DIARY FOR NOVEMBER.

1. SUN..21*st Sunday after Trinity.*
8. SUN..22*nd Sunday after Trinity.*
11. Wed..Last day for service for County Court.
15. SUN..23*rd Sunday after Trinity.*
16. Mon..Michaelmas Term begins.
20. Fri. ..Paper Day, Queen's Bench, New Trial Day, Common Pleas.
21. Sat. ..Paper Day, Common Pleas. New Trial Day, Queen's Bench. Declare for County Court.
22. SUN..24*th Sunday after Trinity.*
23. Mon..Paper Day, Queen's Bench, New Term Day, Common Pleas. Last day to set down for re-hearing.
24. Tues..Paper Day, Common Pleas, New Term Day, Queen's Bench.
25. Wed..Paper Day, Queen's Bench. New Term Day, Common Pleas. Appeal from Chancery Chambers, Last day for notice of re-hearing.
26. Thurs Paper Day, Common Pleas.
27. Fri. ..New Trial Day' Queen's Bench.
29. SUN..1*st Sunday in Advent.*
30. Mon..*St. Andrew.* Paper Day, Queen's Bench. New Trial Day, Common Pleas. *Last day for* Notice of Trial for County Court.

THE

Canada Law Journal.

NOVEMBER, 1868.

JUDICIAL CHANGES.

The vacancy caused by the retirement of the President of the Court of Appeal from the position which he had so worthily held as Chief Justice of Upper Canada (of which more hereafter), has been filled by the appointment of the Hon. William Buell Richards, formerly Chief Justice of the Common Pleas. Mr. Justice Adam Wilson goes with him as Junior Puisne, and Mr. Justice Morrison, now becomes the Senior Puisne Judge in the same court, as he is also on the Common Law Bench. Mr. Justice Hagarty is transferred from the Queen's Bench to the Common Pleas, and becomes Chief Justice of the latter Court, while Mr. Justice John Wilson takes the seat to his right; John W. Gwynne, Esquire, Queen's Counsel, being appointed the new Judge, and sitting as Junior Puisne Judge of that court.

It was at one time thought that the Chancellor would have accepted the Chief Justiceship, which was offered to him in contemplation of Mr. Draper's retirement, and it was hoped by many that he would have accepted the office, as it was very generally thought that he was admirably suited for that position, but difficulties that could not easily be surmounted in the choice of some one to succeed him in the Court of Chancery are said to have prevented his making the change.

These appointments will produce a thorough change in the *personel* of the two courts, the majority of the judges formerly in the Court of Common Pleas being transferred to the Queen's Bench, and Mr. Justice John Wilson being the only representative of the Court of Common Pleas as lately constituted. One result of this will be that the cases still standing for judgment are to be re-argued before the present bench.

As to the appointments in themselves, the Chief Justice has already presided as the Chief of a court, and the duties now devolving upon him will not be materially different from those to which he has lately been accustomed, and will, doubtless, be as faithfully performed. Of the learning and ability of the new Chief of the Pleas it is unnecessary to speak, it is admitted on all sides. We congratulate Mr. Gwynne upon his appointment, which is accepted by the profession as likely to give general satisfaction.

But while glancing at these changes we, in common with the profession at large, do so with a sense of sorrow and regret, not unmingled with certain undefined feelings of doubt as to the future, when we think that he who has of late years been the master-mind of our courts is no longer at the helm, though still in a position where he can be of signal service to his country. We trust it may not be presumptuous in us to express a hope that the example of his dignity, patience, courtesy and attentive industry will be followed by those who occupy seats he formerly filled.

The new Chief Justices were sworn in before His Excellency the Governor-General at Quebec, on the 12th inst. It certainly seems rather hard that their newly acquired dignity should subject them to such an arduous undertaking as a hurried journey to the extreme end of the Dominion. It would be bad enough to have to go to the Capital, where one might expect to find His Excellency, instead of travelling day and night by rail, a distance of a thousand miles or so. There being some doubt as to whether the Governor-General or the Lieutenant-Govenor was the proper person to administer the oaths to the Chief Justices, they were also sworn in by the latter functionary on their return from Quebec.

The Chief Justices of the respective courts on the first day of Term, in open court, administered the required oaths to Mr. Adam Wilson and Mr. Gwynne.

After this form had been completed, the Hon. J. H. Cameron, the Treasurer of the Law Society, in the absence of the Attorney-General, first, in the Queen's Bench, and afterwards in the Common Pleas, congratulated the new Chiefs upon their promotion, and Mr. Gwynne upon his appointment.

Both Chiefs when assuming their new positions in answer to the address of the Treasurer of the Law Society, referred to the good feeling, which at present exists between the Bench and the Bar, and promised to do their best to maintain it. To this end, want of patience or petulance on the part of the Bench is by all means to be avoided; and towards the attainment of the same object there must be respect and respectful demeanor to the Bench on the part of the Bar. Failing either, there will be conflicts which must result in the destruction of that good feeling which happily has hitherto existed, and which all are so anxious to maintain.

CRIMINAL PROCEDURE.

The questions raised by the counsel for the prisoner Whelan at his trial at the Ottawa assizes will it is supposed be brought before the Court of Queen's Bench during the present term.

The criminal law seems to require that where a prisoner convicted of a felony obtains a writ of error, he must be personally present in court when error is assigned, during the argument, and when judgment is delivered.

This rule, of some practical use to prisoners perhaps a hundred years ago, can scarcely be said to be so now, when every criminal can obtain counsel, or counsel is assigned to him by the merciful practice of our law; and it is open to serious objections, some of which present themselves in a case like the present. The prisoner has to travel from the extreme end of the Province at some expense to the county, and from the nature of things, is afforded opportunities of escape, which would not offer themselves under other circumstances. The danger is the more apparent when the possibility of a rescue by the friends of the prisoner is taken into consideration, and this possibility becomes more or less probable according to the ease of accomplishment, and will necessary be greater in proportion to the time occupied in the transit of the prisoner from one place to another, and other circumstances. The chances will be increased when the crime partakes of a political character, or in times of great political excitement. We may here remark that it is now rather the rule than the exception, that the presence of prisoners is dispensed with on the return of writs of *habeas corpus* to test the legality of their imprisonment.

Another thing worthy of comment in our criminal law practice is the curious fact, that although a debtor cannot be committed to close custody for a week, for the non-payment of a dollar a month, pursuant to the order of a Division Court Judge, nor a man sent to jail for ten days, or fined ten shillings and costs by a justice of the peace for vagrancy without being called upon to shew cause to the contrary, and after a formal order duly signed and recorded—a man may be convicted of murder and hanged accordingly, without the scratch of a pen to order the execution. Some judges certainly have occasionally relieved the mind of a timorous sheriff by writing opposite the name of the criminal the words *Sus. per col.*, but this is seldom done we believe in practice, and some judges have refused to do even this.

The answer to this is, we suppose, that a record *can* be made up, if required, at any time, and so it may, if the evidence for the purpose has been preserved—but the fact remains the same, nevertheless, though we do not at present know of any case where this curious absence of what is a mere matter of routine in the most trifling cases has worked any injustice.

Proceedings in error in criminal cases being rather out of the common, it may satisfy the curiosity of some, in view of the *cause celebrè* about to come before the Queen's Bench, to give a short sketch of the *modus operandi*.

The writ of error to the court of Oyer and Terminer of the proper county is obtained on the fiat of the Attorney-General, returnable we presume in either court. The return sets forth the proceedings of the court below in full. Upon the return day of this writ, the prisoner, the plaintiff in error who has to be brought before the court by a writ of *habeas corpus ad subjiciendum*, prays oyer of

the writ and return, and the same having been read, leave is craved to assign error on part of the prisoner, which being granted, the reasons of error are entered on the record, and issue is joined in error on behalf of our lady the Queen. The prisoner then by himself or by counsel prays that counsel may be assigned to him, which being done, a rule for the purpose is drawn up, though in practice this is generally dispensed with. The counsel so appointed then prays for a *concilium*, which the court appoints for a day certain in term.

The prisoner after judgment is pronounced is ordered to be re-delivered to the custody of the sheriff of the county in which he was found guilty—either to suffer the penalty inflicted by the original sentence of the court of Oyer and Terminer, or to await the result of an award of *venire de novo*.

NEW LAW BOOKS.

We understand it is the intention of Mr. Leith, as soon as the consent of Mr. Williams can be obtained for the purpose, to publish an edition of "Williams on Real Property," adapted to the Law of Ontario. If this consent can be obtained, the work will appear in three months. The publication of this edition will be of great benefit to students, and will in this country practically supersede the English editions, and we should strongly reccommend those who have to buy the book to wait until Mr. Leith has published his volume.

Mr. Taylor has his annotations on the new Chancery orders in a forward state, and it will we understand, soon be out of the printers hands, and be ready for delivery inside of a month.

LAW SOCIETY—MICHAELMAS TERM, 1868.

CALLS TO THE BAR.

Mr. Bernard Devlin and Mr. Wright, of the Lower Canada Bar, were called to the Bar of Ontario on the first day of Term.

The following gentlemen, having passed the necessary examinations, were also called to the bar, out of twenty-two who presented themselves:—A. J. Christie, Ottawa; Alex. Dunbar, Stratford; W. R. Chamberlain, Napanee (all without oral); John Muir, Hamilton; J. H. T. Bleasdell, Belleville; Jas. Cartwright, Kingston; James O'Loane, Stratford; John McLean, St. Thomas; Fred'k Biscoe, Guelph; W. H. C. Meyer, Seaforth; William Milloy, Toronto; Jas. E. Robertson, Toronto; John W. Douglas, Perth; — Whitley, Toronto; John H. Scott and Edm'd J. Beaty, Cobourg.

ATTORNEYS ADMITTED.

Of twenty-one gentlemen who went up for examination, only the following have as yet succeeded in passing:—W. M. Merritt, St. Thomas; J. H. Macdonald, Toronto; Seth S. Smith, Port Hope; W. F. Medcalf, Picton; A. J. Christie, Ottawa; Wm. Milloy, Toronto, and W. H. C. Meyer, Seaforth.

None of these were required to undergo the oral test. The remainder answered the *vivâ voce* questions of the Benchers so indifferently that they could not be allowed to pass; they are, however, to have another chance on a future day this Term. Those who have been before that awe-inspiring body known as the Benchers for oral examination, will bear wit ness to the exceeding fairness and courtesy with which they are treated by the Treasurer and those of the Bench who may happen to be present, and cannot but say that every opportunity is given to students to answer the questions put, and that without any fear of their misunderstanding them, and in such a way as, so far as possible, to prevent any nervousness on the part of the students.

Mr. R. C. Henderson, who, we understand, passed an excellent written examination, could not, however, be admitted this Term, owing to some defect in his articles.

LAW SCHOLARSHIPS.

The Examinations resulted as follows:—

First Year—Maximum of marks, 320: R. M. Fleming, 294.

Second Year—Maximum of marks, 320: John Crerar, 245.

Third Year—Maximum of marks, 320: Dan'l Wade (scholarship), 314; H. J. Muckle, 284; Wm. Green, 281; Sam'l Clarke, 274.

Fourth Year—Maximum of marks, 360: Charles Moss, 291.

The answering in the third year appears to have been remarkably good.

The first of the intermediate examinations, under the new rules of the Society, has also taken place, and was, we are informed, most creditable to the gentlemen who passed.

SELECTIONS.

THE FALLACY OF LOCAL TRIBUNALS.

If the wisdom of the social Science Association were to be measured by its discussion on 'the reorganisation of our Courts, superior and local,' the interest in its proceedings would speedily be limited to those who are charmed with the sound of their own voices. To say nothing new, and to say that little badly, is less than could be expected even from the boldest usurpers of the title of *savans*. Yet the only sense on perusing the speeches delivered at Birmingham on the condition of our judicature is one of entire disappointment. To plead as they do in Chancery, to fuse law and equity, and to substitue local for central jurisdiction, are the specifics discovered by the doctrinaires of the Association. The first two propositions are good enough, but they are not new; the last is neither good nor new. It is, as we believe, an idea thoroughly considered and completely discarded by the Judicature Commission, scarcely at this date to be galvanised into a *post-mortem* activity by the most ardent and juvenile of advocates. Yet, as it has been seriously and elaborately recommended in Section B, and not combated by any subsequent debater at the meetings of the Association, it behoves us to say a few words on this proposition.

It is advanced, first, that the plaintiff should be allowed to begin his action in any local court, whatever may be the nature or amount of his claim. Second, that if the claim be below 500*l*., then the plaintiff should be compelled to begin in some local Court. On the other hand, the defendant may post an affidavit to the registrar of the local Court stating that he has a good defence and a good cause for removal. The plaintiff may reply, opposing the removal, by a counter affidavit. This is certainly a pleasant prospect to start with. A., living in Northumberland, receives a summons from the County Court of Cornwall for a demand amounting to some hundreds of pounds. Being a prudent man, he necessarily would not be content with posting an affidavit to the registrar stating an inclination to have his cause tried in London or at Newcastle, but would be driven to employ an attorney at Bodmin to watch the proceedings. The summons is also to contain in all cases a clear warning that, unless the defendant, within six clear days of the hearing, gives notice to the registrar of his intention to defend, with a statement of the grounds on which he rests his defence, the plaintiff shall be at liberty to have judgment entered up against the defendant. At present a summons must be served ten clear days before the day of hearing. The consequence is that, according to this plan, within the space of four days A. would have to find an attorney—his own resident in London, for example—and, through that attorney, to take counsel's opinion as to the grounds of his defence, to get an affidavit drawn and sworn, and to transmit all these documents in due form to Bodmin, under pain of having judgment entered up against him. The post would take two days, so that this marvellous feat would demand accomplishment in about 48 hours.

