DIARY FOR APRIL.

1. Mon.. *Easter Monday.* County Court Term begins. Clerks and Dep. Clerks of Crown and Master and Registrar in Chancery to make quarterly returns of fees.
6. Sat.... County Court Term ends.
7. SUN.. *Low Sunday, or 1st after Easter.*
14. SUN.. *2nd Sunday after Easter.*
21. SUN.. *3rd Sunday after Easter.*
23. Tues.. *St. George.*
25. Thur . *St. Mark.*
28. SUN.. *4th Sunday after Easter.*

THE

Canada Law Journal.

APRIL, 1872.

An interesting and novel question of constitutional law has been examined by the Irish Court of Queen's Bench, in an action against the Lord Lieutenant and others, for an assault. The alleged occasion was when a mob was dispersed by the Dublin Metropolitan Police at the time of the visit of the Prince of Wales to that city. A summary application was made to stay the suit, founded upon affidavits shewing that the only part His Excellency had in the matter was in his official character as head of the Executive Government of Ireland. The motion was granted, the full Court agreeing that the action, so far as applied to the Lord Lieutenant, was brought for an "*act of state,*" and that no such action could be maintained against him in the country where he exercised such authority.

The Lord Chancellor has held in *Sharp* v. *Baron de St. Sauveur*, that the last Imperial Act, 33 Vict., c. 14, empowering aliens to hold and dispose of real estate, has not a retrospective operation, so as to validate the title of land devised to an alien before the passing of this Statute. The *Law Journal* in commenting on the decision, points out that if the alien is living, the title might probably be perfected by a grant from the crown, upon petition to the Secretary of State. And it also gives the following hint to conveyancers, that where it is intended, either in the lifetime or after the death of the alien, to sell land with such a flaw in the title, the best course to adopt is to bind the purchaser by the conditions of sale not to raise the particular objection to the title, and thereby to cast upon him the burden of completing the title by application to the crown. It may be remarked that a condition of this kind was observed upon very unfavorably by the Master of the Rolls in *Else* v. *Else*, 20 W. R. 286.

A new point in connection with selling the good will of a business, has been decided by the Master of the Rolls to this effect: the vendor of a business as a going concern is at full liberty to set up a new business, and to publish advertisements addressed to the public in general, soliciting custom; but he is not at liberty in any manner to solicit his former customers to continue to deal with him, or not to continue to deal with the purchaser of the business. The case proceeds upon an application of the well-established rule, that he who sells a thing shall not afterwards impair the value of that which he has sold. *Labouchere* v. *Dawson*, 20 W. R. 309.

Owing to the short-sighted economy of the English Government, in keeping down the judicial force, whereby the Chief Judge in Bankruptcy has also to do duty as Vice-Chancellor, the unseemly spectacle was lately presented in Bankruptcy, of one Registrar sitting in appeal from another Registrar in regard to a matter relating to the duty of a Registrar on a given state of facts. It must be very pleasant for clients to see the assets of an estate gradually disappearing in procedure like this, where costs are incurred, but the cause not a whit advanced; for we do not suppose that the appellate decision of one Registrar will be any more satisfactory than the original decision of his fellow Registrar.

In bare contemplation of the possibility of a new trial in *Tichborne* v. *Lushington*, the *Law Journal* favours the passing of a law making the ruling of the judge at Nisi Prius absolutely final on all questions of the admission or rejection of evidence, just as it is now in England on stamp questions, with power to the judge to permit an appeal where the verdict in the cause would in substance turn on the evidence in question. The suggestion well merits consideration, when one observes how litigation has been prolonged by the unfortunate rejection or the inadvertent admission of some paltry scrap of evidence that

was really of inappreciable consequence one way or the other.

It has lately been held in the English Court of Admiralty, that under Lord Campbell's Act, corresponding to Con. Stat. Can., c. 78, sec. 2, it is competent for the Court or jury to award compensation in the case of an unborn infant whose father has been killed by accident. *The George & Richard* 20 W. R. 245.

A Mr. Bass has introduced a Bill into the British House of Commons to abolish the power to recover debts under 40*s*. Some of the best of the County Court Judges, however, have taken the would-be benefactor of the poorer classes to task, and say that the effect would be most disastrous to the persons whom it is desired to benefit—we think so too.

QUEEN'S COUNSEL.

The names of seven gentlemen have recently appeared as Queen's Counsel in the *Ontario Gazette*. They are all of unquestionable standing in the profession, and are entitled—some of them eminently so—to the position to which the Lieutenant-Governor has assumed to call them.

Two points, however, arise in connection herewith: firstly, has the Lieutenant-Governor any jurisdiction whatever in this matter, and does not the power rest solely, as heretofore, with the Governor-General? And secondly, have not names been omitted, which the profession would have expected to have seen on the list—we will not say instead of some of those gazetted, but, in addition to their number?

As to the first point, there are grave doubts whether the Lieutenant-Governor, who is appointed, not by the Crown, but by the Dominion authorities, has the power to make Queen's Council and such doubts have been expressed, even by political supporters of the present administration, and, it is also said, by some of the recipients of the honour. This part of the subject we must, however, reserve for future consideration.

As to the second point, it cannot be denied that there is a feeling of surprise on the part of the profession, that the claims of two or perhaps more Barristers to whom we shall refer have been overlooked. The selection has apparently been made with reference the respective claims of the Common Law and Chancery Bars. We have heard complaints that the Country Bar has not been sufficiently represented, but we do not hold to the doctrine that either the Common Law and Chancery Bar, or the Toronto and Country Bar must be equally represented, and in these respects we see no cause of complaint. But, undoubtedly, those whom the Crown ought to select as its counsel ought be those whom their brethren at the Bar would delight to honor. We admit the great difficulty, not to say impossibility of pleasing every one, and we say now, as we said before, that at least three of those (Dr. McMichael, Mr. Christopher Patterson, and Mr. Anderson) recently nominated, should have been appointed long ago on the nomination of the Ottawa Government. But upon what principle of selection Mr. Leith has now been overlooked we do not understand. He was called to the Bar in 1849, and is senior to all the others; and not only is he a man of good general attainments, but in his own important and abstruse speciality, he enjoys the confidence of his brethren in the highest degree. In addition to this Mr. Leith has done immense service to the profession in the treatises he has published on real property subjects, and that "for love and not for money." If a precedent were wanted we might refer to the analogous case of Mr. Joshua Williams, Q.C. We think also that Mr. James Maclennan and two or three we could name are entitled to this distinction equally with some of those who have been appointed, and Mr. Maclennan's name has been mentioned freely as one which should have been found along with those in the *Gazette*.

We thoroughly understand the difficulty of making a selection in these matters, and we desire to give to the learned and eloquent President of the Council, who has obtained such a high position so early in life, both at the bar and in public affairs, as well as to the Attorney General, full credit for an intention to make their selection without "fear, favor, or affection," and we hope that whosoever may prove to have the keeping of the fountain of honor in this Province will not fail to ascertain and carry out the wishes and expectations of so intelligent and independent a body as we believe the Bar of this Province to be, at least so long as they retain that enviable reputation.

COMMUNICATIONS BETWEEN CLIENT AND LEGAL ADVISER.

A correspondent writes us in the following terms:

"Sir,—I would like to have the question, as to the right of gentlemen of the legal profession to be held exempt from divulging in a court of justice their knowledge of their client's conduct in criminal matters, fully discussed in your journal. My proposition is that they are not exempt and that they ought not to be exempt."

The question proposed is not so accurately put as to enable us to determine precisely what is meant. But whatever is meant the discussion would be an unprofitable one, in this sense: that all that can be said upon such a matter has been said long ago, and the law thereupon is fixed beyond a peradventure. It is a well-established rule, that all communications passing between a client and his legal adviser (be he attorney, solicitor, or counsel) in the course, and for the purpose of professional business, are privileged. If the communication is made, not as between client and professional adviser, nor in the usual course of business, or for a fraudulent or illegal purpose, then it is not protected. It is difficult to condense the law on this subject into a few sentences, but it may be found written at large in any modern text-book on discovery or evidence. For example, Wigram, Kerr, Taylor, or Russell on Crimes.

We only discuss subjects taken up by the text-books, where those text-books seem to have come to erroneous or uncertain conclusions, or where there has been some recent alteration of the law, or where it is desirable to agitate for a change of the law, or for the purpose of making a *resumé* of cases upon some point not fully handled in such treatises. In the present instance, no fault can be found with the law; it is eminently reasonable. Suppose the rule were otherwise, then it would be impossible for lawyers to obtain information so as to enable them to give advice or conduct proceedings. No doubt something may be said as to the advisability of changing the law by statute, in so far as to declare privileged all confessions made to spiritual advisers. But it is certainly not desirable to change the present law by breaking down or modifying that privilege, as to legal advisers. It is in every respect, and in all aspects, fit and proper that confessions made by an alleged criminal to his attorney or counsel should not be divulged. If an attorney or counsel has acquired a knowledge of any criminal conduct, on the part of his client, from another source, then no privilege exists, nor need it exist, as to this. The maintenance and enforcement of the rule are supported by considerations which the Lord Justice Knight Bruce has expressed unanswerably: "Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much. And surely the meanness and the mischief of prying into a man's consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."—*Pearse* v. *Pearse*, 1 *De G. & Sm.* 28.

A well-authenticated anecdote is told respecting an ejectment suit, brought by a lady, a few years ago in England, who claimed some estates as sole heiress of the deceased proprietor. Before entering on proof of a long and intricate pedigree, which Mr. Adolphus her counsel had opened, Mr. Gurney, who was counsel for the defendant, offered to prove a fact which would end the suit at once, that the plaintiff had two brothers living, one of whom was then in court. Mr. Adolphus assented. The fact was proved, and on the plaintiff being asked whether she had communicated the fact to her attorney, she replied, "To be sure not; do you take me for a fool? why, he could not have undertaken the case if I had told him that." So difficult is it sometimes to get the truth and the whole truth from clients, under the most favourable circumstances. But remove the safeguard that the law has thrown around such communications, then awkward surprises and unpleasant discoveries worse than the above, would be the rule and not the exception. Then clients would be always speculating how far it would be safe to disclose their case; there would be half-confidences and imperfect narration of circumstances; suppressions and distortions of fact so that the advantages of advocacy would be well-nigh destroyed, and the relationship of solicitor and client, especially as to the "*alter ego*" theory,

would become a meaningless thing, of small benefit to either.

BEQUEST TO A CHARITABLE INSTITUTION.

For the first time since the Reformation the effect of a bequest and devise to a sisterhood of nuns, in England, has been determined by *V. C. Wickens*, in *Cocks* v. *Manners*. This Judge manifested how fitly he is characterized as the English lawyer who knows most about the law relating to charities, by delivering his judgment of unquestioned soundness at the close of the argument. One object of the testator's bounty was "the community of the Sisters of the Charity of St. Paul, at Selley Oak," who appeared to be a voluntary association for the purpose of teaching the ignorant and nursing the sick. As to these, it was held that they were a charitable institution, and that, consequently, the devise of lands failed, though the bequest of pure personalty was valid. There was also a devise to the Dominican Convent, at Carrisbrooke, which it was shewn was an institution consisting of Roman Catholic nuns, who had associated themselves together for the purpose of working out their own salvation, by religions exercises aud self-denial, not visiting the sick or relieving the poor, except casually or accidentally. The Vice-Chancellor was of opinion that such a society was not charitable, and not within the meaning of the act, so that the devise to them, of £6,000 value, was upheld. The curious issue of the law on this case is very strikingly brought out in the language of the *Law Journal*, as follows:—

"The one institution, on its own showing, does not visit the poor, or teach the young, or engage in any of the works of charity or mercy; and because it abstains from doing these good deeds, it is allowed to become the recipient of £6,000. The other institution has to be content with £100 because its members employ themselves in teaching the children of the poor and in nursing the sick. Mr. Bagshaw, in his argument, well compared the two institutions to 'Mary' and 'Martha' of Scripture history—the one 'active,' the other 'passive'—the one 'practical,' the other 'contemplative.' May we not carry the illustration further? As it was of old, so now, the 'passive and contemplative' convent of Dominican nuns seem to have chosen the good part, which the law will not take away from them."

"DULCE EST DESIPERE, &c."

It is strange how "good things" repeat themselves. These, also, would appear to fall under Solomon's aphorism about "nothing new under the sun." Mr. Justice Maule is credited with having had at his fingers' and tongue's end the whole cycle of professional *ana* that periodically re-appears in the published collections. It is told of him, that once upon a circuit his postchaise companion had picked up at a bookstall a collection of anecdotes, supposed to contain an unusual admixture of new material; but the learned Judge undertook to give the point of any story in it, on hearing two lines of it read, and really fulfilled his boast without a single failure.

But the particular "good thing" which has induced this moralizing occurred on this wise: In a case heard at the present Chancery sittings in Toronto, there was put in the witness box a gentleman of high standing in the community, though, like the worthy Zaccheus, little of stature. As he stood in the box, however, after being sworn, with arms stretched along the top, and shoulders and head just visible, he presented to the Chancellor's observant eye, as it first fell upon him, very much the appearance of some awkward fellow squeezed into a sitting position as comfortably as the straitness of the enclosure would allow; whereupon his Lordship admonished the witness to stand up and give his evidence properly. "But I *am* standing up, my lord," said the witness, with such solemnity as truth, spoken under oath, could alone give. An explanation of the true condition of affairs was then made *sotto voce* to the court, and the examination proceeded.

A counterpart to this is the story told of a diminutive barrister, *temp.* Lord Mansfield, named Morgan, who was so addicted to the citation of *Croke's* Reports that he won for himself the soubriquet of "Frog" Morgan,—to which probably his squat figure gave additional point. Before he was much known at the bar, he was beginning to open a case, when Lord Mansfield, in a tone of grave rebuke, addressed him: "Sir, it is usual for counsel, when they address the court, to stand up." "I *am* standing, my lord," screamed "The Frog;" "I have been standing these five minutes."

ACTS OF LAST SESSION.

An Act for the prevention of Corrupt Practices at Municipal Elections.

Her Majesty, &c., enacts as follows:

1. The following persons shall be guilty of bribery, and shall be punished accordingly:

(1.) Every person who shall directly or indirectly, by himself or by any other person lend, or shall offer or promise any money or on his behalf, give, lend, or agree to give or valuable consideration, or shall give or procure, or agree to give or procure or offer or promise, any office, place or employment, to or for any voter, or to or for any person no behalf of any voter, or to or for any person in order to induce any voter to vote or refrain from voting at a municipal election, or upon a by-law for raising any money or creating a debt upon a municipality or part of a municipality for any purpose whatever, or who shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any such election, or upon any such by-law.

