DIARY FOR OCTOBER.

3. SUN. *19th Sunday after Trinity.*
10. SUN. *20th Sunday after Trinity.*
15. Frid. Law of England introduced into Upper Canada 1792.
17. SUN. *21st Sunday after Trinity.*
18. Mon. *St. Luke Evangelist*
24. SUN *22nd Sunday after Trinity.*
28. Thur. *St. Simon and St. Jude.*
30. Sat... Articles, &c., to be left with Secretary Law Soc.
31. SUN. *23rd Sunday after Trinity.* All Hallow Eve.

THE

Canada Law Journal.

OCTOBER, 1869.

COMMON LAW CHAMBERS.

Regularly as the Spring and Autumn Circuits come round, the troubles of those who are in any way connected with proceedings before the Judge in Chambers begin. Suitors blame their attorneys for delays in their suit, and consequent loss to them. Country attorneys blame their Toronto agents for supposed neglect of their business, or slipshod unsatisfactory settlements of pleadings or matters of practice. Agents and practitioners in Toronto are at their wits-end to keep track of the movements of the judges, so as to be able to make or answer motions. Hearing, perhaps, that the judge is to be at Chambers in Osgoode Hall, they rush there franctically to find no one, and then dodge into the Court House to find perhaps, that an order has been made against them in their absence. The judge holding the Toronto assizes thinks it hard that he should commence a fatiguing day's work on the Bench by hearing the Chamber business from nine until ten o'clock in the morning; and again, a judge returning from a distant circuit, for perhaps a few days, thinks he might have a little rest and leisure to attend to his own affairs after, perhaps, a long absence from home on public business.

But still the work must be done, and somebody must do it. It is of course as matters now stand, the duty of the judges to do it between them. That it is often done unsatisfactorily, when it devolves on the judge holding the Toronto Assizes, is a matter of necessity, as he has to scramble through it at a head-long speed, to be able to attend to his duties on the Bench. If it is thought that there is another judge in town who may hold Chambers at Osgoode Hall, the natural desire is to take the business before him; and perhaps some twenty persons, lawyers from the country, Toronto lawyers or lawyers' clerks, after waiting for one or two hours, find that no second judge is in town, or if there is, he does not come to the Hall. Valuable time, very many hours in the aggregate, of the best working time of the day, is thus lost to practitioners, whose time is essentially money; and very often cases are thrown over to another Assize, to the pecuniary detriment and annoyance of the parties to the suit, perhaps resulting in the loss of the debt. We do not say that this is anyone's fault, but it is to many a source of annoyance, trouble and loss. One would scarcely think it necessary to mention it, were it not that it is the fashion for some persons to ignore the importance of Chamber business, that the due preparation of cases for trial and the routine work in Chambers are scarcely inferior in importance, except in reference to the attendant expenses, to the trial of cases at the Assizes.

One of two things must be done or the public business will continue to suffer, for time works no change for the better. Either the judges must so arrange their circuits, if that be possible, so that there may always be a judge in town to hold Chambers, in addition to the judge presiding at the Toronto Assizes; or else the Legislature must make some other provision for the transaction of the business, by appointing, or authorising the judges to appoint some person to decide cases in Chambers, when it is impossible or inconvenient for the judges to attend. How this is to be done is unfortunately not very clear, and there are formidable difficulties to the suggestions which present themselves. If a barrister in good practice, and none other would be fit for the work, should be appointed, it would interfere with his business. An extra judge, the most natural mode of meeting the difficulty, would entail expense which might be objected to, even if minor difficulties as to his position with respect to the other judges, and his other duties as a judge would be satisfactorily arranged. There is, however, a "wrong," and a "remedy" must be found.

ELECTIVE JUDICIARY.

The State of New York was, we believe, the first to open the judicial office to the choice of the people by annual election. It is now proposed by a new constitution, which is shortly to be submitted to the direct vote of the people, to provide for the establishment of a Court of Appeal, to consist of seven judges holding their office for fourteen years. This would be a great improvement, but it is further proposed, after 1873, to vest the appointments of these judges in the Governor of the State, to be held during good behaviour. The better class of the profession and order-loving citizens are anxiously looking forward to a return to the old English system, by which alone, as is remarked in a leading American law periodicals, "the bench can permanently retain its independence or its respectability." The evils resulting from the present system and the corruptions of the judiciary of New York were some time ago exposed in the most scorching way by the *American Law Review*, in language which seemed to despair of any improvement. When, however, a nation, boastful and bigoted though it be, begins to acknowledge that it has made mistakes, there is still it may be hoped a chance of improvement.

ACT FOR QUIETING TITLES.

We have already given our readers a sketch of the proofs of title required by the Referees under the above Act, and which are spoken of more at length in Mr. Turner's book. It will be useful to many of our readers, to republish the preliminary requirements of the Referees, printed by them as instructions for those taking advantage of the Act. This will be found very handy for constant reference by practitioners and clerk, as well when taking proceedings to quiet titles, as in the ordinary routine of searching a title.

The instructions are as follows:—

1.—The affidavit of the petitioner under the 6th section of the Act. (For form, see Turner on Titles, 58.) The affidavit should also state whether the petitioner is married or not.

2.—The certificate of his Counsel or Solicitor, under the 8th section of the Act.

3.—The County Registrar's Certificate of the state of the title up to the time of registering a certificate of the petition being filed.

4.—All deeds and evidences of title in the petitioner's possession or power. (See Act for Quieting Titles, sec. 5, sub-sec. 1.)

5.—If the petitioner cannot produce all the deeds relating to the land, under which he derives title, he must procure and produce:—

(*a.*) Certified copies of the memorials (with affidavits of execution) of all *other* registered instruments affecting the title.

(*b.*) Affidavits of diligent search for the originals of all deeds to which these memorials relate, and of all other deeds relating to the title which are not produced.

(*c.*) Proofs of contents of the non-produced deeds. Those of which there are memorials in the short form in use before the late Registry Act should be shown to have contained no trust, limitation, condition, exception or qualification not mentioned in the memorial

6.—If any of the deeds have no receipt for consideration endorsed, there must further be produced some proof of payment of the consideration.

7.—If there is no release of dower by the wife of a former owner, shew that he was unmarried when he conveyed, or that his wife is dead; otherwise the Certificate of Title must be subject to her dower.

8.—Affidavits are required showing that possession has always accompanied the title under which the petitioner claims. (See Consolidated Order, 501.) Also affidavits showing who is now in occupation, and under what title or claim of title.

9.—Sheriff's certificate that the property is not affected by any execution, sale under execution, or tax sale. (See Turner on Titles, 7, 63, and 64.)

10.—Treasurer's certificate that there are no taxes in arrear and that there has been no sale for taxes.

11.—Collector's receipt for any taxes that are not shewn by the Treasurer's Certificate to have been paid.

12.—Certficate or affidavit that there are no Crown debts affecting the property. (See Con. Stat. U. C. c. 5; 29 & 30 Vic. c. 43.)

13.—A concise statement of any other facts necessary to make out the title and affidavits or other evidence to prove the same.

14.—Schedule of the particulars so produced.

SELECTIONS.

THE LATE LORD JUSTICE CLERK OF SCOTLAND.

The body of the Lord Justice Clerk of Scotland was recovered from the bed of the river Almond, just below Buchanty Spout, on Friday last, and we regret to say that no doubt can be entertained that the unfortunate gentleman met his death by his own act. The *Scotsman*, after giving full details of the recovery of the body by the exertions of Malloch, the Perth boatman, says that on being brought to the bank the body was taken charge of by Constable Wilson, of the county constabulary. Malloch, the boatman, was immediately driven to Perth, where he communicated his discovery to Mr. Jameson, procurator fiscal, and Mr. Gordon, chief constable of the county. At a quarter past five o'clock the procurator fiscal and Dr. Absolon left Perth for Glenalmond House, for the purpose of making a *post-mortem* examination.

After the discovery of the body, the spot where the razor case and necktie were found on Tuesday afternoon was visited with renewed interest. It now seemed but too evident that the case had been one of suicide, and the whole circumstances pointed to the inference that there had been deliberate premeditation. It will be remembered that the articles referred to, were found on a bank overhanging the fall of Buchanty. The deceased appears to have advanced to the edge of the bank, which stands about five or six feet above the torrent, to have there cut his throat, and then allowed himself to fall backwards, instinctively clutching, as he fell, the ash sapling growing on the bank, which was subsequently found with bloody finger-marks. The body would be swept at once into the deep pool below the linn, from which it subsequently drifted downwards to the pool where it was discovered.

The Right Hon. George Patton was the third son of James Patton, Esq., of Glenalmond, sheriff clerk of Perthshire, by Anne, daughter of Thomas Marshall, Esq. He was born at Perth, in 1803, and was consequently in his sixty-seventh year. He received his early education at the academy of that city, from which he was sent to the University of Edinburgh, and subsequently to Trinity College, Cambridge, where he took the English declamation prize. He was admitted a member of the Faculty of Advocates in 1828. His politics were staunch Conservative, and when Lord Derby came into office in 1859, he was appointed Solicitor-General for Scotland. In 1866, he became Lord Advocate, and was elected member for Bridgewater, which he contested twice at great expense. In the same year he was raised to the dignity of Lord Justice Clerk in room of Lord Colonsay as Lord Justice General. About the same time he was made a member of the Privy Council. He was married in 1857 to Margaret, daughter of General Alexander Bethune, of Blebo, who survives him, and who has no issue. The paternal estate of Glenalmond has been occupied by three brothers in succession—first by James Patton, second by Thomas (who died suddenly three weeks ago), and most recently by the late judge. It will now, in all probability, pass to the unmarried sister of his Lordship, who resides in Perth, and is the only survivor of the family.

It is stated that the vacant office of Lord Justice Clerk has been offered to the Lord Advocate (Mr. Moncreiff), and that he has intimated his acceptance of it.

SELF-SATISFACTION EXTRAORDINARY.

Clement Harwood, with the aid of forgery and the falsification of books, robbed his employers of £15,000. His name was placarded all over the country, and a reward was offered for his apprehension. He was captured in New York, brought to England, charged before the Lord Mayor, and superabundant evidence was offered in proof of the guilt of the prisoner. At an adjourned examination the counsel for the prosecution was instructed to withdraw the charge, explaining that the prisoner, who is the son of the senior partner of the firm he robbed, was to be sent abroad. The Lord Mayor dismissed the case, and Clement Harwood was free. We suppose that it would not be easy to cite a more palpable instance of the miscarriage of justice. Because Clement Harwood has rich connections he escapes from the punishment that would surely have happened to a thief whose connections were poor. So far as we are aware, no one has attempted to defend the conduct of the Lord Mayor. What of that? His Lordship is perfectly satisfied with his own conduct. On Monday a deputation from the ward of Walbrook presented him with his portrait. His Lordship said 'There was not one matter which had been brought before him in his magisterial capacity with respect to which he could feel the slightest regret.' Happy Lord Mayor! What a comfort it is to have faith in one's own infallibility! His Lordship added, 'He did not hestitate to say that of all the cases that had come before him none had produced, in the result, greater satisfaction in his own mind than that of Clement Harwood.' This is perplexing. Grant for a moment that the conduct of the Lord Mayor was proper, we are still at a loss to understand why the dismissal of that prisoner should have delighted the worshipful chief magistrate of the city of London. If we are driven to suggest a possible solution of the enigma, we can only assume that the Lord Mayor felt an exquisite delight in being able to save the son of the senior partner of a city firm from penal servitude. His Lordship further said: 'There was not a man in this

country who thoroughly understood the principles of law who would not have endorsed the course he took after having, like himself, mastered the whole of the circumstances.' Can we not utilise this Solon of the age? Can we not have a special Act of Parliament constituting his Lordship Lord Chancellor or Lord Chief Justice of England? At the risk, however, of being charged with legal incapacity by Lord Mayor Lawrence, we venture to tell him that there is not a man in the country who thoroughly understands the principles of law who does not condemn the course his Lordship took in the case of Clement Harwood. Were any circumstances known to the Lord Mayor that were not mentioned in open court? We trust not, for it would be a scandalous breach of magisterial duty to decide a case upon private information. All the facts that came before the public were, that Clement Harwood was guilty of forgery and theft, and that the Lord Mayor dismissed the case. His Lordship now avows that he is perfectly satisfied with that result. We hope that he is an exception, and that his aldermanic brethern do not agree with him; for if so, we should earnestly advocate the immediate appointment of stipendary magistrates for the City of London. In the event of a vulgar forger or thief being brought before the present occupant of the Mansion House, we wonder, if the prisoner cited the case of Clement Harwood, whether his Lordship's mental satisfaction would be disturbed. —*The Law Journal.*

CONTRACTS ENTERED INTO ON FAITH OF ANOTHER'S REPRESENTATIONS.

Skidmore v, *Bradford*, V.C.S., 17 W. R. 1056.

The distinction between a mere voluntary promise or *nudum pactum* that will not support an action and a promise, upon the faith of which another does some act or enters into some engagement, was considered by Lord Erskine, in *Crosbie* v. *McDoual*, 13 Ves. 148, which was followed in *Skidmore* v. *Bradford*. In *Crosbie* v. *McDoual* A. promised to purchase a house for B., but requested B. to enter into the contract of purchase in her own name. B. did so, and the obligation thus incurred by her on the faith of A.'s promise was held to imply a promise to reimburse B. any part of the purchase-money she might be called upon to pay. And this promise A.'s assets, after his death, were held liable to make good.

Skidmore v. *Bradford* was exactly the same case. The testator purchased a warehouse for his nephew, paid part of the purchase-money, and induced his nephew to render himself liable to pay the rest. Having incurred this obligation on the faith of the representation of the testator that he would pay the rest, the nephew was held entitled to have the balance paid out of the testator's assets. As Lord Erskine pointed out long ago, the Statute of Frauds did not touch the case. It was not an engagement to answer for the debt of the nephew, but it was a debt incurred by the nephew on the faith that the testator would see it paid.

It would seem that any representation on the faith of which a liability is incurred may give the person incurring the liability the right to have the representation made good: *Hammersley* v. *De Biel*, 12 Cl. & F. 45. But a mere volunteer cannot require an act of bounty commenced by a testator to be completed by his executors; in order to do so, he must, at the request of the testator, have placed himself in the position of liability from which he asks to be released at the testator's expense. This distinction is essential.—*Solicitors' Journal.*

"ORDINARY" OR "PERSONAL" LUGGAGE—LIABILITY OF R. R. Co.

Hudston v. *Midland Railway Co.*, Q. B., 17 W. R. 705.

This is a case where the question, what is personal luggage? has again been raised. The defendants' private Act allowed passengers to carry a certain weight of "ordinary luggage" (called in their regulations "personal" luggage) free of charge. The plaintiff brought to the defendants' station a "spring horse," an improved kind of rocking horse. The defendants refused to allow him to carry it as personal or ordinary luggage, and compelled him to pay for its carriage as merchandize.

