The Legal News.

Vol. I. NOVEMBER 2, 1878. No. 44.

THE ORANGE PROSECUTION.

We have noticed from time to time, under the head of "Current Events," the leading incidents of the prosecution directed against certain reputed members of the Orange Association in Montreal. The last event to which reference was made was the charge of Mr. Justice Ramsay to the Grand Jury (*ante*, *p.* 477). The substance of that charge, his Honor has since stated from the Bench, has received the concurrence of his colleagues of the Court of Queen's Bench, and must be taken as an authoritative declaration of the law. Since the date of that address, the trial of the alleged Orangemen has taken place, and resulted in an acquittal. The defendants were tried on two indictments. The first, under the common law, was for unlawful assembly. That is to say, even supposing that the Orange Association is a legal organization, it was charged that the defendants by assembling to walk in procession, were guilty of a breach of the peace, or of an act tending to such breach.* On this indictment the prosecution put in some evidence, but at the close of the case, the presiding Judge (Ramsay, J.) directed the Jury to acquit. The other indictment was under the Statute, chap. 10, C. S. L. C., for being members of an unlawful association.† This prosecution also failed, for the reason that no direct or satisfactory proof could be made that the defendants were members of the Orange Association. The only witnesses who could testify to the fact, declined to answer, on the ground that they would incriminate themselves, as their knowledge of the fact involved the admission that they were themselves Orangemen. When the defendants were discharged, the presiding Judge is represented to have said that "they now knew whether their society was within the law, and if they continued to remain in a society which was contrary to law, they put themselves in great peril, for it might happen that a case would arise where there would be a witness to complete the evidence." His Honor, therefore, holds clearly that the Orange Order comes within the Statute respecting seditious and unlawful associations, and for our part, we have never been able to see any good reason to question the soundness of this opinion.

In connection with this case, we have received a copy of the opinion given by Messrs. Wurtele and Curran, in which a view differing somewhat from that taken by Messrs. Bethune, Carter, Ritchie and Barnard, (*ante*, *p.* 371) is expressed. The former gentlemen hold that the Orange Association is prohibited by the Statute, chap. 10, C. S. L. C., and its members "cannot possess any right to hold meetings, nor claim as such the right to walk in procession and make public displays" in the Province of Quebec; but since the repeal in 1851 of the Act to restrain party processions in certain cases, 7 Vict. c. 6, no statute exists which would authorize the civil or other powers to disperse a procession of Orangemen passing through the public highways in a peaceable manner." The opinion appears at length in another part of this issue.

* The indictment, against the defendants jointly, charged that they "did then and there unlawfully assemble and gather themselves together for the purpose of walking in procession through certain public streets in the said City of Montreal with badges, emblems and regalia calculated to give offence to and excite the hatred of a large number of liege subjects of our Lady the Queen, and cause horror and alarm in defiance of a proclamation of the Mayor, &c., * * * and then and there well knowing that such assembling of themselves and others would provoke a breach of the peace," &c.

† The indictment against each defendant separately charged him with being a "member of the Society known as the Loyal Orange Association, the members whereof bind themselves and assent to an engagement of secrecy of the following import, &c., such engagement of secrecy, not being required and authorized by law," &c.

ELECTION LAW.

In connection with the election of a member to the Commons for the County of Jacques Cartier, several points of interest in the Dominion electoral law have been presented for decision. The candidates were Messrs. Laflamme and Girouard, and the returning officer having declared that the former had received a majority of the votes, a recount of the ballots by a judge was demanded. This took place before Mr. Justice Mackay. His Honor held that his duty under the Act consisted in seeing whether the

deputy returning officers had improperly counted or improperly rejected any ballots, or had made a wrong addition of them; that he had no power to hear evidence or to examine the returning officer or the deputy returning officers. His Honor was disposed to allow considrable latitude in the mode of making the cross on the ballots, and he was also disposed to admit ballots the only objection to which was the omission of the deputy returning officer to initial the number on the back. Under sect. 56, the deputy returning officer was bound to number and paraph any objection made to a ballot. "If he did not," his Honor remarked, "he neglected his duty, but the law did not go on to say that such ballot was null and void. He did not see why a voter should lose his right because the deputy returning officer had omitted to paraph a number, an omission with which the voter had nothing to do." The result of the recount was that Mr. Girouard was declared to have a majority of the votes, and he was returned accordingly.

A prosecution was subsequently instituted against several persons for frauds perpetrated at poll No. 2, in the same county. The charge was that a number of votes cast for Mr. Girouard had been abstracted from the ballot box. Several witnesses being called to prove that they had voted for Mr. Girouard, and that their ballots were not among those returned by the deputy returning officer, it was objected to this evidence that a voter could not be permitted to reveal for whom he had voted, but the Court, Ramsay, J., presiding, overruled the objection, remarking that sect. 77 of the Election Act applied only to a legal proceeding to test the validity of an election, and not to a criminal cause like the present, arising out of a contravention of the law.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 21, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

LAFLEUR et al., (contestants in the Court below,) appellants; and THE CITIZENS' INSURANCE Co., (*tiers saisis* in the Court below), respondents.

Insurance—Condition requiring Notice of other Insurance—Waiver.

A person effected an insurance against fire, for one month, the insurance being subject to the conditions of the fire insurance policies of the company. He asked for a policy, but was told that it was not customary to issue policies for short dates. Among the conditions of the fire policies of the company was one requiring notice of any other insurance effected on the property, and endorsation of such insurance on the policy. The insured failed to give such notice. *Held*, that the non-delivery of a policy to the insured was a waiver on the part of the company of the condition cited.