(2.) Every person who shall directly or indirectly, by himself or by any other person in his behalf, make any gift, loan, offer, promise or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in any municipal council, or to procure the passing of any such by-law as aforesaid, or the vote of any voter at any municipal election, or for any such by-law:

(3.) Every person who shall by reason of any such gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure the return of any person in any municipal election, or to procure the passing of any such by-law as aforesaid, or the vote of any voter at any municipal election, or for any such by-law:

(4.) Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person with the intent that such money, or any part thereof, shall be expended in bribery at any municipal election, or at any voting upon a by-law as aforesaid, or who shall knowingly pay, or cause to be paid, any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any such election or at the voting upon any such by-law:

(5) Every voter who shall, before or during any municipal election, or the voting of any such by-law, directly or indirectly, by himself or by any other person on his behalf, receive, agree or contract, for any money, gift, loan, or valuable consideration, office, place or employment, for himself or any other person, for voting or agreeing to vote, or refraining or agreeing to refrain from voting at any such election, or upon any such by-law:

(6.) Every person who shall, after any such election, or the voting upon any such by-law, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted, or refrained from voting, or having induced any other person to vote or to refrain from voting at any such election, or upon any such by-law:

(7.) Every person who shall hire any horses, teams, carriages, or other vehicles for the purpose of conveying electors to and from the polls, and every person who shall receive pay for the use of any horses, teams, carriages or other vehicles, for the purpose of conveying electors to and from any polls as aforesaid.

2. Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of, or threaten to make use of any force, violence or restraint, or inflict, or threaten the infliction, by himself or by or through any other person, of any injury, damage or loss, or in any manner practise intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall in any way prevent or otherwise interfere with the free exercise of the franchise of any voter, shall be deemed to be guilty of undue influence, and be subject to the penalty hereinafter mentioned.

3. The actual personal expenses of any candidate, his expenses for actual professional services performed, and *bona fide* payments for the fair cost of printing and advertising, shall be held to be the expenses lawfully incurred, and the payment thereof shall not be a contravention of this Act.

4. Any candidate elected at any municipal election, who shall be found guilty by the judge, upon any trial upon a writ of *quo warranto*, of any act of bribery, or with using undue influence as aforesaid, shall forfeit his seat, and shall be rendered ineligible as a candidate at any municipal election for two years thereafter.

5. Where the writ of summons, in the nature of a *quo warranto*, is returnable before one of the Judges of the Superior Courts of Law, in case any question as to whether the candidate or any other voter has been guilty of any violation of sections one and two of this Act, affidavit evidence shall not be used to prove the offence, but it shall be proved by *viva voce* evidence taken before the Judge of any County Court, upon a reference to him by the Judge of the Superior Court, for that purpose, in the presence of counsel for, or after notice to, all parties interested; and in case such reference be directed to the Judge of the County Court, he shall return the evidence to the Clerk of the Crown at Toronto, and every party shall be entitled to a copy thereof.

6. In all other cases the Judge of the S.

perior Court before whom the writ of summons is returnable, may order the evidence to be used on the hearing of the summons, to be taken *viva voce* before the Judge of the County Court; and in any such case the previous section of this Act shall apply.

7. The vote of every person found guilty, upon any trial or enquiry as to the validity of the election or by-law of a violation of either of the first two sections of this Act, shall be void.

8. Any person who shall be adjudged guilty of any of the offences within the meaning of this Act, shall incur a penalty of twenty dollars, and shall be disqualified from voting at any municipal election or upon a by-law for the next succeeding two years.

9. The penalties imposed by this Act shall be recoverable, with full costs of suit, by any person who will sue for the same by action of debt in the Division Court having jurisdiction where the offence was committed; and any person against whom judgment shall be rendered, shall be ineligible, either as a candidate or municipal voter, until the amount which he has been condemned to pay shall be fully paid and satisfied.

10. It shall be the duty of the judge who finds any candidate guilty of a contravention of this Act, or who condemns any person to pay any sum in the Division Court for any offence within the meaning of this Act, to report the same forthwith to the clerk of the municipality wherein the offence has been committed.

11. The clerk of every municipality shall duly enter in a book, to be kept for that purpose, the names of all persons within his municipality who shall have been adjudged guilty of any offence within the meaning of this Act, and of which he shall have been notified by the judge who tried the case.

12. All proceedings against a candidate elected at any municipal election for any violation of the provisions of this Act, must be commenced within the time allowed by the Municipal Act of 1866.

13. Any by-law the passage of which has been procured through or by means of any violation of the provisions of this Act, shall be liable to be quashed upon any application to be made in conformity with the provisions of the Municipal Institutions Act of one thousand eight hundred and sixty-six, as hereinafter provided.

14. Before any application for the quashing of a by-law upon the ground that any of the provisions of this Act have been contravened in procuring the passing of the same, and if it is made to appear to a judge of one of the Superior Courts of Law, that probable grounds exist for a motion to quash said by-law, the said judge may make an order for an inquiry, to be held upon such notice to the parties affected, as the Judge may direct concerning the said grounds, before the judge of the county court of the municipality which passed said by-law, and require that upon such inquiry, all witnesses both against and in support of such by-law, be orally examined and cross-examined upon oath before said county court judge; and the said county court judge shall thereupon return the evidence so taken before him to the clerk of the Crown and Pleas at Toronto; and after the return of said evidence, and upon reading the same, any Judge of the said Superior Courts may, upon notice to such of the parties concerned, as he shall think proper, proceed to hear and determine the question; and if the grounds therefor shall appear to him to be satisfactorily established, it shall be competent to him to make an order for quashing said by-law, and may order the costs attending said proceedings to be paid by the parties or any of them, who shall have supported said by-law; and if it shall appear that the application to quash said by-law ought to be dismissed, the said Judge may so order, and in his discretion award costs, to be paid by the persons applying to quash said by-law.

15. After an order has been made by a judge directing an inquiry, and after a copy of such order has been left with the Clerk of the Corporation of which the by-law is in question, all further proceedings upon the by-law shall be stayed until after the disposal of the application in respect of which the enquiry has been directed, but if the matter be not prosecuted to the satisfaction of the Judge he may remove the stay of proceedings.

16. Any witness shall be bound to attend before the judge of the County Court upon being served with the order of such County Court Judge directing his attendance, and upon payment of the necessary fees for such attendance, in the same manner as if he had been directed by a writ of subpœna so to attend; and he may be punished for contempt, and shall be liable to all the penalties for such non-attendance in the same manner as if he had been served with such subpœna.

17. No person shall be excused from answering any question put to him in any action, suit or other proceeding in any court or before any judge, touching or concerning any election, or by-law, or the conduct of any person thereat, or in relation thereto, on the ground of any privilege, or on the ground that the answer to such question will tend to criminate such person; but no answer given by any person claiming to be excused on the ground of privilege, or on the ground that such answer will tend to criminate himself, shall be used in any criminal proceeding against such person, other than an indictment for perjury, if the judge shall give to the witness a certificate that he claimed the right to be excused on either of the grounds aforesaid, and made full and true answer, to the satisfaction of the judge.

18. All other proceedings against any person for any violation of this Act, shall be commenced within four weeks after the muni-

cipal election at which the offence is said to have been committed, or within four weeks after the day of voting upon any by-law as aforesaid.

19. [The clerks of municipalities to furnish returning officers with six copies of Act]

SELECTIONS.

AMERICAN SHIPS UNDER BRITISH COLOURS.

One of the items of damages claimed by the United States under the Alabama Convention consists of losses sustained by the transfer of American ships to the British registry. We believe that during the war more than seven hundred American merchantmen were transferred to our registry, and became British ships for the express purpose of escaping the Confederate cruisers. Assuming that this head of damage is within the treaty, and also capable of proof, we may suggest, on the part of Her Majesty, an objection to the claim which, in the majority of cases, will, we believe, prevail. If the British registry be inspected, it will be found that opposite to many of the ships are placed the names of American mortgagees. The names of the transferees are never given on the registry, but they could be easily ascertained. Now where the names of transferors and mortagees are identical, there arises the presumption that there was no absolute sale of the ship, but only a colourable transfer. So also if in other cases it be found that the transferred ships were held upon trust for the former owners, there again the claim would fail, because, there being no *bona fide* sale, there could be no loss. To these objections, founded upon general principles, must be added one of a more important character, based on the British Merchant Shipping Act 1854. By section 56 of that Act, every person, before being registered as transferee of a ship or share of a ship, must make a declaration that he is qualified to be registered as owner as owner of a British ship, and also that, to the best of his knowledge and belief, no unqualified person is entitled as owner to any legal or beneficial interest in the ship or any share therein. A false declaration constitutes a misdemeanour, and by section 103, if any unqualified person acquires as owner any interest, either legal or beneficial, in a ship using a British flag and assuming the British character, such interest shall be forfeited to Her Majesty. Persons qualified to be owners of British ships are British-born subjects who have not sworn allegiance to a foreign State, denizens, and naturalised person. If, therefore, upon the evidence in any cases under this head of damage, it turns out that an American citizen has retained or acquired after transfer to the British registry any beneficial interest in the ship transferred, that share will be forfeited to the Queen, and no claim against the Crown for damage can be founded on a transaction which in itself constitutes a violation of the municipal laws of the United Kingdom.

It is impossible to believe that in four years ships showing an aggregate burthen of half a million tons were bought out and out by subjects of the Crown, but the American claim rests entirely upon the hypothesis that such was the fact. The alternative hypothesis, which is much more probable, not only defeats the claim, but entitles the Crown to confiscate to its own use an enormous mass of property of the highest value.—*Law Journal.*

A FRENCH VIEW OF LORD BROUGHAM.

At the annual public meeting of the Académie des Sciences Morales et Politiques, a branch of the French Institute, held on Saturday last, M. Jules Simon read a report on the various essays sent in competition for the prizes offered by the Academy. The feature of the day, however, was an address delivered by M. Mignet upon the career and character of the late Lord Brougham, which occupied the attention of the assemblage for more than an hour an a half, and was listened to throughout with the closest attention. M. Mignet said:—"Lord Brougham was the oldest as he was the most illustrious foreign associate of the Academy. He was Lord High Chancellor of England when, in 1832, the Académie des Sciences Morales et Politiques was re-established, and he was immediately admitted to its ranks, and with indisputable titles. A celebrated and an intellectual writer, he had since the beginning of the century applied his powerful faculties and his varied talents to the propagation or defence of the noblest and most humane ideas. He had cultivated with an aptitude that was in some degree universal the vast field of social science, after having in his earlier day traversed not without distinction, the field of physical and mathematical sciences.

A great advocate, he pleaded the greatest causes with earnest speech and vigorous dialectics, and he acquired by his eloquence an imperishable renown. A political orator of extraordinary fertility, and not less remarkable for the loftiness of his views as for the brilliancy of his talents, he was placed from 1810 to 1830 at the head of that party in the House of Commons which desired to improve the laws and to extend the public liberties. An enterprising Minister and a reforming Chancellor, he effected in the Government and in the administration of justice those happy changes, equally prudent and just, which he had recommended while in Opposition." The talents and tastes of Lord Brougham were displayed at an early age, and M. Mignet dwelt at some length upon this portion of Brougham's career, recounting many anecdotes which have become familiar to the English public. After alluding to Brougham's advocacy on behalf of Queen Caroline, and to the famous speech demanding

the repeal of the well-known Order in Council forbidding neutral vessels from entering French ports, the orator passed to the period when the subject of his address became Lord Chancellor, having in the meantime, during a space of twenty years, displayed inexhaustible activity and eloquence on behalf of the most liberal and generous views of reform. The new Chancellor was described as being—"Not only a Liberal Minister in the Council, a fruitful legislator in Parliament, but also a great magistrate in the High Court of Equity, where he was the supreme judge. No one possessed in a greater degree the sentiment and the perception of justice. Scarcely had he become installed in the chief seat of the Court of Chancery than he applied himself with honourable promptitude and ardent equity to accelerate the suits which had accumulated from time immemorial' and which formed a congealed mass of litigation. He sat with indefatigable assiduity in his Court, where he was many times found at the dawn of day listening to argument or delivering judgments. His penetrating sagacity and his general knowledge of jurisprudence enabled him to constitute a real Court of Equity. He there at the same time abolished abuses which would have been lucrative to himself, and he suppressed sinecures which were onerous to the State." Brougham's career in the House of Commons and his efforts on behalf of the parliamentary reform were dwelt upon by M. Mignet, who, referring to the celebrated speech in which the orator implored upon his knees the House not again to reject a bill so anxiously desired by all lovers of the country, said, "Certainly the kneeling was out of place." Referring to that later period when Brougham had become somewhat estranged from the leaders of the Whig party, he said, "At this time Lord Brougham was no less admired than he was fortunate, but perhaps he did give way a little to the intoxication of pride, and failed to restrain the intemperance of a mind whose fiery nature was capable of leading to any extravagance."

Passing to a consideration of Brougham's labours—political, philosophical, and historical—M. Mignet said, 'He loved the English Constitution as an Englishman, he admired it as a publicist. He has ably traced its history, explained its structure, appreciated its influence, and pointed out its useful developments.

Always in progress, the Constitution, becoming more and more representative of England and bending to the exigencies, had adapted itself to the diverse conditions of a great country, whose ideas it follows, and whose wants it satisfies. Little by little it has thus directed the efforts of all powers and classes within the State to the same end—the growing establishment of all that is right, the increasing respect for public interests, the skilful management of common affairs. Lord Brougham well explained that progressive Constitution which, without changing the form of Government, has perfected its means of action, has rendered royalty limited in its intervention, the aristocracy liberal in its conduct, and the democracy moderate in its pretensions; and which, constructed not by force of logic, but by history, has issued less from the spirit than from the very existence of a people which it has enabled in our days to conduct itself as a republic under a monarchy, to enjoy order, prosperity, and greatness combined with liberty. Lord Brougham dedicated his book upon the Constitution of England to Queen Victoria, under whose long reign that Constitution, faithfully observed in its spirit, has never been evaded in its exercise. Written at the age of eighty-one, that dedication is a model of propriety and grace. In the same year in which he dedicated a political work to the Queen of England he dedicated a scientific work to the University of Edinburgh, which selected him for its Chancellor in 1860. That volume contained treatises upon mathematics and physics, written between 1796 and 1858, upon the most various subjects—general theorems of geometry, problems of Keppler, dynamic principles, the differential calculus, the architecture of the cells of bees, analytical and experimental researches into light, the attractions of forces, and lastly, the admirable speech which he delivered at Grantham upon the occasion of inauguruating the monument to Sir Isaac Newton." After describing the residence at Cannes and the industrious and learned life which Brougham passed there during many winters, and where he died on May 7, 1868, M. Mignet thus summed up his estimate of his character:—"Henry, Lord Brougham, belongs to the number of the great men of his time and of his country. Endowed with extraordinary genius, possessed of vast knowledge, gifted with brilliant talents, animated by incomparable ardour, he devoted the thoughts of his mind, the enthusiasm of his soul, the resources of his knowledge, the brilliancy of his talents, to the service of the noblest causes—to the progress of justice, of law, of intelligence, of humanity.

