DIARY FOR NOVEMBER.

1. Wed. *All Saints' Day.* Clerks of Local Municipalities to make out rolls of lands of non-residents whose names are not on assessment rolls.
5. SUN. *22nd Sunday after Trinity.*
12. SUN. *23rd Sunday after Trinity.*
16. Thur. Examination of Law Students for call, with Honors. Last day for service for Co. Court.
17. Fri. Examination of Law Students for call to the Bar.
18. Sat. Exam. of Articled Clerks for certificate of fitness.
19. SUN. *24th Sunday after Trinity.*
20. Mon. Mich. Term begins. Articled Clerks and Law Students to file certificates with Secretary of Law Society.
21. Tues. Exam. of Law Students for Scholarships.
22. Wed. Inter-Exam. of Law Students and Artic. Clerks.
24. Fri. Paper Day, Q. B. New Trial Day, C. P.
25. Sat. Paper Day, C. P. New Trial Day, Q. B.
26. SUN. *25th Sunday after Trinity.*
27. Mon. Paper Day, Q. B. New Trial Day, C. P. Last day for declaring in County Court.
28. Tues. Paper Day, C. P. New Trial Day, Q. B.
29. Wed. Paper Day, Q. B. New Trial Day, C. P. Last day for setting down and giving notice of re-hearing.
30. Thur. *St. Andrew.* Paper Day, C. P. Open Day, Q. B.

THE

Canada Law Journal.

NOVEMBER, 1871.

MEETING OF THE COUNTY JUDGES.

The recent meeting of the County Judges, in Toronto, was, we understand, very numerously attended. It was purely a private one, and properly so, because the subjects discussed did not necessarily require publication in the public press.

The isolated position of County Judges is not without disadvantage to the Local Bench; indeed, one of the greatest advantages in centralization of Courts is the opportunity which the Judges have, as in the case of the Judges of our Superior Courts, of almost daily conference and intercommunication.

The result of the meeting cannot fail to be of profit to all who attended it, for we have been informed that the time was improved in discussing subjects of common interest, for instance, the administration of the Attorney-General's Act, for the speedy trial of criminals before the County Judge—the practice in the County Judges' Criminal Courts—the Division Court procedure—Jurisdiction under the Municipal and Assessment Acts—Appeals to the Sessions, &c. The Judges no doubt found interchange of thought in the matters discussed very advantageous and eminently calculated to secure uniformity of procedure and prevent that diversity of practice which to some extent prevails. The concurrent testimony was strongly in favor of the County Judges' Criminal Courts as a most beneficial and economical method of disposing of criminal charges; and it would appear that all over Ontario prisoners have largely availed themselves of the privilege (we think we may so call it) of being promptly tried by a Judge.

There was one point discussed and determined which we have particular pleasure in noticing, though some possibly may not see the importance of it. After being canvassed in the meeting, a very decided majority pronounced in favor of the practice of the Judges wearing the gown in the Division Courts. Those who had not done so hitherto determined to wear the gown hereafter, and very properly so, for there would be little use in taking a collective expression upon such matters, if, after discussion, the views of the majority did not prevail. Besides, the practice is right in itself, and emphatically so since it has been decided by the Queen's Bench in *Re Allen*, that only professional men have the right to be heard as advocates in Division Courts. The readers of the *Law Journal* will remember that from the first, and persistently, we have advocated the practice of wearing the gown; and although the gentlemen who did not do so were evidently not persuaded by our argument, they have had the good taste, and, we will venture to add, the good judgment, to fall in with the resolution of the collective body of their own order.

We understand the Judges are to meet annually for the purpose of mutual conference, assistance and advice, in order to promote uniformity of practice and to increase their public usefulness—the fourth Tuesday in June being the time appointed, the place, Toronto. We are decidedly of opinion that a more praiseworthy step could not have been taken, and hope that all the County Judges in the Province, without exception, will so arrange their appointments as to enable them to attend the annual gathering.

The Chief Justice of the Court of Appeal sits in the Court of Queen's Bench this term, in place of Chief Justice Richards. Whilst regretting that the state of health of the latter is such as to render a cessation from work necessary, all on the other hand were pleased to see the former again "in harness," looking so well and vigorous after his partial rest.

THE LAW OF WILLS.

An article headed "Wills and Intestacy," over the signature "J. H. Gray," has appeared in the October number of *La Revue Critique de Législation et de Jurisprudence du Canada*, on which we think it proper to make some observations. It commences by stating that—

"The increased intercourse between the different Provinces of the Dominion, brought about by Confederation, renders desirable a more general knowledge of the differences between them in the laws regulating the ordinary transactions of life. The business man from Ontario would be very apt to suppose that what he could do and would do in Ontario, would, under similar circumstances, be a rule of conduct for him in Nova Scotia and New Brunswick. The same of the business man from Nova Scotia or New Brunswick in Ontario. Called by the pursuits of trade to take up his temporary or permanent residence in one of the Provinces other than that in which he had been previously living, it is important to know how the wealth he is accumulating may be disposed of by himself; or, if he failed to will it, how the law would do it for him. There are few things more ruinous to the peace of families than a disputed will; few more conducive to the well-being of a people than a judicious law of intestacy. It is proposed to examine the provisions made in Ontario, New Brunswick and Nova Scotia, in these respects."

Fully concurring as we do in these remarks, we think it advisable to point out some statements in the article in question, which are perhaps calculated to mislead as regards the law in Ontario.

From the general tenor of the essay, it appears that the author professes to show wherein the law on the subject differs in the various Provinces. If his remarks were confined to the *statutes merely*, they would not be so open to criticism; but, as we have seen, he does not confine himself to those alone. He commences by stating that—

"In *New Brunswick*, a testator may, by his will, dispose of all property, and rights of property, real and personal, in possession or expectancy, corporeal and incorporeal, contingent or otherwise, to which he is entitled, either in law or equity, at the time of the execution of his will, or to which he may expect to become at any time entitled, or be entitled to at the time of his death, whether such rights or property have accrued to him before or after the execution of his will. In *Nova Scotia*, the same."

It is further said that—

"In *Ontario*, there is no provision of this general character; but, by the Consolidated Statutes of Upper Canada, chapter 82, section 11, real estate, acquired subsequently to the execution of a will, would pass under a devise conveying such real estate as testator might die possessed of."

Now, the provisions of this section of the U. C. Con. Stat. are overridden, if not virtually repealed, by the Ontario Act of 32 Vic. cap. 8, sec. 1, which now governs, and under which after-acquired property passes: *Gibson* v. *Gibson*, 1 Drew, 62; Leith's Real Prop. Statutes, 293. The statute we have referred to reads as follows: "Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

Contingent and executory interests were devisable under the Statute of Wills of Henry VIII. and 1 Jarman on Wills, p. 43; and consequently, by reason of the application of that statute here, such interests were also devisable in Ontario since 32 Geo. III. cap. 1, introducing the English law. Independently of this, it has generally been considered here that the Consolidated Statute referred to, authorized devises to fully as large an extent as is said to be the law in New Brunswick: (See secs. 14, 11, 12.)

Further on in the article it is said that "in New Brunswick and Nova Scotia a testator must be of age," but that "in Ontario there is no provision to this effect." Now, the Statute of Wills of Henry VIII. is, as above mentioned, the origin and source here of the right to devise, and governs unless varied by subsequent Acts. It expressly exempts infants from the right there given to devise, and we need hardly mention that at common law no one could devise a freehold.

It is further said, where speaking of the execution of wills, that in Ontario there is no general statute, as in Nova Scotia and New Brunswick, with reference to wills; and reference is made to Con. Stat. U. C. cap. 82, s. 13. The Statute of Frauds should also have been referred to as applying to the mode of execution of wills here. That statute was introduced here by the Act of 32 Geo. III. cap. 1, above referred to. It is in force, and cumulative in its provisions with sec. 13 of Con. Stat.

U. C. cap. 82. Mr. Leith, in his work on Real Property Statutes, vol. 1, p. 290, recites the provisions of section 5 of the Statute of Frauds (29 Car. II. cap. 3), which enacts as follows:

"All devises and bequests of any lands and tenements, devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or of any particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else shall be utterly void and of none effect."

Mr. Leith then goes on to say—

"The variance between the statute of Charles and of William is this: that by the former the will must be attested and subscribed, *in presence of the testator, by three* or four *credible* witnesses, who need not subscribe or attest in the presence of each other, or at one and the same time: the latter statute is silent as to the credibility of the witnesses; and execution in the presence of and attested by two witnesses, is as valid as if in the presence of and attested by three witnesses; and it is sufficient if such witnesses subscribe in the presence of each other, without subscribing (as required by the statute of Charles) in the presence of the testator.

"Notwithstanding the act of William is silent as to credibility of the witnesses, that qualification still continues to be as requisite as under the act of Charles: *Ryan* v. *Devereux*, 26 U. C. Q. B. 107. The statute of Charles is not impliedly repealed by that of William: *Crawford* v. *Curragh*, 15 U. C. C. P. 55. It seems clear, therefore, that a will invalid as not complying with the latter Act, is valid if it complies with the former. In a late case (*Crawford* v. *Curragh*, supra), the court went further, and held, in effect, that the statutes were cumulative, and might be read together, and so that a will invalid under either statute, taken singly, might be supported on their joint authority. Thus a will executed in the presence of two witnesses, who subscribed in the presence of the testator, but not in presence of each other, has been held sufficient. The author does not presume to question the unanimous judgment of the court; but he deems it right, in a matter of such importance, to refer to the language of Draper, C. J., in a subsequent case, and to suggest that it may be a proper precaution always to comply with the statute of William, and require that when there are only two witnesses, they should sign in presence of each other. In the case referred to (*Ryan* v. *Devereux*, 26 U. C. Q. B. 107), Draper, C. J., in alluding to the doctrine laid down in *Crawford* v. *Curragh*, says, 'I advisedly abstain from expressing an opinion of concurrence in, or dissent from, that decision. I have not arrived at any positive conclusion upon it.'

"The practitioner should bear in mind that the Imp. Act 1 Vic. cap. 26, has in England varied the mode of execution of wills, and therefore the cases decided under that act may be inapplicable here, unless on the words 'signature,' 'presence,' 'direction,' 'other person,' 'attested,' 'subscribed,' which are common to the Imperial Act of Victoria, the Statute of Frauds, and the Provincial Act."

On again referring to the article in *La Revue Critique*, we find it stated that—

"Under the English law, as prevailing before 1st Victoria, chapter 26, whether a will of freehold estate attested by a witness whose wife or husband had an interest in the will as devisee or legatee, would be invalid or not, was to some degree uncertain, though if the devise or legacy had been to the witness himself, under 25 Geo. II. chapter 6, the doubt as to the invalidity is removed, because it clearly makes him competent, and declares the devise or legacy void."

As to these observations, we would refer to *Ryan* v. *Devereux*, 26 U. C. Q. B. 107, decided here in 1866; also *Little* v. *Aikman*, 28 U. C. Q. B. 337; and in England to *Holdfast* v. *Dowsing*, 2 Str. 1253; and *Halford* v. *Thorp*, 5 B. & Ald. 589. In the case of *Ryan* v. *Devereux*, the plaintiff claimed under a conveyance from the heir-at-law of John Devereux, sen., and the defendant claimed under Devereux's will. The question for the court was, whether a certain Peter McCann, who had been one of the two subscribing witnesses to the execution of the will, was disqualified on account of his being at that time married to a daughter and legatee of the testator. It was held that he was so disqualified: that the bequest of a legacy to his wife was not avoided by 25 Geo. II. cap. 6; and that such bequest prevented him from being regarded as a *credible* witness within the meaning of the Statute of Frauds. The English cases have never been questioned there, and are referred to in the text-books as undoubted law. See also *Emanuel* v. *Constable*, 3 Russ. 436. On this point, therefore, we cannot agree that there has been any uncertainty in England or here, or that, as is further stated in another place, the question here is open.

Again, as regards obliterations, interlineations, or alterations made in a will after its

execution: the Statute of Frauds applies here as introduced with the other general English Law by the above Act of 32 Geo. III. cap. 1, subject to the provisions of 32 Vic. cap. 8.

We have not, in the few remarks made above, touched upon all the points which are open to criticism in the article in *La Revue Critique;* but whilst the observations of the writer, and the mode he has adopted of comparing the law on the subject of wills in the different Provinces, would not, in our opinion, facilitate the object which is stated as the inducement for the article, we are free to admit that it gives the professional reader in Ontario some useful information as to the state of the law as to wills and intestacy in the Provinces of Nova Scotia and New Brunswick, with which the writer is probably more familiar than he is with that in Ontario.

SELECTIONS.

THE ELECTION LAWS.*

The coming year of 1872 will be one of much importance to the Dominion. The first Parliament will have closed its career, and the people will be called upon to choose those to whom they desire the public affairs shall be entrusted. The machinery of government applicable to a large confederation having been devised and set up by the Parliament which shall have passed away, the approval or condemnation of its acts must be submitted to those from whom, under our English constitution, the power emanates. No uniformity in the mode of selecting the representatives to the House of Commons having been agreed upon by Parliament, the selection will be left to each Province, to be made according to its own laws. By an Act passed at the last session of the Dominion Parliament, 34 Vic. c. 20, entituled "The Interim Parliamentary Elections Act, 1871," and to be in force for two years only from the time of its passing, section 2, it is declared: "The laws in force in the several Provinces of Canada, Nova Scotia and New Brunswick, at the time of the Union on the 1st of July, 1867, relative to the following matters, that is to say, the qualifications and disqualifications of persons to be elected or to sit or vote as members of the Legislative Assembly, or House of Assembly, in the said several Provinces respectively; the voters at elections of such members; the oath to be taken by voters; the powers and duties of Returning Officers; and generally the proceedings at and incident to such elections, shall be provided by the British North America Act, 1867, continue to apply respectively to elections of members to serve in the House of Commons for the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick." There are certain exceptions, as to the polling in Ontario and Quebec lasting only for one day, and that the qualification of voters in Ontario shall be such as was by law in force on the 23rd of January, 1869; and a provision that the revisors in Nova Scotia shall add to the list of voters the names of such Dominion officials and employees as would have been qualified to vote under the laws in force in that Province on the 1st of July, 1867, but who may have been disqualified by act of the Legislature of that Province passed since that day. There are also provisions respecting Quebec, British Columbia and Manitoba, and on some other points, but not of a bearing necessary to be observed upon in this article.

Without commenting upon the propriety or impropriety of having the same House composed of representatives chosen under different laws, with different statutory qualifications, and elected in different ways, it is sufficient to say that Parliament in its wisdom thought proper to prefer such a course, leaving to the House hereafter to be chosen to determine whether the continuance of such a course shall be prudent for the future or not. The important questions of the qualifications of the candidates, of the nature and extent of the franchise, and of the mode of election, whether by ballot and simultaneous polling or not, will no doubt form during the discussions preceding, and the canvas pending the elections, the subject of many and exciting arguments.

Assuming that all are desirous of doing what is best for the country, it may be useful to compare the existing laws, and thus by contrast enable the people of all the Provinces to select from the legislation of each that which may be deemed best, not simply in theory but in practical working. For this purpose, it is proposed briefly to point out the salient features of the Election laws in the three Provinces of Ontario, New Brunswick and Nova Scotia (Quebec is not touched upon), and with reference to both British Columbia and Manitoba, it is manifest, a little time must be allowed to those two Provinces to develope their own systems.

In the three Provinces referred to, the Election laws differ very materially, both as to the qualification of the electors and the candidates, the mode and time of voting, and the restrictions imposed upon the exercise of the franchise.

