DIARY FOR SEPTEMBER.

1. SUN.. *14th Sunday after Trinity.*
8. SUN.. *15th Sunday after Trinity.*
15. SUN.. *16th Sunday after Trinity.*
21. Sat. .. *St. Matthew.*
22. SUN.. *17th Sunday after Trinity.*
29. SUN.. *18th Sunday after Trinity.*

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THE
Canada Law Journal.

SEPTEMBER, 1872.

The Right Honourable Sir Barnes Peacock, late Chief Justice of the High Court of Calcutta, was appointed in June last a member of the Judicial Committee of the Privy Council, with a salary of £5,000 a year. Sir Jas. W. Colville, one of his colleagues on the Judicial Committee, is also a retired Chief Justice of the same Indian Court.

Mr. Baron Hughes, one of the judges of the Irish Exchequer, died last July. It is said that his successor will be the present Attorney-General for Ireland, the Right Honourable Richard Dowse, M.P.

In noticing the death of Matthew Davenport Hill, Q.C.,—the senior in the list of Queen's Counsel—the *Law Magazine* and the *Solicitors' Journal* advert to the fact, that in 1838 he won general respect and admiration by his gratuitous defence of twelve men, who had been condemned to transportation by a Canadian Court for political offences in Canada and who were brought to London on a writ of *habeas corpus*, obtained on the ground of an illegal conviction. He succeeded in getting the conviction quashed as to one half the number.

Chief Justice Bovill, who has earned the reputation of being singularly infelicitous in his remarks, when he gives his mind to it, lately adverted to the judgment of the Privy Council in the *Bennett* case, in the following manner—when acknowledging the toast of Her Majesty's judges, at a dinner given by the "Solicitors' Benevolent Association"—"As it was said in former days, that a prisoner had been acquitted, but desired not to do it again, so the Privy Council had in a most elaborate judgment, pronounced a gentleman to be not guilty, at the same time telling him to take warning for the future." He hoped the judgment would at least have the advantage of satisfying both sides—a result which perhaps some day, from the fusion of law and equity, might be attained in all cases, so that both parties to a cause might retire equally well pleased.

The Court of Queen's Bench, in England, recently struck an attorney off the rolls, because of his personating an articled clerk at an examination of the Law Society. It appeared that the candidate was very nervous, and felt himself unequal to undergo the examination, and in an unhappy moment, his friend appeared for him. The Court proceeded upon grounds of public policy.

It has lately been held in the English Court of Bankruptcy, by one registrar sitting as chief judge in an appeal from another registrar, that a liquidation by arrangement cannot be sanctioned by the court in a case where the debtor was without assets. It appears from the judgment, that the point was not argued; no cases are referred to, and the matter is disposed of by a broad declaration that it was clear to the mind of the registrar that the Legislature never intended that a debtor, who has not a single farthing for his creditors, should avail himself of the provisions of the bankruptcy law. The practice is stigmatised as an ingenious device to revive a most obnoxious practice under the old law, that of white-washing, and ought to receive no countenance from the court: *Ex parte Ash*, 16 Sol. J. 574. The *Revue Critique* lately discussed this question under the Dominion Statute, and came to an opposite conclusion. The law has been settled in this Province, in a case not cited in the *Revue* (*Re Thomas*, 15 Gr. 196) that the want of assets is no reason why the case should not fall within the scope of the Act.

A gift for life of consumable articles with a limitation over, in a testamentary instrument, is usually held to vest in the donee the absolute ownership. There have been conflicting decisions as to the effect of such a gift in the case of farm-stock. But lately the Master of the Rolls has held (in *Cockayne* v. *Harrison*, 20 W. R. 504) 6 C. L. J. N. S. 219, that the subject of such a bequest being in the nature of stock-in-trade, only a life-interest passed as to so much of the stock as was of a consumable nature, and that the gift over was operative.

Our readers will have noticed in the *resumé* of the proceedings in Convocation in Easter Term, published in our last issue, that various important changes have been made in the system of law reporting at Osgoode Hall. The intention is to follow the system recently adopted in England. We see some practical difficulties in the way and some imperfections, which may, however, be remedied. The changes will work harshly as to some of the reporters. We shall refer to the whole matter at greater length on a future occasion.

"CAUSE OF ACTION" IN THE COMMON LAW PROCEDURE ACT.

Mr. Harrison in his commentary upon the 44th section of the Common Law Procedure Act (as Consolidated), remarks that much difficulty has arisen about the meaning of the words "Cause of action" contained in that section. The difficulty has, of late, been much increased by the various conflicting decisions of the English Courts upon the corresponding sections of their statute, *i.e.*, the 18th and 19th of the C. L. P. Act of 1852. The result of this conflict is briefly this: the English Common Pleas holds that the statute includes a case where the whole cause of action, technically speaking, has not arisen within the jurisdiction, but where such an act has been done on the part of the defendant, as in popular parlance, gives the plaintiff his cause of complaint. The Queen's Bench holds precisely the opposite of this, namely, that the *whole* cause of action and not merely the act or omission which *completes* the cause of action, must arise within the jurisdiction, in order that the language of the statute may be fully met. The Exchequer has occupied a somewhat intermediate position, and some of its decisions have been, so to speak, of an uncertain sound. Thus *Fife* v. *Round*, 30 L. T. R. 291, is in accord with the holding of the Common Pleas, while the later case of *Sichel* v. *Borch*, 2 H. & C. 954, agrees with the view of the Queen's Bench—though it is to be observed that the court does not advert to its former contrary decision. In the last reported case in the Exchequer, *Denham* v. *Spence*, L. R. 6 Exch. 46, a majority of the judges adopted the views of the Court of Common Pleas, as expounded in *Jackson* v. *Spittall*, L. R. 5 C. P. 542, and held that the "cause of action" referred merely to the act or omission constituting the violation of duty complained of, and creating the necessity for commencing the action. Kelly, C.B., strongly dissented and upheld the interpretation given

to the words by the Queen's Bench. Subsequent to *Denham* v. *Spence*, the only other case reported is that of *Cherry* v. *Thompson*, (in the Queen's Bench) 26 L.T.N.S. 791, where all the judges—Cockburn, C.J., Blackburn, Lush and Quain, J.J.—unanimously affirm the construction put by their court upon the statute.

Thus the practice stands in about as great confusion as once obtained upon the question of security for costs, in cases where foreigners within the jurisdiction were suing in the English Courts—a subject lately discussed in this journal. With colonial deference for English precedents, it will be rather a nice matter for our judges now to say what court or what practice they will follow. We have no reported decisions on the section in question, but the practice, as we understand, has always been in Ontario to hold that it must be shown that the whole cause of action arose within the Province. But suppose a case now to be brought before the judges in term—how would they decide? Follow the holding of the Queen's Bench, as has often been done in matters of practice, where the English Courts were at variance? (Per Robinson, C.J., in *Gill* v. *Hodgson*, 1 Prac. R. 381). Or, hold that the decisions of the Common Pleas, *plus* the later decisions of the Exchequer, outweigh those of the Bench? It seems to us that the true way out of the quandary is the eminently sensible course adopted by Mr. Justice Wilson, in *Hawkins* v. *Paterson*, 8 P. R. 264, where he says, "I am not prepared to adopt as a rule that we are to follow the decisions of the Queen's Bench, in England, more than those of the other courts. * * I think we should exercise our own judgment as to which is the best rule and practice to adopt, if there be a difference in the English Courts, and adopt that which will be the most convenient and suitable for ourselves, whether it shall be the decision of the one court or the other."

In that case the learned judge gave effect to the practice of the Courts of Common Pleas and Exchequer as against that of the Queen's Bench. In the present conflict we incline to think (if we may speak without presumption, where great masters of the law differ) that the practice of the Queen's Bench should be preferred to that of the other common law courts. As a matter of verbal interpretation, we think "cause of action" should be taken to mean the *whole* cause of action. Such has been the uniform meaning attributed to it when used in the English County Courts Act and in our Division Courts Act.

Again, to hold that provincial courts can entertain a suit against a foreigner where, for instance, only the breach of contract has taken place within the jurisdiction and he is not personally served, may give rise to very grave questions of what is clumsily called "private international law," in case the defendant has no assets within the province and it is sought to make him liable on the judgment so obtained in the forum of his domicile.

This is just one of those troublesome questions that can only be settled by a gradual course of decision. As it is merely a matter of practice, it is thereby excluded from being a subject of error or appeal, so that each court is left to independent action, and to do what seems right in its own eyes.

We are indebted to the kindness of R. A. Fisher, who has been appointed General Secretary of the Judicature Commission in England in the place of Mr. Bradshaw, who has been made a County Court Judge, for an early copy of the Second Report of the Commissioners, dated August 6, 1872. It is an interesting document, and especially so in view of the somewhat similar commission now sitting in Ontario, which, by the way, we hear has been cancelled. We trust that the time and labour devoted to the subjects committed to the Commissioners will not prove to have been thrown away. Mr. Justice Gwynne has presided as chairman, since the resignation of Mr. Justice Wilson, who was compelled, we regret to say, to give up his position, from ill health and pressure of judicial duties. We propose in our next issue to reprint as much of the Second Report of the Judicature Commission as will interest Canadian readers.

It has been held in Chambers by Mr. Justice Gwynne in *Jameson* v. *Kerr*, that goods may be replevied out of the hands of a guardian in Insolvency, notwithstanding the provisions of Con. Stat. U. C. cap. 29, sec. 2. This is an important decision. The same point has arisen in Nova Scotia, but has not yet been decided, so far as we have heard.

SELECTIONS.

BAGS AND GOWNS.

At an early period English lawyers began to adopt distinctive costumes. Indeed, since the time of Justinian the members of the legal profession have worn apparel indicative of their rank and calling. This was the natural expression of the ancient and mediæval mind, and was quite in consonance with a social condition which great faith was placed in forms and in ceremonials, and every class of persons was required to appear clothed in characteristic apparel.

In the reign of Henry VIII., when all the younger members of the bar and many of the older lawyers of eminence were adopting the gay costumes of the fashionable world, a series of restrictive rules were begun by the authorities of the four Inns of Court at London, and no less than a dozen orders were issued prohibiting the wearing of gay apparel. In 26 Eliz. the Middle Temple instituted the following regulations in regard to apparel: "1. That no ruff should be worn. 2. Nor any white colour in doublets or hose. 3. Nor any facing of velvet in gownes, but by such as were on the bench. 4. That no gentlemen should walk in the streets in their cloaks, but in gowns. 5. That no hat, or long or curled hair, be worn. 6. Nor any gowns, but such as were of a sad colour." But in 1660 the lawyers resumed their brave and fashionable attire, the judges donned their wigs and wore, in Court, velvet caps, coifs and cornered caps, and barristers were adorned with long bands and falling collars. But gradually these fantastic details of costume became less prevalent among the profession, and finally there remained only the bag and gown for the practitioners and the robe for the judges, which had been professional accompaniments uninterruptedly for ages. The law is represented in the theatrical performances of Queen Caroline's time with a green bag in his hand; in the literature of Queen Anne's reign he is referred to in the same manner; and green bags were commonly carried by the great body of legal practitioners until a very recent date, while the king's counsellors, queen's counsellors, the chancery lawyers and the leaders of the common bar were honoured with the privilege of carrying red, purple or blue bags. The green bag was so characteristic of the profession in the reign of Queen Anne that "to say that a man intended to carry a green bag was the same as saying that he meant to adopt the law as a profession." But bags have disappeared entirely from the English courts, and the gown is the only distinctive species of costume which has withstood the advances of inattention to costume and plainness of dress, even in juridical, formal and conventional England. The robes of her judges, the silk gowns of her royal counsellors and leading barristers, and the stuff gowns of her common law lawyers are likely to be perpetuated for centuries as being perfectly appropriate to an advanced civilization, as a concession to a sober demand for some distinctive professional insignia, and as becoming the dignity, solemnity, authority, and learning of the bench and bar. And it is much to be regretted that the profession in this country should be without any distinctive apparel, at least while in Court. We do not advocate a return to the costume of English judges and barristers of the Middle Ages—to wigs, coifs, caps, bands, and collars, or even to green, red, blue, or purple bags, for these (particularly all but the bags) would not become a dignified and learned profession in a scientific and intellectual period. But extensive use of the robe and the gown, we believe, would add lustre, distinction, and gravity to the bench and the bar, and would be an incentive to all wearers of these professional insignia to render themselves worthy the distinction.

The American lawyers before and immediately after the time of the rupture between the colonies and Great Britain adopted the contemporaneous manners and customs of the English lawyers. But the revolution effected a great change not only in the commercial and military condition of this country, but also in the spirit of the people; and it was sufficient to condemn anything not absolutely necessary for the preservation of life, to concede that it was "English." This influence, combined with the free and independent character of American at the close of the eighteenth and the beginning of the nineteenth centuries, was more than sufficient to abolish many social and professional customs and costumes which had been introduced from abroad and initiate a simple, unostentatious and even inelegant style of living and dress. But it appears to us that both of these elements (that of rudeness and newness of national life and that of prejudice against anything foreign) have been outgrown, in a great measure, in the United States, and that with our advancing power, education, and refinement, with the decline of national prejudice and the increase of our understanding of the proprieties, we ought to adopt some distinct dress for our lawyers. A learned English serjeant once said that "the farther he went west the more he was convinced that the wise men came from the east." But it seems that this observation needs a little modification, when we consider that the bar of St. Louis, a principal western city, have been the first in the country to adopt this wise habit of appearing in court in gowns. Perhaps it may be explained on the hypothesis that the practice was introduced by certain wise men who emigrated thither from the east. However that may be, in all seriousness we consider it both for the interest and the dignity of the profession that the robe and the gown be universally adopted in all our higher Courts. The Supreme Court of the United

States should not alone clothe her judges in official robes, nor the bar of St. Louis alone wear learned gowns. A custom universally practised among the enlightened and intellectual nations of Europe should not be ignored by Americans, especially when there is added to the influence of example a noble and correct national sense of the propriety and desirableness of that custom. And with a bench possessing learning, gravity and authority, and clad in impressive robes, with a bar educated, honourable, and industrious, and clothed in the dignified gown, the legal sense of the nation will no longer be pained by the spectacle of a profession striving, under many weights, to preserve its great name, its honourable reputation, and its respectable authority among men.—*Albany Law Journal.*

The Tercentenary Commemoration of the Middle Temple Hall is worth more than a passing notice in the newspapers. It is a really great event in the history of the Society to which it belongs. Apart from the associations connected with the Hall, others than Templars will be ready to admit that there are few finer specimens of the kind of Elizabethan architecture which it represents. The historical associations, however, are of a singularly rare character. To say nothing of the tradition about the wood from the Spanish Armada, which modern scepticism has cast its evil eye upon, there is the apparently better founded tradition, that "Midsummer Night's Dream" was read here by Shakespeare, in presence of Queen Elizabeth. There are the wainscoted panels on the walls containing the arms and names of the readers, from Richard Swaine, reader, in 1597, down to the present year. There is the old oak screen, evidently not much younger, though not coeval with the building. There are the suits of armour probably of great antiquity; and the colours of the Inns of Court Volunteers, of 1803. The windows contain nearly a hundred and fifty of the armorial bearings of persons of rank, who have been members of the Middle Temple, the latest being that of the Prince of Wales, who was made senior bencher in 1861. Above the dais at the western end is placed a full-length equestrian portrait of King Charles I., by Vandyck, one of four replica copies of the same picture, of which the other three are at Windsor Castle, Warwick Castle, and Chatsworth respectively. There are also fine portraits of Charles II., James, Duke of York, William III., Queen Anne, and George II., besides marble busts of the present Prince of Wales, of the brothers lords Eldon and Stowell, and of Plowden. The associations, too, are not peculiar to any period since its erection. The members have entertained many kings and queens from Elizabeth, and a generation later, Henrietta, the wife of Charles I., and, still later, Peter the Great, and William III., down to the Prince of Wales. The names of those eminent lawyers who have belonged to the Society and who were therefore familiar with the Hall, are scattered thickly about the pages of English history during the last three hundred years. Besides these names, the roll of the Society contains those of several poets and dramatists who are known to fame, amongst others, Sir John Davis, Knight, John Forde, Nicholas Rowe, William Congreve, Thomas Shadwell, Richard Brinsley Sheridan, and Thomas Moore.