Such a scheme is so monstrous, that, if the language was not explicit, it would be only fair to suppose that grave misapprehension existed as to the meaning of the speaker. At present, if the proceedings are in the County Court, the defendont has this advantage, that the plaintiff must come into the defendant's own district; but here the words are: 'The plaintiff should have the option of suing in whatever local Court he thought fit, not being compelled to follow his debtor to any distance;' just as though to 'snap' a judgment was altogether about the most just and delightful thing known to all the legal world. If a man is sued now in the superior Courts, he has eight days to appear; then he has the breathing time afforded before delivery of the declaration; then eight days to plead, with further time as a matter of course. In most cases a defendant gets some three or four weeks in which he may prepare to meet the demand made against him. But that sort of delay is no longer to be allowed, and the defendants are to be tomahawked and scalped within four days from the service of the summons. We can almost discern in the gloom the twinkle of the eye of the tallyman at this charming proposition. But it goes beyond petty debts and the petty oppression of petty creditors, and defendants are to be fixed with judgments and executions, we suppose with proportionate rapidity, for amounts not exceeding 500*l*. Indeed, that seems to be the limit only of compulsory jurisdiction, so that it may be that the judgment may run up to thousands or even millions, unless the local judge of his own mere motion interfere for the purpose of transferring the cause to a superior Court.

We have criticised these items of the general proposition to localise the administration of justice, not so much because they go in any way to the root or principle of the thing, but rather to show how crude, unpractical, and absurd are the views which have been thus put forward. It is impossible for an association to repress persons who insist on reading papers in the several sections, but the mischief is that a fictitious importance is lent to such documents by the prestige of the society. The public, naturally unable to form as sound a judgment on the reform of the adminstration of law as on broad questions of policy, is apt to imagine that there is a virtue in the legal quackery which loudly asserts its own excellence, and that the real authorities, the staff of judges and heads of the profession, are mere adherents of a species of priestcraft. But the principle of localising justice in this country is unsound, the moment that it is carried beyond the speedy means of recovering petty debts,

remedying small grievances, and resolving rights of trifling import. In the present day communication with London is a matter of the utmost facility, and procedure by writ or other notification issued out of offices in the metropolis is at once the most inexpensive and most rapid method of getting the litigant parties together. Every day that diminishes the use of writs brings home to the attorneys a stronger sense of the convenience attached to that ancient system of commencing actions. The main point as against the localisation of Courts is that in proportion as you localise the administration of law, you lessen justice. Local law and bad law are convertible terms. Law is a thing not acquired once for all, as if it were an instrument warranted never to get out of order, but it is a science of unceasing developement. Let the most learned and most acute of judges be taken from Westminster Hall and planted in a County Court, and in ten years he will sink below the least able of the brethren over whom he once towered. The reason why a man elevated to the Bench in Westminster Hall does not decline in knowledge, energy, and power is because the endless attrition of other intellects keeps his mind bright. Take away that instrument, and he rusts. The County Court judge has no chance. He has no Bar before him to keep up his education; he has no means, except through reports which he has little leisure and less inclination to master, of keeping himself *au courant* with the historical changes of the law, which are hourly effected by judicial decisions. It is difficult to measure the extent to which the tendencies of public opinion, the march of scientific, theoretical and moral inquiry, operate on the minds of judges and lawyers, and so by an imperceptible but steady process influence the law. All this is lost upon the local judge. By no human possibility can he get beyond the point of excellence which he had reached at the moment of his appointment. But by the great law of nature, which compels movement in one direction or another, he as surely retrogrades. As a rule, too, unless he is a remarkable man, not only his legal power but his moral nature suffers, as does the nature of all men whom circumstances have placed in isolated superiority to those with whom they have to deal. These are the common causes which go to create the complaints, neither indistinct nor unintelligible, as to the conduct of County Court judges. The system is at fault, not the men, who work well for nine-tenths of the objects for which they were appointed, but fail in the tenth, and so rise against themselves a clamour disproportionate to the real greivance. But now it is demanded that their ju.isdiction shall be extended immeasurably, with the certain result that the outcry against them will find substantial justification, and that a formidable reaction will set in, so soon as the wealthier classes begin to feel where the shoe pinches.

The moment that men of landed estate, of large commercial interests, and of great social standing, experience in their own affairs what it is to have important issues of law and fact decided by the local tribunals, it will go hard with the whole institution. It is precisely because it is desirable to preserve what is of real value in the County Courts that it is a duty to save them from their friends.

These objections, we are glad to perceive, had occurred, though in a very slender degree, to the mind that advanced the great theory of local Courts. Therefore it was proposed that the judicial staff should be increased, and that four times in the year a sort of County Courts Quarter Sessions should be held, at which some three or four judges of the adjoining districts might meet, and hold sittings in banco, and also try issues in fact reserved specially for these meetings. This scheme is fair enough, and might be adopted in some form or other with advantage at the present moment. It is certainly rather vain labour to move a judge to rescind his own ruling on a point of law, and his own finding on an issue of fact, and some plan of making such motions before a Court composed of three or four judges might well be adopted. So also there would be a chance of getting a few counsel to attend on such occasions, to the benefit of the Bench and of the suitors. But it is impossibe to suppose that this balm of Gilead will suffice to heal all the diseases existing or to be engendered in the local tribunals.

Another argument which has found weight in some quarters apparently offers considerable attractions to the gentleman whose views, as expressed at Birmingham, we have endeavoured to explain and to combat. It is said that County Courts and these new quarterly Courts would be a sort of training ground for young advocates. Possibly persons whose breath would be taken away by confrontation with a Middlesex jury and a judge of the Court of Queen's Bench may control their nerves before a County Court judge. But how an arena in which bad law and indifferent manners are not absolutely unknown is to fit an advocate for more exalted struggles it is hard to see. The way to learn law and advocacy is to listen to the ablest counsel, and to note what falls from the ablest judges, and little or nothing is gained by acquiring a confidence which only makes a man rush in where angels fear to tread. There is another point not to be lightly dismissed. It is now pretty well admitted, and was very strongly put amid loud cheering at the meeting of the Bar last spring, that the petty rules and restrictions appertaining to practice on circuit might well be thrown overboard as useless cargo.

How did the ship of the profession ever come to be freighted with the burden? Because each circuit assumed to itself the airs of a petty corporation, in which the members acted on the grand principle of mutual jealousy and suspicion. Just as though all were rogues eager to circumvent their neighbours, and so had to be checked by a code of stringent regu-

lations. So sprang up the notion of protecting one circuit as against another, of protecting elder members as against the juniors, and of protecting all from the contamination of attorneys. All this system is now decaying with such rapidity that it is wholly unnecessary to employ active means for its rapid annihilation. But the notice of local Bars attending local Courts is not only a child of the same family with the aged monster, but is infected by graver vices. What was formerly only felt twice a year and alleviated by the purer air of London practice, is now sought to be made perpetual without the means of finding any alternative. Multiplicity of practice, of traditions, even of law, would be hard to endure, but their mischief would be small in comparison with the gigantic evil of local Bars with a variety of rules of miscalled etiquette, and a host of precedents of conduct of questionable propriety.

There is yet a stand-point for our adversaries They may point to France and to America. In the United States the Constitution rendered localisation of justice necessary, but not in the sense used in this country. Every State of the Union is sovereign—is, so to speak, for all purposes of internal economy, an Empire, and enjoys its own particular system of jurisprudence. Each State, therefore, must of necessity have its own judges and its own lawyers. The example of France serves the turn no better. Considering the very great ability and eloquence of the French Bar, any man must be struck with its want of power and position in the State. The first Emperor could afford to despise and insult the profession, and the existing Government takes no heed whatever of it in calculating the forces of friends and foes. The French Bar cannot furnish a member to the Bench; it even occupies a position of weak antagonism both to the Bench and the Executive. There may be many reasons for this state of things. But the great reason is that the Bar is not one homogeneous and consolidated body, able to concentrate its power in a given direction, but is split up by a system of local centres of justice into a number of associations. In England the Bar is an united body, and this fact is the chief element of its great and growing strength.—*Law Journal.*

STATISTICS OF THE DIVORCE COURT.

If the Frenchman who believes that one of the eccentric peculiarities of Englishmen is the sale of their wives at Smithfield Market when they prove intractable were to air his curiosity in the Divorce Court at Westminster, he would probably after a few hours of attentive listening to the proceedings of the Court be satisfied that a much better mode had been discovered of settling matrimonial disputes in England. It might also dawn upon him that English wives are not wholly passive in the transaction, though how far they are active as petitioners to the Court the Blue-book renders no information. Of the whole of the official returns these are the most meagre—indeed they are so defective as to be wholly valueless for the ordinary objects of statistics. The total number of petitions for judicial separation and for dissolution of marriage is given, but whether the petitioners were the husbands or the wives it has not been thought proper to state. However, we must bear these omissions and also many discrepancies philosophically, and accept what we can get. The number of proceedings for 1867 and for the previous year, as well as an average for the seven preceeding years, 1859–65 inclusive, have been given. A certain though slight improvemeut is perceivable in the business of the Court from year to year. In 1867, there were 321 petitions filed against 306 in the previous year, which shows an increase of 6 when compared with the average for the seven years. We will, before going further, proceed to analyse, as far as possible, the total for the former year. It will be needless to refer to the others, as each particular item of one year is merely an echo of the previous year. The petitions for dissolution of marriage in 1867, then, were 224, on which 119 decrees were made; for judicial separation 70, on which 11 decrees were made; and for the restitution of conjugal rights only 15. Entire dissolution of the Gordian knot, as revealed by these figures, is preferable to the mockery of a judicial separation. Innumerable private reasons of course may exist in many instances to urge the latter form of disunion, but it is well known that some of those who pursue the former plan, immediately on being cured thrust their fingers again into the fire, and not unfrequently discover that they have once more been burnt. There were 9 petitions filed for nullity of marriage, 1 for declaratory act, and 2 *in formâ pauperis*, which make up the total of 321. The remainder of the business of the Court shows a proportionate increase; for example, the number of petitions for alimony was in 1867, 95; in the preceeding year 86; and 77 was the average for the seven years. In the former year 466 citations were issued, and 676 summonses. The number of causes actually tried was 159 in 1867, of which number 127 were tried before the Judge-Ordinary on oral evidence, and the remainder before him and juries; 183 in 1867; and 231 is given as the usual average. Judgment was delivered by the Judge-Ordinary in the whole of the 159 cases brought to trial during last year, from which only 4 appeals were made to the full Court, and the absence of any to the House of Lords is remarkable. The revenue of the Court, like its business, experiences a small variation, but there is a decrease in that for 1867 on every year. The statements stand thus:—In 1867 the sum of 2,512*l.* 16*s.* was the amount of fees actually received, against 2,596*l.* 13*s.* in the previous year, and 2,582*l.* is given as the average of the amounts for the seven preceding years.—*Law Journal.*

THE PRACTICE AND PAYMENT OF CONVEYANCING.

It is rather the habit of the present day to complain of the small fees payable to conveyancers, and of the invaders with which the Profession is troubled in the shape of auctioneers and accountants. In Canada, however, it appears that they are far worse off than we are; for a correspondent of the *Canada Law Journal* tells us in its last number that not only is the regular conveyancer narrowly watched in his professional conduct, and especially in the investigation of titles, but the unhappy fraternity has been almost entirely ousted from their legitimate sphere. "Schoolmasters, magistrates, clerks of division courts, and (until the Act of last session) registrars, Members of Parliament, township officers, and some others have monopolised the principal part of the coveyancing business in this country."

It is urged by the same writer that there should be a known and uniform standard of charges for lawyers such, in fact, as prevails amongst solicitors in this country; and we adduce this evidence to caution the Profession here against too earnestly desiring the *quantum meruit* system. There being no regular scale in Canada, a person who wants law work done goes from firm to firm until he gets the lowest tender. We do not conceive that such a plan would ever succeed in England, and it is as well at once to disabuse the mind of the public as to strengthen in opposition to it the feeling of the Profession. The *quantum meruit* might be well applied to conveyancing, but if it goes so far it is clear it should not be allowed to go farther.—*Exchange.*

RIGHTS OF WOMEN UNDER THE REFORM ACT.

The Hon. George Denman, Q. C. has addressed to a lady his views upon this vexed question He says:

I think it a very doubtful point. As the Bill was originally drawn, I have a strong opinion that it would have given the franchise to women (not married). It contained a clause saying that certain classes of "men" should be enfranchised, and in enumerating those classes, enumerated one of them as "every man who (being a male person) shall be," but that clause (the fancy franchise clause) was struck out. The matter now stands as follows: The Act gives the vote to "every man" who, &c., not being under any legal incapacity. The word "man" was not used in the Act of 1832 (2 & 3 Will. 4). but the words "male person." By 13 & 14 Vict. c. 21, s 4, it is provided that "words importing the masculine gender shall be deemed to include females (in all future Acts of Parliament), unless there is something to the contrary in the Act itself." It is argued, on the one hand, that the words "not being under any legal capacity" are words to the contrary of "man" being held to include "woman;" on the other, that those words merely refer to "minority," "marriage," and such-like incapacities. There is this in favour of your view (and it may have been intended in high quarters), viz., that when I put the question to Mr. Disraeil, whether it was intended, he gave me an evasive answer; and when Mr. Mill proposed the word "person" instead of "man," he (Mr. Disraeil) abstained from voting: but that the House did not mean it is clear, from the faet that we who voted for it were in a considerable minority. With this, however, no judge has any thing to do. It is a pure question of law, and I think, a very arguable one as it stands.—*Exchange.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-law, Reporter to the Court.)*

Forbes v. McClelland.