First, as to the qualification of the voters:

In *Ontario*, every male person 21 years of age, a British subject by birth or naturalization, not coming under any legal disqualification, duly entered on the last revised and certified list of voters, being actually and *bona fide* the owner, tenant or occupant of real

* We reprint this article, from *La Revue Critique*, as interesting at the present time, and as it gives information as to the law on the subject in the sister Provinces. We have not, however, examined it with the view of seeing how far the writer is correct in his statement of the law in this Province. —Eds. L. J.

property of the value hereinafter mentioned, and being entered in the last revised assessment roll for any city, town or village, as such owner, tenant or occupant of such real property, namely:

In Cities, of the actual value of	....		$400
In Towns	"	"	 300
In Incorporated Villages,	"		 200
In Townships		"	 200

shall be entitled to vote at elections for members for the Legislative Assembly.

Joint owners or occupiers of real property rated at an amount sufficient, if equally divided between them, to give a qualification to each, shall each be deemed rated within the Act; otherwise, none of them shall be deemed so rated.

"Owner" means in his own right, or in right of his wife, of an estate for life, or any greater estate.

"Occupant," *bona fide* in possession, either in his own right or in right of his wife (otherwise than as owner or tenant), and enjoying revenues and profits therefrom to his own use.

"Tenant" shall include persons who, instead of paying rent in money, pay in kind any portion of the produce of such property.

In *Nova Scotia*, every male subject by birth or naturalization, 21 years of age, not disqualified by law, assessed on the last revised assessment roll, in respect of real estate to the value of $150, or in respect of personal estate, or of real and personal together, of the value of $300, shall be entitled to vote.

Also, when a firm is assessed in respect of property sufficient to give each member a qualification, the names of the several persons comprising such firm shall be inserted in the list, but no member of a corporate body shall be entitled to vote or be entered on the list in respect of corporate property.

Also, when real property has been assessed as the estate of any person deceased, or as the estate of a firm, or as the estate of any person and son or sons, the heirs of the deceased in actual occupation at the time of the assessment, the persons who were partners of the firm at the time of the assessment, and the sons in actual occupation at the time of the assessment, shall be entitled to vote, as if their names had been specifically mentioned in the assessment, on taking an oath, if required, in accordance with the facts coming within the separate classification of the above provisions.

In *New Brunswick*, every male person 21 years of age, a British subject, not under any legal incapacity, assessed for the year for which the Registry is made up—in respect of real estate to $100, or personal property, or personal and real, amounting to $400, or on an annual income of $400—shall be entitled to vote.

Thus, in both Nova Scotia and New Brunswick the franchise is more extended than in Ontario. In Ontario it still savours of the real estate. In New Brunswick and Nova Scotia it is based upon personal estate, *per se*, as well as real estate.

In *Ontario*, certain persons are forbidden to exercise the franchise, whether qualified or not, namely, Judges of the Supreme Courts, of County Courts, Recorders of cities, officers of the Customs of the Dominion, Clerks of the Peace, County Attorneys, Registrars, Sheriffs, Deputy Sheriffs, Deputy Clerks of the Crown, Agents for the sale of Crown lands, Postmasters in cities and towns, and Excise Officers, under a penalty of $2,000, and their votes being declared void.

Again: no Returning Officer, Deputy Returning Officer, Election Clerk or Poll Clerk, *and* no person who at any time, either during the election or before the election, is or has been employed in the said election, or in reference thereto, or for the purpose of forwarding the same, by any candidate, or by any person whomsoever, as counsel, agent, attorney or clerk, at any polling place at any such election, or in any other capacity whatever, and who has received, or expects to receive, either before, during or after the said election, from any candidate, or from any person whomsoever, for acting in any such capacity as aforesaid, any sum of money, fee, office, place or employment, or any promise, pledge or security whatever therefor, shall be entitled to vote at any election.

No woman shall be entitled to vote at any election.

In *New Brunswick* and *Nova Scotia*, there is no restriction as to the exercise of the franchise by persons who are duly qualified. On the contrary, express provisions are made to enable presiding officers, poll clerks, candidates and their agents, when acting in the discharge of their various duties connected with the election, to poll their votes in districts where otherwise, but for such provisions, they would not be entitled to vote.

As to the Qualification of Candidates.

In *Nova Scotia*, the candidate must possess the qualification requisite for an elector, or shall have a legal or an equitable freehold estate in possession, of the clear yearly value of eight dollars.

In *New Brunswick*, the candidate must be a male British subject, 21 years of age, and for six months previous to the teste of the writ of election have been legally seised as of freehold for his own use of land in the Province of the value of £300, over and above all incumbrances charged thereon.

In *Ontario*, by the Act of 1869, 33 Vic. c. 4, passed to amend the Act of the previous session, entitled, "An Act respecting Elections of Members of the Legislative Assembly" (the 32 Vic. c. 21), it is enacted, "That from and after the passing of that Act, no qualification in real estate should be required of any candidate for a seat in the Legislative Assembly of Ontario; any statute or law to the contrary notwithstanding, and *every such last mentioned statute and law is hereby repealed.*"

Neither the said 32 Vic. c. 21, nor the preceding Acts of the same session, caps. 3 & 4, defining the privileges, immunities and powers of the Legislative Assembly, and for securing the independence of Parliament, point out what shall be the qualifications of a candidate, and the previous Acts in the Consolidated Statutes on the subject have been repealed.

By the 23rd section of 32 Vic. c. 21, 1868–9. the electors present on nomination day are to name the person or persons whom they wish to choose to represent them in the Legislative Assembly. There is no restriction, as in Nova Scotia, that a candidate must have the qualification of an elector, which, among others, is that he shall be a male subject by birth or naturalization, or, as in New Brunswick, specifically, that be must be a "male British subject."

In the Ontario Act, 32 Vic. cap. 21, sec. 4, it enacts: "No woman shall be entitled to vote," but there is no restriction in the 23rd section as to the sex of the person or persons whom the electors shall choose to represent them in the Legislative Assembly, nor is there any clause in the two Acts, caps. 3 & 4, above referred to, from which any such restriction can be inferred. The 61st section of 32 Vic. cap. 21, declares, "That no candidate shall, with intent to promote *his* election, provide or furnish," &c. But by the General Interpretation Act, passed by the Legislature of Ontario, cap. 1, 31st Vic. (1867–8), sec. 6, clause 8, it is enacted that "words importing the singular number, or the *masculine* gender, shall include more persons, parties or things of the same kind than one, and *females* as well as males, and the converse."

And by the 3rd section of the same Act the interpretation clauses were to apply to all Acts thereafter passed.

Thus it would appear, that if the electors present on nomination day choose a female as a candidate, and, in case of a poll being demanded, she should be elected, she would be entitled to take her seat as a member in the Legislature of Ontario.

In this respect Ontario differs from the other two Provinces, and may be said to be in advance of both England and the United States on this point.

This difference—assuming that the above construction of the Ontario Act is correct—is one of so much discussion at the present day, that it may not be uninteresting to refer to a very important argument and decision which took place in the Common Pleas in England almost at the time the Act was under consideration in the Ontario Legislature, and which it is presumed must have come under the observation of the very able legal men in that House. The argument was commenced early in November, 1868, and judgment given in January, 1869. The case of *Chorlton*, appt. v., *Lings*, respt., L.T.N.S., 1868-9, 534, L. R. 4 C. P. 374, 5 C.L.J.N.S. 102. The name of Mary Abbott, with a large number of other women, appeared upon the lists of voters for members of Parliament for the Borough of Manchester. Her name was objected to and struck off by the revising barrister. Her statutory qualification otherwise than as a woman was not disputed. On appeal from the decision of the revising barrister, the case was argued by Coleridge for the appellant, by Mellish for the respondent. The decision which was to govern the other cases as well as her own was that she had not a right to vote. In the course of the argument, some observations were made by the counsel and the judges, which will aid us in the construction to be put upon the Ontario Acts, bearing in mind that the question here is not the right of the woman herself to exercise a right or privilege, but *the right of the electors not to be restricted in the exercise of their rights—that is the right of selection.* And further, whether when in a particular statute, dealing with an entire question, a particular resolution is made with regard to a particular class of persons, it does not negative the application of any other restriction to the same class, than the restriction named, assuming that in other respects the requisitions under the statute are complied with. The Ontario Statute first gives the franchise to every "male person," &c., then as if that was not sufficiently explicit, as if to remove the very doubt which has been raised in England, and to show that the consideration of woman's rights and her position had not been overlooked, it declares "no woman shall be entitled to *vote* at any election." When it comes to the nomination of candidates, it requires the sheriff to call upon the electors present to name the "person" or "persons" whom they desire to choose without any restriction in such selection as in the case of the franchise to the *persons* being male. By a subsequent Act, c. 4, 1869, the legislature abolishes the qualification in real estate, thus removing the inference to be drawn as to night service and the feudal tenure referred to by one of the judges in *Chorlton* v. *Lings*. Then assuming that the selection is of a woman of full age—a feme sole—*compos mentis*—not under any restraint from infancy or marriage or any legal incapacity from crime—does she not come sufficiently under the term "person" to be within the Act. In the case referred to, Mr. Mellish in his very able argument against the construction of the English statute, which Sir John Coleridge was contending for; viz., that woman had the right to vote, because under Lord Romilly's Act, words imputing the masculine gender included the feminine, says; "No one can doubt that in this Act (that is the Representation of the People Act, 1867), the word "man" is used instead of the word "person" for the express purpose of excluding "woman," thereby admitting that if the word "person" had been used (in the absence of anything else in the Act, to control it) woman would have been included." Chief Justice Bovill, in referring to the Reform Act of 1852, and to

the Representation of the People Act, 1867, says: "The conclusion at which I have arrived is that the Legislature used "*man*" in the same sense as "*male person*" in the former Act, and this word was intentionally used to designate expressly the male sex, and that it amounted to an express enactment and provision that every man, as distinguished from woman, possessing the qualification, was to have the franchise, and in that view Lord Romilly's Act does not apply to this case, and will not extend the word "man" so as to include "woman." The other judges, Willes, Byles and Keating, fully concurred with the Chief Justice as to the construction to be put upon the statute, saying that the words "man" and "male person," together with the context of the statute throughout, showed conclusively that it was not intended to confer the franchise on women. Judges Willes and Byles went further, expressing their opinion that women were under a "legal incapacity" from either being electors or elected; the latter observing that "women for centuries have always been considered legally incapable of voting for members of parliament, as much so as of being themselves elected to serve as members," and he hoped "that the ghost of a doubt on this question would henceforth be laid forever." Even the casual opinion of such eminent men is entitled to the highest respect, though the point actually under their consideration and decided by them, was the construction of a particular statute as to *the right of a woman to vote*, not as to the right of the electors to choose one as their representative. The language of the statutes before them was different from the language of the Ontario statute. The latter is the one which governs here. It professes to deal with the whole question—being essentially a question—with which the Ontario legislature had the exclusive power to deal. It classifies and deals with the voters and candidates separately and exhaustively, and throughout the whole contest there is nothing inconsistent with such a conclusion.

Ansley (Thomas Chasholm) in his able review of the Representation of the People's Act, 1867, and of the Reform Act of 1832, ably handles the whole subject, and differs entirely from the views laid down by the learned judges on the case referred to—not upon the broad question, but upon the construction of the statute. His work was written in 1867, their decision given in 1869. In the course of his work he gives Mr. Denman, Q. C., as authority for the statement that the word "person" used in an Act of the legislature of one of the colonies of Australia had given the franchise to women.

It is also further to be observed, that in the Imperial Act 33 and 34 Vic. c. 75, entitled "An Act to provide for Public Elementary Education in England and Wales," (passed in 1870, since the decision in *Chorlton* v. *Lings*), which regulates the distribution and management of the parliamentary annual grants, in aid of public education, and provides for such distribution and management by means of a board or school parliament, with great powers, chosen by election by the ratepayers, the word "person" is used throughout with reference to those chosen to form the board, and under that designation women have been held eligible and taken their seats, notwithstanding that in speaking of such members the word "himself," and other words of the masculine gender only, are used. It would seem, therefore, taking all points into consideration, to require an arbitrary and unusual construction to be put upon such word, to deprive the electors of Ontario of the right of choosing a female representative for their own legislature, if they be so minded.

In all three of the Provinces persons holding offices of profit or emolument under the Crown, excepting members of the executive government, are debarred from holding seats in the Assembly. In all the three Provinces there must be a registration of voters, the foundation in all being the same, namely—the assessment list of the district—the details for the register of voters, simply varying according to the qualifications which give the vote, and which entitles the voter's name to be put upon the list—the exceptional instances in Nova Scotia being when the representatives of a deceased party, or the members of a firm assessed are entitled to vote: and in New Brunswick, when there has been no assessment in the parish for the year for which the list ought to be made up.

In Ontario the voting is *viva voce*.

In New Brunswick and Nova Scotia—by Ballot—introduced in elections in New Brunswick in 1855; in Nova Scotia in 1870.

The mode of conducting the Election.

The mode of conducting the election by ballot is very much the same in Nova Scotia as it is in New Brunswick, the most material distinction between the two being that in the several polling districts in New Brunswick the ballots are openly counted at the close of the poll at each polling place, in the presence of the candidates, or their agents, duly added up openly in the presence of all parties, entered in the poll books or check list, signed by the poll clerk, and countersigned by the candidates or their agents, and the ballots then forthwith destroyed, the countersigned poll book or check list with a written statement of the result of the poll at that district, with the signatures of the candidates or their agents is then forthwith enclosed, sealed up, and publicly delivered to the presiding officer to be transmitted to the sheriff to be opened on declaration day.

Whereas in Nova Scotia the ballot boxes, with the ballots, are sealed up and sent. This mode was in accordance with the law first introducing the ballot in New Brunswick, but, being found liable to abuse, was subsequently amended as above mentioned.

In Nova Scotia, the 17th section of the Act of 1870, introducing the ballot, abolishes the public meeting held by the sheriff on nomination day, but he is to attend at the Court-house or other place prescribed, between 11 a.m. and 2 p.m., for the purpose of receiving the names of the candidates, and he shall exclude all persons not having business in connection with the election.

In Ontario and Nova Scotia, in case of a general election, the polling must be simultaneous throughout the whole Province.

In New Brunswick it is not so; the sheriff or the presiding officer for the county or city selects such time within the writ as he deems most suitable for the convenience of the electors within his county.

As under the Dominion Act, with the exceptions pointed out, the elections are to be held under the laws which were in force on the 1st of July, 1867. The reforms introduced into Nova Scotia by the Act of 1870, of the ballot and the abolition of the hustings on nomination day, will not be applicable.

THE LATE SIR JOHN ROLT.

The career of the late Sir J. Rolt, who died in June last, strikingly vindicates the truth of the aphorism that the Law is always just to those who are just to her. Sir John had no advantages, and he owed his fortune and eminence to his high character, his untiring assiduity, and his excellent parts. Sir John was not a genius, unless we accept the dictum of a famous character who said, 'Genius is only another name for industry.' What Sir John achieved any one endowed with good ability, an iron constitution, zeal and integrity may, without presumption, hope to accomplish.

Sir John Rolt was born in Calcutta in 1804. He was sent to England with his mother, and soon after his father failed in business. This rendered it impossible to give the boy an education, and he was apprenticed to a linendraper. His next employment was secretary to an institution, an appointment which he continued to hold even after he had become a clerk in the office of Messrs. Pritchard & Sons, the well-known proctors of Doctors' Commons. In those days the Benchers of the Inns of Court were not so strict as they are now, and Mr. Rolt was permitted to keep his terms without resigning his post in Doctors' Commons. Probably, had he gone among the proctors in earlier youth, he would have become one of them, and would have contented himself with money-making till 1858 and a pension after the Probate Act. But at his age the doors of that branch of the profession were shut against him, and so he betook himself to Lincoln's Inn. He was not called to the bar until 1837, when he was in his thirty-third year. He obtained an excellent business as a junior, and in eleven years he received silk from Lord Lyndhurst. In 1857 he entered Parliament for the Western Division of Gloucestershire—his maternal grandfather was a Gloucestershire yoeman — and continued to represent that county until 1867. He was a consistent and valued supporter of the Conservative party, and in 1866 became Attorney-General. In 1867 he succeeded Sir James Knight Bruce as one of the Lord Justices of Appeal. The highest expectations were formed of his judicial career, but unhappily he was very soon after his appointment attacked with paralytic symptoms, and had to resign. In surveying his career, we cannot, while admiring his honorable ambition and his indefatigable ardor, refrain from doubting whether he really took the course calculated to ensure genuine happiness to himself or his family in this world. There are games which are not worth the candle, and Sir John has himself been heard to say that no success, however great, could compensate him for what he had undergone. We are all, perhaps, too apt to look at the crowning glory of a man's life, without sufficiently considering whether fortune has not been bought at too high a price.

