Harland* and *Hillary* v. *Gay*, that a legal possession could not be gained by a prohibited act. After a full statement of these two cases, they say, p. 644, "This is the latest declaration of the courts of Westminster Hall upon this subject. . . . We have no disposition to add any thing in regard to the true construction of law as derived from the decisions of the courts of Westminster Hall, and we think the decisions of English courts as to the common law or the construction of ancient statutes are to be regarded of paramount authority." We fully agreee with the court in this conclusion, and since both the latest and uniform doctrine of the English courts is, as we have shown, the reverse of that enunciated by the court in this case, we do not doubt that it will be as readily adopted by them; especially as their conclusion in this case meets little more support from American than from English authority. The court rely on the cases of *Moore* v. *Boyd*, and *Brock* v. *Berry*, which, we have shown, do not apply; and cite the *dictum* of Wilde, J., from *Sampson* v. *Henry*, 11 Pick. 379, but do not refer to the decision in the same case, 13 Pick. 36, that trespass *qu. cl.* would not lie, nor to the express adjudication by the same learned judge in *Miner* v. *Stevens*, 1 Cush. 485, that the lessor might regain possession by force without liability to an action by the lessee, and his unqualified assent to the New York and English law accordingly.

One further ground is dwelt on at length by the court, in support of the action of trespass; that, as the statute of Vermont had reenacted the English statute, 8 Hen. VI. c. 9, which gave restitution and a *qui tam* action with treble damages to the ousted party, he might waive these rights and bring trespass *qu. cl.* instead. The court, in assimilating their statute to that of 8 Hen. VI. do not seem aware that by the latter restitution and the *qui tam* action were given only to freeholders, *Cole* v. *Eagle*, *supra*; 1 Hawkins Pl. A. B. I., c. 28, sec. 15. The same limitation was put on the New York statute by the court of that State; *Willard* v. *Warren*, 17 Wend. 257, 261: hardly, therefore, furnishing a precedent for the assertion of these rights by a tenant at sufferance. But had such rights been expressly given to such a tenant by the Vermont statute, it is a novel doctrine that special proceedings in a statute can be waived at will by the party who may be entitled to their benefit, and in lieu thereof an action be maintained which did not lie at common law and was not given by the statute. So far as the restitution is concerned, it is much the same as if in Massachusetts the executors of a person, killed by the negligence of a common carrier, should waive the indictment given by Gen. Stat. c. 180, sec 34, and claim to recover in tort, because they would have been entitled to the fine imposed upon a conviction. "The form," the court remark, "is immaterial." An extremely convenient but somewhat perilous doctrine. And it should further be observed that, while these statutory rights are expressly limited by the Vermont enactment to the party who has successfully maintained his complaint, the doctrine of the court would allow him in return for giving up rights which he had not shown he was entitled to, to bring an action neither conferred by the statute nor maintainable without it.

In arriving at this conclusion, the court had to surmount another difficulty, namely, that not merely must the plaintiff under the English statute show a freehold, but if the defendant justifies his entry by title, the *qui tam* action fails. This restriction on the maintenance of the action, the court seem to consider to have arisen from "a blunder, to call it by no severer name," between the statute 5 Rich. II. which did not, and the statute 8 Hen. VI. c. 9, which did give this action. But Fitzherbert, 2 Nat. Brev. 248 H. says, "If a man enters with force into lands and tenements to which he hath title and right of entry, and put the tenant of the freehold out, now he who is so put out shall not maintain an action of forcible entry against him that hath title and right of entry because that that entry is not any disseisin of him." To this a note, said to be by Lord Hale, is appended; viz., "He shall not maintain it on the stat. Rich. II.; sec. 9 Hen. VI. fo. 19, pl. 12, but the party shall make fine to the king for his forcible entry." The meaning of Lord Hale doubtless was, that the action was no more maintainable on the statute

of Richard than it was declared to be by Fitzherbert on the statute of Henry, on which this author was expressly commenting. This is clear from the case which is cited by Lord Hale from the Year Books, decided the year after the passage of the statute of Henry, which held expressly, that if the entry of the defendant was with title, no action lay: "but for the force the party entering shall make fine to the king." The decision is exactly given in Lord Hale's note; it runs, "On n'aura action quand il est ouste ove fortmain par un autre, ou entre fuit congeable [justifiable]; per ceo quod pur le fortmain le party convict fera fine au Roy. . . Et purceo quod le breve reherce le statut . . et pur ceo qu'il ne dit ubi ingressus non datur per legem, le breve a batist; car si le entre fuit congealable sur le plaintiff, il n'ad cause d'action:" The careful reader will be somewhat surprised to find that Lord Hale's note is quoted by the court: "He shall not maintain it by the statute Rich. II. *but may by the statute of* Henry VI.," thus converting a decision from the Year Book, expressly denying the action, into a statute authorising it, by the deliberate insertion of the words italicized, not one of which is to be found in the author cited. In any tribunal less respectable than the court of Vermont, this might be called by even a "severer name" than "blundering." It may be added, that the law laid down in the case from the 9 Hen. VI. is reaffirmed in 15 Hen. VI. fo. 17, pl. 12.

The general ground on which this case proceeded, that the entry by force being prohibited could confer no legal possession, must be considered as overruled in Vermont by the later case of *Mussey* v. *Scott*, 32 Vt. 82, where the landlord having a right of entry, violently broke into the premises during the temporary absence of the tenant, and was nevertheless held to have acquired a lawful possesion thereby, which he might defend by force against the tenant. The court distinguish *Dustin* v. *Cowdrey* on the ground that the act here was not within the Statutes of Forcible Entry. But this was not so. Breaking violently into a dwelling-house is as indictable as force to the person. *Rex* v. *Bathurst*, 3 Burr. 1701 and 1702. We must therefore regard this decision as a return to the earlier doctrines held by this court. In Illinois, however, in the cases of *Page* v. *Depuy*, 40 Ill. 506, *Reeder* v. *Purdy*, 41 Ill. 279, the court considering the English authority equally balanced and the American cases conflicting, adopt the conclusions of *Dustin* v. *Cowdrey*, which they consider established by incontrovertible arguments. As these cases rest therefore mainly on authority, we leave them to stand or fall with the cases on which they rely. It is merely to be remarked, that the court is consistent in its view of the effect of the statute, and consider that any violent entry, even after the tenant has abandoned the premises, is equally within the prohibition of the statute, and subjects the landlord to an action of trespass, a conclusion which no other court has ventured to adopt, and which is distinctly repudiated even by those which have sustained the action of trespass in other cases, but which is, nevertheless, the logical result of implying from the statute a liability not therein expressed; the absurdity of the conclusion not lying in the means by which it is reached, but in the doctrine from which it is drawn.