Slander—Application to plead several matters—Justification.

In an action of slander the plea of not guilty puts in issue the defamatory sense imputed to the words alleged to have been spoken.

A plea of justification seeking to justify the use of the words in a sense different to that imputed will not be allowed.

A general plea of justification will.

[Chambers, Sept. 17, 1868.]

This was an action of slander. The declaration contained four counts. The first count alleged that the plaintiff carried on the business of buying and selling cattle, and that the defendant falsely and maliciously spoke and published of the plaintiff in relation to the said business and the carrying on and conducting thereof by me, the following words "Beware of these Highland rogues, they will cheat you if they can, and don't allow your cow to go out of the field until they pay you, for they have cheated me out of nine dollars for a cow," whereby the plaintiff was greatly injured in his good name, credit and reputation, and in his said trade and business.

The 2nd count. That on the 5th June, 1868, the plaintiff personally appeared before Alexander MacNabb, Police Magistrate of the City of Toronto, and laid an information and complaint before him, as such Police Magistrate as aforesaid, upon her oath duly taken and administered by and before the said Magistrate against the defendant, charging him upon oath that he did, in the City of Toronto, on the 4th June, 1868, use grossly insulting language to her, the plaintiff, on the public streets of the said City of Toronto, an offence against a by-law of the said city, and over which the said Magistrate had jurisdiction to enquire and to take the said information, &c., and the plaintiff having been sworn, &c., the Magistrate issued his summons therein against the defendant, and the defendant after the laying of the said information and complaint as aforesaid, and after swearing to the truth thereof, as aforesaid, by the plaintiff, and before the commencement, &c., falsely and ma-

liciously spoke and published of the plaintiff, and of and concerning the said information and complaint, the words following "He swore falsely before you, meaning thereby that the plaintiff committed wilful and corrupt perjury in swearing to the truth of the said information and complaint under oath.

The 3rd count. In that the defendant, &c., the words following "he swore false in Court," meaning that the plaintiff had committed wilful and corrupt perjury in swearing to the truth of the said information and complaint in the said 2nd count mentioned.

The 4th count. For that the defendant, &c., falsely and maliciously spoke and published of the plaintiff, the words "She has perjured herself."

The defendant obtained a summons calling upon the plaintiff to show cause why any two of the last three counts should not be struck out, on the ground that they were based on identically the same cause of actions, and for leave to plead to the whole declaration "not guilty," and for a second plea to the first count "that the plaintiff did not carry on the business of buying and selling cattle as in said first count alleged," and for a second plea to the 2nd, 3rd and 4th count, or such one of them as might remain a plea "that in speaking and publishing the words in the said second, third and fourth counts respectively charged, the defendant meant that the plaintiff, in the information referred to in the said second count, had sworn to what was untrue in fact, and the defendant was understood by all persons to whom the said words were spoken and published so to mean and not otherwise or further, and the defendant saith that in the said information sworn to before the Police Magistrate of the City of Toronto, as in the said second count mentioned, the plaintiff deposed that the defendant, on the fourth day of June, 1868, used grossly insulting language to her, the plaintiff, on the public streets of the City of Toronto, and the defendant further saith that the alleged language referred to in the said information, as used by the defendant to the plaintiff, was not so used on any of the public streets of the said City of Toronto, as therein sworn to by her, the plaintiff, but on the contrary thereof the only language used by the defendant to the plaintiff, on the occasion referred to in said information, was so used in a pasture field at some distance from any street of the said city; and so the defendant saith that it was and is true that the plaintiff, in the said information, had sworn to what was untrue in fact."

McKenzie, Q. C., shewed cause and cited *Earl of Lucan* v. *Smith*, 26 L. J. Ex. 94; *Devlin* v. *Moylan*, 4 Prac. Rep. 150.

The following authorities were cited in support of the summons: *Watkin* v. *Hall*, L. R. 3, Q. B., 402; *Barretto* v. *Pirie*, 26 U. C. Q. B. 468.

Draper, C. J.—The defendant asks leave to plead to the second, third and fourth counts, to the effect following: that the plaintiff hath laid an information on oath before the Police Magistrate of the City of Toronto, that he had (in violation of a by-law of the city) used grossly insulting language to her on the public streets of the city. That in fact he had not used such language in the public streets, but only in a field at a distance from any street. That he only meant and was understood to mean that she had sworn to a matter untrue in fact, and that the plaintiff had thus sworn to a matter which was untrue in fact, *i. e.*, as regarded the place *where* he had used grossly insulting language to the plaintiff.

As regards this plea it admits, as to the second count, that he did say to the Police Magistrate "she swore falsely before you," and as to the third count, "she swore false in court," and as to the fourth count, "she has perjured herself."

Now it is competent to the defendant, on the general issue, to prove that the words were not spoken maliciously, or in the defamatory sense imputed, or in any defamatory sense which the words themselves impart, and therefore, as to the fourth count, all that according to the plea is wanted to be proved, refers to the use of the word "perjured" in a defamatory sense, while as to the words in the second and third counts, in each of which the words are by inuendo stated to charge wilful and corrupt perjury, the question arises different in its terms but leading to the same result.

The plaintiff's information, according to the second count, charged defendant with an offence against a city by-law, *viz.*, using grossly insulting language to the plaintiff on the public streets of the City of Toronto. It will be observed that to constitute this offence there are two requisites. 1st. The use of insulting language. 2nd. In a particular place, to wit, the public streets. Plaintiff therefore must be taken to have sworn to both, or the charge could not have been entertained, the Police Magistrate having no jurisdiction. If she did so swear, then the plea says it was "untrue in fact," and that defendant meant that the plaintiff in this information had sworn to what was untrue in fact, and was so understood to mean by those to whom he used the words stated in these counts, and not otherwise or further, and he asserts that she did swear to the use of insulting language in the public streets, but that he used no such language in the public streets, but in a pasture field at some distance from any street. It will be observed that the defendant does not deny in words that he meant to charge her with wilful and corrupt perjury, he only says he meant that her information was untrue in fact" and "not otherwise or further." But the assertion, as she made it, was material,—of the essence of that which gave the Magistrate jurisdiction, without which there could be no offence committed against the by-law. The natural meaning of the charge of false swearing in an information before a Magistrate would be that perjury had been committed by the accuser, if the fact sworn to were material and indispensable to the charge, and that sustains the inuendo while the plea denies the inuendo, while it asserts the falsehood of the information; it amounts to this "The plaintiff falsely swore to the existence of a material fact in charging me with an offence. I have said she swore falsely and I re-assert it, but I did not mean that she committed perjury, she only swore to what was untrue in fact." If this means anything it is a denial of the defamatory sense imputed to the

words, and may be proved under not guilty. I do not, therefore, allow this plea.

His Lordship also refused to strike out any of the counts on the ground that the plaintiff was entitled to a separate count for each utterance of the alleged slander attempted on the same occasion.

The defendant then applied for leave to plead the general plea of justification to the 2nd and 3rd counts which was allowed.

Order accordingly.

SOWDEN ET AL., EXECUTORS, v. SOWDEN.

Particulars—Special Endorsement—Declaration.

A plaintiff is not limited in his declaration to the particulars of his cause of action specially endorsed on his writ of summons.

[Chambers, October 2, 1868.]

A. H. Meyers, for defendant, applied for a summons to set aside the declaration, copy and service, and notice to plead and service on the ground that the declaration contained counts on causes of action other than those stated in the special endorsement on the writ of summons, citing *Fromant* v. *Ashley*, 1 E. & B., 723, 22 L. J., N. S., Q. B. 237.

The writ in this case was specially endorsed. 1st. For $180, being 18 months interest on a covenant contained in a mortgage to testator for $2,000 (describing the mortgage). 2nd. $300 on a promissory note, dated 4th May, 1863, made by one I., payable to the order of defendant and endorsed by him to testator. 3rd. $55.74, being cost of a certain suit (particularly designated) paid by testator.

The declaration served contained five counts.

1st. For two years interest on the sum of $2,000, mentioned in the covenant stated in the special endorsement, accruing in the life-time of the testator.

2nd. For one year's interest on the same covenant, accruing since the testator's death.

3rd. On a promissory note, dated 4th May, 1863, made by W. E. J., payable to defendant, or order, for $300, and endorsed by defendant to testator.

4th. On a promissory note, dated 11th August, 1863, made by W. E. J., payable to defendant, or order, for $300, and endorsed by defendant to testator.

5th. Common counts on causes of action accruing to testator.

To this declaration are attached particulars of demand on the common counts:—

Costs of suit, Sowden against testator, in his lifetime, and the defendant, on his promissory notes, declared upon in the third count	$55 74
Fees paid to the Sheriff of the United Counties of Northumberland and Durham on making the money on execution in said suit	20 00
Interest on said sums from January, 1864,	20 00

DRAPER, C. J.—The C. L. P. Act authorizes a plaintiff, in all cases where defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, arising on a contract, such as a promissory note or a bond or contract under seal for payment of a liquidated sum, to make a special endorsement of the particulars of his claim, which endorsement shall be considered as particulars of demand, and no further or other particulars of demand *need be* delivered unless ordered by a Court or Judge.

Unless to the common counts no particulars need have been delivered with this declaration: *Brooks* v. *Fallar*, 5 Dowl., 361; *Dawes* v. *Anstruther*, 5 Dowl., 738. This is the general rule, though not without special exceptions.

But in this case the defendant asks to set aside the declaration, copy and service, and notice to plead and service—because the declaration contains counts on causes of action not stated in the special endorsement, and in support of this application he relies on the 15th sec. of the C. L. P. Act. (Con. Stat. U. C., ch. 22.), which is like the 25th sec. of the C. L. P. Act of 1852, in England, and on the case of *Fromant* v. *Ashley*, 1 E. & B. 723. That case did not decide anything at all with reference to the declaration, nor indeed as to the delivery of fresh particulars, though it may be inferred that the court would have held that where the writ had been specially endorsed the plaintiff could not, without leave of a Judge, have delivered fresh particulars.

But the present application appears to go the length of asserting that if an action is brought and the writ of summons is specially endorsed, the plaintiff cannot declare for any other cause of action than that refered to in such endorsement.

I do not find any case so determining; *Fromant* v. *Ashley* certainly does not go that length, nor indeed relate to the declaration at all.

No doubt if the defendant had not appeared to this writ the plaintiff need not have declared, but might have signed judgment, at once, for any sum *not exceeding the sum* endorsed on the writ, and at the expiration of eight days from the last day for appearance might issue execution. Then the special endorsement would have bound him.

But the 15th section of the Act contemplates that, notwithstanding the special endorsement, no further particulars need be delivered unless ordered by a court or a judge.

The plaintiff need not, under the 2nd and 4th counts, have delivered particulars, nor do I think further particulars would have been ordered on the application of the defendant, simply because those counts state all that particulars need to state.

There appears to me to be neither reason nor justice in giving such an effect to the statute. I cannot think the Legislature meant to say to a plaintiff, if you endorse your writ specially, and, by the defendant appearing to contest your claim you are compelled to declare, you must declare only for what is stated in your special endorsement, and if you have any other demand which was due to you from the defendant when you began your action, you must begin another action to recover it, or lose it altogether.

I refuse the summons.

Summons refused.

Hood v. Cronkrite.

"Change of venue—Application for, before appearance on affidavit of a person describing himself as "attorney for defendant in this cause."

An application for a change of venue before appearance entered is irregular.

Before appearance entered, a defendant has no attorney *in the cause*, and an affidavit made by a person calling himself such was therefore *held* insufficient to support an application for a change of venue.

Semble, that the statement of addition as to the name of a deponent is only descriptive, and is not an allegation of a fact.

[Chambers, October 2, 1868.]

This was a summons to change the venue from the County of York to the County of Halton, on an affidavit made by R. S. A., "attorney for the above named defendant," who stated:—

That the declaration was filed on the 23rd September, 1868, laying the venue in the County of York:

That defendant had a good defence on the merits:

That the cause of action arose in the County of Halton and not in the County of York, or elsewhere, &c.

That it will be necessary to subpœna at least ten witnesses who are material and necessary, and that nearly all of them reside (nine out of ten) in the County of Halton.

The estimated difference of expense was $40.

In reply to this the plaintiff swore that no appearance was entered, and that declaration had to be served personally, and had been filed and served:

That he means to subpœna eleven witnesses, whose names he gives, and states they are material; almost all residing in the City of Toronto, and none in the County of Halton, and it was objected to the affidavit filed on the part of the defendant to support the application that the deponent described himself as defendant's attorney when no appearance had been entered.

Draper, C. J.—The C. L. P. Act provides for plaintiff proceeding and declaring, though no appearance be entered. See sec. 55 of Con. Stat. U. C. cap. 22, sec. 61 of original act.

Under the old practice it would seem that the affidavit to change might be made either by the defendant or his attorney. The case of *Biddell* v. *Smith*, 2 Dowl. 219, rather leads to the conclusion that if the defendant be in the Province he should make the affidavit. The affidavit of a defendant's wife was held sufficient, provided he was too unwell to make an affidavit, and she understood the nature and particulars of the action, but Parke B said "the defendant or his attorney" is the proper person: *Williams* v. *Higges*, 8 Dowl., 165. In the report in 6 M. & W. 133, Parke B. says: the proper person to make the affidavit, under the circumstances, (*i. e.*, defendant being unable from illness to make it) is the *plaintiff's* attorney. The application was to bring back—not to change the venue as stated in 8 Dowl.