The question was whether the failure to give an insurance company notice of other insurance effected on the same property, under the special circumstances, rendered the insurance void. One Limoges went to the Citizens' Company and insured his property for one month. He got a receipt for the premium, which stated that he was insured for one month, subject to the conditions contained in the ordinary policies issued by the Company. On getting the receipt he asked the clerk for a policy, but the clerk replied that it was not usual to issue policies for short dates. Limoges then went away, and effected another insurance in the Royal Canadian. He gave no notice to the Citizens' Company of this insurance. Three days afterwards a fire occurred. His creditors, the appellants, having attached the insurance money, the Company declared that they owed Limoges nothing, and when the declaration was contested, they pleaded that by one of the conditions of their policies the insured was bound to notify them of any insurance existing elsewhere. The question was whether the insured was bound by the usual condition of the Company's policies, where no policy issued.

The Court below held the insurance to be void.

The majority of the Court of Appeal, Ramsay, Tessier, and Cross, JJ., reversed this judgment. The reasons are sufficiently set forth in the *considérants* which are as follows:—

"The Court, etc.:—

"Considering that in and by the receipt and undertaking made and delivered by the Respondents, the said Citizens' Insurance Company, to François Xavier Limoges, on the 28th of August, 1876, it was therein in effect declared

that they, the Citizens' Insurance Company, had received from the said Limoges, the sum of $5, being the premium of assurance against loss or damage by fire effected with the Company to the extent of $2000, on a brick encased building in course of construction, on Champlain street, Point St. Charles, near Montreal, (including carpenters' risk) for one month, subject to the conditions of the fire insurance policies of the said Company;

"And considering that the said brick encased building was destroyed by fire on the night of the 31st of August, and morning of the 1st of September, 1876, and that the said F. X. Limoges thereby suffered damages to an extent exceeding the amount of the insurance effected thereon, and although it has been pleaded and established in proof on behalf of the said Citizens' Insurance Company, that one of the conditions of their fire policies is to the effect and in the words following: "The assured must give notice to this Company of any other insurance effected on the same property, and have the same endorsed on this policy, or otherwise acknowledged by the company in writing, and failure to give such notice shall avoid this policy;" and that after the delivery to said Limoges of said receipt and undertaking on the said 28th day of August, 1876, he applied for and obtained from the Royal Insurance Company a like receipt and undertaking insuring the same property to the extent of a further sum of $1000, whereby (*sic*) notice was not given nor allowance thereof made in writing before the said fire on any policy of the said Citizens' Insurance Company; yet it has been established and proved that upon the delivery to him the said Limoges, by the said Citizens' Insurance Company of the aforesaid receipt and undertaking, he asked for and was refused a policy by the said last named company;

"And considering that if the said François Xavier Limoges was under any obligation in respect to such notice and allowance, it was thereby suspended and waived until such policy should be delivered to him, which was not done;

"And considering that upon delivery to him of a policy containing said condition, he was entitled to a reasonable delay to give to the said Citizens' Insurance Company said notice, and get the said allowance in writing;

"And considering that in the said judgment rendered by the Superior Court at Montreal, on the 28th day of June, 1877, dismissing the contestation made by the said appellants to the declaration of the said Citizens' Insurance Company, as garnishees in this cause, there is error;

"This Court doth reverse," &c.

Sir A. A. Dorion, C. J., and Monk, J., dissenting, held that the insured was bound by the condition.

Judgment reversed.

De Bellefeuille & Turgeon for appellants.

Abbott, Tait, Wotherspoon & Abbott for respondents.

Cooey (petitioner in the Court below), appellant; and The Corporation of the County of Brome (defendants in the Court below), respondents.

Voting on the Dunkin Act—Irregularity.

Held, that in a vote of the ratepayers under the Dunkin Act, the failure to keep one of the polls open during the day of voting was a fatal irregularity.

Dorion, C. J., differing from the majority of the Court, remarked that the county of Brome passed a by-law to prohibit the sale of intoxicating liquor within the municipality, and it was provided that the by-law should be submitted to the electors for ratification. The voting took place on the day appointed, and there was a majority for the by-law. The appellant, Cooey, petitioned that the by-law be set aside, first, because the County Council has no jurisdiction to pass such a by-law; secondly, because the by-law was never properly ratified by the electors, inasmuch as in one township—West Bolton—no poll was held, and no vote was taken on the by-law. It was admitted that the poll was not held according to law in this township, and the questions presented for the consideration of the Court were: First. Had the County Council the right to pass the by-law? Second. Did the failure to take the vote in one township annul the voting generally? It was unnecessary to go into all the legislation. As to the question whether the Provincial Legislature in adopting the Municipal Code had repealed so much of the Temperance Act of 1864 as authorized County Councils to enact prohibitory by-laws,

his Honor thought it had not, and the powers of the County Council and the local Council co-exist. The County Council of Brome, therefore, had the right to pass the by-law in question, and to prohibit altogether the sale of liquors within the County of Brome. The second question was whether the vote had been properly taken. The judge in the Court below [Dunkin, J.] held that as the failure to hold a poll in West Bolton could not have affected the result, the irregularity was not material. It appeared that the returning officer opened the poll at ten o'clock, but there being no one to vote, he closed the poll at once, instead of waiting the half hour required by law. There was no complaint on the part of the petitioner that there were any voters who were prevented from voting, or that any injury had been done by closing the poll immediately. He founded his complaint merely upon this, that a formality of the law had not been observed, and not that its non-observance had any effect upon the vote. The question was, was this formality so rigorous in its nature that the absence of it annulled the election? In Parliamentary elections, it had been held that an election would not be annulled because of an irregularity which had no effect on the result. His Honor was disposed to coincide with the view taken by the Judge of the Court below, and to say, first, that the County Council had the right to prohibit the sale of intoxicating liquors; and, secondly, that the failure to keep the poll open at one place for half an hour, not having any effect upon the general vote, did not annul the proceeding. There had been a question raised as to whether the case was appealable. The Judges were all agreed that the case was undoubtedly appealable.