To these, and other historical associations, the treasurer, Sir Thomas Chambers, to whom every member of the Inn is under deep obligations for the way in which the commemoration was celebrated, contrived to add features of a peculiarly interesting character. It was an excellent idea to disentomb the interesting passage about Sir Francis Drake's visit to the Hall, and to crown the reading of the passage by bringing forward a real live Sir Francis Drake, to respond to the toast of "The Descendants of the Ancient Members of the Middle Temple." It was equally interesting to have, in Earl Onslow, a representative of Mr. Speaker Onslow.—*Law Magazine.*

Iowa has added herself to the list of States which have abolished capital punishment. In that State all crimes heretofore punishable with death shall, hereafter, be punished by imprisonment for life at hard labor in the State penitentiary, and the governor shall grant no pardons, except on recommendation of the general assembly.

The tendency of modern philanthrophy is to make punishment for crime as easy as posible, in a physical point of view. Granting everything that may be said, in a general way, in favor of improved modes of punishing crimes we think that the danger is upon us of making the doom of criminals too easy, physically.

Death is the severest physical injury that can befall a human being, and it is only in the extremest cases that such a punishment should be inflicted at all. But we have been able to find no adequate reason for abandoning the custom of ages of putting one to death who wilfully and deliberately kills another. In such a case, at least, we believe in the strict *lex talionis*, the doctrine of "an eye for an eye," "a tooth for a tooth," a "life for a life," not to exact retribution (for that cannot be), but for the safety of society. Self-preservation is the first and strongest law of nature; and the professional criminal, at least, will run more chances of being imprisoned for life, than of being hung immediately on conviction. The laws specifying what crimes shall be punished by death, and regulating the execution of criminals condemned to death, may and ought to be, *modified* in many instances, but the total abolition of capital punishment is a dangerous experiment.—*Albany Law Journal.*

CANADA REPORTS.

ONTARIO.

COMMON PLEAS.

REG. EX REL CLEMENT V. COUNTY OF WENTWORTH.

By-law in aid of railway—Ratepayers' assent not obtained—By-law quashed.

A by-law of a County Council, in aid of a railway, to the extent of $20,000, which had not been submitted to the ratepayers under the Municipal Institutions Act of 1866, was on that ground quashed.

[22 C. P. 300.]

In Hilary term last *F. Osler* obtained a rule to quash By-law No. 210, entitled "A by-law to aid the Hamilton and Lake Erie Railway Co., by a free grant or donation of debentures, by way of bonus, to the extent of $20,000," on certain terms, &c., on the ground that it was passed by the County Council without having been submitted to the vote, and without securing the assent of the ratepayers, and on other grounds.

It was admitted that the by-law had not been submitted to the ratepayers.

The by-law recited the desire of the council to aid the railway by a free grant or donation of debentures to the extent of $20,000, and that it would require $2,200 to be raised annually by special rate to pay the debentures and interest. The debentures were to be payable within twenty years, interest at six per cent., half yearly.

Burton, Q. C., now shewed cause, and urged, first, that on the construction of the Act, it was not necessary to submit any by-law granting a bonus to a railway to the ratepayers, irrespective of the amount.

Secondly, that, as this by-law was for an amount not exceeding $20,000, it need not be so submitted. He cited *Bramston* v. *Mayor of Colchester*, 6 E. & B. 246.

Osler, contra., referred to *McLean* v. *Cornwall*, 31 U. C. 314; *Jenkins* v. *Corporation of Elgin*, 21 C. P. 325; Dwarris Statutes, 568.

HAGARTY, C. J.—Section 349 of the Municipal Act of 1866, declares that a municipality may pass by-laws, 1st For subscribing for shares or lending to or guaranteeing the payment of any sum of money borrowed by a railway corporation, to which section 18 of 14 & 15 Vic. ch. 51, (Ry. Consol. Act), or sec. 75 to 78 of the Consolidated Railway Act have been, or may be, made applicable by any special Act. 2nd. For endorsing or guaranteeing debentures of railway companies. 3rd. For issuing debentures therefor. 4th. For prescribing the manner and form of debentures, and how they are to be signed. "But no municipal corporation shall subscribe for stock or incur a debt or liability for the purposes aforesaid, unless the by-law, before the final passing thereof, shall receive the assent of the electors of the municipality in the manner provided by this Act."

By the Ontario Act 34 Vic. ch. 30, sec. 6, the following sub-section is added to section 349 of said Act, "For granting bonuses to any railway, and to any person or persons, or company, establishing and maintaining manufacturing establishments within the bounds of such municipality, and for issuing debentures payable at such time or times, and bearing or not bearing interest, as the municipality may think meet, for the purpose of raising money to meet such bonuses."

Mr. Burton urged that this new sub-section was to be added to section 349, and would properly come after and not before the proviso as to submitting the by-law to the ratepayers.

We are fully satisfied that this view cannot be sustained. The last Act gives a further power to pass by-laws under a new sub-section, which we think is to form one of the group of sub-sections, and that the added sub-section, equally with the original subsections, is to be followed by and subject to the general proviso as to the assent of the electors.

We cannot understand any other construction according to the rules for interpretation of statutes, and apart from anything to be learned from authority, the natural construction of writing would place the sub-section in such a position. "No debt shall be incurred for the purposes aforesaid, unless," &c. These purposes were set forth in the preceding sub-sections, and here it is declared, not that a new section shall be added to the Act, but that a new sub-section shall be added to the 349th section.

It is, we think, to form part of that section, to be one of the "purposes" of the section, and must be subject to the general proviso as to "the purposes" aforesaid.

We can hardily concur that the Legislature could have designed, while forbidding the council from taking stock in a railway company without the electors' consent, to permit the council to make a present to the company of any amount they might please, without such assent.

The charter of this company (33 Vic. ch. 36, sec. 7,) makes it lawful for any municipality to aid the company by loaning, guaranteeing, or giving money, by way of bonus, or other means; provided that no such aid, loan, bonus, or guarantee shall be given except after the passing of by-laws and their adoption by the ratepayers as provided by the Railway Act, and provided also that such by-law be made in conformity with the Municipal Acts.

Section 77, Consolidated Railway Act Canada ch. 66, provides that no municipality should subscribe for stock, or incur any debt or liability under this Act, except by by-laws passed with the assent of the electors, &c.

It is then argued that counties can pass any by-law for a debt not exceeding $20,000 without such assent.

Section 227 of the Municipal Act enacts that every by-law (except for drainage under section 282) for raising upon credit any money, not required for ordinary expenditure and not payable within the year, must receive the assent of the electors, except that in counties the councils may raise by by-law, without submitting the same to the electors, for contracting debts or loans, any sum or sums over and above the sums required for its ordinary expenditure not exceeding in any one year $20,000.

The decision of the first question seems to involve the second also.

If, as we think, the council cannot incur a debt by by-law to grant a bonus to a railway

except with the ratepayers' assent, it seems to follow that the rule must equally apply to a bonus below as above $20,000.

The power to pledge the credit of the county to the extent of $20,000, without the electors' assent must, we think, be certainly confined to lawful purposes, and not to a grant to a railway company, which can only be done with such assent.

The case may be shortly summed up thus:

By-laws to raise money for all lawful purposes beyond the ordinary expenditure, and not payable within the year, must be submitted to ratepayers, except that counties may raise on credit money not exceeding $20,000 in any one year without such submission.

But *all* aid to railways must be with the assent of the ratepayers; therefore *no* money can be given without such assent without reference to the amount.

Gwynne, J.—If it had not been for the earnest manner in which Mr. Burton, for whose opinion I entertain the greatest respect, pressed his view upon us, I should have thought the point to be free from doubt. The whole force of his argument was that the additional sub-section, added by 34 Vic. ch. 30 to sec. 349 of the Municipal Institutions Act of 1866, must be read after the proviso at the end of the 4th sub-section of section 349; from which he drew the conclusion that the additional sub-section was not subject to the proviso. Now there is nothing in the language or structure of the sub-section enacted by 34 Vic. ch. 30, which requires that it should be so placed as contended for. The words of the 34 Vic. are, "The following sub-section is added to section 349" of 29-30 Vic. ch. 51, "For granting bonuses to any railway, &c." Now the 349th section, to which this new sub-section is added, is as follows: "The council of every township, county, city, town and incorporated village may pass by-laws." Then follow four sub-sections stating the respective purposes, all beginning with the word, "For," and stating the purpose. Now the additional sub-section enacted by 34 Vic., will read as well, whether placed before the first sub-section or between it and any of the others, as after the 4th; but assuming that, having regard to the time of its being passed being subsequent to the enacting of the original section, it should be inserted and read after the fourth, then its proper place appears to be before the proviso, thus keeping all the powers together. If it be read after the proviso, then the purpose declared in the new sub-section would seem to be unnaturally and ungrammatically separated from the words at the commencement of the 349th section, so as to require their mental repetition before the words "For granting bonuses, &c.," to make the latter enactment sensible.

But, correctly speaking, the words at the end of the 349th section, commencing, "But no Municipal Corporation shall," &c., are no more part of the fourth sub-section of the 349th section of the Act of 1866 than of any other of the sections. Their true character is that of a proviso to limit a qualification upon,—or exception from,—the whole section. They are not a *part* of, but a qualification *upon*, the section. When then the Act 34 Vic. declares that "the following sub-section shall be added to section 349," the subsection so added becomes *part* of the section, subject to all *its* incidents; it is inseparably annexed to a section which is subject to a proviso, and being so annexed, must be subject to the proviso, to which its principal, and that of which it is a part, is subject. The by-law, therefore, here passed, for granting a bonus to a railway, must, to be operative, receive the assent of the electors in the manner required by the Municipal Institutions Act of 1866.

Galt, J., concurred.

Rule absolute to quash by-law, with costs.

CHANCERY CHAMBERS.

(*Reported for the* Canada Law Journal *by* T. Langton, M.A., *Student-at-Law.*)

Gunn v. Adams.

Assignment for the benefit of creditors—Composition deed—Time within which creditors may come in under the deed—Effect of creditors neglecting to sign within the prescribed time—Accession by assent and acquiescence—Statute of Limitations—Practice.

Where a debtor made an assignment to trustees for the benefit of his creditors, providing by the terms of the instrument that the benefits conferred by it should be confined to those creditors who should execute it within one year, or notify the trustees in writing of their assent to it; and where one creditor had been aware of the terms of the deed, and had neglected to sign it, but had notified one of the trustees of his assent; and where another creditor had not been aware of the deed, but had taken no proceedings hostile to it, and had given his assent to it when it came to his knowledge; and where another, though aware of the deed and its provisions, had neither executed it nor notified the trustees of his assent to it, but had never acted contrary or taken proceedings hostile to it.

Held, that they were entitled to come in and prove their claims equally with those creditors who had executed the deed in accordance with its terms, although they had allowed more than ten years to elapse.

Objection being made to the application being made by petition in Chambers, and not by a separate suit.

Held, that it was properly made in Chambers by petition in the original suit.

The Statute of Limitations being urged against the admission of the claims.

Held, that the relation of *trustee* and *cestui que trust* had been established between the assignees and the creditors who had acquiesced in the deed, as well as those who had actually executed it, and that therefore the statute was inoperative. There was also the additional reason in two cases that the statute had never begun to run owing to the creditors' right of action having arisen after the debtor had absconded.

[Chancery Chambers, April 16th, 1872.—*Mr. Taylor.*]

This suit was brought for the purpose of carrying into execution, under the decree of the Court, the trusts of a deed of composition and discharge and an assignment made in Nov., 1859, by one Pomeroy of all his estate and effects to the defendants, the trustees, for the benefit of his creditors generally. A decree was pronounced in June, 1871, referring it to the Master to inquire who were the creditors of Pomeroy, whose debts were provided for by the deed, and directing a division of what remained, after payment of costs, rateably among the creditors of Pomeroy, who should have become parties to the deed within one year from its date or in writing notified the trustees of their intention to become parties. Shortly after making this deed Pomeroy absconded.

Two of the creditors, whose claims had been rejected by the Master in consequence of their

not having complied with the terms of the deed in February, 1872, presented their petitions to be allowed to come in, and prove their claims in the Master's office. The petitioner Hardy at the time had been aware of an assignment having been made, but not of the terms of the deed. Within a year, however, he had assented to it, and gave a notice to one of the trustees, though whether in writing or not was doubtful, but he had never complied strictly with its terms. The petitioner Johnson, living in an out of the way place, and taking in no newspaper, had never heard of the deed, nor seen the published notice of it until he had filed his claim in the Master's office under the decree, and he then gave his assent. He had never taken proceedings to enforce his claim, nor in any way acted contrary to the provisions of the deed

W. G. P. Cassels, for the creditors who had acceded to the terms of the deed, opposed the application, and read affidavits as to the registration of the deed, and publication of notice of it with a view to proving a notice of its terms, which would be binding upon all creditors.