The plaintiff endeavoured in a county court to recover damages from the defendants for refusing to take this spring horse. The county court judge held that the spring horse was not personal or ordinary luggage, and decided in favour of the defendants, and this decision was affirmed by the Court of Queen's Bench.

The question what is personal luggage has often arisen before, and there have been a good many decisions upon the subject.

Papers and bank-notes carried by an attorney for use in causes in which he was professionally engaged, *Phelps* v. *London & North Western Railway Co.*, 13 W. R. 782, and the sketches of an artist, *Mytton* v. *The Midland Railway Co.*, 7 W. R. 737, have been held not to be "ordinary luggage." So also it has been decided that a box containing only merchandize, *Cahill* v. *London and North Western Railway Co.*, 9 W. R. 391, and a number of ivory handles packed up with personal luggage, *The Great Northern Railway Co.* v. *Shepherd*, 21 L. J. Ex. 114, 286, are not personal luggage.

These are not the only decisions on the point, but they are the cases that are most frequently referred to. In none of these cases is there any satisfactory definition of either "personal" luggage or "ordinary" luggage; indeed it is perhaps impossible to define what may be fairly considered as comprised by those terms.

The consequence of this state of the law is, that it is very difficult for any one to know whether he is entitled to have his luggage carried free of charge, and yet if he carries as personal luggage articles which do not come within that term he cannot recover anything from the railway company for their loss. It must also be remembered that now that railway travelling is so very common many people, and perhaps the majority of travellers, always carry much that can scarcely be deemed personal luggage. Books, presents, articles belonging to third persons; things that are required in professions and trades, as the papers of merchants, agents, lawyers, and artists; the guns and fishing-tackle of sportsmen, the tools of artizans, &c., &c. Such things are of necessity frequently carried, and yet it is by no means easy even for a lawyer to say off-hand whether they are or are not personal luggage.

It seems to us that a great improvement might be made by adopting the system of giving a fixed sum per pound for any luggage which is lost irrespective of its nature or of its actual value.

If any traveller wished to carry luggage of a value greater than the amount of compensation fixed for cases of loss he might declare the nature and value of the luggage and pay for its carriage, and then be entitled, in case of loss, to recover more than the ordinary compensation. A plan of this sort would put an end to all difficulties about personal and ordinary luggage.

This system is not an untried one. It is adopted on many of the Continental lines, and we believe it works very well. It is reasonable that railway companies should not be liable to be called upon to pay large sums for the loss of luggage of the value of which they were ignorant when they received it, but if the amount of their liability is fixed it matters not to them what is the nature of the luggage carried, except perhaps that they may wish to prevent persons from carrying merchandise as personal luggage. It is, however, impossible to prevent passengers from sometimes carrying merchandise with them as their own luggage, and we think the amount so carried would not be sensibly affected by the alteration that we suggest. The real advantage of the continental plan is that by adopting it the rights of the passenger and the railway company respectively can at once be ascertained without having recourse to litigation.—*Solicitors' Journal.*

MULTIPLICITY OF AMERICAN REPORTS.

We have adverted generally to the very great embarrassment to the practitioner arising from the already great multiplicity of the American Reports—State and national. We reproduce from the *Western Jurist* an article written with great care, which gives with particularity and detail, a forcible statement of the extent and gravity of the growing evil. We do not think the scheme outlined by our contemporary perfectly feasible, nor, if it were, that it would be more than a palliative. The vice is a radical one of principle, not of method. The difficulty is not that Courts numerous beyond precedent elsewhere, and diverse in character beyond the experience of any other people, shonld be reported, as they often are, with prolixity, but that these Courts themselves should go on multiplying with a fecundity equal to any productive force in nature. The great difficulty, and one that will ultimately have to be met, is the diversity of the Judicial systems of the several States. The dream of an entire uniformity in the administration of justice in the United States is not only not chimerical, but is an absolute necessity in the future. Who can contemplate the intricacies which grew up in the British jurisprudence, in an inactive age and amongst a stable people, without a shudder at the interminable involution and complexity of the American jurisprudence, if the present system prevails, fifty years hence? The labyrinths in which the bewildered Theseus wandered in classic story were nothing to the meshes which would have to be unraveled by any one who would aim to take a comprehensive survey of the judicial systems of the several States, and their involved relations with the national Courts. To suppose that we are to have no remedy for this possible state of things is to affront the common sense of mankind. We have no doubt that it is demonstrable by any one that will take the trouble to work out the ratio, that if States increase in numbers as heretofore, and Courts are organized with the same regard to locality that all the rescripts and decretals of all the ages of the Roman empire, east and west, and the whole weight of the British decisions superadded, are not a circumstance to the amorphous mass we shall have accumulated by the year nineteen hundred and twenty.

There is no question but that, while the progress of civilization is simplifying, and making more cunning the instruments with which mankind accomplish what before was done clumsily and with travail, the tools with which the American and the British lawyer work are becoming infinitely more cumbrous and unwieldy. This is abnormal. The intricacy and complexity of the affairs of modern life are already sufficiently great without adding to the difficulty by a vicious system. Napoleon prided himself more upon having systematized and codified the laws of France than upon his victories. And his beneficent work was but a bagatelle compared to that of him who shall unite to clearness of intellect the force and energy of character which shall enable him to perform a similar work for the United States. The difficulties are prodigious. State lines would seem to present an insuperable barrier. Under our present system coercion is out of the question. But force is

not a necessary element. Given a beneficent and useful idea, and the pervasive intercourse of the age works wonders. Certainly in an age which entertains the idea of conventions which shall bring the whole world under a uniform system of public law, the idea of giving simplicity and uniformity to the administration of law throughout the United States, is not quixotic. We have a firm belief that, whatever the difficulty and whatever traditions are disturbed, the change must be and will be effected. The possible spectacle of five thousand *Fora* in the United States administering perhaps a hundred different and clashing systems of law, fifty years hence, is an idea a hundred times more objectionable than such an exertion of the degree of constraint necessary, in exceptional instances, to prevent the absurdity.

We are led to indulge this vein of thought by the assembly of Jurists at Heidelburg, the other day. A leading object of the Convention is to introduce uniformity into the German system of Jurisprudence. May all honor attend Bluntschili and his illustrious compeers in their good work, and may we Americans catch their spirit before our judicial experience is like those unhappy victims of old who floundered about in the

"——— Great Serbonian bog
Betwixt Damietta and Mt. Cassius old,
Where armies whole have sunk."

—*Pittsburg Legal Journal.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

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

SUMMERVILLE v. JOY ET AL.

Notice of trial by proviso.

The defendants having given notice of trial by proviso, claiming that the plaintiff had made default in not proceeding to trial within due time after a new trial had been ordered; the question, whether there had been, under the circumstances, a default such as to enable the defendants to give this notice considered, but not decided.

Quere: whether notice of trial by proviso has been abolished in this country.

[Chambers, Oct. 1, 1869.]

W. Sydney Smith for the plaintiff obtained a summons to set aside notices of trial by proviso, under the following circumstances:—The venue in this cause was laid in the County of Brant. The action was commenced on the 19th of March, 1868, and was tried on the 21st April, 1868, when a verdict was rendered for the plaintiff, for one thousand dollars damages.

The defendants moved for and obtained a rule absolute for a new trial on payment of costs in Hilary Term last, about the 6th day of March last. The costs were taxed and paid by the defendants on or about the the 10th day of April last, in time to let the plaintiff go to trial at the next assizes if he so desired. Only one assize was held for the County of Brant since that date, namely on the 26th day of April.

On the 20th day of September last, notice of trial by proviso and issue book were served, but no other proceedings were had in the cause since the payment of the said costs, nor did the defendants give any twenty days notice to the plaintiff to proceed, nor did they obtain any rule of court enabling them to proceed with the trial of this cause.

The plaintiff alleged that it was his intention to proceed to trial at the next Brant Assizes, if he could procure the attendance or evidence of a witness that he said was material and necessary.

The grounds of irregularity mentioned in the summons were:—1st. That no twenty days notice was given by defendants or either of them to plaintiff to proceed to trial.

2nd. That a trial having been once had, no such notice can or could at present be given to plaintiff.

3rd. That the costs, upon payment of which defendants obtained a new trial, were only paid in vacation preceding Easter Term last, and plaintiff has same time to proceed as if issue then joined, and no assize has passed since Easter Term, this cause being a country cause.

4th. That no notice of trial could be so given until plaintiff was in default under section 217 of the C. L. P. Act, and he was not so at the time of such services. And plaintiff, not having up to present time neglected either to give notice of trial, or to bring the cause on to be tried at the assizes following said Easter Term, is not subject to such notice to proceed, or of trial, or notice of trial by proviso.

The summons also called on the defendant to shew cause why the time for proceeding to trial herein should not be extended over the present ensuing assizes for the County of Brant, to the next Spring Assizes for said county, on grounds of absence of a necessary and material witness for said plaintiff, and the impossibility of procuring his evidence by commission or otherwise at the next assizes, or why such order should not be made for relief of plaintiff, as to said presiding judge might seem meet, on grounds disclosed in affidavits and papers filed.

J. A. Boyd shewed cause. The defendants were entitled to give notice of trial by proviso, owing to the lapse of time since issue had been joined, and for the default of the plaintiff in not having gone to trial at the Spring Assizes as he might have done.

Smith contra. There was no default as the case had been once tried, and the defendants could not proceed either by proviso or twenty days notice. In any case they were not bound to go to trial before the Fall Assizes.

The cases cited are referred to in the judgment of,

GWYNNE, J.—By the Imperial Common Law Procedure Act, 1852, sec. 116, it is enacted that "nothing herein contained shall affect the right of a defendant to take down a cause for trial after default by the plaintiff to proceed to trial, *according to the course and practice of the court.*

The 42nd rule of H. T. 1853, establishes the practice of the court thereafter to be that "no trial by proviso shall be allowed in *the same term* in which *the default* of the plaintiff has been made, *and no rule for a trial by proviso shall be necessary.*"

Our statute has no section similar to the 116th section of the Imperial Act, and the 227th section which makes a provision in substitution for the abolished practice, of moving for judgment as in case of a nonsuit, makes statutory what was provided for by rule 42 of H. T. 1853, in England, for it enacts that no rule for trial by proviso shall be necessary. Why there should be this difference between the two acts is not apparent. If our statute contemplated abolishing trial by proviso altogether, and making the 227th section a substitute for that also, one would suppose that instead of abolishing the *rule* for a trial by proviso, they would have abolished the trial by proviso itself.

It would seem that our courts do not consider that the trial by proviso is abolished, for we have also a rule which is in the words of the statute, that "no rule for trial by proviso shall be necessary."

In Chitty's Archbold, 11th ed., p. 1488, it is said, "it would seem that after the plaintiff has once tried the cause, he cannot be compelled to proceed to trial under the new Act," that is, under the clause in C. L. P. Act of 1852, similar to our 227th clause. No case is cited there in support of that dictum, but *Oakeley* v. *Ooddeen* 11 C. B. N. S 805, has been cited to me as supporting it. The case does not so decide in terms. The point did not precisely arise, and in fact, in one stage of the cause, notice had been given as if the section did apply, but upon its being given, the plaintiff also gave notice of trial, and the case was taken down, but went off for want of a jury, and the plaintiff took the case down for trial again, when the jury, being unable to agree, were discharged. What the case does decide is that where the plaintiff is not in default, there can be no trial by proviso, and that the plaintiff was not in default there, for he had taken the case down to trial, and it was no fault of his that a verdict had not been rendered. Mr. Smith dwelt strongly upon the language of Byles, J., in that case, viz.—"where a new trial is ordered, the plaintiff is *in the same position* as to proceeding to a second trial, as he was when issue was first joined." Mr. Smith, upon this contended that after a new trial was ordered, the plaintiff had the *same time* to go down to trial from the granting of the order, as he had from the joining issue, and the marginal note of the case supports this view. I think all that Byles, J. meant is explained by the next sentence in his judgment, that the plaintiff must, after the new trial is granted, "be guilty of a default before the defendant can interpose, &c." I think, however, that there is good ground for contending, from the terms of the 227th section of our act, that it does not apply to a case where there has been a trial—that is the conclusion which I think would be arrived at in England, upon the similar clause in the Imperial Act; but the Imperial Act specially preserves the practice of trial by proviso, which our act does not; and it may be contended that the omission in our act is intentional and that the trial by proviso as well as judgment in case of a nonsuit, is abolished, in which case our 227th clause must apply to a case where a new trial has been ordered, or the defendant will be without remedy. If I should decide now that trial by proviso is done away with, and that the plaintiff must proceed by a notice under the 227th clause, he could only obtain redress by appealing, and in the meantime he would be deprived of the right which is his, of proceeding to trial by proviso, if that mode of trial is not done away with, whereas, if it is done away with, the plaintiff can as effectually move after the nonsuit, if the plaintiff should suffer himself to be nonsuited, as now. If the 227th section does not apply where there has been a trial, then the time which by that section must elapse before the defendants can give the notice, is not the time which must elapse before he can give notice of trial by proviso, if that mode of trial still exists, unless that be also the time which must elapse according to *the practice of the court*, independently of this section, before the plaintiff is in default. Here an assize has elapsed since the new trial was ordered, and since the costs by the rule granting the new trial ordered to be paid have been paid. *Oakeley* v. *Ooddeen*, does not decide, and no case has been cited to me which does decide that the suffering that assize to elapse is not a default which entitles the defendants to proceed to trial by proviso, if that mode of trial is not abolished. The case of *The Staffordshire &c. Canal Company*, v. *The Trent and Mersey Canal Company*, 5 Taunt. 577, seems to imply that such a default does entitle the defendants to give notice of trial by proviso. I am not prepared to say that this mode of proceeding is abolished. I am not prepared to say that the defendants can and must proceed by a notice under the 227th section. I shall not therefore pronounce the service of the notice of trial to be an irregularity. I shall leave the plaintiff to elect whether he will proceed or not with the trial, and move against a nonsuit, if that should be the result. It is a point proper for the court to determine, and I shall not make an order which might probably deprive the defendants of what might prove to be their right. The defendants may proceed at their own risk of having their proceeding set aside by the court, if it should be of opinion that the trial by proviso is irregular, for if irregular, the irregularity, as it appears to me, is one constituting a nullity.

As to that part of the summons which asks as an alternative to put off the trial—upon the present material I cannot grant that because the plaintiff swears that he intends to proceed to trial himself at the next assize, if he can get the witness spoken of—it may be that he will get him—and if he cannot get him, and if the plaintiff cannot proceed to trial without him, the plaintiff can renew his motion to put off the trial before the judge at Nisi Prius; but while there is acknowledged to be a doubt whether he can be got or not, I should not, I think, put off the trial absolutely.

The proper order I think to make, under the circumstances, will be to discharge the summons without costs, leaving the parties to determine what course they will respectively pursue, and leaving to the court the question which this motion raises, and which is new in practice. If the plaintiff should resolve to let the defendants proceed, and should suffer a nonsuit, he can when moving against the nonsuit, appeal against my order, if he thinks his omitting to do so can in any way prejudice his right to move to set aside

the nonsuit. If the plaintiff should get his witness, he may himself, if he pleases, give notice of trial; or if he cannot get his witness he can, if he pleases, renew his motion to put off the trial.