A Reformer without a chimera, a Conservative without a prejudice, he never separated, either in his writings or in his actions, what was expedient from what was right, and it was his pride to keep in accord the free advancement of men and the moral order of society.

He was also the defender of political liberty, the persuasive advocate of civil equity, the zealous promoter of public education, the eloquent supportor of human emancipation. Illustrious by his works, memorable by his services, Lord Brougham must be counted among those great men who honour the country whose glory they sustain, who maintain what is right and strengthen what is good, and who, by the brilliancy of their talents and the generosity of their souls, are held by posterity in everlasting esteem.'—*Law Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

In re Brown and Wallace.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

32 Vic. cap. 32, secs. 23, 36, (Ont.)—Tavern License Act—Trial by Judge without jury—Depositions as evidence—Prohibition.

Held, 1. After an appeal to the Sessions from a conviction of a magistrate for selling liquor after 7 o'clock on Saturday evening, under 32 Vic. cap. 32. sec. 23, is confirmed a prohibition to the Sessions will not be granted.

Held, 2. That under the above section, it is irregular for the judge who tries the case to call a jury, or to receive depositions of witnesses as evidence, but this is not ground for a prohibition.

[Chambers, January 5, 1872—Galt, J.]

Osler obtained a summons, calling upon John Wallace, and George Duggan, Esq., the Chairman of the General Sessions of the Peace for the County of York, to shew cause why a writ of prohibition should not be ordered to issue out of this court to prohibit the said Court of General Sessions of the Peace from further proceeding in the matter of an appeal to the said court, wherein one Thomas Brown was appellant and one John Wallace was respondent, being an appeal from a certain conviction made by Alexander Macnabb, Esquire, Police Magistrate of the said City of Toronto, against the said Thomas Brown, on the twenty-third day of November, 1871, for that he the said Thomas Brown on November 11th, 1871, sold intoxicating liquors after seven o'clock in the evening of that day, and which said appeal came on to be tried at the said Sessions on December 16th, 1871, and was dismissed, and the said conviction affirmed with costs—on the grounds:

1st. That the said appeal was tried by a jury who were called and sworn upon the matter of the said appeal, and not by the said Chairman of the said Sessions, as required by the Statute in that behalf;

2nd. That the respondent gave no evidence in support of the said conviction, and that the learned Chairman of the said Sessions allowed the respondent to read to the said jury the depositions of the witnesses for the prosecution taken in the Police Court on the hearing of the information, instead of giving the *viva voce* testimony of the said witnesses themselves.

3rd. That the said conviction was affirmed without evidence, and the said Sessions exceeded their jurisdiction in so doing.

The facts of the case material to the application are the following:

The applicant Brown had been convicted in the Police Court of the City of Toronto, upon the evidence of two witnesses, and fined in the sum of $20 and costs, for selling liquor after 7 o'clock on Saturday evening contrary to sec. 23, cap. 32, 32 Vic., Ont. He appealed from this conviction to the Court of General Sessions, pursuant to C. S. U. C. cap. 114, and 32 Vic. cap. 32, Ont., sec. 36, which provides that such appeal "shall be tried by the Chairman of the Court without a jury."

The appeal came on to be heard at the Sessions, when the Chairman, with the consent of the appellant, but against the wish of the respondent, who contended that under the statute the appeal should be tried by him alone, directed a jury to be sworn to try the appeal. The respondent opened his case, and then offered evidence to shew that the witnesses upon whose evidence in the Police Court the appellant was convicted had left the Province, and he proposed to read their depositions taken in the Police Court as evidence in the trial of the appeal. The appellant objected that the depositions in question were not evidence, that the absence of the witnesses from the country did not entitle the prosecutor to read them, and that the witnesses themselves should be called. The learned Chairman of the Sessions overruled the objections, and the absence of the witnesses being proved, their depositions were admitted, and the conviction was affirmed with costs.

The summons for prohibition was then taken out.

Hurd, on behalf of the Chairman of the Sessions and of the respondent, shewed cause.

Prohibition is not the proper remedy, and justice has been done. The effect of a prohibition would be unfair, and put respondent in a worse position than before the appeal. If the appellant has any remedy it would be by error.

The effect of a prohibition if allowed would be the same as a *certiorari*, the right to which is taken away: 33 Vic. cap. 27, sec. 2 (Can.)

The appellant cannot take the objection that the case was tried by a jury, as the jury was called at his instance, and if he can, it may be said that the case was tried by the judge if he accepts their finding and makes it his own judgment. But we say that 32 Vic. cap. 32, sec. 36 (Ont.) is overridden by 32–33 Vic. cap. 31 (Can.) as amended by 33 Vic cap 27 (Can.), which govern in the matter of this appeal.

Osler supported the summons.

The Sessions have exceeded their jurisdiction in trying the case before a jury. The statute is express and positive in its terms, "*shall* be tried by the Chairman without a jury;" sec. 36, cap. 32, 32 Vic., Ont., and the appellant is not estopped from objecting to the jurisdiction by having consented to the jury being sworn: *Smith* v. *Rooney*, 12 U. C. Q. B. 66; *Yates* v. *Palmer*, 6 D. & L. 283; 1 T. R. 552; 2 Just. 602, 607.*

Prohibition lies from the Queen's Bench to the Sessions: *Reg.* v. *Herford*, 3 E. & E. 115.

If inferior court assume a greater or other jurisdiction than that allowed by law, or refuse to allow an act of Parliament, Superior Courts will control them by prohibition: Bac. Abr.; Title Prohibition, C. p. 568; *Ib.* prohibition, K. p. 557.

The court here has assumed a jurisdiction other than that allowed by law in another respect, in that it has decided the appeal without evidence, the depositions not being legal evidence and not receivable: Roscoe Cr. Ev., Ed. 6, pp. 65, 71; Dickenson's Qu. Sess.,

* See *Mossop* v. *Great Northern R. W. Co.*, 26 L. T. 92, and cases there cited.—Eds. L. J.

pp, 525, 643, 644; *Reg.* v. *Austin*, 25 L. J., M. C. 48; Indictable Offences Act, 32-33 Vic. cap. 30, sec. 30, Can., applies only to depositions taken on a preliminary investigation in a criminal matter. The appeal here was an entirely new proceeding, and the prosecutor had to begin *de novo*: Dickenson, 643, 644.

The appeal was governed by the Statute of Ontario, not by the Summary Conviction Act of Canada, 32, 33 Vic. cap. 31, for the subject of it was not a crime under sec. 1, and it was in relation to a matter wholly within the jurisdiction of the Provincial Legislature: B. N. A. Act, sec. 92, sub-sec. 9.

Galt, J. (having consulted Hagarty, C J., C. P.)—There is no doubt that the whole of the proceedings of the Sessions were entirely irregular; but I see a difficulty in granting a prohibition. How is the appeal to be disposed of? If we could grant a conditional prohibition until the next Sessions we might relieve the appellant, but it cannot be disputed that there was jurisdiction to *entertain the appeal.* Are then the facts, that a jury was sworn to try the appeal, and that improper evidence was received, reason for granting a writ of prohibition? I think not. The judge might accept the verdict of the jury, and make it the judgment of the court. I do not think that the other ground taken by the summons, that the Sessions proceeded without evidence, can be put higher than the admission of improper evidence, and this is no ground for a prohibition.

The summons must be discharged, but under the circumstances without costs.

Summons discharged without costs.

Nordheimer v. Shaw.

31 Vic., Cap. 12, Sec. 12.—Computation of time.

[Chambers, Jan. 4, 1872. *Mr. Dalton—Galt, J.*]

Ejectment. The defendant appeared to the writ, and defended for all the land claimed, on the 27th December, in the name of a Toronto attorney, and the next day the served issue book and notice of trial, &c. On the evening of the 29th December, the defendant served on the plaintiff's attorney an order substituting a country attorney in lieu of the former attorney, and with it a notice limiting his defence to part of the land claimed. The question then arose as to the meaning of the words "two clear additional days to the time now allowed by law for such service shall be added," given in the 34 Vic., cap. 12, sec. 12, when the attorney for whom papers are served on an agent resides in the country.

Mr. Dalton.—Service of notice of trial on Monday for Monday is good, and this makes six clear days. Service on Saturday for Monday week following would be eight clear days, thus making two clear days additional, and it is this which the statute means. The two days are to be added to the number of days required, between the day of service and the day for performance of the Act.

The plaintiff appealed from the above judgment, but it was upheld by Mr. Justice Galt.

CHANCERY CHAMBERS.

Meyers *v.* Meyers.
Harris *v.* Meyers.
Turley *v.* Meyers.

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

Sequestration—Abatement of Suit—Effect of upon Sequestration—Form of application to set aside writ of Sequestration on ground of priority of applicant—Practice—Rights of lessees under Sequestration.

After decree for payment of money, the Plaintiff issued a writ of sequestration, under which the Sheriff, as Sequestrator, took possession of certain lands of Defendant. Defendant afterwards died, as it was supposed, intestate and the Plaintiff revived the suit against his heir. Subsequently, a will was discovered whereby defendant devised his estate to one Cross. Upon motion to set aside the writ of Sequestration for irregularity on the ground that the suit was not properly revived. *Held*, not an irregularity, but if revivor improper, time would be given to revive properly.

The application to set aside the writ was also based on the ground that the claims of the applicants and others as creditors of the defendant were prior to that of the plaintiff. *Held*, that even if such priority had been established the application to set aside the writ could not be made in Chambers, but that parties claiming priority must proceed under Order 398.

The Sequestrator had, under the authority of the Court, leased portions of the sequestered lands under leases which stipulated that in the event of the Writ of Sequestration being discharged by payment of the amount due or otherwise during the term created, the lessees should be entitled to six months' notice before giving up possession. *Held*, that even if writ irregular, the tenants were entitled to the notice.

[Chambers, ——— 1872. *Mr. Taylor.*]

The facts appearing on this application were shortly the following: Harris filed a bill against E. W. Meyers for redemption, and, on an account being taken, E. W. Meyers appeared to have received a large amount from rents and profits over and above his mortgage debt this E. W. Meyers was directed to pay, and a writ of Sequestration was issued to enforce the decree. E. W. Meyers died, as it was supposed, intestate, and the suit was revived against his heirs. Harris then assigned his interest under the decree to Turley, which occasioned a second revivor of suit as *Turley* v. *Meyers*. E. W. Meyers had, however, left a will by which he devised all his estate to one Cross upon certain trusts. Two questions were then raised: 1st It being doubted that Turley was the *absolute* assignee of Harris, whether he ought not to revive, making the Harris estate a party, and 2nd, whether the suit was not improperly revived against the heirs of E. W. Meyers, and ought not to be again revived against his executors. Subsequently the beneficiaries under the will commenced a suit against Cross and one Meyers for administration of the estate of E. W. Meyers in which a decree for administration was made, and the suit was consolidated with *Turley* v. *Meyers*. Turley proved his claim against the estate of E. W. Meyers in the Master's office, but the priorities of the several creditors had not been settled by the Master, but it was claimed by the applicants that there were creditors whose claims were prior to the sequestration.

Bain moved to set aside the writs of sequestration issued in *Harris* v. *Meyers* on the following grounds:

1. That *Harris* v. *Meyers* had never been properly revived against the proper parties.

2. That the judgment of Harris was subsequent to the claims of other creditors who had writs of execution against the testator, or had Decrees for payment out of the lands sequestered.

3. That Turley claims a judgment and has brought his claim into the suit of *Meyers* v. *Meyers* for the purpose of proving his claim therein.

4. By a Decree of this Court in *Meyers* v. *Meyers* it was ordered that the lands in the said suit be sold and those sequestered are included.

5. That the writs are void against other creditors who are prior to Turley.

6. That the creditors are entitled to have the lands sold free from the writs of sequestration.

He contended that the leases were made in the absence of the creditors and settled on the understanding that they could not be held against the creditors. That the tenants could have no right against the creditors, and that if the applicants were entitled to have the writs set aside the most the tenants could claim would be compensation. That as to the first ground of setting aside the writs, viz: that the suit had never been properly revived, the plaintiff, Turley, had to show that it was properly revived, and against the proper parties, in order to in any way affect the parties entitled to the estate, and anything done under the writ since the presumed Revivor could be of no avail. That Turley claimed to be the *absolute* owner of Harris' interest in the suit, whereas he was only mortgagee, and the representative of Harris ought to be before the Court as plaintiff or defendant. That interest should have been represented, he urged, before the suit could have been properly revived. The fact of the will never having been discovered would doubtless be relied upon by the respondents; this might be a good reason for an order never having been made but was no answer against an improper revivor of the suit. The order had been made in the absence of parties who ought to have been made parties and have received notice.

That as to the second ground the decree in *Meyers* v. *Meyers* was for the benefit of all creditors, and a sale of the property would cut out the sequestration, and the purchaser might come to this Court and seek to have it delivered up to him, but that the creditors were entitled to have the property sold in the best way possible, and to do this the writs of sequestration should be set aside before sale. It would no doubt be argued that there was not sufficient evidence before the Court on this application, of the claim of other creditors or their priorities, as they did not appear to be represented, but he submitted that the applicants under their decree for sale in *Meyers* v. *Meyers* as vendor's solicitors sufficiently represented and were entitled to shew the position of the creditors. And that the Court would restrain a judgment creditor who had proved his claim from proceeding to sell the property under his *fi. fa.*, and for the same reason the Court would not allow a sequestrator to remain in possession after his claim has been proved in the Master's office.

C. Moss, for Loughead and Anderson, tenants of portions of the sequestered lands lands under leases granted by Sequestrator and approved by the Court, contended that the regularity or irregularity of the proceedings under the writ did not affect the lessees, but even assuming that the suit had never been properly revived, that was no reason for setting aside the writ of sequestration *in toto*. If while the writ was in force the suit became abated, the Court would give the parties time to revive it properly, and if they neglected to do so, the other parties must serve them with a notice to revive within a limited time. He quoted the expressions of Lord Hardwicke in the case of *White* v. *Hayward*, 2 Ves. Sr. 464, to the effect that the Court "*will not turn sequestrators out of possession but give time to revive the sequestration within reasonable time.*"

As to the second ground for setting the writ aside viz: that there are claims prior to those of the sequestrators, proof had not been given that there were any creditors in the Master's office prior to Turley; but even supposing there were, they must come in to shew this, and the applicant here could not set up the rights of those other creditors. The application on the ground of prior claims he submitted was improperly made in chambers. The former practice was for the parties claiming priority to apply for an order to be examined *pro interesse suo*. This was the mode of procedure till 1853, and it still remains the practice in England. In this country the person so claiming must now apply to the Court, under General Order 398, and cannot come into Chambers, and it must be a party who might have come in *pro interesse suo* who can now make such a motion. At any rate the lessees should not be injuriously affected by any thing done by the plaintiff Turley. These leases were made under the sequestration and by the authority of the Court, and leases so made were not to be set aside by the action of the plaintiff. These tenants have been acting in good faith, making improvements and expending money upon their farms. Each of them has paid sums to the Sheriff in advance, and in the terms of their leases is a clause which provides that if the sequestration should be discharged before the end of the term they should receive six months' notice from the parties entitled to the land before giving up possession. The Court provided specially for these lessees, and the six months' notice must be given to them before giving up their rights. They are not connected with the proceedings for revivor. They are in the position of purchasers *pro tanto*, and are not to be affected by any irregular proceeding, if it appears to be one that the Court could properly take, *Gunn* v. *Doble* 15 Gr. 655; *Collins* v. *Denison* 2 Cham R. 465. They are entitled to all the privileges which the Court throws around purchasers.