In the present case no appearance whatever has been entered. By what right does defendant make this affidavit? There are things he may apply for before appearance, though, as a general rule, he must appear before he can take a step in the cause. *Ex. gr.* he may get an order for particulars of demand, or an order to stay proceedings on payment of debt and costs, or to compel plaintiff's attorney to disclose plaintiff's residence. But I find no case in which an application to change the venue has been entertained before appearance. It does not appear to me that he has a right to treat the plaintiff's declaration as an equivalent for his (defendant's) appearing because the plaintiff is authorized by a special provision in the act to take this course. Before the C. L. P. Act he might have entered common bail, or an appearance for defendant, if the latter made default. That, he cannot now do.

But, though an application to change the venue may be made on the common affidavit *before* issue joined, it cannot be made after plea, while on special grounds it should not, as a rule, be made until after issue joined. There is nothing shown to justify the special application before issue in this case.

There being no appearance, the defendant has no attorney *in this cause*, no one on whom service could be made to bind him, nor do I think that he has an attorney who can swear for him, especially when he has actual knowledge of the facts, or most of them, sworn to, while the affidavit produced is on instruction, information and belief. The statement of addition as to the name of the deponent is merely descriptive, it is not an allegation of a fact.

I discharge this summons with costs, on the ground that no sufficient affidavit is filed to sustain it, and I am inclined to think the application irregular because made before appearance entered.

Summons discharged with costs.

Corrigan v. Doyle.

Time to declare where long vacation intervenes—Time for taking next step after plaintiff's summons with stay of proceedings discharged.

Where the plaintiff obtains a summons with stay of proceedings, which is afterwards discharged, he has not the same time for taking the next step in the cause as he had when the stay arose, but must take it on the same day the summons is discharged, or obtain further time, and the practice in this respect is the same both as regards plaintiffs and defendants.

Where the defendant has given the plaintiff notice to declare, the latter has no further time to do so in consequence of some of the eight days falling in vacation, the rule of Court No. 9 and sec. 83 of C. L. P. Act, applying only to pleadings after declaration.

[Chambers, October 13, 1868.]

The facts of this case were as follows:—On the 13th June, 1868, the defendant served the plaintiff with notice to declare in eight days pursuant to C. L. P. Act sec. 82.

On the 18th June the plaintiff obtained a summons to extend the time for declaring until the 22nd August, which was enlarged from time to time, with stay of proceedings, until the 28th July, when it was discharged with costs. On the 29th July the defendant signed judgment of *non pros.*

W. Sidney Smith obtained a summons calling on the defendant to shew cause why the judgment and all proceedings should not be set aside for irregularity, with costs, on the grounds, that it was signed too soon, and before the plaintiff's time for declaring had expired: that the plaintiff had the same time to declare after his summons for further time was discharged, as he had when it was returnable, and as he could

not declare in vacation, that he had until the end of vacation in which to do so.

Osler shewed cause. The stay of proceedings applies only to the adverse proceedings of the other side, and the summons having been discharged the plaintiff was compelled to take the next step in the cause on the same day, or obtain further time to do so: *Mengens* v. *Perry*, 15 M. & W., 537; *Vernon* v. *Hodgins*, 1 M. & W., 152; *St. Hanlaire* v. *Byam*, 4 B. & C., 970; *Hughes* v. *Walden*, 5 B. & C., 770; Ch. Prac., 12 Edn., 224, 1591.

The plaintiff had no further time to declare, in consequence of the last day falling in vacation. The statute and rule of court apply only to pleadings after declaration: *Reg. Gen.* No. 9; C. L. P. Act, sec. 83.

Smith, contra. The plaintiff had the same time to declare after the summons was discharged as he had when it was returnable; the rule as to taking the next step on the day it was discharged applied only to the case of a defendant; at all events, as the last day for declaring, according to the defendant's own admission fell in vacation when it was impossible for the plaintiff to declare regularly, he necessarily had until the end of vacation in which to do so: *Crooks* v. *Dickson*, 10 U. C. L. J. 158; *Ryley* v. *Parmenter*, 2 U. C. L. J. N. S., 268; Arch. Prac. 12 Ed. 1591, 1602; *Mengens* v. *Perry*, 15 M. & W. 537; *Wood* v. *Nichols et al.*, 3 U. C. L. J., N. S., 205; *Abbott* v. *Hopper*, 8 Dowl. 19; *Trego* v. *Tatham*, 9 Dowl. 379.

Morrison J.—I am of opinion that this application must be discharged. It appears that on the 13th June last the defendant gave the plaintiff the usual notice requiring the plaintiff to declare within eight days, otherwise judgment of *non pros.* On the 18th June the plaintiff obtained a summons for further time to declare until the 22nd August. On the return of the summons on the 19th it was enlarged, and was subsequently enlarged by both parties until the 28th July, when it was discharged with costs, proceedings during the enlargements being stayed. At the time the application was made the time for declaring would expire on the 21st of June. On the 29th July, the day after the summons was discharged, the defendant signed judgment. The plaintiff contends that this judgment is irregular, upon the ground that, in effect, when it was signed the time to declare had not expired; that as the plaintiff had two days' time when his summons was granted, he had at least such two days after it was disposed of, and as it was disposed of in vacation, he had until the second day after the 21st August to declare; in other words, he contends that whether his application was granted or dismissed, as it was, with costs, he obtained the time, or rather one day more than the time he asked for. With respect to the stay of proceedings during the pendency of the application, and upon which Mr. Smith, for the plaintiff, rested a good deal of his argument, cases may arise in which a stay may apply to the proceedings of both plaintiff and defendant, but I take it as a general rule that it only applies to the adverse proceedings of the plaintiff or defendant, as the case may be, and whose proceedings it is the object of the applicant to stay or prevent. Here the plaintiff obtained the summons, and the proceeding to be stayed was the entering a judgment of *non pros.* by the defendant so soon as the eight days expired, and the stay could only be applicable to that proceeding. The summons was discharged with costs after the time for declaring had elapsed, and if the plaintiff was entitled to any time to declare, it would be only the whole of the day on which the summons was discharged: *Mengens* v. *Perry*, 15 M. & W. 538. The defendant entered his judgment of *non pros.* the day after the application was dismissed, and it was not contended that the defendant could not sign the judgment in vacation. Under these circumstances, as the plaintiff had disenabled himself, through his own application to file a declaration on the day the summons was discharged, it being in vacation, he ought to have applied to the learned Judge for relief, but I may assume, as the Judge dismissed with costs his application, asking for time until the day after vacation, that he would not have relieved the plaintiff, for, in that case, he would only, in another way, be granting to the plaintiff his original application. I do not think that the plaintiff should be permitted to profit by his own improper application for time, and through it obtain all that he asked, although it was discharged, as already stated. He was not entitled to be, with respect to time, as said by Bayley, J., in *St. Hanlaire* v. *Byam*, 4 B. & C. 970, in a better condition by reason of his own rule improperly obtained.

Summons discharged with costs.

INSOLVENCY.

IN THE COUNTY COURT OF THE COUNTY OF NORFOLK.

In the matter of Lyman F. Langs, an Insolvent.

Insolvency—Composition and discharge—Unnecessary for creditors to prove debts to enable them to execute deed of—Schedules conclusive—Confirmation refused.

[Simcoe, October 28th, 1868.]

This was an application to confirm the discharge of the insolvent under a deed of composition and discharge.

Tisdale for the insolvent.

Ansley for the non-releasing creditors.

The facts of the case fully appear in the judgment of

Wilson, Co. J.—By a deed of assignment bearing date the 22nd day of August, 1867, made under the Insolvent Act of 1864, the insolvent voluntarily assigned his estate to A. J. Donly, the official assignee for the County of Norfolk. Annexed to the deed of assignment is a schedule of creditors of the insolvent, and the amount of his indebtedness to them individually, duly sworn to by him. Amongst other scheduled creditors appeared the names of Leonard Sovereign, John and Eliabim Langs, and Charles Lyons, to whom, as appeared by the schedule, the insolvent was indebted as follows:—

To Leonard Sovereign, for	Rent	$445 00
" " "	Note	250 00
" " "	Do.....	75 00
		$770 00

To John and Eliakim Langs, on judgment assigned 200 00
To Charles Lyons, loan 15 00

The total amount of the indebtedness shown by the schedule is $3,328 98.

At the foot of the schedule was a list of the insolvent's assets, comprising 150 bushels of barley (unthreshed), 80 bushels of wheat (unthreshed), 100 bushels of oats, three quarters of an acre of potatoes (in the ground), 6 acres of growing corn, 4 acres of buckwheat, half an acre of turnips, and 5 tons of hay. From an examination of the insolvent on the 31st August last, it appeared that the barley yielded 227 bushels, worth 80 cents per bushel; that the three quarters of an acre of potatoes yielded from 80 to 100 bushels, worth 40 cents per bushel; that the half acre of turnips yielded 80 bushels; that the hay was worth $10 per ton, but that the buckwheat was a failure; that he also had at the time of the assignment a span of horses worth $120, which were not mentioned in the schedule; and that he had since raised and acquired the following property, viz.: 200 bushels wheat, worth $1.37 per bushel, 6 acres of corn, 5 tons of hay, 6 acres of oats (unthreshed, probable yield 120 bushels,) 125 bushels of barley, sold at 93 cents per bushel, 2 acres of beans, 1 cow worth $20, 3 spring calves worth $6, 6 hogs worth $10, and half an acre of potatoes; and that no part of this property has been handed over to the assignee, although demanded.

At the time of the assignment, John and Eliakim Langs appeared to have had an execution in the hands of the sheriff against the goods of the insolvent, upon which the sheriff, on the 5th of October, 1867, made the sum of $176.90. At the same time the sheriff appears to have paid Leonard Sovereign the sum of $328, on account of a claim made by him for rent. These two payments appeared to have exhausted the greater portion, if not the whole of the assets mentioned in the schedule. The goods comprising these assets appeared to have been divided between the execution creditors and the landlord, who are near relatives of the insolvent, and were left in his possession.

From the evidence of the insolvent it is questionable whether Sovereign was entitled to any sum at the time for rent. The insolvent states that he took a written lease from Sovereign last April. That there was a verbal lease made between them about April, 1867, the terms of which were that he should occupy Sovereign's farm and give him a fair equivalent for it, which he considers would be $100 for last year. At that examination the insolvent stated that he had sold a portion of the produce raised this year, for which he received $237.53, $50 of which he had then in hand, and the balance he had paid out in expenses and necessaries for his family. He appears to have paid Charles Lyons, one of his creditors, (willingly or unwillingly,) the amount of his claim in full.

By a deed of composition and discharge made under the act, bearing equal date with the assignment, but executed subsequently, a majority of the creditors of the insolvent, and representing scheduled debts to the amount of $2,572, in consideration of the nominal sum of 5*s*, released and discharged the insolvent from all liability. It is expressed in the deed that the several creditors executing it release the insolvent from all debts, claims and demands due to them from him, "and set opposite to their respective names" at the foot of the said deed. The amounts set opposite to their respective names correspond exactly with the amounts mentioned in the schedule as being due to them. Assuming the liabilities of the insolvent to be correctly stated in the schedule and release, the former at $3,328.98, and the latter at $2,572, the creditors joining in the discharge represent a sufficient amount and are sufficient in number to bind the remainder of the creditors.

It is objected by Mr. *Ansley*, on behalf of the non-releasing creditors, that until creditors have proved their claims before the assignee, as directed by sub-sec. 4 of sec. 11 of the act, they cannot rank upon the estate or bind other creditors by their acts.

Mr. *Ansley* also contends that the claims of certain creditors who have been paid either in part or in full, (viz., Sovereign, John and E. Langs, and C. Lyons,) who discharge, and whose claims are estimated at the full schedule amounts, should be reduced by the amount paid them, which would reduce the total amount of the debts of the discharging creditors to $2,063, which is less than three-fourths of the whole amount of the insolvent's indebtedness.

Mr. *Tisdale*, on the other hand, contends that it is not necessary for creditors to prove their debts in order to execute a discharge. And further, with regard to the payments made to the creditors above mentioned, that the evidence only shows that certain payments were made, but not that they reduced the indebtedness mentioned in the schedule, and he puts in affidavits of John and E. Langs to show that the actual indebtedness of the insolvent to them was $699.93, $499.93 more than the amount mentioned in the schedule.

Neither of these learned gentlemen produce authorities bearing upon the points raised, but appear to rely upon their interpretation of the statute. It appears that neither L. Sovereign, John and E. Langs, or Charles Lyons, proved their claims before the assignee. It has been stated that some of the creditors have proved their claims, but there is no evidence of this fact before me, and I do not think the omission of any consequence, as I am of the opinion that it is not necessary for creditors to prove their debts to enable them legally to execute the deed of composition and discharge.

In the absence of proof to the contrary, the amounts mentioned in the schedule and sworn to by the insolvent must, I think, be taken to be correct, and I feel that I have no discretion in this case, but must be governed by the schedules in computing the numbers and amounts of the debts of creditors necessary to execute the discharge. Sub-sec. 13 of sec. 5 directs how debts shall be proved under the act. No other method is given. I am clearly of the opinion that I have no power to adjudicate upon the claims of John and E. Langs, and that the amount of their claim cannot be increased by affidavit filed upon the application to me for a confirmation of the discharge. My jurisdiction

in such cases seems to be simply appellate. See *In re Cleghorn*, 2 U. C. L. J., N. S., 133; *Re Stevenson*, 1 U. C. L. J., N. S., 52.

The payments to Sovereign, Langs and Lyons are admitted. These payments must, in my opinion, be applied in reduction of the schedule debts, and being applied in that way will reduce the amount of the debts of the discharging credi. tors to a sum less than the amount required to effect the insolvent's discharge.

Taking this view of the case, it is unnecessary for me to enter into the question of the insolvent's conduct in retaining and dealing with the estate as disclosed in his examination, nor how far the same may have tended to bring him within the provisions of sub-sec. 6 of sec. 9.

Confirmation refused.