Order accordingly.

CHANCERY.

(*Reported by* F. W. Kingstone, Esq., *Barrister-at-Law.*)

Re Tate.

Dower Act of Ontario.

The Dower Act of Ontario, 32 Vic. c. 7, sec. 3, is retrospective in its effects.

[V. C. M., Sept., 1869.]

One Tate applied, under the Act for quieting titles, for a certificate of title to a lot of land in the county of Kent. It appeared that one Ludovick Hartman, on the 29th March, 1840, conveyed the said lot of which he was then seized in fee, to a person through whom Tate claimed.

There was no evidence to show that Hartman was single when he conveyed, or that, if then married, his wife had since died. But on behalf of the petitioner it was submitted, that such evidence was unnecessary, as it was sworn that on the 1st March, 1860, ten years subsequent to Hartman's conveyance, the lot was in a state of nature and unimproved, and that consequently Hartman's widow (supposing her to exist, and to otherwise be entitled to dower) would be deprived of her right to dower in this lot by 32 Vic. c. 7, s. 3, Ontario, the first part of which enacts that "Dower shall not be recoverable out of any separate and distinct lot, tract, or parcel of land, which at the time of the alienation by the husband, or at the time of his death, if he died seized thereof, was in a state of nature and unimproved, by clearing, fencing or otherwise for the purpose of cultivation or occupation."

On the papers being laid before Mowat, V.C., for a certificate, he expressed a doubt whether the above clause of the Dower Act was retrospective in its operation, and directed that the point should be argued before him.

Accordingly on the 2nd September, 1869,

Kingstone, appeared for the petitioner.

The general rule that statutes ought not to be construed retrospectively is admitted, but the ground of that rule was the injury to vested rights that would be occasioned by a different construction, and therefore when provision was made for vested rights, the rule did not apply. In the statute under consideration, such provision was made, for 1st. The period for the Act taking effect was postponed from ths 19th day of December, to the 1st day of February following: and 2nd By the 24th sec. all actions of dower which should be pending when the Act *comes into force* may be continued and carried on to judgment in like manner as if the Act had not been passed. It is clear, therefore, that some provision was made for vested rights, and the court could not enter on the question of the sufficiency of the provision made by the Legislature. See *Towler* v. *Chatterton*, 6 Bing 258; *Reg.* v. *Leeds & Bradford R. Co*, 18 Q B. 343; *Dwarris* on Statutes, 542; *Doe dem. Evans* v. *Page*, 5 Q. B. 772.

The rule will yield to the intention of the Legislature where that intention clearly appears. And such an intention clearly appears here, for, 1. The words of sec. 3, are unlimited and are applicable to vested interests, the word "was" being used instead of the words "shall be." 2. By sec. 24 pending actions, and by sec. 42 certain vested interests, are excepted from the operation of the Act, even where it does come into force generally, and there would have been no occasion to make such exceptions if it was not intended that the Act should be retrospective in other respects. 3. Some portions of the Act, for instance sec. 23, must on the face of them have been intended to be retrospective.

Mowat, V.C., reserved judgment, and subsequently instructed the Referee to make the certicate free from any reservation for dower.

ENGLISH REPORTS.

CHANCERY.

Black v. Jobling.

Wills Act (1 Vict. c. 20, s. 26)—Will and Codicil not found at death—Presumed to be revoked—Probate granted of subsequent Codicil.

A. died having made a will and codicil, neither of which on his death was found. But a second codicil duly executed was found. It recited that the testator had already bequeathed to his grandchildren everything upon or relating to a certain farm. The question was whether that second codicil could be admitted to probate, or whether it fell with the will.

Held, that as this codicil had not been revoked by any of the modes indicated by the Wills Act (1 Vict. c. 20, s. 26) as the only means by which a codicil can now be revoked, it was entitled to probate.

[17 W. R. 1108].

The testator, Ebenezer Black, late of Grindon, in the County of Northumberland, died on 8th of May, 1868.

He made a will in February, 1865, and added a codicil in October, 1866. The codicil gave an annuity of £100 instead of a bequest of fifty shares in the West Hartlepool Dock and Railway Company which he had given in the will to his daughter Ann Jobling, and directed his trustees to dispose of his interest in his farm in Tenhamhill, together with the farming stock, &c., and to hold the proceeds arising therefrom in trust for the five children of his daughter Ann Jobling. Subsequently, by a deed of gift dated May 27, 1867, he "gave and devised" the same farm of Tenham-hill to his daughter and her children.

On the 19th of October in the same year he executed another codicil as follows:—

"I Ebenezer Black farmer Grindon in the parish of Norham in the County of Northumberland having already bequeathed to my five grandchildren issue of my daughter Ann Jobling to wit Mary Thomas Jane William and Ann Jobling the lease stock and profits with everything upon or relating to the farm of Tenham-hill they paying all rents taxes and whatever charges may come against the said farm of Tenham-hill in addition to which I now bequeath to each of the above-named children of my daughter Ann the snm of £300 sterling money when they attain

the age of twenty-one years out of my capital to be paid to them individually by my executors."

This was duly attested.

The will of 1865 and the codicil of 1866 were in the testator's possession, but at his death they could not be found. The defendant, as a legatee named therein, propounded the paper of 19th October, 1867, and the plaintiffs pleaded that it was not executed according to the statute 1 Vict. c. 26; that if well executed, it was executed as a second codicil to his last will and codicil; and that he destroyed them with an intention to revoke them and also the said alleged codicil.

The case was heard before Lord Penzance on May 29.

Dr. Deane, Q. C., and *Pritchard*, appeared for the plaintiff; and *A. Staveley Hill*, Q. C. and *Tristram*, *Dr.*, for the defendant.

J. H. Mitchell proved that the testator called at his house to ask him to draw a codicil to his will; that he did so, and that it was duly attested; and that the testator said that his capital was increasing, and that he had £1,100 he wished to leave to his daughter's family, and that he had already given them a farm and the stock upon it.

June 29.—Lord Penzance, after reciting the facts of the case, said:—The general proposition relied on against the codicil was that a codicil stood or fell with the will; that, no doubt, was a general proposition which was obtained in the Prerogative Court. I took the trouble to ascertain what under the old law were the exceptions, although the result of the case does not appear to me to be very satisfactory.

The earliest case is that of *Barrow* v. *Barrow*, 2 Lee. 335. There a testator made a will and a codicil, the whole effect of the codicil being to give the residue of his property to his wife. He afterwards burned the will, saying it was useless. The Court there held that it was clear that the codicil was not destroyed by the burning the will, but was a substantive instrument. The codicil gave the residue, and no one could say what that was, without having read the will, which disposed of the other portion of the property, but the Court, nevertheless, so held.

The next is the case of *Medlycott* v. *Assheton*, 2 Add 231, which was decided in 1824. There the will was made in April, 1820, and in December, 1820, the testatrix wrote a codicil giving £100 each to the two trustees named in her will, and dividing some trinkets among her friends. In 1824 she looked over the papers in her writing-desk, several of which she burned, and a few days afterwards wrote to her attorney desiring him to destroy her will. The Court held that it was altogether a question of intention, and that the legal presumption that the codicil fell with the will might be rebutted by showing that the testatrix intended the codicil to operate notwithstanding the revocation of the will, and as the circumstances were not sufficient to establish such an intention, the codicil was held invalid.

The next was the case of *Tagart* v. *Hooper*, 1 Curt. 289, decided in 1836. The paper was found in the writing-desk of the deceased, and it commenced thus: "This is a codicil to my last will and to be taken as a part thereof." The Court, in pronouncing for the paper, said that in all cases where the codicil had been considered void by the destruction of the will there were circumstances which showed that the codicil was dependent on the will.

In the other cases it was laid down that the codicil was revoked where the will was revoked; but in this case it was held that where the codicil was so revoked there were circumstances which showed it to be dependent on the will.

These are all the cases on the point before the passing of the statute, and certainly the result is not satisfactory.

The consideration of these cases leaves upon the mind no very definite idea of what is meant by "dependent on the will." In one sense, any codicil that makes any disposition of property at all, must be considered to be dependent on the will which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dissevered from the motives which induced the disposition of the rest.

It is difficult if not impossible to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of must be something of a more limited character. And the meaning of the cases may be that a codicil is independent of the will unless it is of such a character that the giving validity and effect to it without the will to which it was intended to be attached would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the Court in adopting it. But all these cases occurred before the Wills Act. Now the section of that Act is most distinct and positive in its terms. "No will or codicil," &c. And I should have had no hesitation in holding that the intention of that section was to do away with all implied revocations and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the Act. The first of these. *In the Goods of Halliwell*. 4 Notes of Cases, 400. The codicil was dated September 5th, 1845, and commenced thus:—"This is a codicil to the will of me R. H. and which I desire to be added to my will," and it related solely to account between himself and his partners, containing no bequest or appointment. The testator died on the 7th of September, 1846, and he expressly declared shortly before the making of the codicil that he had made a will and that it was then in existence. In that case, the Court said that, supposing it all to have been destroyed, the codicil would, upon the general principle, fall with it, but held that there was an exception in favour of the paper, inasmuch as it seemed to have been made for a particular purpose, and admitted to proof. Then comes the case of *Clogstown* v. *Walcott*, 5 Notes of Cases, 623, in which the will was made in 1840, the codicil in 1842. In April, 1846, he destroyed it all, and in so doing so expressed anxiety about the codicils observing this better. It would not affect the codicils with it. In that

case for the first time the Wills Act was cited, and the way the learned judge referred to it was as follows:—"Under the old law the effect of destroying a will was by presumption to defeat the operation of the codicil to that will, but by the present law there must be an intention to destroy. Here, however, the deceased did not mean to destroy the codicils, but on the contrary he expected at the time and declared afterwards that the parties mentioned in the codicils would have the benefit of the legacies he had given them. I am of opinion that the Court is bound to pronounce for the solidity of the two codicils and I decree probate of them to the brother who is executor according to the tenor on the first codicil." Since this last was established a case occurred, *Grimwood* v. *Cozens*, 2 Sw. & T. s. 64, which was heard in 1860, and in that case Sir C. Cresswell said, "I think it has been established by the cases cited at the bar that previous to the passing of 1 Vict. c. 26, a codicil was *primâ facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former, and moreover that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute. The question there is entirely one of the intention of the deceased. When a will and codicil have been in existence and the will is afterwards revoked it must be shown by the party applying for probate of the codicil alone that it was intended by the deceased that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil also is revoked." In that case the learned judge seems to have taken it for granted that there was no alteration in the principle, and to have decided the case as if it was under the old law.

Now in reviewing these decisions I cannot perceive that the effect of the statute has been fully considered by the Court. Sir C. Cresswell seems to have thought that it had been decided that the statute made no difference, and passed it by as being so. And Sir H. J. Fust discussed the point without any meaning whatever, merely approving that the statute had made it necessary that there should be an affirmative intention to revoke; but the statute says nothing of the kind, and unless it makes an actual revocation necessary it does not interfere with the existing law at all. In this unsatisfactory state of things I think I shall do best in such a case as the present by adhering to the statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the statute as the only modes by which a codicil is to be revoked, it remains in full force and effect and is entitled to probate.

Gibbs v. Harding.

Husband and wife—Separation deed—Agreement for specific performance.

An agreement in writing between a husband of the one part and the wife's father on behalf of the wife of the other part, that the husband and wife should live apart, and that the husband should execute a proper deed for that purpose, and for securing an annuity to the wife, was signed by both parties and also by the wife, and was acted upon by the separation of the husband and wife, and by payment of the annuity.

Held, that this was a valid agreement, and that having been acted upon, the plaintiff was entitled to a decree specific performance.

[17 W. R. 1093.]

This was a suit for the specific performance, under the following circumstances, of an agreement for separation between husband and wife.

Alice the daughter of Joseph Gibbs, was married to Thomas Harding on the 1st of March, 1857. There was no settlement executed upon their marriage, and in consequence of differences which arose between them, they agreed to live apart on the terms mentioned in the following agreement, which was signed by Alice Harding, Joseph Gibbs, and Thomas Harding:—

"Memorandum of agreement made this 5th day of July, 1865, between Thomas Archer Harding of the one part and Joseph Gibbs of the other part. Whereas differences having arisen between the said Thomas Archer Harding and Alice his wife, the daughter of the said Joseph Gibbs and it hath been agreed between the said Thomas Archer Harding and the said Joseph Gibbs, on behalf of his said daughter, that the said Thomas Archer Harding and his said wife should live apart, and the said Thomas Archer Harding doth hereby agree with the said Joseph Gibbs, when thereunto required, to execute and sign a deed of separation to be prepared by Messrs. Bradford & Foote, to contain all usual and proper clauses, and also to secure the sum of £40 a-year to commence from this date, and to be paid by equal quarterly payments by the said Thomas Archer Harding, for the maintenance of his wife and child, but if the said wife should now be in the family way and have another child within eight months from this time, then the sum of £40 shall be increased to £50 to be paid in like manner as the £40 provided for, so long as such child shall live, and the cost of the deed of separation and of this agreement shall be paid in equal portions by the parties hereto."

Alice Harding was not in the family way at the date of the agreement, and had no child born subsequently.

There were four children of the marriage, three of whom died before the separation of Alice and James Harding, and the fourth, Victoria Harding, who was one of the defendants, was an infant of seven years of age, and resided with her grandfather, Joseph Gibbs.

In pursuance of the agreement above mentioned Thomas and Alice Harding lived separately, and the annuity was regularly paid up to October, 1867, to Joseph Gibbs, who brought up the child, and maintained his daughter Alice Harding until she went into service, where she had since remained. In October, 1867, Joseph Gibbs applied to the defendant to execute a deed of separation which had been prepared by Messrs Bradford & Foote, in pursuance, as the bill alleged, of the memorandum of agreement, and which charged the annuity of £40 upon certain real estates to which the defendant was entitled in fee simple, but the defendant declined to execute it.

The bill prayed that the defendant, Thomas Harding, might be decreed specifically to perform the said agreement of the 5th day of July, 1865, and to execute the said separation deed so prepared as aforesaid, or some proper separation deed to be approved by the Court, and to pay the said annuity, and to do all other acts pursuant to the said agreement, the plaintiffs offering specifically to perform the said agreement on

their part, and in particular to execute a proper deed of separation pursuant thereto, and to be approved by the court, and that an account might be taken of the amount due in respect of the said annuity.

Greene, Q C., and *Bagshawe*, for the plaintiff, cited *Wilson* v. *Wilson*, 1 H. L. Cas. 538, 5 H. L. Cas. 40; and to show that the wife was not a necessary party to the agreement: *Williams* v. *Baily*, L. R. 2 Eq. 731.