C. Moss, for the petitioners, said that it had been argued that the registration of the deed was notice of its provisions to all creditors, but this was not, he contended, the effect of the Registry laws. Their effect was to constitute registration notice to any one afterwards dealing with these lands, but that it was notice to all the world had never been held. The question of notice had been brought forward to shew that Johnson was debarred from proving his claim by the fact of an advertisement of the deed having been published eighty-two times in a newspaper. He thought it was necessary for such a contention to shew that the person against whom it was desired to prove notice, took in the particular newspaper. There was an analogy in the decisions as to dissolutions of partnerships. There an advertisement of the dissolution was not notice to any one not taking in the newspaper, *Boydell* v. *Drummond*, 11 East 142; *Leeson* v. *Holt*, 1 Stark 186; *Jenkins* v. *Blizard*, 1 Stark 420. And an advertisement in this country to constitute notice to all the world must be inserted in the *Gazette*. The facts of Johnson's not having been aware of the trusts of the deed until after decree pronounced of his never having acted contrary to his provisions, and of his willingness to assent to its terms when made known to him entitled him to share in the privileges of it. In the case of *Whitmore* v. *Turquand*, 1 Johns & Hem. 444, where the question was whether certain persons had acceded to or gone against a deed. V. C. Page Wood said that persons who had done nothing either for or against a deed of this kind were entitled to come in and prove their claims, and this decision was affirmed upon appeal (3 DeGex. F. & J. 107). It was argued there that quiescence was not accession, and that the deed being expressly upon trust for those who acceded within three months the Court had no jurisdiction to divide the property among persons who had not brought themselves within this description. But Lord Chancellor Campbell said that "since the case of *Dunch* v *Kent*, 1 Vern. 260, the doctrine of the court has been that the time limited by such a deed for the creditors to come in is not of the essence of the deed." Again, "the intention was that all creditors should come in and take a dividend, and that the debtor after his cession should be freed from his liability to these creditors. The deed was not for the benefit of any particular class of his creditors, but for all equally. The period of three calendar months is evidently introduced with a view to hasten the arrangement, and to authorize the trustees when that period has expired to make a dividend, which the subsequent claim of other creditors should not disturb. This is the understanding which has long prevailed on the subject; and with this understanding, the supposed hardship upon a creditor who executes the deed the last hour of the last day of the limited period does not exist; for if he thinks he is secure against any more creditors coming in afterwards, and feels confident that he must receive twenty shillings in the pound, and for this reason consents to execute the deed, he has a right only to blame himself for being ignorant of the law, which he ought to have known, as he ought to know the days of grace given for the payment of a bill of exchange.

W. G. P. Cassels objected that (1) Chambers was not the proper place for an application of this kind. There was no practice which could warrant the addition of parties in this way after a Master had refused to add them. In such a case they could only be added by filing a bill for that purpose. (2.) Both these claims were barred by the Statute of Limitations. Johnston's debt had accrued in 1859, and the petition and affidavit shewed no assent, he thought, to the deed, which could operate in taking it out of the statute. Johnston knew nothing of the deed, and he did not prosecute merely because he did not know of Pomeroy's having left any property so that there was nothing to prevent the statute from running (*Darby* on Limitations, 189). (3.) Both claims were also barred by *laches*. They had lain by now for ten years. In the cases of *Joseph* v. *Bostwick*, 7 Grant 332, and *Collins* v. *Reese*, 1 Coll. 675, it was true that the time had not been considered material, but this was on account of special circumstances, which were absent in this case. As to Hardy he had not actually executed the deed, but he had assented to it. This, he submitted, was insufficient. He must have done *some act* or must have been prejudiced and prevented from proceeding in some other way (*Snell* Principles of Equity, p. 71). And even supposing that Hardy was entitled, this fact could not save him from the statute. He must have been a party to the deed to render the statute inoperative.

Rae, for the defendants, and *Foster*, for the plaintiffs, submitted to what order the Court might make.

Moss, in reply: There was nothing to shew that the estate was not given to pay all claims in full, and in such case other creditors would not be allowed to take advantage of a mere error when the parties beneficially entitled to the residue made no objection. All the objections taken were technical (1) that the application was not made in the proper *forum*. But in all kindred cases it had been made in Chambers in *Schreiber* v. *Fraser*, 2 Ch. Ch. 271, and in *Andrew* v. *Maulson*, 1 Ch. Ch. 316; (2.) That the claims

were barred by the Statute of Limitations. This, he submitted, was a question for the Master, and all that need be decided upon this application whether the petitioners were entitled to prove their claims, not whether they had any claims or whether their claims were good. The claim of Hardy was one in the schedule. He had endorsed a note of Pomeroy's, it was not due when Pomeroy left the country. He paid it when due, and thus became a creditor of Pomeroy's and when his right of action accrued Pomeroy was out of the country, and this fact apart from any trust in his favour under the deed was a bar to the Statute's running against him. So with Johnston's claim. He had become surety for Pomeroy in a bond to B. S. Upon Pomeroy's absconding Johnston became liable to and having paid B. S. he became a creditor of Pomeroy's. In addition to this he submitted that the trust deed had the effect of charging all Pomeroy's debts on his real estate, and preventing the statute from running against his creditors. (3.) *As laches* this objection could not apply to Hardy, to who had done every thing necessary except sign the deed, it was aimed at Johnston, and this very fact of his taking no steps independently, but acting as if he were a party to the deed was one of the grounds upon which he relied. If he had instituted proceedings for the recovery of his debt independently of the deed he might have disentitled himself to any benefit under it. (4.) As to the last objection that assent alone was not sufficient, the petitioners could only have shewn their assent more strongly by executing the deed, and *Whitmore* v. *Turquand* was so clear on this point that it was useless to discuss it.

MR. TAYLOR on this application allowed both petitioners to come in and prove their claims, holding (1) that it was not necessary to file a bill in order to obtain the relief sought from the fact that a suit was pending and the application was properly made in Chambers by petition in the suit. Hardy's case was a similar one to *Pyper* v. *McDonald*, 5 U. C. L. J. (O S.) 162, where no bill was considered necessary. (2.) That the debts were not barred by the statute for the absence of Pomeroy from the country during a period commencing before their right against him accrued and extending to the present time, had prevented the statute from beginning to run. Lastly, it was plain from *Whitmore* v. *Turquand*, 1 John & Hem. 444, and from the late case *Re Baber's Trusts*, L. R. 10 Eq. 554, that a party who had done nothing inconsistent with the deed was entitled to the benefits it secured, and in the latter case, too, the application had not been by bill.

On the 15th April last a similar petition was made by one C. Stead. His position differed materially, however, from that of the former petitioners, Hardy and Johnston, in this, that he was unable to plead ignorance of the deed, and his only ground for being admitted to share the benefits it conferred, was, that he had taken no proceeding hostile to it, but had thus virtually acquiesced in its provisions, and trusted to being paid his claim in due course of administration. Evidence was also put in by the creditors to shew that Stead's claim was a joint one against Pomeroy and one Mathews; that he had sued the estate of Matthews, and proved his claim against it, and therefore could not prove against the Pomeroy estate.

C. Moss contended that to disentitle a creditor *after any lapse of time* to come in, it must be shewn that he acted contrary to the deed, *e. g.* by proceeding against the estate at law. He cited *Joseph* v. *Bostwick*, 7 Grant 332, where a creditor was debarred from enjoying the benefit of such a deed by contesting it, and trying to establish a prior claim; and he submitted that where a party had merely neglected to comply with the strict terms of the deed no lapse of time would prevent him from coming in under it, even, it seemed, where dividends had been paid, on the terms, however, of not disturbing such dividends, *Re Baber's Trusts*, L. R. 10 Eq. 554, was the latest authority, and there *Spottiswoode* v. *Stockdale*, 1 G. Cooper 102, was referred to where Lord Eldon lays down what was now contended, and that too in a case where a proviso was inserted in the deed that it was *to be void unless executed by the creditors within eleven months*. No such provision was contained in this deed, and there was no time limited for notifying the trustees; the year limited referred, only to the execution of the deed. He contended also that it need not be shewn on this motion whether or not Stead had been paid out of the Matthews estate or whether his claim was barred. These were questions for the Master. All that need be decided upon this motion was whether Stead was entitled to prove what he claimed.

Cassels argued that it should be shewn that he had a valid claim before putting the estate to the expense of investigating it, and that if a person having knowledge of the deed did not choose to ascertain whether he had a right under it, he should not be allowed to claim the benefit of it after allowing sixteen years to go by. Stead's evidence shewed that he had always thought the Matthew's estate was liable for his claim; he had a right to prove his full claim against it, as the note under which he was a creditor was joint, and it should be assumed that he had proved to the full extent of his right when he did prove against the Matthew's estate. He again urged the objection of the Statute of Limitations, and contended that it was properly urged now, for though it was for the Master to decide a disputed *amount*, yet it should be shewn on this application that the debt was a valid one.

Moss replied that the evidence shewed that he still claimed $5,000, and that as Stead was mentioned as a creditor in the schedule to the deed, he became a *cestui que trust*, and the Statute of Limitations ceased to affect him from the date of the assignment to the trustees and their acceptance of the trusts.

MR. TAYLOR, THE REFEREE IN CHAMBERS.—The petitioner claims to be a creditor of S. S. Pomeroy, and, as such, entitled to the benefit of an assignment, made by Pomeroy for the payment of his creditors, the trusts of which are being carried out under decree in this cause. His claim appears to have arisen thus: He held a note made in April, 1856, by Mrs. Matthews and Pomeroy, the consideration for the note being an alleged balance due to him for

work done on the property of the Matthews' estate, of which Mrs. Matthews was executrix, and which Pomeroy, a son-in-law, managed as her agent. Upon this note he came in to prove in a suit in this court of *Morley* v. *Matthews*, where part of his claim was allowed and the remainder disallowed, on the ground, as I understand, that it was for work done not for the estate, but upon a portion of it, to which Pomeroy was individually entitled. It is in respect of this balance that he now seeks to prove under the decree in this suit. The deed of trust for the benefit of creditors was made by Pomeroy as far back as November, 1859, and provided for its being executed by the creditors within twelve months. Due public notice of the execution appears to have been given by the trustees, but it has never been executed by the petitioner, nor does he appear ever to have informed the trustees of his acquiescence in the deed. His name appears in a schedule annexed to the deed as one of the creditors of Pomeroy. The question is whether he is now at this late date entitled to participate in the benefit of that deed. In considering the question of delay, it is important to remember that although the deed was made in 1859, no dividend has ever been declared under it. Indeed, the trustees seem to have taken no steps to distribute the estate, nor did any creditor take proceedings to enforce a distribution until the filing of the bill in this cause, in the spring of 1871. The petitioner it appears knew of the deed being executed by Pomeroy, probably soon after it was executed, though the exact time when he became aware of it does not appear. He says, however, that he did not know of the terms of the deed, or of creditors being required to become parties to or execute the deed within a given time. He did not take any step to notify the trustees of his claim or of his intention to take the benefit of the deed, because, he says, he did not think anything would ever come to their hands for payment of the creditors, and that he would be paid his claim out of the Matthews' estate. It is not shewn that he has taken any proceedings hostile to the terms of the deed or inconsistent with them. He has simply lain by or done nothing. Now it is well settled that even although a deed, like the one in question, have limits, a time within which the creditors are to execute it, a creditor who has failed to do so is not necessarily excluded from the benefit of the trusts. *Dunch* v. *Kent*, 1 Vern. 260; *Spottiswoode* v. *Stockdale*, 1 G. Cooper, 102; *Rawworth* v. *Parker*, 2 K. & J. 168. It is sufficient if he has assented to it or acquiesced in, or acted under its provisions and complied with its terms (*Field* v. *Lord Donoghmore*, 1 Dr. & War. 227). No case seems to lay down what acts are necessary to constitute such assent, acquiescence or compliance. All the cases except two, which I shall afterwards refer to, where creditors have been excluded, are cases where they have acted inconsistently with the terms of the deed; as by bringing an action against the debtor when the deed contained a clause releasing him, (*Field* v. *Lord Donoghmore*, 1 Dr. & War. 227;) or as was said in one case actively refusing to come in, and not retracting the refusal within the time limited, (*Johnson* v. *Kershaw*, 1 DeGex & Sm. 260); or setting up a title adverse to the deed, (*Watson* v. *Knight*, 19 Beav. 369); *Brandling* v. *Plummer*, 6 W. R. 117. The two cases I mentioned above are *Lane* v. *Husband*, 4 Sim. 656, where the deed containing a release, a creditor was not allowed to come in, the debtor having in the meantime died, on the ground that the debtor could not then obtain the benefit of the consideration upon which the deed was based. The other is *Gould* v. *Robertson*, 4 DeGex & Sm. 509, which is cited in *White* and *Tudor's* L. C. as an authority, and the only authority for the proposition that a creditor who, for a long time delays, will not be allowed to claim the benefit of the deed. In that case, however, there was a provision, not found in the present deed, that in case any creditor should not come in under the deed for six months, he should be peremptorily excluded from the benefit of it. V. C. Knight Bruce held that after six years, and a correspondence extending over all that period, upon the subject of the debt in question, the creditor was not entitled to share. In a later case—*Re Baber's trusts*, L. R. 10 Eq. 554—even such a provision has been held not to exclude a creditor.

The case of *Whitmore* v. *Turquand*, 1 J. & H. 444, was one where the question was considered in the case of a deed limiting a time for creditors to come in: a creditor who has neither assented to or dissented from the deed within the time, can afterwards be admitted to share together with those who acceded before the expiration of the stipulated time. There V. C. Page Wood allowed a creditor to come in after apparently six years, and his decree was afterwards affirmed on appeal (3 D. F. & J. 107). The latest case on this subject is *Re Baber's trusts*, L. R. 10 Eq. 554. There the deed contained the same provision as in *Gould* v. *Robertson*, excluding creditors who did not come in within a limited time, yet the creditor who all along knew of the existence of the deed and had corresponded with the trustees on the subject, but who was not aware of the provision rendering it necessary for him to execute within a limited time, was allowed to share a dividend even after nineteen years. The circumstance that he had corresponded with the trustees would not seem to have been material under *Whitmore* v. *Turquand*, and was not even alluded to by V. C. Malins in his judgment. It was contended, however, that leave to come in would not be given unless the creditor had clearly a debt for which he could prove. In other words, that if it could be shewn now that there was no debt, the court would at once refuse the application and not leave the question to be inquired into by the Master. Here it is said the debt is barred by the Statute of Limitations, having accrued due in 1859. The present case is in this way distinguished from the one formerly before me in this suit, where the debt accrued due only after the debtor had absconded.

I incline to think that the debt here is not barred. The assignment is complete, it having been acted upon by the trustees, and communicated to some, at least, of the creditors, they having executed the deed. Under such circumstances it could not be revoked by the settlor,

Cosser v. *Radford*, 1 De Gex, J and S., 585; *Acton* v. *Woodgate*, 2 Mil. and Keen, 495. In *McKinnon* v. *Stewart*, Lord Cranworth, in 1 Sim. N. S. 89, holding this, as clear as to creditors who have executed the deed, said, "Where they have not executed the deed, questions have often arisen how far by having been apprised of its execution, and so, perhaps, been induced to do or abstain from doing something which may affect their interests, they may not have acquired the rights of *cestuis que trust*. As all the creditors had, in that case, executed the deed, it was not necessary for him to decide the point. In Darby on Limitations, p. 190, *Simmonds* v. *Palles*, 2 J. & L. 409, 584; *Kirwan* v. *Daniels*, 5 Hare, 493; *Harland* v. *Binks*, 15 Q. B. 718, it is laid down that where creditors are parties to the assignment or it is communicated to them, the relation of trustee and *cestuis que trust* is constituted between the assignees and every one of the creditors, and so long as the property remains in the hands of the assignees, the right of any creditor to an account of the property and to payment out of it, is not barred by lapse of time.