UNITED STATES REPORTS.

SUPREME COURT OF VERMONT.

McDaniels, Executor, &c. v. McDaniels.

Conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party, and listened to by the jurors without understanding that they were guilty of misconduct in so doing.

A motion for a new trial, upon the ground of misconduct by jurors during the trial, need not contain an averment that the misconduct was unknown to the moving party before the jury retired, It would seem to be otherwise when the objection to the juror is some matter which existed before the trial commenced, and which might have been a cause for challenge.

The fact that the moving party neglected to inform the court, before the jury retired, of misconduct on the part of jurors during the trial which came to his knowledge, would not, if proved, necessarily, as a matter of law, defeat the motion for a new trial, but would be one circumstance to be considered with others by the court in determining whether, in their discretion, to set aside the verdict.

Appeal from the probate of an instrument purporting to be the last will and testament of James McDaniels, deceased. The case was tried by jury, at the September Term of the Rutland County Court, A. D. 1866, upon the issue joined upon the plea, that the instrument is not the last will and testament of the decease i, and a verdict was rendered for the proponent. After verdict, and before judgment, a motion was filed by the defendant to set aside the verdict for several causes, among which was the following: "For that some of the panel of jurors, after they were impannelled, and during the progress of the trial, and out of court, were talked to and with, upon the subject of said cause, and favorably to the proponent, by the agents, emissaries, and friends of Isaac McDaniels, and by them were urged and solicited, and influenced by improper conversations with said jurors, or in their presence, to render a verdict in favor of the proponent." This motion was supported by accompanying affidavits. Further testimony was taken and filed by both parties, and at an adjourned session of the County Court, Peck, J., presiding, the verdict was set aside for the cause above assigned,—to which decision the proponent excepted. The exceptions were allowed, subject to the opinion of the Supreme Court whether exceptions will lie in such a case. The exceptions set forth that the court found that the conversations detailed in the affidavits were had with, and in the presence of the jurors who tried the cause, during the trial, and that several of the persons holding such conversations, were the friends of the proponent, and that they held such conversations for the purpose of influencing the verdict of the jury in his favor; that this was dode without the procurement of either the proponent or the defendant, and without the knowledge of the proponent. And the court did not find that it was done with the knowledge of the defendant. It was also found that the conversations were of a character directly calculated to influence the verdict in favor of the proponent.

The court did not find any corruption, or intentional misconduct in any of the jurors, but did find that some of the jurors were guilty of impropriety in suffering conversations to be held with them, and in their presence and hearing.

The counsel for the proponent contended that the court could net legally set aside the verdict; and particularly because it was not set forth in the motion, nor in the affidavits sustaining the same, that the defendant had no knowledge of the conversations when they occurred, and before the jury retired to consider the verdict. But the court held this not to be in law essential.

E. Edgerton and *Daniel Roberts*, for the plaintiff.—1. As a general proposition, it may be said, that the setting aside of a verdict, and the granting of a new trial, rests in the discretion of the County Court, to which no exception lies. But this discretion is not unrestrained license. It is limited by legal principles and legal rules. It depends, both as to its exercise at all, and, in a degree, as to the mode of its exercise, upon the facts found. So far as the decision below can be resolved into a legal conclusion from the facts found and stated upon the record, it is subject to revision: *Joyal* v. *Barney*, 20 Vt. 159-160; *Briggs* v. *Georgia*, 15 Id. 61; *French* v. *Smith et al*, 4 Id. 363.

2. The court reports, that the conversations referred to "were of a character directly calculated to influence the verdict in favor of the plaintiff," but does not find that the verdict was thus influenced; that there was no "corruption nor intentional misconduct in any of the jurors;" and that those conversations were had "without the procurement of the plaintiff, and without his knowledge." Courts will not visit the consequences of an irregularity upon an unoffending party, unless it appear that it has wrought some injury to the other party: *Dennison* v. *Powers*, 35 Vt. 39; *Downer* v. *Baxter*, 30 Id. 467; *Blaine* v. *Chambers*, 1 S. & R. 169; 2 Grah. & Wat. N. T. 309, 310, 312, 317; *Shea* v. *Lawrence*, 1 Allen 167.

3. This was not a proper case for the exercise of any discretionary action of the court, inasmuch as it must be assumed that the defendant knew of the matters complained of, at the time of their occurrence, and did not bring them to the knowledge of the court before the verdict, but lay quiet, speculating upon the chance of a verdict in his favor.

On this point the case states the non-finding of the court. "The court did not find that it

was done with the knowledge of the defendant" —thus distinguishing between this and the positive finding in respect to the plaintiff's knowledge.

Clearly the tendency of the testimony was to prove this knowledge on the part of the defendant.

But to warrant setting aside the verdict, it should be both stated in the motion and be proved affirmatively, that the defendant did not know of the matter complained of before the rendition of the verdict: *Brunshill* v. *Giles*, 9 Bing. 13; *Herbert* v. *Shaw*, 11 Mod. 118; *State* v. *Camp*, 23 Vt. 551; *Jameson* v. *Androscoggin Railroad*, 52 Me. 412; *Pettibone* v. *Phelps, et al.*, 13 Conn. 445; *Selleck* v. *Sugar Hollow T. Co.*, Id. 452; *Woodruff* v. *Richardson*, 20 Id. 237; 2 Grah. & Wat. N. Trials 303, 575.

Charles C. Dewey and *A. Potter*, for the defendant.—I. Exceptions will not lie, and the case should be remanded.

a. The court found the fact that the persons guilty of tampering were the friends of the proponent.

b. That the conversations were of a character directly calculated to influence the verdict of the jury in favor of the proponent.

c. That they were held for the purpose of influencing the verdict of the jury in his favor.

d. That the jurors were guilty of impropriety in suffering such conversations with them, and in their presence and hearing.

e. And that the conversations were in violation of law.

II. As a motion for a new trial, for causes *dehors* the record, is and must be addressed to the discretion of the court, the decision cannot be revised on exceptions, unless, indeed, it be for the improper admission or rejection of evidence, or when it is apparent the decision is based upon a false legal assumption: *Sheldon* v. *Perkins*, 37 Vt. 557; *Shea* v. *Lawrence*, 1 Allen 169; *White* v. *Wood*, 8 Cush. 415; 2 Grah. & Wat. 47, n. 4.

It has never been held, or even claimed, that jurors' depositions may not be received to prove the misconduct of the parties or of persons acting in their behalf: *Ritchie* v. *Halbrooke*, 7 S & R. 458

III. 1. It is not essential that the tampering be done by the party himself, nor by his procurement. It is sufficient if it be done by his friends and in his behalf: *Deacon* v. *Shreve*, 2 Zab. 176; *Coster* v. *Merest*, 3 Brod. & Bing. 272; *Knight* v. *Freeport*, 13 Mass. 218; *Shea* v. *Lawrence*, 1 Allen 169; *Brunson* v. *Graham*, 2 Yeates 166; Pleas of the Crown, vol. 2, p. 308; Grah. & Wat. vol. 2, p. 298, *et seq.*

2. And even if the attempt to bias the jury be made by strangers, the verdict will be set aside if there is fair ground for belief that it has been influenced thereby: Grah. & Wat. vol. 2, p. 309.

3. So, in the class of very numerous cases, where papers have been delivered to the jury by mere mistake, the verdicts have been set aside, whenever the papers had any tendency to bias them: *Whitney* v. *Whitman*, 5 Mass. 405; Vin. Abr., *Trial*, pl. 18; *Hix* v. *Drury*, 5 Pick. 296; *Sargent* v. *Roberts*, 1 Id. 337.

4. The same rule obtains, and verdicts will be set aside: 1. Where jurors are allowed to separate before a verdict is agreed upon, if the separation is attended with the slightest suspicion of abuse: *Oliver* v. *Trustees of Pres. Church*, 5 Cow. 283; *Horton* v. *Horton*, 2 Id. 589. 2. Where a juror gives private information to his fellows, material to the issue, which may have influenced them: *Sam* v. *The State*, 1 Tenn. 61. 3. Where jurors re-examine witnesses who have already testified: *Metcalf* v. *Dean*, 2 Bay 94; *Perine* v. *Van Note*, 1 South. 146; *Bedington* v. *Southall*, 4 Price 232.

It thus appears from the authorities above cited, and many others to be found in the books, that the ground upon which courts set aside verdicts for improper attempts to influence the jury, is not merely and only the misconduct of the party, but the possibility that the unlawful attempt, by whomsoever made, or with whatever motive, may have inoculated the verdict with vice or error.

IV. 1. It is a corollary of the preceding proposition, already incidentally discussed, that it need not affirmatively appear that the verdict was injuriously affected by the tampering. If the purity of the verdict might have been affected, it will be set aside. And this rule has been adhered to with great rigor and tenacity: *Whitney* v. *Whitman*, 5 Mass. 405; *Cohen v. Robert*, 1 Strab. 410; *Perkins* v. *Knight*, 4 N. H. 474; *Hare* v. *The State*, s How. (Miss.) 187; *Com.* v: *Roby*, 12 Pick. 496; *Com.* v. *Wormley*, 8 Grat. 712; *Custer* v. *Merest*, 3 Brod. & Bing. 272; *Knight* v. *Freeport*, 13 Mass. 218; Gra. & Wat. vol. 2, p. 300; *Hix* v. *Drury*, 5 Pick. 286.

The opinion of the court was delivered by

Steele, J.—The motion for a new trial was properly granted. It was not incumbent upon the moving party to show that the verdict was, in point of fact, influenced by the unlawful conversations. It is quite enough that, in a doubtful case, conversations with the jurors have been had during the progress of the trial for the purpose of influencing and directly calculated to influence them to render just the verdict they did. There is no practicable method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had a right to expect, according to law and upon the evidence in court. If the court, in their instructions to the jury, err, with respect to some proposition of law, it is well understood that the right of the defeated party, on exceptions to a new trial, does not depend on his showing that the error actually influenced the verdict. It is enough, if its natural tendency is to influence the jury to render their verdict against him, and such may reasonably have been its result. The right to a correct charge from the court is no more sacred or important than the right which, in this case, was violated. The analogy might be carried farther. It is not essential to the right to a new trial, on exceptions, that the error of the court should have been intentional, or by the fault of the prevailing party. So, in this case, the defendant was not any the less likely to be injured because the jurors did not appreciate the impropriety of tamely listening to conversations intended to influence them, or because the plaintiff was unaware of the officious efforts of his friends on his behalf. The friends of the plain-

tiff who thus approached the jury were guilty of a flagrant violation of the law, and the jurors who suffered themselves to be so approached, though they may have meant no wrong, were guilty, not only of a violation of the law, but also of the oath which they had taken to say nothing to any person about the business and matters in their charge but to their fellow jurors, and to suffer no one to speak to them about the same but in court. Both were liable to severe and summary punishment. The plaintiff, as he was unaware of these transactions, is not liable to punishment, but it does not follow from this that he can hold a verdict which is the result of a trial corrupted, though without his fault, by a shameful disregard of the familiar rules which are necessary to a decent administration of the law. The court set the verdict aside, not as a punishment to any one, but in justice to themselves, as well as to the defendant, that the trial may be conducted fairly, so that the verdict, when finally rendered, may be entitled to the respect of both parties and the confidence of the court as the result of a trial substantially according to law, and upon the evidence in court. It is true that a verdict should not be set aside for every trifling error of law by the court, or for every trifling misconduct of a juror which occurs without the fault of the prevailing party, but it should be whenever the error or misconduct renders it reasonably doubtful whether the verdict has been legitimately procured.

The plaintiff insists that the motion is fatally defective because it contains no allegation that the defendant had not full knowledge of the matters complained of before the jury retired to consider their verdict, and that this is a defect which cannot be cured by proof, and that, even if it could, it has not been in this case, the court merely stating in the exceptions that they did not find that the misconduct occurred *with* the knowledge of the defendant, and not stating that they did find that it occurred *without* his knowledge. We do not think these objections are well taken. It was not incumbent upon the moving party to either allege or prove that he had not such knowledge. If the other party could prove that he had, or if he could prove that he had not, it would be one fact to be considered, with others, by the court in determining whether, in their discretion, to grant the motion, but the circumstance that the moving party had such knowledge would not, as a matter of law, defeat the motion. The case is clearly and broadly distinguishable, both in reason and authority, from those in which the objection to the juror is some matter that existed before the trial. If an objection to a juror exists when the jury are impannelled, the juror may be challenged and another substituted, and if a party knowing the objection neglects to challenge, he thereby expresses his satisfaction with the juror. But where the objection arises from misconduct of the juror during the trial, the opportunity for challenge has passed. Another juror cannot then be substituted and a fair trial thereby secured. If the juror is dismissed it but results in what is asked for here—a new trial. A party ought usually to suggest to the court any serious misconduct of the jurors of which he has positive knowledge, or entirely reliable information, particularly if learned early in the trial, as it *may* result in an immediate discharge of the jury, and a saving of much time and expense. But the fact of the misconduct may be denied, and a court cannot always interrupt a trial to investigate charges against a juror, and must exercise very great caution and discretion to be able to even make inquiries of the jurors with relation to their conduct in such a manner as to create in their minds no feeling of resentment toward either party. We cannot hold that the failure of the party, if proved, to make the suggestion to the court, would be more than a circumstance to be considered and weighed, with others, by the court in determining whether, in their discretion, to grant a new trial.