The majority of the Court reversed the judgment, on the ground that the irregularity was fatal. The *considérants* are as follows:

"The Court, etc.

"Considering that it has not been legally proved or established that the by-law in question in this cause, entitled by-law No. 28, passed by the Municipal Council of the County of Brome, held on the 14th March, 1877, prohibiting the sale of intoxicating liquors, and the issuing of licenses therefor within the said County, has been in due form of law approved of by the municipal electors of the said county of Brome by a duly ascertained majority therefor, and more especially it appears by the evidence adduced, that the mode adopted for taking the votes of the municipal electors of the Township of West Bolton, a subdivision of the said County, on the question of the approval or rejection of the said by-law, was irregular, illegal and insufficient; that in fact no poll was held for the taking of said votes of the municipal electors of said Township in manner or form as required by law, and that consequently said by-law is inoperative, null and of no effect:

"And considering that in the judgment of the Circuit Court for the District of Bedford, sitting at Sweetsburgh, on the 11th of July, 1877, there is error, this Court doth cancel, annul, and set aside the said judgment," &c.

Judgment reversed.

O'Halloran, Q. C., for appellant.
W. W. Lynch for respondents.

LARCENY.

What facts, or what condition of circumstances, constitute, or fail to establish, the crime of larceny, has always, and, so long as the law on the subject remains ill defined as it is at present, will always be a matter of profound difficulty to the judicial mind to determine the meshes of the law, or, if we may be permitted to say so, the interstices between the meshes are of such dimensions, that in some cases it is a matter of ease for the knowing criminal to escape thereby into the open; while, again, fine distinctions are drawn at times by the judges on acts, which, to the lay mind, seem innocent, but which are by the former adjudged to be of a criminal nature. Some weeks ago the following facts were proved before one of the metropolitan police magistrates: the prisoner was intrusted by his master with a check for the purpose of having it cashed; the prisoner got the check cashed, failed to deliver the proceeds to his master, and appropriated the money to his own use; it was held by the learned magistrate that upon these facts he was not warranted in convicting the prisoner of, or committing him for, larceny. Now as is well known, there are three factors which go to make up the crime of larceny: (1) The *asportatio*, (2) the *animus furandi*, and (3) the *invitus dominus*. Which of these three factors were wanting in this case? The *animus fu-*

randi, if it exists at all, must precede the *asportatio*; if there be no *asportatio*, there can be no "outward and visible sign" of an *animus furandi*. Sir J. Fitzjames Stephen, in his Digest of Criminal Law, lays it down (pp. 194-5): "The violation of rights of property may be by the misappropriation of property intrusted by the owner to the offender." And here we come to the distinction which evidently governed the learned magistrate in this case. A man may retain the property in a thing, though he may part with the possession. We are landed in this case on the horns of an awkward dilemma: (1), if the owner of the check had divested himself of the property in the check, would not such an act have amounted to an actual gift of the check to the recipient; and (2), if possession of the check only were intended to be passed to such recipient, would the owner, in whom the original *proprietas* of the check was vested, be debarred from resuming (so far as he could) his full *proprietas* in such check, by any dealing, wrongful or otherwise, by the temporary possessor of such check? To put a somewhat parallel case: A gives his servant £1 to purchase a hamper of victuals to bring back to A. The servant purchases the hamper as directed but abstracts therefrom certain of the victuals, and this phase of the case brings us a step further. Are not the victuals in the constructive possession, and therefore the property of A? If so, there can be no doubt that larceny has been committed by the servant. We doubt whether, on the authority of Reed's case, Dearsl. 168,257, the crime would not be consummated, whether A gave his servant the £1 or not; but it is not material to decide this question: 24 & 25 Vict. c. 96, s. 72. The difficulty under which the judicial mind labors is, that it is very doubtful, under any given state of circumstances, whether the three necessary factors of the crime are made out. But the real question must depend upon whether the prisoner had, or had not, the *animus furandi* at the time when the property, or, at least, the possession, was delivered to him; and the question that is here raised is one solely of law. The facts in Reg. *v.* Middleton, 28 L. T. Rep. N. S. 777, were as follows: A depositor in a post office savings bank obtained (the report does not say how) a warrant for the withdrawal of 10s., and presented it to a clerk at the post office, who placed, by mistake, £8, 16s. 10d. on the counter. The depositor took the same. The jury, upon trial, found, as a fact, that the prisoner had an *animus furandi* when he took the money. This conviction was upheld on appeal upon the above grounds; but four judges out of fifteen were desirous of quashing the conviction on the ground, not that the case of *animus furandi* was not made out, but that the money was not taken *invito domino*. This case shows the divergence of judicial opinion as to what facts do or do not establish a case of larceny. In the case alluded to above, viz: a servant intrusted with a check for the purpose of cashing it, another question may be asked: Was not the master in the *constructive* possession of the check, while the said check was in the *actual* possession of the servant? *i. e.*, had the master ever actually parted with his property in the check? If not, there can be no doubt that the servant was guilty of larceny. But again could not the servant be regarded as a bailee? In whom would then the title to the property be vested? And suppose such bailee were himself, forcibly or otherwise, deprived of the property, in whom would the property vest? Surely the subject-matter does not become temporarily a *res nullius*, liable to be reduced into possession by the first occupier, who would in this instance be the bailee. How is the master to reduce the proceeds of the check into possession, so as to confer on himself a legal title to that to which he is undoubtedly morally entitled? If we do not admit the principle in such a case that the possession of the servant is *pro hac vice* the possession of the master, *i. e.*, that the master retains the constructive possession throughout the transaction, we shall be opening a ready door to the criminally disposed, of which they are sure on every possible occasion to avail themselves. We are well aware that the learned magistrate is apparently warranted in the course he took. In Regina *v.* Walsh, (R. & R. 215; Archbold, 395), the defendant, a stockbroker, received from the prosecutor a check upon his banker to purchase Exchequer-bills for him; the defendant cashed the check and absconded with the money. Upon an indictment for stealing the check and the proceeds of it, it was holden to be no larceny, although the jury found that,

