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CONTEMPT OF COURT—THE McDERMOTT CASE.

We intimated our intention last month to revert to the case of McDermott, noticed in the judgment of the Court of Queen's Bench in Mr. Ramsay's case. The report first communicated to us, and printed at page 146, was that published in the *Times* newspaper, but we have since received that contained in "The Law Reports," which gives the facts and judgment at much greater length.

The first circumstance worthy of note is that when McDermott made his application to the Privy Council on the 3rd November last, the term of six months, during which he was to be imprisoned, had actually expired on the 13th October previous. Laurence McDermott was the publisher of the *Colonist* newspaper, in British Guiana, and the alleged contempt of Court consisted in publishing in that newspaper two articles supposed to reflect on James Crosby, Esq., one of the Judges of the Supreme Court in that Colony, and on Mr. Ross, a barrister practising in that Court. The petition for leave to appeal stated that great dissatisfaction had existed respecting the judicial proceedings of the Supreme Court, and especially with regard to certain proceedings taken against Mr. Campbell, one of the officers of that Court, who, by reason thereof, had been compelled to resign his office; that the petitioner, in reporting the particulars of such proceedings, allowed them to be commented on, and their nature and legality to be discussed in two articles in the *Colonist* newspaper. That the petitioner had an intimation that an *ex parte* order, dated the 2nd April, 1866, had been issued by the Supreme Court against him, in the following form:—"Upon the information and motion of Edward Charles Ross, Esq., Barrister-at-Law, this day made to me in non-session of this Court, and upon reading the affidavit of James Burford, dated and sworn this day, and filed in this matter; and upon reading a certain copy referred to in such affidavit of a printed newspaper called the *Colonist*, appearing to have been published by one Laurence McDermott, at his office, Lot 26, Water Street, New Town, on the 29th day of March last, wherein are printed and published divers scandalous and libellous articles and statements reflecting on the administration of justice in this Colony by the Supreme Court thereof; and in particular certain scandalous and libellous passages and statements as to his honour James Crosby, Esq., one of the judges of the said Supreme Court, maliciously abusing and threatening the said judge, and tending to the great obstruction of the course of justice, and being in contempt of this Court, I do hereby order and direct that the said Laurence McDermott do personally attend this Court at its sitting, in George Town, on Wednesday next, the 4th day of April instant, at half-past ten A. M., and further that he then and there show cause why an attachment should not be issued against him for such contempt as aforesaid, or why he be not committed to prison or otherwise dealt with in respect of such contempt according to law, and as the Court shall think fit to order. J. Beaumont, C. J."

The petition further stated that this order was not personally served on the petitioner, but was left at the registered office of the *Colonist*, and was handed to the petitioner by one of his servants; and the petitioner having such notice, and the same purporting to affect his personal liberty, he appeared in Court on the 4th of April, 1866. That the Court, consisting of Chief Justice Beaumont, and Mr. Justice Beete, thereupon adjourned the matter of the order to the 6th April, when the petitioner again appeared, and his Counsel were heard on his behalf. The Court then took notice of another article which had appeared in the *Colonist* on the 5th April, reflecting upon the proceedings of the Court, and the petitioner was ordered to appear again on the 10th April, to answer as well for the former contempt as that of the 5th April. On the 10th April, the petitioner again attended personally, and being called on to show cause, as directed by the order of 6th April, his counsel objected to do so, alleging that the order was

irregular, and ought not to be proceeded on; but that the Court ought, without reference thereto, to adjudicate on and dispose of the matters alleged against the petitioner, and as to which he was called on to show cause by the orders of the 2nd and 4th of April. The Court overruled this objection, and held that the order of the 6th April was regular. And further (as his counsel objected that the order was pronounced *ore tenus*, and that no minute or written copy thereof had been served on him), the Court considered that the petitioner having been present personally and by his counsel in Court, when such order was made, it was not necessary to serve him with any minute or copy thereof. The petitioner refused to show cause, and the informant having been heard, the Court reserved its decision till the 13th of April, when it gave judgment, adjudging that McDERMOTT had committed a high contempt of the Court by printing and publishing the articles of the 29th March and 6th April, and ordering that he be imprisoned for six months. The petitioner was delivered into custody the same day under a warrant of commitment made by Chief Justice BEAUMONT.

Being advised that the order of commitment was illegal, he applied to the Court before he was taken into custody, and afterwards by petition, for leave to appeal from the order of commitment to Her Majesty in Council. In his petition for leave to appeal he stated that the order had the effect of a final or definite sentence, involving a civil right, namely, his right to liberty for six months, which was of more value to him than the sum of £500, the sum limited by the Order in Council regulating appeals from the Supreme Court to Her Majesty in Council. By the aforesaid Order in Council it is provided, that if the party appellant shall establish to the satisfaction of the Court that real and substantial justice requires that, pending such appeal, execution should be stayed, it shall be lawful for such Court to order the execution of any judgment to be suspended pending such appeal, if the appellant shall give security for the immediate performance of any judgment which may be pronounced by Her Majesty in Council upon any such appeal; and the petitioner submitted that real and substantial justice required that, pending such appeal, execution should be stayed, inasmuch as the petitioner had been condemned to be imprisoned for six months; and unless the execution of the sentence was stayed pending the appeal, the petitioner, in the event of the appeal being decided in his favour, would in all probability, before the decision could be made known in the colony, have undergone the whole period of such imprisonment, and be without remedy or redress for having suffered the same. On the 4th May, 1866, Chief Justice BEAUMONT refused to grant the petitioner leave to appeal, on the ground that it was not an appealable case within the provisions of the before mentioned Order in Council of the colony.

The petitioner then petitioned Her Majesty, praying for inquiry and relief in the matter of his imprisonment, and was advised by the Lieutenant Governor of the colony and the Secretary of State for the colonies, that the only redress he could obtain was by an appeal to be heard by the Judicial Committee. The petitioner accordingly moved for leave to appeal from the order of the 13th April, 1866, and the judgment of the Supreme Court of the 4th May, 1866, refusing him leave to appeal. The following is the report of the argument and judgment given in the Law Reports (1 P. C. 266—8).

"Mr. *Coleridge*, Q. C., for the petitioner, said: Although the appealable value is limited by the Order in Council of the 20th June, 1831, to £500, yet we submit that, in a case such as this, where the liberty of the subject is involved, an appeal will lie irrespective of any money value. If the rule were otherwise, the grossest injustice on the liberties of British subjects resident in the colonies, might be perpetrated at the caprice of the judges in the colonies. It is essential, therefore, that such an appeal should be allowed. It has been admitted in several cases: *Smith* v. *The Justices of Sierra Leone* (3 Moore's P. C. Cases, 361); *Rainy* v. *The Justices of Sierra Leone* (8 ibid. 47). In this country the petitioner would have had his remedy by writ of *Habeas Corpus*, but in a case like this, that writ could not be obtained from a Colonial Court, and since the statute, 25 and 26 Vict. c. 20, s. 1, it cannot be applied for here. [LORD WESTBURY:

Suppose a contempt at *Nisi prius* and a fine inflicted, would an appeal lie?] Perhaps not in England, but in the colonies it is different; thus in *Rainy* v. *The Justices of Sierra Leone*, an appeal from an order imposing fines and imprisonment on a practitioner of the Court was allowed; and though that case broadly lays it down that, in the case of contempt, the Court making the order is the sole judge of what constitutes the contempt, the appeal was admitted by this Court on the ground of the illegality of the order, and the alleged contempt was inquired into.

"LORD WESTBURY: Their Lordships regard this case as one of great importance, and one that may lead to important consequences. On the one hand it is essential to preserve a Court from all obstruction to the course of justice; on the other hand, it is very desirable that there should be a check upon any arbitrary exercise of the powers of the Court. But at present, having regard to the distinction between things done by practitioners of Colonial Courts, and things done *in curia*; things done directly leading to interference with the administration of justice, and things which do not come within either of these categories, their Lordships are disposed to give leave to appeal, but without prejudice to the question, whether there is a right of appeal or not. Our object is that of necessity this important question should be fully argued when it comes before us."

By an Order in Council, made on the petition, it was ordered that the petitioner should be allowed to enter and prosecute his appeal from the order of the Supreme Court of the 13th April, and the judgment of the 4th May, 1866, without prejudice to the competency of Her Majesty in Council to entertain an appeal from an order of a Court of Record, inflicting punishment, by fine or imprisonment, for a contempt of Court, which question was to be open to argument on the hearing of the appeal, and a copy of the order was directed to be served on the Judges of the Supreme Court, with leave to put in their answer to the appeal.

It is apparent from the report that in this case the judge assailed (CROSBY) took no part whatever in the proceedings against MCDERMOTT. Though a judge of the Supreme Court, he appears to have been absent on every occasion when the case was before the Court. This may have been merely accidental, or, more probably, in consequence of the natural reluctance of a judge to take part in an inquiry, in the course of which he may be exposed to fresh insult. At all events, no allusion to the circumstance occurs in the report, and there is no ground for supposing that Mr. Justice CROSBY deemed himself incompetent. We have as yet received no account of further steps before the Privy Council. Possibly MCDERMOTT, having undergone the full term of imprisonment, may shrink from the expense of prosecuting an appeal, which can give him no substantial redress.

ACTION QUI TAM.

M. LE REDACTEUR.—Le gouvernement vient de refuser d'obéir à une loi passée en 1864, sous les circonstances suivantes:

La clause 3 du ch: 43, de la 27-28 Vict., dit: "Il sera loisible à la couronne d'intervenir aux "dites actions ou poursuites dans le Bas Cana- "da en tout état de cause, et d'en prendre seule "la conduite; pourvu que s'il appert, après la "fin d'icelles, qu'il y a une raison suffisante "pour intenter la poursuite, et si le dit pour- "suivant a fourni à la couronne, qui sera ainsi "intervenue, toute l'aide et les renseignements "en son pouvoir, pour faire triompher l'action, "la couronne rembourse au poursuivant ses "frais de poursuite."

Pour ne compromettre aucune des parties intéressées, nous nous abstiendrons de les nommer. A. avait souffert des dommages du défaut d'enrégistrement de la déclaration de société existant entre B. et C. Il se crut justifiable d'intenter une action *qui tam*, conformément à la loi, contre B. et C. pour le recouvrement de la pénalité, tant en son nom qu'au nom de Sa Majesté. Mais au moment de prendre le bref, il s'apperçoit que B. et C. se sont fait poursuivre par un homme de paille, et il apprend en même temps que l'avocat de cet homme de paille n'est qu'un prête nom, qui sert à déguiser l'intervention des avocats de B. et C. Sous ces circonstances, A se crût justifiable d'informer la couronne de cette tentative de fraude contre ses intérêts, n'agissant en cela qu'en conformité à la loi.