Hodgins, for Sequestrators, argued that the parties now moving had recognized that the suit had been revived, and could not therefore now dispute it; they could not recognize or deny it as it suited their purpose. They were moving now a third time for what had been already refused them twice before. This application was simply an endeavour to reverse the order made in November last. That order directed the Master to settle the priorities of all creditors, and declared that all parties were to be at liberty to

dispute *before the Master* the claims brought in. The applicant sought to reverse that order and settle the priorities in Chambers. He stood upon the following points: 1st. The question of priority had been referred to the Master. 2nd. The infants on whose behalf the application is claimed to be made had nothing to do with regard to the priority. 3rd. No proof was brought of any creditor prior to and *primâ facie* the sequestrators were prior for there is evidence of their claim. The applicants have admitted that. But not only have the sequestrators a claim against the estate they had a judgment against the intestate in his lifetime. He did not die for four years after the writ of sequestration was in the hands of the Sheriff. *Meyers* v. *Meyers* in some form he found in every volume of the Chamber Reports, and referred to them to shew the position of the suit. (1 Cham. Repts. 229 and 262; 2 Cham. Repts. 121 and 240; 3 Cham. Repts. 103 and 107.) He also referred to Pemberton on Revivor, 153, and the cases there cited, also to the suit of *Wharam* v. *Broughton*, 1 Ves. Sr. 183, where during four years the suit remained unrevived, and the Court gave time to revive it also to Dan. Pr. 952. And lastly he remarked that they were now unable to revive for the order in *Turley* v. *Meyers* stayed allpr oceedings in that suit.

Bain in reply said that all admit that the suit under the order of Revivor was not properly revived, and the question was whether they should now be allowed to revive. If it was shewn that it had not been properly revived, the order asked should be made and the Court would not allow a revivor in this case. Till the Harris estate was represented in *Turley* v. *Meyers* the proceedings were improper. The parties substantially interested were not before the Court, and besides the suit should be revived against the executors of E. W. Meyers, who represent not the heirs-at-law, nor the devisees, but the creditors. It was objected that this application had been made before, but he submitted that if defeated in one he could make a new application on grounds not in existence at the time of the first, and he contended that the two applications were different, one to set aside the writ and the other to set aside the revivor and the writ. If the Revivor and the Sequestration were got rid of they could get rid of the leases. Of course he had been obliged to acknowledge that an order of Revivor had been made, and what he contended was that it was improperly made. He did not seek to remove the discussion from the Master's office, he sought to remove the sequestration. All he now sought to determine was whether the writs were to continue in force after the parties had come into the Master's office and proved their claims. He had shewn that the estate would not pay fifty cents in the dollar, and by the Property and Trusts Act of 1865 when an estate is insolvent all creditors rank *pari passu* and Turley is in no better position than a judgment creditor who is not now preferred. Besides the decree in *Meyers* v. *Meyers* appointed a Receiver to receive the rents and profits until sale, and the Court would not in the same suit make two such contradictory orders, one directing a sale and appointing a Receiver until sale, and the other directing a Revivor of the Sequestration. It is not necessary to go to the Court unless to go into the merits of the case, but in a question of mere irregularity the application is properly made in Chambers and the practice which has been adopted instead of the old method of applying to be examined *pro interesse suo* does not apply to this application. That the tenants must be allowed their crops in the ground or be paid their value he conceded, but not that they are entitled to compensation for not having the full time of their leases, that must be paid them by the Sequestrator, for no matter what hardship it be to the lessees their rights could go back no further than the lessor.

Mr. Taylor, Referee in Chambers.—The grounds upon which the plaintiffs rely for setting aside the writ of sequestration resolve themselves into three. That the order of revivor is irregular; that Turley has brought his claim into the Master's office under the Decree in this suit, and that there are creditors whose claims are prior to that of Harris, and against whom the sequestration is therefore void. The notice of motion does not ask to set aside the order of Revivor itself.

The order of Revivor is objected to upon two grounds: first that the suit has been revived against the heirs of E. W. Meyers as if he had died intestate, while in fact he left a will by which he devised his estate to one Cross upon certain trusts. Cross is not made a defendant by the order of Revivor. The order appears to have been made in April, 1869; it was amended as to the names of some of the parties by an order made in the May following, and by a subsequent order the name of Sophia Meyers was struck out, she having moved against the order. The will of the original defendant, E. W. Meyers, was not proved until some time in 1871. The plaintiff, Turley, was not aware of the existence of this will, and seems to have taken proper steps to enquire into the true facts before taking out the order of Revivor as in the case of intestacy. The widow of the defendant was not aware of the existence of this will, for she made an affidavit that she had no will or testamentary paper in her possession, nor had she any knowledge of the existence of any such. The adult children of Meyers seem also to have been unaware of the will. They are all made parties defendants by the order of Revivor, but none of them moved against the order, nor did they inform Turley or his solicitor that such a will existed until after it had been proved. Under these circumstances I cannot say there was any such suppression of material facts as to justify the setting aside of an *ex parte* order on the ground of concealment. The fact that the order makes the wrong parties defendants does not seem to me to make the order irregular in the sense which would justify my making an order in Chambers for setting it aside. Suppose instead of an order of Revivor this had been a bill filed by Turley against the children of Meyers, alleging his death intestate, that he did not so die would be no ground for taking the bill off the files as irregular. The defendants would set up the facts by answer which would occasion a necessity for the plaintiff's amending. If the will was not discovered until too late for setting up such a defence by answer, the subsequent discovery of its existence would be a ground for allowing a supplemental answer

to be filed. (See 2 Beav 236; 5 Beav. 432 *McKinnon* v. *Macdonald*, 2 Chy. Cham R. 23.) So here the subsequent discovery of the will, if the parties can shew they were not previously aware of its existence, would be a good ground for allowing them to move against the order of Revivor although the time allowed for doing so has long since elapsed.

To the other objections that the order of Revivor here is by Turley, as the assignee absolute of Harris' judgment, while he is only a mortgagee of his interest, there is the same answer as to the former. Had Turley filed a bill, the absence of any one representing the estate of Harris, interest, if it appeared on the face of the bill, might have been taken advantage of by demurrer, if it did not, the defendants, if aware of the objection, might by answer have set up the facts and alleged the want of necessary parties. How the fact is I do not know, but Turley may be legally the absolute owner of Harris' interest. The equitable interest of Harris' representatives may be a matter of private arrangement between the parties, in which case, so far as I can see, the defendants would not be prejudiced by the absence of any one representing Harris. If the facts were till recently unknown to them, and they are, by the absence of such representation, in any way prejudiced, it would, as in the former case, be a ground for giving leave to move against the order, but I cannot see that the order is irregular.

The second ground, that Turley has come in under the Decree in this suit, does not seem to furnish any reason for setting aside the writ of sequestration as irregular. If the Sequestration was regular when issued a proceeding taken by any of the parties subsequently cannot render it irregular. Such an act may render it inequitable that the party should any longer enjoy the benefit of the sequestration, and in such a case an application to the Court to discharge the sequestration would be made, just as in a suit like the present, the Court may, by injunction, restrain a judgment creditor from taking any proceedings by execution against the estate being administered. Whether, however, the Court would do so would depend upon a great many circumstances, and even if Chambers were the proper place, I have not before me sufficiently the facts upon which to decide such a question. Turley may be entitled to prove and also to hold the advantage he has gained under his sequestration. All these, however, are questions which cannot, I conceive, be raised and decided in Chambers upon a motion to set aside a writ for irregularity. The only remaining ground alleged for setting aside the writ is that there are prior creditors upon whom the sequestration is not binding. It is objected that there is no evidence on this motion that there are any prior creditors, and even if held to be sufficient evidence of the fact, the plaintiff cannot here set up the rights of these creditors. The plaintiffs, in answer to that, claim that a decree having been made for sale, they, as vendors, represent for all purposes connected with the sale and for getting incumbrances on the estate removed all the parties, and can, therefore, make this application. Perhaps they are right. Assuming that they are, and that there is sufficient evidence of there being creditors prior to Turley, the existence of such creditors does not make the sequestration irregular.

Apart from questions which may be raised as to whether these parties have not by their conduct lost their priority, the mere fact that these are persons who claim by a title paramount does not render a sequestration irregular.

The proper course to be pursued by any person who claims title to an estate or any property sequestered, whether by mortgage or judgment or otherwise, or who has a title paramount to the sequestration, was formerly to apply for leave to be examined *pro interesse suo*, 2 Danl. Pr. (Perk Ed.) 1268. Now he should take proceedings under general order 398.

That a judgment creditor, though prior, must, if the sequestration be executed, come before the Court in this way is clear from the language of Lord Eldon in *Angel* v. *Smith*, 9 Ves. 337, and a mortgagee with a clear title to take possession must adopt the same course: *Anon*, 6 Vesey 286 *Hamlyn* v. *Lee*, 1 Dickens, 94.

As to the position in which the tenants stand I do not think even if I had set aside the sequestration I should have ordered them to deliver up possession until they had received the notice specified in their leases.

They acquired their interests under a decree of this Court, regularly obtained, and a writ regularly issued, to enforce that decree. They had no knowledge of the existence of the will any more than Turley or the family of the testator.

Even if I had held the order of Revivor irregular, and that the suit of *Harris* v. *Meyers* had never in fact been revived, *White* v. *Hayward*, 2 Ves Sr. 461, would seem to be an authority for giving the plaintiff time to revive, keeping the sequestration in force until he could do so. As the plaintiffs have, even if entitled to have the sequestration set aside, mistaken the proper *forum*, I must refuse this application with costs.

Royal Canadian Bank v. Dennis.

Sale—Master's directions not followed.

When a sale has been had and the Master's directions have not been followed, the vendor will have to make out, at his own expense, that all parties interested have not been injured by such non-observance, in which case the Master will confirm the sale; otherwise not.

[Master's Office, April, 19, 1871.]

In this case the property had not been advertised as directed by the Master. After the sale took place the Master was asked to report upon it.

Mr. Boyd.—It is the duty of the Master to investigate whether he can approve of the sale under such circumstances. A case will have to be made by the vendor on affidavit or other evidence sufficient to show *primâ facie* that no detriment has resulted to any person interested from the omission to advertise as directed, upon which a warrant will issue calling on defendant and other persons (if any) interested in the proceeds of the sale to show cause why the Master should not approve of the sale. This will be personally served, if Bill is *pro confesso*, and underwritten:

"The plaintiff not having complied with the Master's directions as to advertising the property sold herein to shew cause why such sale should not be approved of by the Master. Upon the return of this warrant the affidavit of ——

now filed in the Master's office will be read by the plaintiff."

Upon the return of the warrant the Master will determine upon what report to make. These proceedings must, of course, be had at the vendor's own expense. The suit is not to be burdened therewith.

Re S. S. McDonell.

Proceeding on Master's Warrant—Costs of day.

The Master will proceed upon his warrant, though the order of reference obtained *ex parte* be not served, so long as the warrant is not moved against.

As to when costs of day will be granted.

Mr. Boyd.—The Master will not look behind his own warrant and direction, that being based upon an order of reference; so long as the direction stands, the party is "bound" to comply with it. If a party fails to comply with the warrant, and in consequence an adjournment is occasioned by his conduct, or asked for by him, as in the present case, in order to comply with the warrant, the general orders give the Master power over the costs, and in such cases, I think, the party in default should pay the costs of the day to the other side—provided always that he has had sufficient time and opportunity to comply with the warrant. It is said here that the solicitor had not a proper opportunity to comply with the warrant, which directs the solicitor to bring in an account under oath of his receipts and payments as in the order mentioned, because the order to refer and tax, being *ex parte*, should have been, but was not served upon the solicitor, either before or with the copy of the warrant served. Now, I rather think that the client is not bound to serve this order until he seeks directly to compel the solicitor to take some step, or do or refrain from doing some act referred to in it. The order being brought into the Master's office is operative though not served. *Church* v. *Marsh*, 2 Ha., 652. If the solicitor did not know what account he was to bring in, the means of ascertainment were easily within his reach—either by demanding a copy of the order, or attending to examine it as brought into the Master's office. But this question does not really arise here. The solicitor asked as a favour to have further time to bring in his account, the client being ready to proceed and being prepared to waive any account. The rule laid down in *Re Dendy*, 21 Beav., 565, applies, and the solicitor should pay costs of day as the price of the indulgence. See orders 296, 215, 217, 231.

Fuller v. Parnall.

Usury—Appropriation of payments.

Since the stat. 16 Vic., cap. 80, and before the abolition of the usury laws, a mortgage at 10 per cent. cannot be enforced for more than 6 per cent., though as to payments made without appropriation, the mortgagee can appropriate the money to the satisfaction of the usurious interest before coming into court.

In part payment of the usurious mortgage, another mortgage of a third party was assigned, which had not fallen due.

Held, that the amount of this mortgage could not be applied by anticipation to the payment of usurious interest not due.

Mr. Boyd.—The law upon the Canadian statutes of usury is conclusively laid down in the judgment of the Court of Error and Appeal, in *Quinlan* v. *Gordon*, 7 U. C. L. J. 232 (which, strange to say, is nowhere else reported.) From this case it appears that *Stimson* v. *Kerby* in 7 Grant, 510, relied upon by the defendants, is over-ruled.

The mortgage in the present case was made during the period between 24th March, 1853 and 16th August, 1858, and is drawn for 10 per cent. interest.

If interest in excess of 6 per cent. has been paid by the defendant, he cannot get the benefit of that excess. The test is whether an action for money had and received would lie therefor; and this the Court of Appeal answers in the negative. They hold in effect that since P. S., 16 Vict., c. 80, the voluntary payment of any amount of interest by the borrower is legalised, and the lender may retain the amount, although this statute prohibits the lender from enforcing through the medium of a court more than 6 per cent. They put the excess upon the same footing as cases under the English statute prohibiting any action being brought for a debt due for small quantities of spirituous liquors.

The plaintiff had the right to appropriate the payments, if made by the debtor without appropriation to the payment of the 10 per cent. interest as far as they would go, and in the account brought in he has so applied the moneys, and I shall not disturb his account in this respect down to 10th July, 1870. I am justified in this by the holding in cases relating to spirituous liquors of the kind referred to by the Court of Error and Appeal. See *Cruickshank* v. *Rose*, 1 M. & Rob. 100; and *Philpott* v. *Jones*, 2 A. & E., 41.