In Missouri, the true distinction is drawn, and it is held that whatever remedy the ousted tenant may have by the statutory process of restitution, he cannot maintain trespass against the landlord. *Krevet* v. *Meyer*, 24 Mo. 107; *Fuhr* v. *Dean*, 26 Mo. 116.

In Massachusetts, notwithstanding some general *dicta* or decisions not duly limited, the law is clearly in accordance with the English law, and an action lies by the tenant neither for a forcible entry nor for forcible expulsion if no unnecessary force is used. The early case of *Sampson* v. *Henry*, 11 Pick. 379, in which the *dictum* of Judge Wilde occurs, which he quoted at the beginning of this article, was trespass for assault. The plaintiff was beaten with a pitchfork by the landlord while the latter was effecting an entry; and the language used by the court so far from announcing the doctrine, sought to be derived from it, of the general unlawfulness of force, was immediately preceded by the statement, that the defence claimed was "the right not only of breaking open the house and entering therein with force and violence, but also of committing an assault with a dangerous weapon." The whole simply means that as improper force was used, trespass for assault lay. That trespass *qu. cl.* did not lie, was held in the same case in 13 Pick. 36. In *Miner* v. *Stevens*, 1 Cush. 482, 485, the same judge cites the English and New York cases, which had held that possession could be regained by force, and that no action lay, and declares this to be the law of Massachusetts. In *Meader* v. *Stone*, 7 Met. 147, an action of trespass *qu. cl* was held not maintainable by a tenant at sufferance against his lessor. The same decision was made in *Curtis* v. *Galvin*, 1 Allen 215, where the tenant was forcibly removed, and in *Moore* v. *Mason*, *Ib.*406, where the entry was forcible. In *Commonwealth* v. *Haley*, on indictment against the landlord for assault on the tenant with a hatchet, the court held, that the landlord, if resisted in taking possession, must desist, and did not limit this proposition as they should, to the case of a criminal proceeding; but in *Mugford* v. *Richardson*, 6 Allen, 76, an action of tort in the nature of trespass was held not to lie against a landlord, who, after taking peaceable possession of part of the premises, overcame with force the tenant's resistance to his repossession of the remainder. The same law was laid down in *Winter* v. *Stevens*, 9 Allen, 526, 530, where the circumstances where even stronger, entry being made by the owner accompanied by five men and the tenant being ejected with force. The general doctrine that expulsion was mere aggravation in trespass *qu. cl.*, and answered by

plea of title, was declared in *Merriam* v. *Willis*, 10 Allen, 118, and the right to expel with necessary force affirmed in *Pratt* v. *Farrar*, *Ib.* 519, 521, and decided in *Morrill* v. *De la Granja*, 99 Mass. 383. Clearly, therefore, no civil action is maintainable in Massachusetts by inference from the general prohibition of the statute.

It will have been apparent from the cases cited in this discussion and the principle upon which they have gone, that no such distinction exists as has sometimes been intimated, restricting the right to expel to cases where the entry has been peaceable. No such distinction has ever been decided to obtain, but the doubt has arisen from the language of the courts; as, for instance, in *Mugford* v. *Richardson*, *supra*, where it is said, "the landlord being in peaceable possession had the right to use force," &c., whence the inference has been suggested that such peaceable possession was a condition precedent to the right to expel. But it has been clearly established from the cases, that the possession gained by force is as legal as if gained peaceably and equally efficient to revest title, the criminal liability in no way affecting the efficacy of the entry civilly.

A doubt might also arise from a hasty perusal even of some of the cases which authorise a forcible repossession by the lessor, from the terms employed by the courts to describe the amount of force permissible. Thus in *Winter* v. *Stevens*, 9 Allen, 526, 530, it is said that a tenant at sufferance may be ejected "by force if reasonable and without a breach of the peace, and not disproportionate to the exigency." But any force applied to a person against his will is an assault and a breach of the peace. The exception intended is merely excessive force. The language of Parke, B., above cited, is clearer, and admits of no such ambiguity. See *Harvey* v. *Brydges*, *ante*.

If excessive force is used, the landlord is liable for such excess, but only in an action of trespass for assault. Such excess, whether occurring in the entry or subsequent expulsion, does not affect the legality of that entry or of the possession thereby acquired, but merely fails to receive from that possession the protection which a proper use of force would have had. Thus, in *Sampson* v. *Henry*, 11 Pick. 379; 13 Pick. 36, the landlord though liable for the excess of force in trespass for assault, was not liable in trespass *qu. cl.*. It has been intimated that by such excess of force the landlord becomes a trespasser *ab initio*, as his authority to enter is one given "by law" within the distinction taken in the *Six Carpenters' Case*, 8 Co. 146 a; *Whitney* v. *Sweet*, 2 Fost. 10. But this seems to be a misapprehension. Even if the authority of the lessor to enter, arising from the contract of demise by the expiry of the tenant's title in accordance with its nature or its terms, could not be regarded as given by "the party" rather than by "the law," still "the abuse of the authority of law which makes a trespasser *ab initio* is the abuse of some special and particular authority given by law, and has no reference to the general rules which make all acts legal, which the law does not forbid:" *Page* v. *Esty*, 15 Gray, 198. It was accordingly held in this case that the right of the owner to expel, flowing from title, was not such a special and particular authority, and that the owner was liable only for excess of force. A similar rule was applied in *Johnson* v. *Hannahan*, 1 Strob. 313, and the doctrine of trespass *ab initio* was limited to cases where the act without a license would be a trespass, such as the right to distrain, and did not apply where the entry was under title.

But while it is clearly the English law, and the undoubtedly preponderating opinion in the American courts, that no civil action lies against a landlord for regaining with force the demised premises, unless there is excess of force, and then only for such excess; yet in regard to the statutory process for restitution, we apprehend that in America the prevailing rule is the reverse, and that by this proceeding the landlord may be compelled to give up a possession obtained by violent means. In England, restitution was always the fruit of a criminal process, it being awarded only where the party forcibly entering had been convicted, or at least an indictment had been found, or where the force had been found on inquisition before a justice of the peace,—an officer of purely criminal jurisdiction. See Dalton's Justice, c. 44.* In no case, moreover, was restitution made, except to a freeholder under the Stat. 8 Hen. VI., or to a tenant for years under the Stat. 21 Jac. 1. Under these statutes, where a writ of restitution was sought it was requisite for the title of the plaintiff to be truly set out, and mere possession made a *prima facie* title, only if not traversed; *Rex.* v. *Wilson*, 8 T. R. 357, 360; 2 Chit. Crim. Law, 1136. But in the United States almost universally restitution is given on a summary civil process. We do not propose here to give in detail the various enactments by which this is conferred, but it may be said generally with substantial accuracy that a bare peaceable possession without title suffices for its maintenance. Taylor, Land. & Ten. (5th ed.) sec. 789, n. 5. This is especially true of the Western States, where this statute was regarded as the means to prevent entirely the use of force in the assertion of title, an evil mainly to be apprehended in a new country; and if force was used, restitution was awarded irrespective of title, the intention being to compel title in all cases to be settled by due process of law: *King* v. *St. Louis Gas Light*

* "Restitution is made by the justice, or he may certify the finding before him as a presentment or indictment to the King's Bench, as the highest criminal court. In 3 Blackst. Comm. 179, it is said that restitution is made for the 'civil injury,' and a fine for the 'criminal injury.' This merely refers to the person who is to receive the penalty imposed, but does not make the proceeding in any way civil any more than the indictment against common carriers for negligence causing death is under the Massachusetts statute, because the fine goes to the representatives of the deceased."

