The Legal News.

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FICTITIOUS APPEALS.

The number of genuine suits and appeals in the present age is so overwhelming that it is quite natural for courts and judges to condemn severely the attempt to inflict dummy litigation upon them. We do not know whether New Zealand has yet attained a fair share of legal business, or whether the judges of that colony have still leisure for imaginary controversies, but the *New Zealand Jurist* states that there were four dummy appeals heard at a recent sitting of the New Zealand Court of Appeal. The solicitors, it appears, for mere display, set the cases down after they had been settled; and the judges, though aware that there was no *bona fide* controversy, heard the cases and decided them. Our contemporary is incensed at this proceeding, and cites precedents to show that in England attorneys bringing up dummy appeals would be considered guilty of a contempt of court. Litigation for the mere fun of the thing cannot be too severely repressed, yet cases frequently arise in which it is convenient for parties to obtain the opinion of the Court on a doubtful point of law without the bitterness and ill-will which usually attend an ordinary suit. We presume the *New Zealand Jurist* does not mean to include such cases in its censure. If there is a useful object, no contempt of court is intended, and it would be harsh to infer it.

STAYS v. *STRAPS.*

A novel illustration of contributory negligence has figured before the Supreme Court of Pennsylvania, the title of the cause being *West Philadelphia Passenger R. R. Co.* v. *Whipple*. A woman, while being conveyed in one of the company's cars, and unable to find a seat, was thrown down and injured by the sudden stopping of the car. She sued for damages, but the company contended that she had been guilty of contributory negligence in not taking hold of the hand straps with which the car was provided. The woman answered that she could not conveniently have done so, as it would have disarranged her dress, and she had taken hold of the hand of a friend. At the trial, the question of negligence on her part was left to the jury, with the instruction that if they found she could not conveniently reach the strap, and so took hold of the hand of a fellow passenger, it was for them to say whether this was a sufficient precaution. The Supreme Court very properly held this instruction to have been correct, and added that "possibly a woman may be so fantastically and foolishly hooped, wired, and pinned up, as to deprive her of her natural power to help herself; but, if so, the question is one of fact, and not of law, and so we incline to leave it, instead of imposing upon our brethren below the difficult duty of prying into the artificial stays of the plaintiff's case."

A PROTRACTED SUIT.

We do not think that law suits in the present day are spun out to such interminable length as was often the case in times gone by. Few litigations attain the longevity satirized by Dickens in *Jarndyce* v. *Jarndyce*. In Canada, assuredly, law is not only cheap but expeditious, and as a rule two years measures the life of the hardest fought case on this side of the Atlantic. In England, too, great efforts have been made to oil the wheels of justice, and cases progress much more rapidly than of old. In the United States the machinery is probably upon the whole not less expeditious, but our contemporaries there have discovered one case, *Yale* v. *Dederer*, reported in 68 N. Y., which seems to be a remarkable exception. The action was brought to charge the estate of a married woman with a promissory note signed by her. The note was payable 1st May, 1854, and the suit was instituted soon after. In August, 1855, it was heard by the Special Term of the Supreme Court (21 Barb. 286). It made a first appearance before the Court of Appeals in December, 1858 (18 N. Y.), when the Court held that a promissory note did not charge the separate estate of a married woman, unless she *intended* that it should have that effect. The case went back for re-trial, and came up before the Court of Appeals a second time in 1860 (22 N. Y.) The Court on this occasion held

that *the intention must be expressed in the instrument.* The parties seem to have been discouraged by this decision, and the case slumbered for near a score of years. But once more it made its appearance before the Court of Appeals, and on the 30th January, 1877, was finally determined. The judgment was for the defendant, the Court intimating that *while regretting the rule they had established before, they would not change it.* The note was for $998; the report is silent as to the amount of the costs, but it would naturally be greatly in excess of the claim.

A CHAPTER OF BLUNDERINGS ON AND OFF THE BENCH, AND OF THEIR CAUSES AND REMEDIES.

[Continued from p. 359.]

No one ever doubted that, if a statute says, "Whoever does so and so shall be punished," it does not subject to punishment an insane person, or a person under the age of seven years. But why not? The Legislature has made no exception. Is not the legislative will to be obeyed? What right has a court to set up its notions against the express command of a statute? If the statute is wrong, let the prosecuting officer enter a *nolle prosequi;* or, if he does not choose to do this, let the governor pardon the offender after conviction. Why look to the judges for mercy, when their function is awful justice?

Still, in spite of these high considerations, what is thus assumed to be the legislative will is disobeyed every time an insane person, or an infant below the age of legal capacity, is set at the bar of a court for trial. There is no exception, and no complaint that the judges act in contempt of the legislative authority. But there are localities in which—not always, but now and then, and not in accordance with any intelligible rule yet discovered—the judges, when an unfortunate person who has done the best he could, yet has been misled as to some fact, is brought before them, having violated the letter of the statute by *act*, yet not by *intent*, resort to the high considerations, and turn him over to such mercy as he can find in the prosecuting officer or the governor. The legislative will, they tell us, is plain. The prosecuting officer may disregard it, but the judges should do better, and mind. Or, if the governor chooses, he may accomplish by the pardoning power what he could not by his veto—the annulling of the legislative will.

Now, adapting the before-quoted language of Hoar, J., to this sort of judicial decision, we have the following: "It is singular, indeed, that a man deficient in reason is protected from criminal responsibility for violating the letter of a statute, and another, who was obliged to decide upon the evidence before him, and used in good faith all the reason and faculties which he had, should be held guilty."