before he received the check, the defendant had formed the intention of converting the money to his own use; not of the check, because the defendant had used no fraud or contrivance to induce the prosecutor to give it to him; and because, being the prosecutor's own check, and of no value in his hands, it could not be called his goods and chattels; nor of the proceeds of the check, because the prosecutor never had possession of them, except by the hands of the defendant. It will be observed in the above case, two of the ingredients necessary to constitute the crime of larceny are wanting, viz: (1), the *asportatio*, and (2), (almost as a necessary consequence) the *invitus dominus*. The element in the crime, which to the lay mind would appear most difficult to find, is here clearly and apparently without hesitation found. In the face of 24 & 25 Vict. c. 96, ss. 1, 3, we think the above verdict, on the facts, would not stand. But the case is interesting, as illustrating what subtleties of distinction the judges of half a century ago admitted; it would almost seem that they went out of their way to devise methods whereby parties clearly guilty of at least a grave moral offence might escape. In a subsequent case (Reg. v. Metcalf, 1 Mood. Crim. Cas. 433), the prisoner, who acted as occasional clerk to the prosecutors, was indicted for stealing a check. The check, made payable to a creditor, was given to the defendant to deliver to the creditor. Defendant appropriated it to his own use. It was held by nine judges (one *dubitante*) that defendant was guilty of larceny. Now, this case is really more on all-fours with the case which came before the learned magistrate than the preceding. The only difference is that here the prisoner was to get the check cashed and to deliver the proceeds to his master; in the case quoted the prisoner was to deliver the check, *as a check*, to another person. The act, then, of converting a check, with which one is entrusted, into cash, and then appropriating such cash to one's own use, is divested of criminality. If such really is the law, it would be desirable to import the civil doctrine of relation into such transactions, and presume the three ingredients of larceny against the prisoner upon the proof of the facts, as above, and call upon such prisoner to rebut any one of such presumptions. The question did not, and could not, arise here, whether the subject matter of the theft was or was not the subject of larceny. The prisoner, so far as it appears to us, was discharged on the ground that the money, the proceeds of the check, had never been reduced into the possession of the prosecutor; but, for reasons given above, we think this position is untenable.

We propose to consider in a subsequent article the remedy, suggested by the Code of Indictable Offenses, to meet the serious defect, if such defect can be said to have any legal existence. —London *Law Times*.

CURRENT EVENTS.

CANADA.

THE LEGALITY OF THE ORANGE ASSOCIATION.—The following is the opinion of Messrs. Wurtele and Curran, referred to on page 517:

To the St. Patrick's National Association of Montreal.

Having been requested by your Association to give you our opinion on the status of the Orange Association and of its members in the Province of Quebec, we examined the statutes relating to the matter, and after careful consideration we now proceed to answer your questions in the order in which they were submitted to us.

Question 1.—Is the existence of the Orange Association in this province illegal and prohibited by law?

Answer.—The sixth section of chapter ten of the Consolidated Statutes of Lower Canada, intituled "An Act respecting seditious and unlawful associations and oaths," enacts that every society or association of which the members are required to keep its acts or proceedings secret, or of which the members take or bind themselves by any oath or engagement not required or authorized by law, or of which the members take, subscribe or assent to any test or declaration not required by law, and every society or association which is composed of different divisions or branches or of different parts acting in any manner separately or distinctly from each other, or of which any part shall have officers elected or appointed by and for such part, shall be unlawful combinations and confederacies; and that every person who becomes or acts as a member of any such

society or association, or who maintains intercourse with or aids or abets any such society or association, shall be deemed guilty of an unlawful combination or confederacy. The ninth section exempts Lodges of Freemasons constituted under the authority of warrants from any Grand Master or Grand Lodge of Great Britain or Ireland; and an amendment passed in 1865 29 Victoria, chapter 46, extends the exemption to lodges of Freemasons constituted under the authority of warrants from the Grand Master or Grand Lodge of Canada. The seventh section of the statute imposes the punishment of an imprisonment for a term not exceeding seven years in the penitentiary, or for a term less than two years in the common gaol, upon any person who may be convicted upon indictment of having been guilty of such unlawful combination or confederacy.

This Statute is in force in the province of Quebec, and we are of opinion that the Orange Association falls within the description of societies mentioned, and that its provisions make the lodges established within its limits unlawful combinations and confederacies, and render their members liable to the punishment above mentioned.