Le 2 mars dernier, A écrit au procureur général et le prie de se prévaloir des dispositions de la loi ci-dessus citée et d'intervenir dans les actions *qui tam*, tout en l'informant de tous les faits qui pouvaient faire ressortir la fraude concertée entre B. et C.

Voici l'étrange réponse du Gouvernement :—

"Bureau du Procureur General, B. C.
"Ottawa, le 15 Mars, 1867.

"Monsieur,

"J'ai reçu instruction de l'Honorable Sir N. F. Belleau, de vous informer, en réponse à votre lettre en date du 2 de mars courant, que les tribunaux judiciaires se trouvant saisis des causes auxquelles vous faites allusion, la justice doit avoir son cours,—et que l'intervention du Procureur-Général dans ce cas ne serait pas justifiable.

Je vous renvoie l'affidavit qui accompagnait votre lettre.

J'ai l'honneur d'être,
Monsieur,
Votre très obéissant serviteur,

(Signé) GEO. FUTVOYE."

A ne pouvait laisser sans réplique une semblable réponse.

"Montréal, 28 mars, 1867.

Hon. Procureur-General, B. C.
Ottawa.

Monsieur.—Je n'ai pu répondre avant ce jour à la lettre que j'ai reçue du Bureau du Procureur-Général, B.C., en date du 15 courant, par laquelle vous me dites que les tribunaux, se trouvant saisis des causes auxquelles je faisais allusion, la justice devait avoir son cours,—et que l'intervention du Procureur-Général dans ce cas ne serait pas justifiable.

Je vois que je n'ai pas été compris, et j'espère que vous prendrez en considération les remarques qui suivent :

Deux associés sont passibles chacun d'une pénalité de deux cents piastres, pour ne pas avoir fait enrégistrer leur déclaration de société dans le temps voulu par la loi, et moitié de l'amende appartient au poursuivant, et moitié à la Couronne. Ces associés, se voyant près d'être poursuivis par moi, qui ai eu à souffrir de ce défaut d'enrégistrement, se poursuivent eux-mêmes sous un nom supposé, et le même avocat conduit la procédure, tant pour la demande que pour la défense, toujours sous différents noms, afin de frauder la loi et la Couronne.

En vertu du ch. 43, 27 et 28 Vict., la Couronne a le droit d'intervenir dans toutes les actions *qui tam*, et en tout état de cause (section 3), dans le but de voir à ce que ces poursuites, quand elles sont intentées, soient sérieusement conduites, et empêcher qu'elles aient lieu dans le but de défaire les fins de la loi. Si la justice n'eut pas été saisie, l'intervention de la Couronne n'était pas nécessaire, et le soussigné se serait chargé lui-même de faire une poursuite sérieuse, et dont la Couronne eût profité. C'est précisément parce que la justice est saisie, que l'intervention de la Couronne est nécessaire,—c'est parce qu'elle est saisie dans un but frauduleux, et pour empêcher qu'un poursuivant sérieux en ait saisi la justice, que le soussigné a pris la liberté d'informer le Procureur-Général, que le cas prévu par la loi suscitée se présentait.

Sous ces circonstances, je ne doute pas que vous en veniez à la conclusion que votre devoir est d'intervenir, lorsqu'une personne de bonne foi informe la Couronne qu'on veut la frauder et éluder la loi.

J'ai l'honneur, &c.,

A.

Voici maintenant la conclusion à laquelle le Gouvernement en est venu :

"Bureau du Procureur-General, B. C.
Outaouais, le 8 avril, 1867.

"Monsieur,—J'ai reçu instruction de l'Honorable Sir N. F. Belleau, d'accuser réception de votre lettre en date du 29 de mars dernier, et de vous mander que ma lettre du 15 de mars aussi dernier, est la seule réponse qu'il se croit justifiable de donner dans cette affaire.

"J'ai l'honneur, &c.,

"(Signé,) GEO. FUTVOYE."

De tout cela il résulte que le Gouvernement considère comme lettre morte la loi de 1864, qui a été faite dans un but de protection. Mais ce qu'il y a d'étrange dans la correspondance ministérielle, c'est l'absence de logique : "c'est parce que les tribunaux sont saisis, que nous n'intervenons pas." Est-ce que vous auriez pu

intervenir si les tribunaux n'avaient pas été saisis ?. On veut que la justice ait son cours, et pourtant on la laisse aux prises avec des gens décidés à la détourner de son cours régulier, c'est-à-dire, décidés à éluder la loi et à frauder la Couronne.

Si c'est ainsi que le Gouvernement entend l'exécution des lois, il nous semble que nous pourrions avoir des sessions moins longues et des statuts moins considérables.

GONZALVE DOUTRE.

13 avril.

BANKRUPTCY—ASSIGNMENTS.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Abbott, Richard	London	Thos. Churcher	London	April 3rd.
Amos, John	London	L. Lawrason	London	March 30th.
Anderson, John	Holim, C. W.	Thomas Saunders	Guelph	April 5th.
Arcand, Alphée, individually and as partner of Arcand & Frère	Lambton, C. E.	T. Sauvageau	Montreal	April 1st.
Atkinson, Wm. Thos.	Whitby	James Holden	Whitby	April 2nd.
Baker, Wm. S.	Frelighsburg	Wm. M. Pattison	Frelighsburg	April 8th.
Barron, Geo. R.	Owen Sound	George J. Gale	Owen Sound	April 4th.
Bell, James	Pembroke	Thos. Deacon	Pembroke	March 30th.
Bletcher, Wm.	Port Hope	E. A. Macnachtan	Cobourg	April 9th.
Bradbury, Jas. Roberts	Toronto	Thomas Clarkson	Toronto	April 13th.
Branchaud & Frère	Ste. Cécile, C. E.	T. Sauvageau	Montreal	April 5th.
Burbank, Jas. R., and Geo. H. Goddar, individually and as partners of Burbank & Goddar	Richmond, C. E.	A. M. Smith	Sherbrooke	April 5th.
Carey, Daniel	Quebec	A. Fraser	Quebec	April 12th.
Currin, Joseph	Township of Gloucester	Francis Clemow	Ottawa	April 2nd.
Daigle, Pierre, Odile Hebert and Hector Duvert, individually and as firm of Daigle, Hebert & Duvert	Montreal and St. Charles.	T. Sauvageau	Montreal	March 28th.
Delaney, James	Kingston	Henry C. Voigt	Kingston	April 10th.
Delaney, Peter	Kingston	Henry C. Voigt	Kingston	April 10th.
Denison, R. B.	Toronto	W. T. Mason	Toronto	April 6th.
Fletcher, Edwin	Oil Springs	George Stevenson	Sarnia	April 16th.
Franks, William	Lucan	Thos. Churcher	London	April 11th.
Gale, Benjamin	Northridge	J. McCrae	Windsor	March 29th.
Gemmill, Wm., individually and as copartner of Gemmill, McDougall & Co.	Montreal	A. B. Stewart	Montreal	April 1st.
Girard, Barthèlemy	St. Pie, C. E.	T. S. Brown	Montreal	April 9th.
Harper, John	Toronto	Thomas Clarkson	Toronto	April 12th.
Hill, John & Wm.	Township Logan	Thos. Miller	Stratford	April 3rd.
Kennedy, Adam	Pembroke	Thos. Deacon	Pembroke	April 16th.
McDonald, A. & Sons	Montreal	John Whyte	Montreal	April 10th.
McKinn, Christopher S.	Napanee	W. S. Williams	Napanee	April 13th.
McNeely, John B.	Sarnia	George Stevenson	Sarnia	March 18th.
Maddocks, Thos. B. H.	Stratford	Thos. Miller	Stratford	April 3rd.
Provandie, Charles A.	Sherbrooke	A. M. Smith	Sherbrooke	April 13th.
Ranney, Geo. Worner	Belleville	Geo. D. Dickson	Belleville	March 29th.
Ross, John	Clinton	S. Pollock	Goderich	March 28th.
St. George, J. Bte.	St. David, C. E.	T. Sauvageau	Montreal	March 28th.
Ste. Marie & McDonell, and McDonell & Ste. Marie	Knowlton and Waterloo.	T. Sauvageau	Montreal	April 10th.
Smallacombe, Roger	Stratford	Thos. Miller	Stratford	April 3rd.
Smith, Robert Cattle	Toronto	Thomas Clarkson	Toronto	April 5th.
Stanton, Nicholas	Kingston	R. M. Rose	Kingston	April 5th.
Taggart, John	London	Thos. Churcher	London	April 15th.
Taft, Wm. Campbell	Ulverton, C. E.	John Whyte	Montreal	April 2nd.
Traher, Wm. J., and Alfred Suhler	London	Thos. Churcher	London	March 28th.
Treffrey, Henry	Township of Howick	S. Pollock	Goderich	March 28th.
Walsh, James	St. Davids	W. A. Harvey	St. Davids	April 15th.
Wartman, Barnabas	Township of Kingston	R. M. Rose	Kingston	April 2nd.
Watson, David	Culloden	Jas McWhirter.	Woodstock.	April 8th.
Watson, James	Goderich	John Kerr	Toronto	April 10th.
Whitcomb, Martin C.	Napanee	W. S. Robinson	Napanee	April 6th.
Wood, Alonzo	Shefford	A. B. Foster	Waterloo	April 19th.
Woodward, Francis, and Edwin D. Broughton	Petrolia	George Stevenson	Sarnia	April 13th.

N. B.—The Writs of Attachment are not given separately. The names of the insolvents against whom attachments issue will appear in the table of assignments when assignees are appointed.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

RAMSAY *v.* THE QUEEN.

[Continued from page 240.]

BADGLEY, J. (Conclusion.) Reference has been made to the recent McDermott case before the Privy Council, in which Mr. McDermott, the editor of a newspaper in Demarara, had been subjected to six months' imprisonment on a conviction in contempt for publishing in his newspaper what the judgment of conviction affirmed to be scandalous, reflecting upon the Court and the administration of justice. That case has no application to this particular, and even McDermott's counsel before the Judicial Committee of the Privy Council calls it a case of peculiarity, and as such entreats the Court to permit the issue of the appeal. And the judges of the Privy Council appear to have so taken it, inasmuch as they abstain from any opinion upon the matter of the application, and content themselves with saying that they would give leave to appeal, but would reserve to themselves the right to consider *whether the appeal was allowable.* Under all these circumstances I am of opinion to quash the writ.