The jumble comes from an entire ignoring of a familiar and well-settled rule of statutory interpretation. It is, as expressed by the present writer in another connection, that "whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at the common law."* So that as an insane person will go free who does a thing forbidden by the common law, in like manner he will when the thing done is contrary to a statutory inhibition. And, as one of sound mind will not be punished at the common law if, being circumspect and careful to obey the law, he is misled concerning facts and does the thing which he should were the facts what he believes them to be, so neither will he be punished under a statute. The common-law doctrines are applied to a statutory offence the same as to an offence at common law.

It will be helpful to go for illustrations to two cases, in each of which the true doctrine appears. A statute of the United States declared that "any captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, or negligence, or inattention to his or their respective duties the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter." And it was ruled to be no defence for such a person that his misconduct proceeded from ignorance of the business. "He should not have engaged in a duty so perilous as that of an engineer when he was conscious that he was incompetent."† Here was the wicked mind, and the common-

* Bishop's Stat. Cr., sec. 139.
† United States v. Taylor, 5 McLean, 242, 246.

law rule, simple and pure, was applied to the indictment under the statute the same as to an indictment at common law.

So likewise it was in the following case, which resulted differently. A statute required the masters of steamboats passing from one port to another, where a post-office is established, to deliver to the post-master in the latter place within a specified time after arrival, all letters and packets destined for the place. But it was held that if, for example, a letter is put into the hands of his clerk, or otherwise conveyed on board, yet not within his personal control, and he has no knowledge of it, this ignorance of fact will excuse the non-delivery of it to the post-master, notwithstanding the unqualified terms of the statute. Here, the reader perceives, there was an ignorance of fact which proceeded from no negligence or other culpability; and, therefore, the common-law rule, applied to the statute, screened from guilt the party who had committed a formal violation of the statutory command. "It is not to be supposed," said Johnson, J., "that it was the intention of the law-maker to inflict a penalty upon the master of a steamboat in a case where he was ignorant that a letter had been brought upon the boat, either by the clerk or any person employed on board, and had not the means of ascertaining the fact by the use of reasonable diligence. This would be little less unjust than the disreputable device of the Roman tyrant who placed his laws and edicts on high pillars, so as to prevent the people from reading them, the more effectually to ensnare and bend the people to his purposes." *

Let us now see how the doctrine is put by a court in a moment of forgetfulness of the rules of statutory interpretation. A statute in Massachusetts made it polygamy and heavily punishable "if any person who has a former husband or wife living shall marry another person," except in particular circumstances pointed out. † Does this forbid marriage after the former husband or wife is dead, in a case not within the exceptions of the statute? No one pretends that it does. Then, if a married woman has an insane delusion that her husband is dead, and, under its influence, marries another, the adjudged law in Massachusetts, the same as elsewhere, holds her free from guilt. But is not an insane woman a "person?" Every court deems her to be. And the sophistical argument is that, as such a case as this is within the exact terms of the statute, the insane woman must be punished by the court or remitted to the governor for his pardon. The Legislature has spoken, and must be obeyed!

The answer, and the only answer to such a suggestion, is the one already given, namely, that every statute is to be construed as limited by the rules of the unwritten law; and in this case, as the woman without her own fault supposed her husband to be dead, she is to be judged on a question of crime the same as though he were so. In other words, as the unwritten law requires a criminal intent, so therefore does the statute. And an insane person can have no criminal intent.

In this condition of the law a married woman was left by her husband, who did not return, under circumstances inducing the honest belief that he was dead. So, in due time, she married another man, whom she instantly left on hearing that her husband was alive. She was indicted for polygamy, and the court held that nothing which these facts tended to prove would constitute a defence. The case differs, as we have seen, in no essential particular from one of insane delusion, in which the doctrine of the same court is directly the reverse. Said the learned judge: "It was urged in the argument that, where there is no criminal intent, there can be no guilt; and, if the former husband was honestly believed to be dead, there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense, but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does, he of course intends to do. If the statute had made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it. On this subject the law has deemed it so important to prohibit the crime of polygamy, and found it so difficult to prescribe what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact, and, as the same vague evidence might create a belief in one mind and not in another, the law has also deemed it wise to fix a definite period of seven

* United States v. Beaty, Hemp. 487, 496.
† Rev. Stat. Mass. 1836, ch. 130, sec. 2.

years' continued absence, without knowledge of the contrary, to warrant a belief that the absent person is actually dead. One, therefore, who marries within that time, if the other party be actually living, whether the fact is believed or not, is chargeable with that criminal intent, by purposely doing that which the law expressly prohibits."*