Co., 34 Mo. 34. In some States it was incorporated into the act, giving the process, that title should not be inquired into therein; Alabama Rev. Code, 1867, sec. 3307; New Jersey, Nixon's Dig. of 1861, p. 301; Iowa Code, sec. 2362; and where not so expressly enacted, the same rule was held to prevail at law. Thus, in the case last cited, following *Krexct* v. *Meyer*, 24 Mo. 107, "lawfully possessed" was constructed to mean merely, "peaceably possessed," and no proof of want of title in the complainant was admissible. The effect has been to produce in some degree the evil sought to be avoided, and a scramble for the possession is the result, as the party first in actual possession, however defective his title or clear his want of one, can only be ousted by the slow process of a real action; and the court will go through the circuity of restoring possession to a tenant at sufferance, whom they will immediately thereafter dispossess on a like summary proceeding brought by the landlord under the other branch of the statute.

But, however widely elsewhere this doctrine may prevail, we doubt if it is the true construction of the statute in Massachusetts. By Gen. Stat. c. 137, sec. 1, it is enacted that "no person shall make entry, &c., except where his entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner." By sec. 2, "When a forcible entry is made," &c., "or the lessee holds over," &c., "the person entitled to the premises may be restored to the possession." The language here is unlimited, and every forcible entry is prohibited and made cause for restitution. The words used are only "*may* be restored," but this could hardly be considered to give a discretion. It is apparent, however, that every forcible entry is not ground for restitution, as, for instance, on the possession of a servant: *State* v. *Curtis*, 4 Dev. & B. 222; for there the possession is in admitted subordination to the title. By the Massachusetts statute, restitution is to be made, not to the "complainant," but to the "person entitled." But no special weight can be attributed to this difference of language, as this particular expression was not part of the original Statute of Forcible Entry, Stat. 1784, c. 8, but was introduced from the Stat. of 1835, c. 89, which gave summary process against tenants, when these two acts were incorporated in one in chap. 104 of the Revised Statutes. By the Stat. of 1784, c. 8, restitution was to be made to the "complainant;" and there is no ground for attributing to the legislature, from their adoption of the expression in question, any intention to limit the class of persons who could have restitution, to those who showed title. By the Stat. of 1784, c. 8, it was given to any person dispossessed; for although the general prohibition of force in sec. 1 of chap. 137 of Gen. Stat. was not in the Act of 1784, but was first introduced by the revising commissioners in 1836, yet it was expressly stated by them to have been part of our common law, and its enactment to be merely declaratory; Commissioners' notes to chap. 104; and this has been affirmed in *Commonwealth* v. *Shattuck*, 4 Cush. 141, 144. Hence, though the provincial statute of 13 William III. gave restitution only to a *disseisee*, that is, to a freeholder,—for this statute was derived from and receives the same construction as the statute 8 Hen. VI., see *Presby* v. *Presby*, 13 Allen, 284,—it is clear that the literal construction of the statute of 1784 authorized restitution to every one who complained of dispossession with force.

But though neither the history nor the construction of secs. 1 and 2 of the Gen. Stat. c. 137, discloses any restriction on the class of persons "entitled" to restitution, we think such a restriction is clearly implied from another section of the same statute. It is provided by sec. 9, following sec. 13 of c. 120, that if the title is drawn in question in this proceeding by plea or otherwise, the case shall be removed and the title determined by a higher court. That this cannot refer to the clauses of this chapter relating to process against tenants holding over, is evident, for the estoppel of the tenant in this process, to contest by any plea his lessor's title, has been repeatedly recognized: *Coburn* v. *Palmer*, 8 Cush. 124; *Oakes* v. *Munroe*, *Ib.* 282; *Green* v. *Tourtellott*, 11 Cush. 227. The right to introduce the issue of title can only therefore apply to the process of forcible entry; and title seems recognized by implication as a snfficient answer to the force, and to restitution therefor.

This view is strengthened by the recent decisions, which hold that in this summary proceeding, if the plaintiff's title determines *pendente lite*, judgment for possession will not issue: *King* v. *Lawson*, 98 Mass. 309; *Casey* v. *King Ib.* 503. These were, it is true, cases between landlord and tenant; but the principle upon which they proceed seems clearly to be, that, where the question of title is examinable, possession will not be awarded on a summary proceeding to one who at the time of judgment is not entitled to the premises, whatever right he may have had to institute the proceeding. The title, it may be observed, which determines the right to possession is not merely, as under the English statutes, above referred to, a subsisting freehold or term for years; but is any existing possessory right, which would authorize an action of trespass, and for this a tenancy at will is sufficient; *Dickinson* v. *Goodspeed*, 8 Cush. 119. The construction of the statutes which we suggest, does not therefore trench on the right of possession under any valid title, however slight, and it seems to be a correct conclusion, that in Massachusetts restitution by the summary statutory proceeding will not be given in any case where there is not title enough to maintain trespass; and a landlord may safely regain possession by force if he use no more than is necessary, and will incur no more liability to the statute process than to an action of trespass *qu. cl.* or for assault.—*American Law Review.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

LEASE—COVENANT NOT TO ASSIGN—VOLUNTARY ASSIGNMENT IN INSOLVENCY—FORFEITURE.—The lessees under a lease containing a covenant not to assign without leave, in the statutory form, made a voluntary assignment in insolvency on the 17th May, 1869. The assignee sold the stock-in-trade of the insolvents, who were dry goods merchants, and the purchaser took possession of the premises from him on the 27th May, the assignee also occupying a room there for the management of the estate: *Held*, that such assignment was a breach of the covenant and a forfeiture, for the term passed to the assignee, under the provisions of the Insolvent Act, and if any election to accept it were necessary on his part, it was shewn by his conduct.—*Magee* v. *Rankin, Elliott, Allan and Robinson*, 29 U. C. Q. B., 257.