DUVAL, C. J. The law of discretion is the law of tyrants, and a judge who relies on that law, is a tyrant on the Bench. On the other hand, if a judge respects the law of the land, his decisions will be respected. Otherwise a judge might indulge term after term in improving on the criminal law of England. One day he might say that there was no capital punishment, and another, that there was a writ of error in cases of contempt, although there has not been a single case cited. We are to be guided by the criminal law of England, and not by individual judicial notions of public convenience. Our own statute has made no change. What is the criminal law of England as stated on this subject? That every Court must be the judge of its own contempts. Blackstone already referred to, in treating of contempts, says that the judgment of the Court is to be carried into immediate execution. And if so, how can there be a writ of error? A man, for instance, is sent for twenty-four hours to jail. He suffers the punishment before he can get his writ of error. There is not a single case in the English books that can be referred to in support of such a pretension. In the case of McDermott, communicated to the *Lower Canada Law Journal*, (*Vide ante*, p. 146), we are told that different rules were laid down. On the contrary, Lord Westbury distinctly said the Committee would reserve to themselves the right to consider whether the appeal was allowable. We cannot find any authority which would justify us in interfering in this case. We are told that if in England there is no writ of error, there is one by our own criminal law. On what is that founded? Most assuredly the intention of our legislature was not to introduce anything new in this respect. Our statute says there may be a writ in all criminal cases. Let us see if we have nothing similar in England which will give us the interpretation of this. Has not the English Court of Queen's Bench jurisdiction in all criminal cases? Do not the English statutes and common law give the Court of Queen's Bench the right to take cognizance of all criminal cases? Then why should contempt be embraced here any more than in England? There is nothing in the statute to show that it was the intention of the Legislature to go beyond the English law, and we are therefore bound by the English decisions. It was said, you could get your remedy by *Habeas Corpus*, and why not by a writ of error? But the two things are as distinct as can be, and it does not at all follow that because a judgment can be reviewed on a writ of *Habeas Corpus* that it can also by a writ of error. It was idle to put such a question. We follow precisely the rule laid down in England, and whatever the Privy Council may do hereafter in the McDermott case, it cannot affect the grounds of our judgment. The Privy Council has powers over all Courts of the empire which we cannot pretend to exercise. It is very consolatory, however, for us to know that if we are wrong our refusal does not debar the party from going before the Privy Council. For my part I solicit an appeal. I wish the question to be decided; but having looked at the case dispassionately, I

can come to no other opinion, and I have not heard one principle of law laid down to-day militating against the judgment of the Court. I do not argue from considerations of convenience, but from principles of law; and if we are wrong, we can be set right by an appeal to the Privy Council. Possibly it may turn out that the Privy Council, while allowing an appeal in the McDermott case, will refuse it in this, for I see a great difference between the two cases. I stated the other day that I thought there was a statute that granted the right of appeal in cases where the penalty exceeded £100. I find that such is the case. (Con. Stat. Lower Canada, cap. 105, sec. 6.) The power is given, though I do not remember any appeal having been brought under it before the Privy Council. The judgment of the Court is that the writ having issued illegally and improvidently, must be quashed.

DRUMMOND, J., concurred.

Mr. *Ramsay*. I move for leave to appeal to the Privy Council, and although this question has been incidentally decided already, I wish to show in what that decision appears to me erroneous, as it was given on a consideration suggested by the Court, and which I had not an opportunity of answering. I claim my appeal as of right on these words, that there shall be an appeal to Her Majesty in her Privy Council, "where the matter in question relates to any fee of office, &c., or *any* sum of money payable to Her Majesty." This relates to a sum of money payable to Her Majesty; but it is said fines are excluded, because there is a special statute (cap. 105, C. S. L. C.) which gives an appeal when the fine is over £100. But that statute was prior to the statute I invoke, and if incompatible the earlier must yield to the later. There is a case in 1 A. & E., R. v. Wright, where *any* was declared to cover all.

[DUVAL, C. J. But it is in the Consolidated Statutes.]

Yes, but it must be remembered that the statutes do not lose their original order of date by the consolidation.

[DUVAL, C. J. That is correct.]

Well, the statute I invoke gives me the appeal in express words. This case has been dismissed in the same way as if it had been dismissed on a preliminary plea. Now it will not be denied that if the matter in question be appealable, the appeal lies whether the case is dismissed on a question of jurisdiction or on the merits.

DUVAL, C. J. This is the last day of the term, and it would be of no use to take the matter *en délibéré*; besides you will not lose any right by our refusing the appeal, which I hope may be taken.

The plaintiff in error, in person.

G. Ouimet, for the Crown.

[ADDENDUM. We have to correct an inaccuracy which occurs in the report of this case on page 233. Not having heard the argument of Mr. RAMSAY, yet being desirous of giving fully all that had been urged by the losing party, we followed a newspaper report which appeared to have received that gentleman's revision. We have since learned that the statement made therein respecting *Driscoll's case* is totally unfounded. The impression is conveyed to the reader that Chief Justice ROLLAND refused to sit during the proceedings, because, being the judge who suggested the contempt, he believed himself incompetent. Now, the register shows that in point of fact Chief Justice ROLLAND presided on Tuesday, the 11th day of April, 1854, the day the rule issued, and if he was not present on every occasion, the sole reason was that he feared to be subjected to fresh insult.

We may add here that during the last term of the Court of Queen's Bench sitting on the Crown side, Mr. Justice DRUMMOND attended the sitting of the Court (which was being held under the presidency of Mr. Justice MONDELET), and having caused the judgment quashing the Writ of Error to be read and entered on the minutes, ordered the Sheriff to see that the judgment was executed. Mr. RAMSAY stated that the Sheriff had received an intimation from the Crown that the judgment was not to be pressed pending his application to the Privy Council; but Mr. Justice DRUMMOND having replied that the Sheriff must obey the order of the Court or abide the consequences, Mr. RAMSAY subsequently paid £10, amount of the fine imposed. We understand that steps have been taken to bring the case before the Privy Council.]

March 5.

MORGAN ET AL., (plaintiffs in the Court below) Appellants; and GAUVREAU, (defendant and petitioner in the Court below) Respondent.

Community—Cohabitation as man and wife—Liability.

The defendant cohabited for many years with a woman, whom he held out to the world as his wife, and in a deed of lease he described himself and her as *communs en biens*. The woman carried on business as a milliner, and the defendant, her husband, as a repairer of hats in the same premises, but all the receipts of both went into the millinery account. He also ordered goods and made payments in her name. After her decease, the plaintiffs, creditors, having subjected his estate to compulsory liquidation for a debt of the community, the defendant alleged *inter alia* that he was not married to the woman, and, therefore, not liable for her debts.

Held, that under the circumstances, the defendant was liable for the debts of the deceased, whether married or not married, inasmuch as he had held her out to the world as his wife, and she was presumed to act for him.

This was an appeal from a judgment rendered by *Monk*, J., in the Superior Court at Montreal, on the 20th October, 1866.

On the 23rd August, 1866, the appellants, under the provisions of the Insolvent Act of 1864, took proceedings in compulsory liquidation against the respondent. The writ issued on affidavit, and was returned on the 1st September. On the 6th September, the defendant petitioned that the proceedings taken against him be set aside and quashed, alleging that the plaintiffs were not his creditors; that he never transacted with them; that he had never been a trader, but only a hatter, and did not owe in all $200.

The plaintiffs answered in writing that they were creditors of the defendant for goods sold to him and his wife, with whom he was *commun en biens*, as appeared by a deed of lease produced; that the defendant was a trader, and subject to the Insolvent Act. To this answer the defendant subsequently filed a *réplique*, alleging that the person mentioned in the plaintiffs' answer as his wife, was not his wife, as they had never been married; and that he appeared to authorize her in the lease produced merely for the purpose of concealing from the public the state of concubinage in which he lived with this woman, who died in August, 1866; that she was a *commerçante-modiste* doing business at Montreal, and that it was to her alone the goods were sold. The plaintiffs moved to reject this *réplique*, but the motion was refused. After *enquête*, judgment was rendered by *Monk*, J., granting the petition, and quashing all the proceedings. From this judgment the plaintiffs appealed.

On behalf of the appellants it was submitted that the replication was improperly filed, and contained matter which should have been stated in the petition. Further, that the defendant was a trader within the meaning of the Insolvent Act. The defendant had attempted to evade liability by alleging that he had never been married to Madame Gauvreau, and that the debt was hers; but, it was contended, he had rendered himself liable for the debt, whether married or not married. He had ordered goods, and was supported by the proceeds of his wife's millinery business. Creditors had a right to consider her as his wife *commune en biens* with him.

For the respondent it was contended that he had never been a trader; that he did not buy the goods in question from the appellants; but that the woman Flavie Clément, *dite* Larivée, who kept the shop, was the real debtor; that he had never been married to her, and could not be held liable for her debts as *commun en biens* with her.

BADGLEY, J. This is an appeal from proceedings in insolvency. Upon the 23rd of August, 1866, a writ of attachment issued upon affidavit filed. The writ was returned on the 1st September, and on the 6th, the respondent filed his petition to quash. The Act contemplated and provided no other proceeding, the insolvent procedure being necessarily summary; but the appellants answered in writing under a judicial order, and thereupon the respondent opened his *enquête*, and made proof in support of his petition. Whilst the *enquête* was proceeding, the respondent filed a *réplique* to the appellant's answer, but without permission, in which he made allegations which should have been in the petition.

All this is wrong, and should not have been allowed without judicial sanction. The statute gives to the alleged insolvent, power to petition, on grounds shown, to quash the attachment, but the delay is strictly limited to five days from the return and not longer, and it is upon those grounds in the petition that the quashing of the writ is sought. The Court has no power to prolong the delay or to allow subsequent allegations of other grounds or facts, which would necessarily set aside not only the statutory delays, but also the petition itself; because the quashing might in fact be made to rest, not upon the allegations of the petition, but upon the new facts set up in a pleading put in at any time afterwards. I think all this proceeding faulty, and contrary to the statutory procedure.

But what are the merits? The writ of attachment issued on affidavit duly made, and under it seizure was made in the respondent's premises of the stock of goods in the shop, and other effects as set out in the *procès-verbal* filed of record. The respondent's petition to quash sets out these proceedings and the seizure made in his premises; that the appellants are not his creditors; that he owes them nothing; that he never was a trader, but only a hatter; that he did not owe $200. Wherefore he prays that the writ be quashed; that the seizure thereunder be set aside; that *main levée* be granted to him of the effects seized as *his property*. The appellants, as above stated, answered in writing. After this, the respondent files a *réplique* to the answer, in which he alleges that the woman Gauvreau was not his wife; that she traded for herself, and was credited for herself by the appellants and others, and that her stock is there upon which the creditors may act, but not against him.