Here the trustees are themselves beneficially interested, so the deed was not revocable. *Siggers* v. *Evans*, 5 Ell. & Bl. 367; *Lawrence* v. *Campbell*, 7 W. R. 170. That such a deed would create a good trust, for even those creditors to whom it was not communicated, and who were not parties to it, would seem to follow from *Griffiths* v. *Ricketts*, 7 Hare, 307, where Lord Langdale doubted whether such a trust having been communicated to some of the creditors, it could ever after satisfying them be revoked by the settlor, as to creditors to whom it had not been communicated. Besides, in the present case the settlor by the deed declares that the schedule annexed contains the names of the creditors and the sums due them respectively, and then provides that other persons not mentioned in the schedule, being *bona fide* creditors of his, may come in and share and participate in the advantage to be derived from the trusts, rateably, with the other creditors. In this schedule the petitioner's name appears as a creditor, and I think the trust prevented the statute from running against his debt.

The hardship of allowing a creditor to come in now upon those who signed the deed within the limited time was urged here, as it has been in almost all the cases on this subject. The courts have always refused to give effect to the argument, and I cannot be any more attentive to it here. The order will declare the plaintiff entitled to participate in the benefit of the deed, and to come in and prove his claim under the decree. As this is, I understand, a test case brought forward by arrangement, and by the decision in which all similar cases are to be governed, both parties should have their costs out of the estate.

ENGLISH REPORTS.

CHANCERY.

Cockayne v. Harrison.

Will—Construction—Bequest of farming stock during widowhood—Res quæ ipso usu consumuntur.

Testator being tenant of a farm from year to year, bequeathed his farming stock, consisting of consumable articles, to his wife during the term of her widowhood, and then over:

Held, that the gift was made for the purpose of enabling her to carry on the testator's business of a farmer, and that she was entitled to an interest in the stock during her widowhood only, the ordinary rule as to *res quæ usu consumuntur* not applying.

[26 L. T. N. S. 385, M. R.]

The testator, James Cockayne, a farmer, was at the time of his death in the occupation, as tenant from year to year, of two farms, one at West Bridgford and the other at Sneinton, in the county of Nottingham. By his will, dated the 21st October, 1868, he gave and bequeathed to his wife Jane such furniture (to be selected from the testator's furniture at West Bridgford) as should be sufficient to furnish her a comfortable room at his farm at Sneinton, which furniture, together with his farming stock and all other personal estate and effects at Sneinton aforesaid, the testator gave and bequeathed to his wife during the term of her widowhood, and from and after the time of her marrying again, or her decease, he gave and bequeathed the same to his executors, upon trust for sale.

The testator died on the 28th October, 1868, when his widow took possession of the farming stock and carried on the farm. In 1870 she married again.

Two suits, which had been instituted for the administration of the testator's estate, now came on for further consideration, and a question arose as to what interest the widow took in the articles comprised in the bequest of farming stock, consisting of manure, beasts, growing crops, stacks of hay and straw, clover, corn, turnips, and other consumable articles; whether an absolute interest or an interest for the term of her widowhood only.

Horace Davey, for the parties having the conduct of the suits.

Fellows, for the widow, contended that the gift was absolute, being a gift of things *quæ ipso usu consumuntur*. He referred to *Andrew* v. *Andrew*, 1 Coll. 692; *Bryant* v. *Easterton*, 5 Jur. N. S. 166; *Randall* v. *Russell*, 3 Mer. 194; *Groves* v. *Wright*, 2 K. & J. 347.

Horace Davey, in reply.—*Groves* v. *Wright*, (*sup*.) is a clear authority that a gift of farming stock does not come within the rule as to *res quæ ipso usu consumuntur*. The testator intended to give the widow the usufruct of the farming stock, so as to enable her to carry on the farm, and not to make it an absolute gift.

[*Fry*, Q. C., *amicus curiæ*, referred to *Phillips* v. *Beal*, 32 Beav. 25.]

Lord Romilly said that there seemed to be a conflict of authority as to a gift of a life interest in perishable articles, such as farming stock, but he was disposed to follow his own decision in *Phillips* v. *Beal* (*sup*.), and hold that, as the gift of farming stock was apparently made for the purpose of enabling his widow to carry on the

farm, it was a gift of a limited interest only; that the widow was bound to keep up the stock so long as her interest continued, and in the event of any part having been sold, she was entitled to the income arising from the investments of the proceeds of sale.

Hadley v. McDougall.

Practice — Production of documents — Joint possession — Entries in partnership books of individual transactions of one partner.

A person who had carried on certain business transactions on his own account, and had made entries relating to them in the partnership books of a firm of which he was a member, was made defendant to a suit for an account of those transactions:

Held, (reversing the decision of Malins, V.C.) that no order could be made for the production of the partnership books, as one of the joint owners of them was not a party to the suit; but that the plaintiff's proper course was to amend his bill so as to compel the defendant to set forth copies of the entries in question, and then to obtain production of the books themselves at the hearing by serving the defendant's partner with a *subpœna duces tecum*.

[26 L. T. N. S. 379, L. J.]

This was an appeal from a decision of Malins, V. C. The bill, which was one for an account of transactions relating to a contract made with the defendant for the supply of saddlery to the French Government during the late war, alleged that the plaintiff was interested in the contract.

By his answer the defendant stated that he was in partnership with his father, and that the accounts relating to the contract in question were entered in the partnership books, although he (the defendant) was solely interested in the contract and it was not a partnership transaction.

The defendant having declined to produce the partnership books on the ground that his father refused to allow them to be produced, a summons was taken out to compel production, and an order to that effect was made in chambers, the defendant to be at liberty to seal up the parts of the books not relating to the transactions in question.

The Vice-Chancellor having confirmed this order the defendant appealed.

Glasse, Q.C. and *W. Pearson*, in support of the appeal.—We contend that this order cannot be sustained. *Murray* v. *Walter*, Cr. & Ph. 114, and *Reid* v. *Langlois*, 1 Mac. & G. 627, show that where a document is not in the exclusive possession of the defendant, but in the possession of somebody jointly with him, the production cannot be ordered. In the latter case Lord Cottenham says that that "is a well established rule, and cannot be considered as now open to dispute." [Sir *Roundell Palmer*, Q.C., as *amicus curiæ*, referred to *Taylor* v. *Rundell*, Cr. & Ph. 104, as showing that a defendant who has not exclusive possession of documents may be ordered to give in *ipsissimis verbis* any entries relating to the subject matter of the suit.] The ground of the rule is that the court cannot order a man to do what he has not legal power to do. They also referred to *Warrick* v. *Queen's College, Oxford* (No. 2) L. Rep. 4 Eq 254.

Cotton, Q.C. and *F. Harrison*, for the plaintiff. We contend that the appellants cannot be allowed to prevent the production of the parts of the partnership books containing entries relating to his son's private business transactions, after having allowed his son to use the partnership books for such purposes. *Reid* v. *Langlois*, (*sup.*) is distinguishable from this case, for there the entries of which it was sought to compel production related to partnership matters; while here they only relate to the private accounts of one of the partners.

Without calling for a reply.

Lord Justice James: The consequences would be very serious if we were to depart from the settled rules of the court. It is a settled rule that no order can be made for the production of documents which are in the possession of two or more persons, when one of the joint owners is not before the court. The plaintiff may amend his bill and compel the defendant to set out in his answer all the entries which he desires to see, and he can then require the books themselves to be produced at the hearing by means of a *subpœna duces tecum*. The order of the Vice-Chancellor must therefore be discharged. The costs of both sides will be costs in the cause.

Lord Justice Mellish concurred.

UNITED STATES REPORTS.

QUARTER SESSIONS, PHILADELPHIA.

Commonwealth ex rel. Dennis Shea et al. v. Wm. R. Leeds, Sheriff.

It is a conspiracy for two or more parties to act in concert in unlawful measures to enforce the Sunday Liquor Law. As by inducing a tavern-keeper to furnish beer on Sunday, by artifice or persuasion.

The mere admission of visitors into a tavern on Sunday is not an infraction of the Sunday Law, unless liquor is actually sold.

[Opinion by Paxson, J., May 4, 1872.]

This case was heard upon *habeas corpus*. The relators, Dennis Shea, Frank N. Tully and Charles Hooltka, were charged with conspiracy by one G. A. Barthoulott. The latter keeps a drinking saloon, and it is alleged that the relators were engaged with others in a series of prosecutions against liquor dealers for violation of what is known as the Sunday Liquor Law. The facts of this case, as they appeared at the hearing upon the writ of *habeas corpus*, were substantially as follows:

On Sunday, the 24th of March last, the relators, Shea and Tully, called at the house of the prosecutor. The front door, window, and back entry were closed, but they obtained admission through a private entrance. There was no one in the bar-room when they entered but the prosecutor and one of his boarders. They asked the prosecutor for beer. He refused them, saying, "I don't sell beer on Sunday." After some persuasion, and being told by Shea that a friend of his (the prosecutor) had told them if they would call there they could get some beer, the prosecutor gave Shea and Tully two glasses of beer, repeating, however, his former declaration that he could not sell beer on Sunday. They then each took a piece of bread and wanted to pay for that; but this, also, was declined, and the prosecutor finally ordered them out of his place. Up to this point he did not know the relators.

On the 18th of April suit was commenced against Barthoulott, before Alderman Jennings, upon complaint of one David Evans, who styles himself the "Treasurer of the Tax-payers' Union," to recover the penalty of $50 imposed by section 2 of Act of February 20th, 1855, upon all persons who shall "sell, trade or barter any spirituous or malt liquors, wine or cider, on the first day of the week, commonly called Sunday." At the hearing Shea and Tully were examined as witnesses. The alderman dismissed the case. It further appeared that, after the above suit was commenced before the alderman, the said Evans stated to Mrs. Barthoulott, that if her husband would pay him $52.50, the suit would be discontinued and no criminal prosecution commenced.

There was also evidence that this was but one of a large number of suits before the same alderman for alleged violation of the law referred to. All of these suits were commenced upon complaint of the aforesaid David Evans, upon information furnished by these relators. In some of them there were offers to settle upon payment of penalty, with costs, to Mr. Evans, and one at least of the defendants testified that he had so settled with Mr. Evans, the latter agreeing to abandon any criminal prosecution.

For the relators it was urged that they were engaged in a lawful object, to wit, the enforcement of the Sunday Liquor Law. If this was in truth their object, it was certainly a lawful one, and worthy of all commendation. Assuming such to have been their purpose, did they resort to any unlawful means to accomplish it? If they did, and if they acted in concert in the pursuance of a common design, there was a conspiracy. It was never intended that a man should violate the law in order to vindicate the law.

I am of the opinion that these relators, in their anxiety to procure evidence against Mr. Barthoulott, went a step too far. He was not engaged in any violation of law when they entered his place. They urged and persuaded him to furnish the beer; in fact they resorted to artifice and deception for that purpose. If any crime was committed, they were present aiding and abetting.

It was urged in extenuation of the conduct of the relators that their action was entirely in accordance with the practice in the detective service, not only of the police, but in other departments of the Government. This is not my understanding of the detective service. I have never known an instance of detectives deliberately procuring a man to commit a crime in order to lodge information against him. Such informers have been infamous from the time of Titus Oates.

We can have no sympathy with the men who sell liquor on Sunday in defiance of law. That there is a class of persons who habitually and insolently defy the law is a reproach to all who are charged with the prosecution of such offences. It is the duty of every good citizen to aid in the suppression of this Sunday traffic. The evils which flow from it are beyond all computation in dollars, and are felt and seen by every citizen. And I have no hesitation in saying, that few persons are more deeply interested in enforcing this law than those who are legitimately engaged in the liquor business. There is nothing which has done more to arouse an antagonism to the whole system than the spectacle witnessed every Sabbath, of drunken men reeling upon our streets.

I am aware of the difficulty of procuring testimony against this class of offenders. It is believed, however, that with proper vigilance on the part of the police, and a hearty co-operation on the part of all good citizens, the selling of liquor on Sunday cannot be carried on to any great extent. Be this as it may, the resort to such means as the Commonwealth alleges were employed in this case is more than questionable. The law does not sanction it, and no solid moral reform will be promoted by it. It is quite possible that when the relators come to be heard in their defence, they may show an entirely different state of facts from those above stated. What I have said is based upon the facts as they now appear. The relators will have an ample opportunity of vindicating themselves before a jury, and for that purpose they are remanded.

DIGEST OF ENGLISH LAW REPORTS.

(*From the American Law Review.*)

FOR FEBRUARY, MARCH AND APRIL, 1872.

Action.—*See* Lease; Negligence, 2; Slander.

Adjudication.—*See* Bankruptcy, 8.

Administrators.—*See* Executors and Administrators.

Agency.—*See* Principal and Agent.

Agreement.—*See* Contract.

Agricultural Purposes.—*See* Tillage.

Ambiguity.—*See* Legacy, 6.

Appointme. t.—*See* Power 1.

Assault.—*See* Evidence, 1.

Assignment.—*See* Bankruptcy, 1, 7; Landlord and Tenant, 1; Lease; Railway, 1; Sheriff.

Average.—*See* General Average.

Bailment.

The defendants received, as ordinary bailee, a dog to be carried on their road. The dog had on its neck, when delivered to the defendants, a collar, to which was attached a strap. The defendants secured the dog by the strap, and the dog slipped its collar, escaped, and was killed. *Held*, that securing the dog by the collar was the ordinary and proper way, and that the defendants were not guilty of negligence in fastening the dog by the strap suggested by the plaintiff, who delivered the dog without notice that the fastening was unsafe. Judgment for defendant.—*Richardson* v. *North Eastern Railway Co.*, L. R. 7 C. P. 75.

Bank.—*See* Company, 7; Executors and Administrators, 1.

Bankruptcy.

1. A. covenanted with the trustees of a marriage settlement to effect insurance on his life for £2000. A. was insured in two policies of £500 each. On Oct. 29, 1869, A. handed one policy to the trustees, and on Dec. 9, signed a memorandum stating that he delivered up and handed over said two policies to the trustees. Dec. 13, A. was adjudged bankrupt; in Jan. 1870, he handed the second policy to the trustees; and in Dec. 1870, he died. Notice that the policies were claimed by the trustees was given to the insurance offices, after A. was adjudged bankrupt, but before any notice was given by the assignee. *Held*, that the assignee was entitled to the money due on the policies, as they were in the order and disposition of the bankrupt with the consent of the true owners.—*Ex parte Caldwell; In re Currie*, L. R. 13 Eq. 188.

2. The word "due" in the English Bankrupt Act means "presently payable."—*Ex parte Shurt; In re Pearcy*, L. R. 13 Eq. 309.