Dickinson, Q C., and *W. W. Karslake*, for the defendant, contended that the agreement was one which the court could not enforce, as it was entirely without consideration, and was also a mere agreement between the wife's father and the husband, for the wife, as a married woman, could not contract, and her signing was ineffective. Even if the agreement had been binding, the defendant could not have been compelled to execute such a deed as that which was prepared. There was no covenant to indemnify the husband against the wife's debts, which was indispensable to such a deed, and the annuity was charged on particular landed property of the defendant's, although there was no agreement to that effect. Then the annuity was by this deed limited to the wife for ninety-nine years if she should so long live, whereas it should be to her so long only as she and her husband should live apart. This was not like the case of *Wilson* v. *Wilson*, where there was valuable consideration and a covenant to indemnify against debts. They cited *Walrond* v. *Walrond*, 7 W. R. 33, John. 18; and *Mornington* v. *Keane*, 6 W. R. 434, 2 De G. & J. 292.

Langley, appeared for the infant.

Stuart, V.C.—Said that this was a suit for the specific performance of an agreement for separation, the agreement being made between the father of the wife on her behalf, and the husband. The agreement was signed not only by the parties to it, but also by the wife herself, who was, therefore, no doubt, bound by it so far as a married woman could bind herself by contract. It had been argued that there was a want of consideration and mutuality in the agreement. But there was no doubt that the agreement was perfectly valid. It had been acted upon by the father of the wife who was at that time maintaining the child, and whenever an agreement which was not illegal had been acted upon and obligations incurred upon the faith of it, the Court would see that such an agreement was properly performed. Although there was nothing in the written agreement to justify the charging the annuity upon the land, as had been done by the deed which had been prepared, still the husband would have done better to have executed the deed, and if well advised would do so even then, but if he would not there must be a reference to chambers to settle a proper deed, and for the purpose of securing the annuity. It was with great reluctance that his Honour made a decree at all, as the case was one which should never have been brought into court, but, under the circumstances, there must be a decree for the specific performance of the agreement as prayed, and the husband must pay the costs of the suit.

Ross v. Tatham.

Breach of covenant—Administration suit—Liability of executors.

Executors applied in an administration suit to have a sum set aside to indemnify them against a breach of covenant in a lease, committed by the testator, the lessee.
The lessor had taken no action on the covenant, and had not come in under the administration decree.
Held, that the executors were exonerated by the administration decree from liability, and that their application must be refused. [V. C. M., 17 W. R. 960.]

This was a petition by residuary legatees for payment out of court of the residue.

The testator in the cause was lessee of certain property under a lease for ninety-nine years from Christmas, 1860. In the lease was contained a covenant to build within twelve months from the date of the lease a factory of certain specified dimensions, at a cost of not less than £1,800.

The testator died in 1864, without having erected the factory; a bill for the administration of his estate was filed, and a decree for administration made.

No action had been taken by the lessor in respect of the breach of covenant, nor had he come in under the decree.

Owen, in support of the petition.

Wickens, for the executors, contended that a sum of money sufficient to indemnify them against any liability in respect of the breach of covenant should be retained in court for that purpose. Lord St Leonards' Act, 22 & 23 Vict., c 35 does not relieve executors from liability in such a case as this. The covenants referred to in section 27 are only ordinary and usual covenants, and do not apply to an extraordinary covenant which to the knowledge of the executors has been broken: Morgan, p. 280. If the executors had been dealing with the estate out of court it would have been their duty to have set aside a fund to answer this liability. The Court will now direct them to do the same.

Osborne Morgan, *Q. C.*, *amicus curiæ*, cited *Thomas* v. *Griffith*, 9 W. R 293, 2 DeG. F. & J. 555.

Owen, in reply, referred to *Bennett* v. *Lytton*, 2 J. & H. 155. *Williams* v. *Headland*, 12 W. R. 367, 4 Giff. 495.

Romer, for the widow entitled to a life interest.

Nalder, for the plaintiff in the cause, supported the petition.

Malins, V. C., after mentioning the facts, decided that the lessor was a creditor of the testator for unliquidated damages in respect of the breach of covenant, and, as such ought to have brought in his claim under the administration suit, As he had not done so, he had lost his remedy against the executors, and must follow the assets. A contrary decision would give rise to the greatest inconvenience, and in this case the argument went to the extent of asking the Court to retain the money till the determination of the lease. His Honour could not accede to the application of the executors, who were, in his opinion, exonerated from liability; and, resting on the authority of *Bennett* v. *Lytton* and *Williams* v. *Headland*, made the order as prayed.

Ogle v. Knipe.

Will—Words—Bank stock—Money and securities for money

Bank stock is not comprised in a bequest of "money and securities for money."

[17 W. R. 1090.]

This was a special case, one of the objects of which was to determine whether certain Bank stock passed by the will of Elizabeth Furniss under the description of "moneys and securities for money" or was comprised in the testatrix's general personal estate.

Amphlett, Q C., and *Chitty*, for the plaintiffs, contended that the Bank stock passed under the residuary bequest contained in the testatrix's will.

Everitt and *Babington*, contra.

James, V.C.—It appears to me to be utterly impossible to hold that Bank stock, which is after all nothing but a share in the capital of a company, incorporated by Act of Parliament for the purpose of carrying on a banking business, is any more a security for money than a share in any other partnership. It is merely a share in an incorporated partnership, with certain privileges with regard to discounting bills and so on. It is really as much a share in a company as any co-partner's share in a brewery is. Therefore, clearly, Bank stock does not pass as security for money.

UNITED STATES REPORTS.

SUPREME COURT OF VERMONT.

Windham County; February Term, 1868.—In Chancery.

Louisa Clark & Fessendon Clark v. Shubael Peck & Tully A. Clark.

(Chicago Legal News.)

Husband and Wife. *Notice.*—Where the *use* of property is given to a married woman, she takes it independent of the marital rights of her husband, and a court of equity will restrain his creditors from coming in, and attaching and disposing of the property or its products in payment of the husband's debts.

Where a testator in his will provided for the payment of his debts, and the support of his widow, and gave a specific legacy to one of his sons, and then said, "I also give to my daughter, Sophronia Clark, one third of the residue of all my estate, both real and personal. I also give the use of the other two thirds of my estate, both real and personal, to Louisa Clark, the wife of my son Tully A. Clark, so long as she shall remain his wife or widow, and when she shall cease to remain his wife or widow, to the lawful heirs of the said Tully A. Clark," it was *held* that the said Louisa took the property thus bequeathed to her, to her separate use, and not subject to the marital rights of her husband, and, being in the possession and occupation thereof she is clearly entitled in equity to the products thereof, and to be protected against any attempt, on the part of her husband's creditors to deprive her of it.

Her title under the will was a matter of record. She was in possession, and that was at least constructive notice to all the world of her right.

The bill set forth that on or about the 10th day of September, 1841, the oratrix, Louisa Clark, married Tully A Clark, her present husband, and ever since said marriage said Louisa and Tully A. have lived, and still do live, together as husband and wife, and have now living three lawful minor children; which was admitted in the answers of the defendants. On or about the 25th day of April, 1850, Perez Clark, the father of Tully A., since deceased, made and executed his last will and testament, containing * * * * among other provisions the following:

"I also give the use of the other two-thirds of my estate, both real and personal, to Louisa Clark, the wife of my son Tully A. Clark, so long as she shall remain his wife or widow, and, when she shall cease to remain his wife or widow, to the lawful heirs of the said Tully A. Clark.

"And I hereby nominate, constitute and appoint my son, Tully A. Clark, to be executor of this, my last will and testament.

* * * * * * * * *

The case was heard on bill, answers, replication, and proofs, at the September term, 1864, Barrett, Chancellor.

Inasmuch as the property was receipted, and has remained in the possession of the oratrix, an injunction simply restraining the defendant Peck from pursuing it, was all that seemed necessary. It was therefore ordered that a decree be entered for a perpetual injunction to that intent and effect, and for the oratrix to recover costs of the defendant Peck.

Appeal by the defendant Peck.

Butler & Wheeler, for the defendant Peck.

The will of Perez Clark does not limit the use of two-thirds of the farm to the oratrix, to the exclusion of the marital rights of her husband. *Brown* v. *Clark*, 3 Ves., 166; *Houghton* v *Hapgood*, 13 Pick., 154; 2 Roper on Husband and Wife, 97, 98; Toller on Executors, 225; 2 Story Eq., 608, 609; *Frary et al* v. *Booth et al.*, 37 Vt., 88; *Stanton* v. *Hall*, 2 Russel & Mylne, 175; *Tyler* v. *Lake*, Ib., 183; *Elliot* v. *Cordell*, 5 Madd. 96.

To exclude the husband's rights requires affirmative words expressing that intention on the part of the testator. At the decease of Patience, the widow of Perez, the oratrix became seized of a freehold estate in two-thirds of the farm. The rents, profits and products of this estate were the absolute property of her husband. Reeve's Dom. Rel., 27; *Clapp* v. *Stoughton*, 10 Pick., 463; *Shaw, admr.*, v., *Partridge*, 17 Vt., 626; *Bruce und wife* v. *Thompson*, 26 Vt., 741.

The purchase of Sophronia's third in the name of the oratrix, was the same, in effect, as if made in the name of her husband. Reeve's Dom. Rel., 60; 2 Story Eq., 443.

The right of the oratrix to the oxen and horse, must stand upon the allegation in the bill that they were purchased with "moneys of her own, which she inhereted from her father's estate," and the proof, by the cross-examination of Morse, that the moneys came to her husband's possession. *Parks & Co.*, v. *Cushman*, tr., 9 Vt., 320; 26 Vt., 741; 2 Story Eq., 631; *Ward* v. *Morrill et al.*, 1 D. Chip., 322.

The source of the oratrix's property, in the cows, steers and heifers, does not appear with sufficient distinctness to show that she has any interest in them. Toller on Executors, 226; 2 Story Eq., 625; 2 P. Williams. 82. 83, 341.

No question arises now as to the equitable right of the oratrix to have any portion of this

property secured to her and her children's maintenance.

But if the bill were framed with the proper aspect, there is not enough alleged or proved to entitle her to any allowance for maintenance. 24 Vt., 391; Reeve's Dom. Rel., 12 n. 1; *Davis* v. *Newton*, 6 Met., 537; 24 Vt., 395: 37 Vt. 91; 2 Story Eq., 643; 1 Roper, 171; *Elliott* v. *Cordell*, 5 Madd., 96.

H. E. Stoughton, for the orators, cited, as decisive of the claims of the defendant *Peck*, *Russell* v. *Filmore*, 15 Vt., 130; *Blaisdell* v. *Stevens, et al.*, 16 Vt., 179; *Richardson, admr.*, v. *Merrill et al.*, 32 Vt, 28; 19 Vt., 410; *White* v. *Hildreth and tr.*, 32 Vt., 266; *Webster* v. *Hildreth and tr.*, 32 Vt., 457; *Caldwell, admr.*, v. *Renfrew*. 33 Vt., 213; *Barron* v. *Barron et al.*, 24 Vt., 375, 391–397; 32 Vt., 34.

The opinion of the court was delivered by

Pierpoint, C.J.—It appears in this case, that Tully A. Clark, one of the defendants, is the husband of Louisa Clark, the oratrix, and the son of Perez Clark, deceased. Fessenden Clark, one of the orators, is the administrator, with the will annexed, of said Perez Clark. Shubael Peck, the other defendant, is a judgment creditor of said Tully A. Clark, seeking to collect his execution by the sale of certain property which he has taken thereon, claiming it to be the property of said Tully A. The orators claim that said property belongs to the oratrix, Louisa Clark, being the property, or the product of property that was bequeathed by said Perez Clark to her for her separate use. This bill is brought to restrain the defendants from disposing of said property, and for its return.

The main question involved is as to the construction of that clause in the will of said Perez Clark, by which the bequest is made to said Louisa Clark.

The testator in his will provides for the payment of his debts and the support of his widow' and gives a specific legacy to his son Fessenden' and then says: "I also give to my daughter' Sophronia Clark, one third of the residue of all my estate, both real and personal. I also give the use of the other two-thirds of my estate, both real and personal, to Louisa Clark, the wife of my son Tully A. Clark, so long as she shall remain his wife or widow, and when she shall cease to remain his wife or widow, to the lawful heirs of the said Tully A. Clark." Does Louisa Clarke take the property thus bequeathed to her, to her separate use, or subject to the marital rights of her husband? The rule, as laid down by Judge Story, and supported by numerous decided cases, is this: "That where, from the terms of a gift, settlement or bequest, the property is expressly, or by just implication designed to be for her separate and exclusive use (for technical words are not necessary), the intention will be fully acted upon, and the rights and interests of the wife sedulously protected in equity;" but that the purpose must clearly appear beyond any reasonable doubt. 3 Story's Eq., 608.

In ascertaining the intention of the testator (for that is always to be sought for in construing instruments of this kind), we are to be governed by the same rules, in a case like the present, as apply in all other cases of the construction of wills. We are not to look at the words alone to ascertain the intent, but the language used is to be considered, in connection with the situation of the parties, the surrounding circumstances, the subject matter, the object to be accomplished, etc.; as it is proper to do in the construction of all written instruments. This is too well settled to require argument or authority in its support. In applying this principle to the case in hand, what aid do we derive from such sources? The interest given by the will to Louisa Clarke, is only the *use* of certain property for a specified period, and then the property itself is given to the children of her husband. She is not the child of the testator; her husband is. They had children, and they and their children were living together in harmony at the time the will was made. There is nothing to show any ill will on the part of the testator toward either. The natural course under such circumstances would seem to have been for the testator to give the property to his son, Tully A., either absolutely, or for his life or the life of his wife, and then to his children. In deviating from this course and in giving the use to his wife, it is apparent the testator had a purpose; and it is difficult to conceive of any other purpose than that she should hold the property to her sole and separate use, to the exclusion of the marital rights of the husband. If the testator had supposed that, in giving this use to the wife, the legal effect would be to vest such use absolutely in the husband, would he have made such a provision? If so why not give it directly to the husband? The legal effect is the same. Why go through the form of apparently giving her something, when in fact he gives her nothing?

If the *title* to the property had been given to the wife, then there would have been something for the will to operate upon aside from its use; the title would have been in her, subject to the rights of the husband in its use, and we could reasonably suppose such to have been the intent of the testator. But here the use only is given, and that necessarily excludes the use of the husband. To have added *to be held to her use* would have been mere repetition. If we hold that she takes it subject to the marital rights of her husband, we render the provision wholly nugatory, so far as the interests of the wife are concerned, and make it impossible for her to avail herself of it in any form, and, also, defeat the manifest intent and purpose of the testator in making it.

We think the fair and just implication arising from the language of the provision, viewed in the light of the facts and circumstances always proper to be considered in such cases, is that it was the clear intention of the testator to give the use of the property for the sole and exclusive benefit and use of the said Louisa; and this, too, beyond a reasonable doubt.