CONTRACTS IMPOSSIBLE OF PERFORMANCE.

A new case of importance confirms a rule which, however, has been far from invariably assented to. *Robinson* v. *Davison* excited some interest when it was first heard at the assizes, and in its form in the Court of Exchequer (24 L. T. Rep. N. S. 755) it loses none of that interest for lawyers. It will be remembered that the defendant was the husband of the famous Arabella Goddard, and he undertook that she should perform at a particular concert. She was unable to do so owing to illness. Could damages be recovered for the breach of contract? The Court of Exchequer said, No.

It was argued in *Thoroburn* v. *Whitacre* (2 Lord Raym. 1164) that there are three descriptions of impossibility that would excuse a contractor—legal impossibility, as a promise to murder a man; natural impossibility, as a promise to do a thing in its nature impossible; and thirdly, that which is classed as "*impossibilitas facti*," "where, though the thing was possible in nature, yet man could not do it, as to touch the heavens, or to go to Rome in a day." All must agree with Chief Justice Holt that these may be reduced to two—impossibilities in law, and natural impossibility. Without discussing all the cases relating to impossible contracts, which will be found collected in a note to Mr. Benjamin's work on the Sale of Personal Property, p. 428, we will confine ourselves to the effect of illness.

One of the leading cases on this subject reveals one of the delightful differences of judical opinion with which we are familiar. In *Hall* v. *Wright* (1 L. T. Rep. N. S. 230) a plea to an action for breach of a contract to marry was that before breach the defendant became afflicted with dangerous bodily illness, and

was thereby incapable of marrying without danger to his life. The Court of Queen's Bench was equally divided; and the Exchequer Chamber was also divided, four Judges holding the plea bad, three holding that it was good. Judgment was therefore entered for the plaintiff. The contract of marriage is peculiar, and likely to be affected by bodily illness on the one side or the other; and as Baron Watson said, unless stated to be otherwise, a contract to marry must be taken—as was stated in the declaration—to be of the ordinary kind, with all its usual obligations and incidents. It is difficult to speak of this case with any confidence one way or the other, but the view put by Mr. Justice Willes seems to be consistent with common sense—that which cannot without danger be consummated by either contracting party ought to be voidable only on the election of the other. "If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life . . . I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman more anxious to marry, in order to be a companion and a nurse, if she could not be the mistress, of her sweetheart." Not even a lawyer can regret that the plaintiff had a verdict.

Such a case as *Hall* v. *Wright* puts in a clearer light the accuracy of the decision in *Robinson* v. *Davison*, for the services of the performer are required for one single purpose, which purpose she was unable to accomplish; whereas, in *Hall* v. *Wright*, some of the objects ot the contract might be attained, and performance of the contract was not impossible but only dangerous. But it is to be observed what the nature of the contract is of which the law will excuse the performance, on the ground that it is impossible. The rule and the exceptions are carefully stated by Mr. Justice Blackburn in *Taylor* v. *Caldwell* (8 L. T. Rep. N. S. 356), where he says—"There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay the damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible." He then goes on to say; "But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have coutemplated such continuing existence as the foundation of what was to be done: there, in the absence of any express or implied warranty that the thing shall exist, the contract is not be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

Now it is clear that no ordinary contract would contain a warranty as to the continuance of health on the part of one of the contractors, and where there is no such warranty it is hard to see how it was possible to enforce a personal contract, or to recover damages for its breech where illness prevents its performance. And there is only one further question in connection with the subject, and that is raised by Baron Cleasby, who would seem to suggest that a performer was not bound to appear and carry out her contract unless it is possible to fulfil it in all respects according to its terms. His Lordship said: "This was a contract to perform as a pianiste at a concert; in truth, to be the sole performer, and to do what requires the most exquisite taste and the greatest artistic skill, and which, unless well done, would disgust the audience, who naturally expect a great deal from so great a performer. That being so, the question arises, can this be done by the person engaged unless well and in good health?"

No such considerations as are here stated, can, in our opinion, be accepted as weighing on one side or the other. If a performer can scramble or struggle through an entertainment even discreditably, and even, we would add, disgusting the audience thereby, and is not absolutely disabled, he is bound to go on with his undertaking. If a skillful person contracts to do a certain thing requiring the utmost skill, he cannot be excused on the ground that he is by reason of ill health incapable of fulfilling his contact as skillfully as he would have done had he been in health. It would be vain to give greater latitude to a plea of impossibility arising out of natural incapacity than has hitherto existed. The incapacity, as in *Hall* v. *Wright*, should be total for all intents and purposes, and in no degree merely partial. If it is ever held otherwise, a wide gate would be open to the fraudulent evasions of a contract.—*Law Times.*

PROSECUTIONS AND THE POLICE.

The police have been severely censured for their conduct of the prosecution in the Eltham murder. It is said that having constructed a theory at the commencement of the case, they devoted their entire attention to the procuring of evidence to confirm their suspicion. They believed that they had got the right man, and so believing, they could recognise no evidence that did not fall in with their preconceived views.

Undoubtedly there was much in the conduct of the case for the prosecution that proved the need for a professional public prosecutor. The proper business of the police is to gather to-

gether every fact affecting a crime, and place it in the hands of some competent solicitor, by whom all may be sifted—what is worthless put aside, and the clue followed up where the evidence is weak. The Greenwich police are not lawyers, and they were not advised by a lawyer. On the first aspect of the facts, there were strong grounds for suspicion. It must be remembered, in their justification, that they were informed of a great deal that was not legal evidence, and that in the pursuit of justice it is necessary to pick up every thread that may guide to discovery. The commentators on the conduct of the case appear to forget that the police were in possession of a great deal which though not admissible in the witness box, is yet called "moral evidence"—that is to say, evidence which *influences* the judgment, though not legally controlling it. It is right to exclude such evidence at the trial, because it is open to a certain amount of question as being in some case unreliable; but no individual would dream of excluding those facts from his consideration on any matter, when his object was to form a fair judgment of the truth. The communications of the murdered girl to her friends as to her relationship with accused, were properly excluded from the witness box, because it would be most dangerous to condemn a man to punishment upon statements made by some person behind his back. But the police were bound to take these statements into consideration for the purpose of investigation, and to help their own judgments in the pursuit of legal evidence. It was, to say the least of it, a remarkable coincidence that she should have said so much before the murder about a man who on that very evening was found to be going, in a muddy state, in a direction from the very spot where she was killed. Extraordinary coincidences do occur, and from the evidence adduced for the defence this appears to be one of them. But the police must act according to the usual human experience, and they would have no right to treat concurrent facts as mere coincidences until they are proved to be so, and no proof of this was given until the trial produced the witnesses that answered the probabilities by the facts. What the poor girl had said about Pook could not, without gross injustice, have been put in evidence against Pook; but it could not fail to make an impression upon the mind, and to direct the suspicions of the police, and they are not to be blamed for acting upon those suspicions and following up the clue which had thus been given to them. Their error lay in not putting before the jury all the facts they had found. But, then, their answer to this is that the case was out of their hands, and had passed into the possession of the lawyers. Thus much is due to them.—*Law Times.*

Larceny—Animals Feræ Naturæ.

The Queen v. *Townley*, C. C. R. 19 W R. 725.

This case is of some value as illustrating the distinction between what will regarded as one continuous act, and what as to two distinct acts. The prisoner was indicted for a larceny of rabbits. He came in a cab and removed rabbits which had been hidden under a hedge, and it was found by the jury that they had been placed there by poachers, who had killed them on land in the same occupation as the place where they were found; it was also to be taken as a fact that the poachers had not intended to abandon possession of them. It was not found by the jury, or stated in the case as assumed, *but it was assumed by the Court* that the prisoner was himself one of the poachers. The Court held that the whole was one continuous act, and that therefore, although the rabbits did according to *Blades* v. *Higgs* (13 W. R. 727), become the property of the landowner on whose land they were killed, the prisoner was not guilty of larceny. This seems more in accordance with common sense, than the refinement as to an act "not continuated but interpolated," which seems sanctioned by the passage in 1 Hale, P. C. 510, commented on by the Court, and explained away in a manner which Lord Hale would probably not have approved. The lapse of time between one particular act and another, or even the temporary absence of the perpetrator from the spot where the goods lie, may be *evidence* of whether the whole is one thing, or whether the acts are to be taken as distinct; but it can be no more. The continued *intent* seems to be the distinguishing test. If, to use the illustration of orchard robbery quoted by Blackburn, J., from Lord Cranworth's judgment in *Blades* v. *Higgs*, the thief after picking the apples found them more than he could carry, and went home for a truck, would the continuity of the act have been broken? It would seem not. But if from lapse of time or from other circumstances it could be inferred that that the thief had given up his intention to remove the goods, but afterwards resumed it and removed them, it could no longer be said that the act was a continuous one.

The case might be noted by game law reformers as illustrative of the anomalies resulting from the present state of the law.—*Solicitors' Journal.*

There seems to be a curious desire to fasten upon the legal profession the character of ebriosity. If we are to give credence to all the charges which are so freely made in the present day, in reference to different classes of society, we must perforce conclude that we have fallen upon a crapulous age, however unconscious many of us may be of the unattractive phenomena which are said to be so patent to the observation of our more censorious contemporaries. The *American Law Review* tells us that

"In America all lawyers drink; *very few are sober after ten o'clock in the morning.* It is not customary to keep sherry bottles or beer barrels in offices, because sherry and beer are rarely drunk in America—except by women. Lawyers, like all other men, drink whiskey, and for this purpose a hogshead of it is kept in every practitioner's safe. Formerly, it was kept in the main office, but since the introduction of wall safes (and the passage of the prohibitory laws, which are now so common throughout the country) the safe has been found the most convenient place. For conveyancers, the register of deeds keeps a supply. This practice is entirely unknown to the English, owing to the absence of compulsory registration. Formerly, in Massachusetts, no contract was considered valid in the profession, unless it had been, to use the term then in vogue, "ratified." Ratification consisted of a solemn drink, *inter partes*, participated in by the attorneys. Whether this custom would ever have ripened into law it is impossible to say, because the practices we have been describing excited for some reason so much animosity among the Jesuits, that they procured the enactment of a prohibitory law by the legislature, nominally directed against the sale of all liquors, really however, against the Bar. This has resulted in making alcoholism in chambers more secret. It is thought, however, that nothing will totally eradicate it, except the introduction of light European wines."

What can this mean? Is it that the public which has endured a "Tammany Hall" and an "Erie Ring" puts up, as a small matter, with a legal profession "very few of whom are sober after ten o'clock in the morning;" or is this piece of self-accusation as ridiculous as the mare's nest of legal alcoholism lately unearthed by a legal journal on this side of the Atlantic? American lawyers who come to England tell us that lawyers in the States work nothing like so hard as their brethren here. The tone, too, of the legal profession is very much less fastidious in America than in England. But there is moderation, and we do not believe that the American lawyers are the exception which proves that rule. The paragraph in our transatlantic contemporary's pages, if not intended as a hoax, must have been written, after ten a.m. by an unfortunate specimen in a mood of generalization.—*Solicitors' Journal.*

It has been held in England, in *Lee* v. *The Lancashire and Yorkshire Railway Company*, that the legal and equitable rights of a passenger injured by a railway accident are exactly the same as those of a passenger injured by any other common carrier, and the same considerations and rules apply in both cases. And that where a receipt has been given under seal it discharges at law all cause of action, and can only be set aside by the equitable jurisdiction of courts of law; but a mere receipt in writing has no such effect, it amounts simply to an acknowledgment of money paid; it cannot be pleaded in answer to an action, and it may be impeached or explained by parol evidence.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

In the matter of Sophia Louisa Leigh *

Custody of children—Con. Stat. U. C. cap. 74, sec. 8.

Upon an application by the mother, under Con. Stat. U. C. cap. 74, sec. 8, for the custody of her infant daughter, four years of age, the husband and wife having separated:

Held, (after reviewing the cases decided under the corresponding English Act,) that the statute in question does not take away the common law right of a father to the custody of his child, but only makes the recognition of this paternal right conditional upon the performance of the marital duty, and subjects it, in some degree also, to the interest of the child.

If, therefore, upon an application of this kind, it appears that the husband and wife are living apart, the court will inquire into the cause of their separation, in order to ascertain

(1) Whether the husband has forfeited, by breach of his marital duties, this *primâ facie* right to the possession of his children. (2) And whether the wife, by deserting the husband without reasonable excuse, has relinquished her claim to the benefit and protection of the statute, which was intended "to protect wives from the tyranny of their husbands, who ill-used them."

[Chambers, May 17, 1871.—*Gwynne, J.*]

This was a petition, under Con. Stat. U. C. cap. 74, sec. 8, by Mrs. Henry Leigh, praying that her infant daughter, Sophia Louisa Leigh, aged four years, might be taken from the custody of its father and delivered to her.

It appeared, from the affidavits filed on the application, that the husband and wife had been living apart since April, 1870; the cause of separation alleged by the petitioner being her husband's ill-treatment of and cruelty towards her for eight years previous to that time. The husband, in reply, filed the affidavits and certificates of a large number of his neighbours, all of whom testified in the strongest terms to the high character which he had always borne in his social and domestic relations. He also fully met and disproved the allegation of the petitioner that on account of hereditary insanity in his family, it would be unsafe to entrust him with the custody of the child.

The material portions of the evidence, and the cases cited upon the argument, fully appear in the judgment.

Dalton McCarthy appeared for the petitioner.

William Boys for the respondent, Henry Leigh.

Gwynne, J.—In *Re Taylor*, 11 Sim. 178, which was one of the first cases that arose under the English Act, 2 & 3 Vic. cap. 54, it appeared that on the 20th October, 1837, Mrs. Taylor left her husband's house, alleging, in justification of that step, a charge of adultery, which she then preferred against him, upon grounds of which she afterwards admitted the entire insufficiency, and which were, in fact, wholly without foundation. Overtures for a reconciliation were immediately made by Mr. Taylor, and various negotiations followed; but Mrs. Taylor, by the advice of her friends, refused to return home. Circumstances occurred which convinced Mr.

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* See *In re Kinne*, 6 C. L. J. N. S. 96, and the judgment of Adam Wilson, J., in *Re Allen*, Q. B. H. T., 1871 (not yet reported).—Eds. L. J.

Taylor that his wife's affections were alienated, and that no *bonâ fide* reconciliation could be expected; and he went to reside in France. Afterwards, in July 1838, Mrs. Taylor instituted a suit in the Consistory Court of London for restitution of conjugal rights. To this suit Mr. Taylor put in an allegation in bar, stating the circumstances under which his wife had left his house, and the charge she had made against him; and adding, that although she well knew the charge to be entirely devoid of foundation, she persisted in refusing to retract it. On the 5th February, 1839, the allegation was rejected by the court. Mr. Taylor appealed to the Arches Court, where the judgment of the Consistory Court was affirmed on the 20th June, 1839. He then appealed to the Judicial Committee of the Privy Council, pending which appeal the petition came on to be heard. At the time of the presentation of the petition, there were living five children of the marriage, two of whom were more than seven years old, but the other three were under that age, the youngest having been born on the 23rd May, 1837. The prayer of the petition appears to have been, that Mrs. Taylor might have access to her children.