Here is a jumble: "If the statute," says the judge, "has made it criminal to do any act under particular circumstances"—that is, to marry a second husband *while the former one is living*—"the party voluntarily doing that act is chargeable with the criminal intent of doing it." But in fact, as the court admitted, this woman did not intend to do what the statute forbids. Her *intent* was to marry a second husband, her *former husband being dead.* The statute did not forbid this. It was a very different thing from the intent to marry again, her former husband being alive. But the judge tells us that the statute has prescribed "what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact," should it afterward appear that he was alive. Insanity is not set down in the statute among the evidences; hence, if this view is correct, an insane person marrying in such circumstances should be punished. But, no; we all see that the court would not hold this. The act of the insane person was not "voluntary;" it was impelled by disease. Neither was the act of the woman marrying under mistake "voluntary;" it was impelled by the mistake. This is so even in civil affairs; for, if one enters into a contract through mistake of fact, there is no "voluntary" concord of minds, and the formal undertaking is not binding. The act is of the same sort as the constable's is in arresting a person supposed to be drunk, while he is not. The mistake caused it. Nor did the learned judge further intimate that the seven years' absence is the only evidence which can ever be received of the death of an absent person. Suppose a husband is riding on a train of cars, and it is thrown down an embankment, and he is killed. His mangled body is taken back to the widow, and she buries it. A year afterward she marries again, but she is indicted for polygamy. This court would not hold that she could prove the death of the absent husband only by showing a seven years' absence, so that she must go to prison for remarrying, while her former husband was known to be buried. But suppose the body to have been greatly mangled, yet the indentification was satisfactory to all, and it should afterward appear to have been the body of some other person, while the real husband ran away and concealed himself. Here was evidence adequate in any court; and, in this case of mistake, the intent of the woman was precisely the same as in the case of actual death. She proceeded cautiously and honestly; she meant to obey the law, not to break it; and the central, fundamental principle of our criminal jurisprudence forbids that she should be punished. The statute screens the woman who does not know whether her former husband is dead or alive, if his absence has continued seven years. If she knows he is dead, she may at once marry. And, if there is an unavoidable mistake in such knowledge, she is still not to be punished for what she could not avoid. Nor could the Massachusetts court, in the actual case we have been considering, so blind itself by sophistry as to come to any other conclusion; for the case was continued to allow the woman to apply to the governor for a pardon, which was procured and pleaded, and then she was discharged. But, if the court interpreted aright the legislative will, with what propriety could the governor frustrate it, or the court connive at its frustration? A pardon, as well as a judicial judgment, may be wrongly granted. And it is not a just function of the pardoning power to annul what the Legislature has intentionally established.

In the law, precedents are so prevailing that, unless a false step is pointed out by some one who can succeed in arresting the attention of the judges, it almost necessarily leads to another. So it was in Massachusetts. I shall not attempt to trace the whole course of subsequent erratic *dicta* on this subject of mistake of fact in criminal cases, including one or two or more actual decisions contrary to sound doctrine, but something further seems desirable. The case of the arrest by a police-officer, the decision in which was right, was subsequent to this one of polygamy. Subsequent, also, were the following:

The General Statutes of Massachusetts provide that "whoever commits adultery shall be pun-

* The Commonwealth v. Mash, 7 Metc. 472, 474.

ished" in a way pointed out.* A woman married and lived awhile with her husband, but his habits were dissipated and he did not provide for her, so that she was compelled to leave him. She read in the newspapers of the killing of a man of his exact name, in a drunken row, and had no suspicion that the person killed could be any other than her husband. Thereupon she represented herself to be a widow. Eleven years after she last saw or heard from him, she and another man intermarried, both acting in absolutely good faith, with no doubt of the death of the former husband. But, in fact, he was alive, and the second husband was indicted for adultery committed by cohabiting under the second marriage. He was convicted, and the court held the conviction to be right.† He had exerted his best faculties to obey the law; the supposed widowed woman had waited the very decent time of eleven years; he had done what the best judge on the bench would have done if he, too, had been single, and had loved her; but all was of no avail. The majesty of the law must not be snubbed. There is some advantage in Massachusetts in being insane. If this man had been blessed with a mere insane delusion that the supposed facts were true, while the woman was cohabiting with her first husband, and had married her and cohabited with her also, he would have been "all right."

I am not aware of any Massachusetts case which better merits the fame of key-stone in the new arch that the one last cited.

A man was indicted for being a common seller of intoxicating liquor, contrary to the terms of a statute which were: "Whoever is a manufacturer of spirituous or intoxicating liquor for sale, or a common seller thereof, shall" be punished in a way pointed out.‡ He offered to prove that the article sold was bought by him for non-intoxicating beer, that he believed it to be such, and had no reason to suppose it to be otherwise. This evidence was rejected; he was convicted, and the court held the conviction to be right. The learned judge observed that this "is not one of those cases in which it is necessary to allege and prove that the person charged with the offence knew the illegal character of his act." Of course, this is so. The indictment need not allege, or the evidence show, that the defendant was not under seven years of age, or was not insane; yet affirmative proof of either would be adequate in defence. Neither, added the judge, was this a case "in which a want of such knowledge would avail him in defence." If the want of knowledge proceeded from carelessness, or a will to disobey the statute or do any other wrong, or an indifference to its commands, this utterance, thus modified, would accord with the general doctrine prevading the criminal law. But, if the mistake arose out of a proper enquiry, prompted by a purpose to obey the statute and do all things lawfully and well, it ought to excuse the person misled thereby. Yet the learned judge continues: "If the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to accertain the nature of the article which was sold." This is a different doctrine from that laid down where an officer arrested a man believed to be drunk, while he was not. So, probably, thought the judge while he proceeded: "Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises unless he knew that he could do so lawfully, if he violates the law, he incurs the penalty." Thus the case appears to be distinguished from the one of arrest. There was for the distinction no law except what reposes in the breast of a judge. But what a jumble! Whence comes the idea that a legislature creating a statute, and knowing that, by fundamental doctrine the world over, there can be no crime without a criminal intent, proceeds "without reference to the intent or purpose," unless the reference is in the form of words? Let us assume that the real meaning of the Legislature was indisputably to frame just such a statute as this, construed by the rules which prevail under the common law. By what form of words could it be done? The words actually employed are: "Whoever is a common seller of intoxicating liquor shall," etc. These words, by the common interpretation, would require the indictment simply to allege that the defendant did the unlawful act, thus making a *prima-facie* case against him, and the prosecutor to prove at the trial that he did it: leaving the accused