If there was occasion for it, I think something might be said as to the reasonableness of the rule requiring that the rights of the wife should be established byond a reasonable doubt, as against the claims of the husband. Why she is not entitled to the benefit of a fair balance of testimony as in other civil cases, is not quite apparent to me. I am aware of the old idea that the male is the superior branch of the hu-

man family, and that the rule referred to has its origin in that idea, and that all doubts are to be solved, and all presumptions raised in favor of the husband and against the wife, so far as her property is concerned

This idea, and the rules that sprung from it, had *their* origin in a period much nearer the days of semi-barbarism than the present; and as civilization and Christianity have advanced in the world, the public mind, as evidenced by both legislative and judicial action, has become much more inclined to place the rights of the wife more nearly upon an equality with those of the husband, in respect to property. The court of chancery in this State is constantly extending its action in aid of the rights of the wife to her separate property.

It appears from the bill, answers and proofs, that after the decease of the widow of the testator, to whom he gave all his property during her life, the said Louisa, with the consent of the administrator, as aforesaid, went into possession of the said two-thirds with her said husband and children, and still continues to occupy the same, claiming to have the sole and exclusive right to the use of the same, her said husband acquiescing therein; that she bargained with the said Sophronia for the purchase of the other third of the real estate of the said Perez, took a bond for a deed, and paid a part of the purchase-money out of her own money, being the proceeds of her two thirds of the said estate, and took the possession; that the said Louisa and her husband both treated and regarded the use and product of this property as the separate estate of the said Louisa, the said Tully A. disposing of the product only with her consent and under her direction, and applying the proceeds in the support of herself and family, and, by her directions, in payments toward the share of the said Sophronia.

The right to the use of this property being in the said Louisa, and she being in the possession and occupation thereof, she is clearly entitled in equity to the products thereof, and to be protected against any attempt on the part of the creditors of her husband to deprive her of it. Her title under the will was a matter of record. She was in possession, and that was at least constructive notice to all the world of her right.

The property taken by the said Peck consisted of hay and grain in the straw, which grew upon the said premises, and were on it when taken; a yoke of oxen and a horse, which the said Louisa purchased with her own money, obtained independently of her husband, and which were in her possession on the farm; a wagon and harness, which belonged to the estate of the said Perez, the use of which passed to the said Louisa, and were in her possession; two steers, two cows and two heifers, which were grown and raised upon the said premises, and were a part of the proceeds, product or income thereof.

There is nothing in the case to show that the said Tully A. ever owned any part of this property, or ever paid a dollar toward its purchase or procurement, or ever claimed to own it, or ever exercised any acts of ownership over it except as subservient to her rights as its owner.

Under such circumstances we think it inequitable that the creditors of the said Tully A. should come in and seize that property, and dispose of it in payment of his debts; and the said orators having come into a court of chancery, and asked to be relieved from the attempt of the defendant to do so, we think they are entitled to the relief prayed for.

Decree of the Chancellor affirmed.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

(Continued from page 247.)

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

Easement—*See* Landlord and Tenant, 4, 5; Light.

Ejectment—*See* Landlord and Tenant, 8; Mesne Profits.

Election.

1. A., a married woman, having a general power of appointment, notwithstanding coverture over fund X., and also power to appoint fund Y. (in case she died in her husband's lifetime), appointed both funds by will made in her husband's lifetime, amongst several persons, some of whom were her next of kin. By the death of her husband in her lifetime, A. became absolutely entitled to fund Y.; but her will was not republished. Fund X. was insufficient to pay the legacies in full. *Held*, that those of the legatees who were also next of kin were not put to their election, but were entitled both to their shares of the residue (as to which, in the events that had happened, the appointment had failed), and also to proportionate parts of their legacies.—*Blaiklock* v. *Grindle*, Law Rep. 7 Eq. 215.

2. A testator, being entitled under a settlement, subject to a life-interest, to a moiety of a fund, by will, after reciting (erroneously) that he was entitled, "subject to the trusts" in the settlement, to the whole fund, purported to bequeath the whole, and to give one moiety to the husband of the woman who was really entitled to a moiety of the fund. *Held*, that the husband, who had become his wife's administrator, was not bound to elect between the legacy and his wife's moiety.—*Grissell* v. *Swinhoe*, Law Rep. 7 Eq. 291.

See Voter.

Embezzlement.

A. was treasurer of a friendly society, whose rules directed that all money should be paid to the treasurer, and that he should make no payments, except on an order signed by the

secretary, and that he should give security. Another rule provided that all the moneys of the society should be vested in the trustees. A. was a member of the society, but received no salary as treasurer. *Held*, on an indictment against A., as clerk and servant of the trustees of the society, for embezzling money which he had received as treasurer, that he was not the "clerk or servant" of the trustees within 24 & 25 Vict. c. 96, s. 68.—*The Queen* v. *Tyree*, Law Rep. 1 C. C. 177.

Equitable Assignment—*See* Assignment.

Equity Pleading and Practice.

Plaintiff filed a bill alleging that, while infirm, she made a deed in favor of the defendant of which she had no copy, and which the defendant refused to produce, and praying that it might be cancelled. She then filed a second bill, stating the above facts, and alleging that she had since seen the deed; and, finding that it contained a power of appointment, she had made an appointment to herself that the defendant claimed to hold the deed as trustee, and praying that if the court, on the hearing of the first suit, should not be of opinion that the deed ought to be declared void, it would then order that it should be delivered up to her, and that the second suit might be treated as supplemental "so far as necessary or proper" to the first. The defendant demurred to the second bill on the grounds that, (1) the plaintiff should have amended her first bill instead of filing the second; (2) that the bill presented an alternative case. The demurrer was overruled.—*Foulkes* v. *Davies*, Law Rep. 7 Eq. 42.

See Attorney, 3; Company, 3; Contempt, 3; Costs; Injunction; Lunatic; Principal and Surety, 1; Vendor and Purchaser of Real Estate, 3.

Escape.

By statute, a registrar in bankruptcy may act, in a commissioner's absence, as commissioner; but the general rules issued under authority of the statute provide that he shall not so act, unless by a request in writing, except in case of emergency, the nature whereof shall be entered on the proceedings. To an action for escape, the sheriff pleaded that the debtor had been released by order of a registrar. The plaintiff replied that the registrar had not been requested in writing to act as commissioner, nor had any emergency arisen, nor the nature thereof been entered on the proceedings. *Held*, on demurrer, that, if the order was voidable, it was not void, and protected the sheriff.—*Hargreaves* v. *Armitage*, Law Rep. 4 Q. B. 143.

Estate by Implication—*See* Devise, 3.

Estate Tail—*See* Devise, 3; Vested Interest, 2.

Estoppel.

The plaintiff sold shares in a company to W., the managing director of the company. On the settling day, W. gave the name of G. as the real purchaser, and the transfers were made and sent to him. W. also passed a check on the company's bankers for the amount of the purchase-money to the debit of G. and informed G. what he had done. G. refused to execute the transfers; but retained them till the company was wound up, and then handed them to the secretary as a security for the money carried to his debit. *Held*, that G. was estopped to deny that he was the purchaser of the shares, and that he must indemnify the plaintiff against the calls, and pay the costs of the plaintiff, and of W.—*Shepherd* v. *Gillespie*, Law Rep. 3 Ch. 764.

See Company, 1; Divorce, 4; Landlord and Tenant, 3; Vendor and Purchaser of Real Estate, 3.

Evidence.

A memorandum by the registrar in bankruptcy on a composition deed, that the deed has been duly registered, pursuant to the provisions of the Bankruptcy Act, 1861, is *prima facie* evidence that an affidavit, pursuant to that act, was delivered to the registrar, together with the deed.—*Waddington* v. *Roberts*, Law Rep. 3 Q. B. 579.

See Award, 1, 2; Divorce, 1, 3, 4; Insurance, 3; Interrogatories; Mesne Profits, 1; Necessaries; Perpetuity; Prescription; Presumption; Production of Documents; Railway, 2; Will 2, 3.

Executor and Adminstrator.

1. A will contained these words: "I leave the sum of one sovereign each to the executor and witness of my will for their trouble, to see that every thing is justly divided," but did not name any executor. Beneath the signature of the testator, and opposite the names of the attesting witnesses, were the words, "executors and witnesses." *Held*, that there was no appointment of executors.—*Goods of Woods*, Law Rep. 1 P. & D. 556.

2. A. having deposited certain title deeds with a bank as security for advances, by will empowered his executors to charge his real estates in aid of his personal estate. His widow and sole executrix was allowed to draw

out other money as executrix on deposit of other title deeds of A.'s estate. The moneys were drawn out from time to time in small sums, and applied by the widow for her own expenses, as well as for A.'s debts. *Held*, that in absence of proof of notice to the bank of A.'s breach of trust, the bank was entitled to prove against the estate for their advances to the widow.—*Farhall* v. *Farhall*, Law Rep. 7 Eq. 286.

See Conflict of Laws; Nullity of Marriage; Power, 2; Principal and Surety, 1; Sale, 5.

Executory Trust.

A testator gave jewels to A. "to be held as heirlooms by him, and by his eldest son on his death, and to descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity will permit. And I request A. to do all in his power, by will or otherwise, to give effect to this my wish." The testator left no real estate. *Held*, that this was a good executory trust for A. for life, remainder to B. (A.'s eldest son) for his life, and on the death of B., in trust for B.'s eldest son, to be a vested interest in him when he should attain twenty-one; but if he should die in B.'s lifetime, or after him under twenty-one, leaving an eldest son born before B.'s death, in trust for such eldest son, to be a vested interest, when he should attain twenty-one. Subject to these limitations, the jewels vested in A. absolutely.—*Shelley* v. *Shelley*, Law Rep. 6 Eq. 540.

Factor.

An agent "intrusted with, and in possession of, goods," within the Factors Acts, is a person who is intrusted as agent for sale; and, consequently, one whose authority to sell has been revoked cannot pledge goods which had been intrusted to him for sale; but which he has wrongfully retained after his authority has been revoked, and the goods demanded from him by his principal. (Exch. Ch.)—*Fuentes* v. *Montis*, Law Rep. 4 C. P. 93.

See Marshalling of Assets.

False Pretences—*See* Larceny, 1.

Fixtures—*See* Landlord and Tenant, 6.

Forgery—*See* Larceny, 1.

Fraudulent Conveyance.

A trader, by a post-nuptial settlement, settled all his property, both present and future, on trust for his wife for her separate use for life, remainder for himself for life, remainder for his children, reserving the control of his stock in trade to himself. He had no debts at the time, except mortgages on the settled property, which were afterwards paid off. Five years later he became bankrupt. *Held*, at the suit of his assignees, that the settlement was void, under 13 Eliz. c. 5.—*Ware* v. *Gardner*, Law Rep. 7 Eq. 317.

See Voluntary Conveyance.

Frauds, Statute of—*See* Contract.

Freight.

1. The owners of the cargo advanced money to the master, and the master gave a receipt promising to pay the amount out of the freight. *Held*, that this was a loan, and not an advance of freight.—*The Karnak*, Law Rep. 2 Adm. & Ecc. 289.

2. The consignee of goods, before the arrival, indorsed the bill of lading to A. in these words: "Deliver to A., or order, looking to him for freight without recourse to us." The goods were delivered to A. In a suit by the ship-owners against the consignee for freight, it was admitted that the consignee would have been liable to A. for any freight paid by him. *Held*, that the burden of proof was on the consignee to show not only that the indorsement was on the bill of lading, when it was given to the captain, but that the captain in fact saw and assented to it. (Exch. Ch.)—*Lewis* v. *M'Kee*, Law Rep. 4 Ex. 58.

3. By a charter-party the charterer agreed to load "a full and complete cargo of oats or other lawful merchandise, and to pay freight, as follows:" 4*s*. 6*d*. sterling per 320 lbs. weight delivered for oats, and if any other cargo be shipped, in full and fair proportion thereto, according to the Baltic printed rates. The charterer put on board a full and complete cargo of flax, an article mentioned in the said rates, and paid the freight earned by the flax according to a scale derived from the tables which form the said rates. The ship-owners claimed, in addition, the difference between this amount and the amount which would have been earned by a full cargo of oats. *Held*, that flax being "lawful merchandise" within the meaning of the charter-party, the charterer had fulfilled his contract, and was therefore not liable for the additional freight claimed.—*Southampton Steam Colliery Co.* v. *Clarke*, Law Rep. 4 Ex. 73.

4. The defendant shipped cement under a bill of lading which stipulated that freight should be paid "within three days after arrival of ship, and before delivery of any portion of the goods." The ship arrived with the

cement, but was, within the three days, in consequence of an accidental fire, scuttled with a view of saving ship and cargo, and on her being raised the cement was found to be useless, having ceased to exist as cement, and the consignees refused to receive it or to pay freight. *Held*, that the ship-owners, not being ready to perform their part of the contract, could not sue for freight.—*Duthie* v. *Hilton*, Law Rep. 4 C. P. 138.

Friendly Society.

A member of a benefit building society obtained an advance on his shares on executing a mortgage by which he covenanted to repay the advance with interest by monthly subscriptions. The mortgage contained a power of sale in the event of the subscriptions falling into arrear, and the purchase-money was to be applied in satisfaction of all moneys then due or to become due from the mortgagor in respect of subscriptions, fines, or otherwise, under the mortgage, the surplus to be paid to the mortgagor. The mortgagor having fallen into arrears, the premises were sold. *Held*, (reversing the decision of Giffard, V.C.), that the mortgagor was not entitled to any discount on subscriptions not due, though the rules would have allowed him such discount in case of redeeming his mortgage before the expiration of the full period of payment.—*Matterson* v. *Elderfield*, Law Rep. 4 Ch. 207.

Gas—*See* Injunction, 1, 2; Larceny, 3.

General Average—*See* Insurance, 2.

Gift.

A check was given by A. to B., and presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the check not having been paid. *Held*, a complete gift, *inter vivos*, of the amount of the check.—*Bromley* v. *Brunton*, Law Rep. 6 Eq 275.

Guaranty.

A. drew bills on B., who accepted them, and C. gave B. a guaranty that funds should be supplied to take them up. S. discounted the bills, being informed by A. of the guaranty; but S. never notified B. or. C. *Held*, that S. had no equity to claim as a creditor against C. on the guaranty.—*In re Barned's Banking Co*, Law Rep. 3 Ch. 753.

See Sale, 5.

Heirlooms—*See* Executory Trust.

Highway—*See* Injunction, 1, 2; Negligence, 1.

Husband and Wife.