WAREHOUSE RECEIPTS—CON. STAT. C. CH. 54, 24 VIC. CH. 23.—The plaintiffs, a bank, claimed title to goods, under C. S. C. ch. 54, sec. 8, by virtue of a warehouse receipt signed by defendants, acknowledging to have received *from the plaintiffs* 6000 lbs. of wool, deposited in defendant's warehouse, subject to the plaintiffs' order.

Held, affirming the decision, but dissenting from the opinions expressed in the Queen's Bench —that such receipt, given directly to the plaintiffs, was not within the statute, which authorizes only a transfer by endorsement; and that the plaintiffs therefore could not recover.—*The Royal Canadian Bank* v. *Miller et al.*, 29 U. C. Q. B. 266.

SALE OF GOODS—F. O. B.—*Held*, reversing the judgment of the Queen's Bench, that upon a contract for the sale of 10,000 bushels of oats, "at 40 cents per 34 lbs., free on board at Kingston," the purchaser was not bound to pay or tender the price before requiring the seller to put the oats on board.—*Clark* v. *Rose*, 29 U. C. Q. B. 302.

EJECTMENT —STATUTE OF LIMITATIONS— POSSESSION UNDER DEFECTIVE TITLE.—Where a *bona fide* purchaser claims a whole lot, of which a portion is cleared, under a title which turns out to be defective, and while cultivating such portion treats the wild and uncultivated part as owners under such circumstances usually do, there is evidence to go to a jury to sustain his title by possession to the whole.

In this case the grantee of the Crown died in 1838, having by his will devised to his wife his personal property only. Supposing that it passed the real estate also, she registered the will, leased this land, one hundred acres, and received the rents until 1843, when she sold it for its full value to one L., who sold to defendant in the following year, there being then about thirty-five acres cleared. Defendant took possession on his purchase, built a house, and had occupied it ever since, having cleared about twenty acres more. The heir-at-law of the patentee, who was six years old when his father died, brought ejectment in 1868, so that the statute had clearly run against him as to all of which there had been possession.

The jury found that defendant had held possession of the whole one hundred acres for more than twenty years.

Held, that such verdict was warranted, and that the plaintiff could not recover.

Per Morrison, J.,—Payment of taxes on the whole is an important fact in such a case.—*Davis* v. *Henderson*, 29 U. C. Q. B., 344.

CONSTRUCTION OF THE ACT 29 VICTORIA, CHAP. 28, SECTION 28.—Where certain creditors of a deceased insolvent sued his executor, recovered judgments, and sold his real estate, and got paid in full: *Held*, that they were still bound to account, and that the other creditors of the insolvent were entitled to have the whole estate distributed *pro rata*, under the Act 29 Victoria, chapter 28.—*The Bank of British North America* v. *Mallory*, 17 Grant, 102.

PATENT FOR INVENTION—NOVELTY.—The plaintiff had obtained a patent for an improved gearing for driving the cylinder of threshing machines; and the gearing was a considerable improvement: but, it appearing that the same gearing had been previously used for other machines, though no one had before applied it to threshing machines, —it was *held*, that the novelty was not sufficient under the statute to sustain the patent.—*Abell* v. *McPherson*, 17 Grant, 23.

INSOLVENCY—MORTGAGE TO CREDITOR—ILLEGAL PREFERENCE.—A banking firm in Toronto, having become embarrassed by gold operations in New York, applied to the Plaintiffs, to whom they owed $50,000, to advance them $15,000 more; and, in order to obtain the advance, they offered to secure both debts by a mortgage on the real estate of one of the partners, worth $30,000. The plaintiffs agreed, made the advance, and obtained the mortgage. In less than three months afterwards the debtors became insolvent under

the act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors:

Held, that as respects the antecedent debt the mortgage was valid as against the assignee in insolvency.—*The Royal Canadian Bank* v. *Kerr*, 17 Grant, 47.

FIXTURE.—In the absence of special contract, tenants' fixtures cannot be removed after the termination of the lease by breach of condition and re-entry.—*Pugh* v. *Arton*, L. R. 8 Eq. 626.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

FORGERY.—It is forgery to make a deed fraudulently with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed.—*The Queen* v. *Ritson*, L. R. 1 C. C. 200.

PRINCIPAL AND SURETY—RECOGNIZANCE.—Two persons became bound for the due appearance of a person confined in gaol on a criminal charge and the recognizance was prepared, as if the accused and his two sureties were to join therein; but the justice discharged the prisoner without obtaining his acknowledgement of the recognizance: *Held*, that this had the effect of discharging the sureties.—*Rastall* v. *The Attorney General*, 17 Grant, 1.

SCHOOL SECTIONS—SEPARATION—INFORMAL BY-LAW—DELAY IN MOVING TO QUASH.—The Corporation on the 7th December, 1857, passed a resolution, that a petition asking for a separation from school section 9, and to form a separate section consisting of certain lots, be granted, and a meeting be called to elect trustees.

On the 3rd October, 1868, they passed a by-law, enacting that this resolution should "remain confirmed, whole, and entirely without abatement whatsoever, with the force and effect of a by-law of this corporation."

The applicant in Michaelmas Term, 1868, moved to quash the by-law and resolution. It appeared that both had been passed after due notice, and after opposition by the applicant and others before the council, and that a school had been opened, and school taxes collected and expended in the section as separated:

Held, as to the resolution, that the delay in moving was a sufficient reason for refusing to interfere; and as to the by-law, (the merits being against the application, on the affidavits) that though informal it was not substantially defective, and was not open to objection as being retroactive. The rule was therefore discharged, but without costs.—*Leddingham and the Corporation of the Township of Bentinck*, 29 U. C. Q.B., 206.

HIGHWAY—OBSTRUCTION—INDICTMENT.—Defendant being indicted for overflowing a highway with water by means of a mill dam maintained by him, objected that there was no highway, and could be no conviction, because the road overflowed, which was an original allowance, had been in some places enclosed and cultivated. It was used, however, at other points, and those who had enclosed it were anxious that it should be opened and travelled which they said was impossible owing to the overflow. The overflow too was at other parts than those so enclosed.

Held, that a conviction was clearly right—*Regina* v. *Lees*, 29 U.C. Q.B., 221.

RAILWAY CO.—ASSESSMENT.—The omission of the assessor to distinguish, in his notice to a Railway Co., between the value of the land occupied by the road and their other real property, as required by the act, does not avoid the assessment.

Such an omission may be corrected on appeal by the Court of Revision and County Court Judge. *Scragg* v. *Corporation of London*, 27 U. C. R. 263, dissenting from *Corporation of London* v. *Great Western Railway Co.*, 16 U. C. R. 500, approved of and followed on this point.