As to $400 balance not yet paid of May's mortgage, the plaintiff cannot by anticipation apply this to the excessive interest and forestall the debtor's right to apply it. It stands now as a credit which the court is to appropriate, and this I do to satisfy the balance of interest at 6 per cent. due on 10th July, and the rest in reduction of the principal money—on which thereafter only 6 per cent. can be allowed.

COUNTY COURT CASES.

Brown v Heather.

Negligence—Accident.

The horse of the defendant being baulky, the defendant struck it with a whip to start it, his servant boy being on it. The horse started off and knocked down and injured the plaintiff in a lane along which the horse ran. The boy tried to stop the horse and called to the plaintiff. The plaintiff was nonsuited.

Held, that the nonsuit was right.

[Peterborough, January 12, 1872.]

This case was tried at the last sittings of the County Court of the County of Peterborough.

The declaration alleged, 1. That defendant, by negligence of his servant in the management of a horse, caused plaintiff to be thrown down, &c.

2. That defendant struck a horse and made him unmanageable and run against the plaintiff, whereby plaintiff, was injured, &c.

3. That defendant wrongfully and maliciously drove his horse against the plaintiff, whereby plaintiff was thrown down and injured, &c.

4. That defendant wantonly struck a horse ridden by one Cullen, and caused said horse to run against plaintiff, and plaintiff was knocked

down and injured, and prevented from attending to his business, &c. Special damage claimed.

Plea not guilty.

The plaintiff was examined as a witness, and stated that about 14th September last a horse, with a boy on his back, ran against him while walking in a lane in the town of Peterborough; and he detailed the injury he suffered from being knocked down. On cross-examination he said he did not know whose the horse was that struck him.

Robert Romane was with plaintiff at the time he was knocked over; the lane was a public thoroughfare; the horse was galloping; the boy was riding him barebacked, keeping him in. And he further said, on cross-examination, that it was purely an accident; boy doing his best to keep him in.

James Cullan, sworn.—I was last September in defendant's employment, (defendant was a butcher) carrying meat round; had been in his employment before that about six weeks; had had the mare all the time; she was about five years old; was riding bareback when accident happened; generally rode with a saddle; mounted at the west market door. Defendant gave me a basket of meat and put it on the shoulder of the mare; she baulked and would not go, and defendant took a whip and, I think, struck her; tried my best to hold her and turn her off the lane, but could not; she struck plaintiff and knocked him down. The mare never ran away before; once in a while baulked. Pulled her in at Ormond's Corner.

Cross-examined.—I meant to go up the main street; could not keep the mare out of the lane; had been accustomed to horses, riding with saddle and bare-back too; had regularly used the mare for about six weeks; had no difficulty but once before, when I managed her.

Re-examined.—It was a week before, that I had had the trouble; she only turned her head round; did not run away.

William Spence.—Defendant tried to start the mare up the main street; he took a whip out of a waggon and struck the mare, or struck at her; believe what defendant did, made the mare run away. The mare, I think, was only playing, not baulky.

Cross-examined.—Defendant treated the mare properly under the circumstances. I would call it simply an accident. The boy did all he could; cried out to give warning. The lane is narrow; a good many waggons pass through it. I am with Winch (a butcher in the market). Quite common for boys (butchers) to ride bare-back.

Re-examined.—I think defendant tried to lead the mare before he got the whip.

John Kelly was examined as to special damages (plaintiff was a barber), and Dr. Harvey as to amount of injury.

At the close of the plaintiff's case, the defendant's counsel moved for a non-suit on the ground that there was no case to submit to the jury, as the evidence only showed that an accident had happened, and the learned judge being of that opinion, the plaintiff was non-suited.

In Term the plaintiff's counsel moved for a rule nisi, to shew cause why the non-suit should not be set aside and a new trial had.

Dennistoun, Co J. — Feeling strongly that such a rule would not be made absolute, I reserved the application, requesting plaintiff's counsel to cite any cases he relied on in support of his own view that the non-suit was improper, and I have been referred to the following :—

Peters v. *Devinney*, 6 U. C. C. P., 389, where the injury was caused by the erection of a dam; plaintiff's evidence giving him a right to a verdict.

Robinson v. *Bletcher et al.*, 15 U. C. Q. B., 159, where, for anything that appears, plaintiff may have made out a *primâ facie* case; but the judgment of the Court shews that on such evidence as the plaintiff gave in the present suit, he is not entitled to recover.

Ridley v. *Lamb*, 10 U. C. Q. B., 354. The defendant herein was guilty of an improper act and plaintiff suffered damages. In the present case the evidence of Cullan and Spence shews defendant not to have been guilty of an improper act.

Goodman v. *Taylor*, 5 C. & P., 410. In this case two of the plaintiff's witnesses stated that the pony and chaise that caused the accident were standing on the street with no one to look after them, and the case went to the jury on contradictory evidence.

Rex v. *Timmins*, 7 C. & P., 500. There was here evidence to shew that defendant was racing on a highway, and so doing an improper act.

I do not think that these authorities sustain the plaintiff's contention that the case should have gone to a jury; on the contrary, the view I took at the trial seems to be sustained by the cases I shall now refer to.

In *Deverill* v. *G. T. R. Coy.*, 25 U. C. Q. B., 517, Hagarty, J., said, "We have to consider the motion for a non-suit, and are at once met by the difficulty which the cases present as to what shall be considered sufficient evidence for a jury. It is not enough that there was some evidence or a mere surmise that there may have been negligence on the part of the defendants, that clearly would not justify the judge in leaving the case to the jury." And the learned judge also quoted from the judgment in *Cotton* v. *Wood*, 8 C. B. N. S., 573, where it is said that, "There is another rule of the law of evidence which is of the first importance, and is fully established in all the Courts, viz., that when the evidence is equally consistent with either view—*with the existence or non existence of negligence*—it is *not competent* for the judge *to leave the matter* to the *jury*. The party who affirms negligence has altogether failed to establish it. That is a rule which should never be lost sight of." In the case of *Cotton* v. *Wood*, Erle, C. J., says, "Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of care on the one side or the other, the party who founds his claim upon the imputation of negligence fails to establish his case."

Hammack v. *White*, 11 C. B. N. S., 588, and *Jackson* v. *Hyde*, 28 U. C. Q. B. 294 are to the effect. In the latter case, Wilson, J., remarks, "It is notorious, there are many cases in which jurors are not the most dispassionate or most competent persons to try the rights of parties, and an action of this kind comes within the class to which I have alluded. In such actions the

judge should firmly assume the responsibility of determining himself, whether sufficient evidence has or has not been given to compel him to leave the case to the jury."

The rule must be refused.

Rule refused.

ENGLISH REPORTS.

COURT OF PROBATE.

In the Goods of Foster.

Will—Substituted executors.

A testator by his will appointed "my wife my sole executrix, and in default of her, I nominate and appoint as my executors, &c.," A. B. and C. D.

The wife took out probate, and at her death the court held that A. B. and C. D. were the substituted executors of the husband, and granted probate to them of his estate in preference to the wife's executors.

[Nov. 21, 1871, 25 L. T., N. S., 763.]

G. H. Foster, late of Regent's-park, in the county of Middlesex, died 1st Dec., 1858, having duly executed a will, bearing date 24th July, 1857. The appointment of executors was in the following terms:

"I hereby authorise my executrix and executors hereinafter named, to continue any security or securities which I may die possessed of, for any term in their discretion not exceeding five years from my death, notwithstanding any trusts in this my will contained, and I nominate and appoint my said wife the sole executrix of this my will, and in default of her I nominate and appoint the said John Knowles and Richard Foster to be executors of this my will."

Probate of the will was granted to the wife, Maria Isabella Foster, on 24th Dec., 1858, and she died 25th May, 1871, having duly executed a will dated 4th Nov., 1870, whereby she appointed the said John Knowles and Richard Foster, together with F. Moseley, Benjamin Hugh Allen, Christopher Proctor, and John Rae Campbell to be executors and trustees. Probate of this will was granted on 5th July, 1871, and the question now arose whether the executors of the said Maria Isabella Foster were the personal representatives of G. H. Foster, her husband; or whether in default howsoever of Maria Isabella Foster, as executrix, the said John Knowles and Richard Foster, were entitled to take probate as substituted executors.

Dr. *Swabey* moved for a grant to them, and referred to *In the Goods of Johnson*, 2 Sw. & Tr. 595; 7 L. T. Rep. N.S. 357.

Lord Penzance.—This is a question of construction of what the testator meant when he said, "I appoint my wife my sole executrix, and in default of her, two others, A. B and C. D." The testator, by the words of the will, appears to have given the preference to his wife that she should be his executrix as long as she was able to act—but then comes the question whether the substitution of the two other executors was to take place in the event of the wife not acting at all, or whether it was to happen in case of some intervening circumstance like that of death, by which the wife would no longer be able to act. I think the will must not be construed with over-technical strictness. We must look to the object the testator had. It was that his wife should administer as she has done, and his reasonable wish was that she should administer as long as she could, or until her death put an end to the administration. In either one event or the other—in the event of her being unable to administer, or in the event of her death, then the others would be substituted. That is the reasonable interpretation of this will, and I am prepared to make a grant to the two other executors in accordance with that interpretation.

Teague and Ashdown v. Wharton and another.

Testamentary suit—Administration to a nominee of both parties refused.

Except under very special circumstances the court as a general rule will refuse to make a grant of administration to the nominee of the next of kin, who has himself no interest, even though all the next of kin may consent.

[Nov 21, 1871, 25 L. T., N. S. 764].

Emily Harvey Jeffries, late of Spring-grove, Isleworth, in the county of Middlesex, died a widow, and without parent or children. She and her husband died at different places within two hours of each other, and there was a question as to the survivorship.

By her will, dated 14th Oct., 1870, she had nominated her husband her sole executor and universal legatee. Mr. Jeffries also left a will, by which he had named his wife sole executrix and universal legatee.

The next of kin and persons entitled in distribution of the estate of Mrs. Jeffries were one brother, Mr. C. R. Teague, and three sisters, Mrs. F. M. Ashdown, Mrs. L. S. Wharton, and Mrs. Elizabeth Anne Owen. The two first named of these were about to apply for a grant of administration, but were met by a caveat lodged on the part of Mrs. Wharton. To avoid litigation it was subsequently arranged among the parties interested, that as they could not agree upon the appointment of any one of themselves as administrator, they should all consent to the appointment of a stranger—Mr. James Waddell

Dr. *Tristram*, on behalf of the defendant, accordingly moved for a grant of administration to Mr. James Waddell, as nominee of the next of kin. He cited *Farrell* v. *Brownbill*, 3 Sw. & Tr. 467.

Inderwick consented on behalf of the next of kin of the husband. *Cur. adv. vult.*

Nov. 28.—Lord Penzance.—In this case the court was asked to make a grant to the nominee of the next of kin. The court expressed some difficulty at the time, upon which the case was cited of *Farrell* v. *Brownbill*, 3 Sw. & Tr. 467. From that case it appears that the court has done something similar. In that case there was a litigation. The next of kin came before the court, and the court made a grant, under the 73rd section, to the nominee of the next of kin. This was done on the authority of a case *In the goods of John Holroyd*, and I have had that case looked out to ascertain what were the facts. I find that in that case the next of kin were permitted to nominate somebody other than themselves to take the grant. There were special reasons there, because the persons put forward were persons who had been executors of the will

of the father of the next of kin, and they had had the management of the father's estate, of which the property in issue consisted, up to the death of the party whose administration was contested. The case, therefore, forms no authority for a general proposition that the court should permit the parties entitled to renounce in order to make a grant to a third party who has no interest, but who is nominated by them. Since *Farrell* v. *Brownbill* the court has decided another case—*In the goods of Peter Richardson*, (40 L. J. 36, P. & M.; 25 L. T. Rep. N. S. 348), of which the marginal note is, "The court refused, in the absence of special circumstances, to make a grant to the nominee of the next of kin, although she was an old lady of eighty, not able to transact business." In refusing that grant several cases were cited, and the court pointed out that it would be an inconvenient practice to make the grant in the manner asked for without some special circumstances, because it would result that people who knew nothing of their own rights would be induced to put them in the hands of third persons, and the grant passing to a nominee would become vested in the hands of a third person who had no interest in the administration. The court, therefore, refused to make the grant, and refused to adopt as a general rule the proposition that if the next of kin chooses to renounce and nominate a third person to take the grant, the court will therefore make the grant to this third person. The more I consider the matter the more I am satisfied that that is the way in which the court ought to look at these cases. There being no special circumstances here, the grant must go to the next of kin, and if they choose to renounce, then to any person entitled who may apply.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR AUGUST, SEPTEMBER, AND OCTOBER, 1871.

Account.—See Executors and Administrators; Partnership, 2; Set-off, 1.

Action.—See Set-off, 2.

Adjudication.—See Bankruptcy, 1.

Adverse Possession.

A., entitled as tenant in tail to an estate, held the same as an agent for B. for twenty years. *Held*, that B. had acquired title by adverse possession.—*Williams* v. *Pott*, L. R. 12 Eq. 149.

Agency.—See Principal and Agent.

Agreement.—See Contract.

Agricultural Purposes.—See Tillage.

Assignment.—See Author; Bankruptcy, 1; Priority.

Assurance.—See Covenant, 2.

Attorney.

An attorney has no implied authority, after judgment in favor of his client, to enter into an agreement binding his client to postpone execution.—*Lovegrove* v. *White*, L. R. 6 C. P. 440.

Author.

The plaintiff employed one W. to write a play for him, the plaintiff suggesting the subject. The play being given to him, the plaintiff made alterations and additions, one scene being entirely new. W., on receiving payment, gave a receipt as follows: "Received of [the plaintiff] the sum of four pounds, account of fifteen guineas for my share, title and interest as co-author with him in the drama intituled," &c., "balance to be paid on assigning my share to him." W. died, and the plaintiff, as joint author, sued the defendant for infringement. *Held*, that the above facts did not constitute the plaintiff author or proprietor of the play, or joint author with W.; and that there was no assignment to the plaintiff.—*Levy* v. *Rutley*, L. R. 6 C. P. 523.

Average.—See Bill of Lading.

Baggage.—See Luggage.

Bank.—See Executors and Administrators; Partnership, 2; Set-off, 1; Ultra Vires.

Bankruptcy.

1. Three persons assigned the firm property for the benefit of creditors. Previously, one partner had accepted, in the name of the firm, a bill of exchange in which the drawer's name was left blank, giving the bill to his agent for negotiation. After said assignment, a drawer's name was inserted in the bill, which was then indorsed to a *bona fide* holder for value. The holder obtained an adjudication of bankruptcy against the firm, grounded on the assignment. *Held*, that the adjudication must be reversed, as there was no debt on the bill until the indorsement to the holder, which was after the assignment.—*Ex parte Hayward*, L.R. 6 Ch. 546.