1. Land was held by a trustee on trust to sell and immediately divide the proceeds among certain persons, one of whom was a married woman. By a deed, in which the *cestuis que trust* joined, the trustee bought the estate. A. and her husband concurred in the deed, but it was not acknowledged under 3 & 4 Wm. IV. c. 74. A.'s husband received her share of the purchase-money. *Held*, that A., who had survived her husband, could have the deed set aside.—*Franks* v. *Bollans*, Law Rep. 3 Ch. 717

2. In a settlement made on the marriage of a female infant, the husband covenanted that if his wife attained twenty-one, he would concur and would endeavour to induce her to concur in settling her real estate. This was never done. In 1862, after the wife was of age, the husband and wife mortgaged her real estate to secure money advanced to the husband. They both told the mortgagee that there was no settlement; and though the person who acted as solicitor for both parties knew that there was, he concealed it with the acquiescence of the husband and wife from the mortgagee. In 1865, the mortgagee discovered the existence of the settlement. The mortgage deed, by mistake, was not effectually acknowledged by the wife till after the mortgagee had received notice of the settlement. *Held*, on a bill by the mortgagee, (1) that he was not affected by notice to the solicitor; and (2) that though the wife's estate did not pass to the mortgagee till after notice of the settlement, yet that she had been guilty of a fraud which bound her estate, and that the mortgagee had priority over those claiming under the settlement.—*Sharpe* v. *Foy*, Law Rep. 4 Ch. 35.

3. In a marriage settlement it was declared and the husband covenanted that if during the coverture any real or personal estate should come to or vest in the wife or the husband in her right, by devise, descent, gift, or otherwise, it should be conveyed and assigned by the husband and wife on the trusts of the settlement. *Held*, that a legacy given to the separate use of the wife was within the covenant.—*Campbell* v. *Bainbridge*, Law Rep. 6 Eq. 269.

4. A power in a will for trustees to apply part of a fund settled for the separate use of a married woman for life, remainder for her children, at any period of her life for her advancement or benefit: *Held*, under special circumstances to authorize an advance to her husband, on his personal security, for the purpose of setting him up in trade.—*In re Kershaw's Trusts*, Law Rep. 6 Eq. 322.

See Alimony; Contempt, 3; Divorce; Election, 1; Injunction, 5; Nullity of Marriage; Power, 2; Trust, 3; Wife's Equity.

Ignorance of Law—*See* Voter.

Illegitimate Children.

1. Testator, after a gift to "my son T." (who was illegitimate), directed a division of his estate into seven parts, one of which he gave to his wife and after her death to "such of my children to whom the other six shares are given." He directed those six shares to be paid "among all my children living at my decease, except my son T." Testator left seven children, of whom two (T. and A.) were illegitimate. *Held*, that A. was not entitled to a share.—*In re Well's Estate*, Law Rep. 6 Eq. 599.

2. An unmarried woman, by will, describing herself as a spinster, gave her property to her children. She had four illegitimate children, and in a codicil she described them by name. *Held*, that these children and not the next of kin were entitled to the property.—*Clifton* v. *Goodbun*, Law Rep. 6 Eq. 278.

3. Testator gave a fund to his daughter M. for life, and after her death to all the children of M. begotten, or to be begotten, in equal shares. At the time of the testator's death M. had four children by A., whom the testator believed to be M 's lawful husband, and after the testator's death M. had three more children by A. The marriage between M. and A. turned out not to be lawful. M. never had any legitimate children. *Held*, that the children born before the testator's death took under the gift, but those born after his death did not.—*Holt* v. *Sindrey*, Law Rep. 7 Eq. 170.

4. Illegitimate children of an unmarried woman described in the will by her maiden name, are entitled to share in a legacy to her "and her two youngest daughters."—*Savage* v. *Robertson*, Law Rep. 7 Eq. 176.

Income Tax.

A fund was assigned to trustees on trust to pay a fixed sum annually to the assignor's creditors in payment of their debts *pro rata*, with interest on such debts till payment. *Held*, that the assignor was entitled to deduct income tax on the payment of interest.—*Crane* v. *Kilpin*, Law Rep. 6 Eq. 334.

Indictment.

1. It is not error that the caption of an indictment states that the grand jurors were sworn and affirmed without alleging who were sworn and who were affirmed.—*Mulcahy* v. *The Queen*, Law Rep. 3 H. L. 306.

2. The 11 Vict. c. 12, declares it felony "to compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen." In an indictment under this statute it is sufficient to allege as overt acts that the defendants conspired, combined, confederated, and agreed to commit the offence; and the allegation in one count of several different overt acts of felony is not objectionable.—*Ib.*

See Judgment.

Infant.

The defendant, being of age, signed the following statement at the foot of an account of the items and prices of goods furnished to him, while an infant by the plaintiff: "Particulars of account to the end of 1867, amounting to 162*l.* 11*s.* 6*d.*, I certify to be correct and satisfactory." *Held*, that this was not such a ratification in writing of the contract within 9 Geo. IV. c. 14, s. 5, as to render him liable.—*Rowe* v. *Hopwood*, Law Rep. 4 Q. B. 1.

See Necessaries.

Injunction.

1. The breaking up of the streets of a town for the purpose of laying gas-pipes without lawful authority will be enjoined in equity. (*Sheffield Gas Consumers' Co*, 3 DeG. M. & G. 304, not followed.)—*Attorney-General* v. *Cambridge Consumers' Gas Co.*, Law Rep. 6 Eq. 282.

2. The breaking up of the streets of a town without lawful authority, for the purpose of laying pipes by an unincorporated gas company, is not such a nuisance as will be enjoined in equity on an information at the relation of a rival gas company (reversing the decree of Malins, V.C.)—*Attorney-General* v. *Cambridge Consumers' Gas Co.*, Law Rep. 4 Ch. 71.

3. Where a plaintiff has proved his right to an injunction against a nuisance, it is not for the court to inquire how the defendant can best remove it. The plaintiff is entitled to an injunction at once unless the removal of the nuisance is physically impossible. But when the difficulty of removing the injury is great, the court will suspend the operation of the injunction for a time, with liberty to the defendant to apply for an extension of time.—*Attorney-General* v. *Colney Hatch Lunatic Asylum*, Law Rep. 4 Ch. 146.

4. The defendants, officers of a trades' union gave notice to workmen by placards not to hire themselves to the plaintiff pending a dispute between the defendants and the plaintiff. The bill prayed an injunction to restrain the issuing of the placards, alleging that by means thereof the defendants had intimidated work-

men from hiring themselves to the plaintiff, and that the plaintiff was thereby prevented from continuing his business, and the value of his property materially diminished. *Held*, on demurrer, that the acts, as alleged, amounted to crime, and that they would be enjoined, inasmuch as they also tended to the deterioration of property.—*Springhead Spinning Co.*, v. *Riley*, Law Rep. 6 Eq. 551.

5. A wife moved for an injunction to restrain her husband from proceeding to obtain a dissolution of marriage, alleging a contract by him to condone all former causes of complaint, and not to take legal proceedings in respect thereof. The injunction was refused, as the contract might be set up in defence in the divorce court, and as it was executed by the husband in ignorance of the fact that his wife had committed adultery and on her positive assertion of innocence.—*Brown* v. *Brown*, Law Rep. 7 Eq. 185.

6. An injunction restraining a defendant from entering a house was suspended during an appeal to the House of Lords; the case being one in which irreparable injury might be done to the defendant, and the defendant undertaking to proceed on the appeal with all due diligence.—*Walford* v. *Walford*, Law Rep. 3 Ch. 812.

See Contempt, 3; Costs.

Insanity—*See* Lunatic.

Insurance.

1. A policy with the usual suing and laboring clause on the plaintiff's vessel was made "subject to the running down clause." By that clause, the assurers agreed that if the plaintiff became liable to pay and paid as damages for running down any other ship any sum not exceeding the value of the vessel insured, they would repay to the plaintiff a certain proportion of such sum. The vessel having run down another, the plaintiff successfully defended an action brought against him for the injury. *Held*, that he could not recover any part of the costs of the defence, either under the suing and laboring clause, or the running down clause.—*Xenos* v. *Fox*, Law Rep. 3 C. P. 630.

2. A. insured goods by a policy which included jettison among the perils insured against. The goods were jettisoned. A. sued the underwriters for the whole amount insured, without having first collected the contributions to which he was entitled from the other owners of the ship and cargo. *Held*, that he could recover.—*Dickenson* v. *Jardine*, Law Rep. 3 C. P. 639.

3. A. insured goods against "perils of the seas," &c., and "all other perils, losses," &c., for a voyage by a steamer from K. to Y. While the steamer was loading at K., her draught was increased by the weight of the cargo, till the discharge pipe was brought below the water, which then flowed in and through some valves negligently left open, and injured A.'s goods. *Held*, (1) that the injury was caused by a peril insured against; (2) that the burden of proving unseaworthiness was on the underwriter.—*Davidson* v. *Burnand*, Law Rep. 4 C. P. 117.

Interest.

1. In the voluntary winding up of a joint-stock company, claim made to the liquidator on bank-notes and drafts current at the time of the stoppage, is a sufficient demand for payment, and interest runs from the date of such claim.—*In re East of England Banking Co.*, Law Rep. 4 Ch. 14.

2. Upon the winding up of a bank, all the debts of which were paid in full, interest was claimed on bank-notes and drafts current when the bank stopped payment. *Held*, that closing the doors of the bank dispensed with the necessity of a formal demand, and that interest was therefore payable.—*In re East of England Banking Co.*, Law Rep. 6 Eq. 368.

3. The plaintiff was liable to pay a debt which carried interest at 11 per cent. The defendant was so bound to indemnify the plaintiff, but the plaintiff knew that the defendant denied that he was so bound, and would not pay without suit. *Held*, that the plaintiff ought to have paid the debt at once, and could only recover interest at 4 per cent from the time the debt was due.—*Hawkins* v. *Maltby*, Law Rep. 6 Eq. 505.

See Bond; Principal and Surety, 2; Tenant for Life and Remainder Man.

Interrogatories.

1. In an action for libel, leave to put interrogatories to the defendant was refused, the avowed object of the plaintiff being to make the defendant criminate himself if he answered them in the affirmative.—*Edmunds* v. *Greenwood*, Law Rep. 4 C. P. 70.

2. It is no objection to the administration of interrogatories tendered to the defendant in a cause of possession in the admiralty, that his answers might subject him to penalties under the Foreign Enlistment Act; but if he states on oath his belief that an answer to any particular interrogatory will subject him to such penalties, he will not be compelled to

answer it.—*The Mary or Alexandra*, Law Rep. 2 Adm. & Ecc. 319.

Joint Tenancy—*See* Next of Kin, 2; Tenancy in Common.

Judgment.

Semble, that when judgment is given on a verdict of guilty on a count in which several overt acts are charged, the judgment will be sustained, if any one of the overt acts be sufficient and be sufficiently alleged.—*Mulcahy* v. *The Queen*, Law Rep. 3 H. L. 306.

Jurisdiction.

County courts have jurisdiction of actions of ejectment where the yearly value of the premises does not exceed 20*l*. A county court decided on conflicting evidence that the yearly value of the premises did not exceed 20*l*. *Held* (*per* Cockburn, C.J., and Lush, J.; Hannen, J., *dubitante*), that the Court of Queen's Bench could not review this decision by prohibition.—*Brown* v. *Cocking*, Law Rep 3 Q. B. 672.

See Admiralty; Award; Escape; Injunction, 4; Trust; Vendor and Purchaser of Real Estate, 3.

Jury.

The 3 & 4 Wm. IV. c. 91, provides that the sheriff shall not return as jurors the names of any persons not qualified to serve according to the act, "and that every man except as hereinafter excepted, between the ages of twenty-one years and sixty years, residing, &c., shall be qualified with respect to property, and shall be liable to serve on juries." *Held*, that when a juryman was returned whose age exceeded sixty years, that fact only operated in his favor as an exemption, and was not cause for challenge by the prisoner.—*Mulcahy* v. *The Queen*, Law Rep. 3 H. L. 306.

Landlord and Tenant.

1. B. executed a mortgage of certain premises to the defendants. The mortgage was by indenture, but was never executed by the defendants; by it B. conveyed the premises in fee, on trust for sale, "and as a further security for the principal and interest for the time being due from B. to the defendants." B., by the deed, attorned, and became tenant to the defendants for and during the term of ten years, if that security should so long continue, at a certain yearly rent, payable on each 1st of October. "Provided, that without any notice or demand it should be lawful for the defendants, before or after the execution of the trusts of sale, to enter on the premises, eject B., and determine the said term of ten years." B. accordingly continued in occupation, and rent not being paid on the first rent day, the defendants distrained. *Held*, that the intention of the parties, as appeared by the deed, was to create a tenancy at will only; that a deed being therefore unnecessary, the tenancy was created by the assent of the parties and the occupation under it, and that the fact that the defendants had not executed the deed was immaterial.—*Morton* v. *Woods*, Law Rep. 3 Q. B. 658.

2. A. let to B. a defined portion of a room in a factory, with steam-power for working machines belonging to B, at a certain yearly sum, payable quarterly; a deduction to be allowed in case of hindrances in the supply of power. *Held*, a sufficient demise to entitle A. to distrain.—*Selby* v. *Greaves*, Law Rep. 3 C. P. 594.

3. A tenant is estopped to deny that his landlord has a legal reversion, though it appear from the instrument of demise that the landlord has only an equity of redemption.—*Morton* v. *Woods*, Law Rep. 3 Q. B. 658.

4. The lessee of an inner close has, by necessity, a right of way over an outer close which belongs to his lessor, but he cannot, by user, acquire an easement to deposit packages on a close which belongs to his lessor.—*Gayford* v. *Moffatt*, Law Rep. 4 Ch. 133.

5. The plaintiff took a lease for ninety-nine years, with a covenant for quiet enjoyment, of land on which his lessor had built him a house. The plaintiff laid out a garden on the demised land back of the house. Subsequently, the plaintiff's lessor let the adjoining land to the defendant, who built thereon a stable, having a wall twenty-three feet high, running the whole length of the plaintiff's garden. The plaintiff filed a bill to restrain the erection of the wall as interfering with the free access of light and air to, and the enjoyment of, his garden. *Held*, that there was no contract, express or implied, that the enjoyment of the garden, as garden, should not be interfered with.—*Potts* v. *Smith*, Law Rep. 6 Eq. 311.

6. A lessee covenanted, for himself and his assigns, that he and they would not assign the demised premises without the consent of the lessor. *Held*, that this covenant ran with the land, and that the lessor could sue an assignee of the lease for the breach of it, and that the measure of damages would be such a sum as would place the lessor in the same position as if he had still the defendant's liability, instead of the liability of another of inferior pecuniary ability, for breaches both past and future.

Similar covenants to keep the buildings in repair, and to repair and replace tenants

fixtures fixed to the premises, run with the land, but not similar covenants as to movable chattels on the premises at the time of the demise.—*Williams* v. *Earle*, Law Rep. 3 Q. B. 739.

7. An underlease of a whole term amounts to an assignment.—*Beardman* v. *Wilson*, Law Rep. 4 C. P. 57.

8. A tenant under a parol agreement underlet a part of the premises, and at the determination of both tenancies the undertenant held over against the will of the tenant. *Held*, that the landlord could recover against the tenant as damages the value of the premises for the time he was kept out of possession, and the costs of ejecting the undertenant.—*Henderson* v. *Squire*, Law Rep. 4 Q. B. 170.