3. Under the English Bankrupt Act of 1869, an execution creditor who has seized the goods of his debtor before petition filed for adjudication of bankruptcy, was *held* entitled to the proceeds. The 87th section of said act referring to traders includes only traders at or after the act came into operation.—*Ex parte Bailey; In re Jecks*, L. R. 13 Eq. 314.

4. Under the English Bankrupt Act the holder of a note signed by two members of a firm, by the firm, and by other persons, was allowed to prove against, and receive dividends from, the estates of the said two partners and against the joint estate of the firm.—*Ex parte Honey; In re Jeffery*, L. R. 7 Ch. 178.

5. A bankrupt who had not received his discharge paid six months' rent in advance to his landlord, who had notice of the bankruptcy. *Held*, that the money could not be recovered from the landlord by the assignee in bankruptcy.—*Ex parte Dewhurst; In re Vanlohe*, L. R. 7 Ch. 185.

6. A debtor promised to call and pay a debt at an appointed time, but failing to obtain money, he did not call, but stayed at his place of business. *Held*, that the debtor had not absented himself with intent to defeat or delay creditors, and therefore had not committed an act of bankruptcy.—*Ex parte Meyer; In re Stephany*, L. R. 7 Ch. 188.

7. A debtor to secure an antecedent debt assigned the whole of his property, except a pension, which would not pass to the trustee in bankruptcy, and could not be taken in execution by a creditor. *Held*, that the assignment was an act of bankruptcy.—*Ex parte Hawker; In re Keely*, L. R. 7 Ch. 214.

8. Under the English Bankruptcy Act it was *held* that a judgment creditor who seized goods under execution, but had not actually sold them, before adjudication of bankruptcy, was entitled to sell goods and retain the proceeds.—*Slater* v. *Pinder*, L. R. 7 Ex. (Ex. Ch.) 95; s. c. L. R. 6 Ex. 228; 6 Am. Law Rev. 81.

See Proof.

Bequest.—*See* Devise; Legacy; Power; Tenancy in Common; Trust; Will.

Bill in Equity.

The plaintiff, an Englishman, contracted in France with the defendant A., a Frenchman, for the joint carrying out of certain undertakings. The defendants B. and C. were merchants in London, into whose hands money had come in the course of the transactions. The plaintiff brought a bill praying among other things that an account be taken of the money in the hands of B. & C. under said transactions. The defendants moved that proceedings be stayed until the determination of a suit by the plaintiff against the defendant A. pending before the civil tribunal in France. *Held*, that there being portions of the bill which the defendants were bound to answer, the motion, which was in the nature of a demurrer, must be refused.—*Wilson* v. *Ferrand*, L. R. 13 Eq. 362.

Bill of Lading.—*See* Sale 1; Ship.

Bills and Notes.

1. The maker of a note in 1846 indorsed the note with his name and the year 1866. *Held*, that the indorsement was a sufficient acknowledgment to take the note out of the statute of limitations.—*Bourdin* v. *Greenwood*, L. R. 13 Eq. 281.

2. The plaintiff, for a consideration paid by A., accepted certain bills drawn by X., which were discounted by the defendant, A. guaranteeing payment. The defendant at the time of receiving the bills had no knowledge whether they were accepted for valuable consideration or not, but before maturity was informed that A. was primarily liable, and the plaintiff only as surety. After this the defendant agreed with A. to hold over for a time the bills which were then payable. *Held*, that the plaintiff was thereby discharged.—*Oriental Financial Corporation* v. *Overend*, L. R. 7 Ch. 142.

3. Indictment for forging an instrument being an I. O. U. for thirty-five pounds purporting to be signed by the prisoner and one W. The latter's name was forged. *Held*, that the in-

strument was an "undertaking for the payment of money" within 24 & 25 Vic. c. 92 s. 28.—*Reg.* v. *Chambers*, L. R. 1 C. C. 341.

See Bankruptcy, 4; Priority; Proof.

Bond.—*See* Merchant.

Broker.

1. A jobber in the stock exchange agreed to purchase certain shares of the plaintiff, and gave him a ticket containing the name of the transferee to whom the shares were afterward tranferred. Subsequently the transferee turned out to be an infant, of which fact both the other parties had been ignorant, and the plaintiff was obliged to pay calls on the shares. The plaintiff brought a bill alleging that the jobber was the principal in said sale, and praying specific performance and indemnity for all past and future calls. *Held*, that the custom of the stock exchange discharging a jobber when he had given the name of the transferee and paid for the shares, discharged the defendant.—*Rennie* v. *Morris*, L. R. 13 Eq. 208.

2. The defendants, fruit-brokers, gave the plaintiffs a contract note as follows: "We have this day sold for your account to our principal, fifty tons raisins. M. & W., Brokers." The defendant's principal accepted part of the raisins only, and the plaintiffs sued the brokers, offering evidence of a custom in the London fruit trade that if the principal was not named in the contract note the broker was personally bound; also of a similar custom in the London colonial market. *Held*, that the evidence was admissible, and that the brokers were liable for the non-performance of the contract.—*Fleet* v. *Murton*, L. R. 7 Q. B. 127.

3. The defendant, a merchant in Liverpool, employed the plaintiffs, tallow-brokers in London, to buy fifty tons of tallow for him in London. By the custom of the London tallow trade, brokers contract in their own name and are personally liable for the total quantity of tallow they need, passing to their principals bought notes for the specific quantity ordered. The plaintiffs bought 150 tons of tallow and sent the defendant a bought note for 50 tons according to said custom, and the defendant refused to accept. *Held*, (by Kelly, C.B., Channell, B., and Blackburn, J.), that the defendant was bound by said custom. *Held* (by Mellor and Hannen, JJ., and Cleasby, B.), that the plaintiffs, being employed as brokers, could not set up a custom of which the defendant was ignorant, whereby to make themselves principals.—*Mollett* v. *Robinson*, L. R. 7 C. P. (Ex. Ch.) 84; s. c. L. R. 5 C. P. 646; 5 Am. Law Rev. 473.

Building.

An unfinished house, of which all the walls, external and internal, were built and finished, the roof on and finished, a considerable part of the flooring laid, and of which the internal walls and ceilings were ready for plastering, *held*, a building.—*Reg.* v. *Manning*, L. R. 1 C. C. 338.

Cargo.—*See* Ship.

Carrier.—*See* Bailment.

Charge.—*See* Legacy, 1.

Charity.—*See* Legacy, 6.

Chose in Action.—*See* Husband and Wife.

Class.—*See* Legacy, 5.

Codicil.—*See* Will.

Common Carrier.—*See* Bailment.

Company.

1. The directors of a company formed to take the business of an old firm, issued a prospectus in which they omitted to state the insolvency of the firm. The directors believed that by obtaining additional capital from the sale of shares in the company, the business of the firm could be carried on with profit. *Held*, that the directors were personally liable for omission to state the firm's insolvency in the prospectus to the purchaser of shares, unless the latter postponed for an unreasonable time inquiry into the truth of the representations in the prospectus upon the faith of which he took his shares. *It seems*, that if an allottee of shares is barred from proceeding against the directors by time or condonation, his transferee is barred also.—*Peek* v. *Gurney*, L. R. 13 Eq. 79.

2. A. applied for shares in a company, and on March 15, shares were allotted him, and the letter of allotment was posted March 16. A. had omitted in his application the name of the city in which he lived, and in consequence said letter did not reach him until March 21. On March 20, A. posted a letter of allotment posted a letter withdrawing his application for shares. *Held*, that the letter of allotment posted to the address A. had given, was a good allotment.—*In re Imperial Land Co. of Marseilles: Townsend's Case*, L. R. 13 Eq. 148.

3. In 1865 S. agreed to become a director in a company and signed the memorandum of association for 200 shares. Before signing, the solicitor of the company informed S. that he could withdraw if two-thirds of the capital were not subscribed, but the articles of association only provided that the directors need not go on with the company if said amount were not subscribed. The directors resolved to begin business before said amount was subscribed, and S. therefore resigned as director, and his

resignation was accepted. No shares were allotted to S., and his name was not placed upon the list of shareholders. In 1870 the company was ordered to be wound up. *Held*, that the official liquidator was not precluded by lapse of time from placing S. upon the list of contributories.—*Sidney's Case*, L. R. 13 Eq. 228.

4. By the articles of association of a company its directors had power to receive from shareholders money paid in advance of calls on their shares. The directors were also to receive a certain compensation to be as they should determine. The directors paid into a bank the amount uncalled for on their shares, and drew it out the same day in payment of their fees. *Held*, that said payment was not *bonâ fide*, and that the directors were not relieved from liability on their shares.—*Sykes' Case*, L. R. 13 Eq. 255.

5. The plaintiff paid for and received scrip certificates which gave him the right to have a certain number of shares in a company as soon as the directors gave notice that they were prepared to register shares. The plaintiff never received such notice, but was registered as holder of shares, and an action was brought for calls on the same, to which he pleaded that he was not a shareholder. He afterward attended a meeting of the shareholders and signed his name in the attendance-book, headed "shareholders present," &c.; he also signed two proxy papers, in which he was styled a proprietor. He never intended to acknowledge himself a shareholder. *Held*, that the plaintiff was entitled as against the company to have his name removed from the list of shareholders. *McIlwraith* v. *Dublin Trunk Connecting Railway Co.*, L. R. 7 Ch. 134.

6. The M. company owed money not immediately payable to a contractor who had bought shares in the company, and was unable to pay his brokers for the same. A director in the M. company, also a director in the C. company, negotiated a loan of money from the latter wherewith to pay the contractor and enable him to take up said shares. The M. company had no power to purchase its own shares, and set up in defence of repayment that the sum borrowed was borrowed for the purchase of its own shares with knowledge of the C. company. *Held*, that the C. company was not affected with notice of the purpose to which the money was to be applied.—*In re Marseilles Extension Railway Co.; Ex parte Credit Foncier & Mobilier of England*, L. R. 7 Ch. 161

7. The directors of a company devised the following plan for obtaining a sufficient number of subscriptions for shares to enable them to begin business according to law. The directors deposited £1500 with a bank whose manager was in the scheme, under the following agreement: The bank was to open an account with one S., loaning £1500,—the said company guaranteeing repayment, and charging their account with said loan and whatever sums S. should draw. S. was to obtain sham applicants for shares, and pay the requisite sum to the account of the company, drawing the necessary funds from the bank, and then receive blank transfers of said shares. The scheme was effected; and finally there stood to the account of the company £24,000, and therefore S.'s account was debited with the same sum. The company sued the bank for £24,000, apparently on the ground that said guarantee being fraudulent and void with notice to the bank, said sum remained to their credit and was due. *Held*, that said company was entitled to said £1500 actually deposited with the bank, and no more.—*British & American Telegraph Co.* v. *Albion Bank*, L. R. 7 Ex. 119.

See Contract, 1; Corporation; Injunction; Negligence, 2; Railway, 2; Trust.

Construction.

See Contract, 1; Covenant; Devise; Frauds, Statute of, 2; Insurance, 2; Landlord and Tenant, 2; Legacy; Merchant; Sale, 1, 2; Settlement; Tenancy in Common; Trust.

Contract.

1. By agreement between two companies one was given the option of buying the works of the other on or before the 25th of December, for a certain sum, after having given six months' previous notice. The first company gave due notice, but was unable to complete the purchase for want of funds at the time for payment. Subsequently a second notice was given, but the second company refused to sell. *Held*, that the right of purchase was not destroyed by failure in payment at the expiration of the first notice.—*Ward* v. *Wolverhampton Waterworks Co.*, L. R. 13 Eq. 243.

2. The defendant promised to marry the plaintiff upon the death of the defendant's father, but afterwards declared that he would never do so, whereupon the plaintiff sued for breach of promise, though the defendant's father was still alive. *Held*, that there was a breach of contract, on which the plaintiff might sue.—*Frost* v. *Knight*, L. R. 7 Ex. (Ex.

Ch.) 111; s. c. L. R. 5 Ex. 322; 5 Am. Law Rev. 461; 7 C. L. J. N. S. 135.

See Broker, 2; Company; Covenant, 1; Executors and Administrators, 2; Frauds, Statute of; Good-will; Insurance, 3; Merchant; Negligence, 1; Power; Sale, 1, 2.

Contribution.—*See* General Average.

Corporation

An American company had a place of business in England and was there sued, the writ being served on the head officer of the English branch, who was not the head officer of the American corporation in the United States. *Held*, that the company could be sued in England; and that said writ was properly served. *Newby* v. *Colt's Patent Firearms Co.*, L. R. 7 Q. B. 293; s. c.

Covenant.

1. The defendant covenanted not to carry on the business of a publican within the distance of one-half a mile from the plaintiff's premises. *Held* (Cleasby, B., dissenting), that said distance was half a mile in a straight line, not half a mile by the nearest way of access to said premises.—*Mouflet* v. *Cole*, L. R. 7 Ex. 70.

2. A lessee for the lives of A., B., and C., and the survivor of them, by deed reciting his lease conveyed to the plaintiff to hold for the lives of A., B., and C., and the survivor of them, and covenanted that the said lease was a valid and subsisting lease for the lives of A., B. and C., and the survivor of them. B. was dead at the date of said covenant. *Held*, that the covenant was that the lease was valid and subsisting, not that the three lives were still in existence. The mention of the three lives were merely matter of description of the lease.—*Coates* v. *Collins*, 7 Q. B. (Ex. Ch.) 145; s. c. L. R. 6 Q. B. 469; 6 Am. Law Rev. 292.

See Lease; Railway, 1; Settlement.

Criminal Law.—*See* Evidence, 2.

Cross Remainder.—*See* Devise, 2.

Custom.—*See* Broker, 1-3.

Damages.—*See* Sheriff.

Death.—*See* Legacy, 5.

Deed.—*See* Pleading.

Demurrer.—*See* Bill in Equity; Slander.

Descent.—*See* Distribution.

Devise.

1. A testator who owned a brick field in respect of which royalties were due, devised the field to trustees upon trust to sell it when they deemed advisable, and directed that in the rents and profits his daughter should have a life estate. The trustees retained the land to be sold at some future time for building purposes, and allowed the brick-fields to be worked out, and further royalties became due. *Held*, that the daughter was entitled to the royalties becoming payable after the testator's death, and not to interest only on the same.—*Miller* v. *Miller*, L. R. 13 Eq. 263.

2. A testator devised an estate to A. for life, and after A.'s decease to A.'s four sons (the testator's nephews), for life as tenants in common; after said nephews' decease their respective shares to their respective eldest sons then living for life; after the decease of each eldest son, his share to his first and other sons successively in tail male. In default of issue of any of the said eldest sons, his share to the second and other then living sons of said nephews successively in tail male. Failing the issue of said nephews, he devised to all the sons of said nephews "hereafter to be born, in tail male," After which the will proceeded: "And for default of such issue, I give the same to my own right heirs forever, it being my will and intention that the said lands shall go and remain in my name and family forever, or so long as the law will permit such enjoyment of the same." The oldest nephew died leaving daughters; the second died leaving no issue; and the third and fourth died leaving sons, who claimed against said daughters the estate of said eldest and second nephew. *Held*, that cross remainders must be implied between the devisees and their heirs male, and that therefore the sons of the third and fourth nephews took the estate of the second nephew and of the eldest nephew to the exclusion of his daughters, who were his heirs general.—*Hannaford* v. *Hannaford*, L. R. 7 Q. B. 116.