The two main points are: 1st. Was the respondent a trader? 2. Were the appellants his creditors? The first point seems to have been clearly proved. He and the deceased cohabited for twelve or thirteen years, occupying the same premises all that time. In part of the premises she had a millinery shop, and he in the other part a workshop for the repair and renewal of hats, supplied to him by merchants who furnished goods to his wife. The appellants have also proved his personal purchase of goods for the shop from the appellants and others, ordering them to be sent to the shop; his payments to creditors for goods purchased; his admission of the business being common to both; that the money due for his *specialité* went in deduction of the account for goods purchased for the millinery business; finally, his own admission in a deed of lease of their premises, dated 10th July, 1865, that he was a *commerçant*. He cannot escape the result of this proof that he is a *commerçant*.

The second point is, was he indebted to the appellants? On this head, we have the facts of cohabitation and residence; his application for hat-work and repairs, not to be paid in money to him, but to be credited on the millinery account; his participation in the business in the name of his wife, by buying, selling and paying, all proved by the evidence of record. In addition to this positive testimony, which proves his communal quality as well as his indebtedness to the appellants, we have his own admissions. It has been objected that the entries in the appellants' books are in the name of Mme. Gauvreau. But this objection amounts to nothing, for the witnesses assert that the entries are always so made where the woman is a milliner, and it is well known that in a haberdasher's shop, where families are supplied, the entries are almost universally made in the name of the wife, not the husband. But, it is objected that she was not his wife. Two clergymen have been brought up who say, that they looked over the parish registers and found no trace of the marriage. But negative allegations and proofs of want of marriage between them cannot be allowed to override their mutual frequent assertions of being man and wife, and his own affirmation and positive admission that she was his wife and that she was *commune en biens* with him. He must be held liable solidarily with her for the debts, because she is legally presumed to act for him. It has been held that when a wife living with her husband carries on trade, it is to be presumed that she does so by his authority, and as his agent. It might be different if they did not cohabit. If she were not his wife, in fact, his cohabitation with her, her use of his name

his purchases and sales of goods, &c., make him liable. Even supposing that she was not his wife, she is presumed to be doing business as his agent, and therefore, his liability is unquestionable. He has, moreover, by his petition rendered his position entirely untenable, by claiming the millinery goods seized as his own property and demanding their discharge from the attachment. The judgment has maintained this demand. We therefore set aside the judgment appealed from.

DRUMMOND, J. The rule of law is well established that where a man and woman live together as man and wife, they are equally liable as if they had been married. A contrary doctrine would lead to the absurd result, that no merchant would give credit to a lady describing herself as married unless she exhibited the marriage certificate. Whether married or not married, Gauvreau and this woman cohabited as man and wife, and the defendant is clearly liable.

AYLWIN, J. In this place I think it my duty to state that a more infamous attempt to evade liability has never been made within my knowledge. It is a most scandalous, most disgraceful attempt.

MONDELET, J., concurred.

The following is the judgment recorded:

Considering that the appellants have established by legal and sufficient evidence, the allegations, matters, and things set forth in the affidavit by them filed in this cause, and upon which the writ of attachment in insolvency issued in this cause; considering that the respondent has failed to establish by sufficient evidence the non-subjection of his estate to involuntary liquidation, and his avoidance of the said allegations, matters and things, in the said affidavit contained; considering that the said writ of attachment was duly issued, and the seizure and proceedings thereunder were duly had and made; considering that in the said judgment of the Superior Court there was error, this court doth reverse and set aside the said judgment, and maintain the said writ of attachment, &c.

Perkins & Stephens, for the Appellants.

Labelle & David, for the Respondent.

March 4th.

TAYLOR *v.* MULLIN.

Practice—Appeal—Final Judgment.

A judgment having been rendered by the Superior Court, under the Municipal Act of Lower Canada, the defendant inscribed the case for hearing in review. The Court of Review, on motion, rejected the inscription. The defendant having moved for leave to appeal from this judgment as from an interlocutory judgment:—

Held, that the judgment of the Court of Review rejecting the inscription was a final judgment, and could only be appealed from as such.

Devlin, for the defendant, James E. Mullin, moved for leave to appeal from an interlocutory judgment rendered by the Court of Review in December last, (Vide, ante, p. 200.) The action had been brought for the purpose of expelling Mr. Mullin from his seat in the City Council of Montreal, and a judgment of expulsion was rendered in the Superior Court by MONK, J. The defendant inscribed this judgment for review, but in December last, the Court of Review, holding that the judgment was not susceptible of revision, granted the plaintiff's motion that the inscription be rejected. It was from this judgment of the Court of Review, that the defendant asked leave to appeal.

[DUVAL, C. J. How can you consider a judgment, which excluded you from being heard, as an interlocutory judgment? It must be treated as a final judgment.]

Under the statute we have no right to an appeal *de plano*, as the right to appeal from judgments under the Municipal Act has been taken away.

[DUVAL, C. J. The right of appeal was taken away by the Legislature on public grounds. It is evidently of the greatest importance that these cases should be disposed of with the utmost despatch consistent with the rights of the parties. For a dozen seats might be contested, and in the meantime how could the business of the city be carried on?]

Abbott, Q. C., for the plaintiff. The judgment of the Court of Review was manifestly final.

DUVAL, C. J. The Court is unanimous that

the judgment of the Court of Review was a final judgment, and consequently the motion of the defendant, asking leave to appeal from it as from an interlocutory judgment, must be dismissed with costs.

AYLWIN, DRUMMOND, BADGLEY, and MONDELET, JJ., concurred.

Abbott, Q. C., for the Plaintiff.

Devlin, for the Defendant.

March 5th.

SACHE (defendant in the Court below), Appellant; and COURVILLE ET AL. (plaintiffs in the Court below), Respondents.

Action to compel proprietor to make repairs.

The lessees of a house brought an action against a person who had become proprietor during the existence of the lease, to compel him to make repairs.

Held, that the action was rightly brought against the defendant, though he was not the immediate lessor.

This was an appeal from a judgment of the Superior Court, rendered at Montreal on the 12th April, 1864, by *Monk*, J., in favor of the plaintiff.

The action was brought under the Lessor's and Lessee's Act, for the purpose of compelling the defendant to make certain repairs to a house occupied by the plaintiffs. The defendant had become proprietor of the house during the existence of a lease from one John Ostell to the plaintiffs.

The plea of the defendant was that he had made all the repairs he was bound to make. After *enquête*, the defendant amended his plea by inserting the averment, that he had never been put *en demeure* to make any repairs, that he only became proprietor during the lease, and could not be held liable to make repairs to a property not belonging to him.

By the judgment of the Court below, from which the present appeal was instituted, the defendant was condemned, within eight days, to put the premises in good repair, in default of which, the plaintiffs were authorized to make the repairs at the defendant's expense.

For the appellant it was represented that he became proprietor of the premises during the lease. The lease was from John Ostell to the plaintiffs, dated 22nd February, 1862; it was continued by *tacite reconduction*, from 1st May, 1863, to 1st May, 1864. The defendant became proprietor on the 7th January, 1864; the action was instituted against him on the 26th January, 1864, and he sold the property on the 16th March following, so that the judgment rendered against him on the 12th April, 1864, condemned him to make repairs to a house into which he no longer had a right to enter. Further, he had not been put *en demeure*.

For the respondent it was contended that it was proved the defendant on being requested to make repairs had refused to do so, and, in any case, the action was sufficient to put him *en demeure*. The defendant, if he wished to avoid liability for costs, should have offered to make the repairs immediately on being served with the writ, or by his plea, and not have waited till the plaintiffs, after a long *enquête*, had proved that the premises were uninhabitable.

AYLWIN, J. This was an action brought under the Landlord and Tenant's Act. The ground upon which this appeal has been brought is that the suit is an action of damages, and that the action has been brought by the plaintiffs against a person who is not the immediate landlord; that the premises were purchased by Sache, the present appellant, from one John Ostell, who leased them to the plaintiffs. The other pretension of the appellant is that the damaged state of the premises has not been proved. Now, in the first place, the action is not an action of damages; it is an action to compel the defendant to repair, and the obligation to keep the premises in proper repair was equally binding upon Sache as upon Ostell, his *auteur*. Then, as to the state of the premises, there is certainly a contrariety of testimony, but still the evidence is of such a description as to satisfy us that the judgment was right and must be confirmed with costs.

DRUMMOND, BADGLEY, and MONDELET, JJ., concurred.

R. & G. Laflamme, for the Appellant.

Louis Ricard, for the Respondents.

March 5th.

WILSON (plaintiff in the Court below), Appellant; and DEMERS (defendant in the Court below), Respondent.

Statute of Limitations—Demurrer.

In an action on a promissory note, made more than five years previous to the institution of the action, the plaintiff alleged in his declaration, that by the law of New York State, where the note was made, and of Wisconsin, where the note was payable, the fact of the defendant's absence from his domicile suspended the Statute of Limitations. To this the defendant demurred, on the ground that it was the *lex fori*, the law of Lower Canada, which applied.

Held, (reversing the judgment of the Superior Court), that the plaintiff's action could not be dismissed on this demurrer, as there were allegations of fact in the declaration irrespective of those upon which the demurrer was founded.

(Per AYLWIN, and BADGLEY, JJ. *Held*, that the Statute of Limitations must be pleaded by an exception, and cannot be put in issue by a demurrer.)

This was an appeal from a judgment rendered in the Superior Court by *Berthelot*, J., on the 9th of July, 1866, maintaining a *défense en droit*, filed by the defendant.

The action was brought on a promissory note. The declaration set out that the defendant, (who was then carrying on business in partnership with his brother, Hector Demers, in Fond du Lac, Wisconsin, under the name of Demers, Bros.,) on the 12th of September, 1857, at the city of New York, gave to the firm of L. O. Wilson & Co., of that city, a promissory note, signed by Demers Bros., for $1120·47, payable four months after date, at Fond du Lac. L. O. Wilson & Co. transferred this note to the plaintiff at maturity; it was protested for non-payment, and about the date of protest, the defendant and his brother left their domicile in Fond du Lac. Since then up to the 19th of April, 1866, the plaintiff had failed to discover their whereabouts,—but he at length ascertained that they were in Lower Canada. That by the laws of New York and Wisconsin, the absence of the defendant suspended the Statute of Limitations, and gave the plaintiff a right to sue for the amount of the note.