See Condition; Covenant, 3; Mortgage, 2.

Larceny.

1. The cashier of a bank has a general authority to conduct its business, and to part with its property on the presentation of a genuine order; and if, being deceived by a forged order, he parts with the bank's money, he parts, intending so to do, with the property in the money, and the person knowingly presenting the forged order is not guilty of larceny, but of obtaining money on false pretences.—*The Queen* v. *Prince*, Law Rep. 1 C. C. 150.

2. Partridges, hatched and reared by a common hen, so long as they remain with her, and, from their inability to escape, are practically in the power and dominion of her owner, may be the subject of larceny, though the hen is not confined in a coop, but at liberty.—*The Queen* v. *Shickle*, Law Rep. 1 C. C. 158.

3. A. stole gas for the use of a manufactory by drawing it off from the main through a pipe, which was never closed at its junction with the main. The gas from this pipe was burnt every day, and turned off at night. *Held*, (1) that as the pipe always remained full, there was a continuous taking of the gas, and not a series of separate takings; and (2) that even if the pipe had not been kept full, the taking would have been continuous, as it was substantially one transaction.—*The Queen* v. *Firth*, Law Rep. 1 C. C. 172.

Lease—*See* Landlord and Tenant; Presumption.

Legacy.

1. A testator gave a legacy to A., "if not an uncertificated bankrupt at my death." A. was a bankrupt at the testator's death, but the bankruptcy was annulled four months later. *Held*, that A. was not entitled to the legacy.—*Cox* v. *Fonblanque*, Law Rep. 6 Eq. 482.

2. A testator gave a legacy to several persons successively for their lives, and after the death of all of them to H.; but if H. should be dead when the legacy should "descend and come" to him, then that the same should be paid to all the children of H., "except the one entitled to any real property on his father's decease" On the death of H., in 1862, after the testator's death, his eldest son became tenant for life in remainder of real estate, expectant on the death without issue of the tenant for life in possession, which happened in 1863. The surviving tenant for life of the legacy died in 1867. *Held*, that the eldest son of H. was excluded from participation.—*In re Grylls's Trusts*, Law Rep. 6 Eq. 589.

See Bond; Charity; Conversion; Devise; Election; Executory Trust; Husband and Wife, 3; Illegitimate Children; Mortmain; Next of Kin, 1; Perpetuity; Vested Interest; Will, 4–7.

Legislature—*See* Libel.

Lex Loci—*See* Conflict of Laws.

Libel.

An accurate report in a newspaper of a debate in parliament, containing matter disparaging an individual, is not actionable; the publication is privileged on the ground that the advantage of publicity to the community outweighs any private injury; and comments in the newspaper on the debate are so far privileged, that they are not actionable so long as they are honest, fair, and justified by the circumstances disclosed in the debate.—*Wason* v. *Walter*, Law Rep. 4 Q. B. 73.

See Interrogatories, 1; Slander.

Light.

To acquire a right to the access of light and air to a house by actual enjoyment, under 2 & 3 Wm. IV. c. 71, s. 3, it is not necessary that the house should be occupied or fit for immediate occupation during the statutory period.—*Courtauld* v. *Legh*, Law Rep. 4 Ex. 126.

See Landlord and Tenant, 5.

Limitations, Statute of—*See* Tenancy in Common, 2.

Lord's Day—*See* Sunday.

Lunatic.

1. A lunatic died seised of real estate; it had not been found who was her heir. F., C., and D. respectively claimed as heirs. The person who had been acting as solicitor for the committee, acted as F.'s solicitor, and had induced the tenants to attorn to him. On bills

filed by C. and D., *held*, that a receiver ought not to be appointed, it being merely a case where several persons set up adverse legal titles.—*Carrow* v. *Ferrior*, Law Rep. 3 Ch. 719.

2. M. filed a bill as next friend of P., whom he alleged to be of unsound mind. P., on a proceeding in lunacy, was found sane. The bill was taken off the files on P.'s application, and M. ordered to pay P.'s costs, as between solicitor and client, and the defendant's costs as between party and party.—*Palmer* v. *Walesby*, Law Rep. 3 Ch. 732.

Marriage—*See* Divorce; Nullity of Marriage.

Married Woman—*See* Husband and Wife.

Marshalling of Assets.

A., in Ceylon, was in the habit of consigning cargoes to his factors in England for sale on his account, and of drawing bills on the factors against the consignments. Consignments of coffee having been thus made, and the factors having accepted bills against them, the factors pledged the coffee, together with certain securities of their own, with one T., to secure a debt due from them to him. The factors became bankrupt, and T. sold the coffee (which produced more than enough to cover the bills drawn against it), and enough of the other securities to satisfy his debt. *Held*, that A. was entitled as against the factors' estate to have the remaining securities in T.'s hands marshalled, and to have a lien thereon for the balance due him on account of the coffee.—*Ex parte Alston*, Law Rep. 4 Ch. 168.

Master—*See* Bottomry Bond; Collision, 3; Freight, 1, 2.

Master and Servant.

To an action for breach of an indenture of apprenticeship, the defendant, the apprentice's father, pleaded that the apprentice "was and is prevented by act of God, to wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all said term." *Held*, on demurrer, a good plea in excuse of performance, without any averment that the plaintiff had notice of the illness before the commencement of the action.—*Boast* v. *Firth*, Law Rep. 4 C. P. 1.

See Contract; Seduction.

Mesne Profits.

1. In an action of trespass for mesne profits the plaintiff proved that the defendant had had a lease of the premises (which was not produced), and that he had paid a certain yearly rent; but when or for how long did not appear. He also gave in evidence a judgment by default in a previous action of ejectment for the same premises. By the writ in ejectment, which was dated February 5th, 1868, the plaintiff had claimed title from March 28th, 1867. *Held*, that on all this evidence it sufficiently appeared that the defendant was in possession of the premises at the date of the writ of ejectment, and that the plaintiff was entitled to mesne profits from that time.

Per Kelly, C.B. The judgment by default taken alone is no evidence of the defendant's possession at any time. Per Channell and Cleasby, BB., such judgment is *prima facie* evidence that the defendant was in possession at the date of the writ, but not for the period during which the plaintiff claims title in his writ.—*Pearse* v. *Coaker*, Law Rep. 4 Ex. 92.

2. In an action for mesne profits the declaration alleged that the plaintiff "had incurred great expense in recovering possession of his land." *Held*, that under these words he was entitled to recover the costs of a previous action of ejectment.—*Ib.*

Misrepresentation—*See* Husband and Wife, 2; Injunction, 5; Vendor and Purchaser of Real Estate, 3.

Mistake—*See* Award, 1; Revocation of Will.

Money had and received.

Where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, and the holder promises to pay the transferee, an action for money had and received lies at the suit of the transferee against the holder.—*Griffin* v. *Weatherby*, Law Rep. 3 Q. B. 753.

Mortgage.

1. A debenture purporting to be an assignment of the undertaking and of all the real and personal estate of a company, to secure the repayment of a sum of money at a future date, creates a valid charge on all personal estate existing at the date of the debenture, but not on subsequently acquired personal estate.—*In re New Clydach Sheet and Bar Iron Co*, Law Rep. 6 Eq. 514.

2. A. mortgaged the lease of the house in which he lived, together with two policies of insurance, to the defendant, to secure the repayment of £250 and interest, and also the premiums. The mortgage deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagee in respect to the house at the yearly rent of £175. The

mortgagor having become bankrupt, the mortgagee distrained for a year's rent under the attornment clause, though at that time the landlord's rent of £115, the interest on the money advanced, and the premiums, had all been paid. *Held*, on demurrer, that the attornment clause was not intended to enable the mortgagee to repay himself any of the capital advanced, but only to secure the payment of rent, interest, and premiums.—*Hampson* v. *Fellows*, Law Rep. 6 Eq. 575.

3. A mortgage deed contained a power to the mortgagee, on default, to sell and dispose of the premises by public sale or private contract for such price as could reasonably be gotten for the same. Default having been made, the mortgagee sold the premises and credited the mortgagor with the whole of the purchase-money; but in fact received only a part, and allowed the remainder to remain on mortgage given by the purchaser. *Held*, that the transaction being *bona fide*, the execution of the power was valid, and the original mortgagor had no equity of redemption.—*Thurlow* v. *Mackeson*, Law Rep. 4 Q. B. 97.

See Demand; Devise, 2; Executor and Administrator, 2; Friendly Society; Husband and Wife, 2; Landlord and Tenant, 1, 3; Priority.

Mortmain.

A legacy payable out of both personalty and the proceeds of the sale of realty is, while unpaid, within the statute of mortmain; and it cannot be bequeathed by the legatee to a charity, nor can it be apportioned so as to give the charity that part of the legacy which would be paid out of personalty.—*Brook* v. *Badley*, Law Rep. 3 Ch. 672.

See Will, 5.

Navigable Water.

A claim for anchorage dues on a navigable arm of the sea cannot be supported in respect of the mere ownership of the soil; but such ownership, together with the maintenance of buoys from time out of mind, and the benefit to the public therefrom, are a sufficient consideration to support the claim, if the dues have been paid time out of mind. (Exch. Ch.)—*Free Fishers of Whitstable* v. *Foreman*, Law Rep. 3 C. P. 578.

See Prescription.

Necessaries.

The plaintiff sold to the defendant, a minor, a pair of jewelled solitaires, which might be used as sleeve-buttons, worth £25, and an antique silver goblet, worth £15, which last the plaintiff knew the defendant intended for a present. The defendant was the younger son of a deceased baronet, with no establishment of his own, and an allowance of £500 a year. In an action for the price of these articles, the question whether they were necessaries was left to the jury, who found that they were. *Held* (Exch. Ch.), that the question whether they were necessaries was one of fact, but like other questions of fact should not be left to the jury unless there was evidence on which they could reasonably find that they were; that there was no such evidence in this case, and that a nonsuit ought to have been ordered.

Whether evidence that the defendant was sufficiently provided with such articles, though the plaintiff did not know it, was admissible, *quære*.—*Ryder* v. *Wombwell*, Law Rep. 4 Ex. 32.

Negligence.

1. The defendant, under a contract with the Metropolitan Board of Works, opened a public highway for the purpose of constructing a sewer; some months afterwards, the plaintiff's horse was injured by stumbling in a hole in the road. The defendant had properly filled up the road, and the hole was owing to the natural subsidence which sometimes takes place, sooner or later, after such an excavation. *Held*, that the defendant was not liable for the damage, for that there was no obligation on him to do more than properly reinstate the road. (Exch. Ch.)—*Hyams* v. *Webster*, Law Rep. 4 Q. B. 138.

2. The plaintiff, while travelling by the defendant's railway, was injured by the fall of a girder, which workmen, not under the defendant's control, were employed in placing across the walls of the railway. It was proved that the work was very dangerous, though none of the witnesses had ever known of a girder falling; that it was the practice when such work was going on over a railway, for the company to place a man to signal to the workmen the approach of a train; and that this precaution was not taken; but there was no evidence that the company's servants knew that the girder was being moved at the time the train was passing, or knew the means used for moving it. On a case in which the court were at liberty to draw inferences of fact: *Held* (in the Exchequer Chamber, reversing the judgment of the Court of Common Pleas), that though the evidence of negligence was such that it could not have been withdrawn from a jury, yet, that as a fact, the defendants were not guilty of negligence.—*Daniel* v. *Metropolitan Railway Co.*, Law Rep. 3 C. P. 591.

See Bill of Lading; Collision, 2, 3; Damages, 1; Railway, 2; Ship, 2.

Negotiable Instruments—*See* Bills and Notes.

New Trial—*See* Slander.

Next of Kin.

1. A legacy was given on trust for F., a married woman, for life, then to her husband for life, and after the death of the survivor, for such persons "related by blood" to F. as she should appoint, and, in default of appointment, for those who would be "the personal representatives" of F. in case she had died sole and unmarried. A codicil referred to the above trusts as being for the benefit of the "relations and next of kin" of the testator's daughter. F. died during the testator's life. *Held*, that "personal representatives" meant statutory next of kin.—*In re Grylls's Trusts*, Law Rep. 6 Eq. 589.

2. Personal property was settled by a marriage settlement, after other trusts, in trust for such person or persons as at the wife's death should be her next of kin "under and according to" the Statute of Distributions. *Held*, that the next of kin took as tenants in common, and not as joint-tenants.—*In re Ranking's Settlement Trusts*, Law Rep. 6 Eq. 601.

See Will, 6.

Notice—*See* Covenant, 1; Executor and Administrator, 2; Husband and Wife, 2; Master and Servant; Priority.

Novation—*See* Sale, 5.

Nuisance—*See* Injunction, 1–3.

Nullity of Marriage.

Impotence does not render a marriage void, but only voidable, and the validity of a marriage cannot be impeached on that ground after the death of one of the parties. Therefore the right of a husband to administer his wife's estate cannot be disputed on the ground of the nullity of the marriage by reason of his impotence.—*A.* v. *B.*, Law Rep. 1 P. & D. 559.

Officer—*See* Escape; Stamps.

Parent and Child—*See* Seduction.

Parliament—*See* Libel.

Parol Evidence—*See* Award, 1, 2; Perpetuity, 1.

Parties—*See* Company, 3; Vendor and Purchaser of Real Estate, 3.

Partnership.

1. A court of equity will not decree specific performance of a contract for partnership, where the plaintiff has a remedy at law, where there are no legal difficulties in the way, which the court can remove, and where there has been no part performance.—*Scott* v. *Raymond*, Law Rep. 7 Eq. 112.

2. B. and H. owned a newspaper in equal shares. B. assigned his share to W., who had the assignment registered under the Copyright Act. W. knew at the time of the purchase that there was a suit between B. and H. as to the ownership of the newspaper, and after the purchase he allowed B. and H. to carry on the newspaper as partners. *Held* (1) that W. could only take B.'s share, subject to the equities between the partners; and (2) that the registration was futile, as there was nothing analogous to copyright in the name of a newspaper.—*Kelly* v. *Hutton*, Law Rep. 3 Ch. 703.

See Tenancy in Common, 1.

Penalty—*See* Bond, 2; Broker.

Perpetuity.

1. Gift by will to a woman for life, remainder to her children for life, and a gift over to the grandchildren. *Held*, that evidence that at the date of the will, the woman was past childbearing was not admissible to show that children then living were meant, so as to make valid the gift over, which otherwise was void for remoteness.—*In re Sayer's Trusts*, Law Rep. 6 Eq. 319.

2. A testator directed trustees to apply so much as was necessary of the income of his residuary personal estate for the maintenance of A., a lunatic, and to invest any surplus, and treat it as part of the testator's personal estate, which was given over after A.'s death. *Held*, that under the Thelluson Act, the direction to invest the surplus was void beyond the period of twenty-one years, and that the testator's next of kin were entitled to the accumulations.—*Mathews* v. *Keble*, Law Rep. 3 Ch. 691.

Pilot—*See* Collision, 1–3; Ship, 4.