3. A testator gave land to his wife without words of limitation, and made her executrix. He directed that if his wife should marry again, an inventory should be taken of said lands by certain persons, whom he appointed guardians of his children, with power to take away the goods, &c., and reserve them and the land for the benefit of his children until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole and divide the proceeds "equally amongst my surviving children." He also directed "my executrix" to pay his eldest son £5 a year for wages as long as he should continue to labor on the farm after testator's decease. *Held*, that the wife took the fee on the testator's decease.—*Pickwell* v. *Spencer*, L. R. 7 Ex. (Ex. Ch.) 105; s. c. L. R. 6 Ex. 190; 6 Am. Law. Rev. 86.

See Executors and Administrators, 1; Legacy; Power; Tenancy in Common; Trust; Will.

Director.—*See* Company.

Discovery.

The defendant, in a bill to restrain infringement of a trade-mark, was ordered to disclose the places to which goods were sent impressed with the alleged counterfeit mark, and the description in his books and letters of the stamp or mark to be placed on the goods referred to therein; but not the names of customers, or of persons to or from whom letters produced were written or received, or their addresses by post, or the prices of said goods. —*Carver* v. *Pinto Leite*, L. R. 7 Ch. 90.

Distress.—*See* Trespass, 1.

Distribution.

Where a fund was divisible, under the English Statute of Distributions, between grandchildren and great-grandchildren claiming by one line of descent, and grandchildren and great-grandchildren claiming by a second line, from a common ancestor, it was *held*, that the fund must be divided into moieties divisible among the descendants by each line of descent *per stirpes* and not *per capita*.—*In re Ross's Trusts*, L. R. 13 Eq. 286.

Ejectment.—*See* Landlord and Tenant, 3.

Eminent Domain.—*See* Railroad, 1.

Equity Pleading and Practice.—*See* Pleading.

Estate pur autre Vie.

A rent-charge was directed to be divided equally between A., B. and C., during their lives and the life of the longest liver. *Held*, that A. had an estate *pur autre vie*, viz., for his own life and the lives of B. and C.—*Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192; s. c. L. R. 12 Eq. 464.

Estoppel.—*See* Sheriff.

Evidence.

1. A prosecutrix, in an indictment for an indecent assault amounting to an attempt at rape, if asked on cross-examination whether she has had connection with a person other than the prisoner, cannot be contradicted.—*Reg.* v. *Holmes*, L. R. 1 C. C. 334.

2. Where two prisoners are indicted and tried together, one is not a competent witness for the other.—*Reg.* v. *Payne*, L. R. 1 C. C. 349, 8 S. C. L. J. N. S. 109.

See Broker, 2; Frauds, Statute of, 2; Legacy, 5; Patent.

Examination.—*See* Evidence, 1.

Execution.—*See* Bankruptcy, 3.

Executors and Administrators.

1. A bank opened an account with F.'s executrix, entitling it "F.'s executors' account," and advanced money to her on the security of title-deeds of F.'s estate, deposited by her. F.'s executors were empowered to charge his real estate in favour of his personal estate. The executrix expended the above money for her own purposes, but the bank had no notice that the money was not desired for or applied to proper purposes. *Held*, that the bank could not prove against the general estate of the testator for a balance remaining unpaid after realizing the security.—*Farhall* v. *Farhall*, L. R. 7 Ch. 123; s. c. L. R. 12 Eq. 98; 6 Am. Law Rev. 295.

2. The executor of an executrix *de son tort* is not liable for a breach of contract of the executrix's testator.—*Wilson* v. *Hodson*, L. R. 7 Ex. 84.

See Devise, 3; Legacy, 1, 2.

Foreign Corporation.—*See* Corporation.

Forgery.—*See* Bills and Notes, 3.

Fraud.—*See* Company, 7.

Frauds, Statute of.

1. Bill for specific performance of a verbal agreement. The defendant wrote a letter agreeing to hire a house for seven years, not stating when the term was to begin. In a subsequent letter he referred to the first, adding that he understood that on his taking a lease from Michaelmas the lessor was to perform certain stipulations stated, which the plaintiff denied to be in the original verbal agreement. *Held*, that there was no memorandum of an agreement sufficient to satisfy the Statute of Frauds.—*Nesham* v. *Selby*, L. R. 13 Eq. 191.

2. The defendant being chairman of a local board of health, asked the plaintiff whether he would lay certain pipes. The plaintiff said, "I have no objection to do the work, if you or the board will order the work or become responsible for the payment." The defendant replied, "Go on and do the work, and I will see you paid;" and accordingly the plaintiff did the work. The work was not authorized by the board, and they refused to pay for it *Held*, that the defendant was liable for the price of the work, as there was evidence for the jury that the defendant contracted to be primarily liable.—*Mountstephen* v. *Lakeman*, L. R. 7 Q. B. (Ex. Ch.) 196; s. c. L. R. 5 Q. B. 613; 5 Am. Law Rev. 466.

General Average.

A vessel sailed from Melbourne for London being provided with a donkey engine adapted for hoisting sails, pumping the vessel, &c., and supplying the place of an additional crew of ten men. There was on board coal sufficient for an ordinary voyage. The vessel encoun-

tered a cyclone, and was so strained that the engine had to be kept constantly pumping; in consequence of which, when the supply of coal had nearly given out, the master cut up extra spars and mixed them with the coal, enabling the engine to keep working until an extra supply of coal was obtained. There was no sudden emergency, rendering the use of spars necessary, but without working the engine the vessel would have sunk. *Held* (by Kelly, C. B., Bramwell, B.; Martin and Cleasby *contra*), that there was an emergency sufficiently imminent to render the destruction of the spars a case for general average. Also (by the whole court), that there was no case for contribution in respect to the extra coal.—*Harrison* v. *Bank of Australia*, L. R. 7 Ex. 39.

Good-will.

The defendant, who had sold the good-will of a business to the plaintiff, began business again, giving out that the same was a continuation of his former business, and soliciting his former customers for orders. *Held*, that the defendant was entitled to publish any advertisement or circular to the world at large announcing that he was carrying on said business, but was not entitled by private letter, or by a visit, or by his agent, to solicit a customer of the old firm to transfer his custom to him, the new firm.—*Labouchere* v. *Dawson*, L. R. 13 Eq. 322.

House.—*See* Building.

Husband and Wife.

J. desired to obtain money to pay a certain debt, and J.'s wife desired money to repair certain property of her own. By advice of a solicitor, the defendant, an advance payable by instalments was procured on a mortgage of the wife's separate property, executed by husband and wife, and upon two policies of insurance on the life of J. and his wife respectively. In said mortgage the husband covenanted for repayment of the loan to the mortgagees. The defendant, under written authority of J. and his wife, received the first instalment and paid said debt of J., and claimed to retain the balance in his hands in satisfaction of a debt due from the husband for professional charges for business before done. *Held*, that said advance was raised in part to pay said debt of J., and the remainder for the separate use of the wife, and that the money advanced had not been reduced to possession by J. The defendant, therefore, had no right to retain the same.—*Jones* v. *Cuthbertson*, L. R. 7 Q. B. 218.

See Slander.

Indecent Assault.—*See* Evidence, 1.

Indictment.—*See* Evidence, 2.

Injunction.

An injunction to restrain a railway company from running trains over land ordered to be sold in satisfaction of a lien was refused.—*Lysett* v. *Stafford and Uttoxeter Railway Co.*, L. R. 13 Eq. 261.

See Patent.

Insurance.

1. Action on a policy of insurance on a voyage, touching at a certain port. The master of the vessel had written of said port, "It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe;" and the insured showed the letter to the insurer. Both insured and insurer were ignorant of the character of the port. The conduct of the insured and said master was *bonâ fide*. In fact, said port was dangerous during "the hurricane months," and the vessel was there destroyed by a storm. *Held*, that the statements in said letter being only of matter of opinion, there was no misrepresentation.—*Anderson* v. *Pacific Fire and Marine Insurance Co.*, L. R. 7 C. P. 65.

2 The plaintiffs, who were lightermen on the Thames, effected a policy for the sum of £2,000, "to cover and include all losses, damages and accidents amounting to £20 and upwards, in each craft, to goods carried by [the plaintiffs] as lightermen, or delivered to them to be waterborne, either in their own or other craft, and from which losses, damages and accidents [the plaintiffs] may be liable or responsible to the owners thereof, or others interested." This policy was subscribed by different underwriters, the defendant underwriting for £100. Goods were lost to the value of £1,100, the total value of the plaintiffs' risks covered by the policy being £20,000. The defendant contended that he was only liable for such a proportion of the loss as 100 bore to 2000. *Held*, that the plaintiffs were entitled to be indemnified for the loss actually sustained, viz., £1,100, and to recover £55 from the defendant as his proportion of the loss.—*Joyce* v. *Kennard*, L. R. 7 Q. B. 78.

3. An insurance company made a memorandum of the terms upon which a policy was to be issued to the plaintiff, which, though not enforceable at law or equity, is, according to the customs of insurers, the complete and final contract. After making the memorandum, and before a policy was made out, material facts came to the knowledge of the plaintiff, and were not disclosed by him. *Held*, that the

policy was not avoided.—*Corey* v. *Patton*, L. R. 7 Q. B. 304.

See Bankruptcy, 1.

Interrogatories.—*See* Bill in Equity; Landlord and Tenant, 3.

Joint Tenancy.—*See* Tenancy in Common.

Landlord and Tenant.

1. The plaintiff, a lessee, by agreement not under seal, assigned his interest in the property to the defendant, who accordingly entered into occupation of the premises, but the assent of the lessor, necessary to the assignment, was never obtained. The defendant paid rent to the lessor for the plaintiff, taking receipts made out to the latter. At Michaelmas, 1870, the defendant quitted the farm, having given said lessor, but not the plaintiff, notice to quit. If the defendant had wished, he could have occupied until March 1, 1871, but the premises were left vacant until said day, when the plaintiff paid the lessor £40 rent, which he sought to recover, either on an implied indemnity or as rent due from the defendant as his tenant, or for constructive use and occupation. *Held*, that the plaintiff was not entitled to recover.—*Crouch* v. *Tregonning*, L. R. 7 Ex. 88.

2. The appellants owned a building divided into different suites of rooms, distinct from each other, and occupied separately as residences or offices. The suites were let by agreement, containing the following terms: The lessee agrees to pay rent quarterly, to keep the premises in repair, and to deliver up possession at the end of the tenancy; the lessors agree to pay all rates and taxes; they are to have liberty to enter for the purpose of painting the outside wood and iron work. In case of non-payment of rent or breach of covenant by the lessee, the lessors may, without notice, re-enter and resume possession of the premises. Each entrance of the building is to be in charge of a resident porter appointed by the lessors; the porter has a duplicate key to the outer door of every suite of rooms, and his general duties, for which there is no charge to the lessee, are to clean the stairs, to deliver to the lessee all letters, parcels and messages, and to receive the keys of the outer doors of the suites from the lessee on his leaving at night. *Held*, that each suite was occupied by the tenant, and that the lessor had parted with possession of the premises, including the outer doors of the building. The tenants were not merely inmates or lodgers under the lessor.—*The Queen* v. *St. George's Union*, L. R. 7 Q. B. 90.

3. A tenant holding over after expiration of his lease cannot, in an action of ejectment, be allowed to put interrogatories to the lessor asking whether the latter's title has expired.—*Wallen* v. *Forrestt*, L. R. 7 Q. B. 289.

See Bankruptcy, 5; Frauds, Statute of, 1; Railway, 1; Trespass, 1.

Larceny.

The prisoner, whose goods were in the hands of a bailiff under a warrant of execution, forcibly took the warrant from the bailiff, thinking to deprive him of his authority. *Held*, that the prisoner was not guilty of larceny, but of taking for a fraudulent purpose.—*Reg.* v. *Bailey*, L. R. 1 C. C. 347.

Lease.

The plaintiff, a lessee, assigned his estate to B., who covenanted to indemnify against subsequent breaches. B. assigned to the defendant, who covenanted in like manner. The defendant committed a breach, the lessor recovered from the plaintiff, and he sued the defendant. *Held*, that the plaintiff was entitled to recover.—*Moule* v. *Garret*, 7 Ex. (Ex. Ch.) 101; s. c. L. R. 5 Ex. 132; 4 Am. Law Rev. 700

See Covenant; Frauds, Statute of, 1; Landlord and Tenant; Railway, 1.

Legacy.

1. A testator gave a legacy to an infant chargeable upon certain real estate in case the personal estate was inadequate. The personal estate was sufficient at the time of the testator's death, but was subsequently wasted by his personal representative. *Held*, that the legacy was not chargeable upon said real estate upon the infant attaining twenty-one.—*Richardson* v. *Morton*, L. R. 13 Eq. 123.

2. A testator appointed A. and the testator's "friend" B. executors of his will, and gave each a legacy of £1000 "as a remembrance." B. never acted as executor. *Held*, that B. was entitled to the legacy without proving the will.—*Bubb* v. *Yelverton*, L. R. 13 Eq. 131.

3. A testator gave, devised, and bequeathed to his trustees, their heirs, executors and administrators, all his estate and effects upon trust to convert his personal estate into money, and hold the same upon certain trusts. *Held*, that the testator's real estate passed to the trustees under the will, but that the trusts in the will applying only to the personal estate, the beneficial interest in the real estate resulted to the testator's heir.—*Longley* v. *Longley*, L. R. 13 Eq. 133.

4. A testator made a certain provision for his nephew, and then added that for making a further provision for his nephew it should be lawful for the testator's trustees to expend a

certain sum in the purchase of any commission, or in obtaining the promotion of said nephew in the army. The purchase of commissions was abolished by royal warrant before payment of said legacy. *Held*, that said nephew was entitled to the sum named, as a legacy.—*Palmer* v. *Flower*, L. R. 13 Eq. 250.

5. By will, dated October 4, 1845, a testator bequeathed to the children of A., who should be living at the testator's death, £1000, to be raised out of a life estate bequeathed to B. A. had five children, one of whom had gone to the United States and had not been heard from since February 17, 1845. The testator died, and B. was found lunatic in 1852, her estate being transferred to the account of "B. and the children of A." Four-fifths of said £1000 were divided among said four children, who in 1871 petitioned that the remaining fifth be divided. *Held*, that there being no evidence that said fifth child was living at the testator's death, the fifth was divisible among said four children; and also, that the title of account under which stood B.'s estate, showed that the children were interested in the same, and prevented their losing title under the statute of limitations; but that interest on said fifth could be claimed for six years only.—*In re Walker*, L. R. 7 Ch. 120.