By agreement between the plaintiffs and the Erie and Niagara Railway Co. the plaintiffs were working the latter railway with their own engines and cars, and the defendant, as collector, seized the plaintiffs' car on such railway for taxes due by the Erie and Niagara Railway Co. in respect of other land belonging to that company: *Held*, that such seizure was unauthorized, for the car when taken was in the plaintiffs' possession and their own property.—*The Great Western Railway Co.* v. *Rogers*, 29 U.C. Q.B., 245.

ONTARIO REPORTS.

ELECTION CASE.

(Reported by HENRY O'BRIEN, ESQ., *Barrister-at-Law.)*

REG. EX REL. FLATER V. VANVELSOR.

Municipal election—Qualification of candidate—Effect of incumbrances.

Held, that the fact of the property on which a candidate seeks to qualify being incumbered, cannot be taken into consideration for the purpose of reducing the amount for which he appears to be rated on the roll, which must be taken to be conclusive as to his property qualification.

[Chambers, March 16, 1870.—*Mr. Dalton.*]

It was alleged in the statement of the relator, that Daniel J. VanVelsor had not been duly elected, and had unjustly usurped the office of deputy Reeve in the said Township of Harwich in the County of Kent, under the pretence of an election held on Monday, the 3rd of January, 1870, and it was declared that he, the said relator, had an interest in the said election as a voter, and the following cause was alleged why the election of the said VanVelsor to the said office should be declared invalid and void, namely: That the said VanVelsor was not duly or legally elected or returned, in that he was not qualified, not having sufficient property qualification, he being assessed and rated as a freeholder on the last revised Assessment Roll of the Township, for certain lots, which were assessed and valued in the whole on the said Roll, at the sum of $470; and all the said lots were, at and before the said election, encumbered by a mortgage made by the said VanVelsor, to secure payment of $1125, and which was still unsatisfied and undischarged, and, also by a writ of *fieri facias* against the lands and tenements of the said VanVelsor and others, and which, at the time of the said election, remained for execution in the hands of the Sheriff of the County of Kent, having been delivered to him on 1st April, 1869, and these incumbrances were much more than the value of the said property.

A number of affidavits were filed on both sides, on which there was much discusssion, but the main facts necessary for the consideration of the case, and on which it turned, as found by Mr. Dalton, were as follows: That the defendant was assessed as above, at $470: that the mortgage spoken of was entirely paid before the election: that the above judgment was paid or assigned to the defendant since the election: that, at any rate, since November last, the defendant had in his possession goods liable to the execution to an amount greater than the amount of the judgment; but both the writ against goods and lands still remained in the sheriff's hands.

John Patterson, for the defendant, shewed cause. The defendant having paid the mortgage, that objection falls. The defendant has goods sufficient to cover the execution, and as the writ against goods must be satisfied first, the writ against lands is really no incumbrance.

O'Brien for the relator. The defendant has up to the present time pretended that these incumbrances were *bona fide* charges on his property, and it is only when it suits his purpose, that they are pretended to be paid or assigned; but the *fi. fa.* lands is in fact an incumbrance, even if there are goods to satisfy the claim, it binds his interest in the lands, though no sale can take place until the goods are exhausted. [Mr. Dalton—Can the fact of an incumbrance on the property, whereon it is sought to qualify, be taken into consderation here?] The statute is silent on the point, but it contemplates the necessity of the candidate having a property qualification: see 29-30 Vic. cap. 51 sec. 70; and in *Blakely* v. *Canavan*, 1 U. C. L. J. N. S., 188; it seems to be taken for granted that the incumbrances are to be deducted from the value as rated. There is, however, no express decision on this point.

MR. DALTON.—Substantially the defendant was qualified. Is he technically so under the statute?

At the time of the election the judgment and the writ against lands remained a charge. To satisfy that judgment the defendant had goods, sufficient in amount, and a writ upon the judgment against goods was in the hands of the sheriff.

The enactment as to qualification is sec. 70 29-30 Vic. cap. 51: "The persons qualified to be elected Mayors, Aldermen, Reeves, Deputy Reeves, and Councillors, or Police Trustees, are such residents of the municipality within which, or within two miles of which, the municipality or police village is situate, as are not disqualified under this Act, and have, at the time of the election, on their own right, or in the right of their wives, or proprietors, or tenants, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipality, or police village, to at least the value following—(Then follow the amounts in different cases, and in this case to $400 freehold, or leasehold to $800.) "And the qualification of all persons where a qualification is required under this Act, may be of an estate either legal or equitable."

Now if the defendant's assessed qualifications of $470 is to be affected by the charge of the *fi. fa.* lands, that is, if the amount of the judgment is to be deducted from the assessed value in computing the amount, it would perhaps be difficult to decide that the possession of goods by the defendant could avoid that result. For though the goods must first be exhausted before the lands can be sold to satisfy the judgment, or even though the defendant had money in the bank for that purpose, still, if liens and encumbrances are to be taken into account, the *fi. fa.* lands, so long as the judgment is unsatisfied remain a lien—and it would perhaps require some express provisions to enable me to set first against that lien other countervailing assets, and thus to free the land.

But can charges of this nature be taken into account at all? I have looked for cases upon this point but find none—I find the point taken in argument, and in one case noticed in the judgment, but never that I can see decided.

The words of the statute are, "have at the time of the election in their own right, or in the right of their wives, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipality &c." If the clause means such a thing, no word is said as to the *value beyond incumbrances*, or any thing at all of value, except the value as "rated" by the assessor. The facts necessary in strict grammatical construction are, that they

shall have the estate at the time of the election, and that it was rated in their names at the proper amount on the last revised assessment roll.

But how is it held in analogous cases? Take the case of voters at municipal elections—their right depends upon the 75th section (now varied by the Statute of Ontario, but not as affecting the present matter)—they must be severally, but not jointly rated on the then last revised assessment roll, for real property held in their own right or that of their wives, as proprietors or tenants—and the clause declares such rating absolute and final. Certainly in this case the law permits no enquiry into incumbrances.

The only oath that can be administered to a freeholder appearing on the roll to have the proper qualification is, that he is of the full age of twenty-one years, is a natural born or naturalised subject, that he has not before voted at that election and that he is the person named in the Roll: see *Reg. ex rel. Ford* v. *Cottingham*, 1 U. C. L. J. N. S. 214; *Reg. ex rel. Chambers* v. *Allison*, Ib. 244.

Then as to parliamentary elections (section 81) the law is as I take it the same. The requirement is, that they should be entered on the last revised assessment roll, as the owner or occupant of real property, of the actual value, &c. No encumbrance affects the right. There can be no enquiry as to qualification except as to the identity of the party with the name on the roll

I will notice two other cases where the legislature has intended an opposite effect, and has expressed it very clearly.