For the petitioner, Mrs. Taylor, it was contended that the intention of the Act was to create a right in the mother to which the court should give effect in all cases of separation between husband and wife where the wife had not been guilty of criminal conduct: that the clause in the Act pointing out the criminality of the mother as the only cause which should exclude her from the benefit of the Act, distinctly recognised her general right in cases where no criminality could be imputed: that the Act created a positive right of access in the mother, which the court could not deprive her of: that the court was merely the instrument appointed by the legislature to put her in possession of her right: that it was the right of every innocent mother living in a state of separation from her husband; and that the discretion of the court was to determine the *manner* only in which the right was to be enjoyed, not to take it away: that the interest of the children was the only consideration which could be allowed to interfere with the mother's right.

The Vice-Chancellor of England, however, was in that case of opinion that the jurisdiction given by the Act was to be exercised solely in the discretion of the court; and that, pending the question in the Ecclesiastical Court, it would not be right for the court to say that Mrs. Taylor was entitled to have access to her children. Moreover, he was of opinion that the fact of her having, without cause, removed herself from her husband, was a sufficient reason why the court should not exercise the jurisdiction of ordering any access. Accordingly, no order was made on the petition.

In re Bartlett, 2 Col. 661, was an application under the Act, praying the delivery to the mother of two of her children, a boy and a girl under seven years of age, the girl being only two years of age; and that she might have access to her other children, four in number. It appeared that the wife's family had brought about an unhappy state of existence between the husband and wife; that on one occasion he had separated himself from her, and on returning to his house struck her; that he had been bound over to keep the peace towards her; and that he had, both in words and in writing, expressed himself towards her in a very violent and offensive manner. In giving judgment, the Vice-Chancellor held that the statute did not, as a condition of the interference of the court, require that the wife should have obtained or should be entitled to obtain a divorce *a mensâ et thoro*. "This," he said, "is a case in which the husband and wife are living apart from each other" (her brothers having removed her from his house), "her husband appearing to wish, and the wife objecting to, a reunion." He says also, "That she is clearly legally justified in living apart from him, it would be imprudent for me, upon the evidence before me at present, to say; but if she is not so, that she is not without excuse, not without apology, may, I think, be safely stated." He accordingly made an order for the delivery to the mother of her youngest child (two years of age), Mrs. Bartlett's two brothers undertaking for the proper care, maintenance and education of the child while in her custody. The order also made provision for her having access to the other children, and for access for the father to the youngest child so removed into the custody of the mother; and it was ordered that this child should not be removed from the house of Mrs. Bartlett's brothers without the leave of the court.

In re Fynn, 2 DeG. & Sm. 457 (A. D. 1848), was not a petition under the Act, and no order was made upon the petition for the want of a sufficient provision being made for the care, maintenance and education of the child, if the father should be deprived of his common-law right of possession and control of his children. In that case, however, the facts were such as seemed to justify the wife in living apart from her husband, for Knight Bruce, V. C., says, "I am not persuaded, however, that she has not a good defence to the pending suit, if there is one pending, or to any suit against her for restitution of conjugal rights."

In *Re Tomlinson*, 3 DeG. & Sm. 371, no order was made, for a reconciliation took place while the petition stood over to enable the wife (the petitioner) to answer the affidavit filed by the husband. Knight Bruce, V. C., in this case also seemed to regard the mother's right as dependent upon her being justified in living apart from her husband; for he says there, "I should have thought it right now to make an order relating to the custody of the infant, without directing the petition again to stand over, had there appeared to me to be a probability of the mother's success in the ecclesiastical suit, that is to say, in establishing that she is justified in living apart from her husband" The husband had instituted a suit for the restitution of conjugal rights, and the case had stood over for the purpose of enabling counsel from the Ecclesiastical Court to argue the case upon the validity of the mother's defence to that suit; at the close of which argument the learned Vice-Chancellor made the observations above quoted.

In *Warde* v *Warde*, 2 Phill. 786 (A.D. 1849), the wife obtained a decree *a mensâ et thoro*, and the order was made on her petition. Lord

Cottenham has there ennunciated his opinion of the object of the Act. He says: "I must say something with regard to the position of the children under the late Act of Parliament, as to the construction of which, and the object with which it was introduced, some very erroneous notions appear to exist. The object of the Act, and of the promoters of it, and that which I think appears upon the face of the Act itself, was to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from seeking justice from her husband, by the terror of that power which the law gave to him, of taking her children from her. That was felt to be so great a hardship and injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife without the risk of any injury being done to her feelings as a mother. That was the object with which the Act was introduced, and that is the construction to be put upon it. It gives the court the power of interfering; and when the court sees that the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother, that is precisely the case in which it would be called upon and ought to interfere."

In re Halliday, Ex parte Woodward, 17 Jur. 56, came before Turner, V. C., in 1852. That was the case of a petition under the Act, presented by the mother, praying for the custody of her infant child, four years of age. It appeared that the husband and wife had lived happily enough together until about a year previously, when a legacy of £540 had been left to the wife, which, it was alleged, the husband had since squandered in dissipation. The money being all gone, and his wife becoming chargeable to the parish, he was taken up for deserting his wife, convicted, and sentenced to six months' imprisonment. Shortly after coming out of prison, he made his way, in the absence of his wife, to the lodgings where she was living and maintaining herself by going out as a laundress, and took away their child. He refused to state what had become of it, except that it was at board in Essex. By the affidavits filed in the matter, each accused the other of habitual drunkenness, and in addition the wife accused the husband of adultery.

In relation to the Act and its object, the Vice-Chancellor says: "It will necessarily be important, in the first place, to look at the principles upon which the Act proceeds. When this Act came into operation, it was the undoubted law of the country that the father is entitled to the sole custody of his infant children, controllable only by this court (the Court of Chancery) in cases of gross misconduct. With this right the Act does not, as I understand it, interfere so far as to have destroyed the right; but it introduces new elements and considerations under which that right is to be exercised. The Act proceeds upon three grounds: first, it assumes and proceeds upon the existence of the paternal right; secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognizing the paternal right; thirdly, the act regards the interest of the child. These three grounds, then—the paternal right, the marital duty, and the interest of the child—are to be kept in mind in deciding any case under this statute." He then cites *Warde* v. *Warde*, in confirmation of his view, and says, "I think there is a very great difficulty in calling on the court to restrain a man in the exercise of his legal right. * * * There are, however, two grounds on which the court has jurisdiction under the Act, viz., breach of marital duty, and the interest of the child. That the husband did desert his wife previously to May, 1851, he does not deny; but he justifies the desertion as necessary. It is, therefore, incumbent upon me to look into the conduct of the wife. The charge against her is that of habitual drunkenness." The Vice-Chancellor, upon the evidence, came to the conclusion that this charge was not proved; and, referring to the conduct of her husband taking away her child from his wife's lodgings, and to the fact that he did not even inform the court where the child was, except that it was at board in Essex, he proceeds: "Is it, or is it not, in contravention of the marital duty, which the Act has placed in competition with the paternal right, that the husband should thus take away his children and keep them, without any communication with the mother as to the mode, or place, or circumstances of their maintenance? The natural right must be held to have been modified by the Act, and the same opportunities must now be given to the mother as to the father, of communicating with the offspring. Then there is to be considered the question of access only, or of custody of the child; and that depends upon what is most for the interest of the child in the position of the parties." And finally, he says: "But I shall decide, if possible, rather in favour of the paternal right than against it; and I therefore give now an option to the father to place his child to be taken care of where the mother can have access to it, and see that it is properly attended to, so that she may have the benefit intended by the Act. Unless it be shown by affidavit on the next seal day that this has been done, I shall direct the child to be delivered over to the mother."

In *Shillito* v. *Collett*, 8 W. R. 683 (A.D. 1860), the application was by the mother against the testamentary guardians of the children, appointed by her husband's will, for the custody of three children, all under seven years of age. The observations of Kindersley, V. C., in that case, are to be taken as applying to the particular circumstances of that case, which from its nature raised no question arising out of the fact of a husband and wife living apart. The stress which he lays upon the interest of the children being the point to decide the case, must be limited to the case before him. This sufficiently appears to be the intent of the learned Vice-Chancellor, from the context of his judgment; and it is therefore by no means an authority for the position, that in the case of separation between husband and wife, the cause of separation is to be overlooked, and that the sole point for consideration is the benefit of the children. He says, there, "Beyond all doubt, if it had not been for Mr. Justice Talfourd's Act, the guardians could have assumed the conduct themselves of the education and maintenance of the children; but

under the statute, the court has the discretion, either against the father or the testamentary guardians, as in this case, where any of the children are under seven years of age, if it sees fit, to decide that the custody shall be given to the mother, although she was not appointed guardian. With respect to the age of the children, the Legislature considered that as between the guardian and the mother, the very young children required a mother's nurture; and, notwithstanding the legal rights of a father, they should be entrusted to her. But it still enabled the court to do that which it thought best for the interest of the children. It did not consider that, as between the father and mother, the father had an equal interest with her, but that in the majority of cases the custody should be given to the mother; but, under ordinary circumstances, it was most desirable that it should be entirely discretionary in the court." In the exercise of that discretion, the Vice-Chancellor was of opinion that he "must look at the interest of the children, which might be just as well preserved by giving the custody either to the father or the mother, the tendency being to lean towards the mother when the children were of very tender age; but still the material question was, what was for the children's benefit?" He then proceeds to show why, in that case, he thought the discretion of the court would be best exercised by leaving the children in the custody of the testamentary guardians. There is nothing in this case which countenances the idea that the learned Vice-Chancellor intended to cast any doubt on the propriety of the observations of Lord Cottenham in *Warde* v. *Warde;* of Turner, V. C., in *Re Halliday;* or of the Vice-Chancellor of England in *Re Taylor*, in a case where husband and wife were living apart.

In *Re Winscom*, 11 Jur. N. S. 297 (A.D. 1865), the application was by the mother for access to her female child eight and a half years old; but the principle upon which the right of access and custody depends is the same. In that case the husband had petitioned the Divorce Court for a divorce upon two allegations of adultery, one of which was condoned and the second not established, and so the petition for divorce was dismissed, but the husband and wife lived apart. Wood, V. C., in that case, rests upon Lord Cottenham's decision in *Warde* v. *Warde*, as establishing the intention of the Act, and the course of the court in relation to it; and applying these observations to the case before him, after stating the circumstances under which the husband and wife were living separate, he says, p. 299: "The consequence is, that they are not separated from the matrimonial tie; but it could not, as I apprehend, be with any great hope of success suggested, that the lady is in a position to institute any suit for restitution of conjugal rights. Nothing of the kind is suggested, and they must for the present remain apart." And again: "But further, I have had to consider most seriously how far it would help her for me to interfere at all with the father's directions in a case circumstanced like the present. In the first place, it is not clearly a case in which, according to Lord Cottenham's view, the court is called upon for any interference whatever. It is not a case in which, to use Lord Cottenham's expression, the mother requires protection from the tyranny of her husband."

Our Act, Con. Stat. U. C. cap. 74, sec. 8, is identical with the Imperial statute 2 & 3 Vic. cap. 54, with the exception that in our Act the age of twelve years is substituted for seven years, and that the jurisdiction which the English Act confers on the Lord Chancellor and Master of the Rolls is by our Act conferred upon the Superior Courts of Law and Equity, or any judge of any of such courts.

From all of the above cases, the true principle to be collected, I think, is, that the court or a judge, in the exercise of the discretion conferred by the Act, is bound to recognise the common law right of the father, and should not assume to impair or interfere with that right, so long as the father fails not in the due discharge of his marital duties. In order to induce the court to interfere on behalf of the wife, she should satisfy the court that the separation, if the act of the husband, is in disregard of his marital duties, that is, without sufficient cause given by the wife; or, if the act of the wife, that, although she may not have cause sufficient to entitle her to a decree for judicial separation, she has reasonable excuse for leaving her husband and living apart from him: and further, that it should not appear that it is not the interest of the children that she should have access to them, or the custody of those under the age mentioned in the Act in that behalf. The object of the Act being to protect wives "against the tyranny of husbands who ill-use them," a wife can have no right under the Act, who should capriciously or without some reasonable excuse, desert her husband, absent herself from his home, and abandon her duties as a wife and mother. In view of these principles, it will now be necessary to enquire whether the petitioner in this case brings herself within them, so as to entitle her to the interposition of the jurisdiction conferred by the Act.

It is difficult to conceive anything more contradictory than the statements contained in the affidavits of the wife, her mother, and of Margaret McKay, on the one side, and in the affidavits of the husband and others, filed upon his part, in the material points. By the affidavit of Mrs. Leigh it appears that she and Mr. Leigh have been married for ten years; and she alleges that for the last eight years her husband has been in the habit of abusing, insulting, and maltreating her in the most shameful manner, not only in vituperative language, but also by inflicting upon her grievous bodily injury; and she says that to such an extent has he carried his cruelty towards her, that frequently, through the effect of his brutal treatment of her, she has been so ill that her life has been despaired of; and that whilst so ill, her husband manifested such perfect indifference as to her condition, and so neglected her, that she had to apply to her mother for her care and protection, and even for the common necessaries of life; and that finally, from the continued and constant ill-treatment she received from her husband, and being pregnant of her youngest child, and being apprehensive of danger to its life and to her own, she, in pursuance of the advice of her physician, left her husband's house in April, 1870, taking with her her three children, now aged nine, eight and four years respec-

tively, and has since continued to reside with her mother. The affidavit then alleges that the father, on the 5th April, 1871, succeeded in getting possession of her child of four years of age, and in taking it away; and avers that since it was so taken away, the mother has never seen the child, nor does she know of its whereabouts. The affidavit then proceeds to allege that two of the husband's brothers have for a long time been subject to fits of insanity, and that the wife, from her husband's treatment of her, and his general demeanor, has no hesitation in saying that he is, and for some time has been, subject to fits of insanity; and that she has no doubt he was under the influence of one of such fits when he took away his child, on the 5th April last: and it alleges that the mother is well able to supply all the wants of the children.

Now, the first observation which strikes one upon the perusal of this affidavit is, that it is strange that no single particular instance is given of the ill-treatment, which it is said has continued for a period of eight years, during which the life of the wife, in consequence of such ill-treatment, was frequently despaired of. If the husband is one of a family long afflicted with fits of insanity, and if he himself, as is alleged, has been subject to such fits, and under the influence of them has, for a period of eight years, in the midst of a civilized community, treated his wife, in the language of her mother, "more like a brute than a natural creature;" and if, in consequence of such treatment, the wife, acting upon the advice of her physician, found it necessary to leave her husband's house, and fly with her children for protection to her mother, surely abundant and indisputable evidence could be adduced of the truth of the charges The only evidence, however, which has been offered, is that contained in the affidavits of the wife, her mother, and the hired servant now living with them, and who, it appears, did at one time live with Mr. and Mrs. Leigh for about four months, in the year 1868.

The husband, in his affidavit, contradicts, in as express terms as is possible, the general charges made against him; and he states matters which are wholly uncontradicted, and which, being uncontradicted, I should be obliged, even though not confirmed, to treat as true upon this application, but they are confirmed in most important particulars by the affidavits of other persons. These affidavits appear to establish that reliance cannot be placed on the affidavits filed by the petitioner, upon the essential points offered to evoke the jurisdiction conferred upon me by the statute.