Pleading—*See* Collision, 5; Equity Pleading and Practice; Indictment, 2; Master and Servant; Mesne Profits, 2.

Pledge—*See* Factor; Marshalling of Assets.

Power.

1. A., having power to appoint funds by deed or by her last will in writing or any writing purporting to be or being in the nature of her last will, to be signed in the presence of two witnesses, died intestate, but left in an envelope an unattested memorandum signed by herself "for my son and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The funds I wish divided" in a certain way. *Held*, that this memorandum showed no intention to execute the power, and that therefore the

court could not give it validity as an appointment.—*Garth* v. *Townsend*, Law Rep. 7 Eq. 220.

2. By a marriage settlement, a fund was settled on such trusts as the wife should by will appoint, and, in default of appointment, in trust for such persons as should, at the death of the survivor of the husband and wife, be the next of kin of the wife. By her will, purporting to exercise the power, the wife gave all her property to her executors therein named, and gave several legacies which did not exhaust the fund. She died in her husband's lifetime. *Held*, that the fund was by the appointment all converted into the wife's general personal estate, and that the surplus, after paying legacies, belonged to her husband and not to those entitled under the settlement in default of appointment.—*Brickenden* v. *Williams*, Law Rep. 7 Eq. 310.

3. A. devised his estate to B. for life, without impeachment of waste, and then to B.'s issue, and in default of issue over. The will gave B., or any person in possession under the limitations of the will, power to work or to lease the mines. B. was to pay over to trustees the rents and profits of the mines, and with them B. was to buy, with the consent of the trustees, other estates, of which she was to receive the rents during her life. While in possession, B. made a lease for sixty years. *Held*, that the lease was not warranted by the power, for that on the whole will it appeared that A. intended to restrict B. to making a lease for her life only.—*Vivian* v. *Jegon*, Law Rep. 3 H. L. 285.

4. A settlement contained, among other things, a power for B., in case of the death of his first wife and his marrying again, to charge the estates with portions for the younger children of his second marriage, the amounts to be greater or less, according to the number of children of the first marriage. The deed provided that if the brothers of B. should respectively, come into possession of the estate, "either before or after their marriage with any woman or women," they might charge the estate with "the like sum or sums of money for the portion or portions of their child or children (other than an eldest son), as B. is entitled to do before or after his marriage with any woman or women after the death of his first wife." *Held* (Lord Cranworth, *dubitante*), that this was an absolute power which, with reference to a younger brother of B. succeeding to the estate, was not subject to the restrictions and contingencies which applied to B.—*Earl of Harrington* v. *Countess (Dowager) of Harrington*,) Law Rep. 3 H. L. 295.

See Conversion; Election, 1; Husband and Wife, 4; Mortgage, 3.

Practice—*See* Costs; Equity Pleading and Practice; Interrogatories.

Prescription.

The owner of a several fishery in a navigable and tidal river claimed a right to use stop-nets to catch fish. The nets had been in use for forty-five years up to 1862; there was no evidence of previous user, nor was there any evidence to the contrary. *Held*, that the user for forty-five years did not raise a conclusive presumption of law that the nets had been used from time immemorial.—*Holford* v. *George*, Law Rep. 3 Q. B. 639.

See Landlord and Tenant, 4; Light; Navigable Waters.

Presumption.

By an indenture dated 1598, a farm was demised for 1,000 years, with a covenant by the lessor to convey the fee to the lessee within five years if required. The farm was assigned as leasehold in 1777, since which time it had been three times devised as freehold, and on the court rolls of the manor, of which the farm formed part, the land was called freehold. *Held* (reversing the decision of the Master of the Rolls), that the farm remained leasehold as between the heir and administrator of an intestate owner.—*Pickett* v. *Packham*, Law Rep. 4 Ch. 190.

See Prescription; Will, 3.

Principal and Agent—*See* Bills and Notes, 2; Factor; Sale, 1.

Principal and Surety.

1. A surety on a bond to secure a debt was secured by another bond of indemnity against all sums he might be called on to pay as such surety. This second bond was given by one A., who had died, having by will devised certain property specifically on trust to pay the debt. The creditor having applied to the surety, the surety had recourse to A.'s executors, who said that they had no funds, and were unable, under the will, to raise money by sale of A.'s estate without a decree of the court. *Held*, that though the surety had paid nothing, yet he could maintain a bill against the executors for administration, payment of the debt, and indemnity; and also that the bill need not be filed on behalf of all the creditors of A.—*Wooldridge* v. *Norris*, Law Rep. 6 Eq. 410.

2. A third party joined in a mortgage as

surety, but for the payment of interest only, and the principal and surety covenanted jointly and severally with the creditor to pay the interest. Afterwards the debtor executed a deed whereby he assigned all his property in trust for his creditors, and the creditors released him from all debts, with a proviso that nothing contained in the deed should affect any mortgage held by any creditor, or any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor either alone or jointly with any other person. *Held*, that the deed gave only a qualified release, and did not extinguish the debt, and that the remedy of the creditor against the surety for interest was not barred.—*Green* v. *Wynn*, Law Rep. 7 Eq. 28; s. c. Law Rep. 4 Ch. 204.

See Guaranty.

Priority.

1. Where a prior equitable title is established by the court against one who took an equitable mortgage by deposit of the title deeds: *Semble*, the court will order him to deliver up the deeds, though he acquired them for value and without notice from the legal owner.—*Newton* v. *Newton*, Law Rep. 4 Ch. 143.

2. The owner of a ship mortgaged her to G., who transferred the mortgage to A. Both mortgage and transfer were registered. Subsequently G. paid off A., and an entry discharging the mortgage was made in the registry. After a year A. re-transferred to G. this mortgage, and the registrar wrote in the margin of the register, that a re-transfer only had been intended. G. then transferred the mortgage to W. by way of security, and the transfer was registered. In March, 1865, G. paid off W., but no re-transfer was executed. In May, 1865, the ship-owner gave G. another mortgage, which was registered. In November, 1865, this mortgage was transferred to B., but was not registered till July, 1866. In March, 1866, G. agreed with W. that G.'s original mortgage should be a security for the balance due from G. to W. *Held*, that the first mortgage was discharged by the entry of discharge, and could not be revived, and that the new agreement between G. and W., not being registered, was of no avail against B.—*Bell* v. *Blyth*, Law Rep. 4 Ch. 136.

See Conflict of Laws; Husband and Wife, 2; Partnership, 2.

Privilege—*See* Arrest; Libel.

Production of Documents—*See* Attorney, 3, 4.

Prohibition—*See* Jurisdiction.

Promissory Note—*See* Bills and Notes, 2, 3; Interest, 1, 2.

Public Officer—*See* Stamps.

Quia Timet—*See* Principal and Surety, 1.

REVIEWS.

The Real Property Statutes of Ontario, with remarks and Cases. By Alexander Leith, of Toronto, Barrister-at-Law: Henry Rowsell, King Street, Toronto, 1869.—Vol. I.

If any professional man in good practice in Ontario were asked what new books he would like to see within his easy reach, he would probably say a collection of the Real Property Statutes with notes and cases (if possible from the pen of such a reliable authority as Mr. Leith), a consolidated digest of the Upper Canada reports, bringing the cases down to the present time, and a new edition of Harrison's Common Law Procedure Act.

In all these, we are likely soon to be gratified. Mr. Leith's first volume has been published; the digest is well on its way to completion, and three parts of the Common Law Procedure Act have been printed.

If we remember correctly, Lord Bacon says, in some of his writings, that every man is a debtor to his profession, and if debtors, we should try to pay our debts, not certainly all by writing books—that would be as improbable as it would be appalling—but in such ways as tastes and circumstances may direct. That Mr. Leith has gone far towards paying *his* debt, we have all reason to testify.

It is eminently proper that those who are specially learned in any particular branch of the laws, should give the public the benefit of their research, labour, or talent. This is particularly the case where, as in this country, from local differences in legislation, the many admirable text books of the old country fail to guide us. We should, therefore, always welcome, and, as far as in us lies, encourage all that appertains to Canadian legal literature. Let it not be imagined that, as a matter of money, law books in Canada "pay;" copying at three cents a folio would earn more money, nor does it even "pay" in the way that writers in England make capital out of their works; all the more credit then, say we, to those who have sufficient courage and

patience to devote their spare time and energies to an attempt, however feeble it may be, to add to the general stock of knowledge, or to save the time and labour of their fellow workers. But we are beginning to wander from the subject in hand.

Mr. Leith commences this his first volume with the recent act to amend the law of property and trusts in Upper Canada. To the various sections are appended notes, explanatory of the defects sought to be remedied, a critical examination of the result, and as to whether the desired objects have been attained, and the present state of the law as affected by the provisions of the act.

The statutes relating to the transfer of real property next engage his attention, and the short and simple, but comprehensive explanations of the various clauses will be of great use to students, whilst many of the observations on Con. Stat., U. C., cap. 90, and the statutes which in the natural order of things follow it; the acts respecting short forms of conveyances, and short forms of leases, expose many mistakes which conveyancers have fallen into, and give valuable hints for future guidance. Our readers have already had the benefit of Mr. Leith's observations on the statutes respecting short forms of conveyances, as also the chapter in a subsequent part of the work on memorials as evidence.

The statutes governing the descent of freehold estates of inheritance come next, and are introduced by some observations on the common law rules of descent, thus enabling the reader better to appreciate the changes that have been made.

We have next the statutes respecting dower and the rights and conveyances of married women. As the learned author remarks in the preface:—

"The chapter on descent, and part of the chapter on dower are taken, with many alterations, from the work of the author on the commentaries of Blackstone adapted to the law of Upper Canada; a course justified by the alterations made, and the probability that that work will shortly be out of print"

There are some very valuable notes to the sections of the different acts which refer to the power of married women to acquire and dispose of their separate property, a subject always of much difficulty, and not by any means made clearer by the recent attempt to give married women greater rights and privileges.

Next comes a short chapter on wills, and then the numerous statutes to make sale of and give title to real estates under writs of execution.

The next chapter is devoted to mortgages. In speaking of the late Act of 32 Vic., cap. 9, intended to "give certainty to the right of married women jointly with their husbands, to execute certificates of discharge of mortgage." He points out some of the difficulties which he thinks a statute, extended as an enabling statute are likely to lead to, thus:—

"Since the statute consolidated by Con. Stat. ch. 73, there can be but few cases wherein, when a married woman is entitled to mortgage moneys, she is not so entitled to her separate use under that statute. As far as the author is aware, it has not been usual in practice, on obtaining from a married woman a certificate of discharge of mortgage, to require compliance with Con. Stat. ch. 85: and neither where the woman is entitled to the moneys to her separate use, nor even in the few and exceptional cases wherein she is not, would such compliance appear to have been requisite. Under Con. Stat. ch. 73, she is to 'have, hold and enjoy,' free from the control and disposition of her husband as fully as if unmarried. She would be competent to receive, and give a receipt, as a *feme sole*, for her moneys, and the form of discharge given by the Registry Act is but a receipt in writing, though the Act gives it when registered, and not till then, the effect of a reconveyance. The receipt then works a reconveyance by operation of law, by force of the Registry Act; in itself it does not profess to convey. If the view of the author be correct, then the Act has considerably encroached on the rights given to a married woman by Con. Stat. ch. 73, and practically placed the obtaining of her mortgage moneys under the control of her husband."

We commend to the notice of solicitors engaged in the investment of money the remarks on fire insurance in connection with mortgages, also those with reference to powers of sale in mortgages. The statutory power can scarcely be said to be as perfect as it might be. It is a great pity that a provision which has been found of so much practical benefit, should be open to the criticisms even to which it is here subjected. Powers of sale are more and more used every day, and whether or not the form in the act respecting short forms of mortgages is defective (and it certainly is so in some re-

spects), we cannot now well do without some provision of the kind. Probably the legislature may at an early day remedy the defects for the future, and possibly, where it can be done without injustice, confirm proceedings *bona fide* had under it heretofore.

The last chapter treats of memorials as evidence, already spoken of, and with which many are already familiar, through the pages of this *Journal*. It is a masterly article; the author's treatment of the subject having more than once been referred to from the Bench in the complimentary manner.

The volume concludes with an appendix, giving in full the important cases of *Finlayson* v. *Mills*, 11 Grant 218, on the law of merger, and *Moore* v. *Bank of British North America*, 15 Grant, 308, as to constructive notice under the Registry Act, &c., also the letter of H. Bellenden Ker, Esq., addressed to the Lord Chancellor in 1845, on the Imperial Act of 7 and 8 Vic., cap. 75, "for simplifying the transfer of property," a valuable adjunct in thoroughly appreciating our statute as to the transfer of real property, which, by the way, was mainly taken from the Imperial Stat., 8 and 9 Vic., cap. 106, framed by Mr. Ker.

Such is a short and necessarily imperfect sketch of Mr. Leith's first volume. What we here have only gives us a taste for more. The reputation of Mr. Leith as a real property lawyer is so well established that the mere fact of his having written the book before us with his usual care and caution, is, one would imagine, sufficient to command a large and ready sale. But further than this, as we are all interested in the success of this volume now in print (selfishly it must be admitted) we sincerely hope that he will receive sufficient encouragement to induce him to continue his labours, by completing the important work he has undertaken. *We* have now endeavoured, poorly though it may be, to do *our* share, let others do theirs, and not allow the talent we have in our midst, whether it be that of the author of this volume, or that of any other deserving author, lie dormant from want of this material assistance and encouragement, which, though they expect and ask it not, is theirs of right, and necessary to its full development.

The Albion, 39, Park Row, New York.

We gladly welcome week by week this "journal of literature, art, politics, finance and news." It seems to have taken a new lease of life, coming out with all the vigor of its palmiest days, and that is saying a good deal.

Judging from the following notice to subscribers, which appeared in it some short time since, we presume there is some fear on the part of those "Will-o'-the-wisp" personages of entrusting their precious mites to the tender mercies of post office authorities, thus:—"Subscribers in the United States and the Dominion are informed that they may remit money with perfect safety, and at the risk of this office, by registered letter, thus saving the trouble and expense of other methods of remittance." We commend this notice to *our* readers also, and can assure them that so far as we are concerned they need have no delicacy in making use of the post office in the same way for our benefit and at our risk.

GENERAL CORRESPONDENCE.

Students—Articled Clerks—Military School.

To the Editors of the Law Journal.

Gentlemen,—Would you be kind enough to give the necessary information in your next issue, whether a Student-at-Law is prevented by the rules of the Law Society from entering the Military School, that is, would they or not disallow his time while there?

Also, in the case of an articled clerk, if the clerk got the permission of the attorney to whom he is articled, to absent himself for two or three months, would a course of instruction in the Military School be considered business or occupation other than the proper practice and business of the attorney.

As there are a number of students and clerks who might attend the Military School if not prevented as above, an answer is respectfully solicited. Yours truly,

Renfrew.

Pembroke, Oct. 21st, 1869.

[We think no difficulty would arise, nor would any part of the time be disallowed if the proper consent were first obtained—Eds. L. J.]