It is very true that in two Connecticut cases it has been held that it is necessary for the party to aver in his motion his ignorance, until after the jury retired, of the misconduct which occurred during the trial. But the latter of these two cases, *Woodruff* v. *Richardson*, 20 Conn. 241, professes to be governed by the earlier, *Pettibone* v. *Phelps*, 13 Conn. 452; and in *Pettibone* v. *Phelps*, the court, after stating several very good reasons why the motion should be denied, merely add, a point not made by counsel, that the motion is also insufficient for the reason that it contains no allegation that the misconduct of the juror was unknown to the plaintiffs before the trial closed, and that it was settled in *Selleck* v. *The Sugar Hollow Turnpike Co.*, 13 Com. 453, that such an allegation was essential. It thus seems that this doctrine, in Connecticut, originally rests solely upon the authority of *Selleck* v. *The Sugar Hollow Tnrnpike Co.* Upon examination of that case, it turns out that the objection there taken was not at all misconduct by a juror during the trial, but was a disqualification which existed before the trial, in that the talesman was not an elector in Connecticut, but a citizen of New York; and the court hold that if the party knew the fact at the trial he might have challenged the juror provided he did not choose to waive the disqualification, and that he should have alleged that he did not know it in order to excuse his not making the objection seasonably and regularly. It is clear, therefore, that this case is no authority to warrant the decisions which professedly rest upon it.

The views which we have expressed are decisive of the matter before us, and it becomes unimportant to discuss the other questions presented. In the opinion of the court, this case presents a state of facts in which the court below, in the exercise of their discretion, not only might, without error, but ought to have granted a new trial, and the exceptions to the action of the court in so doing are overruled and the cause is remanded.—*Am. Law. Reg.* 729.

To constitute the crime of bigamy, there must be a valid marriage subsisting at the time of the second marriage. A marriage between slaves was, in legal contemplation, absolutely void; but if the parties, after their manumission, continued to cohabit together as husband and wife, it was a legal assent and ratification of the marriage; and if, while such marriage exists, one of the parties marries another, it is bigamy.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR MAY, JUNE AND JULY, 1868.

(Continued from page 267.)

Garnishee.—*See* Attachment.

Gaming.

Surrounding the inclosure of the grand stand for the Doncaster races was a strip of land, itself inclosed by a paling. Within this strip were placed temporary wooden structures with desks, at which were clerks. A man outside conducted the business of betting, and the clerks recorded the bets. *Held*, that such a structure was an "office" and a "place," within 16 & 17 Vic. cap. 119, sec. 3, making penal the keeping of such.—*Shaw* v. *Morley*, Law Rep. 3 Exch. 137.

Highway.—*See* Way.

Illigitimate Children.

A testator, who had none but illegitimate children, left his property in trust, to divide the residue into four parts, and to hold one share each, on certain trusts, for each of his four children; and if the trusts should fail as to the share of either child, then the same was to be held for such persons as would be the next of kin of said child at his decease, under the Statute of Distributions. There were further trusts as to moneys to which a child should become entitled, "by virtue of the provisions hereinbefore contained, as next of kin of the others, or other, of them." The trusts failed as to one child. *Held*, that there was an intestacy as to that share. The words "next of kin" could not be read as designating the surviving illigitimate children of the testator.—*In re Standley's Estate*, Law Rep. 5 Eq. 303.

Income.—*See* Vested Interest.

Indemnity.—*See* Specific Performance, 1.

Indorsement.—*See* Bills and Notes.

Infant.—*See* Contributory, 2.

Injunction.—*See* Company, 2, 3; Patent, 1; Trial by Jury; Vendor and Purchaser of Real Estate.

Insanity.—*See* Lunatic.

Insurance.

A ship then at Calcutta was insured for three months from and after thirty days after her arrival there, and valued at £8,000. At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the repairs would have exceeded its value when repaired. During the continuance of the risk, the ship was totally lost. *Held*, that the policy attached, notwithstanding the previous injury to the ship, and that, there being no fraud, the valuation of the ship in the policy was conclusive between the parties.—*Barker* v. *Janson*, Law Rep. 3 C.P. 303.

Interest.—*See* Account; Vested Interest.

Judge.

Plea to a declaration for slander, that the defendant was a county court judge, and the words complained of were spoken by him in his capacity as such judge, while sitting in his court, and trying a cause in which the present plaintiff was defendant. Replication, that the said words were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not *bona fide* in the discharge of the defendant's duty as judge, and were wholly irrelevant in reference to the matter before him. *Held*, that the action could not be maintained.—*Scott* v. *Stansfield*, Law Rep. 3 Exch. 220.

Jurisdiction.—*See* Admiralty; Vendor and Purchaser of Real Estate.

Laches.—*See* Specific Performance, 4.

Larceny.

1. The prisoner, having paid a florin to the prosecutrix for purchases, asked her afterwards to give him a shilling for change, which he put upon the counter. She put a shilling down, when the prisoner said to her, "You may as well give me the two-shilling piece and take it all." She then put down the florin, and the prisoner took it up. She took up her shilling, and the change for it put down by the prisoner, and was putting them into the drawer, when she saw she had but one shilling of the prisoner's money. But as she was about to speak, the prisoner's confederate drew her attention, and both left the shop. *Held*, that the prisoner was guilty of larceny.—*The Queen* v. *McKale*, Law Rep. 1 C. C. 125.

2. The prisoner found a sovereign on a highway; believing it to have been accidentally lost, and with a knowledge that he was doing wrong, he at once determined to keep it, notwithstanding the owner should afterwards become known to him, but not expecting that the owner would. *Held*, on the authority of *Reg.* v. *Thurborn* (1 Den. C. C. 387; 18 L. J. M.C. 140), that the prisoner was not guilty of larceny.—*The Queen* v. *Glyde*, Law Rep. 1 C. C. 739.

Lease.—*See* Winding up, 1.

Legacy.

Bequest of personal estate to unborn issue for life, with an ultimate limitation to the exe-

cutors, administrators and assigns of the survivor of the said unborn issue, gives an absolute interest to the survivor, and is not too remote. *Avern* v. *Lloyd*, Law Rep. 5 Ch. 383.

See Ademption; Illegitimate Children; Marshalling of Assets; Satisfaction; Vested Interest; Will.

License.

"We do grant to W. liberty and license to fasten" a coal hulk to certain moorings, until one month's notice be given. W. "to pay towards the expenses of placing and maintaining and repairing the moorings," £30 per ann. *Held*, to be a license, not a demise, and hence that W. was not liable to be rated as occupier. *Watkins* v. *Overseers of Milton-next-Gravesend*, Law Rep. 3 Q. B. 350.

Lien.—*See* Vendor and Purchaser of Real Estate.

Limitations, Statute of.

1. Trustees, under an act of Parliament, made a road, fifty years before this suit, separated from a field by a hedge, a bank, and a ditch three feet wide, adjoining the field. This ditch became filled up, and was never re-opened; but a ditch a foot wide had been made since by the tenant of the field, and it had also become obliterated. The hedge had always been included in the lease of the field, and the tenants had always trimmed the same at their own expense, testified that they had "held and used" the land within the same for more than twenty years (though apparently only by allowing their cattle to drink out of the ditch when open, and graze over its site when filled up), without the interference of the trustees. *Held*, there was no such adverse user as to give the owners of the land a title to the site of the ditch by the Statute of Limitations.—*Searby* v. *Tottenham Railway Co.*, Law Rep. 5 Eq. 409.

2. A cheque is not an advance until it has been paid, and the Statute of Limitations only runs from that time.—*Garden* v. *Bruce*, Law Rep. 3 C. P. 300.

3. The analogy of the Statute of Limitations cannot be set up by an executor, in answer to a claim founded on a breach of trust by his testator.—*Brittlebank* v. *Goodwin*, Law Rep. 5 Eq. 545.

See Trust, 2, 3.

Locus Pœnitentiæ.—*See* Company, 1.

Lunatic.

A committee of the person of a lunatic had received an allowance of a certain sum a year for the maintenance of the lunatic, and another sum for the maintenance of her children, and swore that, after properly maintaining the lunatic, he had spent the remainder of her allowance on the maintenance of her children. *Held*, that he would not be ordered to account on the petition of the children.—*In re French*, Law Rep. 3 Ch. 317.

See Ademption.

Marriage.—*See* Conflict of Laws, 1; Nullity of Marriage.

Marshalling of Assets.

A testator left £2,000 to plaintiff, and devised the residue of his real estate to the defendant. The personal estate was insufficient to pay debts and legacies. *Held* (reversing the decision of Kindersley, V. C.), that the plaintiff had not a right of marshalling as against defendant, in consequence of the Wills Act, but that both should contribute ratably.—*Heusman* v. *Fryer*, Law Rep. 3 Ch. 420; s.c. Law Rep. 2 Eq. 627 (*ante*, 1 Am. Law Rev. 516).

See Power.

Master and Servant.

1. It is no answer to a suit against directors of a company, for infringement of a patent, that the acts were done by workmen employed by defendants, but contrary to their orders; the infringement having taken place in defendants' works, and in the course of the proper duties of the workmen.—*Betts* v. *De Vitre*, Law Rep. 3 Ch. 429, 441.

2. W., the defendants' servant, was killed in consequence of the negligent construction of a platform by N., also in their employ. N.'s fitness for his place was not denied. The jury were instructed, that, if the platform was completed before W. was engaged, and if the defendants had delegated to N. their whole power and duty, without control on their part, W. and N. were not fellow-workmen, and the defendants would not be discharged on that ground. *Held*, erroneous. N.'s duty was a continuing one. A master is not made liable to a servant for an injury caused by the negligence of a fellow-servant, by the simple fact that the latter is of a higher grade, as a superintendent.—*Wilson* v. *Merry*, Law Rep. 1 H. L. Sc. 326.

Misdemeanor.—*See* Obscene Publication.

Mistake.—*See* Estoppel.

Mortgage.

1. A mortgage was made, by one of the defendants to the plaintiffs, of a certain number of branded sheep, with their "issue, increase and produce." A second mortgage was made to the other defendants, which included other sheep. While the mortgagor was in possession, he mingled the latter sheep with the former;

but fraud was not alleged in the bill. *Held*, that the first mortgage did not cover sheep afterwards brought upon the run; and that on the pleadings the plaintiffs had no claim against such sheep outside the mortgage. Fraud must be specifically charged.—*Webster* v. *Power*, Law Rep. 2 P. C. 69.

2. A., B., C. and D. gave a mortgage to the defendant, who covenanted to reconvey, on payment of the mortgage debt, to the mortgagors, as tenants in common, their heirs and assigns, or otherwise, as they should direct. Some changes were made in the respective interests of the mortgagors. A. died, and the debt was paid. A draft of a reconveyance to C. and D. was objected to, as containing false recitals. A deed, with no recitals, executed by B. C. and D., and the heir and executor of A.. was thereupon tendered to the defendant, who refused to execute it, demanding that the agreements affecting the interests of the mortgagors should be recited. *Held*, that, although defendant was not bound to execute a deed with false recitals, he could not object to one concurred in by all parties in interest because it contained none.—*Hartley* v. *Burton*, Law Rep. 3 Ch. 365.

See Equity Pleading and Practice, 2; Exonerate.

Negligence.

1. The defendants provided gangways from the shore to ships lying in their dock, the gangways being made with materials belonging to the defendants, and managed by their servants. The plaintiff went on board a ship in said dock on business, at the invitation of one of the ship's officers; and, while he was there, defendants' servants moved the gangway, and negligently left it insecure, so that it gave way, and the plaintiff was injured on his return, without negligence on his part. *Held* (by Bovill, C. J., and Byles, J.; Keating, J., *dubitante*), that there was a duty on the defendants toward the plaintiff not to let the gangway be insecure without warning him, and that he could recover damages for his injuries—*Smith* v. *London & St. Katharine Dock Co.*, Law Rep. 3 C. P. 326.

2. The plaintiff, while travelling by the defendants' railway, was injured by the fall of an iron girder, which workmen, not under the defendants' control, were employed in placing across the walls of the railway. It was proved that the work was very dangerous; that the defendants knew of the danger; that it was usual, when such work was going on, for the company to place a man to signal to the workmen the approach of a train; and that this precaution was not adopted. *Held*, sufficient evidence to warrant a jury in finding that the defendants were guilty of negligence and liable, even though the workmen were so also.—*Daniel* v. *Metropolitan Railway Co.*, Law R. 3 C.P. 216.

See Master and Servant, 2; Railway.

Negotiable Instrument.—*See* Debenture, 2.

Notice.—*See* Attachment; Banker; Company, 3.

Nullity of Marriage.

In a suit by a wife for nullity. on the ground of the husband's impotence, the only evidence of the same was that of the petitioner, which was contradicted by the respondent. The medical witnesses testified that she might have had regular intercourse with her husband consistently with the appearances, and there were circumstances discrediting the wife's testimony. A decree was refused.—*U.* v. *J.*, Law Rep. 1 P. & D. 460.

Obscene Publication.

A pamphlet, entitled "The Confessional Unmasked," besides innocent casuistical discussions, contained obscene extracts from Catholic writers, with condemnatory notes. It was published and sold at cost, solely for controversial purposes. It was ordered to be destroyed under stat. 20 & 21 Vic. cap. 83, sec. 1. (Mellor, J., *dubitante*.) It being found to be obscene, as a fact, within that statute, the intention to break the law must be inferred, and was not justified by an ulterior good object. — *The Queen* v. *Hicklin*, Law Rep. 3 Q. B. 360.

Parent and Child.—*See* Custody of Children.

Parties.—*See* Vendors and Purchasers of Real Estate.

Partnership.

The plaintiff and defendant entered into partnership as solicitors, for a term of seven years, the plaintiff paying a premium of £800. The defendant, before entering into the partnership, knew that the plaintiff was inexperienced and incompetent in his profession, and gave that as a reason for the amount of the premium asked. After two years, the defendant wrote to the plaintiff, accusing him of negligence, and saying that the partnership must be dissolved, and that he had instructed counsel to file a bill for that purpose. Plaintiff thereupon filed a bill for a dissolution, and for a return of a part of the premium, proportionate to the unexpired portion of the term. *Held* (reversing the decision of Stuart, T. C.), that the plaintiff could recover.—*Atwood* v. *Maude*, Law Rep. 3 Ch. 369.