2. A. executed a bond to B. as follows: Reciting that, whereas A. had agreed to sell B. £1100 consols assigned to B. by deed of even date, to which A.'s wife was entitled on the death of her mother; and whereas A.'s wife might survive him, and refuse to confirm the said assignment, it was conditioned that if A. should within six months after his wife's mother's death obtain the transfer of the consols, or if the trustees of said consols should transfer the same to B., the bond was to be void. Before breach of condition of the bond, A. was discharged in bankruptcy from a "debt payable on a contingency," and a "liability to pay money on a contingency." *Held*, that A. was not discharged from his liability on the bond.—*Kent* v. *Thomas*, L. R. 6 Ex. 312.

See Bills and Notes, 2; Set-off, 1; Settlement.

Bequest.—See Devise; Legacy; Will.

Bill of Lading.

The owner of a ship chartered it to C. on the following terms: C. was to ship a full cargo; fifty running days were allowed for loading, and ten days' demurrage at £8 per day; the owner to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibility to cease on shipment of the cargo. A full cargo was not shipped, and the ship was detained eighteen days in addition to the ten days' demurrage. The captain signed a bill of lading whereby the cargo was to be delivered at London, "as per charter-party," to the consignee, "he paying freight and all other conditions or demurrage (if any should be incurred) for the said goods, as per the aforesaid charter-party." A copy of the charter-party was sent to the consignee with the bill of lading. The owner claimed a lien for £80 demurrage, for dead freight, and for said eighteen days' detention. *Held* (Bramwell and Cleasby, BB., dissenting), that there was no lien for damages for short loading under the term "dead freight" in the charter-party. Also (Willes and Brett, JJ., dissenting), that there was a lien for the ten days' demurrage. By the whole court, that there was no lien for the eighteen days' detention. Judgment of Queen's Bench affirmed. *Gray* v. *Carr*, L. R. 6 Q. B. (Ex. Ch.) 522.

See Bills and Notes, 3; Freight, 2.

Bills and Notes.

1. A note payable on demand, dated Feb. 16, 1864, was presented for payment Dec. 14, 1864, and it was held on the circumstances of the case that the delay in presentment was not unreasonable.—*Chartered Mercantile Bank of India, London, and China* v. *Dickson*, L. R. 3 P. C. 574.

2. A. being insolvent, his father agreed to give notes for ten shillings on the pound to trustees for the benefit of creditors, who were to sign a deed of composition under the English Bankrupt Act. A creditor brought suit against A., averring that the composition deed was obtained by fraudulent representations. The suit was referred to an arbitrator, who gave judgment for the creditor. The creditor afterwards brought the present action against A.'s father on said notes, with one count in detinue, and a second on the notes. He alleged that the above judgment was void, as the composition deed was binding upon him under the Bankrupt Act. *Held* (reversing judgment of Queen's Bench), that the count in detinue failed, as the defendant was not possessed of the notes; that the plaintiff could not succeed on the second count, as it had not been found that the composition deed, the consideration of the notes, was valid. Also, that the plaintiff, by having brought action and obtained judgment against A., had repudiated the composition and the notes, and destroyed the consideration for which the notes were given. It appears the creditors were not *estopped* from alleging that the composition deed was binding upon him, as this action was not against A.—*Latter* v. *White*, L. R 6 Q. B. (Ex. Ch.) 474; s. c. L. R. 5 Q. B. 622.

3. A. obtained from a banking company a letter of credit as follows: "You are hereby authorized to value on this bank . . against cotton purchased in conformity with the letter of instructions . . . such drafts to be covered by shipping documents, say invoices and bills of lading of cotton, addressed to this company, and forwarded under separate cover by the same mail which brings the drafts for acceptance, on receipt of which documents we engage to honor such drafts." Bills were accepted against shipping documents representing cotton of less value than the bills. The bank was ordered to be wound up, and the holders of the bills, with knowledge of said facts, claimed to prove their full amount. *Held*, that the bank was only debtor for the value of the bills less the net proceeds of the cotton applicable to them. The bill-holders had no lien on the cotton whereby to make the bank trustee for them of its proceeds.—*Banner* v. *Johnson*, L. R. 5 H. L. 157.

See Bankruptcy, 1.

Bond.—See Bankruptcy, 2.

Boundary.—See Lease.

Broker.—See Principal and Agent.

Burden of Proof.—See Settlement, 1.

Canal.—See Easement.

Cargo.

A ship-owner received oil-cake in good order and condition, undertaking to deliver in like good order and condition, dangers of the sea only excepted. The oil-cake was surrounded by animal and vegetable matter, whose putrescible nature, when deprived of ventilation, caused the oil-cake to deteriorate. *Held*, that the damage was not caused by a danger of the sea, and the ship-owner was therefore liable.—*The Freedom*, L. R. 3 Pw. C. 594.

See Bill of Lading; Freight, 1.

Carriage.—See Hackney Carriage.

Carrier.—See Luggage.

Charge.—See Deed of Settlement; Priority.

Charity.

Devise of lands and tenements to the master, wardens, &c., of the Company of Merchant Taylors, "to this intent, and upon this condition, that they, the said master and wardens, shall yearly, every year, for ever, of and with the rents and profits of the said lands," provide for twelve poor men and twelve poor women of London certain garments of a specified price; with a direction that the chamberlain and town-clerk of London should see that the garments were given, receiving 10s. apiece out of the rents for so doing; and so that the whole residue of the rents the master and wardens should maintain and gather into a stock, and therewith repair, and, if need be, rebuild, the tenements; and in case they should be remiss in delivering the said garments, then others to enter and hold said lands, &c. At the death of the testator the income of the tenements was more than required for the said charity, and subsequently became very much greater. *Held*, that the company were not entitled to the surplus income for their own benefit, but were bound to apply it to charitable purposes.—*Merchant Taylors Co.* v. *Attorney-General*, L. R. 6 Ch. 512; s. c. L. R. 11 Eq. 35.

See Legacy, 2, 3.

Charter.—See Ultra Vires.

Charter-party.—See Bill of Lading; Freight, 2.

Codicil.—See Will, 2.

Company.

1. By the articles of a company it was provided that a director should vacate his office if he participated in the profits of any contract with the company without declaring his interest therein to the other directors. It was *held* that this clause did not merely prescribe acts which would vacate the office of director, but that it made it lawful for a director to contract with the company on giving proper notice of his interest.—*Imperial Mercantile Credit Association* v. *Coleman*, L. R. 6 Ch. 558.

2. The plaintiff, a debenture holder, obtained judgment on the same against the defendant railway. Subsequently, a majority of debenture holders agreed, under the R. W. Companies Act of 1867, to a scheme of accepting stock in lieu of principal and arrears of interest due; but the plaintiff in no way assented to the scheme, and obtained execution on his judgment. The company prayed an injunction. *Held*, that the plaintiff was still a debenture holder, and bound by the scheme. Injunction granted.—*Potteries, Shrewsbury and North Wales Railway Co.* v. *Minor*, L. R. 6 Ch. 621.

See Execution.

Composition Deed.—See Bills and Notes, 2.

Condition.—See Bankruptcy, 2; Covenant 4; Lease; Settlement, 3.

Consignee.—See Bill of Lading.

Construction.

By statute, petroleum "shall include such rock oil, and oil made from petroleum, &c., as gives off inflammable vapor at a temperature of less than 100° F." *Held*, that petroleum proper, whether giving off inflammable vapor under 100° F. or not, was within the Act.—*Jones* v. *Cook*, L. R. 6 Q. B. 505.

See Bill of Lading; Charity; Company, 1; Covenant, 3, 4; Deed of Settlement; Devise; Execution; Gaming; Hackney Carriage; Lease; Legacy; Reservation; Settlement, 2, 3; Tax.

Contract.—See Attorney; Company, 1; Covenant, 1; Freight, 1; Lease; Principal and Agent; Sale; Settlement, 3.

Contribution.—See Legacy, 1.

Copyright.—See Author.

Corporation.—See Lease.

Costs.

1. Costs of trustee who was served with, and appeared upon, a petition by tenant for life for payment of dividend, ordered to be paid out of the dividends.—*Ex parte Smithett*, L. R. 12 Eq. 111.

2. A wife instituted a suit against her husband for dissolution of marriage, but subsequently filed an application for its dismissal. The court ordered the application to stand over for a fortnight, that the wife's attorney might file his bill of costs, and obtain an order for their taxation.—*Dixon* v. *Dixon*, L. R. 2 P. & D. 253.

3. An executrix propounded a will, and a party pleaded undue influence, giving the executrix notice that he only intended to cross-examine the witnesses produced in support of the will. The party was *held* liable to the executrix for costs.—*Harrington* v. *Bowyer*, L. R. 2 P. & D. 264.

Counsel.—See Attorney.

Court.—See Power.

Covenant.

1. A., for himself, his heirs, executors, and administrators, covenanted by deed with B., his executors and administrators, that he would at any time thereafter, at the request of B., execute to B. a lease of certain premises, with certain covenants, for twenty-one years, to begin at the date of the agreement. No

lease was ever made, but B. entered and paid rent until his death, after which his personal representative entered and paid rent. *Held*, that a claim against B.'s estate for rent accrued since his death, and for a sum which would have been due under the covenants if the lease had been executed, that such claims were of the nature of specialty debts, and must be allowed as such.—*Kidd* v. *Boone*, L. R. 12 Eq. 89.

2. A. assigned to trustees an equitable interest in copyholds, with a covenant for further assurance. A. subsequently was admitted to the copyholds, sold them, applying the purchase-money to his own purposes, and died insolvent. *Held*, that the covenant entitled the trustees to prove for a specialty debt.—*Blackburn* v. *Dickson*, L. R. 12 Eq. 154.

3. A lessee for the lives of A., B., and C., and the survivor of them, by deed reciting his lease, conveyed to the plaintiff, to hold for the lives of A., B., and C., and the survivor of them, and covenanted that the said lease was a valid and subsisting lease for the lives of A., B., and C., and the survivor of them. B. was dead at the date of said covenant. *Held*, that the covenant was that the lease was valid and subsisting, not that the three lives were all still subsisting. The mention of the three lives was merely matter of description of the lease.—*Coates* v. *Collins*, L. R. 6 Q. B. 469.

4. A lease contained a covenant that the demised premises should be used for a post-office, and for no other purpose. The post-office issued licenses for men-servants, horses, carriages, dogs, &c. *Held*, that issuing such licenses was analogous to issue of stamps and money-orders, which formed part of the duties of the office when the lease was made; and that there was no breach of the covenant.—*Wadham* v. *Postmaster-General*, L. R. 6 Q. B. 644.

See Bankruptcy, 2; Settlement, 3.

Credit, Letter of.—See Bills and Notes, 3.

Cross Action.—See Set-off, 2.

Cy Prés.—See Charity; Legacy, 2, 3.

Damages.—See Cargo; Freight, 1; Receipt; Set-off, 2.

Danger of the Seas.—See Cargo.

Dead Freight.—See Bill of Lading.

Debenture.—See Company, 2.

Debt.—See Covenant, 2.

Deed.—See Bills and Notes, 2; Covenants, 3; Seal.

Deed of Settlement.

In the deed of settlement of a Baptist chapel it was provided that the minister should be subject to removal by order of the church, made at one meeting and confirmed at a subsequent. Notice may be given of the object of each meeting. Notice was given that a meeting would be held for the purpose of bringing charges against the minister. A meeting was held, and it was resolved that the minister "having on different occasions uttered deliberate falsehoods," and "also having on several occasions been seen drunk," he was "not a fit and proper person to occupy the position of pastor, and that his office of pastor cease forthwith." Notice was given of a second meeting, for the purpose "of confirming the resolutions passed" at the first meeting, and at the second meeting it was ordered "that the above minutes be confirmed." *Held*, that vague and insufficient reasons having been assigned for the minister's removal, the latter was invalid, but if no reasons had been assigned, the same could not have been set aside. And that the notice of the second meeting should have set forth the resolution which was to be confirmed.—*Dean* v. *Bennett*, L. R. 6 Ch. 489.

Detinue.—See Bills and Notes, 2.

Devise.

1. Devise for testator's two daughters for life as tenants in common, and after their respective decease, the trustees to convey to their respective husbands and their heirs: provided, that if either daughter should die unmarried, her share in trust for the other daughter for life, and on her decease the whole to her husband and his heirs. A daughter married, and her husband died, devising to his wife and her heirs the estate he was entitled to under the above will. A purchaser from said daughter refused to complete his purchase on the ground of defect in title. *Held*, that if the said daughter should die, leaving a second husband surviving her, his title would be a good one, her first husband not having been entitled to an absolute estate in fee in remainder expectant on his wife's death.—*Radford* v. *Willis*, L. R. 12 Eq. 105.

2. A testator gave his estate to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family." The widow gave an annuity to an illegitimate son of the testator's son. *Held*, that the gift to the widow was absolute, and that there was no trust for children under the will. The annuity was valid.—*Lambe* v. *Eames*, L. R. 6 Ch. 597; s. c. L. R. 10 Eq. 267; 7 U. C. L. J., N.S., 170, 222.

3. A testator devised as follows: "I devise and bequeath to my mother, all my real and

personal estate, and knowing that what I give to my mother will become the property of her husband, my step-father, I therefore declare the intention of my will to be that my mother's husband shall hold and enjoy all my said real and personal estate to him, his heirs, executors, administrators, and assigns, for ever, and to be absolutely at his free will and disposal: provided, that he does not at any time dispose of any portion of my said property to any of my late father's family." *Held*, that the mother took an estate for life in the real estate, and the step-father a remainder in fee.—*Gravenor* v. *Watkins*, L. R. 6 C. P. (Ex. Ch.) 500.

4. A testator devised a certain estate to his son J. for life, remainder to J.'s children in fee, "and in case my son J. shall depart this life without leaving lawful issue," said estate "equally between my sons G. and R. in the same manner as the estates hereinafter devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned, in case my son J. should leave a widow." The testator then devised certain other estates to G. and R. in identical terms. Then followed this proviso: "Provided, that in case any or either of my said sons shall depart this life leaving a widow, then I give the premises so specifically devised to such one or more of them dying, unto his widow" for life. R. died unmarried. G. died leaving a widow, who claimed a life-estate in the moiety of R.'s estate, which had come to G. *Held*, (by Cleasby, Pigott, Channell, and Bramwell, BB., reversing judgment of C. P. Kelly, Blackburn, and Mellor, JJ., dissenting), that G.'s widow took a life estate only in the premises devised to G., and not in said moiety of R.'s estate.—*Melsom* v. *Giles*, L. R. 6 C. P. (Ex. Ch.) 532; s. c. L. R., 5 C. P. 614.

See Charity; Executors and Administrators: Partnership.

Disseisin.—See Adverse Possession.

Divorce.—See Costs, 2.

Drain.—See Watercourse.

Easement.