Leigh, in his affidavit, after extracting the material allegations from the affidavit of his wife, says that there is not a word of truth in any of such statements: that he has never in any way abused or ill-treated his said wife or any of his children, and that she left him entirely without cause: that he and his wife lived always on good terms up to the time she left him, and that when she did leave him it was without any previous misunderstanding whatever: that she had asked him to drive her and the little girl (the custody of whom is now in question) out to her mother's, and to let her stay two or three days, and that he did so; and that on leaving her at her mother's, it was arranged between him and his wife that he should take them back home on the following Sunday: that accordingly he went for them on the Sunday, but that his wife's mother said they had better not return that day, it was so very cold: that he then returned without them, and without any suspicion whatever that his wife did not intend to return to him, he having parted with her then on the best terms: that previous to his leaving on that occasion, it was arranged that Mrs. Bull (his wife's mother) should drive his wife and child home: that having waited for a week without their returning, he went over to Mrs. Bull's again, and then asked his wife if she was going to forget him altogether, to which she made no answer; and that then, for the first time, he saw that there was something wrong; and that he had again to leave the mother's house and return home without discovering what was the matter, or what his wife intended to do: that on the next day he again went to see his wife, and found her at Mr. Steele's house; that she at first hid from him, but that on his asking for her, she came out and shook hands with him; but on talking to her there, she at last told him she did not intend returning to her home: that he returned home alone, and that shortly afterwards Mrs. Leigh got possession of the other two children by taking them on their way home from school. He then proceeds to contradict the several other charges made against him; and after retorting charges against her in relation to her temper and ill-treatment of her children (which is much to be regretted, as this case cannot be made to depend upon the relative suitability of either to have sole charge of the children), he concludes by saying that he is still and always has been willing and anxious that his wife should return and resume her proper place in the management of his household, and that she keeps away from her home entirely against his will.

This affidavit is accompanied with certificates, signed by about twenty of his neighbours, who have known him for periods varying from ten to forty years, describing him to be a sensible, upright, honest, trustworthy, respectable man, of sound judgment, a good and obliging neighbour, to whose disparagement nothing is known; that he bears the best of characters; and one describes him to be noted as a good husband and kind father—a man of good sense, steady habits, and amiable disposition, and esteemed so by all his neighbours. Mr. John Steele, who has been for thirteen years reeve of the township in which Leigh lives, states on affidavit that he has known Leigh for eighteen years; that during all that time he has always found him to be a temperate, well-conducted man; that he has known the brothers of Leigh also for eighteen years, and that he has never heard of any of them being insane, or subject to fits of insanity; that his brother Leonard, upon the occasion of his wife's death, was much overcome with grief for about a month; and this, as well from Mr. Steele's affidavit as from that of Mr. Simpson, who was Leonard Leigh's father-in-law, seems to be the only foundation for the charge of insanity. Mr. Steele also states that about three years ago Mrs. Leigh was very ill, and was expected to die; and that as she owned some separate property, Mr. Steele

was sent for to draw her will; and he says that then she spoke highly of her husband, and of his kindness to her—that he had been a good husband and father. He also states that until Mrs. Leigh left her husband, her mother, Mrs. Bull, always spoke highly of Leigh, and considered him an excellent man. Mr. Steele also says that he was present at Mrs. Bull's on the day that Leigh's wife remained there on account of the coldness of the weather; and that from the manner of Mr. and Mrs. Leigh to each other, he (Mr. Steele) had no idea she was going to leave her husband, and that he was quite surprised when a short time afterwards he heard that she would not return to him.

A Mr. Lawrence, a medical man, states that he attended Mrs Leigh and the family during the years 1867-8-9: that during those years she was twice dangerously ill—once from inflammation of the lungs, and the other time from pleurisy: that during those periods, her husband manifested the greatest concern for her, and paid her the greatest attention, and procured for her everything she required. He adds that he has had many opportunities of judging, and that he has never seen any trace of mental disease in Leigh; that he does not believe there is any; that he is, in fact, a quiet man, and by no means excitable or violent in any way. Then there is the affidavit of a Mrs. Charlotte McCalman, who lived in Leigh's family for upwards of six months in 1868, and during the period that Margaret McKay was there. She describes the conduct of Leigh towards his wife, and also towards his children, as most kind and affectionate; she describes him as a kind husband and father; that he never ill-treated his wife, but was always kind and attentive to her; that he was fond of his children, and they of him. Andrew Home and Charles Morgan describe Leigh as a quiet, sober, industrious man, who holds a very respectable position as a farmer in the township; and say that they have never known or heard of his being insane, or in any way violent or peculiar in temper. Then there is the affidavit of Mr. Simpson, who has known Leigh's family for forty years, and is the father-in-law of his brother Leonard. He says that Henry Leigh, the petitioner's husband, is a kind-hearted man; that he has always been sober and well conducted, and that he does not believe any of the statements to the contrary made by his wife in her affidavit filed in this matter; that in his belief, the wife has no just cause whatever for leaving her husband, and that he believes the trouble between them to be of her own making, under the instigation of her mother; and as to the imputation of insanity in the family and in Henry Leigh, he says he has never known or heard of anything of the kind, and in effect he says the only foundation for the charge is that Leonard Leigh was out of his mind with grief for the loss of his wife for one or two months after her death, but that he got over it, and has ever since been perfectly sane.

Upon the whole, the only conclusion at which I can arrive upon this evidence is, that the petitioner has failed in satisfying my mind that she has had any excuse for leaving her husband's home and deserting her duties as a wife in the manner she appears to have done. Her allegations, and those of her mother, and of Margaret McKay, are contradicted by Leigh himself, as plainly as they can be, having regard to the generality of the charges; and the uncontradicted account which Leigh has given of the manner in which his wife left him and got possession of all his children, so diametrically opposed to the account of the same transaction given by the wife, coupled with the confirmation which I think Leigh receives from the affidavits of the other persons filed by him, forces upon me the conviction that reliance cannot be placed on the statements contained in the petition filed; and that I cannot do otherwise than discharge the application, without incurring the danger of giving rise to a belief in ignorant minds that the duties of the married state are less obligatory upon the wife than upon the husband.

I have not thought it necessary to refer to the mutual charges of unfitness of either alone to have charge of the children, because of the opinion which I have formed that the petitioner has not established such a case as in my judgment warrants my interfering with the paternal right. But in view of the character for sound judgment and amiability of disposition given by his neighbours to Mr. Leigh, and to the character of Christian meekness and gentleness given to Mrs. Leigh by the Rev. Mr. Ferguson and others, I venture to express the hope that both husband and wife will yield to their better feelings, and agree to forget their differences, from whatever cause they may arise, and live together in love and affection; and that Mrs. Leigh will not permit any one to lead her away from the discharge of the duties imposed upon her by her marriage contract; and that she will resume, as desired by her husband, her proper place at the head of his household. If, unfortunately, different counsels should prevail, and if the wife should at any future time be advised to renew this application, I should certainly, if the application should be made to me, require the parties and witnesses to be examined *vivâ voce* before me, for the purpose of arriving, if possible, at the truth as to the grounds of an alienation which, upon the material at present before me, I am obliged to say appears to me to be causeless.

In the hope of avoiding adding bitterness to the feelings of either of the parties, and of aiding in the promotion of a good understanding between them, I shall discharge the present summons without costs.

Summons discharged.

NOVA SCOTIA.

IN THE SUPREME COURT.

In re Thomas Archibald and John Archibald, Insolvents.

32, 33 Vic. cap. 16, ss. 105, 106; 34 Vic. cap. 25, sec. 1—Scope of the amended Act—Retrospective legislation.

The Insolvency Amendment Act of 1871 (34 Vic. c. 25) is retrospective in its operation, and applies in a case where proceedings commenced under the Insolvent Act of 1869 were still pending at the time the later Act was passed.

Therefore, where insolvents who had ceased to be traders before the 1st Sept., 1869, applied for and obtained an order of discharge under sec. 106 of the Act of that year, the discharge was confirmed on appeal to the Supreme Court, the operation of the original statute having in the

meantime been so extended by the amending enactment as to bring the case within its scope.

[Sup. Ct. N.S.—June 2, 1871.—*Sir W. Young, C. J.*]

Sir William Young, C. J., now (June 2, 1871,) delivered judgment as follows:

This is an appeal from an order of the Judge of Probate and Insolvency at Halifax, dated 1st March last, discharging the insolvents under secs. 105 and 106 of the Act of 1869. Their petition set out their assignment of 1st December, 1869, and that more than one year having elapsed from the date thereof, and the petitioners having failed in obtaining from the required proportion of their creditors a consent to their discharge, they applied to the judge to grant such discharge pursuant to the statute. The insolvents were thereupon subjected to personal examination before the judge respecting their dealings, books and liabilities, which extended over three days, and after careful examination, the counsel who appeared for the creditors and against the insolvents, expressed themselves satisfied with the explanations afforded by the insolvents, and acquitted them of fraud in their dealings. Some delay then took place with a view to the legal objection being raised which was urged on the appeal, but which had not been brought before the Judge of Probate, who granted the order of discharge as unopposed The first hearing on the appeal was had before me at Chambers on the 31st March, when some preliminary objections were taken on the part of the insolvents, which were afterwards withdrawn, and the main question came up on an admission of the insolvents that at the time the Act passed in 1869 they had ceased to be traders. The case of *Surtees* v. *Ellison*, 9 B. & C. 750, decided in 1829, was then cited, and I looked into the point and was prepared to give judgment, but withheld it at the instance of the counsel, who were negotiating for a settlement. In the meanwhile the Dominion Parliament passed, on the 14th April, the amending Act of 1871, chapter 25, upon which the insolvents insisted at a second hearing on the 26th May, and I am now to consider the effect of both Acts.

The policy of the imperial and colonial legislatures has varied much from time to time, as to the persons to whom the privileges and obligations of the bankrupt laws should extend The 34 & 35 Hen. VIII. c. 4, passed in 1542, was aimed at all persons who, in the quaint language of the preamble, "craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but, at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience,"—a description which might be applied to a good many bankrupts of the present day. The 13 Eliz. c. 7, and the 21 Jac. I. c. 19, comprehend all persons using or exercising the trade of merchandise and some other trades or professions. By the 6 Geo. IV. c. 16, all persons using certain trades, and doing certain acts, and all persons using the trade of merchandise, shall be deemed traders; and the present Bankrupt Law in England, the 32 & 33 Vic. c. 71, passed in 1869, extends to non-traders as well as traders, a full description of traders being given in the schedule, while a recent decision* has extended it to peers of the realm.

The Canadian Insolvent Act of 1864, the parent of the present one, applied in Lower Canada to traders only, and in Upper Canada to all persons, whether traders or non-traders. The Dominion Act of 1869 applies to traders only, and this the amending Act of 1871 has somewhat modified.

Under the Act of 1869, I should have held, on the authority of *Surtees* v. *Ellison*, that a person who had ceased to be a trader at the passing of the Act did not come within it. The trading in that case was before the passing of the 6 Geo. IV. c 16, and the court were all of opinion that they must look at the statute as if it were the first that had ever been passed on the subject of bankruptcy, and that there was no sufficient trading to support the commission. Lord Tenterden, in stating this result, lamented that a statute of so much importance should have been framed with so little attention to the consequences of some of its provisions. The legislature, he added, cannot be said to be *inops consilii*, "but we may say that it is *magnas inter opes inops*." The reasoning of this case has a direct bearing on the Act of 1869, and in my opinion confined its operations to persons who had been and continued to be traders at the time it passed.

We may infer that such was the opinion also of the Dominion Parliament, and that it led, among other things, to the Act of 1871, amending the Act of 1869, the first section of the later Act being as follows: "The first section of the said Act (that of 1869) is hereby amended by adding thereto the following words: 'And persons shall be held to be traders who, having been traders, and having incurred debts as such, which have not been barred by the Statutes of Limitations or prescribed, have since ceased to trade; but no proceedings in compulsory liquidation shall be taken against any such person, based upon any debt or debts contracted after he has so ceased to trade.'"

This is a very comprehensive and a very important provision, peculiar, so far as I know, to our law, and the true construction of which it is of great moment to ascertain. The section I have just cited is not declaratory in its form—it is professedly, as it is in fact, an amendment, but an amendment incorporated with the original section, and henceforth forming an essential part of it. Even in statutes distinct from each other, but on the same subject, the several Acts are to be taken together as forming one system, and as helping to interpret and enforce each other—being in *pari materia* they are to be read as one statute. The doctrine as to the retrospective operation of statutes was fully considered by this court in the case of *Simpson's Estate*, 1 Oldright, 317, and had been previously reviewed in the case of *Wright* v. *Hale*, in the Exchequer, reported in 6 H. & N. 227 We held "that however it may be in the United States, where the constitution expressly con-

* *Ex parte Morris. In re Duke of Newcastle*, L. R. 5 Ch. 172. *See* 6 C. L. J. N. S. 189.

demns and forbids retrospective laws which impair the obligation of contracts, or partake of the character of *ex post facto laws*, there can be no doubt that the Imperial Parliament or Colonial Legislatures, within the limits of their jurisdiction, have a more extended authority; and where their intention is to make a law retrospective, it cannot be disputed that they have the power. That intention is to be made manifest by express words, or to be gathered clearly and unmistakably from the purview and scope of the Act. It is a question of construction; and, the Act being its own chief exponent, still the surrounding circumstances are to be looked at."

Applying these principles to the Act of 1871, there can be no question, I think, that it was intended to govern the operation and to enlarge the scope of the Act of 1869, and that all future proceedings in cases of bankruptcy, and the traders to whom it shall apply, must be regulated by it.

The reference to the Statute of Limitations is not strictly within the scope of our present enquiry, but in a matter coming before all the Courts of Probate in our Province, and which will be eagerly discussed, it is not amiss, I think, that I should add, that where the debts of a person who had been a trader before, but had ceased to be so on the 22nd June, 1869, have been barred by the Statute of Limitations, or prescribed, (that is where they are no longer enforceable at law,) such person is not entitled to the benefit of the Act.

Under the facts in this case I am of opinion that the insolvents came within the Act, if it applies to proceedings actually commenced in our courts of Probate, or under appeal in this court.

This is the only question that remains, and several cases in Fisher's Digest, 8231, were cited by Mr. McDonald as bearing on it, on behalf of the insolvents. In *Wright* v. *Hale* it was held that the 23 & 24 Vic. c. 126, enabled a judge to certify in an action commenced before the passing of the Act. "There is a considerable difference," said Pollock, C. B., "between new enactments which affect vested rights, and those which merely affect the procedure in courts of justice. When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does not apply to such actions." See the Imperial Act 24 & 25 Vic. c. 26, sec. 5. The same principle is recognized in *Freeman* v. *Moyes*, 1 A. & E. 338, and in the Admiralty case of *The Ironsides*, reported in 1 Lush. 458. I have already held that the first section of the Act of 1871 must operate as a retrospective enactment, and I see no reason why it should not apply to a a pending suit or appeal. To hold otherwise would only oblige the insolvents to commence *de novo*. The case of *Cornill* v. *Hudson*, 8 E. & B. 429, where it was held that the 10th section of the Mercantile Law Amendment Act did not extend to actions already commenced, and our own decision of the like purport in *Coulson* v. *Sangster*, 1 Oldright, 677, proceeded mainly on the language of the enactment, and, as I think, do not apply here. I confirm, therefore, the discharge of the insolvents, but as they have succeeded on a ground which had no existence when they entered their appeal, I must decline giving them costs.

QUEBEC.

COURT OF REVIEW.*

Martin v. Thomas.

Insolvency—Compulsory Liquidation—Official Assignee.

Held:—1. That an insolvent under the Act has no legal interest to plead an assignment made by him under the Act, in bar of proceedings on compulsory liquidation.

2. That, in case of an assignment so made to an official assignee, non-resident in the county or place where the insolvent has his domicile, evidence must be adduced by the party pleading such assignment, that there is no official assignee resident in such county, and this notwithstanding that the sheriff, in his return to the writ of attachment, certifies that there is not an official assignee so resident, and that, in consequence thereof, he has appointed a special guardian.