Question 2.—Are their meetings and processions and public displays prohibited by our statutes?

Answer.—The Orange Association being prohibited by the statute above mentioned, its members cannot possess any right to hold meetings nor claim as such the right to walk in procession and make public displays in the Province of Quebec; but since the repeal in 1851 of the "Act to restrain party processions in certain cases," 7 Victoria, chapter 6, no statute exists which would authorize the civil or other powers to disperse a procession of Orangemen passing through the public highways in a peaceable manner. The law declares certain societies, within which we are of opinion that the Orange Association falls, to be unlawful combinations and confederacies, but it restricts its mode of enforcement to the individual punishment after conviction upon indictment of their members or abettors.

Question 3.—Can any Orangeman for administering the Orange oath to initiate an Orangeman, be criminally prosecuted under our Statute?

Answer.—The Statute of Canada, 37 Victoria, chapter 37, prohibits the administering of all oaths not authorized or required by law, it declares any person administering an oath not so authorized or required, to be guilty of a misdemeanor, and to be liable to an imprisonment not exceeding three months, or to a fine not exceeding $50.00, at the discretion of the court. The oath to initiate an Orangeman is neither authorized or required by law, and any person administering it would therefore render himself liable to be prosecuted under this Statute for the misdemeanor created by it, in addition to the liability under which he lies for being a member of an unlawful society, under chapter 10 of the Consolidated Statutes of Lower Canada.

Question 4. — Can known Orangemen be arrested for attending as such their meetings or processions?

Answer.—Any person who becomes or acts as a member of a society prohibited by the chapter above mentioned of the Consolidated Statutes of Lower Canada, may be indicted as being guilty of unlawful combination or confederacy. Being of opinion as above stated that the Orange Association falls under the prohibition of the Statute, we hold that persons attending, as members, its meetings or processions within the Province of Quebec, are liable to be proceeded against under its provisions.

Question 5. — Can the known President or Secretary of such Association be prosecuted under our Statute?

Answer.—We are of opinion that they can.

Question 6.—Can the Officers of the said Association be forced to produce their form of oath and minutes of proceedings, and to testify generally in case of such prosecution?

Answer.—They would be required and compelled, like any other witnesses to answer all questions and to produce all papers under their control, of which the answer and production would not criminate themselves.

Question 7.—What legal means would you advise to have the question of the legality or illegality of the existence, processions, displays, &c., of the Orange Association in the Province of Quebec, determined so as to remove all doubt on the question hereafter?

Answer.—The way to obtain a judicial decision on the question of the unlawfulness in this Province of the Orange Association, would be

to lay an information against a member, charging him with being guilty of an unlawful combination and confederacy, in breach of the provisions of chapter 10 of the Consolidated Statutes of Lower Canada.

J. WURTELE, Q. C.,
J. J. CURRAN, Q. C.

Montreal, 24th July, 1877.

DIGEST OF ENGLISH DECISIONS.

[Continued from p. 516.]

Sale.—1. W. Blenkiron & Son, a well-known and responsible firm, did business under that style at 123 Wood Street. One A. Blenkarn ordered goods of the respondents by letter, dated "37 Wood Street." The letters were signed without any initials, and in a manner to look very much like "Blenkiron & Co." Respondents sent the goods to "Messrs. Blenkiron & Co., 37 Wood Street," supposing they were dealing with W. Blenkiron & Son. A. Blenkarn was subsequently convicted under an indictment for falsely pretending, in obtaining these goods, that he was W. Blenkiron & Son. Meantime, the appellants had bought in good faith some of the goods of A. Blenkarn. The respondents brought trover for the goods. *Held*, that there was no contract of sale between the respondents and A. Blenkarn, and accordingly he could give, and the appellants could acquire, no title to them.—*Cundy* v. *Lindsay*, 3 App. Cas. 459; s. c. 1 Q. B. D. 348; 2 Q. B. D. 96.

2. Plaintiff and one P. made a contract for a lot of lumber, to be purchased of P. by plaintiff, and shipped from time to time as it was ready. Subsequently, P. shipped a lot of six hundred tons on a ship chartered by him, by the order and for the account of the plaintiff. The bills of lading stated the goods to be shipped by P., to be delivered "to order or assigns" of P. Plaintiff insured the cargo. P. drew a bill of exchange on the plaintiff, and indorsed it to one C., with the bills of lading. C. discounted the bill at defendant's bank, handing the bank the bills of lading with it. Plaintiff declined to accept the bill without the bills of lading. Thereupon P. drew a second bill to the order of C. on the plaintiff, which was given the defendants in place of the first, "upon the terms of the delivery of the bills of lading to the plaintiff, upon payment of the second bill of exchange." The bills of lading and the bill of exchange reached the plaintiff the same day, the bills of lading "to be given up against payment of" the draft. Plaintiff refused to accept the bill of exchange, and returned it to defendant bank, stating he should pay it at maturity. The cargo was then entered at the custom-house in the name of the defendant. Afterwards, plaintiff offered to pay the bill on receiving the bills of lading, and to give a guarantee for the freight, which the defendant bank pretended to think itself liable for. This was refused, and defendant subsequently sold the cargo. The jury found that P., as well as plaintiff, intended the cargo should be the property of plaintiff on shipment, subject to a lien for the price. *Held*, that the property in the cargo had passed to plaintiff, and he could recover from the defendant bank.—*Marabita* v. *The Imperial Ottoman Bank*, 3 Ex. D. 164.