6. In 1868 a testatrix bequeathed a sum to the treasurer for the time being of the fund for the relief of the clergy of the diocese of W. Said diocese in 1868 included the archdeaconries of W. and C., but until 1837 included only the archdeaconry of W. Until 1837 there was a society of the diocese for the above purpose, and this society, when the diocese was enlarged, was restricted to the archdeaconry of W. There was a similar society for the archdeaconry of C. The testatrix and parents had contributed to the society in the archdeaconry of W., but not to the other society. *Held*, that the sum must be paid to the W. society.—*In re Kilvert's Trusts*, L. R. 7 Ch. 170; s. c. L. R. 12 Eq. 183; 6 Am. Law Rev. 298.

See Devise; Power; Tenancy in Common; Trust; Will.

Letter.—*See* Company, 2.

Libel.—*See* Slander.

Lien.—*See* Injunction.

Limitation, Statute of.—*See* Bills and Notes, 1; Legacy, 5.

Lodging.—*See* Landlord and Tenant, 2.

Marriage.—*See* Contract.

Marriage Settlement.—*See* Settlement.

Marshalling Assets.

A. effected policies of insurance upon his life, and mortgaged the same for sums borrowed. B. became surety for the payment of the amount borrowed upon a policy. A. died bankrupt, and B. paid the amount for which he was surety. *Held*, that B. was entitled to have the moneys payable upon the different policies marshalled so as to be repaid the sum he had paid as surety. Also, that a payment by A.'s wife out of separate estate was no exoneration of the balance of the policy moneys.—*Heyman* v. *Dubois*, L. R. 13 Eq. 158.

See Priority.

Master.—*See* Ship.

Merchant.

The defendant gave a bond conditioned not to "travel for any porter, ale, or spirit merchant as agent, collector, or otherwise." The defendant became traveller and collector for a brewer. *Held*, that there was no breach of the condition.—*Josseleyn* v. *Parson*, L. R. 7 Ex. 127.

Mortgage.

The mortgagees of a policy of insurance mortgaged by a deceased testator to secure a certain sum, received under the policy an amount sufficient to repay said sum and leave a balance. The testator's estate was insolvent. *Held*, that the mortgagees might retain said balance in discharge of other debts due from the testator.—*In re Haselfoot's Estate: Chauntler's Claim*, L. R. 13 Eq. 327.

Motion.—*See* Bill in Equity.

Navigation.—*See* Trespass, 2.

Negligence.

1. Defendant, in pursuance of a contract, laid down a gas-pipe from the main to a metre in the plaintiff's shop. Gas escaped from a defect existing in the pipe when laid, and the servant of a gas-fitter employed by the plaintiff went into the shop to find out the cause, carrying a lighted candle. The jury found that this was negligence on the servant's part. The escaped gas exploded and damaged the shop. *Held*, that the defendant was liable, and was not exonerated by the negligence of said servant.—*Burrows* v. *March Gas and Coke Co.*, L. R. 7 Ex. (Ex. Ch.) 96; s. c. L. R. 5 Ex. 67; 4 Am. Law Rev. 713.

2. The defendants were a canal company, and the plaintiff proprietor of a coal-mine under part of the bed of the canal. Said company was authorized by statute to take land for the canal, the minerals in the land being reserved to the owners thereof subject to a proviso that in working the same no injury should be done to the navigation. It was also

provided that a mine-owner wishing to work his mine should give certain notice to the company, which should then inspect the mine and consent or refuse to allow the same to be worked; in the latter event paying the market price for the same. If the company should omit to give or refuse such consent, the mine-owner might work the mine. The plaintiff gave proper notice, but the defendants did not inspect, and refused to purchase the mine. The plaintiff worked the mine without regard to the surface, without knowledge that the effect would be to let down the surface and probably dislocate the slate and admit water, but otherwise were not negligent or unskilful, but took coal in the ordinary manner, and could not otherwise have obtained full benefit of the mine. Consequently, with negligence of the defendants, water entered the mine. The plaintiff brought an action of tort, charging negligent management of the canal whereby the water escaped to the damage of the mine. *Held* (Hannen, J., dissenting), that the action could not be maintained. *It seems*, that the plaintiff could recover compensation for the loss of the coal under said statute.—*Dunn* v. *Birmingham Canal Co.*, L. R. 7 Q. B. 244.

See Bailment.

Notice.—*See* Company, 6; Contract, 1.

Obstruction.—*See* Trespass, 2.

Office.—*See* Larceny.

Parties.—*See* Will, 2.

Partnership.—*See* Bankruptcy, 4; Company, 1.

Patent.

The plaintiff in 1871 purchased lamp burners manufactured under an American patent dated 1859. The defendants were holders of an English patent dated 1865 for a similar burner, and after the plaintiff had offered his burners for sale, published a notice that they were informed of an infringement being made in America for sale in England, and that on the sale of said burners made in infringement, legal proceedings would be at once instituted. It appeared that the notice was not *bonâ fide*. *Held*, that the plaintiff should be enjoined from publishing said notice. There is no presumption in favor of a new patent, and parties cannot, under its colorable protection, issue circulars intimidating the public and injuring the trades of others.—*Rollins* v. *Hinks*, L. R. 13 Eq. 355.

See Discovery.

Payment.—*See* Company, 4.

Pleading.

Averment in a bill in equity that an indenture was executed between A. and B., and the several other persons whose names and seals were, or were intended to be, thereunto subscribed and set (being respectively creditors of A.). *Held*, no sufficient averment of execution by creditors.—*Glegg* v. *Rees*, L. R. 7 Ch. 71.

See Slander.

Possession.—*See* Husband and Wife; Landlord and Tenant, 2; Settlement; Trespass, 1.

Power.

1. A testatrix gave certain real estate to her husband in trust to stand possessed thereof and enjoy the rents arising therefrom for his own use during his life, with power to take and apply the whole or any part of the capital arising therefrom to his own use; and after his decease, over. *Held*, that the husband took a life estate, with power of acquiring the entire interest in the estate; and that in default of such appointment the gift over took effect.—*Pennock* v. *Pennock*, L. R. 13 Eq. 144.

2. A. having under her husband's will a general power of appointment over residuary estate, directed in her will, of which she appointed an executor, that her debts should be paid, gave three legacies, and bequeathed the residue of the personal estate in which she had any interest or title to four persons as tenants in common, two of whom died before the testatrix. *Held*, that the shares of the two persons dying went to the personal representatives of A.'s husband.—*In re Davies' Trusts*, L. R. 13 Eq. 163.

Practice.—*See* Corporation.

Principal and Agent.—*See* Broker, 1-3; Negligence, 1.

Principal and Surety.—*See* Bills and Notes, 2,3.

Priority.

A. discounted a bill for the defendant, who charged a certain fund for the same and for any further sum advanced, or for which the defendant might be liable to A. Subsequent advances to the defendant were made by other parties, and charged against said fund without A.'s knowledge. After these advances the defendant accepted a new bill payable to A for the amount of the bill discounted by A. with interest and costs; A. also made a further advance to the defendant; and finally a bill accepted by the latter was indorsed to A. The said fund became distributable at a bank, Dec. 8. One creditor served notice of his charge at half-past five p.m., Dec. 7, and the other creditors as soon as the bank opened on Dec. 8. *Held*, that notice of all said charges was at the same time; that the first charge was in favor of A. for the bill payable to him, and for his second advance, but did not cover the bill endorsed to him, which did not come

with the terms of the charge. — *Calisher* v *Forbes*, L. R. 7 Ch. 109.

Probate.—*See* Will, 2.

Promissory Note.—*See* Bills and Notes.

Proof.

Bills drawn by the A. bank upon the B. bank were accepted for the accommodation of the A. bank upon the understanding that funds would be furnished to meet them. The bills were discounted by C., but before they matured both said banks suspended payment. C. proved against both banks and recovered a dividend from both. *Held*, that the B. bank could not prove against the A. bank for the amount it had paid to C.—*In re Oriental Commercial Bank*, L. R. 7 Ch. 99; s. c. L. R. 12 Eq. 501; 6 Am. Law Rev. 492.

See Executors and Administrators, 1.

Railway.

1. A railway company gave the plaintiff notice that it would require his leasehold premises, and subsequently entered into possession and paid for the same. *Held*, that the plaintiff was entitled to a decree that the company should accept an assignment of the lease and engage to indemnify the plaintiff against the rent and the covenants in the lease.—*Harding* v. *Metropolitan Railway Co.*, L. R. 7 Ch. 154.

2. A railway company was empowered by statute to extend its line and raise money by the issue of so-called extension shares; said extension to form, for financial purposes, a separate undertaking, and its capital and shares a separate capital; its profits to pay its dividends and the holder of its shares to have no dividend from the other profits of the company; and the company to keep separate accounts of the extension. The company might raise an additional sum by mortgage, but not until all the extension capital was subscribed for and half paid up; such sum to be applied only to the purposes of said act. A creditor, to whom the company was indebted for construction of the original line, obtained judgment and execution under which land obtained under the extension act was seized. *Held*, that the creditor was entitled to an order of sale of said land.—*In re Ogilvie*, L. R. 7 Ch. 174.

See Bailment; Injunction.

Remainder.—*See* Devise, 2; Settlement.

Rent-charge.—*See* Estate pur autre Vie.

Rents and Profits.—*See* Devise, 1.

Return.—*See* Sheriff.

Sale.

1. The plaintiffs agreed to ship a cargo of ice to the United Kingdom, "forwarding bills of lading to the purchaser, and upon receipt thereof the purchaser takes upon himself all risks and dangers of the seas;" and the defendant agreed to buy and receive the ice on its arrival and pay for it in cash on delivery. The vessel was lost by dangers of the seas after the defendant had received the bills of lading. *Held*, that the defendant was liable for the value of the ice.—*Castle* v. *Playford*, L. R. 7 Ex. (Ex. Ch.) 98; s. c. L. R. 5 Ex. 165; 5 Am Law Rev. 63.

2. The defendants' agents in Valparaiso purchased for them a cargo of soda, and chartered the P. to bring it to England; the soda was soon after destroyed by an earthquake, and the agents thereupon cancelled the charter. After the defendants, being ignorant of the destruction, sold to the plaintiff the soda, "being the entire parcel of nitrate of soda expected to arrive at port of call per P. Should any circumstance or accident prevent the shipment of the nitrate, this contract to be void." The defendants' agents upon hearing of this contract bought another cargo of soda and shipped it by the P. to England. *Held*, that the plaintiff had no claim to the soda, not being the specific quantity contracted for.—*Smith* v. *Myers*, L. R. 7 Q. B. (Ex. Ch.) 139; s. c. L. R. 5 Q. B. 429; 5 Am. Law Rev. 301.

See Bankruptcy, 8; Contract, 1; Goodwill; Injunction, Railway, 2; Sale, 2.

Security.—*See* Executors and Administrators, 1.

Service of Writ.—*See* Corporation.

Settlement.

Two marriage settlements contained covenants by the husband and wife that if at any time after the marriage and during their joint lives, they or either of them in her right should by gift, descent, succession, or otherwise howsoever, become entitled to any real or personal estate to the value of £100, the same should be conveyed, transferred, assured, and paid to trustees. In the first case certain remainder vested in the wife before marriage, vested in possession. In the second case the wife died before a vested remainder vested in possession. *Held*, that "entitled" in said covenant signified "entitled in possession," and that in said first case the trustees were entitled to the fund; otherwise in the second case.—*In re Clinton's Trust: Holway's Fund*, L. R. 13 Eq. 295.

Shareholder.—*See* Company.

Sheriff.

A sheriff seized goods under a *fi. fa.*, and remained in possession until dismissed by the plaintiff, and made return that he had seized the debtor's goods and held them until ordered to withdraw by the plaintiff. The goods seized

had been assigned prior to the seizure by a valid bill of sale. To an action for not levying under the writ, and for a false return, the sheriff pleaded *nulla bona*. *Held*, that the sheriff was not estopped by his return from proving that the goods seized did not belong to the debtor, and that an action for a false return would not lie unless actual damage had been caused to the plaintiff.—*Stimson* v. *Farnham*, L. R. 7 Q. B. 175.

Ship.

Beans were shipped by the plaintiffs on the defendant's vessel to be carried under a bill of lading from Alexandria to Glasgow. At Liverpool the vessel was damaged by a collision (a peril excepted in the bill of lading) and the beans were saturated with salt-water. The vessel put into Liverpool, was repaired, and proceeded to Glasgow without drying the beans, which in consequence fermented and were much damaged. The beans might have been taken from the vessel, dried, and carried to Glasgow, and the shippers so requested, offering, also, to receive them at Liverpool, paying freight *pro rata*. If dried and reshipped the expense would have been particular average, payable by the shipper. Such drying and reshipping would have been reasonable and proper, if there was a legal duty on the master so to do. *Held*, that under the circumstances of the case it was the master's duty to dry and re-ship the beans, and that the shipowners were therefore liable.—*Notara* v. *Henderson*, L. R. 7 Q. B. (Ex. Ch.) 225; s. c. L. R. 5 Q. B. 346; 5 Am. Law Rev. 79.

See General Average; Insurance; Trespass, 2.

Slander.

Action for slander in imputing adultery to the plaintiff whereby she was injured in her character and reputation, and became alienated from and deprived of the cohabitation of her husband, and lost and was deprived of the companionship and ceased to receive the hospitality of divers friends. On demurrer, *held*, that the alleged loss of hospitality was sufficient to sustain the declaration, and was such a consequence as might reasonably and naturally be expected to follow the use of such slanderous words. Also, that the real damage was to the wife, and would sustain an action by husband and wife.—*Davies* v. *Solomon*, L. R. 7 Q.B. 112.

Special Property.—*See* Trespass, 1.

Statute.—*See* Negligence, 2.

Statute of Distributions.—*See* Distribution.

Statute of Frauds.—*See* Frauds, Statute of

Statute of Limitations.—*See* Limitations, Statute of.

Stock Exchange.—*See* Broker, 1.

Surety.—*See* Bills and Notes, 2, 3.

Tenancy in Common.

A testatrix bequeathed a fund to her nephews and nieces to be divided among them *per stirpes*, the children of a deceased niece "taking between them only the equal share to which the said" niece would have been entitled. *Held*, that said children of the deceased niece took as tenants in common.—*Attorney-General* v. *Fletcher*, L. R. 13 Eq. 128.

Tillage.

In case any part of certain land was converted into "tillage," a tithe rent-charge became due. The owner of the land built a house thereon, and converted a part into garden ground, the remainder being orchard. *Held*, that the land was not converted into tillage, which is land used for agricultural purposes.—*Vigar* v. *Dadman*, L. R. 7 C. P. (Ex Ch.) 72; s. c. L. R. 6 C. P. 470; 8 Am. Law Rev. 304.

Tithe.—*See* Tillage.

Trader.—*See* Bankruptcy, 3; Good-will.

Trade-mark.—*See* Discovery.

Trespass.