3. That a petition to stay proceedings fyled by an insolvent, after the expiration of five days from the demand of an assignment, on the ground that he has assigned to an official assignee, is too late.

[Montreal, Nov. 30, 1870—15 L. C. J. 236.]

This was a hearing in Review of a judgment rendered by the Hon. Mr. Justice Lafontaine, at Aylmer, in the district of Ottawa, on the 18th of June, 1870, maintaining the petition of the defendant to stay the proceedings of the plaintiff in compulsory liquidation, by writ of attachment, under the Insolvent Act of 1869, and quashing the attachment.

The insolvent resided at Bonsecours, in the district of Ottawa, where a demand of assignment was served on him by plaintiff, on the 21st December, 1869.

On the 29th December, 1869, the insolvent made an assignment in notarial form, to Henry Howard, official assignee, residing at St. Andrews, in the district of Terrebonne.

On the same day, the plaintiff sued out proceedings in compulsory liquidation by writ of attachment, at Aylmer.

The writ was served on the insolvent on the 30th December, 1869, and was returned on the 10th January, 1870. And, in his return, the Sheriff certified that there was no official assignee resident within the district of Ottawa, and that in consequence he had appointed a special guardian.

On the 12th January, 1870, the insolvent caused a petition to stay proceeding to be served on the plaintiff, which was fyled on the 13th January, 1870. By this petition the insolvent pleaded the assignment to Howard, alleging that there was no official assignee resident in the county or place where the insolvent had his domicile, and that Howard was the nearest resident assignee.

To this petition, the plaintiff fyled a general answer on the 16th February, 1870.

No evidence of any kind was adduced in support of the petition, and the parties having been heard before the Judge, he rendered the following judgment on the 18th June, 1870:—

"Considering that, at the time of the execution of the present attachment, the defendant was an insolvent, and his estate and effects vested in

* Before Berthelot, J., Torrance, J., Beaudry, J.

the hands of an assignee, maintaining the conclusions of the said petition, it is considered and adjudged that the said attachment, and all the proceedings thereunder, be, and the same are hereby set aside and quashed, and further the *demande* of the plaintiff is hereby dismissed. The whole with costs against the plaintiff," &c.

Judgment of Superior Court reversed.

ENGLISH REPORTS.

Pollard v. The Governor and Company of the Bank of England.

Bill of exchange—Custom of bankers—Payment by agent under mistake of facts—Clearing-house system.

A bill of exchange payable at L.'s bank at N. was presented by the agent of the branch Bank of E. at the former bank for payment, the latter bank having discounted the same for P. The bill was presented for payment in the morning, and instead of cash being given for the same, it was marked with the initials of L.'s bank, signifying, according to the usual custom of bankers, that the same would be honoured, and a "credit note" was given to the branch Bank of E. for the same, to be honoured in exchange after the termination of business at four o'clock on the same day, and at the usual daily settlement among the bankers at N. Before four o'clock, however, L.'s bank discovered that the acceptor had stopped payment, and thereupon immediately applied to the agent of the Bank of E. to cancel the credit note given by L.'s bank in the morning. This, however, was refused; but the Bank of E. debited their customer P. with the amount of the bill as unpaid; and, in an action against them by P. for the amount, they (the Bank of E.) being indemnified by L.'s bank,

Held, that on the presentation of the bill for payment, the initialing the same and giving a credit note amounted to more than a mere provisional arrangement made for convenience sake between the bankers, and subject to a subsequent revocation by the parties; that such a recognition of the bill of exchange was in the nature of payment; and that, therefore, the Bank of E. having received payment of the bill, were not entitled to debit the amount thereof against their customer; and that P., therefore, was entitled to recover.

[19 W. R. 1168, Q. B.]

This was a question submitted by special case without pleadings for the decision of the court, and the point in dispute was whether the plaintiffs, Pollard & Co., were entitled to have credit in their account with their bankers, the defendants, at their branch at Newcastle-upon-Tyne, for the amount of two separate bills of exchange for £219 15s. and £276 1s. 10d. respectively, drawn by the plaintiffs upon and accepted by Messrs. John Hopper & Son, millers, of Gateshead, and payable at the bank of Messrs. Lambton & Co., Newcastle-upon-Tyne, and which bills were indorsed by the plaintiffs to, and discounted by, their bankers, the defendants.

The material statements in the special case are fully set out, and the respective arguments for the plaintiffs and the defendants are sufficiently indicated and enlarged upon, in the elaborate judgment of the court set out *in extenso infra.*

Quain, Q. C. (*Lewers* with him) for the plaintiffs, cited *Chambers* v. *Miller*, 11 W. R. 236, 13 C. B. N. S. 125; *Warwick* v. *Rogers*, 5 M. & G. 340: *Thompson* v. *Gills*, 2 B. & C. 452; and *Gillard* v. *Wise*, 5 B. & C. 134.

W. Williams, for the defendant, cited *Aiken* v. *Short*, 4 W. R. 645, 1 H. & N. 210; *Chambers* v. *Miller* (*ubi sup.*); and *Warwick* v. *Rogers* (*ubi sup*).

July 6.—The judgment of the court* was delivered by

Blackburn, J.—In this case the plaintiffs were drawers of a bill of exchange, accepted payable at Lambton & Co., bankers, Newcastle the bill had been discounted by the Newcastle branch of the Bank of England, and the question raised is whether the Bank of England are entitled to debit the plaintiffs with the amount as being a dishonoured bill; and upon that again depends the further question, whether what took place at Newcastle amounted to payment of the bill by Lambton & Co. to the defendants, or was merely an expression of an intention to pay the bill, revocable and revoked. Bankers in London, for the sake of economy of cash payments, have established a clearing-house, the details of the practice of which (so far at least as was material to the point then in question) are stated in the special verdict in *Warwick* v. *Rogers* (*ubi sup.*). The number of bankers and the quantity of business in Newcastle are far less than in London, and apparently are not sufficient to make it worth while to have such an elaborate arrangement, but many of the objects of the clearing-house are effected by an arrangement (described in the special case) by which all the Newcastle bankers have accounts at the branch Bank of England there, and use it as the means of making all payments between each other.

The case is not very lucidly stated, and there was some controversy between the counsel at the bar as to what it really meant.

It is stated in paragraph 6 that the bankers send all cheques of which they are holders, drawn upon other bankers, to the Bank of England for collection; and the statement in the case then proceeds thus: "These cheques are presented by the said branch Bank of England about two o'clock upon the drawee, the total amount ascertained, and a cheque upon the branch Bank of England given by the drawees for the amount, which is then placed to the debit of their account with the Bank of England."

We infer, though it is not stated, that cheques which the Bank of England hold in their own right are treated in the same way; and also, from what is afterwards stated, that bills initialed in the manner stated afterwards, and the credit notes on the exchange account afterwards mentioned are treated in the same way, and that the "total amount that is ascertained" includes the cheques on that banker (designated in the case as the drawee) which the Bank of England holds as collector for the other bankers, the cheques on him which it holds in its own right, the bills initialed by them, and the credit notes given by him, and that the cheque on the Bank of England which is then given is for the aggregate amount of these four sums, and not merely for the amount of the cheques given to the Bank of England by other bankers for collection; but this, though a material part of the case, is not clearly expressed, and was controverted.

The case then proceeds, in paragraph 7, to state, as follows: "Any one of the bankers, not being the Bank of England, who has a bill made

* Cockburn, C.J., Blackburn, Mellor and Lush, JJ

payable at another banker's, sends it down in the morning to that banker to see if it is in order, and will be paid; and if it is, the banker at whose house it is payable initials it and returns it to the banker who is the holder; the bills thus initialed are sent by the holder to the Bank of England for collection in the same manner as cheques. No question in the present case arises as to the effect of initialing a bill, and returning it so initialed to the holder, the present bill having been held by the Bank of England itself, and not by one of the other bankers. When the Bank of England itself holds the bill, the practice is that the bill is left with the bankers at whose house it is domiciled, and a credit note is given to the Bank of England. The credit note is also treated by the Bank of England in the same manner as cheques"

The case then proceeds to state that the bill in question was taken on the morning it became due to Messrs. Lambton, and upon presentation, "was, in accordance with the above practice," marked by Messrs Lambton for payment, and that a credit note was given, indicating that it, with other moneys, was in order for payment, and would be paid, of which note the following is a copy:—

"Newcastle-upon-Tyne, February 24, 1868.

"Credit Branch Bank. Four hundred and ninety-seven pounds 16/10—£497 16s. 10d.

"For Lambton & Co.,

"Thomas Johnson."

From this statement it may be inferred that bills held by the Bank of England are initialed in the same way as those held by other bankers; but in the view we take of the case it is not material whether this is so or not.

The case then in paragraph 9 states that "upon the afternoon of the same day—namely, about two p.m.—the clerk of the said branch Bank of England took all the cheques drawn on Messrs. Lambton & Co. to their bank, together with the said credit note, which was admitted into the total amount, and a cheque upon the said branch bank was handed by Messrs. Lambton & Co. to the said clerk for the amount of the balance due to the defendants." It would seem that the word "balance" is used here in the sense of aggregate of the cheques, initialed bills, and credit notes, and not as indicating that a further account was struck in which credit was given to Lambton & Co. for any cheques or bills payable by the Bank of England of which Lambton & Co. were holders; but this is not clearly stated, and it was in controversy at the bar what was meant. It does not, however, seem to be important to ascertain this, for it is explicitly stated that the cheque was given for an amount which included the credit note representing this bill *inter alia*. After the banks had closed to the public, which is at three o'clock, Messrs. Lambton & Co., for the first time, ascertained that the acceptor of the bill had stopped payment, and that the balance to his credit with them was not sufficient to meet this bill. Of course, if they had known earlier that he had stopped payment they never would have done what they did, and if what they had done was still revocable they would have revoked it; they immediately gave notice to the branch bank that they had paid the bill in error, and required them to take it back. This was done before four o'clock, but after their account was already debited with the amount in the accounts of the Bank of England.

The question in this cause is, whether they still had the right to do this. If the bill was already paid they clearly had not. If what took place amounted to no more than an arrangement amongst the bankers, by which for convenience sake they, at three o'clock, stated the account of what they at that time intended to pay at the later hour of four, but only provisionally, so that the intention was revocable up to the time of actual payment, it would be otherwise; and if, instead of giving a cheque for the amount, the banker had given a credit note expressing that their account was to be debited provisionally with this amount, but subject to alteration and revocation at their pleasure up to a later hour, it would have clearly indicated that there was such an arrangement. But a cheque given purports to be *prima facie* an absolute payment, and it would require very strong evidence to show that it was not so.

The defendants contended that the 10th paragraph in the case shows that the giving of the cheque had no more effect than a credit note to the effect suggested would have had That paragraph is in the following terms:—"The banks at Newcastle close to the public at three o'clock, p.m. For the purposes of business between the said branch bank and the bankers at Newcastle, who keep accounts with them, the said branch bank remains open after that hour, and until about four o'clock, when it closes for the day It is the practice, and was so for many years before 1867, for those bankers to attend at the said branch bank between those hours for the purpose of having the day's accounts between them and the said branch bank investigated, and of rectifying any mistakes and errors of any kind that may have arisen in the course of the day and of finding and striking the final balances between them. All mistakes and errors made in the course of the day are subject to correction during that investigation" We cannot think that this statement has the effect attributed to it by the argument of the defendant's counsel. Where money has been paid under a mistake of fact to an agent, it may be recovered back from that agent, unless he has in the meantime paid it to his principal or done something equivalent to payment to him, in which case the recourse of the party who has paid the money is against the principal only: see Story on Agency, s. 300; *Cox* v. *Prentice*, 3 M. & S. 344; *Holland* v. *Russell*, 9 W. R. 737, 1 B. & S. 424.

It would obviously be of great importance to a banker, who had by mistake paid money, to be entitled to demand it back from the Bank of England, instead of being obliged to have recourse against the customer of that bank; and full effect is given to all that is stated in paragraph 10 by supposing the arrangement among the bankers to be that the Bank of England shall not alter its position by paying over the money to its customer, or doing anything equivalent to payment to him, before four o'clock; but in the present case the payment, if it was one, was not made under such circumstances as

would entitle the bankers, Lambton & Co., to recover it back: see *Chambers* v. *Miller* (*ubi supra*).

It is necessary for the defendants to go so far as to maintain that the stating of the account between Messrs. Lambton and the Bank of England, the drawing by Lambton & Co. of a cheque on the Bank of England for the amount, and giving it to the Bank of England, and the placing of that cheque on the Bank of England to the debit of Messrs. Lambton as if they—the Bank of England—had honoured it, were all merely *pro forma* transactions subject to revocation at the pleasure of Lambton & Co., provided they gave notice of that revocation before four o'clock. We cannot think that the statement in paragraph 10 justifies us in coming to that conclusion.

The matter may therefore be shortly put thus: the bill having been presented by the defendants at Lambton & Co.'s, a cheque on the defendants themselves was given by Lambton & Co., who had funds in defendants' hands to cover the amount. Thereupon, unless the giving the cheque was provisional, and subject to ratification on going over the accounts later in the day, it became the duty of the defendants at once to transfer the amount of the bill from the account of Lambton & Co. to that of the plaintiff; and this they in fact did. Such a transaction might no doubt, by arrangement between the bankers, be provisional only and subject to be set aside; but it is for the defendants to show that such an arrangement existed, in order to divest the transaction of what would otherwise be its necessary effect. This the defendants have failed to do, and our judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR MAY, JUNE, AND JULY.

(Continued from page 281.)

Abandonment.—*See* Criminal Law, 1.

Acceptance.—*See* Bills and Notes, 2; Contract, 2.

Account.—*See* Patent, 5.

Action.—*See* Executors and Administrators, 3, 4.

Adjudication.—*See* Bankruptcy, 2.

Administration.—*See* Executors and Administrators.

Admiralty.—*See* Maritime Lien.

Adverse Possession.—*See* Bailment; Evidence.

Affidavit.—*See* Libel.

Age.

Devise to two daughters absolutely, if they had no children; otherwise, &c. One being fifty-five years and four months, and the other fifty-three years and nine months old, it was ordered that they hold absolutely, on the presumption that they would not have any children.—*In re Widdow's Trust*, L. R. 11 Eq. 408.

See Illegimate Children, 1.

Agency.—*See* Principal and Agent.

Agreement.—*See* Contract.

Amalgamation.—*See* Company, 2, 3.

Ambiguity.—*See* Legacy, 1.

Annuity.—*See* Husband and Wife; Legacy, 3; Residuary Estate.

Anticipation.—*See* Husband and Wife.

Appointment.

Property was settled on trusts for A., with power of appointment jointly with B., said power and trusts being subject to forfeiture by certain acts. A proviso followed that A. might by deed or will, executed prior to determination of the trusts, appoint in favor of his wife. A. appointed by will, committed an act of forfeiture, and died. *Held*, that the will did not come into operation until the death of the testator, and the appointment was void.—*Potts* v. *Britton*, L. R. 11 Eq. 433.

See Power; Trust.

Apportionment.

1. A claim against a testator's estate was compromised by payment of a gross sum several years after testator's death. *Held*, that as between tenants for life and remainder-men under the will, such sum was to be treated as composed of a principal debt due when said claim accrued, with interest thereon to date of testator's death, which two sums were to be charged against the *corpus*. Interest from testator's death on such aggregate principal and interest was to be charged to tenants for life.—*Maclaren* v. *Stainton*, L. R. 11 Eq. 382.

2. A testator bequeathed a specific sum to pay off a contingent charge upon his X. estate; and if so applied, then a second charge, created on his Z. estate, to be shifted to his X. estate. A portion only of said sum was applied in paying off the charge on the X. estate. *Held*, that the condition was not apportionable, and none of the charge on the Z. estate was to be thrown upon the X. estate.—*Caldwell* v. *Cresswell*, L. R. 6 Ch. 278.