To this declaration the defendant demurred, on the ground that the note in question was not subject to foreign law, *lex loci contractus*, but to the law of Lower Canada, and was prescribed. This demurrer being maintained, and the action dismissed, the plaintiff appealed.

Popham, for the Appellant. 1st. The question is one to be decided by Private International Law, and, according to the opinion of the majority of writers on this department, the *lex loci contractus*, or the law of the place where the note was made payable, should be applied to the case. 2nd. Even if the *lex fori* be applied, the allegations in the declaration raise questions of fact, which exempt them from a demurrer. 3rd. Admitting the declaration to be demurrable, the demurrer should not have been based on the Statute of Limitations as in this case.

Girouard, for the respondent. The decision of the Court below is fully justified by the dispositions of our Statutory law, and also by the international jurisprudence of all countries where the English enactments respecting prescription have been adopted. It may be said that this question could not be raised by a demurrer. But the plaintiff himself provoked the demurrer by setting out in his declaration that the note, not being prescribed by the law of the country where it was made, or where it was payable, was not prescribed here. The defendant merely answered, that supposing the facts alleged in the declaration to be true, he had nothing to do with the *lex loci contractus*, but only with the law of this country.

DRUMMOND, J. [After stating the facts set out in the declaration]. The plaintiff, apparently foreseeing the exception that might be set up, has stated his case in such a way as to meet that exception. The *défense en droit* filed by the defendant is very irregular, being partly an exception and partly a demurrer. The plaintiff alleges that the law of the place where the note was made or where it was payable, should govern; and then the defendant says, your action is ill founded, because it is not the law of the place where the note was made or where it was payable, but the law of Lower Canada, that applies. I am inclined to think, however, that this demurrer, so far as it goes, is good. There is a difference of opinion on this point; but we are all of opinion that the demurrer does not meet the whole case. It does not meet the allegation of inter-

ruption of prescription by the defendant's absence; and, therefore, taking whatever view you please of this *défense en droit*, the Court below was in error in dismissing the whole action upon it. The judgment of this Court has been drawn so as to reconcile the slight difference of opinion on the point referred to.

BADGLEY, J. The declaration sets out defendant's promissory note dated in 1857, in Michigan, and payable at four months from date, and was met by a *défense en droit*, demurrer, which was sustained by the Superior Court, and the action in consequence dismissed; the judgment resting on the ground that the *demande* on the face of the declaration was by law obnoxious to our Statutory Limitation for promissory notes. That may or may not be the case, but the limitation cannot be put in issue by a demurrer. The essential constituent of limitation, as of our prescription, is time, and without it both words are mere legal abstractions. This time ingredient is a fact which may be legally avoided by other facts in contradiction or waiver of it, and therefore necessitates a special plea of the limitation relied upon, in order to form a bar to the action; for the obvious reason, to enable plaintiff to show in his replication any fact sufficient to avoid the bar. Our own prescriptions require to be pleaded, and may not be supplied by the Court; and so in England, the limitation, in like manner, must be pleaded, as shown in the following case: in which "the declaration alleged a promise made at a certain time, for money lent, and after verdict it was moved in arrest of judgment, that the cause of action did not accrue within six years before action brought. But the plaintiff had judgment; for though the cause of action appeared to be twenty years before action brought, yet the plaintiff shall recover, if the defendant do not plead the Statute, which was made for the use of those who would take advantage of it, but the Court shall not give the defendant the advantage of it if he will not plead it." These facts cannot form an issue in law, and the judgment therefore sustaining the *défense en droit* cannot be maintained.

AYLWIN, J. In one word, the ground of the demurrer is the Statute of Limitations, but the Statute of Limitations could only be pleaded by an exception: therefore, the demurrer is worse than the original declaration.

MONDELET, J., concurred in the judgment.

The judgment was *motivé* as follows: Considering that the declaration contains allegations of fact, entirely irrespective of those upon which the *défense en droit* is founded, allegations which could not be disposed of in adjudicating upon said *défense en droit*; considering that the said *défense en droit* is irregular and insufficient; considering therefore that in the judgment appealed from, there is error, &c. Judgment reversed, and record ordered to be remitted to Court below.

J. Popham, for the Appellant.

D. Girouard, for the Respondent.

CIRCUIT COURT.

Quebec, Nov. 24, 1866.

BROWN *v.* THE QUEBEC BANK.

Payment—Deficiency in packages of silver.

Held, that banking institutions are not liable for any deficit in packages of silver paid out by them, unless the silver be counted and the deficit made known before the packages are taken from the bank.

This was an action brought to recover $20, which was claimed as so much money which the Bank had short paid on a cheque. It appears that a cheque for $830 was drawn; and on presentation of it, eight packages, said to contain $100 each, and three packages containing ten dollars each, were paid to the clerk presenting the cheque. The money was taken from the banking-house without being counted; but within ten minutes, the packages were counted over at a broker's office; and one of the $100 packages was found to contain but $80. The clerk returned to the Bank with the package, and demanded the $20. The Bank refused to entertain the claim.

At the enquête the fact of the deficiency was clearly proved, and in arguing the case the counsel for the plaintiff urged, that the only question to be decided in this case was whether the plaintiff did or did not receive from the bank the amount specified in his cheque. It was clearly proved that he did not, and that there was still $20 due on the cheque. It was clear, therefore, that the plaintiff ought to have that sum, and that the Quebec Bank

ought not to be allowed to violate the well-known principle of law: "Personne ne peut s'enrichir au dépens d'autrui."

For the defendants it was urged that if the plaintiff's demand was maintained, it would open a way to unlimited fraud, and that the ends of justice would be better accomplished by releasing banks from liability for any deficiency in packages of silver paid out by them, unless the same was ascertained at the counter of the bank, even though in some cases individuals should suffer. It was argued also that the fact of the following notice having been stuck up in prominent places about the bank in large printed letters, was a sufficient ground for the dismissal of the plaintiff's action, it forming, as was maintained, a quasi-contract between the bank and parties dealing with it, who thus had a knowledge of the custom of the bank. The notice was in these words:—

"Parties are requested to count money paid at the counter before the same is taken from it, as the bank will not hold itself responsible for any deficiency in silver, or in the payment of notes, after the same have been taken from the counter."

STUART, J. Although the amount involved in this action is small, still it is one of some interest and importance to the mercantile community in general, and more especially to money and exchange brokers; and it is after mature deliberation that I have come to the conclusion that judgment ought to be given in favour of the defendants; for, did I decide otherwise, the case, as a precedent, would open the way to many frauds, by dishonest persons obtaining moneys from banking offices. Moreover, it has been seen to be the general and well-known custom of the banks not to make good deficiencies, which have not been noted before the money has been taken from their counter; and this custom the Quebec Bank further upheld by the notices, referred to in the pleadings, which were posted up in conspicuous places about the bank. Besides, the rule is made and acted upon in the interest of both parties; for, if there were a surplus instead of a deficiency in the amount delivered, the error, being discovered before the eyes of one of the bank's employees, would be more likely to be rectified than if only found out sometime afterwards, when the overplus might easily be ascribed to some other cause. For these reasons, therefore, the plaintiff's action is dismissed with costs.

Stuart & Murphy, for the Plaintiffs.
F. C. Vannovous, for the Defendants.
(I. T. W.)

RECENT ENGLISH DECISIONS.

QUEEN'S BENCH.

Ship—Proof of ownership primâ facie evidence of employment of those on board.—A ship was laid up in a public dock for the winter, under the care of a shipkeeper; the plaintiff, being lawfully on board, suffered injury from the negligence of the persons in charge of the ship, and brought an action against the defendant. At the trial there was no evidence by whom the shipkeeper was appointed, and the only evidence to fix the defendant with liability was the ship's register, on which his name appeared as owner:—*Held* (by Blackburn and Lush, JJ.; Mellor, J., dissenting), that the register was *primâ facie* evidence for the jury, from which they might draw the inference that the persons in charge of the ship were employed by the defendant. *Hibbs* v. *Ross*, Law Rep. 1 Q. B. 534.

Bailment of Pawn or Pledge—Interest under original Pledge not determined by Repledge.—A deposited debentures with B as a security for the payment, at maturity, of a bill endorsed by A and discounted by B, on the agreement that B should have power to sell or otherwise dispose of the debentures if the bill should not be paid when due. *Before* the maturity of the bill, B deposited the debentures with C, to be kept by him as a security until the repayment of a loan from C to B *larger* than the amount of the bill. The bill was dishonored, and while it still remained unpaid, A brought *detinue* against C for the debentures:—*Held*, that the repledge by B to C did not put an end to the contract of pledge between A and B, and B's interest and right of detainer under it; and that A, therefore, could not maintain detinue without having paid or tendered the amount of the bill.—Blackburn, J., remarked in the course of his opinion, "I think that the subpledging of goods, held in

security for money, before the money is due, is not in general so inconsistent with the contract, as to amount to a renunciation of that contract. In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody." Cockburn, C. J., said: "The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action, —for nominal damages if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged." *Donald* v. *Suckling*, Law Rep. 1 Q. B. 585.

Corporation—Contract not under Seal.—The plaintiff supplied coals from time to time to the defendants, the guardians of a poor-law union, for the use of their work-house, under articles of agreement between the plaintiff and the defendants, executed by the plaintiff, but not under the seal of the defendants. The defendants received and used some of the coals. In an action for goods sold and delivered:—*Held*, that as the goods had been supplied and accepted by the defendants, and were such as must necessarily be from time to time supplied for the very purposes for which the defendants were incorporated, the defendants were liable to pay for the coals although the contract was not under seal. *Nicholson* v. *Bradfield Union*, Law Rep. 1 Q. B. 620.

Libel—Inadequacy of Damages.—The plaintiff brought an action against the defendant for having published in a Liverpool newspaper, of which the defendant was proprietor, a series of libels, of a gross and offensive character, on the plaintiff as the incumbent of a church in Liverpool. It appeared at the trial that the first libel originated in the plaintiff having preached and published in the local papers two sermons, reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol, and on the town council for having elected a Jew their mayor; and the plaintiff had, soon after the libels had commenced, alluded, in a letter to another newspaper, to the defendant's paper as the "dregs of provincial journalism;" and he had also delivered from the pulpit and published a statement, to the effect that some of his opponents had been guilty of subornation of perjury in relation to a charge of assault for which the plaintiff had been fined 5s. The jury having returned a verdict for a farthing damages, the plaintiff obtained a rule for a new trial on the ground of the inadequacy of the damages:—*Held*, that, although on account of the grossness and repetition of the libels, the verdict, in the opinion of the Court, might well have been for larger damages, it was a question for the jury, taking the plaintiff's own conduct into consideration, what amount of damages he was entitled to; and that the Court ought not to interfere. *Kelly* v. *Sherlock*, Law Rep. 1 Q. B. 686.