Patent.

1. The specification of a patent may describe the process so insufficiently as to be bad, and

yet disclose enough to show that what is claimed by subsequent patent is not new. It is like a publication in a book, and it is not necessary that it should have been acted on, but only that it should be capable of being acted on, which may be tested by experiments, using any new facilities prior to the second patent. But it must furnish the knowledge necessary to carry it into practice with reasonable certainty, in order to invalidate the second patent.

The public use of an invention means a use and invention *in* public, not *by* the public.

This was a suit against brewers for infringement of a patent for capsules. Defence, that the capsules used were made in Germany, the bottles covered with them in Scotland, and sent through England for exportation only. *Held*, that the sending the bottles into England was an infringement. There is no distinction between an active and a passive use. Injunction granted. The mere use of the capsules was the very benefit intended to be derived, which continued while they remained on the bottles.

Since 21 & 22 Vic. cap. 27, the court can direct an account and award damages in the same suit.—*Betts* v. *Neilson*, Law Rep. 3 Ch. 429.

2. The plaintiff being possessed of a patent, granted to the defendants the exclusive license to work it in a certain district by an indenture, in which the latter covenanted to pay certain royalties, and to give every information, the better to enable the plaintiff to support the letters-patent; and the plaintiff covenanted for quiet enjoyment of the patent by the defendants; and that, in case any person should work the patented processes, the plaintiff would, at his own costs, commence and carry on all such actions, &c., as should be necessary to put a stop to such working of said processes; and that, in case the plaintiff should fail or neglect so to do, the defendants should not be liable "*thence forth*" to pay the said royalties, "*after the time af such person commencing to work the said processes*," until the plaintiff had, by law or otherwise, put a stop to such working. But the defendants were to keep an account of all royalties, that they might be paid to the plaintiff, on the enforcement of the patent right against the person infringing the same. *Held*, that the payment of royalties was not to be suspended, under the above condition, until the plaintiff had notice of an infringement, and until he had been allowed a reasonable time to institute proceedings to restrain the same.—*Henderson* v. *Mostyn Copper Co.*, Law Rep. 3 C. P. 202.

See Master and Servant, 1; Trial by Jury.

Pledge.—*See* Factor.

Power.

£5,000 were appointed on certain trusts subject to a power of appointment to the amount of £1,000. The fund, instead of £5,000, only amounted to £2,000. *Held*, that the appointee of the £1,000, and the persons entitled to the residue of the fund, must abate proportionately.—*Miller* v. *Huddlestone*, Law Rep. 6 Eq. 65.

Practice.—*See* Award.

Prescription.—*See* Trust, 2.

Presumption.—*See* Railway, 1; Stamp.

Principal and Agent.

Wool brokers gave a bought note for wool "bought of Messrs. R. & Co.," and a sold note for the same, "sold to *our principals*." It did not appear that the purchasers knew of this variance; but a usage in the Liverpool trade was proved, that, when a broker is employed to buy wool, he may either contract in the name of his principal, or, without informing the latter, may make himself also personally liable for the price. *Held*, that the usage was reasonable, and the brokers justified in giving the above sold note.—*Cropper* v. *Cook*, Law Rep. 3 C. P. 164.

See Factor.

Production of Document.

A plaintiff suing as transferee of a mortgage was ordered, before decree, to produce his transfer deed, for the inspection of the defendant's witnesses before they made their affidavits, upon the defendant's solicitor making affidavit that it was necessary in order to determine whether the same was forged, although the answer only denied the validity, and not the genuineness of said deed.—*Boyd* v. *Petrie*, Law Rep. 5 Eq. 290.

Profits.—*See* Account.

Promissory Note.—*See* Bills and Notes.

Proximate Cause.—*See* Railway, 3.

Railway.

1. A train of the defendants, while stationary on their railway, was run into by, and by the fault of, another train. Several companies had running powers over that part of the defendants' line, and no evidence was given whether the moving train belonged to or was under the control of the defendants. *Held*, that *prima facie* defendants were liable.—*Ayles* v. *South-Eastern Railway Co.*, Law Rep. 3 Ex. 146.

2. A railway carriage on which the plaintifs (husband and wife) were passengers to R., on reaching R. overshot the platform on account of the length of the train. The passengers were not warned to keep their seats, nor was

any offer made to back the train to the platform, nor was it so backed. After several persons had got out of the carriage the husband did so, and the wife then took his hands and jumped from the step, and in so doing strained her knee. There was no request made to the company's servants to back the train, or any communication with them. It was daylight. *Held* (*per* Martin, Bramwell and Pigott, BB.; Kelly, C. C., *dissentiente*), that there was no evidence for the jury of negligence in the defendants.—*Foy* v. *London B. & S. C. R. Co.* (18 C. B. N.S. 225), distinguished.—*Siner* v. *Great Western Railway Co.*, Law Rep. 3 Exch. 150.

3. The plaintiff, on getting into a railway carriage, having a parcel in his right hand, placed his left hand on the back of the open door, to aid him in mounting the step. It was after dark, and he could see no handle, if there was one. The guard, without warning, slammed the door, throwing the plaintiff forward, and crushing his hand between the door and doorpost. *Held* (by Byles and Keating, JJ.; Montague Smith, J., *dissentiente*), that the jury were justified in finding that the guard was negligent, and that the plaintiff was not, and that injury was not too remote to be recovered for. *Fordham* v. *Brighton Railway Co.*, Law Rep. 3 C. P. 368.

4. But when the plaintiff had entered the carriage, and a porter gave warning, and then shut the door, in the ordinary course of his duty, the other facts being as above, *Held*, that the plaintiff could not recover.—*Richardson* v. *Metropolitan Railway Co.*, ibid, 374, in notes.

5. Cattle sent to London by the plaintiff over defendants' railway arrived Sunday, A.M., but by law could not be removed before midnight. Meanwhile they were placed in pens at the station, by the defendants' servants, assisted by a servant of the plaintiff. The plaintiff's servant coming again shortly after midnight, found two steers killed, and was refused leave to take away the remaining cattle unless he signed a receipt for the whole, which he declined to do. Later the plaintiff removed them, but by the delay missed a market. *Held* (*per* Bramwell and Channell, BB.; Martin, B., *dissentiente*), that the defendants' liability as carriers had ceased when the damage occurred.—*Shepherd* v *Bristol & Exeter Railway Co.*, Law Rep. 3 Exch. 189.

See Attachment; Company, 2–4; Negligence, 2; Rent Charge; Ultra Vires.

Reconveyance.—*See* Mortgage, 2.

Register.—*See* Specific Performance, 1.

Release.—*See* Equity Pleading and Practice.

Remainder.—*See* Contingent Remainder; Will, 3–5.

Residue.—*See* Will, 8.

Rent Charge.

Land having been conveyed to the company in consideration of a rent charge, with a power to distrain on the land for arrears, the owner of the rent charge was allowed to distrain, although a receiver of the profits of the company had been appointed in a suit by the owner of a like rent charge, on behalf of himself and other such, who might choose to come in.—*Eyton* v. *Denbigh, Ruthin & Corwen R. Co.*, Law Rep. 6 Eq. 14.

Res Adjudicata.—*See* Collision.

Rescission.—*See* Vendor and Purchaser of Real Estate.

Sale.

1. T. & Co. ordered whiskey of M. & Co., who knew the purpose for which the same was wanted, for barter on the African coast. The spirits were to match one sample in price, flavor and strength, and another in color. They were colored with logwood, which, though not shown to be injurious to health, produced alarming physical effects, and made the natives think it poisoned. By 10 & 20 Vic. c. 60, s. 5, where goods are sold for a specified purpose, the seller warrants that they are fit for that purpose. On an issue, whether the whiskey was colored with an "innocent" material, the judge in Scotland refused an instruction, that T. & Co. must prove that the logwood was injurious to the health of the consumer before they could recover; and there was a verdict for them. *Held*, that the refusal was right, and that M. & C. were liable in damages.—*McFarlane* v. *Taylor*, Law Rep. 1 H. L. Sc. 245.

2. P. *bona fide* ordered and paid for goods of the W. I. Company, which loaded the same on a railway to his address, and sent him the invoices, after the presenting of a petition, but before the winding-up order. *Held*, that the disposition of the property was complete before said order, and the goods were ordered on this ground, as of course, under Companies Act, 1862, sec. 153, to be delivered to P.—*In re Wiltshire Iron Co., Ex parte Pearson*, Law Rep. 3 Ch. 443.

See Damages; Stoppage in Transitu.

Salvage.

A collision occurred between two vessels, A. and B. A. was in tow of a steam tug; the tug afterwards rendered assistance to B. B. was found solely to blame for the collision. *Held*, that the tug's right to salvage was not affected

by 25 and 26 Vic. cap. 63, sec. 33, which makes it the duty of ships mutually to assist each other after a collision.—*The Hannibal, The Queen*, Law Rep. 2 Adm. & Ecc. 53.

Satisfaction.

G. covenanted with the trustees of the marriage settlement of his daughter P., to pay them £12,000, and an annuity of £300 for her separate use, without power of anticipation. G. subsequently give his other daughter, L., £12,000 also. By will, G. charged his real estate with an annuity of £400 for the separate use of P., and with one of £1,000 for L., and, in a certain event, with £1,500 each, additional. G. devised his real estate, "charged with the four several annuities to his daughters," and bequeathed his residuary personal estate, subject to the payment of his debts. *Held*, having regard to the tone of the will, and the direction for the payment of debts, that P. was entitled to the £400 annuity, in addition to that of £300, which she took by the settlement.—*Paget* v. *Grenfell*, Law Rep. 6 Eq. 7.

Scire Facias.—*See* Execution.

Servant.—*See* Master and Servant.

Shareholder.—*See* Bankruptcy, 2; Company, 1–3

Execution.

Shelley's Case, Rule in.—Analogous Rule as to Personal Property.—*See* Legacy.

Ship.—*See* Admiralty; Charter Party; Collision.

Slander.

Slander. "You have heard what has caused the fall" (*i.e.*, in certain shares); "I mean, the rumour about the South Eastern chairman having failed:" meaning thereby that the plaintiff had become insolvent. Plea, that defendant meant, and was understood to mean, that there was a rumour to the above effect, and not that the plaintiff had become insolvent, as in the inuendo alleged, and that it was true that there was such a rumor. *Held*, that the plea was bad. The existence of the rumor did not justify its repetition, the latter not being shown to be privileged, and the truth of the rumor not being pleaded.—*Watkin* v. *Hall*, Law Rep. 3 Q. B. 396.

See Judge.

Specific Performance.

1. The plaintiffs contracted to sell shares, purchased from and registered in the name of C., to agents of the defendant, whose name was given and inserted in the transfers from C. These were sent to him, and were not afterwards forthcoming, and he paid the purchase money; but more than a month afterward he refused to have them registered, saying that he had bought for others, without a guarantee that he should be registered, and that he had not authorized his agents to give his name as transferee. A bill for specific performance was filed, which was decreed, although an order had been made for winding up the company since the filing of the bill. Defendant was also ordered, in addition to the decree of Stuart, V.C.) to give indemnity for all expenses which might be incurred by the plaintiff in respect of the shares not having been registered in the name of the former.—*Paine* v. *Hutchinson*, Law Rep. 3 Ch. 388.

2. A broker purchased shares of the plaintiff, in a company subsequently wound up, for and by order of W. By the usage of the Stock Exchange, the purchaser's name was not disclosed to the plaintiff until the next settling day, when the broker, also by order of W., gave the name of G., the defendant. The deeds of transfer were made out to G., handed to him for execution, kept by him for some time, and finally deposited as security for the purchase money with which he was debited. G. expressed no dissent to the vendor, but only to W. Specific performance was decreed against G.—*Shepherd* v. *Gillespie*, Law Rep. 5 Eq. 293.

3. Upon the sale of a public house as a going concern, time is of the essence of the contract. When, instead of being able to procure a transfer of the license in five days from the time of sale, as they were bound to, the business going on meanwhile, the vendors could only obtain one for the defendants by a more expensive process, with considerable delay, and, after a suspension of the business for two or three days, a decree for specific performance was refused.—*Day* v. *Luhke*, Law Rep. 5 Eq. 336.

4. In November, 1861, S. agreed to purchase from the plaintiff "the mill property, including cottages, in E.; all property in E. to be freehold;" and verbally agreed to take a limited title. A correspondence was carried on for the purpose of perfecting the title till December 12, 1864, when notice was sent to the plaintiff, that, unless he complied with certain requisitions, within a week, S. would require a perfect title to be made out within five weeks, or would abandon the bargain. A bill for specific performance was filed August 12, 1865. *Held*, that the written contract was not too ambiguous to satisfy the Statute of Frauds, or to be enforced; that there was no culpable delay, as the time occupied in negotiations must be excluded, and the notice of December 12 was an admission of a subsisting contract; that the limited title was not an objection, as defendant had notice, agreed to it, and also had waived the point by

not raising it sooner; and that, though either party may by subsequent notice make time of the essence of the contract, a reasonable time must be allowed, which had not been done. The decree limited objections to title to those made in a letter of June 14, 1863, accompanied by an opinion of counsel, and accepting the title, subject thereto.—*McMurray* v. *Spicer*, Law Rep. 5 Eq. 527.

Stamp.