As to candidates at parliamentary elections, the qualification is to the value of £500 sterling, expressed to be "over and above all rents, charges, mortgages and incumbrances, charged upon and due and payable out of or affecting the same;" Imp. Stat. 3-4 Vic. cap. 35, sec. 28. No one can have doubt or hesitation here.

Then take the case of magistrates. By Consol. Stats. Canada, cap. 100, sec. 3, the qualification must be "over and above what will satisfy and discharge all incumbrances affecting the same, and over and above all rents &c., payable out of or affecting the same."

Looking at the careful and explicit language used in these cases, it seems not reasonable to conclude that in the case of municipal candidates the legislature meant any more than the grammatical meaning of the language used conveys, and I therefore think that the defendant being rated in his own name on the last revised assessment roll for a freehold estate—of the proper value—and having that estate at the time of the election, is properly qualified, and that the judgment standing against him does not affect it.

I must give the costs against the relator, as it does not appear that exertions were made to ascertain whether the incumbrances charged as affecting the valuation were existing at the time of the election.

Judgment for defendant with costs.

Regina ex rel. Gibb v. White.

Municipal election—Disqualification—Indians—Enfranchisement.

An Indian, who is a British subject and otherwise qualified (in this case by holding real estate in fee simple to a sufficient amount), has an equal right with any other British subject to hold the position of Reeve of a municipality, even though not enfranchised, and receiving as an Indian a portion of the annual payments from the common property of his tribe.

[Chambers, March 23, 1870—*Mr. Dalton.*]

O'Brien, for the relator, obtained a *quo warranto* summons to try the validity of the election of the defendant to the office of Reeve of the Township of Anderdon, in the County of Essex.

Tht statement of the relator complained that Thomas B. White had not been duly elected to the office of Reeve in the Township of Anderdon and usurped the office under the pretence of an election held on the first Monday in January; and that Dallas Norvell of Anderdon aforesaid, merchant, was duly elected thereto, and ought to have been returned at the said election; and the following causes were stated why the election of the said T. B. White to the said office should be declared invalid and void, and the said Dallas Norvell be duly elected thereto, namely:—That the said Thomas B. White was an Indian, and a person of Indian blood, and an acknowledged member of a tribe of Indians, and not in any way enfranchised or exempted from the disabilities of Indians, and as such was disqualified from holding the property qualification necessary to entitle him to such office, and that therefore he had not the necessary qualification, either of property or otherwise, and that the said Dallas Norvell was the only other candidate for the said office, and should be declared elected.

There appeared to be no dispute about the facts of the case. The defendant was born in Ontario, as was his father before him; he was the son of the Chief of the Wyandotts, or Huron Indians, of Anderdon; he was never "enfranchised" under our statute, and from time to time received his portion of the annual payments from the property of his tribe; he had for the last twelve years been engaged in trade — latterly rather extensively; he had been for some years the owner in fee simple of patented lands in Anderdon, on which he lived; but these lands were not allotted to him from the lands of the tribe, but were acquired by himself. The value was beyond the necessary qualification.

Osler, shewed cause.

O'Brien, contra.

Con. Stat. Can. cap. 9; Con. Stat. U. C. cap. 81; 31 Vic. (Can.) cap. 42; 32, 33 Vic. (Can.) cap. 6; Treaty and Proclamation in Public Acts, 1763 to 1834, [20], [32]; *Reg.* v. *Baby*, 12 U. C. Q. B. 346; *Totten* v. *Watson*, 15 U. C. Q. B. 394; *The Cherokee Nation* v. *The State of Georgia*, 5 Peters 60; 2 Kent's Com. 72, 73, 3 *Ib.* 381, were cited on the argument.

Mr. Dalton.—There is a marked difference in the position of Indians in the United States and in this Province. There, the Indian is an alien, not a citizen, see the case in 5 Peters 1, 27, 58, 60: "The Act of Congress confines the descriptions of aliens capable of naturalization to *free white persons*. * * * It is the declared law of New York, South Carolina and Tennessee, and probably so understood in other

States, that Indians are not citizens, but distinct tribes, living under the protection of the government, and consequently they can never be made citizens under the Act of Congress."—2 Kent's Com. 72, 73.

In this Province they are subjects. Con. Stat. Can. cap. 9, so speaks of them (see preamble, and sec. 1, also the 16th sec. of the Act of last session). But authorities are needless for such a proposition. Chapter 9 (now repealed), was the Act in force for many years down to 1869, declaring the rights, and providing for the management of the property of the Indians, and its provisions have much to do with the present matter. The word *Indian* in that Act (sec. 1) is defined to mean only Indians, or persons of Indian blood, or intermarried with Indians acknowledged as members of Indian tribes or bands, residing upon lands which have never been surrendered to the Crown, or which having been so surrendered, have been set apart, or are reserved for the use of any tribes or band of Indians in common, *and who themselves reside upon such lands.* But any Indian (sec. 2) who is seized in fee simple in his own right of patented lands in Upper Canada, assessed to $100 or upwards, is excluded from the definition, and is not an Indian within the meaning of the Act. The Act goes on to provide means for the "enfranchisement" of the Indians, meaning the class so defined, and the apportioning to those enfranchised parcels of the lands of the tribe, to be held by such enfranchised Indians in severalty. And it confers certain immunities on the Indians, and subjects them to certain disabilities, always having reference, as I understand, to the above description of the class to which the Act applies. If this Act were now in force, whatever effect it might have on the defendant's position to be within it, I suppose he would not be within it, for he does not live with the tribes on their reserved land, but is the owner in fee simple of patented lands of greater assessed value than $100, not set apart from the lands of the tribe, but acquired by himself.

That Act however is repealed, and the Acts now in force are 31 Vic. cap. 42, and 32 & 33 Vic. cap. 6 of Canada. The only immunities or disabilities of an Indian now, whether enfranchised or unenfranchised, relate to the property he acquired from the tribe, and that no person can sell to him spirituous liquors, or hold in pawn anything pledged by him for spirituous liquors. But Indians may now sue and be sued, and have, except as above, so far as I can see, all the rights and liabilities of other subjects.

In *Totten* v. *Watson*, 15 U. C. Q. B., 392, the Court of Queen's Bench, in the time of Sir John Robinson, decided that the prohibition of sale of land by Indians, applied only to reserved lands, not to lands to which any individual Indian had acquired a title; and from this case and sec. 2, cap. 9, Con. Stat. Can., it is quite plain that an unenfranchised Indian might purchase and hold lands in fee simple. The defendant then has the necessary property qualification. Being a subject he must have all the rights of a subject which are not expressly taken away; then why is he not qualified to be Reeve of a township? it is certainly for the relator to show why. I think that he is qualified, and that judgment must be for the defendant with costs.

Judgment for defendant with costs.

ENGLISH REPORTS.