* Gen. Stat. Mass. 1860, ch. 165, sec. 3.
† The Commonwealth v. Thompson, 11 Allen, 23.
‡ Gen. Stat Mass. 1860, ch. 86, sec. 31.

person to excuse himself if he could, the same as in a case of insanity, or of a child too young for crime. And what can be more reasonable then that this is what the Legislature means in any such case, even if we suppose its members to be ignorant of all rules of law? If the words are, instead of the above, "Whoever is a common seller of liquor which he knows to be intoxicating," the meaning is very different. The indictment must conform to the statute; and the prosecutor, to make a *prima-facie* case, must prove knowledge. And the same observation will apply to any other change of the like sort. Another method would be to introduce a clause that "this act shall be construed by the courts in accordance with the fundamental principles of the law." But, without such a clause, the courts are required to construe every statute in this way; so that this method would be nugatory. The result is that, in Massachusetts, there is no possible form of words whereby the Legislature can make the law which it desires. The learned judge proceeds, "The salutary rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases." But that rule comes from necessity. Shall, therefore, unnecessary hardship be inflicted by the court? It seems so. "And the hardship is no greater," he continues, "where the law imposes the duty to ascertain a fact." * This statute does not say it is the duty of the party to ascertain a fact. That is put on by the court, in the interpretation. And, to be consistent, the court should add that the statute makes it the duty of the party to be sane, and to be over seven years old; so that, if a child of six, or a lunatic, escaped from the hospital, should be caught at liquor-selling, such a person must be punished. The statute is general—"Whoever"—and it imposes on every person the duty to be old enough and sound enough in mind for crime.

[To be continued.]

Complaint is made in Chicago, that justices of the peace in that vicinity sign summonses in blank, and sell them to sewing machine companies by the dozen, to enable them to commence suits against poor women who are unable to pay for machines purchased.

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* The Commonwealth v. Boynton, 2 Allen, 160.

DIGEST OF ENGLISH CASES.

[Continued from page 360.]

Company.—The articles of the I. Company, limited, authorized the directors named therein to appoint other directors, and provided that no person should be a director who was not the holder in his own right of stock to the amount of £50, and has not held the same for six months. J. was chosen a director by the board, and attended six meetings thereof, and took an active part in the proceedings; and his name appeared in the prospectus of the company as a director, but he never held any shares in the company. On winding-up proceedings, *held*, that he had never been a director, and could not be made a contributory. — *In re Percy & Kelly Nickel, Cobalt, & Chrome Iron Mining Co. Jenner's Case*, 7 Ch. D. 132.

2. Five persons formed a syndicate, for the purchase of a coal-mine of A., the owner. An agreement was made between I, one of the syndicate, and A., by which A. was to sell I. the mine for £66,000; of which £24,000 was to be cash, and £42,000 in paid-up shares in a company to be formed by I. for working the mine, with a capital of £200,000. The memorandum of association, signed by I. and another member of the syndicate, and five others, nominees of the syndicate, stated the capital to be twenty thousand £10 shares. The articles of association set forth that the property was to be acquired for and should belong to the persons named in the schedule of an agreement to be executed, and that the fifteen thousand shares set against their names were to be considered as fully paid up and allotted. I. subsequently declared himself a trustee for the company; and the agreement mentioned in the articles was executed and duly registered under the Companies Act, §25. This agreement stated that the property had been acquired by I. for A., the members of the syndicate, and their nominees, being the persons named in the schedule. There followed a declaration of trust by them for the company, and the statement that fifteen thousand shares were allotted to them as fully paid up. Besides the paid-up shares allotted him, A. bought three thousand five hundred and twenty shares from members of the syndicate. No shares were ever allotted beyond the fifteen thousand, and the company was voluntarily wound up. *Held*, reversing the decision of MALINS, V. C. that A.

could not be put on the list of contributories in respect of the three thousand five hundred and twenty shares purchased by him.—*In re Wedgwood Coal & Iron Co. Anderson's Case*, 7 Ch. D. 75.

3. A contract was made Oct. 15, 1875, between the plaintiff and the promoters of a proposed company. Dec. 16, 1875, the company came duly into existence, and subsequently ratified the contract, and acted on it. *Held*, that the company was liable on the contract.—*Spiller* v. *Paris Skating Rink Co.*, 7 Ch. D. 368.

4. Under a contract not registered as required by the Companies Act, 1867 (30 and 31 Vict. c. 131), shares in a limited company were allotted to the party with whom the company made the contract, and were duly registered by the company as such. The shares are subsequently transferred for value as fully paid up shares to N., who had no notice of any irregularity in their issue. On the winding up of the company, *held*, reversing the ruling of HALL, V. C., that the company was estopped to deny that the shares were fully paid up, and that the official liquidator could not have N. put upon the list of contributories as a holder of shares not fully paid up.—*In re Farmer's Pure Linseed Cake Co.*, 7 Ch. 533.