A canal company, under an Act of Parliament, diverted the greater part of the water of a brook into a canal which did not return the water to the brook. More than forty years afterward the canal was discontinued, and its water returned to the brook, and the plaintiff's land bordering on the brook was flooded in consequence. *Held*, that plaintiff had acquired no easement of having the water in the canal diverted from the stream.—*Mason* v. *Shrewsbury and Hertford Railway Co.*, L. R. 6 Q. B. 578.

See Watercourse.

Education.—See Religious Education.

Ejectment.—See Lease.

Election.—See Principal and Agent, 2.

Endowment.—See Legacy, 3.

Entry.—See Lease.

Equity.—See Partnership, 1; Priority; Receipt.

Equitable Interest.—See Covenant, 2.

Error.

Error on a judgment in favor of a husband and wife, assigning that said alleged wife was in fact wife of another man. *Held*, that such fact should have been pleaded in bar or abatement, and that the assignment of error was bad.—*Metropolitan Railway* v. *Wilson*, L. R. 6 C. P. 376.

Estate for Life, &c.—See Devise, 3; Legacy, 1; Tenant for Life, &c.

Estoppel.—See Bills and Notes, 2; Lease; Receipt.

Evidence.—See Inn-keeper; Legacy, 2; Negligence; Principal and Agent, 2; Seal; Set-off, 2.

Execution.

The Companies' Act enacts that any execution put in force after commencement of winding-up process, shall be void. A creditor took out execution upon a judgment against a company, and handed it to the sheriff three hours before the company began winding-up process, but possession was not taken until three hours after the winding-up was begun. *Held*, that the execution was not "put in force" until the sheriff took possession, and was void.—*In re London and Devon Biscuit Co.*, L. R. 12 Eq. 190.

See Attorney.

Executors and Administrators.

A bank opened an account with F.'s executrix, entitling it "F.'s executors' account," and advanced money to her on the security of title-deeds of F.'s estate, deposited by her. F.'s executors were empowered to charge his real estate in favor of his personal estate. The executrix expended the above money for her "own purposes, and in various speculations with regard to the purchase, sale, and farming of land." *Held*, that the bank could prove against the general estate of the testator for a balance remaining unpaid after realizing the security.—*Farhall* v. *Farhall*, L. R. 12 Eq. 98.

See Costs, 3; Covenant, 1.

Flats.—See Lease.

Fraud.—See Bills and Notes, 2.

Frauds, Statute of.—See Principal and Agent, 2.

Freight.

1. An owner of a vessel agreed to take a cargo and proceed to London, and there deliver at a good and safe wharf. The vessel, with cargo on board, was run into by a tug in the Thames, sunk, and raised in a few days, when she continued her voyage, and finally drew up near a wharf. The same day notice was sent to the freighter requesting him to name a wharf for delivery of the cargo, but he declined so to do, or to receive the cargo. The next day the vessel and freight were arrested in a suit by the tug. The owner brought suit against the freighter. *Held*, that the owner was entitled to recover damages for refusal to accept the cargo, equal to the amount of freight that would have been due if the cargo had been delivered. The freighter's breach of contract was previous to the arrest by the tug; and in any event, he could have had the cargo on either his or the owner's paying the freight into court.—*Stewart* v. *Rogerson*, L. R. 6 C. P. 424.

2. Plaintiff chartered a vessel to the defendants at a certain rate of freight, and the master was "to sign bills of lading at any current rate of freight required, without prejudice to the charter-party; but not under chartered rates, except the difference is paid in cash." The defendants required the master to sign bills of lading at rates under the chartered rates, without receiving the difference in cash, on the assurance that all would be made right when the vessel had finished loading. The difference was not paid, and the vessel was lost on the voyage. *Held*, that the difference was recoverable.—*Byrne* v. *Schiller*, L. R. 6 Ex. (Ex. Ch.) 319.

See Bill of Lading.

Gaming.

By statute, every person betting in a public place, with any table or instrument of gaming, at any game of chance, may be convicted as a rogue. The defendants had the following machine at a race-course, for which they solicited subscriptions. The machine had a certain number of holes, each of which was appropriated to a horse. Behind each hole moved numbers. A person wishing to bet on a particular horse gave the defendants a sovereign, and received a ticket representing said horse, and then the number behind the hole standing for the horse betted on was increased one. Thus the numbers opposite the holes showed the number of persons who had bet on the horse it represented. There was also a hole having behind it a number which registered the total number of bets. Therefore, any one looking at the machine could tell the number of bets on each horse, and the total of bets on all the horses. The holders of tickets representing the winning horse divided the total of bets. *Held*, that the machine was not simply a register of bets, but an instrument of gaming, and that the horse-race was thereby converted into a game of chance.—*Tollett* v. *Thomas*, L. R. 6 Q. B. 514.

Guaranty.—See Sale.

Hackney Carriage.

The respondent owned a brougham which, by arrangement with a railroad, he stood within their station, and while so there he solicited two passengers to engage him, which neither did. *Held*, that the brougham was a "hackney carriage plying for hire" within 32 & 33 Vict. c. 115.—*Allen* v. *Tunbridge*, L. R. 6 C. P. 481.

Horse-race.—See Gaming.

Husband and Wife. — See Error; Religious Education.

Illegitimate Children.—See Devise, 2.

Incumbrance.—See Priority.

Indorsement.—See Bankruptcy, 1.

Infant.—See Religious Education.

Infringement.—See Author.

Injunction.—See Company, 2; Receipt; Water-course.

Inn-keeper.

The plaintiff went to a hotel in Bristol, having in his pocket a bag of money. He went to his room and to bed, leaving his door, in which was a key, unlocked. In the morning he found that his money was stolen. *Held*, that while leaving the door unlocked did not necessarily exonerate the inn-keeper from his common law liability, yet it was rightly left to the jury to determine whether the plaintiff neglected to use ordinary care, in which case the inn-keeper would be exonerated.—*Oppenheim* v. *White Lion Hotel Co.*, L. R. 6 C. P. 515.

Insolvency.—See Settlement, 1.

Insurance.

The plaintiffs, brokers, were directed to effect insurance on hides shipped on the Socrates, Capt. J. C. The defendant's office had a list of vessels, in which were the Socrates, Capt. A., a Norwegian vessel, and the Socrate, Capt. J. C., an old French vessel. The insurance clerk asked the plaintiff's clerk whether the Socrates was the vessel meant, and the latter clerk replied in good faith that "he thought so." Insurance was effected accordingly, January 24. On February 4, the plaintiffs insured for different principals, hides

by ships to be declared, and subsequently declared for hides on the Socrates. The hides were in fact shipped in both instances on the Socrate, which was afterward lost. The jury found that both parties to the second insurance meant to insure hides on the vessel on which they were shipped, whatever her name might be. *Held*, that in the first case there was a misrepresentation, the statement of belief being tantamount to an assertion of the fact; and that the defendants were not liable; but otherwise as to the second insurance, as that was effected in a different transaction, in which, considering the finding of the jury, the misnomer was of no consequence.—*Ionides* v. *Pacific Insurance Co.*, L. R. 6 Q. B. 674.

Joint Author.—See Author.

Judgment.—See Bills and Notes, 2; Error; Execution.

Judgment Creditor.—See Company, 2.

Jurisdiction.—See Partnership, 1.

Jury.—See Inn-keeper.

Landlord and Tenant.—See Lease.

Lease.

1. A corporation passed a resolution in 1860, agreeing to let to the plaintiff "the frontage" of a field, "with the flat part of the beach opposite." The plaintiff entered and paid rent, but, in 1864, receiving notice to quit, he asked for a lease, which was refused by the corporation, which, after some negotiation, brought ejectment against the plaintiff. The plaintiff filed a bill for specific performance, and to restrain the ejectment. *Held*, that the corporation was bound by acquiescence, and must perform their agreement, though not under seal. And that the boundaries of the field on the water were lines drawn from the extremities of the field perpendicular to the sea-coast, and extending to high-water mark.—*Crook* v. *Corporation of Seaford*, L. R. 6 Ch. 551; s. c. L. R. 10 Eq. 678.

2. J. K. leased land described as containing 5 a. 2 r. 20 p., to L. at a rent of £100 a year. The lease contained these words, "It shall be lawful for the said J. K., at any time during the continuance of this demise, upon giving to the said L. one month's notice, in writing, of his or their (*sic*) intention to resume, for building purposes, the possession of any portion of the premises hereby demised, it shall be lawful for the said J. K., his heirs or assigns, to enter into such possession, and thereupon and on obtaining such possession, it is hereby agreed that the portion of ground so taken should be valued at the rate of £20 per acre, and that the rent hereby reserved shall be proportionally reduced." J. K. covenanted to stand seised to the use of himself and V. K. as tenants in common. Notice of intention to resume the entire premises, signed by J. K. and V. K., was given to L., who subsequently brought ejectment. *Held*, that J. K. and V. K. were entitled to resume possession of the whole of the land, and were not restricted to five acres. 2. That the notice given was good. 3. Notice having been given and ejectment brought, actual entry was unnecessary. 4. *It seems* that the above clause was not a technical condition capable of being destroyed by the above severance of the reversion; and if it were, J. K. and V. K. would have the rights of J. K. under the lease, by 23 & 24 Vict. c. 154.—*Liddy* v. *Kennedy*, L. R. 5 H. L. 134.

See Covenant, 1, 3, 4.

Legacy.

1. A testator gave his personal estate to his wife for her absolute use and benefit; and certain freehold estate was charged with payment of his debts, with surplus to his wife; other real estate he devised absolutely to his wife; and other real estate to his wife for life, remainder over. Said freehold estate was insufficient to pay his debts. *Held*, that the specifically devised personal and real estate must contribute ratably.—*Powell* v. *Riley*, L.R. 12 Eq. 175.

2. In 1868, a testatrix bequeathed a sum to the treasurer for the time being of the fund for the relief of the clergy of the diocese of W. Said diocese, in 1868, included the archdeaconries of W. and C., but until 1837, included only the archdeaconry of W. Until 1837, there was a society of the diocese for the above purpose, and this society, when the diocese was enlarged, was restricted to the archdeaconry of W. There was a similar society in the archdeaconry of C. Evidence was offered to show that the testatrix and her parents had contributed to the society in the archdeaconry of W. *Held*, that the evidence was admissible, but that the legacy was to a charitable object, to which effect must be given by dividing the sum between the two societies.—*In re Kilvert's Trusts*, L. R. 12 Eq. 183.

3. Bequest of personal estate "in aid of an endowment for the Welsh church now in course of erection at A.," and a further bequest in trust, "to be applied in aid of erecting or of endowing an additional church at A." There was no additional church in the course of erection at A. at the date of the testatrix's will or death. *Held*, that the

bequest failed.—*Sinnett* v. *Herbert*, L. R. 12 Eq. 201.

4. A testator bequeathed all he should die possessed of to his two sisters, A. and S., to be invested as they should direct, A. to have the immediate control of her share, and S. upon attaining twenty-five, until which time in trust for her; and in case of the death of his sisters before the testator, or before marrying and having children of their own, the whole to the survivor. *Held*, that S. took a moiety absolutely on attaining twenty-five, and not subject to the additional contingency of marrying and having children.—*Clark* v. *Henry*, L. R. 6 Ch. 588; s. c. L. R. 11 Eq. 222.

See Devise; Partnership, 3; Will.

License.—See Covenant, 4.

Lien.—See Bill of Lading, 3; Bills and Notes.

Limitation.—See Lease.

Limitations, Statute of.—See Adverse Possession.

Luggage.

A passenger on a railway from Liverpool to London took with him a trunk containing six pairs of sheets, six pairs of blankets, and six quilts, for the use of his household when he should have provided himself with a home in London. The trunk was lost. *Held*, the above articles were not "ordinary luggage," and that the railway company was not liable for their value. The court (per Cockburn, C.J.), *held* "the true rule to be, that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage."—*Macrow* v. *Great Western Railway Co.*, L. R. 6 Q. B. 612.

Marriage Settlement.—See Settlement.

Marshalling Assets.—See Covenant, 1.

Misdescription.—See Insurance.

Misnomer.—See Insurance.

Mistake of Fact.—See Insurance.

Mortmain.—See Legacy, 3.

Mortgage.—See Power; Priority.

Motion.—See Costs.

Negligence.

By statute, gates must be maintained across a road on each side of a railway crossed by the road, and must be kept closed, "except during the time when horses, cattle, carts, or carriages, passing along the same shall have to cross such railway." The gates being open on one side of the railway, the plaintiff walked within them, and waiting for a train to pass, started to cross, when he was injured by another train. *Held* (Bramwell, J., dissenting), that there was evidence of negligence on the part of the railway company to go to the jury.—*Wanless* v. *North Eastern Railway*, 6 Q. B. (Ex. Ch.) 481.

See Inn-keeper.

Notice.—See Deed of Settlement; Lease; Priority.

Partnership.

1. A. and B. were partners. A debtor to the firm set off against his debt a private debt of B. to him, without A.'s knowledge or consent. A. filed a bill in equity against B. and the debtor to compel the latter to pay over A.'s share of the firm debt, without deducting the private debt of B. *Held*, that one partner had no authority to discharge a partnership debt by setting off his private debt against it; and that the debtor, knowing his own debt to be to a partnership, the bill was sustainable against him; and that as A. and B. would have to join as plaintiffs in a suit at law, the case was properly brought in equity.—*Piercy* v. *Fynney*, L. R. 12 Eq. 69.

2. One partner of a firm carried on business in Manchester, and the other in York, in each place under the name of "K. & Co." The former partner opened a bank account in Manchester in his own name, and when closed, the account showed a balance due to the bank. The balance had been used for partnership purposes. *Held*, that one partner had no authority to open a banking account on behalf of a firm in his own name, and that the York partner was not liable for the balance.—*Alliance Bank* v. *Kearsley*, L. R. 6 C. P. 433.

3. A testator gave to his wife his life-interest in a colliery in which he was a partner. By the deed of partnership, profits were to be added to the joint stock, or divided between the partners, or placed to their separate accounts on the books of the firm. For several years the profits were carried to the credit of a profit and loss account, after which subsequent profits were divided. At the testator's death there remained to the credit of the profit and loss account a large sum, most of which had been sunk in the colliery. *Held*, that the testator's share of the sum remaining to the credit of said account went to the remainder-men, not to the tenant for life.—*Straker* v. *Wilson*, L. R. 6 Ch. 503.

Peril of the Sea.—See Cargo.

Perpetuity.—See Legacy, 3.

Pleading.—See Error.

Pledge.—See Ultra Vires.

Possession.—See Adverse Possession.

Post-Office.—See Covenant, 4.

Powers.

Under a settlement power was given to lease premises for ninety-nine years for the purpose of building or repairing buildings, and also power of sale or exchange, but no power was given to raise money by mortgage. A house on the premises became so ruinons from the foundation giving way, that it would have to be rebuilt on a new site. The court being satisfied that the value of the premises with a new house would not be less than the mere agricultural value if the house were pulled down and the material sold, authorized the house to be rebuilt with money raised by mortgage of the estate.—*Frith* v. *Cameron*, L. R. 12 Eq. 169.