3. Property was sold at public auction under certain conditions. The auctioneer entered in his book the names of the seller and the buyer, the description of the property and the price, but made no reference to the conditions. *Held*, not to be a sufficient memorandum in writing to satisfy the Statute of Frauds.—*Rishton* v. *Whatmore*, 8 Ch. D. 467.

4. In 1873, G. borrowed £450 of H., giving a verbal promise to give a bill of sale when demanded. H. died in 1874, and her executors were told by G. that he had promised to give a bill of sale, and was ready to do so at any time. They did not demand it; and, in 1877, the executors, hearing that a writ had been served on G., asked for and received a bill of sale of all G.'s property, except book-debts. There was no recital as to when the advance was made, nor of a past promise. The document was duly registered the next day; and two weeks afterwards, being the 17th, G. was served with a debtor's summons. G. notified the executors, who took possession on the 19th, advertised and sold the property on the 23rd. Subsequently, G. was adjudged bankrupt. *Held*, that the bill of sale was not good against creditors.—*In re Gibson. Ex parte Bolland*, 8 Ch. D. 230.

Salvage.—1. In an action of salvage against a ship on behalf of the owners, master, and crew of two steam tugs, it appeared that one tug,

while towing a vessel, saw the ship ashore and in distress, and went off her course to notify the other tug of the accident, and the other tug proceeded to the spot, and saved the ship. *Held*, that both tugs were entitled to salvage.—*The Sarah*, 3 P.D. 39.

2. The steamship S., in distress from a collision, signalled the steamship C., and transferred to her the passengers and some of the cargo. Attempts to tow the S., by the C. failed, and she was abandoned, and her crew were taken on board the C., and they, with the passengers and cargo saved, landed in port. In an action by the owners, master and crew of the C., against the saved cargo of the S., life-salvage was claimed, and also salvage for services to the S., and in saving the cargo. The owners of the cargo cited in the owners of the S., who appeared. The owners of the cargo asked that such portion of the salvage awarded as was life-salvage the owners of the S. should be required to pay. Refused, on the ground that no property of the owners of the S. was saved. —*The Cargo ex Sarpedon*, 3 P. C. 28.

See *Shipping and Admiralty.*

Settlement.—1. Defendant, when an infant, agreed to give seven houses to his intended wife, when he came of age. Fourteen years after the marriage, he executed a post-nuptial settlement, giving nine houses—among which were the aforesaid seven—to trustees, for the separate use of his wife for life, then to himself for life, with power of appointment in the wife as to the disposition after the death of the survivor, and, in default of appointment, in trust to the wife in fee. No reference was made to the above agreement, and it was recited that he had made no settlement in favor of his wife on the occasion of his marriage. Afterwards he agreed to sell three of the houses; and, in action for specific performance, *held*, that there had been no ratification of the agreement as to the seven houses made when the defendant was an infant; that the post-nuptial settlement was voluntary, and there must be specific performance as to the three houses.—*Trowell* v. *Shenton*, 8 Ch18. D. 3.

2. In 1855, a marriage settlement was executed by D., to make provision for his intended wife and the children of the marriage, by which land was given in trust to such uses, &c., as D. and his wife should appoint, and, in default of appointment to D. for life; remainder to the wife for life; remainder to the children as tenants in common in fee; remainder, in case of the death of all the children under twenty-one without issue, to the heirs and assigns of D. There was a proviso that the trustee or his successor should, after the death of the survivor of D. and his wife, leaving a minor child, receive the rents and profits of such child's share, and, after paying for the child's maintenance, &c., invest the balance, and accumulate it for those who should become ultimately entitled to the share from which the same came. There was no power of sale. In 1860, D. and his wife mortgaged the land to E., and appointed it to him, subject to redemption; and E. covenanted to reconvey on payment of the debt and costs to such uses, &c., as the property was then subject to. There was a power of sale providing that the balance of the proceeds of the sale, after deducting the debt and costs should be paid over to "D., his heirs, executors, administrators, or assigns." In 1869, D. died intestate, leaving his wife and children surviving. In 1875, the mortgagee sold the premises under his power, and held the balance subject to the order of the court. *Held*, that D.'s administratrix took the surplus as personal property. There was no resultant trust.—*Jones* v. *Davies*, 8 Ch. D. 205.

Solicitor. — Where a plaintiff's solicitors of record in London employed his country solicitors to get evidence, and one member of the country firm did all the business alone, but had some affidavits sworn to before his partner, *held*, that these affidavits were inadmissible.—*Duke of Northumberland* v. *Todd*, 7 Ch. D. 777.

See *Attorney and Client*, 1, 2.

Specific Performance.—See *Contract*, 2.

Surety.—One E., an insurance agent, committed acts which his principal, an insurance company, was advised amounted to embezzlement, and the company ordered his arrest. Thereupon, some friends of E. had an interview with the company's manager, and proposed an arrangement by which the company should be secured and E. go free; but the manager refused to consider it. Later on the same day, the company was advised that E.'s acts did not amount to embezzlement, and the order for his arrest was thereupon countermanded. Two days after, E.'s friends, not knowing the order for arrest had been stopped,

and not being informed of it by the company, made an arrangement by which they became sureties for E., by depositing a sum to be held as collateral security for the payment by E. of the amounts due the company from him. The sums not being paid, the company sued for this deposit against the sureties, and the latter brought a cross-action to annul the agreement. *Held*, that the agreement was not binding on the sureties, as having been made by them under the supposition that E. was liable to be arrested, to which supposition they were led by the company. *Semble*, also, that the agreement was bad, as savoring of compounding with felony; but the court would interfere actively, and not stay its hand in a such a case.—*Davies* v. *The London & Provincial Marine Ins. Co.*, 8 Ch. D. 469.