Libel—Matter of Public Interest.—A church warden having written to the plaintiff, the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during service, and by turning the vestry-room into a cooking apartment, the correspondence was published without the plaintiff's permission in the defendant's newspaper, with comments on the plaintiff's conduct:—*Held*, that this was a matter of public interest, which might be made the subject of public discussion; and that the publication was, therefore, not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified. *Kelly* v. *Tinling*, Law Rep. 1 Q. B. 699.

Nuisance—Master and Servant—Master liable on Indictment for act of Servant.—The owner of works, carried on for his profit by his agents, is liable to be indicted for a public nuisance caused by the acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to

his general orders. *The Queen* v. *Stephens*, Law Rep. 1 Q. B. 702.

Liability of Commissioners for a public purpose.—By an act of parliament, drainage commissioners were to make and maintain a cut and sluice; the sluice burst, owing to the negligence of the servants of the commissioners, and damage having ensued to the plaintiff's land, he brought an action against the commissioners, in the name of their clerk:—*Held*, on the authority of the *Mersey Docks* cases (ante, p. 173), that the commissioners were not exempt from liability by reason of their being commissioners for a public purpose; and that the duty being imposed upon them of maintaining the sluice, they were liable for the damage caused by the negligent performance of that duty by their servants. *Coe* v. *Wise*, Law Rep. 1 Q. B. 711.

COMMON PLEAS.

Carriers—Delivery within reasonable time—Delay caused by third persons.—A common carrier of goods is not, in the absence of a special contract, bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case; and he is not responsible for the consequences of delay arising from causes beyond his control. The defendants, a railway company, were prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a reasonable) time. The obstruction was caused by an accident resulting solely from the negligence of another company who had, under an agreement with the defendants, sanctioned by act of parliament, running powers over their line:—*Held*, that the defendants were not liable to the plaintiff for damage to his goods caused by the delay.

This decision reversed the judgment of the Lincolnshire County Court, which held the defendants liable. The action was brought to recover damages sustained by the plaintiff in consequence of a delay in the delivery of three hampers of poultry, which he had sent by the defendants' railway for the early London market. There was no special contract made by the defendants to deliver the goods in time for any particular market. The delay was wholly occasioned by an accident which occurred on the defendants' line between Hitchin and London, to a train of the Midland Railway Company, who have running powers over that portion of the defendants' line. The accident resulted solely from the negligence of the servants of the Midland Railway Company. The County Court judge decided in favor of the plaintiff, on the ground that as the Midland Railway Company used the said railway by the permission of the defendants, the latter were responsible for delay caused by the negligence of the former company, and, therefore, that the delivery in this case was not within a reasonable time. On appeal, it was urged on behalf of the plaintiff that, if he could not recover in this action, he had no remedy, as there was no privity between the Midland Railway Company and him.

ERLE, C. J., said: "I am of opinion that our judgment should be for the defendants. I think a common carrier's duty to deliver safely has nothing to do with the time of delivery. That is a matter of contract, and when, as in the present case, there is no express contract, there is an implied contract to deliver within a reasonable time, and that I take to mean a time within which the carrier can deliver, using all reasonable exertions. The ground upon which the decision went against the defendants was that, as the Midland Railway Company used the Great Northern line by the defendants' permission, the defendants were responsible for a delay caused by the Midland Company on their Great Northern line. But in so deciding I think the County Court judge took an erroneous view of the relations between the two companies. The legislature have declared by many acts that it is for the public advantage that railway companies should have running powers over each other's lines, and it has specially declared it to be so in the case of the present agreement. The Midland Railway Company, therefore, were not merely using the line by the defendants' permission, but were exercising a statutory right, and the defendants were not responsible for their acts." *Taylor* v. *The Great Northern Railway Co.*, Law Rep. 1 C. P. 385.

Rules of Descent—Attainder—Civil Death.

—A. having been attainted of treason escaped to a foreign country, and there married and had children, and was afterwards executed on the same attainder:—*Held*, first, that the marriage was valid, and the children legitimate. *Held*, secondly, that the descent of property between brothers is immediate, and not through their father; and that the descendants of one of A.'s children could inherit property from the descendants of another notwithstanding A.'s attainder. *Kynnaird* v. *Leslie*, Law Rep. 1 C. P. 389.

Sheriff—Escape—Measure of Damages.—In an action against a sheriff for suffering a judgment debtor to escape, the jury, in estimating the value of the custody, may take into account not only the debtor's own resources, but all reasonable probabilities, founded upon his position in life and surrounding circumstances, that the debt, or any portion of it, would have been discharged if he had remained in custody. Thus, in an action against a sheriff for an escape, it was proved that the debtor, though insolvent, was the only son of a wealthy father, who was upwards of 100 years old; and that, shortly before his arrest, the debtor's solicitor had offered to pay a composition on his debts of 6s. in the £. The judge directed the jury to give as damages the value to the plaintiff of the chance that the debt, or any portion of it, would have been extracted by the debtor's remaining in custody:—*Held*, a right direction; and the jury having given substantial damages the Court refused to disturb the verdict. *Macrae* v. *Clarke*, Law Rep. 1 C. P. 403.

Statute of Frauds (29 *Car. II.*, *c.* 3), *s.* 17. —*Memorandum of the bargain.*—A. having sold some cheeses and candles to B., sent him an invoice of the goods. B. returned the invoice with a note, signed by him, on the back to the following effect: "The cheese came to day, but I did not take them in for they were badly crushed. So the candles and cheese is returned:"—*Held*, that the contents of the invoice were sufficiently referred to by the note on the back of it, and that the two together constituted a sufficient memorandum in writing of the bargain to satisfy the Statute of Frauds. *Wilkinson* v. *Evans*, Law Rep. 1 C. P. 407.

Marine Insurance—Implied Warranty of Seaworthiness—Landing by Lighters.—The warranty of seaworthiness which is implied as to the ship in an ordinary policy of marine insurance, does not extend to lighters employed to land the cargo. Therefore, to a declaration on an ordinary policy on goods from Liverpool to Melbourne, "including all risk to and from the ship," the policy to endure until the goods should be discharged and safely landed at Melbourne, alleging damage by perils insured against, a plea—that the damage happened after the goods had been discharged from the ship, and while they were in a lighter for the purpose of being conveyed to the shore, that the lighter was not seaworthy for the purpose, and that the damage was caused solely by such unseaworthiness—affords no defence.—Erle, C. J., remarked: "I think that when the ship is seaworthy at the commencement of the voyage the insurer is responsible for all the ordinary incidents arising in the course of the voyage, and that where, as here, the contract of insurance is upon goods from their shipment until their landing, if one of the ordinary incidents of the voyage is the hiring of local lighters, the insurer must bear the consequences of such local lighters not being qualified to land the goods in safety." *Lane* v. *Nixon*, Law Rep. 1 C. P. 412.

Unpaid Vendor—Stoppage in transitu.—On the 12th of July, 1864, W. sold P. eleven skips of cotton twist, then lying at the defendants' station at S., to be delivered for P. at B. station. Three of the skips were delivered on the 22nd, and paid for; but P., objecting to the weight and quality, declined to take any more of them. On the 17th of August, four more were sent to B. station, and an invoice of the eight was sent to P., with an intimation to him that four had been forwarded, and that the remaining four were lying at S. station waiting his instructions. P. immediately returned the invoice, and wrote to W., saying that he declined to take any more of the twist. On the 1st of September, W. sent an order to S. station, directing the defendants to deliver the remaining four skips to P. These were accordingly forwarded to B. station, and were taken by P.'s carman to his mill, but were immediately returned by P.'s orders; and

the whole eight were sent back by him to S. station to the order of W. They were again returned by W. to B. station; but P. refusing to have anything to do with them, they remained there until P.'s bankruptcy on the 19th of October, when W. claimed them:—*Held*, upon a special case stated in an action of trover by P.'s assignee against the railway company, in which the Court were to draw inferences of fact, that, under the circum stances, the transitus was never determined, and consequently that the unpaid vendor, W., had a right to stop them. *Bolton* v. *The Lancashire and Yorkshire Railway Co.*, Law Rep. 1 C. P. 431.

Vendor and Purchaser.—The rule in *Flureau* v. *Thornhill*, 2 W. Bl. 1078, that, where a contract for the sale of real estate goes off in consequence of a defect in the vendor's title, the purchaser is not entitled to damages *for the loss of the bargain*, does not apply to the case of a lease granted by one who has no title to grant it. *Lock* v. *Furze*, Law Rep. 1 C. P. 441.

Bill of Exchange—Acceptance for Honor —Forgery.—A bill purporting to be drawn by A. at Lima, upon B. at Liverpool, payable to the order of C., and indorsed by C. to D., and by D. in blank, was presented for acceptance to B., by a person who represented himself to be D. B., having stopped payment, refused to accept, but gave the person who presented it a letter to the plaintiffs, discount-brokers in London, with an intimation that the defendant, the London correspondent of A., would probably accept the bill for A.'s honor. The plaintiffs took the bill and B.'s letter to the defendant, and he, assuming the bill to be genuine, accepted it for the honor of the supposed drawer, and the plaintiffs thereupon discounted it. The drawing and indorsements turned out to be forgeries. In an action by the plaintiffs to recover the amount of the bill from the defendant:—*Held*, that the defendant, having induced the plaintiffs to part with the money upon the faith of his authentication of the bill, was estopped from denying its genuineness; and, *semble*, that, the payee being a fictitious or non-existing person, the bill was to be taken to be a bill payable to bearer. *Phillips* v. *im Thurn*, Law Rep. 1 C. P. 463.

Vendor and Purchaser.—By a memorandum of agreement, A agreed to purchase from B certain lands, therein described, and all the mines, beds, and veins of coal, &c., under the same, at a certain price; and B agreed to purchase from A all coal that he might from time to time require, at a fair market price:—*Held*, that these were concurrent acts; and that A. could not sue B. for not taking the coal, without averring performance or a readiness to perform his part of the agreement. *Bankart* v. *Bowers*, Law Rep. 1 C. P. 484.