See Tenancy in Common.

Appropriation of Payments.

A. was indebted to B. on three accounts, on one of which a judgment was obtained creating a charge on A.'s lands. A. and B. then entered into an agreement, whereby a smaller sum was to be received from the gross amount of the three demands, payable in instalments; and on failure to pay an instalment, B to be remitted to his original rights. A. paid one instalment, and failed to pay further. *Held*,

that B. must apply the instalment received to the three debts ratably, and not to one of the unsecured debts only.—*Thompson* v. *Hudson*, L. R. 6 Ch. 320. *See* L R. 2 Ch. 255; 4 H. L. 1.

Assignment.—*See* Devise, 1, 9; Vendor and Purchaser, 2.

Bailment.

A bailee of goods converted them without the knowledge of bailor, more than six years before action brought, but subsequently refused to deliver less than six years before action brought. The bailor brought detinue. *Held*, that the Statute of Limitations ran from the date of demand and refusal to deliver, not from the date of the conversion. *It seems*, the bailor was entitled to sue either for a wrongful parting with property, or wait till the bailee refused to deliver on request. Otherwise, if the action had been trover.—*Wilkinson* v. *Verity*, L. R. 6 C. P. 206.

Bankruptcy.

1. Action in England upon a judgment obtained in Canada, and second action upon a contract made and to be performed in Canada. Plea to both actions, discharge under the English Bankruptcy Act. The discharge was after the cause of action in each case arose, but before the judgment. *Held*, that the discharge was no defence to the first action, on which the judgment was conclusive, though the discharge might have been set up as a defence to the action in Canada; but that the second action was barred, as a discharge in England was binding upon her colonies.—*Ellis* v. *M'Henry*, L. R. 6 C. P. 228; 7 C. L. J. N. S. 162.

2. Under the English Bankruptcy Act it was *held* that a judgment creditor who seized goods under execution, but had not actually sold, before adjudication of bankruptcy, was entitled to sell the goods and retain their proceeds.—*Slater* v. *Pinder*, L. R. 6 Ex. 228.

3. A., owing a banking firm a certain sum, became bankrupt. A.'s trustee paid into the banking firm, £665 in trust for the creditors. The said firm became bankrupt, and subsequently A.'s bankruptcy was annulled. *Held*, that the property in the £665 reverted to A., as if it had never passed from him, and that he could set off that sum against the amount he owed the banking firm.—*Bailey* v. *Johnson*, L. R. 6 Ex. 279.

See Set-off; Specific Performance.

Bill of Lading.

1. A bill of exchange was drawn upon the plaintiff against a bill of lading, and was presented to him for acceptance by a bank, with the memorandum, "The bank holds bill of lading and policy for 251 bales of cotton, per William Cummings." Plaintiff accepted, without asking to see bill of lading, and paid the bill before due. The bill of lading turned out a forgery. *Held*, that the memorandum did not amount to a guarantee by the bank that the bill of lading was genuine, and that the equities between the parties were equal.—*Leather* v. *Simpson*, L. R. 11 Ex. 398.

2. B. bought cotton for A., at his request, and B. transmitted a bill of lading and invoice thereof to C., his correspondent. The invoice, a duplicate of which was sent to A., described the cotton as shipped "on account and risk of A." C. sent A. the bill of lading, with a bill of exchange drawn upon him; and A. returned the bill of exchange unaccepted, but retained the bill of lading. C. stopped the delivery of the cotton to A. *Held*, that accepting the bill of exchange was a condition precedent to the right to hold the bill of lading, and that in this case the cotton remained the property of B.—*Shepherd* v. *Harrison*, L. R. 5 H. L. 116; s. c. L. R. 4 Q. B. 196; 493.

See Freight; Set-off.

Bills and Notes.

1. A company had power to issue "bonds, obligations, or mortgage debentures," to be sealed and registered; also, "to make, draw, accept, or endorse any promissory note, bill of exchange, or other negotiable instrument." The company issued instruments headed "£20. Debenture Bond," promising "to pay to the bearer" the principal, with interest, and sealed with the seal of the company. Interest coupons were attached, headed, "Debenture Bond, No. , for £20. Interest Coupon, No. ." *Held*, that the instruments were promissory notes.—*Ex parte Colborne and Strawbridge*, L. R. 11 Eq. 478.

2. A. sent B., his agent, a bill to be presented for acceptance. B. presented the bill on Friday at two o'clock, and called on Saturday at half-past eleven, business hours closing at twelve, for the accepted bill. The bill, which had been accepted without B.'s knowledge, was mislaid, and B. departed without it. On Monday the acceptance was cancelled. *Held*, that it being the custom of merchants to leave a bill twenty-four hours for acceptance, and such period running beyond business hours on Saturday, B. was not guilty of negligence in waiting until Monday for an answer from the drawee.—*Bank of Van Diemen's Land* v. *Bank of Victoria*, L. R. 3 P. C. 526.

3. Promissory note as follows: "We, the

directors of," &c., "do promise to pay," &c., with the company's seal affixed. *Held*, that the directors were personally liable.—*Dutton* v. *Marsh*, L. R. 6 Q. B. 361.

See Bill of Lading; Contract, 3; Partnership; Set-off.

Bond.—*See* Bills and Notes, 1, 3; Surety.

Broker.—*See* Contract, 2; Stock Exchange.

Burden of Proof.—*See* Presumption.

Cargo.—*See* Freight.

Carrier.—*See* Negligence, 2.

Charge.—*See* Nonsuit.

Charter-party.—*See* Freight.

Class.—*See* Devise, 12; Perpetuity, 1.

Codicil.—*See* Illegimate Children, 1; Legacy 4.

Company

1. One company agreed to transfer its business to another; the shareholders in the first to become shareholders in the second. Certificates of shares in the second company were sent to the shareholders in the first, with blank receipts therefor. *Held*, that a shareholder in the first company, filling out and returning the receipt sent him, was a shareholder in the second; but a shareholder taking no notice of the communication did not become shareholder in the second company.—*Challis's Case*, L. R. 6 Ch 266.

2. The M. Insurance Co. agreed to amalgamate with the A. Insurance Co., and notice thereof was sent to S., a policy-holder in the M Co, with directions for surrendering his policy and obtaining a new one in the A. Co. S. did not surrender his policy, but on subsequently receiving a notice of an allotment of profits from the A. Co., he accepted a sum allotted to him. *Held*, that S. had adopted the liability of the A. Co. in substitution for that of the M. Co.—*Spencer's Case*, L. R. 6 Ch. 362.

3. F. was a policy-holder in the N. F. Insurance Co., and shareholder in a second company, and both companies amalgamated with a third, which assumed their liabilities. *Held*, that F. became a member of the new company, and lost his claim against the separate assets of the N. F. Co.—*Fleming's Case*, L. R. 6 Ch. 393.

See Shareholder.

Condition.

A company was empowered to sell certain lands, provided it should "first offer the same to the person or persons of whom the same were purchased by the said company." *Held*, that the right of pre-emption was limited to the actual person who sold, and did not extend to such person's representatives.—*Highgate Archway Co.* v. *Jeakes*, L. R. 12 Eq. 9.

See Apportionment, 2; Contract, 1; Ejectment; Mortgage, 3; Vendor and Purchaser.

Consideration.—*See* Settlement.

Consignee.—*See* Principal and Agent.

Construction.—*See* Bills and Notes, 3; Contract, 3; Devise; Foreign Enlistment Act; Forfeiture; Freight; Husband and Wife; Illegitimate Children, 1, 2; Information; Legacy; Mortgage; Perpetuity; Power; Residuary Estate; Shareholder; Surety; Tax; Tenancy in Common; Voter; Will.

Contraband of War.—*See* Foreign Enlistment Act.

Contingent Remainder.—*See* Devise, 4.

Contract.

1. A pianist engaged to play on a certain day, but was prevented by illness. *Held*, that there was an implied condition in the contract that illness should excuse her.—*Robinson* v. *Davison*, L. R. 6 Ex. 269; 7 C. L. J. N S. 137.

2. Defendant requested his brokers to purchase 100 shares for him. The brokers gave his name as purchaser of a portion of the shares to plaintiff's brokers, and the plaintiff accepted the defendant as purchaser, and made out a deed of transfer, which was accepted for the defendant by his brokers. Defendant subsequently refused to accept the shares. *Held*, that defendant was bound by his brokers' acceptance of the transfer; that purchasing shares in several lots according to custom of the Exchange was necessary and lawful; and that there was privity of contract between plaintiff and defendant.—*Bowring* v. *Shepherd*, L. R. 6 Q. B. (Ex. Ch.) 309.

3. A wrote to B as follows: "I authorize you to draw upon" me for a certain sum "in drafts at three months' date, which I engage to have renewed three times, by drafts of the same date, making the currency of the credit twelve months in all," you "to furnish me with funds to pay each set of bills previous to maturity, in order to keep this company out of cash advance." B. acknowledged the letter, repeating its terms, but adding to the same the words "*for the said twelve months.*" After which B. added, "We subscribe to the engagement of renewing three times our drafts with furnishing you with funds to pay the drafts renewed, in order to keep you out of cash advance *for twelve months.*" The last set of bills became due a few days beyond twelve months from the time the first set was drawn. *Held*, (overruling judgment of Exch. Ch. and Court of Exch.), that B. agreed to pay each set of bills previous to maturity, not simply to

keep A. out of cash advance for twelve months. —*English and Foreign Credit Co.* v. *Arduin*, L. R. 5 H. L. 64.

See Company, 2; Forfeiture; Freight; Mortgage, 2; Railway; Shareholder; Specific Performance; Stock Exchange; Ultra Vires; Vendor and Purchaser, 2, 3.

Contribution.—*See* Surety.

Conversion.—*See* Bailment.

Conviction.—*See* Indictment.

Costs.

1. An heir-at-law filed a bill against a devisee and executor to set aside a will, and the will was adjudged valid. *Held*, that the bill must be dismissed with costs as regarded the devisee, and that the heir must pay the executor's costs.—*Banks* v. *Goodfellow*, L. R. 11 Eq. 472.

2. A wealthy lunatic had made two wills before he was found lunatic. *Held*, that if the master should approve the filing of a bill to perpetuate testimony as to their validity, such costs of the suit as he should think proper might come out of the estate.—*In re Tayleur*, L. R. 6 Ch. 416; *See* 7 C. L. J. N. S. 212.

Court.

A decision of the Court of Chancery, determining next of kin to an intestate, will not be reopened by the Courts of Probate and Divorce in a suit between parties to the former suit or those claiming under them. Otherwise of those not parties.—*Spencer* v. *Williams*, L. R. 2 P. & D. 230.

See Decree.

Covenant.—*See* Bills and Notes, 1, 3; Ejectment; Surety; Tax.

Criminal Law.

1. A woman living apart from her husband, and having custody of her infant child, left it at her husband's door, telling him she had done so. The husband allowed it to remain from 7 p. m. to 1 a. m. *Held*, that the husband was guilty of wilfully abandoning and exposing the child.—*Reg.* v. *White*, L. R. 1 C. C. 311; 7 C. L. J. N. S. 266.

2. The defendant killed a number of rabbits, left them in bags in a ditch in the grounds where killed, as a place of deposit, and subsequently returned and took them away. *Held*, that the killing and taking away were one continuous act, and the defendant was not guilty of larceny, but felony.—*Reg.* v. *Townley*, L. R. 1 C. C. 315. *See ante* p. 294.

See Indictment.

Custom.—*See* Mortgage, 1.

Damages.—*See* Franchise; Ultra Vires.

Death.—*See* Presumption.

Debt.—*See* Appropriation of Payments.

Decree.

In two actions *in rem* for wages, judgment was taken by default, and the court pronounced a certain sum to be due, and ordered the same to be paid. Before a payment a mortgagee entered a præcipe for a caveat against payment. *Held*, that the court might revoke the order of payment, and that the mortgagee should have preference.—*The Markland*, L. R. 3 Ad. & Ec. 340.

See Patent, 5.

Dedication.

The owners of a field, over which had been a footway from time immemorial, had also from time immemorial ploughed up the footway in such parts as they thought fit, and lifted the plough over in others. *Held*, that the right so to plough was not inconsistent with the dedication.—*Arnold* v. *Blaker*, L. R. 6 Q. B. 433.

Deed.—*See* Power.

Deposition.

A reduction to writing of an oral statement previously given under oath, is a deposition, though not itself sworn to.—*Reg.* v. *Fletcher*, L. R. 1 C. C. 320.

Descent.—*See* Condition.

Detinue.—*See* Bailment.

Devise.

1. A. let four houses, and took an assignment to himself of the lease as security for rent. He subsequently devised "my freehold houses," giving the numbers of the houses leased. *Held*, that the mortgage debt did not pass, but formed part of the testator's personal estate. The assignment did not merge the term in equity.—*Bowen* v. *Barlow*, L. R. 11 Eq. 454.

2. A testator devised to his wife, remainder to A., but "should A. not survive my wife, and die without legal issue by marriage," then to B. The wife died before A., who had no issue. Held, that the devise must be read, "should A. die in the lifetime of my wife without issue," then to B.; and that consequently the gift over to B. failed.—*Reed* v. *Braithwaite*, L. R. 11 Eq. 514.

2. The Wills Act (1 Vic. ch. 26) provides that a will shall be construed with reference to real and personal property, as if executed immediately before the death of the testator, unless a contrary intention appear. A testator devised to A. "all my mansion and estate called Cleve Court." Subsequent to date of the will he purchased other land adjoining the above estate. *Held*, that evidence was admis-

sible to show what the testator treated as the Cleve Court estate to the time of his death; and that the subsequent purchases passed by the will.—*Castle* v. *Fox*, L. R. 11 Eq. 542.

4. Devise of a house in trust for A. to receive and take rents, and on A.'s decease in trust for the daughters of A. who should attain twenty-one, or be sooner married, residue of testator's estate over. A. had a daughter, and died before the latter attained twenty-one. *Held*, that the contingent remainder to the daughter was supported by the estate in the trustees; and that the rents accumulated between A.'s death and her daughter's attaining twenty-one formed part of the residuary estate. —*In re Edells's Trusts*, L. R. 11 Eq. 559.

5. Devise of lands in parish of H. to certain parties, "the rest of my freehold hereditaments situate in the parish of H." to S. The first devise was void. *Held*, that the land first devised did not pass to S., the devise to him being specific, not residuary.—*Springett* v. *Jennings*, L. R. 6 Ch. 333; s. c. L. R. 10 Eq. 488

6. Devise of "all and singular the estate and mines of Aroa," in trust to sell, and legacies to A. and B, in full satisfaction of any sums due from testatrix. There was also the usual devise of lands held as trustee and mortgagee. The Aroa estate was subject to a mortgage, the money due on which was impressed with trusts for A. and B. *Held*, that A. and B. must elect between the mortgage money and the legacies under the will. — *Wilkinson* v. *Dent*, L. R. 6 Ch. 339.

7. A testator having two great-nephews, sons of a deceased niece, and also nephews and nieces, devised to his great-nephew A., and to his "great-nephew B., and to such other of my nephews and nieces," &c. In one place the testator called A. his "nephew." *Held*, that "nephews and nieces" did not include great-nephews and great-nieces.—*In re Blower's Trusts*, L. R. 6 Ch. 351; s. c. L. R. 11 Eq. 97.

8. Devise of land without words of limitation to a wife who was made executrix. Testator directed "my executrix" to pay a certain sum to B. annually. *Held*, that the wife took the fee.—*Pickwell* v. *Spencer*, L. R. 6 Ex. 190.