Taxes.—A taxing act must be construed strictly, *per* the Lord Chancellor (LORD CAIRNS).—*Cox* v. *Rabbits*, 3 App. Cas. 473.

Trade-mark.—The plaintiff got a patent for a kind of floor-cloth, in 1863, and continued the sole manufacturer thereof until the expiration of the patent. He devised the name "Linoleum" for his article, and no one else had ever undertaken to use that name until after the expiration of the patent, when the defendants proposed to manufacture the article under that name. *Held*, that the plaintiff was not entitled to protection in the sole use of the name.—*Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. 834.

2. W. owned all the collieries in the parish of R., except one belonging to the "W. Coal Co." For some time prior to 1873, W. worked her collieries, using her own name and the designation "The R. Coal Works." In 1868, the defendants set up at R. as coal merchants, styling themselves "The R. Coal Company." Thereupon, in 1873, the plaintiff changed her style to "W.'s R. Collieries." In 1875, defendants bought out C. & Co., bankrupt retail coal dealers at G., in Surrey, and continued their business there, advertising themselves "The R. Colliery Proprietors,.... (Late C. & Co.)...., Supply direct from the collieries." This was followed by a specification of kinds of coals mined at plaintiff's R. collieries. On their office they put "The R. Colliery Proprietors. Coal Office." The plaintiff remonstrated, and the sign was changed to "The R. Coal Co., Colliery Proprietors. Coal Office." Subsequently, in 1876, defendants for the first time became proprietors of a colliery, by leasing one not in the parish of R., but within a district called the "R. District," all the coal from which was known in some places as "R. Coal." *Held*, that the defendants were not authorized to use the designation "The R. Colliery Proprietors," they having no colliery in the parish of R., or to use any form implying that they sold coal from that parish; and that it was unnecessary for the plaintiff to prove actual damage to entitle her to prevail.—*Braham* v. *Beachim*, 7 Ch. D. 848.

Trust.—1. A testatrix devised real estate to D., her solicitor, and M., a neighbor, whom she saw very little of, as tenants in common, absolutely and free from any trust. She had told her solicitor that she wished to leave her property for charitable purposes, and he had explained to her that she could not so dispose of her real estate. M. had no communication with the testatrix about the matter, and did not know until her death that the property had been given to him. D. explained to her, when she proposed to leave the property to D. and M. absolutely, that they could put the money in their own pockets if they chose; and she replied that she was aware of that, and intended to give it absolutely, and she had no doubt they would make a good use of it. Appended to the will was a statement signed by the testatrix stating that she had made the gift to enable D. and M. to assist certain institutions in which they knew she was interested, in case they saw fit, and not otherwise; but that she had imposed no secret trust upon them, nor had they given her any promise to apply the money in any way but for their personal benefit. *Held*, that there was no trust imposed either upon D. or M., and the devise was good.—*Rowbotham* v. *Dunnett*, 8 Ch. D. 430.

2. Bequest of £3,000 to trustees, to hold for the three minor daughters of testator's deceased daughter until the youngest survivor thereof attained twenty-one, and then to divide the principal and accumulation among the survivors. The trustees were directed to apply the whole or such part of the income, as the trustees should think fit, to the maintenance and education of the daughters while under twenty-one. The father of the legatees applied to have the whole of the income paid him for

their education and maintenance, instead of a small portion thereof allowed him by the trustees. His income was only £200 a year; he had five children by a second marriage, and had contracted debts in maintaining the three daughters of his first wife at school. *Held* that the court could control the discretion given the trustees; and it was ordered that the trustees pay the whole of the income to the father for the future, as well as what had already been withheld and accumulated.—*In re Hodges. Davey* v. *Ward*, 7 Ch. D. 754.

Ultra Vires.—See *Company*, 1; *Contract*, 2; *Railway*, 2.

Vendor and Purchaser.—See *Sale.*

Waiver. — The defendant executed a deed covenanting to pay the plaintiff £400 on demand with interest; and it was provided that the debt should run two years, if the interest should be "punctually" paid; and the defendant charged his leaseholds with the debt, and agreed to give a formal mortgage on them on demand. Six months' interest becoming due and not being paid, the plaintiff demanded the £400 and interest or a formal mortgage. The defendant paid the interest, and the plaintiff gave a receipt for it "without prejudice to the notice." He offered to accept an instalment of £100. *Held*, that neither receipt of the interest nor the unaccepted offer operated as a waiver of plaintiff's right to recover the whole at once.—*Keene* v. *Biscoe*, 8 Ch. D. 201.

Warranty.—See *Charter-party.*

Way.—The defendant owned a house with a gateway under it, and a yard in the rear, partly covered. The road under the gateway and the yard were paved with stones, and there was no other approach to defendant's stables in the rear, where he kept his horses; allowing his vans, when not in use, to stand in the yard. Defendant leased the yard to the plaintiff, with power to erect a building suitable for his business of gas-engineer. Plaintiff was not "to obstruct the entrance and gateway, except by the use of the entrance for the purposes of ingress and egress." Plaintiff erected his building, to which, as to the stables, there was no approach except by the paved way. Plaintiff applied for an injunction to restrain the defendant from obstructing the way with his vans, and alleging damage to his business from such obstruction. *Held*, that under the lease he had a general right of way unobstructed.—*Cannon* v. *Villars*, 8 Ch. D. 415.