Railway Company, acceptance of Bills of Exchange by—Ultra vires.—It is not competent to a company incorporated in the usual way for the formation and working of a railway, to draw, accept, or indorse bills of exchange; and the question is properly raised by a plea denying the acceptance, though the acceptance was given by order of the directors, and under the common seal of the company.—Erle, C. J., observed: "These were actions by the indorsees against the acceptors of several bills of exchange. The defendants pleaded in each action that they did not accept. It appeared that the defendants are a company incorporated by an act, 22 & 23 Vict. c. 63, for the purpose of making and working a railway in Wales. The question is whether this company, being a corporation created for the specific purpose of making a railway, can lawfully bind itself by accepting a bill of exchange. I am of opinion that it cannot. The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of any indorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments, that they should be valid or not according as the consideration between the original parties was good or bad,—or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on a loan beyond their borrowing powers. It

would be a pernicious thing to hold that, in respect of the former, the corporation might be sued by an indorsee, but in respect of the latter not. So much for the general bearing of the question upon principle. How stands the matter as to authority? Subject to these exceptions, I find no case in which an action upon a bill of exchange or promissory note has been sustained against a corporation: and these exceptions prove the rule."—Byles, J., said: "These cases are of great importance, raising, as I believe they do for the first time, the precise question whether it is competent to a railway company to accept bills of exchange. No precedent has been cited in support of the affirmative; and I cannot but feel that, if we intimated any doubt upon the matter, the market would in a short time be inundated with acceptances by railway companies. Only three instances can be cited of the acceptance of negotiable instruments by corporations. The first is that of the Bank of England; but that establishment was incorporated for the very purpose,—its promissory notes and bank post bills forming a very large portion of the circulating medium of this country. The second is that of the East India Company: there, the authority to draw, accept, and indorse bills and notes, if not created, is at all events ratified and confirmed, by two acts of parliament, the 9 & 10 Wm. III, c. 44, and 55 Geo. 3, c. 155. The third instance is that of *Stark* v. *Highgate Archway Company*, (5 Taunt. 792) where the company had express authority to give bills."—Montague Smith, J., observed: "I think it was not the intention of the legislature that they should accept bills at all. The shareholders advance their money upon the faith of the limited borrowing powers. This limit would be illusory if the directors could be held bound by acceptances. There is no authority to show that they have power to accept, and there is much authority in analogous cases the other way. It has been held that mining companies, waterworks companies, gas companies, salt and alkali companies, and many others, all more in the nature of trading companies than this company, are incapable of drawing, accepting, or indorsing bills of exchange. The first object of a railway company is the making of a railway, though they may and practically always do carry on the business of carriers. That corporations created for the purpose of trading may have power to issue negotiable instruments is the well-known exception. But that applies where the primary object of the incorporation is the carrying on of trade as other persons carry it on, viz. by buying and selling." *Bateman* v. *Mid-Wales Railway Co.*, Law Rep. 1 C. P. 499.

Principal and Surety.—Where a person enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent, does not release the surety from his contract of suretyship as to the other. *Harrison* v. *Seymour*, Law Rep. 1 C. P. 518.

Money Paid.—The plaintiff, under a bill of sale, seized goods on the defendant's premises, and with his knowledge, but without any express request, allowed them to remain there until rent became due. The landlord, having distrained them for rent, the plaintiff paid the rent and expenses, and freed his goods from the distress. *Held*, that this payment was not a compulsory payment by the plaintiff of a debt of the defendant, for his benefit or at his implied request, and that the plaintiff was not entitled to recover the amount. *England* v. *Marsden*, Law Rep. 1 C. P. 529.

Shipping—Marine Insurance.—The ship Sebastopol, of which the plaintiffs were owners, was chartered for a voyage from the Chinca Islands to the United Kingdom with a cargo of guano, at a freight payable on arrival at the port of discharge. The plaintiffs effected with the defendants a policy on the charter freight, which contained the usual suing and laboring clause, and the following warranty:—"warranted free from particular average, also from jettison, unless the ship be stranded, sunk or burnt." In the course of the voyage the vessel encountered a severe storm, and put into Rio, so damaged by perils of the sea as to be not worth repairing, and she was accordingly sold. The plaintiffs gave no notice of the abandonment, but the guano having been landed and warehoused at Rio, the master

procured another vessel, the *Caprice*, to carry it on to Bristol, for an agreed freight of £2467 11 10, which the plaintiffs paid, receiving from the owners of the cargo the full charter freight. The master also incurred an expense of about £100 in landing, warehousing, and reloading the guano at Rio:—*Held*, that the plaintiffs were entitled to recover from the defendants, under the suing and laboring clause, the expenses so incurred and the freight of the *Caprice*, notwithstanding there had been no abandonment. *Held*, also, that evidence was admissible to show that, by the usage amongst underwriters, the term "particular average" does not include expenses which are necessarily incurred in order to save the subject matter of insurance from a loss for which the insurers would have been liable, and that these are usually allowed under the name of "particular charges." *Held*, also, that the occasion upon which these particular charges were incurred being such as to be within the suing and laboring clause, the application of that clause was not excluded by the warranty against particular average. *Kidston* v. *Empire Insurance Co.*, Law Rep. 1 C. P. 535.

Proof of Conviction.—A conviction before a police magistrate can only be proved by the production of the record of the conviction, or an examined copy of it. *Hartley* v. *Hindmarsh*, Law Rep. 1 C. P. 553.

Damages—Fraudulent Misrepresentation.—In an action for fraudulent misrepresentation the plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of the defendant's representations. Therefore, where a cattle dealer sold to the plaintiff a cow, and fraudulently represented that it was free from infectious disease, when he knew that it was not, and the plaintiff having placed the cow with five others, they caught the disease and died:—*Held*, that the plaintiff was entitled to recover as damages the value of all the cows. Willes, J., said: "The defendant induced the plaintiff to buy the cow by representing that it was sound when he knew that it was not so, and that it might communicate the disease to any other cattle with which it might be placed. Was it not necessarily within the contemplation of the parties that it might be placed with other cows? The plaintiff was induced, by the defendant's misrepresentation, to treat it in the ordinary way, and the illness and death of the other cows was the direct and natural consequence of his doing so." *Mullett* v. *Mason*, Law Rep. 1 C. P. 559.

Adjoining Land-owners—Right to Lateral Support.—The right of the owner of land to the lateral support of his neighbor's land is not an absolute right, and the infringement of it is not a cause of action, without appreciable damage. Therefore, where A dug a well near B's land, which sank in consequence, and a building erected on it within twenty years fell, and it was proved that if the building had not been on B's land, the land would still have sunk, but the damage to B would have been inappreciable:—*Held*, that B had no right of action against A. Erle, C. J., said: "There is no doubt that a right of action accrues whenever a person interferes with his neighbor's rights, as, for example, by stepping on his land, and this though no actual damage may result. But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbor; and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount. A person may build a chimney in front of your drawing-room, and the smoke from it may annoy you, or he may carry on a trade next door to your house, the noise of which may be inconvenient, but unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is in itself a lawful act." *Smith* v. *Thackerah*, Law Rep. 1 C. P. 564.

Carriers by Railway—Undue prejudice—Collection of parcels.—A collected parcels, and forwarded them by railway; the railway company refused to admit A's vans into their station after 6. 30 P. M., but admitted their own vans and those of B at a later hour with parcels, which they forwarded the same night. The time (6. 30 P. M.) fixed by the company, as that after which they would not receive goods to be forwarded the same night, was reasonable. The company in admitting their

own vans later acted *bona fide*, and not with the intention of gaining an undue advantage over other collecting carriers; they admitted B's vans in consequence of an injunction obtained by him. In two similar cases—*Garton* v. *Bristol and Exeter Railway Company*, and *Baxendale* v. *South Western Railway Company*—injunctions had been granted by the Court to restrain those companies from admitting their own vans into their station with goods to be despatched the same night, at a later hour than those of other persons. On an application by A for a similar injunction against the present defendants:—*Held* (by Erle, C. J., and Montague Smith, J.), that, the exercise of this special jurisdiction by the Court being subject to no review, and depending in each instance on the special facts of the case, cases previously decided under it are not binding on the Court in the same manner that precedents in law are binding; that the injunction prayed would interfere with the transport of traffic, which it was the object of the legislature to facilitate; and that it ought not to be granted. *Held* (by Willes and Keating, JJ.), that the above cases were precedents binding on the Court, and also were rightly decided; and that the injunction ought to be granted. *Palmer* v. *London and South Western Railway Co.*, Law Rep. 1 C. P. 588.

Tender under protest.—An offer to pay, under protest, the sum claimed is a good tender.—The defendant's attorneys wrote to the plaintiff's attorney, "if you insist upon being paid the amount demanded before satisfactory explanations have been given, our clerk will hand you a cheque this morning for the amount, but you must consider the payment as under protest, and our client will seek to recover back what is overpaid afterwards." In accordance with this letter, a cheque for the full amount claimed was tendered to the plaintiff's attorney, but he refused to receive it, unless the letter was withdrawn, or he was allowed to state in his receipt that he received it not under protest. Willes, J., remarked: "The question is one of general importance, whether a debtor tendering an amount which he is satisfied to pay rather than be sued for it, may guard himself against an admission that the claim is a just one, so as to put himself in a position to take further proceedings to test the justice of the claim, by adding the words "under protest" to his tender, and tendering under protest. It is quite obvious that he may. I think that the protest imposes no conditions on the tender. The creditor has only to say, 'I take the money; protest as much as you please,' and neither party makes any admission." *Scott* v. *Uxbridge and Rickmansworth Railway Co.* Law Rep. 1 C. P. 596.

Contract, Construction of.—The plaintiffs contracted with the defendant to erect upon premises in his possession a steam-engine and machinery, the works being by the contract divided into ten different parts, and separate prices fixed upon each part, no time being fixed for payment. All the parts of the work were far advanced towards completion, and some of them were so nearly finished that the defendant had used them for the purposes of his business, but no one of them was absolutely complete, though a considerable portion of the necessary materials for that purpose was upon the building, when the whole premises, with the machinery and materials, were destroyed by an accidental fire:—*Held*, that the plaintiffs were not entitled to recover the whole of the contract price; but that, inasmuch as the machinery was to be fixed to the defendant's premises, so that the parts of it when and as fixed would become his property and be subject to his dominion, and the contract must be taken to involve an implied promise on the defendant's part to keep up the building, they were entitled to be paid, as upon an implied contract, the value of the work and materials actually done and provided by them under the agreement. *Appleby* v. *Meyers*, Law Rep. 1 C. P. 615.