Practice.—See Costs, 1.

Prescription.—See Easement.

Presentment.—See Bills and Notes, 1.

Principal and Agent.

1. A. and B. were cotton brokers, each acting for an undisclosed principal. A. bought cotton of B., making an over-payment by mistake. B. had made advances on the cotton to his principal, and subsequently set off the sum received from A. against these advances, and went on making further advances. *Held*, that B. did not, as a mere agent, receive the price from A., but as principal, and was liable to A. for the over-payment.—*Newall* v. *Tomlinson*, L. R. 6 C. P. 405.

2. The defendant authorized a broker to buy cotton for him, but declined to allow his name to appear. The broker offered to buy cotton of the plaintiff, but the latter refused to trust him, and he therefore gave the defendant's name. Bought and sold notes were exchanged. on which the broker was named as buyer. The plaintiff applied to the broker for payment, and not obtaining it, sued the defendant. *Held*, that the fact of the principal being known at the time of the contract, did not render evidence inadmissible to show that the contract was with him, though the broker's name only appeared in the bought and sold notes; and that neither the insertion of the broker's name in the notes, nor the request for payment, was a conclusive election to look to the broker only.—*Calder* v. *Dobell*, L. R. 6 C. P. (Ex. Ch.) 486.

See Adverse Possession; Attorney; Insurance; Partnership, 2.

Priority.

The owner of a term mortgaged the same, less two days, to A. He then created an equitable mortgage by way of second charge in favor of B. And last of all, he assigned the whole term by way of mortgage to C., who had notice of A.'s mortgage, but not of B.'s charge. *Held*, that the equities between B. and C. being equal, C.'s legal estate in the two days entitled him to priority.—*In re Russell Road Purchase Moneys*, L. R. 12 Eq. 78.

Profits.—See Partnership, 3.

Promissory Notes—See Bills and Notes.

Proof of Debt.—See Executors and Administrators.

Race.—See Gaming.

Railway.—See Luggage; Negligence; Receipt.

Ratification.—See Lease.

Receipt.

The plaintiff having been injured by an accident on the defendant railway, was offered and accepted a certain sum in full of all claims for his injuries, after first asking whether the receipt would prevent his recovering further if his injuries proved more severe than then supposed, and receiving an answer in the negative from the defendant's agent. The injuries proved more severe than supposed, the plaintiff brought an action, and the defendant set up the receipt in full. The plaintiff then filed a bill that the defendant be enjoined setting up such defence, but no fraud on the part of the defendant was alleged. *Held*, that the bill must be dismissed, as the plaintiff might rebut his receipt in an action at law.—*Lee* v. *Lancashire and Yorkshire Railway Co.*, L. R. 6 Ch. 527.

See Author.

Release.—See Receipt.

Religious Education.

A Roman Catholic died, leaving a widow who was a Protestant, and an infant six months old, who was baptized in the Catholic Church shortly before the father's death. The mother educated the child in the Protestant faith until arriving at the age of eight and a half years. The court ordered the child to be educated in the Roman Catholic faith, the religion of the father.—*Hawksworth* v. *Hawksworth*, L. R. 6 Ch. 539.

Remainder.—See Devise, 1, 3; Legacy, 1.

Remainder-man.—See Partnership, 3.

Rent-charge.—See Tillage.

Reservation.

Inclosure commissioners taking lands for inclosure, ordered, "That one-sixteenth part of value of the lands be allotted to the lords of the manor, &c., exclusively of their right and interest in the game." *Held*, that the right to take game in the whole of the lands inclosed

was reserved to the lords.—*Musgrave* v. *Forster*, L. R. 6 Q. B. 590.

Residuary Estate.—See Charity.

Riparian Rights.—See Easement.

River.

The Lord Chancellor *held* that the conservators of a river, appointed by Parliament, were the best judges of the necessary height of the water, and that evidence lessening the height they deemed necessary was of extremely little weight. — *Attorney-General* v. *Great Eastern Railway Co.*, L. R. 6 Ch. 572.

See Easement; Evidence.

Sale.

The plaintiff offered to sell to the defendant oats, exhibiting a sample. The defendant accepted the offer, believing the oats to be old, and paying a very high price for them if new; and the plaintiff, it seems, was aware of the defendant's mistaken belief. The defendant discovered the oats were new, and refused to complete the contract. *Held*, that passive acquiescence of the plaintiff in the self-deception of the defendaut did not avoid the contract. Though the minds of the parties were not *ad idem* on the age of the oats, they were so as to the sale and purchase of them. It seems that if the plaintiff believed the defendant to believe that he, the plaintiff, was contracting to sell old oats, the defendant would have been relieved from liability.—*Smith* v. *Hughes*, L. R. 6 Q. B. 579.

Salvage.

On appeal from the Admiralty Court, salvage for services under circumstances of great danger in saving a ship and cargo, valued at £46,000, were increased from £1,000 to £2,000. —*Arnold* v. *Cowie* (The Glenduror), L. R. 3 P. C. 589.

See Cargo; Insurance.

Seal.

A commission was issued for taking the acknowledgment of a deed at Melbourne. The deed when sent out had pieces of green ribbon attached to the places where the seals should be, but no wax. The deed was returned in the same state, properly attested as "sealed," &c. *Held*, that there was sufficient *primâ facie* evidence that the deed was sealed at the time of its execution.—*In re Sandilands*, L. R. 6 C. P. 411.

See Covenant, 1; Lease.

Security.—See Bills and Notes, 3; Executors and Administrators.

Set-off.

1. A county treasurer kept with a bank an account headed "Police Account," and also his private account. He overdrew his private account, and paid the sums so obtained to the credit of the police account, and subsequently became bankrupt. There stood to his credit in the police account a large sum, somewhat exceeding the amount due thereon from him to the county, and about equal to his indebtedness to the bank on his private account. *Held*, that the bank could not set off the two accounts, and that the balance due on the police account belonged to the county.—*Ex parte Kingston*, L. R. 6 Ch. 632.

2. Action for improper performance of contract. Defence that the defendant had brought action for price of work under said contract, and had recovered the whole amount, no evidence of said improper performance having been offered. *Held*, that the plaintiff was not bound to offer said evidence to effect a set-off, but might bring the present cross-action.—*Davis* v. *Hedges*, L. R. 6 Q. B. 687.

See Partnership, 1.

Settlement.

1. Where a party made a voluntary settlement, and nine months afterward was insolvent, the burden of proof was held to be on him to show his solvency at the date of the settlement.—*Crossley* v. *Elworthy*, L. R. 12 Eq. 158.

2. By settlement a husband's real estate was limited to his first and other sons successively in tail male. The wife's estate was limited to the sons and daughters "other than the eldest or only son," as tenants in common in tail. A third son succeeded to the father's estate, and the former's son claimed a share with the daughters in the wife's estate. *Held*, that "eldest son" meant eldest son taking the father's estate, and that said son of the third son was entitled to no interest in the wife's estate.—*In re Bayley's Settlement*, L. R. 6 Ch. 590.

3. By marriage articles a father covenanted with his daughter's husband to settle property at his death upon the husband and wife during their respective lives, and after their death to their issue. The husband covenanted to settle his property upon like trusts. The wife died without issue, and the father died, directing his executors to pay whatever might be due under the marriage articles. The husband had never performed his covenant, and claimed a life interest in his wife's father's property. *Held*, that the performance of his covenant by the husband was not a condition precedent to his claim against said father's property, and the claim was allowed.—*Jeston* v. *Key*, L. R. 6 Ch. 610.

See Power.

Ship.—See Bills and Notes; Freight.

Specialty Debt.—See Covenant, 1, 2.

Specific Performance.—See Covenant, 1; Lease.

Statute.—See Company; Construction; Gaming; Hackney Carriage; Negligence; Reservation.

Statute of Frauds.—See Principal and Agent, 2.

Statute of Limitations.—See Adverse Possession.

Tax.

By statute, the "occupier of land covered with water" pays a certain sewer rate. The appellant possessed a canal; land occupied by filter beds and appurtenances for filtering water; land adjoining used for preparing sand for filter beds; and last, land, part of public roads, footpaths, and other ways occupied by iron pipes, mains, and sewer pipes. *Held*, that the canal and filter beds should pay said rate, but not the two latter parcels of land.—*East London Waterworks Co.* v. *Leyton Sewer Authority*, L. R. 6 Q. B. 669.

Tenant for Life.—See Costs, 1; Partnership, 3.

Tenant in Tail.—See Adverse Possession.

Term.—See Priority.

Tillage.

In case any part of certain land was converted into "tillage," a tithe rent charge became due. The owner of the land built a house thereon, and converted a part into garden ground, the remainder being orchard. *Held*, that the land was not converted into tillage, which is land used for agricultural purposes.—*Vigar* v. *Dudman*, L. R. 6 C. P. 470.

Tithe.—See Tillage.

Title.—See Adverse Possession; Devise, 1.

Trover.—See Ultra Vires.

Trust.—See Devise, 2.

Trustee.—See Bills and Notes, 2, 3; Company, 1; Costs, 1.

Ultra Vires.

By a bank charter it was declared not lawful for the bank to lend or advance money on the security of merchandise. The bank advanced money upon a pledge of wool. *Held*, that whether the above provision was violated or not, the right of property and possession passed to the bank, which could maintain trover for the conversion of the wool.—*Ayers* v. *South Australian Banking Co.*, L.R. 3 P.C. 548.

Voluntary Settlement.—See Settlement, 1.

Wager.—See Gaming.

Warranty.—See Sale.

Water-course.

The plaintiff's stream was supplied in part by underground springs, which the defendant drew off by his drain. *Held*, that if the defendant could not get it at all, and the defendant was enjoined drawing water from the stream.—*Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. 483.

See Easement.

Water Rate.—See Tax.

Will.

1. A testator, in the presence of witnesses, wrote his will on the second and third sides of a sheet of note paper, the attestation clause and signature of said witnesses being on the back, or first and fourth pages. *Held*, that the will was well executed under 15 & 16 Vict. c. 24.—*In the Goods of Archer*, L.R. 2 P. & D. 252.

2. A testator struck his pencil through certain paragraphs of his will and wrote his initials opposite, and opposite other paragraphs he put a query. Afterward he executed a codicil confirming, so far as it did not alter, the will. *Held*, that the will must be admitted to probate without the pencil alterations.—*In the Goods of Hall*, L. R. 2 P. & D. 256.

See Charity; Costs, 3; Devise; Executors and Administrators; Legacy; Partnership, 3.

Winding-up.

See Company.

Words.

"*Dead Freight.*"—See Bill of Lading; Freight, 6 Am. Law Rev. 89.

"*Debt payable on a contingency.*"—See Bankruptcy, 2.

"*Exclusively.*"—See Reservation.

"*Frontage.*"—See Lease.

"*Land covered with water.*"—See Tax.

"*Liability to pay money upon a contingency.*"—See Bankruptcy, 2.

"*Plying for Hire.*"—See Hackney Carriage.

"*Put in force.*"—See Execution.

"*Specifically.*"—See Devise, 4.

"*Tillage.*"—See Tillage.

REVIEWS.

The London, Edinburgh, British Quarterly and Westminster Reviews. New York: Leonard Scott & Co. Toronto: Copp, Clark & Co. January, 1872.

The contents of the great British Quarterlies are to those of the general run of the current popular periodicals, pretty much what good bread and beef are to sponge cakes and whipped cream. They eschew novels and sensationalism in all its forms, and afford recreation as well as instruction in the discussion, under the form of reviews, of such

works in literature and science as seem most worthy of being brought under the notice of the public.

Representing the great political parties in the state, as well as the principal school of religious and scientific thought, they shew the progress of each in their respective spheres, and their views and opinions on the social and political questions of the day, as set forth by their ablest champions. They are of value therefore rather to the student than to the mere reader who wishes to wile away an idle hour. To the former they will, in a condensed form, give a mass of information on many subjects to which he otherwise would have no access, and will inform him of the views held with regard to them by men, who have both the time and material for their elucidation, which he from circumstances does not possess. Of the two numbers before us, the *British Quarterly* is the more interesting to the general reader, being rather less scientific than the others and chiefly filled with reviews of historical works. Among them is a very good paper on "The Speaker's Commentary," to which illusion is so frequently made, though few have yet seen the work itself. "An English Interior in the Seventeenth Century" is very interesting. "Mahomet" is the title of a critique on a very remarkable work, viz.: "A series of Essays on the Life of Mahomet," written by Khan Bahador, a lineal descendant of the Prophet and a professor of his religion, who is withal a Knight of the English Order of the Star of India, and who does not fear in defence of his religion to meet "either Christian divines or European scholars on their own ground."

The contents of the *Westminster* are chiefly political and scientific. Among the subjects discussed are, "The Political Disabilities of Women," — "The Development of Belief,"— and "A Theory of Wages." Among the lighter articles is an interesting sketch of the "Life of the first Earl of Shaftesbury."

Of the articles in the *Edinburgh*, we notice especially "Yeale's Edition of the Travels of Marco Polo,"—"Lace Making as a Fine Art," — "Tyerman's Life of John Wesley," — "Railway Organization in the late War."

Blackwood's Magazine for March

Is an unusually attractive number, and contains an eloquent and probably not an exaggerated sketch of the Life of General Lee, the greatest General that ever trod this continent and perhaps the third in rank of all modern Generals. There is also a paper by Cornelius O'Dowd, entitled "The American Revoke," and many other interesting articles all in the true Blackwood style. This number is of peculiar interest to readers here at the present moment. It has been republished very early by the Leonard Scott Publishing Company of New York. The following are the contents in full: — "A True Reformer"— "Voltaire" — Maid of Sker, Part viii"—"Autumnal Manœuvres"—"The Manchester Nonconformists and Political Philosophy"—"General Lee"— "Cornelius O'Dowd (The American 'Revoke'")—"Ministers before Parliament"

American Law Review. January, 1872. Little, Brown & Co., Boston, U.S. Quarterly, $5 per annum.

The above number contains articles principally of interest to the people and lawyers of the United States. The usual digest of English Law Reports is given (which we again make use of), also a Selected Digest of State Reports, list of law books published in England and America since October 1871, Summary of Digest, &c.

The April number is also received, and will be noticed hereafter.

Wood's Household Magazine. March, 1872. S. S. Wood & Co., Newburgh, N. Y.

This periodical, now in its tenth year, has with the present issue passed into the hands of the well known Gail Hamilton, as editor-in chief. With a frankness characteristic of her sex and country, this lady lets us know that her income exceeds $3,000 a year, that she means to make money for the proprietors, that she has secured, as contributors, such writers as Greeley, Portus, Beecher and Saxe, and that for a dollar per year the whole can be secured. Taking the average run of readers, something can be found in this magazine suitable for everybody, so diversified are its contents. We have found the stories not to be of that livid kind which induce nightmare and dyspepsia, but rather gentle sedatives, well adapted after a course of legal reading to tone the nervous system down to balmy sleep.