5. An unlimited company was formed in 1843, under a deed of settlement, in which it was provided that a shareholder should have no more than twenty votes, and that no share should be transferred to any person not first approved by the directors. A controversy arose as to the desirability of turning the company into a limited company; and the plaintiff, a large shareholder, having several thousand shares, transferred some shares by a *bona fide* sale to one E., and other shares to his nephew, to hold as trustee for himself. These transfers were made in order to secure more votes for the project which the plaintiff had in view. The directors refused to approve and accept the transferees, but without objecting to the character of the latter, or pretending that they were not proper persons to hold stock in the company. *Held*, that the directors should be ordered to approve the transfers, as they had no power to refuse, except for personal objection to the transferees. They could not refuse, because they did not approve of what they thought to be the object of the transfer.—*Moffatt* v. *Farquahar*, 7 Ch. D. 591.

Composition.—A purchaser from a debtor, who at the time of the purchase had filed a petition in bankruptcy, and whose creditors had accepted a composition, *held*, not bound to enquire whether the instalments provided for in the composition had all been paid, as the debtor has complete control of his property from the time of the composition until the creditors again take action under section 26 of the Bankrupt Act, and have him adjudged bankrupt.—*In re Kearley & Clayton's Contract*, 7 Ch. D. 615.

Consideration.—See *Guaranty.*

Construction.—1. Oct. 21, at 12.40 P.M., the excise officer discovered a dog belonging to the respondent, and without a license. At 1.10 the same day, the owner took out a license, which ran from the date hereof, &c. The dog law (30 Vict. c. 5) provides that "every license shall commence on the day" on which it is granted. *Held*, that the respondent had violated the act. *Campbell* v. *Strangeways*, 3 C. P. D. 105.

2. The word "paintings," used in a statute in the phrase "paintings, engravings, pictures," *held*, not to include colored working models, and designs for carpets and rugs, though painted by hand and by skilled persons, and each worth as much as £30 as models, but valueless as works of art.—*Woodward* v. *The London & North-western Railway Co.*, 3 Ex. D. 121.

Contingent Remainder.—See *Devise.*

Contract.—Plaintiff sued to recover £5 and a week's wages. The defendant set up a contract under which the plaintiff agreed to be conductor on defendant's tramway, and to deposit £5 as security for the performance of his duties; and, in case of his discharge for breach of the rules of the company, the £5 and his wages for the current week were to be retained as liquidated damages. The manager of the company was to be "sole judge between the company and the conductor" as to whether the same should be retained, and his certificate was to be binding and conclusive evidence in the courts as to the amount to be retained, and "should bar the conductor of all right to recover." Plaintiff was discharged for violating a rule of the company. *Held*, that the agreement was good, and the certificate of the manager that the forfeiture had been incurred was conclusive.—*The London Tramway Co., Limited*, v. *Bailey*, 3 Q. B. D. 217.

Contributory.—See *Company*, 2, 4.

Conveyance.—See *Vendor and Purchaser.*

Copyright.—O., a Frenchman, composed an opera, and had it performed for the first time March 10, 1869, in Paris. An arrangement of the score for the piano, and also one for the piano with voices, were made by S., a Frenchman, with O.'s consent, and published in Paris, March 28, 1869. In June, 1869, O. assigned the opera and copyright, with the right of publicly playing and performing the music in England, to the plaintiff, and delivered to him the score. June 9, 1869, a copy of the piano arrangement was given to the registration officers, and the opera was registered under the Copyright Act (5 & 6 Vict. c. 45) and the International Copyright Act (7 Vict. c. 12), as follows: Title of the opera; name of the author, O; name of proprietor of the copyright, O. (given as "proprietor of the copyright in the music, and of the right of publicly performing such music"). Time of first publication, "March 28, 1869" (the time of publication of the piano arrangement by S.); and time of first representation, "March 10, 1869") the time the opera itself was first played in Paris). The title of the copy of the piano arrangement deposited consisted of the title of the opera, with the addition of a statement as to the piano arrangement by S. No other mention of S. appeared in the registration. In August following, some separate instrumental parts of the opera were published, and no copy thereof delivered to the registration officers; but the rest remained unpublished. Subsequently, the defendant announced an opera in English, with the same name, music by O., and brought it out in London. The music as played was substantially as given in the arrangement by S. *Held*, reversing the decision of Bacon, V. C., that the registration as made protected the opera, and the defendant was guilty of an infringement.—*Boosey* v. *Fairlie*, 7 Ch. D. 301.

Costs.—See *Trust*, 2.

Covenant.—1. Plaintiff and another sold the defendant a lot of land, and in the deed defendant covenanted that no building to be erected upon the land should at any time "be used or occupied otherwise than as and for a private residence only, and not for purposes of trade." The lot was one of several contiguous lots, all sold under deeds containing a like covenant; and on one lot the plaintiff himself had built a private residence. The defendant proposed to erect on his lot a building for the accommodation of one hundred girls, belonging to a charitable institution for missionaries' daughters, and supported by contributions. There was evidence that the plaintiff had permitted a small school to be kept in one of the other houses. *Held*, reversing the decision of Bacon, V. C., that the defendant had violated the covenant, and that the permission for the school in the other house did not amount to a waiver by the plaintiff of the covenant in defendant's case. Injunction granted.—*German* v. *Chapman*, 7 Ch. D. 271.