1. Action for an excessive distress for rent. The property distrained had been assigned to trustees in trust for the plaintiff's wife. It was left in the plaintiff's house and enjoyed by him. *Held*, that though the plaintiff was not the legal owner of the property, yet as he had a right of possession by consent of his wife and the trustee, he could maintain the action. *Fell* v. *Whittaker*, L. R. 7 Q. B. 120.

2. The plaintiff owned the soil under a lake open to public navigation. The defendant built from his land, bordering upon the lake, a pier running into the lake and supported by piles driven into the plaintiff's land. The plaintiff brought trespass against the defendant for causing people to pass and repass over said pier to and from the defendant's steamboats. *Held*, that the plaintiff must be considered to have claimed the pier as being built upon his own soil, and therefore was in the position of maintaining the pier to the obstruction of navigation, and that passing over the pier was therefore justifiable.—*Marshall* v. *Ulleswater Co.*, L. R. 7 Q. B. 166.

Trust.

1. A testator directed the trustees under his will to sell his freehold estate at L. and his personal estate, immediately after his decease, or so soon thereafter as they should see fit to do. The personal estate included shares

in an unlimited banking company, considered by the testator and the trustees to be perfectly safe. The trustees held the shares two years and a quarter when the bank failed. R., one of the trustees, was a minor at the death of the testator, and attained majority nine months before said failure. *Held*, that the trustees, including R., should have sold said shares within a reasonable time, or one year from the testator's death, and were liable to make up the loss to the *cestuis que trust*.—*Sculthorpe* v. *Tipper*, L. R. 13 Eq. 232.

2. A testator who was a tenant from year to year of an estate, desired his trustees to give up the tenancy of the plaintiff if the landlord would accept him as a tenant; if so accepted, the plaintiff to have the farming stock. The testator's assets were insufficient to pay legacies if the plaintiff received said stock. The trustees represented these facts to the landlord, and accordingly by advice of the trustees the plaintiff was refused as a tenant unless he should first convey certain other estates to the trustees for payment of said legacies. The plaintiff executed deeds accordingly. *Held*, that said deeds were obtained by a breach of trust, and must be set aside; and that the trustees must pay all costs.—*Ellis* v. *Barker*, L. R. 7 Ch. 104.

See Devise, 1; Legacy, 3; Trespass, 1.

Undertaking for Payment of Money.—*See* Bills and Notes, 3.

Usage.—*See* Broker, 2, 3.

Use and Occupation.—*See* Landlord and Tenant, 1.

Vendor and Purchaser.—*See* Contract, 1.

Warrant.—*See* Larceny.

Will.

1. By statute a devise to a person whose wife attests the will is null and void. Testatrix devised to A., and A.'s wife was an attesting witness. By a codicil, properly attested, the testatrix confirmed her will. *Held*, that the devise to A. was rendered valid.—*Anderson* v. *Anderson*, L. R. 13 Eq. 381.

2. The plaintiff, who had been cognizant of a previous suit contesting the validity of a will, but compromised without his knowledge, was *held* not barred by the decree founded on said compromise from bringing suit of revocation of probate.—*Wytcherley* v. *Andrews*, L. R. 2 P. D. 327.

See Executors and Administrators, 1; Legacy; Power; Tenancy in Common; Trust.

Witness.—*See* Evidence.

Writ.—*See* Corporation.

Words.

"*Between.*"—*See* Tenancy in Common.

"*Building.*"—*See* Building.

"*Due.*"—*See* Bankruptcy, 2.

"*Entitled.*"—*See* Settlement.

"*Porter, Ale, or Spirit Merchant.*"—*See* Merchant.

"*Tillage.*"—*See* Tillage.

REVIEWS.

The Law and Practice of Injunctions in Equity and at the Common Law. By William Joyce, Esq., of Lincoln's Inn, Barrister-at-Law. London: Stevens and Haynes, Law Publishers, Bell Yard, Temple Bar, 1872. In two volumes, royal 8vo. Price 70 shillings, cloth.

This work, considered either as to its matter or manner of execution, is no ordinary work. It is a complete and exhaustive treatise, both as to the law and the practice of granting injunctions. It must supersede all other works on the subject. Of late years the remedial power of granting injunctions has been very frequently and very widely exercised, and now that its exercise is not restricted to Courts of Equity, the members of both branches of the profession are interested in understanding it.

The author, after referring briefly to the well understood definition of an injunction, divides his work into four parts—the first treating of injunctions to stay wrongful acts of a special nature, not being proceedings in other courts; the second, of injunctions to stay proceedings in courts at law and other courts; the third, the practice as to injunctions; and the fourth, injunctions at common law.

The chapters in the first part (injunctions to stay wrongful acts of a special nature, not being proceedings in other courts) are headed real property (including leaseholds), personal property, incidents of property (real and personal), persons and relating to persons, corporations, quasi corporations, friendly and benefit societies, ecclesiastical matters, burial grounds, companies (railway and other public companies), jurisdiction, and injunctions generally.

The chapters in the second part (injunctions to stay proceedings in courts of law and other courts) are headed—jurisdiction, real

property (including leaseholds), personal property, incidents of property (real and personal), persons and relating to persons, corporations, companies, and injunctions generally.

The chapters in the third part (practice) are headed—by what means an injunction is obtained, by what means dissolved, what is done on the motion to dissolve, who may apply to dissolve and before whom the application should be made, evidence on the motion and form of the order to dissolve, filing the bill, service of the bill, service of notice of motion for an injunction, form of notice of motion, and of notice of the time of making the motion, the time for and order and form of making the motion, evidence on the motion, the effect of pleadings and of changes in the pleadings, dismissal of the bill, orders and injunctions obtained on interlocutory applications, interim restraining orders and injunctions and interlocutory injunctions, drawing up and service of, the notice of and minutes and orders for an injunction, and preparation and issuing and service of the writ of, and order for an injunction, the injunction made at the hearing of the cause, appeals, breach of injunction, practice on injunctions generally.

The chapters in the fourth part (injunctions at common law) are headed—injunctions under the Patent Law Amendment Act, 1852, injunctions under the Railway and Canal Traffic Act, 1854, injunctions under the Common Law Procedure Act, 1854, staying proceedings under the Common Law Procedure Act, 1852, and practice of injunctions at common law.

The first two parts, embracing no less than 1,253 pages, form an able and exhaustive exposition of the law as to injunctions generally in Courts of Equity and Law. The third part, containing less than 100 pages, is the part that will be most valued by members of the profession in active practice. There is a great difference between the law and its administration. A man may be a good lawyer, as far as mere knowledge of the principles of law are concerned, and yet know nothing of the practice of the law. But as most men who become members of the profession, in the colonies at all events, do so to acquire a livelihood, mere knowledge of the law without some knowledge of its mode of administration is of little value. The practical man will more frequently refer to the third than to any other part of this great work, and his references will seldom be in vain. The terse statement of the practice regulating the granting, dissolution, and punishment for breach of injunctions will be found, to such an one, of incalculable value; and, as the practice varies from year to year, this recent exposition of it will be the more eagerly sought for. Whenever a future edition of the work becomes necessary, it might be advisable to insert a chapter as to costs in injunction cases, though, of course, costs in general follow the result.

The common law practitioner will be only too glad to refer to the fourth part, as to injunctions at common law. Though courts of common law in this Province have, since 1856, had power to issue writs of injunction, the power is seldom invoked. One reason, no doubt, is that the judges of the common law courts, here and in England, in their construction of the act, greatly curtailed its intended operation. But another reason is, that the law of injunctions is little understood by members of the common law bar. If better understood, we are confident that there would be in many cases, an effort made to compel the court, in which an action for a continuing wrong is instituted, to do complete and final justice between the parties. This was the object of the Common Law Commissioners who recommended the change in the law, and of the Legislature who gave effect to their recommendation. We know of no book as suitable to supply a knowledge of the law injunctions to our Common Law friends as Mr. Joyce's exhaustive work. It is alike indispensable to members of the Common Law and Equity bars.

We cannot conclude without making some remarks as to the manner in which the work has been written. The author has been careful not to lay down propositions beyond the authority of the decided cases to which he refers. It is not always that the *dictum* of a text writer is supported by the cases on which he relies. Some of the best of English text writers are open to this charge. We do not mean to say that it is always the result of want of proper care. Judges who have all the advantages of argument by opposing counsel before deliberation, and generally of consultation before decision, sometimes take wrong views of cases. The text writer who

draws his conclusions without any of these advantages, is not less likely occasionally to err. But we observe on the part of Mr. Joyce an anxious desire "to keep within bounds." This is the more manifest from the fact that whenever he can, he gives the very words of the judge, and not his own understanding of what the judge said. His industry in the examination of cases is very great. He tells us in his preface that every case in the English Courts of Equity, where an injunction has formed any material portion of the relief asked for, has been noticed. Besides he has laid under tribute the cases on the subject of injunctions at Common Law—cases on injunctions in the House of Lords, including the Scotch cases of interdict, cases in the Privy Council and in the Irish Courts, together with a selection of American cases.

Mr. Joyce might have gone further, and made a selection from the many important cases decided by our Court of Chancery, which, for learning, will compare favourably with his selections from the Irish and United States Courts. Our reports are to be found in the library of the Middle Temple, and, if we mistake not, also in the library of Lincoln's Inn. We would advise English law authors, who write upon subjects of as much interest in the colonies as at home, to extend the field of their explorations beyond United States jurisprudence. Our decisions are, of course, not binding on courts in England; no more are United States decisions. But all are equally useful and equally valuable to the author whose aim is to expound the law of England, as best understood where it is administered. The profession in England have very little idea of the learning that adorns the Bench in some of our Colonies, and the sooner they overcome the notion that there is nothing good in the Colonies the better for themselves and for the colonists. When we find continued references to the decisions of United States Courts and no reference to the decisions of our Courts, where, to say the least, equal learning, equal ability, and equal judgment are to be found, we become somewhat nettled. Recently we have seen references to Canadian authorities in text books written by United States authors. It is full time that our English brethren should wake up to our existence. We want English authors to understand that there is such a country as Canada. We want them to know that in Canada there are men who, though colonists, would do honour to the bench of the mother country, and we do not want English authors, when preparing works on branches of English jurisprudence, either to forget us or our decided cases. If we mistake not, Messrs. Stevens and Haynes, the publishers of the work now under review, could impart some knowledge, as to the status of the profession in Canada, that would astonish some people in London, who never having gone beyond the limits of Britain, drowsily imagine that there is nothing good in the Colonies.

We do not intend by these remarks in any manner to censure Mr. Joyce. He has done just what all English law authors before him have done, written only for England, unmindful of the fact that in Canada, whose jurisprudence is as nearly as possible the same as that of the mother country, decisions may be found as deserving of notice as Scotch, Irish, or United States decisions. It is time that, in this respect, there should be a change, and colonists will hail with pleasure an author who will treat us as deserving of as much consideration as foreigners.

Mr. Joyce's great work would be a casket without a key unless accompanied by a good index. His index to injunctions in equity is very full and well arranged. The same may be said of his index to injunctions at common law. We do not know why there are two indexes. One general index would, we think, be better. There must be a great deal of the work common alike to courts of law and equity. The division of the index has a tendency to throw the enquirer off his guard and in a future edition we would strongly recommend the author to consolidate them. Each index while alphabetical is, to a great extent, analytical, and in each the headings sub-headings, &c, are so arranged as to readily catch the eye. The two indexes together occupy no less than 180 pages. Besides, there is a table of cases (numbering 3,500) which occupies 30 pages.

We feel that this work is destined to take its place as a standard text book, and *the* text book on the particular subject of which it treats. The author deserves great credit for the very great labour bestowed upon it. The publishers, as usual, have acquitted

themselves in a manner deserving of the high reputation which they bear as the leading law publishing firm of Great Britain.

The Principles of Equity, intended for the use of students and the profession. By the late Edmund Henry Turner Snell, of the Middle Temple, Barrister-at-Law. The Second Edition, by J. R. Griffith, Esq., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1872. In 8 vo., 583 pages.

This book is now so well known to the profession and to law students in Canada as to require little notice at our hands. All will welcome the second edition, and yet receive it with regret at the accompanying announcement that its able author is no more.

When the first edition was published in 1868, we were greatly pleased with it. We admired the arrangement of the work, and the author's treatment of the different parts into which the work was divided. The idea of the work first occurred to the author when making notes in the course of his studies for the bar. These notes he enlarged and re-cast, so that he was able, in an intelligent and brief form, to unfold the principles of equity. This he did in five parts—the first, treating of maxims of equity; the second, of the exclusive jurisdiction of equity; the third, of persons under disability; the fourth, of concurrent jurisdiction; and the last, of the auxilliary and specially remedial jurisdiction of equity. The subjects treated of in the second part are trusts of different kinds, such as private trusts, public trusts, implied trusts, constructive trusts, and then chapters are devoted to *donationes mortis causâ*, legacies, conversion, re-conversion, election, performance, satisfaction, administration, marshalling assets, mortgages legal and equitable, pledges, penalties, forfeitures and liens. The subjects treated of in the third part are—separate estate of married women, their pin money and paraphernalia, their equity to a settlement, settlement in derogation of martial rights, infants and persons of unsound mind. The subjects treated of in the fourth part are—accident, mistake, actual fraud, constructive fraud, suretyship, partnership, account, set off and appropriation of payments, specific performance, injunction and interpleader. The subjects treated of in the last part are—discovery, bills to perpetuate testimony, bills *quia timet*, bills of peace, cancelling and delivering up of documents, bills to establish wills and *ne exeat regno*.

The work when first published was valuable to the student for its lucid unfolding of the principles of equity, and to the practitioner for its reliable collection of modern cases. The editor of the second edition, while following as far as possible the author's division of the subject, has brought it down to the present day, by reference to the more important changes effected by subsequent statute or case law. This he has done without much enlarging the size of the book, for while the first edition contained 564 pages, the second contains only 583 pages. The value of the work is increased by the addition of the new law and correction of the old by Mr. Griffith. So far as we can judge, he has done his work with reasonable skill and industry.

The price, in cloth, is 18 shillings sterling.

American Law Review. Boston: Little, Brown and Co., 110 Washington Street. July, 1872.

This number contains interesting articles on the following subjects: Slander and Libel; Responsibility for the condition of demised premises; the Wharton trial, &c.; also, the usual valuable digests of English and American Reports, and a list of law books published in England and America since April, 1872; summary of events, &c.

The British Quarterlies and Blackwood's Magazine. Leonard Scott Publishing Co., 140 Fulton Street.

These first-class reviews are duly received. Small wonder that the enterprise of the Leonard Scott Publishing Company meets with so much appreciation, when people are aware of how much of the best reading matter is given for such a small price. All who can afford it should subscribe at once.

ERRATA.

We regret that some errors occurred in the article in our last number headed "On Judicial Expression." The following corrections should be made: Instead of "whether" in line 20 of the 2nd column read "*where*," and instead of "beneath" in the 6th line of the verses read "*cometh*." "*Abley* v. *Dale*" should read "*Abley* v. *Dale*," and the next sentence should form the commencement of a new paragraph.