Will.—1. A testator directed his executors "to pay my.... debts out of the proceeds of my property." Then followed, "Whereas I am possessed of landed and chattel property, as stated in the annexed schedule, I direct my executors to sell" four pieces of landed property named "for its full value." A fifth piece was then devised to W. for life, remainder to F., ultimate remainder to T., and T. was made residuary legatee. Several legacies were given. The will was written on three sides of a sheet of paper; the signature and attestation were at the bottom of the third page. The fourth page contained a schedule of testator's landed property, and was headed "Schedule referred to within." It contained the four pieces ordered to be sold; and at the bottom of the schedule the statement that the fifth "is not included in the above schedule, it being willed by me to W.: my executors have no control over it." The schedule was signed by the testator, and bore the same date as the will. The attesting witnesses to the will knew nothing about the schedule. *Held*, that the schedule formed no part of the will, and could not be referred to in construing the will; but that by the will proper all the real estate, except the specific devise to W., was to be turned into money for the general purposes of the will, and that what remained went to T., the residuary legatee, and not to the heir-at-law.—*Singleton* v. *Tomlinson*, 3 App. Cas. 404.

2. H. died April 16, 1852, leaving a will, by which he devised real estate to trustees for his wife, during her life or widowhood, and, upon her second marriage, for certain trusts named during her life, and then to G. M. absolutely. He then gave personal property in trust to pay the income to the wife until her second marriage; and upon that event "all the bequests" in her favor were to cease, and she was to receive £500 a year during her life, to be paid from the rents of the real, and any deficiency to be made up from the income of the personal estate; and the trustees were to accumulate the balance until her death, and then pay it over in certain legacies specified. As to the residue of the whole personal property and the income thereof, and the rents from the real property accumulated at the wife's death, he

gave it to T. M. absolutely. The wife married in 1854, and her annuity was paid until the present time, and the surplus accumulated. On a case made for instructions as to the disposition of the accumulation, *held*, that under Thellusson's Act there was no valid disposition of the surplus rents and income from April 16, 1873, until the death of the wife, and T. M. was not entitled to it as residuary legatee.—*Weatherall* v. *Thornburgh*, 8 Ch. D. 261.

3. A testator devised the residue of his property to his wife for life, and at her death, absolutely to such of the children of his late sisters as should survive his wife, and being males should attain twenty-one, or being females should attain that age or marry. "But, in case any of such children shall be dead at my decease leaving issue, then I direct that such issue shall take.... the share of their deceased parent." *Held*, that the issue of a niece of the testator who died before the date of the will could take nothing.—*West* v. *Orr*, 8 Ch. D 60.

4. A testator bequeathed to trustees "the sum of £3,000, to be applied by them in supporting or founding free or ragged schools for gutter-children, or for the poorest of the poor;" and added in a codicil, that "such school or schools should be situated in the parish of B. .... for the resident poor of said parish." For some years prior to the testator's death, there had been such a school maintained by him in a hired room in B. *Held*, that the gift was in the alternative, and that a bequest for "supporting" such a school could be made without violation of the Mortmain Act, which forbids a testamentary gift to be "laid out or disposed of in the purchase of any lands, tenements, or hereditaments" for a charity.—*In re Hedgman. Morley* v. *Croxon*, 8 Ch. D. 156.

5. A testator died possessed of, *inter alia*, £2,900 Egyptian nine-per-cent. bonds, shares in two corporations, an interest in a copyright, a leasehold house where he lived, and a leasehold house held for a term determinable on the death of one H., and a policy for £3,000 on H.'s life. By his will, he gave some pecuniary legacies, made specific bequests of his plate, books, and apparel, of £2,400 of the Egyptian bonds, and of all the other property above specified. The residue he gave to his nephew A., mentioning expressly therein his carriage and furniture. After the date of his will, the testator married, and thereupon made a codicil to his will, giving his wife the income for life in all his property, postponing "the payment of all legacies, and the distribution of all estates vested in me, or over which I have any power of disposition or appointment, until after her decease." Between the date of the will and the date of the codicil, the testator sold the Egyptian nine-per-cent. bonds, and bought with part of the proceeds other Egyptian bonds, called Khedive bonds. E., the legatee of the leasehold, depending on the death of H. and of the policy on H.'s life, was to receive "all the bonuses and additions thereto," and "pay the future payments in respect thereof." By the provisions of the policy, the holder could take the bonuses either to increase the sum insured, or in part payment of the premiums. *Held* (BAGALLAY, L. J., diss.), that the residue must be converted, and the income paid the widow during her life; that the Khedive bonds formed part of the residue, the specific legacies of the Egyptian nine-per-cent. bonds having been adeemed when the bonds were sold; that the furniture formed part of the residue; that the houses must be added to the capital insured; and the premiums must be raised by mortgaging the policy.—*Macdonald* v. *Irvine*, 8 Ch. D. 101.

GENERAL NOTES.

THE LATE MR. HILLIARD.—Francis Hilliard, the well-known legal writer, died at his residence, Worcester, Mass., on the 9th ult. He was born at Cambridge, Mass., in 1806. He was graduated at Harvard College in 1823. After his admission to the bar he practised for some years. He was at one time a Judge of the Massachusetts Insolvency Court, and also sat in the Massachusetts Legislature. But he is best known to the profession, by the legal treatises bearing his name, comprising treatises upon Elements of Law, (a second edition of which in two volumes has just been issued) Injunctions, Bankruptcy, Contracts, Mortgages, New Trials, Taxation, Torts, Remedies for Torts, Real Property, Sales, Vendors, etc., several of which have passed through from two to four editions.