2. *Held*, that a covenant in a lease of a dwelling-house in London, not to assign without the consent of the lessor, was not a "usual covenant." *Haines* v. *Burnett*, (27 Beav. 500) considered overruled. *Hampshire* v. *Wickens*, 7 Ch. D. 555.

3. The assignee of a lease had notice of a restrictive covenant on the property binding upon his assignor. *Held*, that the covenant was binding on him in equity. *Keppell* v. *Bailey* (2 My. & K. 517) considered overruled. —*Luker* v. *Dennis*, 7 Ch. 227.

4. The assignee of land on which there is a covenant is in exactly the same position as if he were a party to the covenant, in case he had notice of it.—*Richards* v. *Revitt*, 7 Ch. D. 224.

5. By an agreement for the purchase of a public house, the plaintiff agreed to assume the lease thereof at a rent named, "subject . . . to the performance of the covenants" therein, "such covenants being common and usual in leases of public-houses." The said lease contained the clause: "Provided always, and these presents are upon this express condition, that all underleases and deeds," made during the term, "shall be left with the solicitor . . . of the ground landlord, . . . for the purpose of registration by him, and a fee of one guinea paid to him" therefor. Then followed a provision for re-entry for breach or non-performance of any of the "covenants or other stipulations." The jury found this clause was not a "common and usual covenant." *Held*, that the purchaser was not bound to specific performance, though the said clause might not be, in strictness, a "covenant."—*Brookes* v. *Drysdale*, 3 C. P. D. 52.

See *Lease*.

Damages.—See *Ancient Lights*.

Debt.—See *Will*, 3.

Deed.—See *Covenant*, 1.

Delivery.—See *Vendor's Lien.*

Demurrage.—A cargo was shipped under several bills of lading, one of which, indorsed to the defendants, contained the following: "Three working days to discharge the whole cargo, or £30 sterling per day demurrage." The defendants were ready to take their goods out within the time; but, their goods being at the bottom, they had to wait for other consignees to remove theirs, so that the three days had passed before their goods were out. In a second case, the facts were as above; and, in addition thereto, the charter-party provided that fourteen days should be allowed for loading and unloading, and ten days for demurrage, at £35 a day. One of the several bills of lading was indorsed to the defendants, and contained the phrase, "paying freight . . . and all other conditions, as per charter-party." *Held*, that in each case the defendants were liable for demurrage.—*Straker* v. *Kidd & Co. Porteus et al.* v. *Watney et al.*, 3 Q. B. D. 223.

Devise.—1. A testator devised his real estate to trustees, their heirs and assigns, to hold to them for the use of B. for life, and afterwards to the use of such children of B. as should attain the age of twenty-one years. B. was directed to keep the premises in repair during his life. The trustees were empowered to apply the income of the portion of an infant devisee for his or her benefit during minority, or to pay the income over to such devisee's guardian, without responsibility for its application; and they were empowered to use the principal for the advancement of such infant before his attaining twenty-one, if they thought best. B. died leaving four children, one an infant. *Held*, that the trustees took a legal estate in the property; and, whether B.'s life-estate was legal or equitable, B.'s children took equitable estates, and, consequently, the infant's estate did not cease on B.'s death during his minority. —*Berry* v. *Berry*, 7 Ch. D. 657.

2. Devise to trustees, to the use of testator's son W. for life, and upon W.'s death without issue male to sell and pay the proceeds unto such one or more of testator's "children as might be living at the decease of his said son W., without male issue as aforesaid, and the issue of such of his said children as might be then dead, leaving issue," such issue to take *per stirpes* and not *per capita*. The testator died in 1840, and left W. and two other children living at his death. W. died in 1876 without issue. One of the other children died in 1872, having had two children, one of whom died in 1861, and the other is still living. On the question whether the child dying in 1861 before her parent took under the will, *held*, that the trust was an original gift, and said deceased child took according to the rule that "the issue of children take without regard to the question whether they (the issue) do or do not survive the parent, if any issue survive the parent." *Dictum* of Kindersley, V. C., in *Lanphier* v. *Buck*, (2 Dr. & Sm. 499), disallowed.—*In re Smith's Trusts*, 7 Ch. D. 665.

3. A testator devised copyholds held of the manors of Y., U., and I., to trustees, to the use of A. for life, remainder to the trustees to preserve contingent remainders, remainder to the use of A.'s children and their or his heirs, remainder to testator's grandson S. for life, remainder to the trustees to preserve contingent remainders, remainder to S.'s children, the plaintiffs. By a custom of the manors of Y., U., and I., the tenant can hold for life only, with power to nominate, by will or by deed, his successor or successors; and, if he nominates more than one, the survivor may nominate his successor. In a codicil, the testator, after stating that it had been found that his said copyhold estates were within the manors of U. and I., directed that the trustees should hold his said estates situated in those manors for the trusts of the will, so far as the customs of said manors would permit. But if the said customs forbade the "entails" made in the will, then the said A. and his nominees or successors should hold the said copyholds according to said customs. A. was admitted tenant of the copyhold of Y., and died without issue, having nominated the defendant B. his successor. The trustees were never admitted as tenants; one of them survived, and was made a defendant in the suit. *Held*, that, under the will, the trustees, and not A., ought to have been admitted as tenants of the copyholds held of Y.; that the limitations in the will were equitable interests, and were valid; and that A., having been admitted as tenant, held only as *quasi* trustee for the parties beneficially

interested, and that the defendant B. was accountable to the plaintiffs for the rents and profits of the copyhold of Y. since her admission thereto.—*Allen* v. *Bewsey*, 7 Ch. D. 453.