Shipping—Charter party—Substituted contract.—The defendants chartered two vessels of 300 tons each for a voyage from Ibraila to London with full cargoes of petroleum, at 84s. per ton. In consequence of their stores at Ibraila having been destroyed by fire, they were unable to furnish any oil; and the owners agreed to cancel the charter parties and to procure other cargoes upon the defendants guaranteeing each vessel "a sum of £900 gross freight home." The homeward cargoes

shipped under the substituted contract fell short of the guaranteed sum for each vessel by £343. One of the vessels arrived in safety; the other was lost:—*Held*, that the contract was broken at the moment of the shipment of the homeward cargo, and consequently that the owners were entitled to recover the deficiency in respect of each vessel, notwithstanding the loss of one. *Carr* v. *Wallachian Petroleum Company*, Law Rep. 1 C. P. 636.

Shipping—Deviation.—A charter party contained a clause that the ship should "with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit direct or on the way, proceed to E., and there load a full cargo of cotton." This the freighters bound themselves to ship. The ship deviated to C. and arrived at E. a few days later than she would have done if she had gone there direct. The ship had not been taken up for any particular cargo, and a small loss in freight was the only result of this delay. —In an action against the freighter for not loading a cargo:—*Held*, that the above clause was a stipulation, and not a condition precedent, and that the delay afforded no justification to the freighter for refusing to load a cargo; but that his remedy for any damage that had accrued by reason of the delay was by cross-action. *MacAndrew* v. *Chapple*, Law Rep. 1 C. P. 643.

Company—Authority of Directors.—A company was incorporated under 25 & 26 Vict. c. 89; the memorandum of association being signed by seven shareholders; no deed of association was filed and no other shares allotted. A. entered into an agreement to act as foreman of the "company's" works, which was signed by B. & C., two of the persons signing the memorandum of association, as "Chairman" and "Managing Director," respectively. In an action by A. against the company for work done under the agreement:—*Held*, that in the absence of evidence to the contrary, the jury were justified in presuming that B. & C. had authority to bind the company. *Totterdell* v. *Fareham Brick Co.*, Law Rep. 1 C. P. 674.

EXCHEQUER.

Trespass—Duty of Owner of Land.—One, who for his own purposes brings upon his land, and collects and keeps there anything likely to do mischief if it escapes, is *prima facie* answerable for all the damage which is the natural consequence of its escape.—The defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land; mines under the site of the reservoir, and under part of the intervening land, had been formerly worked, and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts, and flowed by the underground communication into the plaintiff's mines:—*Held*, reversing the judgment of the Court of Exchequer, that the defendants were liable for the damage so caused. *Fletcher* v. *Rylands*, Law Rep. 1 Ex. 265.

Bankruptcy—Action for false representation.—To a declaration for a false representation, whereby the plaintiff was induced to pay £2000, and "sustained great loss, and became and was adjudicated bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit," the defendant, except as to the claim in respect of the adjudication in bankruptcy, and the remainder of the personal damage alleged, pleaded that before action the plaintiff had been adjudicated bankrupt, that the loss sustained was a pecuniary loss, and that the right to sue for it passed to his assignees:—*Held*, that the only damage recoverable was a direct pecuniary loss, the right to sue for which passed to the assignees, and, therefore, that the plea was a good answer to the whole declaration, and might have been so pleaded. *Hodgson* v. *Sidney*, Law Rep. 1 Ex. 313.

Statute of Frauds.—In order to make a valid

note or memorandum of a contract for the sale of goods within the Statute of Frauds, s. 17, the names of the parties to the contract must appear upon the document as such parties.—Spooner, the purchaser from Vandenbergh, of goods above the value of £10, signed a document in the following terms:—D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at the Lyme Cobb, at 1s per foot":—*Held*, (in an action by Vandenbergh) that Vandenbergh's name not being mentioned as seller, the document was not a note or memorandum of the contract within the Statute of Frauds, s. 17. Bramwell, B., remarked: "Can the essentials of the contract be collected from this document by means of a fair construction or reasonable intendment? We have come to the conclusion that they cannot, inasmuch as the seller's name *as seller* is not mentioned in it, but occurs only as part of the description of the goods." *Vandenbergh* v. *Spooner*, Law Rep. 1 Ex. 316.

[This decision seems rather doubtful. The words "purchased by Mr. Vandenbergh" appear to indicate clearly enough that Vandenbergh was the actual owner and vendor. Besides, there was evidence that after Spooner had signed the above memorandum, he wrote out what he alleged to be a copy of it, which was as follows: "Mr. J. Vandenbergh agrees to sell to W. D. Spooner the several lots of marble purchased by him, &c."]

Sheriff.—A debtor, whose goods had been seized under a writ of *fi. fa.*, persuaded the officer executing the writ not to advertise the sale, and himself interfered to prevent the issue of the bills; on the day of sale his agent induced the officer to postpone it to a later hour, and on the officer's proceeding to sell, directed him to sell also for a writ that day lodged with him, and under which he could not otherwise have then sold. In the management of the sale the officer conducted himself negligently in not properly lotting the goods, and they consequently sold at an undervalue:—*Held*, that the above facts did not constitute the officer the agent of the execution debtor, so as to absolve the sheriff from liability for the officer's negligence in the conduct of the sale. *Wright* v. *Child*, Law Rep. 1 Ex. 358.

Permanent Alimony.—In allotting permanent alimony the Court will take into consideration the circumstance that the husband is obliged, in order to earn his income, to live in a more expensive place than the wife, and when that is the case will not allow her the usual proportion of such income. (The husband in this case had to go to India. One-quarter was allowed, instead of one-third, the ordinary proportion.) *Louis* v. *Louis*, Law Rep. 1 P. & D. 230.

ADMIRALTY AND ECCLESIASTICAL.

Expenses incurred by Master.—A master, while at a foreign port with a homeward bound vessel, incurred expenses in defending himself against a charge of murder maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried and acquitted, and bound over in a sum of £10 to prosecute the men for perjury. He forfeited the £10 in order to return with the vessel to England:—*Held*, on a motion to review the report of the registrar in a suit for disbursements, 1st. That the master was entitled to the expenses of his defence, on the ground that the charge originated directly from the performance of his duty to his owners in chastising the men. And, 2ndly, the Court allowed the £10 forfeit, as it was for the interest of his owners that the master should not be delayed in returning with the vessel. *The James Seddon*, Law Rep. 1 A. & E. 62.

Salvage — Contract to tow.—Where the master of a steamer engages to tow a vessel, it is upon the supposition that the wind and weather and the time of performing the service will be what are ordinary at the time of year; but if an unexpected change of weather, or other unforeseen accidents occur, he is bound to adhere to the vessel, and to do all in his power to rescue her from danger; and he will be entitled to reasonable extra remuneration for the extra service. *The White Star*, Law Rep. 1 A. & E. 68.

Cause of Booty of War—Principles of Distribution.—In a cause of booty of war, the *onus probandi* lies upon the parties claiming as joint captors as against the actual captors. The Court of Admiralty had no jurisdiction with respect to booty—property captured on land by land forces exclusively—until the passing of 3 and 4 Vict. c. 65, the 22nd sec-

tion of which, enacting that the Court "shall proceed as in cases of prize of war," must be understood to mean, not that in all respects the distribution of booty should be assimilated to that of prize, but merely that the ordinary course of proceeding in prize should be adopted. —All prize belongs absolutely to the Crown, which, for the last 150 years, has been in the habit of granting it to "the takers," who are of two classes, actual captors and joint or constructive captors. Joint captors are those who have assisted, or are taken to have assisted, the actual captors by conveying encouragement to them or intimidation to the enemy. The union of the joint captor with the actual captor under the command of the same officer alone constitutes the bond of association which the law recognises as a title to joint sharing. Community of enterprise does not constitute association, and is equally insufficient as a ground for joint sharing, if the bond of union, though originally well constituted, has ceased to be in force at the time of the capture. Such co-operation as will confer a title to a joint share of prize is also strictly limited to encouragement to the friend and intimidation to the enemy. The distinctions between captures on land and captures at sea, tend to show that in considering joint capture of booty, a wider application that is recognised in prize cases, must be allowed to the term "co-operation;" concerted action on a vaster scale than is feasible at sea being indispensable to a campaign. The rule of sight, too, which prevails at sea, is inapplicable on land. The general rule for the distribution of booty, to be adhered to as far as possible, in accordance with naval prize decisions, is the rule of actual capture. In the case of an army consisting of several divisions, the line of distribution, in analogy to the rule of the naval service, and in conformity to military usage, will be drawn between division and division; that division to be regarded as the actual captor, any portion of which has captured the prize. The association entitling to joint sharing must be military and not political, and must be under the immediate command of the same commander. The co-operation which is necessary as a title to joint sharing, is a co-operation directly tending to produce the capture in question. What tends to produce the capture cannot be once for all defined, but strict limits must be observed of time, place, and relation. Services rendered at a great distance from the place of capture, acts done long before the capture was contemplated, even though they affect the whole scene of operations, cannot be deemed such co-operation as will give a title to share in booty. Indirect services will be insufficient. To entitle the commander-in-chief to share in booty, he must himself be in the field; but "to be in the field," it is not necessary that he should be actually present with the division that makes the capture; being in the field with one division, he is in the field with all. But, if troops have been placed under the INDEPENDENT command of another, the commander-in-chief, though actually in the field, does not share in booty taken by those troops. No distinction should be made in the right of the general and personal staff to share in booty; in principle, the right of both stands or falls with that of the commander-in-chief, therefore all his staff who are in the field with him are entitled to share. *Banda and Kirwee Booty*, Law Rep. 1 A. & E. 109.

[The report of the case in which the above principles were laid down by Dr. Lushington, fills 160 pages, the judgment alone occupying 140 pages. The case arose out of the military operations undertaken by the British Government in India, for the suppression of the mutiny in that country during the years 1857 and 1858. The evidence adduced consisted of six printed volumes, chiefly correspondence. The booty amounted to about £750,000, and was actually captured by the division under Major General Whitlock, but claims were preferred by the commander-in-chief, and generals commanding other divisions, on the ground that their forces cooperated in the movements of troops which led to the capture of the property. These claims were referred by an order in Council to the Judge of the High Court of Admiralty, Her Majesty having waived her right to the property, and having desired that it should be divided among the forces concerned in the operations. This was the first reference of the kind under the Statute, and our readers will find Dr. Lushington's elaborate judgment well worthy of perusal.