COMMON PLEAS.

PENTON v. MURDOCK.

Negligence—Contagious disease—Glandered horse.

Declaration that defendant knowingly delivered a glandered horse to the plaintiff to be put with his horse without telling him it was glandered; whereby the plaintiff, not knowing it was glandered, was induced to and did put it with his horse, *per quod* his horse died.

Held, after verdict for plaintiff, a good declaration, though no concealment or fraud or breach of warranty was averred.

[18 W. R. 382, Jan. 25, 1870.]

Declaration—For that the defendant wrongfully kept a horse well knowing the same to be glandered and to be in a contagious, infectious, and fatal disease called glanders, and well knowing the premises wrongfully delivered the said horse to the plaintiff, to be kept and taken care of by the plaintiff for the defendant in a stable of the plaintiff with another horse of the plaintiff, and without informing the plaintiff that the said horse was glandered or had the said disease; by means of which premises the plaintiff, not knowing that the said horse of the defendant was glandered or had the said disease, was induced by the defendant to and did place the same in the said stable of the plaintiff with the said horse of the plaintiff, and the said disease was thereby communicated by the said horse of the defendant to the said horse of the plaintiff, *per quod* the plaintiff's horse died, &c.

On verdict found for the plaintiff,

Waddy moved in arrest of judgment, on the ground that the declaration disclosed no cause of action, inasmuch as it did not state any concealment, or fraud, or breach of warranty on the part of the defendant. He cited *Hill* v. *Balls*, 5 W. R. 740, 2 H. & N. 299, 27 L. J. Ex 45, and relied on the following passage in the judgment of Martin, B., in that case:—"In my view of the law, where there is no warranty, the rule *caveat emptor* applies to sales, and, except there be deceit, either by a fraudulent concealment or a fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor upon the sale of a horse or other animal."

BOVILL, C.J.—The case is different from *Hill* v. *Balls*. There Martin, B., says, "It is consistent with everything averred in this declaration that the defendant told the auctioneer that the horse was glandered, and to sell him as such, and, indeed, that the plaintiff may have been so told, but that, relying on his own judgment, he believed the horse was sound, and bought him notwithstanding that he had notice that the horse was unsound." Any such supposition is excluded by the averments in this declaration, and the defendant must be held to have contemplated the consequences of his act, which were that the plaintiff's horse caught the disease and died.

MONTAGUE SMITH, J.—The declaration avers that the defendant induced the plaintiff to put the defendant's horse in a stable with a horse of the plaintiff, the defendant knowing, and the plaintiff not knowing, that the defendant's horse was glandered. I do not see what more there can be to constitute the cause of action. The plaintiff's ignorance is clearly averred, and, therefore *Hill* v. *Balls* does not apply.

BRETT, J.—We must take it now that the defendant delivered the horse to the plaintiff for a particular purpose—viz., to be kept in a stable with another horse of the plaintiff, and that the defendant induced him to take it for that purpose. If the defendant did so, and knew that his horse was glandered, and knew that it was a contagious and fatal disease, that would raise a duty on his part to tell the plaintiff of it, and it averred, not only that he did not tell the plaintiff, but that the plaintiff did not know it. The case is distinguishable from *Hill* v. *Balls*, because there was no averment there that the horse was delivered to be put near any other horse at all, and, as Martin, B., pointed out, allegations were wanting of the plaintiff's ignorance.

Rule refused.

CHANCERY.

FREEMAN V. POPE.

Voluntary deed—Intent to defraud creditors—Deed set aside at the instance of subsequent creditor—Decision of Lord Chancellor.

A voluntary deed, executed by a person indebted at the time of its execution, may be set aside as against creditors on bill filed by a subsequent creditor. if any portion of the prior debt continue due at the time of the filing of the bill, although the deed may have been executed without any express intention to delay, hinder, or defraud creditors.

A Vice-Chancellor, in deciding a case, is bound by a previous decision of a Lord Chancellor applicable to the case, whether he assents to it or not.

[18 W. R. 399.]

This was a creditor's suit for the administration of the estate of the late Rev. John Custance, rector of Blickling with Erpingham, in the county of Norfolk, who died on the 21st of April, 1868, considerably indebted to several persons, and, among others, to the plaintiff, Edward Joshua Freeman, who claimed the sum of £62 12*s*. 8*d*. for grocery and other goods supplied by him to the deceased.

The bill was filed by the plaintiff on behalf of himself and all other unsatisfied creditors of the deceased, against (1.) the Rev. George Pope; (2.) A. R. Chamberlin, administrator and one of the creditors of the deceased; (3.) Robert Tucker, Secretary of the Pelican Life Assurance Company.

The bill prayed, among other things, that an indenture of the 3rd of March, 1863, executed by the deceased, might be declared fraudulent and void as against creditors. By the indenture in question the deceased assigned a policy on his own life for the sum of £1,000, effected by him with the Pelican Life Assurance Company, to trustees, in trust for such person or persons as Julia Thrift (then the wife of W. J. Thrift, and afterwards the wife of the defendant George Pope) should appoint. At the time of executing the deed the defendant was indebted to his bankers in a sum of about £500, of which about £100 remained due at the time of the filing of the bill. The income of the deceased was about £1,000 a-year. The debt due to the plaintiff was contracted *after* the execution of the deed sought to be set aside. The further facts of the case were somewhat complicated, but the inference drawn by the Vice-Chancellor from the evidence, which may be assumed as true for our present purpose, was, that the deceased had not, in executing the indenture of the 3rd of March, 1868, any express or deliberate intention to delay, hinder, or defraud His creditors.

By deed-poll, dated the 3rd day of June, 1868, Julia Pope (in pursuance of the power reserved to her by the indenture of the 3rd of March, 1863) appointed the money assured by the policy to her husband, the defendant George Pope.

Kay, Q C., and *Cozens Hardy*, for the plaintiff, referred to *Taylor* v. *Jones*, 2 Atk. 600; *Richardson* v. *Smallwood*, Jac. 556; *Jenkyn* v. *Vaughan*, 4 W. R. 214, 3 Drew. 425; *Stockoe* v. *Cowan*, 9 W. R. 801, 29 Beav. 637; *Spirett* v. *Willows*, 13 W. R. 329, 3 De G. J. & S. 293; *Adams* v. *Hallett*, 16 W. R. Ch. Dig. 99, L. R. 6 Eq. 468.

Fellows, for Chamberlin, in the same interest as the plaintiff, referred to *French* v. *French*, 4 W. R. 139, 6 De G. M. & G. 95.