4. Devise of thirteen houses, a garden, and a pew in a church to testator's four sons, in equal shares, "to have and to hold subject to the following conditions: It is my will and desire" that the house be not disposed of or divided without the consent of the four sons, their heirs or assigns; that the garden be sold, if necessary, to meet contingent expenses; that, "until the before-mentioned distribution is made," the income shall come into one fund, and be among the sons; that, if there should be no "lawful distribution" during the life of the sons, the property should go to their issue, and if any of the sons died without issue, such son's widow should have the income during widowhood, and afterwards "it" should "devolve" to the survivors of the other sons, *i. e.* to testator's grandchildren, their heirs and assigns, share and share alike. The four sons were residuary legatees, absolutely. *Held*, that the sons took absolutely as tenants in common in fee, and the executory devise to the children was void.—*Shaw* v. *Ford*, 7 Ch. D. 669.

Director.—See *Company*, 1, 5.

Discretion.—See *Power.*

Distribution.—See *Perpetuity; Will*, 2.

Domicile.—J. M., born in Scotland in 1820, went to New South Wales in 1837, and carried on the business of sheep farmer. In 1851 he bought land in Queensland, and lived there regularly till four months after his marriage, in 1855. After a three years' visit to England, he lived three months on his land in Queensland, then three months at a hotel at Sydney, New South Wales; then in a house there, which he leased on a five years' lease. Then he built an expensive mansion-house at Sydney, in which his family resided till his death in 1866. He lived there except when away in Queensland on business or political duties. He died suddenly in Queensland, and at his request was buried there. *Held*, that he had lost his Scotch domicile, and his domicile in Queensland, and at his death had his domicile in New South Wales.—*Platt* v. *Attorney-General of New South Wales*, 3 App. Cas. 336.

See *Marriage.*

Dormant Partner.—See *Partnership.*

Easement.—Two houses, belonging respectively to plaintiff and defendant, had stood adjoining each other, but without a party-wall, for a hundred years. More than twenty years ago, the plaintiffs turned their house into a coach factory, by taking out the inside, and erecting a brick smoke-stack on the line of their land next the defendants, and into which they inserted iron girders for the support of the upper stories of the factory. In excavating for a new building on the site of the old one, which the defendants had removed, they left an insufficient support for the smoke-stack, and it toppled over, carrying the factory with it. The defendants were not guilty of negligence in excavating. *Held* (Lush, J., diss.), that the defendants were not liable.—*Angus* v. *Dalton*, 3 Q. B. D. 85.

See *Ancient Lights.*

Evidence.—See *Contract; Negligence; Will*, 1.

Exchange, Bill of.—See *Bills and Notes.*

Factor.—H., a broker in tobacco, and importer thereof, left tobacco in bond in the K. warehouse, receiving in the usual course dock-warrants therefor. He then sold the tobacco to plaintiff, a tobacco manufacturer, who, not wishing to pay the duty before he needed to use the tobacco, left it in bond in H.'s name, and let H. retain the warrants, he being ignorant that such warrants were in practice issued. H., having possession of the warrants, pledged a portion of the tobacco to the defendants for a loan, and handed them the dock-warrants, which they surrendered to the warehouse, receiving new warrants therefor in their own name; and they had the goods transferred in the books of the warehouse from H.'s name into their own. Of all these transactions the plaintiff was ignorant. *Held*, that the plaintiff was entitled to the goods free from the claim of the defendants.—*Johnson* v. *The Crédit Lyonnais Company. Same* v. *Blumenthal*, 3 C. P. D. 32; s. c. 2 C. P. D. 224. See 40 & 41 Vict. c. 39.

Fire Insurance.—See *Insurance*, 1.

Foreign Exchange.—See *Bills and Notes*, 5.

Fraud.—See *Anticipation; Trust*, 2.

Freight.—See *Railway.*

[To be continued.]

CURRENT EVENTS.

QUEBEC.

THE LEGALITY OF ORANGE ASSOCIATIONS.—Considerable discussion has taken place during the past month concerning the legality of Orange Associations within the Province of Quebec. Those who doubted or denied the legality of such organizations were fortified in their position by the following opinion given by counsel learned in the law, at the request of the St. Patrick's Society of Montreal. We append the document, which has acquired historical interest and importance:—

MONTREAL, July 9, 1878.

Sir,—The St. Patrick's Society, of Montreal, placing full confidence in your eminent legal ability and impartial judgment as a lawyer, request you will give them, at the earliest possible moment, your opinion on the following case.

CASE.

An Association exists in Montreal, claiming to be an Orange Association or Lodge, and its chief officer, calling himself County Master, has directly or through some subordinate officer called upon the civic authorities for protection in connection with the intended procession of the Association through the streets of the city of Montreal on the 12th of July. The oath taken and subscribed by the members of the said Association is one not authorized by law, and, moreover, contains an engagement of secrecy not required by law.

The opinion of counsel is requested upon the following questions:—

1. Is the Association illegal under the 10th chapter of the Consolidated Statutes of Lower Canada, and if so, would such procession, should it take place, constitute an unlawful meeting?

2. Are parties, residents of the province or elsewhere, joining the procession in Montreal of such Association, although not members of the Association, equally liable as if they were members?