9. Devise in trust for E, with certain remainders to her children, and ultimate limitation as follows: "and in case every child born or to be born should die under the age of twenty-one years, and without leaving issue, then to the use of the heirs and assigns of E., as if she had continued sole and unmarried;" remainder to heirs of testator. E. had a child who died, aged twenty-three, after the date of the will, at which date the child was aged sixteen, but before testator's death. E. assigned her interest under the will to the defendant. The plaintiff claimed as heir-at-law of the testator and of E. *Held*, that the ultimate limitation did not take effect; and if it did, yet E. had no power to assign the estate devised, and the plaintiff would take as heir of E. if she had continued unmarried. The rule in Shelley's case did not give E. the fee, Judgment for plaintiff.—*Brookman* v. *Smith*. L. R. 6 Ex. 291.

See Age; Apportionment, 2; Husband and Wife; Illegitimate Children, 1, 2; Legacy; Perpetuity; Tenancy in Common.

Divorce.—*See* Jurisdiction.

Domicile.

A British subject domiciled in France, had two illegitimate children by a Frenchwoman, whom he afterward married, when the children were legitimated according to the law of France. *Held*, that the status of the children in England was to be determined by the law of France.—*Skottowe* v. *Young*, L. R. 11 Eq 474.

Easement.—*See* Dedication.

Ejectment.

Ejectment on a forfeiture for breaches of covenants in a lease. Plaintiff assigned as particulars of breaches a certain act of forfeiture, and failure to pay several quarters' rent since such act. *Held*, that alleging the second ground of forfeiture was no waiver of the first, or affirmance of the tenancy.—*Toleman* v. *Portbury*, L. R. 6 Q. B. 245; s. c. L. R. 5 Q. B. 288.

Election.—*See* Devise, 6; Will.

Embezzlement.—*See* Indictment.

Estate for Life.—*See* Devise, 9.

Estoppel.—*See* Court; Trust.

Evidence.

In a wall forming one side of a house belonging to A. was a stone with an inscription stating the wall to be the property of B, and that the ground eighteen feet south from the stone was given to the public for a street. B. had asserted no claim of title for at least thirty years. *Held*, that the fee of the street remained in B., and that A. had not gained a title to the wall by adverse possession. The inscription on the stone was sufficient to prevent such adverse possession arising —*Phillipson* v. *Gibbon*, L. R. 6 Ch. 428.

See Devise, 3; Illegitimate Children, 3; Legacy, 1; Libel; Negligence, 1; Nonsuit; Patent, 5; Presumption; Limitations, Statute of.

Execution.

A debtor was possessed of a mansion-house and grounds, and a farm, the farm-house on which was distant a mile from the mansion-house; the whole formed one block, with the exception of two fields, one being near the farm, and the other three miles distant, but both being used as part of the farm. A sheriff executed a *fi. fa.* at the mansion-house, informing those in charge that he seized every thing upon the estate, but did no other act of seizure. *Held*, that the goods on the farm were seized, together with every thing on the holding.—*Gladstone* v. *Padwick*, L. R. 6 Ex. 203; *See* 7 C. L. J. N. S. 262.

See Bankruptcy, 2.

Executors and Administrators.

1. Testator in his will appointed three executors, one of whom died in testator's lifetime, and a second refused administration. On application to make a residuary legatee administrator with the will annexed, *held*, that administration could not be granted on appearance and consent of the remaining executor; he must either renounce probate or withdraw his appearance.—*Garrard* v. *Garrard*, L. R. 2 P. & D. 238.

2. The court, notwithstanding consent of all persons interested, refused to depart from the established rule that a grant of administration must be made to the person who is by law entitled to the property.—*In the Goods of Richardson*, L. R. 2 P. & D. 244.

3. Where a widow after her husband's death carried on his business with his tools and material, and thereafter died, *held*, that it was to be presumed she had carried on the business for the benefit of her husband's estate, and that her administratrix *de bonis non* was the proper person to bring an action for the price of the work done.—*Mosely* v. *Rendell*, L. R. 6 Q. B. 338.

4. Executors carried on testator's business according to directions in his will, but with material which had not belonged to him. *Held*, that as money recovered in the course of the business would be assets of the testator, the executors might sue as such for the same.—*Abbott* v. *Parfitt*, L. R. 6 Q. B. 346.

Fact, Mistake of.—*See* Partnership.

Fee Simple.—*See* Devise, 8.

Felony.—*See* Criminal Law, 2.

Ferry.—*See* Franchise.

Foreign Enlistment Act.

The English Foreign Enlistment Act (33-34 Vic. chap. 90) provides "that if any person . . . despatches any ship with intent . . . that the same shall be employed in the military or naval service of any foreign state at war with any friendly state," such person commits an offence against the act. "Military service" includes military telegraphy. A company contracted in November 1870, with the French government to lay a series of cables along the coast, which were in fact capable of being connected by land lines, so as to make a continuous line from Dunkerque to Verdon. The company had no purpose of constructing or adapting the line for military use, though it was probable the line would be partially so used. *Held*, that there was no violation of the Act.—*The International*, L. R. 3 Ad. & Ec. 321.

Forfeiture.

By statute (1–2 Will. 4, ch. 32) a forfeiture is imposed on the occupier of land who shall kill game thereon, where the right to kill has been reserved by the landlord. A tenant agreed that "he would not destroy any game" on a farm, and killed game thereon. *Held* (Lush, J., dissenting), that the tenant could not be convicted under said statute, as there was no reservation of the right to the landlord.—*Coleman* v. *Bathurst*, L. R. 6 Q. B. 366.

See Ejectment.

Franchise.

By statute the owner of a hereditament, which is injuriously affected by the construction of a railway, is entitled to compensation. The owner of an ancient ferry had his travel diverted by a railway bridge, with a footway for passengers. *Held*, that the ferry was a franchise, and therefore a hereditament, and that the injury to the ferry was the immediate consequence of the erection of the bridge.—*Reg.* v. *Cambrian Railway Co.*, L. R. 6 Q. B. 422; *See* L. R. 4 Q. B. 320.

Fraud.—*See* Inspection of Documents.

Freight.

The master of a vessel belonging to B. entered into a charter-party with a freighter, acting on behalf of A., to carry 701 tons cargo, to be furnished by A., B. to have a lien on cargo for both freight and dead freight. Bills of lading for 701 tons were signed by the master, and endorsed to A.; but the actual amount received was but 386 tons. There was no other cargo. *Held*, that B. was bound to deliver only the amount of cargo received, and that he had a lien for dead freight, *i. e.*, unliquidated compensation for loss of freight.—*McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128.

Game.—*See* Forfeiture.

Guarantee.—*See* Bill of Lading, 1.

Hereditament.—*See* Franchise.

Husband and Wife.

The statute 33-34 Vict. ch. 93, enacts that a husband shall not be liable for the debts of his wife contracted before marriage, but "any property belonging to the wife for her separate use shall be liable to satisfy such debts as if she had continued unmarried." An annuity was devised to a woman without power of anticipation. After her marriage, but on the same day, judgment was entered against her for a certain sum. *Held*, that the debt must be paid out of the annuity.—*Sanger* v. *Sanger*, L. R. 11 Eq. 470.

Highway.—*See* Dedication.

Illegitimate Children.

1. Testator gave a share of his property in trust for his niece B. and her husband, "and for the child if only one, or all the children if more than one," of his niece B. And a second share upon such trusts in favor of his niece C. and her husband, and her child or children, as should correspond with the trust for B. There were codicils to the will not affecting the gift. At the date of the will C. was fifty years of age, and fifty-seven at the date of the last codicil. C. had but one child, who was illegitimate. *Held*, that the illegitimate child could not take under the will.—*Paul* v. *Children*, L. R. 12 Eq. 16.

2. Testator's daughter had married the husband of her deceased sister. Testator devised "to my son-in-law J. C.," and "to my daughter M., wife of said J. C.," and also "to the children or child of my said daughter, M C." Testator's daughter had two children by J. C., living at date of the will. *Held*, that the daughter's children by J. C. took, although illegitimate.—*Crook* v. *Hill*, L. R 6 Ch. 311.

3. On a question of the legitimacy of A., his declarations were offered in evidence; and, *contra*, evidence was offered on the *voir dire* to show A. was illegitimate, and exclude his declarations. At that stage of the proof A. was *primâ facie* legitimate. *Held*, that the declarations should be admitted.—*Hitchins* v. *Eardley*, L. R. 2 P. & D. 248.

See Domicile.

Illness.—*See* Contract, 1.

Implied Condition.—*See* Contract, 1.

Indictment.

An agent, being bound to pay over weekly the sums he collected, was indicted for embezzlement of a sum due at the end of a week, but composed of several smaller sums collected during the week. *Held*, that there might be separate indictments for each of the smaller sums, or for their gross amount.—*Reg.* v. *Balls*, L. R. 1 C. C. 328.

Infant.—*See* Criminal Law, 1.

Information.

On a statute running, "If any person shall," &c., "such person shall" pay a certain sum. *Held*, that an information against two jointly, with subsequent separate convictions, was proper.—*Reg.* v. *Littlechild*, L. R. 6 Q. B. 293.

See Libel.

Infringement.—*See* Patent, 4.

Injunction.—*See* Specific Performance; Trade-mark.

Inspection of Documents.

Action on a policy of life insurance; defence, fraudulent concealment and misrepresentation in obtaining it. The plaintiff having shewn that the insurers had charged a special premium, after considering his proposals and reports of his private friends to whom the insurers were referred as to his health and habits, and of a medical man who examined him on behalf of the insurers, the court allowed him to inspect those reports, although the forms on which they were written stated that the insurers would regard the answers as strictly private and confidential.—*Mahony* v. *Widows' Life Assurance Fund*, L. R. 6 C. P. 252.

Insurance.—*See* Inspection of Documents.

Intention.—*See* Power.

Invoice.—*See* Bill of Lading, 2.

Joint-tenancy.—*See* Perpetuity, 2; Tenancy in Common.

Judgment.—*See* Bankruptcy, 1; Decree.

Jurisdiction.

Plaintiff, in a petition for separation from his wife, was resident in England, and made affidavit that he had no intent to return to his domicile of origin. The court believing the intention to make his domicile in England was not *bonâ fide*, *held*, that it had no jurisdiction.—*Manning* v. *Manniny*, L. R. 2 P. & D. 223.

Jury.—*See* Negligence, 1.

Landlord and Tenant.

The plaintiff hired the ground floor of defendant's warehouse, the defendant occupying the upper story, and a rat gnawed a hole through a gutter in the upper story, letting the rain leak into the house and injure plaintiff's goods. *Held*, that the defendant was not liable.—*Carstairs* v. *Taylor*, L. R. 6 Ex. 217; *See* 7 L. C. G. N. S. 131.

Sse Ejectment; Forfeiture.

Larceny.—*See* Criminal Law, 2; Indictment.

Lease.—*See* Landlord and Tenant; Tax.

Legacy.

1. A testator bequeathed to a nephew and

niece by name, and then "to all and every the children of my late nephew M. I. and my niece E. W., share and share alike." In a codicil he referred to, "the legacy left to my niece E. W." The testator's brother M. I. had died, leaving children, one of whom, M. I. having had a son born in England, had gone to America; and the testator knew these facts, but believed that his nephew M. I. was, or might be, dead. *Held*, that the bequest was to the living nephew, and not the dead brother, and evidence of intention otherwise was not admissible. Further, that the gift was to E. W., and not to her children.—*In re Ingle's Trusts*, L. R. 11 Eq. 578.

2. An estate was settled to the use of A. for life, with remainders in tail. A subsequently bequeathed his personal estate in trust for the persons who should for the time being be in possession of the above settled estate, to go with said estate "so far as the rules of law or equity will permit, but so, nevertheless, as that the same chattels personal shall not, as to the effect or purpose of transmission, vest absolutely in any person who" should be entitled to said estate, "unless such person shall attain the age of twenty-one years, or, dying under the age, shall leave issue inheritable." The representatives of B., a remainderman, who had died under twenty-one, without issue male, claimed the personal estate against C., a remainder-man, holding the said *real* estate, who was also A's residuary legatee. *Held*, that C. was entitled to the personal estate, either under A.'s will or as his residuary legatee, and it was unnecessary to decide which. *It seems*, the words "so far," &c, do not make an executory bequest to be executed according to the general intent of the testator. —*Harrington* v. *Harrington*, L. R. 5 H. L. 87; s. c. L. R. 3 Ch. 564.

3. A bequest to A. of £50 a year, "out of the interest, dividends, and produce, arising from all my personal property," and after A's death "said £50" to others, is a gift to the latter of a principal which will produce £50 per annum.—*Bent* v *Cullen*, L. R. 6 Ch. 235.

4. A testator reciting that he should be entitled to a certain sum in stock, "or the securities or property now representing the same," on the death of his sister, bequeathed "the sum of £2000 consols, part thereof, or a sum equal thereto, to be paid to my son when the same shall be received or got in by my executors." The sister died in 1865, and in 1868 the testator made a codicil reducing the legacy of £2000 consols bequeathed to his son, but in other respects confirming his will. Before the date of the codicil the testator had sold the principal part of said consols, and sold the remainder before his death. *Held*, that the legacy was specific, and failed, as the fund charged therewith was no longer in existence.—*Oliver* v. *Oliver*, L. R. 11 Eq. 506.

See Devise; Illegitimate Children; Will.

Legitimacy.—*See* Illegitimate Children.

Letter.—*See* Contract, 3.

Lex Fori.—*See* Judgment.

Libel.

Affidavits that in a newspaper containing a libel, J. S. was stated to be printer and publisher, and that deponent believed him to be such, furnish no evidence of publication by J. S. *It seems* that defects in prosecutor's affidavits on a criminal information for a libel may be supplied by statements in defendant's affidavits.—*Reg* v. *Stanger*, L. R. 6 Q. B. 352; 7 L. C. G. N. S. 126.

See Maritime Lien.

Lien.—*See* Maritime Lien.

Limitations, Statute of.—*See* Bailment; Evidence.—*American Law Review.*

APPOINTMENTS TO OFFICE.

JUDGE OF THE SUPERIOR COURT—QUEBEC.

THE HON. CHRISTOPHER DUNKIN, of Knowlton, in the Province of Quebec, a Member of the Queen's Privy Council for Canada, and one of H. M. Counsel learned in the Law, to be a Puisné Judge of the Superior Court of Lower Canada, now Quebec, *vice* the Hon. Edward Short, deceased. (Gazetted Oct. 28th, 1871.)

MINISTER OF AGRICULTURE.

JOHN HENRY POPE, of Cookshire, in the Electoral District of Compton, in the Province of Quebec, Esquire, to be a Member of the Queen's Privy Council for Canada, and Minister of Agriculture, *vice* the Hon. Christopher Dunkin.

NOTARIES PUBLIC.

JOHN DONALD McDONALD, of the village of Renfrew, Esquire, Barrister-at-Law. (Gazetted Oct. 28th, 1871.)

JAMES CLELAND HAMILTON, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted Nov. 11th, 1871.)

CHARLES E. PEGLEY, of the Town of Chatham, Esquire, Barrister-at-Law. (Gazetted Nov. 11th, 1871).

JOHN TAYLOR, of the City of London, Esquire, Barrister-at-Law. (Gazetted Nov. 11th, 1871.)

HAMNETT PINHEY HILL, of the City of Ottawa, Gentleman, Attorney-at-Law. (Gazetted Nov. 11th, 1871.)

RICHARD THOMAS WALKEM, of the City of Kingston, Esquire, Barrister-at-Law. (Gazetted Nov. 18th, 1871.)

FREDERICK FENTON, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted Nov. 18th, 1871.)

ASSOCIATE CORONERS.

MYERS DAVIDSON, of the Village of Florence, and ANSON S. FRASER, of the Village of Sombra, Esquire, M.D., within and for the County of Lambton. (Gazetted Oct. 28th, 1871.)

THOMAS WHITE, junior of the City of Hamilton, Esquire, M.D., within and for the County of Wentworth. (Gazetted Nov. 18th, 1871.)