Osborne Morgan, Q C., and *H. A. Giffard*, for the defendant, George Pope, referred to *Skarf* v. *Soulby*, 1 Macn. & G. 364; *Holmes* v. *Penney*, 5 W. R. 182, 3 K. & J. 90; Lewin on Trusts, 5th ed. p. 63. In *Spirett* v. *Willows*, 13 W. R. 329. 3 De G. J. & S. 802, it is laid down by Lord Westbury, that "if a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent 'to delay, hinder, or defraud creditors,' or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency." That *dictum* carries the authority of Lord Westbury with it. [JAMES, V. C.—Lord Westbury gave that judgment as Lord Chancellor; and the judgment of a Lord Chancellor is binding upon this Court, whether I assent to it or not.] It is true that a subsequent creditor may file a bill to set such a settlement aside, but this rule has reference simply to the *locus standi* of a subsequent creditor, which must not be confounded with his right to a decree.

JAMES, V.C.—Had there been no authority on the point before me, I should have thought that the question was whether there was any intention on the part of the settlor to delay, hinder or defraud his creditors. I am satisfied that the deceased gentleman had no such intention. But I am bound by two authorities. First, by the judgment of Vice-Chancellor Kindersley in the case case of *Jenkyn* v. *Vaughan*, 4 W. R. 214, 3 Drew. 424; whose decision is, that if there be a creditor subsequent to tho deed, and also an unpaid creditor prior to the deed, the subsequent creditor has the same right to file a bill as theprior creditor had.* That is, I must try the case as if the

* The reader's attention is requested to the following extracts from the judgment of Vice-Chancellor Kindersley, here referred to:—"It is not in dispute that a *subsequent* creditor is entitled *to participate*, if the instrument is set aside by *any* creditor; and I am not aware that *in that case* there is any distinction between the two classes of creditors, those who were so before and those who became so after the deed. I believe they all participate *pro rata*. It is clear, therefore, that a subsequent creditor has an equity *to some extent*, viz., a right to participate in the division of the property, if the settlement is set aside. *Prima facie* then, if a subsequent creditor has an equity, *one would suppose* there could be no reason to prevent him from filing a bill to enforce it.

"In cases where a subsequent creditor files a bill, it occurs to me that much may depend on this (supposing there is no evidence of anything to show the fraudulent intent, but the fact of the settlor being indebted to some extent)

bank were the plaintiff suing as creditor on the present occasion. I am therefore bound by the judgment of Lord Westbury in *Spirett* v. *Wiliowe*. [His Honour read the opening passages of Lord Westbury's judgment in *Spirett* v. *Willows*, 13 W. R. 329, 3 DeG. J. & S. 302, to the end of the following passage:—] "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement."* That is to say, if the debt of the creditor existed at the debtor's death, it is immaterial whether the debtor was or was not solvent at the time of making the settlement.

I must therefore declare this settlement to be fraudulent and void as against creditors. There must also be an inquiry whether any and which of the creditors assented to or acquiesced in the voluntary deed.

Jan. 22.—The case being spoken to on the minutes, his Honour was of opinion that the plaintiff, being entitled as against the defendant Pope to costs as between party and party, would be entitled to recover the difference between the costs as between solicitor and client, and costs as between party and party, from the estate of the deceased.

—whether, at the time of filing the bill, any of the debts remain due which were due when the deed was executed. In such a case, as any of the prior creditors might file a bill, it appears to me that a subsequent creditor might do so too; but if at the time of the filing the bill no debt due at the execution of the deed remains due, the distinction may be that then a subsequent creditor could not file a bill, unless there were some other ground than the settlor being indebted at the date of the deed to infer an intention to defraud creditors. *However, I do not find any such rule laid down, and I shall not take upon myself to lay it down positively.*"

It is questionable how far this language warrants the inference which appears to be drawn by Vice-Chancellor James, that a subsequent creditor who files a bill is, for all intents and purposes, on the same footing as a prior creditor who does so.

* See, however, as regards subsequent creditors, the passage immediately following upon this, which was cited on the present occasion in the argument of counsel on behalf of the defendant Pope.

REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW. May, 1870. London: Butterworths, 7 Fleet St.

This number opens with an article on the subject of the Civil Code of New York, to which writers in England have paid much more attention than its intrinsic merits warranted, but this is in accordance with the usual desire of Englishmen to praise everything that emanates from a country which dislikes and despises England in an equal ratio to the amount of senseless adulation that the latter on every conceivable occasion bestows on everything American.

The next article discusses the distinction between The Law Military and Martial Law. Then there is rather a lengthy notice of the diary of a Barrister, which gives some pleasant reading for a spare half hour. The speech of Hon. W. B. Lawrence on the Marriage Laws of various countries as affecting the property of married women, delivered at the British Congress of the Social Science Association in October last, is interesting and useful for reference. We commend it to the champion of women's rights in the West, the enterprising Editress of the *Chicago Legal News*.

Mr. Justice Hayes, lately one of the Judges of the Queen's Bench in England, and whose sudden death last November was much deplored, is highly spoken of in the next article. He is described as a deeply read lawyer, with an acute intellect and subtle mind, as well as a man of great and varied accomplishments, and in social life a universal favorite. Some of our readers may have heard of the celebrated case of the "Dog and the Cock," descriptive of a trial where a country jury acquitted a prisoner who was found with a newly killed fowl in his possession, on the suggestion of an ingenious counsel that a dog, whom no witness had seen or heard—but as to whom "there might have been a dog although you didn't see it"—had worried the fowl, that the prisoner had come up and rescued the fowl, wrung its neck to put it out of pain, and put it in his pocket "just to give the prosecutor;" it is said that a song written upon this by Mr. Hayes, and occasionally sung by himself, was a thing never forgotten by those who heard it.

There are also articles on Friendly Societies—A M. S. of Vacarius—Church Patronage in England and Scotland—The Lord Chancellor's Judicature Bills, &c.

APPOINTMENTS TO OFFICE.

ADMINISTRATOR OF THE GOVERNMENT.

THE HON. EDWARD KENNY, a Member of the Queen's Privy Council for Canada, to be Administrator of the Government of the Province of Nova Scotia, and to execute the office and functions of Lieut-Governor during the absence of Lieut-General Sir Charles Hastings Doyle, the Lieut-Governor of the said Province. (Gazetted May 13, 1870.)

JUDGE—SUPERIOR COURT—QUEBEC.

LOUIS EDWARD NEPOLEON CASAULT, of the City of Quebec, in the Province of Quebec, Esq., one of Her Majesty's Counsel, learned in the Law, to be a Puisne Judge of the Superior Court, for Lower Canada, now the Province of Quebec, in the room and place of the Hon. Felix Adilon Gauthier, resigned. (Gazetted May 27, 1870.)

NOTARY PUBLIC.

CHARLES E. HAMILTON, of the Town of St. Catharines, Esq., Barrister-at-law. (Gazetted May, 21, 1870.)