3. In case such assembly be unlawful, is it the right and duty of the conservators of the peace to disperse the same?

You may associate with you such other legal gentlemen as you may deem fit.

Your obedient servant,

M. Walsh,

EDWARD BERNARD, Esq., Q. C. Cor. Sec.

OPINION.

1. By the 6th Section of Chapter 10 of the Consolidated Statutes of Lower Canada (1861), every Society or Association, the members whereof are, according to the rules thereof, or to any provision or any agreement for that purpose, required to keep secret the oaths or proceedings of such Society or Association, or to take any oath or engagement not required or authorized by law; and every society or association the members whereof or any of them take, or in any manner bind themselves by any such oath or engagement, or in consequence of being members of such society or association the members whereof or any of them take, subscribe or assent to any engagement of secrecy, test or declaration not required by law; and every society or association which is composed of different divisions or branches of or different parts acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, secretary, treasurer, delegate or other officer elected or appointed by or for such part, or to act as an officer for such part, shall be deemed and taken to be unlawful combinations and confederacies. And by the 7th section, any person, who in breach of the provisions of the Act, shall be guilty of any such unlawful combination or confederacy and shall be convicted thereof, shall be imprisoned in the provincial penitentiary for a term not exceeding 7 years, nor less than 2 years, or to be imprisoned in the common jail or house of correction for for any term less than 2 years. And by the 9th section, Freemasons under any Grand Lodge in the United Kingdom are exempt from the operation of the Act, and by the 29th Vic., chap. 46 (1865), the exemption is extended to Freemasons under the Grand Lodge of Canada.

The Orange Association referred to being bound by an oath not authorized by law, and containing an engagement of secrecy not required by law, we are of opinion that it is an unlawful combination and confederacy within the meaning of the said Act, chap. 10, of the Consolidated Statutes of Lower Canada, and consequently that any meeting of the Society, either in a building or in any of the streets of this city, or in any other place within this Province, is an nlawful meeting or assembly. The right thus to meet or assemble

being illegal, it necessarily follows that the walking together of such society in procession in the streets of Montreal on the twelfth instant will be unlawful.

2. Applying the principles of the common law, and in view of the express provisions of the second sub-section of Section 6 of the said Act, chap. 10, of the Consolidated Statutes of Lower Canada, we are of opinion that any persons, whether residing in the Province of Quebec or not, joining in the procession although not members of the said Orange Association would be equally liable, as if they were such members. The words of this sub-section are as follows;—"And every person who becomes a member of any such society or association, or acts as a member thereof, and every person who directly or indirectly maintains correspondence or intercourse with any such society or association, or with any division, branch, committee or other officer or member of such society or association, whether within or without this Province, as such, or who by contribution of money or otherwise aids, abets or supports such society, or any member or officer thereof, as such, shall be deemed guilty of an unlawful combination or confederation."

3. Holding as we do for the reasons above stated that the contemplated meeting and procession are unlawful, we are further of opinion that it is not only the right, but the duty of the conservators of the peace to suppress and disperse any such meeting and procession should they be held. The law on this subject cannot perhaps be better stated than in the following remarks of the Court, in the case of the Queen vs. Neale et al., 9 Carrington and Payne, 431:—It is not only lawful for Magistrates to disperse an unlawful assembly, even when no riot has occurred, but, if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty.

STRACHAN BETHUNE, Q. C.
EDW. CARTER, Q. C.
THOS. W. RITCHIE, Q. C.
EDMUND BARNARD, Q. C.

MONTREAL, 10th July, 1878.

Acting on this advice, members of the Orange Association were on the 12th July arrested, and the whole question will probably have to be considered by the courts at an early date.

ENGLAND.

PAYING MONEY INTO COURT—CONTINGENT LIABILITY.—The London *Law Times* says:—"A defendant may deny his liability and pay money into court to provide against the contingency of being fixed with liability notwithstanding his denial. So the Court of Appeals has decided in Berden *v.* Greenwood, and another of the old pleading land-marks is ruthlessly swept away. There must have been some good reason which sustained the old rule to the contrary for so many years."

NOTICES OF NEW PUBLICATIONS.

"SHORT STUDIES OF GREAT LAWYERS," by IRVING BROWNE. Weeds, Parsons & Co., Albany.

This is a republication of sketches originally printed in the *Albany Law Journal*. The author intends them rather as estimates of character than as biographies, but they embrace the most prominent events in the career of the distinguished men whose lives are noticed in the book, and for those who have not fuller and more complete biographies at hand, will serve as reliable and interesting information on the subject. Mr. Browne's style is polished and entertaining, the matter is skilfully selected and handled, and his book will make pleasant reading for the holidays. The worthies noticed in it are Coke, Mansfield, Kenyon, Thurlow, Loughborough, Ellenborough, Erskine, Eldon, Romilly, Abinger and Brougham of the mother country; and Parsons, Marshall, Kent, Pinkney, Wirt, Riker, Story, Webster, Walworth and Choate of the United States. The work, we may add, is beautifully printed and bound.

THE AMERICAN LAW REVIEW, for July, 1878; Boston, Little, Brown & Co.

The latest number of this valuable quarterly, which closes the 12th volume, is, as usual, carefully edited. The subjects discussed in the leading articles, with the exception of that on "Possession," are chiefly of local interest, but the rest of the contents will be generally useful. We are indebted to the *Review* for the latest English and United States decisions.