By the 17 & 18 Vic. cap. 83, sec. 5, no person shall be entitled to recover in an action brought on any foreign bill of exchange, unless it had the stamp required by the act upon it at the time it was transferred to him. In such an action, the plaintiff could not remember whether the bill was stamped when he received it, but it was so when produced at the trial. *Held*, *prima facie* evidence that the act had been complied with.—*Bradlaugh* v. *De Rin*, Law Rep. 3 C. B. 286.

Statute of Frauds.—*See* Damages, 2; Specific Performance, 4; Trust, 1.

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

Stoppage in Transitu.

Goods were shipped by A. in Calcutta to B. in England. B. pledged the bill of lading to C., and afterwards became bankrupt. On the arrival of the ship in which the goods were, C. obtained from the ship's brokers, on payment of the freight, an overside order for the delivery of the goods. This order was presented to the officer of the ship, who promised C. should have the goods as soon as they could be got at. Before the ship broke bulk, A. forbade the delivery of the goods. *Held*, that A. had not lost his right of stoppage *in transitu*. The goods were not brought into the possession, actual or constructive, of B. by the promise to C. After satisfying C., A. had a right to the surplus proceeds, as against the assignees in bankruptcy of B.—*Coventry* v. *Gladstone*, Law Rep. 6 Eq. 44.

Tenant in Common.—*See* Will, 6.

Time.—*See* Specific Performance, 3, 4.

Trial by Jury.

The defendant to a bill for an injunction to protect a legal right, viz., a patent, cannot claim a trial by jury as a matter of right. Before St. 21 & 22 Vic. c. 27, and 25 & 26 Vic. c. 42, such cases were sent to be tried at law, not to obtain a jury trial, but because the judgment of a common law court was required. *Bovill* v. *Hitchcock*, Law Rep. 3 Ch. 417.

Trust.

1. When a person knows that a testator intends certain property to be applied for purposes other than for his own benefit, and, either expressly or by implication, promises so to apply it, and it is left to him on the faith of that promise, it is a case of trust, and the devisee cannot set up the Statute of Frauds. Decree of the Master of the Rolls reversed on the evidence.—*Jones* v. *Badley*, Law Rep. 3 Ch. 362.

2. It having been *held*, reversing the decision of the First Division of the Court of Session, that the appellants were entitled to the fee simple of certain lands by a devise to charitable uses, two hundred years before, and not only to a rent charge of a certain sum, it was further *held*, that the respondent having acknowledged the trust, and the question being only as to its extent, the question of prescription did not arise.—*University of Aberdeen* v. *Irvine*, Law Rep. 1 H. L. Sc. 289.

3. By a marriage settlement, made in 1821, stock belonging to the wife was assigned to B. and another, in trust for the separate use of the wife for life, remainder to the husband for life; remainder, in default of children of the marriage, to B. The trustees neglected to have the stock transferred to them, and in 1822 the husband and wife sold it, and the former took the proceeds. B. died in 1829, the husband in 1858, and the wife in 1864. There were no children. In 1866, B.'s executors claimed the trust fund from the husbands' estate. *Held*, that the claim was not barred by the Statute of Limitations (which did not begin to run until 1864), nor by B.'s acquiescence. His cognizance of the misapplication of the trust funds could not be inferred from his having taken no step, for eight years, to secure them. Any other *cestui que trust* could have compelled the husband's estate to refund; and the fact that B. was also a trustee did not change the case.—*Butler* v. *Carter*, Law Rep. 5 Eq. 276.

See Banker; Limitations, Statute of, 3; Wills, 6, 8.

Ultra Vires.

1. In October, 1864, the defendant company, having borrowed all the money (£60,000) which it was empowered to, issued a debenture for £500 to W. Later in the same year, seventeen similar debentures were satisfied by a sale of goods on execution. February, 1865, the directors re-issued four debentures for £500 to E., in return for his check for £1,000, and an overdue Lloyd's bond for £1,000. March, 1865, they re-issued ten more debentures for £500, to E., for cash; and in July, 1865, they issued one for £1,000 to L., under an agreement for the hire of engines. By §§ 39, 40 of the Com-

panies Clauses Act (8 & 9 Vict. c. 16), the power of re-borrowing shall not be exercised without the authority of a general meeting of the company; and a copy of the order of a general meeting giving such authority, and certified by one of the directors to be a true copy, is sufficient evidence of the same having been made. No general meeting was called to authorize the above re-borrowing. *Held*, that the debenture issued to W. was void, as *ultra vires*. Those issued to E. for cash were valid, notwithstanding the want of a general meeting. The above § 39 was not for the protection of other creditors, but of the company against the directors; and though the latter might be personally liable, as between themselves and the company, the clause was directory, as against the holder of the debenture. The debentures issued for the Lloyd's bond were void, unless it could be shown that it was given for money due to a contractor or the like, and not merely for money borrowed. L. was to be paid the amount actually due him under the agreement.—*Fountaine* v. *Carmarthen Railway Co.*, Law Rep. 5 Eq. 316.

2. Defendant Company A. was registered for financial operations; by the articles, the limitation of the liability of shareholders was to be unalterable, but there was a power to amalgamate with other companies having the same objects. In March, 1865, it was agreed between the respective directors that Company A. should be amalgamated with Company B., registered for banking and financial operations, and "any further objects which the company might from time to time adopt." Shareholders of A. were to take 25,000 shares of B. at £6 per share, to be credited as £5. The sum of £150,000 to be paid from the assets of A., and, if they proved insufficient, then by a call on the shareholders of the same. The amalgamation and the winding up of A. were resolved on, April, 1865. *Held*, not within the powers of the directors of A., under their articles, as the objects of B. were different, and the liability of the shareholders of A. was increased; nor under Companies Act, 1862, § 161, as it was not a sale of the assets of A., with an option of purchase of shares in B., but a binding of A. to take so many shares, and making its shareholders liable to a call for that purpose before it could be dissolved.

The plaintiff, as shareholder in A., first knew that any thing erroneous had been done in June, 1865. In September, 1865, notice of the registration of certain shares in B., under the arrangement, was first sent to the Registrar of Joint Stock Companies, and advances were made by B. to A., nothing serious having been done before. Bill filed Nov. 10, 1865, on behalf of all the stockholders. *Held*, not too late; and, though some stockholders had assented, that plaintiff was competent to sue, on behalf of all, to set aside a transaction which was *ultra vires*.—*Clinch* v. *Financial Corporation*, Law Rep. 5 Eq. 450. See *Imperial Bank of China, I. & J.* v. *Bank of Hindostan, C. & J.* Law Rep. 6 Eq. 91.

As to secret receipt of money by directors of the old company in such case, see *Atwool* v. *Merryweather*, ib. 464, in notes.

See Attachment, 2; Company, 2; Debenture, 1; Winding up, 1.

Undue Influence.

Persuasion is not unlawful; but pressure, of whatever character, if so exerted as to over power the volition, without convincing the judgment, of a testator, will constitute undue influence, though no force is either used or threatened.—*Hall* v. *Hall*, Law Rep. 1 P & D 481.

Usage.—*See* Principal and Agent.

Vendor and Purchaser of Real Estate.

W. agreed to buy of B. an estate for £250,000, which he then agreed to sell to the A company for £350,000. By both agreements the acreage was to be conclusively shown by the title deeds, and was specified in the agreements; but B. told W., who told the company, both acting *bona fide*, that there were 1,580 acres. Before making their agreement, the company had the estate valued by a surveyor; but it did not appear whether he measured it. After W. had paid B. £50,000, and the company had paid W. £75,000, and had given him their bonds for £75,000, the company refused to complete the purchase, alleging a failure in quantity. The lands were mineral lands, and, after a failure of a third, would have lasted two hundred years. W. thereupon refused to complete his purchase on the same ground, and sued B. for £50,000 and damages. B. offered to reduce the purchase money £50,000, and W. made a like offer to the company; but both offers were refused. W. compromised his action, B. repaying £50,000, and their agreement was cancelled. The company was wound up, and the liquidator, six months after their repudiation of the purchase, sued W. to have the contract cancelled, the £75,000 and the bonds returned, and that W. should be enjoined from parting with the bonds. The bill did not allege a deficiency of acreage, and there was no evidence of it.

Held, that the company had no right to rescind the contract; that they could not recover the purchase money paid, in equity, on the ground of a lien upon it, which they had not, or on any other ground, *assumpsit* being the proper remedy; that as to the bonds the suit was needless, as they could only be assigned subject to the equities between W. and the company, and could not be sued upon without leave of court; bill dismissed without prejudice to any rights at law.

After his agreement with B., W. agreed with C., D., and E., to share the profits of the resale with them in certain proportions. W., C., D., and E. got up the company, and part of the money received by W. from the company was used by them jointly. *Held*, that C., D., and E. were improperly joined as defendants.—*Aberaman Ironworks* v. *Wickens*, Law Rep. 5 Eq. 485.

See Damages; Specific Performance, 4; Way.

Vested Interest.

A testator bequeathed £20,000 in trust after his daughter's death, for such of her children as she should appoint, and, in default, for all her children who should attain twenty-one, in equal shares as tenants in common. He gave powers of maintenance out of the income of the share to which any such child might be presumptively entitled, and powers of advancement to the extent of one-fourth of the portion to which any such child should be presumptively entitled. The daughter, by her will, appointed that the trustees should raise for each of her two younger children, F. and M., who should reach twenty-one, £2,000, and subject thereto, as to the whole of the fund, to all of her children who should reach twenty-one, in equal shares as tenants in common. She died, leaving four children. The eldest of these having reached twenty-one, *held*, that said eldest child was entitled to one-fourth of the income of the whole £20,000 which had accrued since the death of her mother; and that after payment to her of her share of capital, she would be entitled, during the respective minorities of F. and M., to one-fourth of the income of the two sums of £2,000 appointed to them in the event of their reaching twenty-one respectively.—*Gotch* v. *Foster*, Law Rep. 5 Eq. 311.

See Will, 7.

Waiver.—*See* Specific Performance, 4.

Warranty.—*See* Sale.

Way.

The owner of two adjoining closes, A. and B., made and used a way across B. to A. for farm purposes, and afterwards conveyed A., "together with all ways . . . thereto appertaining, and with the same now or heretofore occupied or enjoyed." The purchaser had access to A. from other land of his own. *Held*, that, as there was no roadway over B. to A. before the unity of possession, the right to use it did not pass by the above grant.—*Thompson* v. *Waterlow*, Law Rep. 6 Eq. 36 followed.—*Langley* v. *Hammond*, Law Rep. 3 Exch. 161.

See Company, 4.

Will.

1. A will, disposing only of property in a foreign country, is not entitled to probate in England.—*In the Goods of Coode*, Law Rep. 1 P. & D. 449.

2. A will, after specific devises and bequests, continued as follows: "I give *all the rest of my* household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, *estate and effects*, of what nature or kind soever, and wheresoever the same shall be at the time of my death," to trustees, "*their executors, administrators and assigns*," to sell and pay the proceeds as directed. (Surplus, after payment of debts and a legacy, to A. and B.) Then followed a bequest of ready money, proceeds of the sale of specified land, securities for money, and all sums due to testator at his death, and then further specific bequests. At the date of the will, and at the time of his death, testator was seised of a freehold estate not mentioned in the will. *Held* (contrary to the decision of *Sanderson* v. *Dobson*, 1 Exch. 141, and following s.c. 7 C.B. 81, approved in *O'Toole* v. *Brown*, 3 E. & B. 572), that said freehold passed by the words "all the rest of my estate."—*Dobson* v. *Bowness*, Law Rep. 5 Eq. 404.

3. Gift to A. until B. reaches twenty-one, then to B. If B. should die before her estate "should be received," then over. Codicil, giving A. the income for life. *Held*, that "received" meant "vested," and that B.'s estate vested at twenty-one, though not to be paid to B. until A.'s death.—*West* v. *Miller*, Law Rep. 6 Eq. 59.

4. Bequest of a residue in trust to pay one-fifth of the income each to A., B., C., D., and E. for life, remainders to their respective children. In case of the death of either of the first takers, "without leaving issue," his share to go to the survivors in like manner as the original shares. It was added, that none of said shares should be "so paid to or become *vested* interests in" either of said children, until he attained the age of twenty-five; but, in the

mean time, trustees might pay any part of the income towards the maintenance and education of such children respectively. Proviso (void for remoteness), for the accruer of shares of children dying before twenty-five to survivors; and then it was declared that, in case of death of child before such share accrued, it should again accrue in like manner, but provided that in case such child should have left issue, such issue should take such share as his parent would have had "if living," such share "to be paid to" such issue at such age as before directed as to payment of parent's original shares. *Held*, that the word "vested" must be construed as meaning "indefeasible;" and that the remainders to children vested in such of said children as were alive at the death of testatrix or born afterwards.—*In re Edmondson's Estate*, Law Rep. 5 Eq. 389.

5. Devise to testator's wife for life, then to his daughter; upon her decease, "equally between my surviving brothers and sisters, and those of my wife." The testator's daughter survived him, but died before his wife. Some of the brothers and sisters died before the daughter, others after her, but before the wife. *Held*, that on the death of the wife there was an intestacy. The word "surviving" meant surviving the survivor of the tenants for life. —*Howard* v. *Collins*, Law Rep. 5 Eq. 349.

6. A testator gave £3,000 to his executors in trust for M., for life, and after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage." The executors died in the lifetime of M. *Held*, that the children of M. who survived her were entitled to the fund as tenants in common.—*In re Phene's Trusts*, Law Rep. 5 Eq. 346.

7. A testatrix devised the T. estate to J. for life, with remainders to the sons and daughters of J. successively in tail. Proviso, that if any tenant for life or in tail in possession should neglect to reside on the T. estate for six months, said estate should go to the person next entitled in remainder, as if the person so neglecting were then dead without leaving issue; she then bequeathed her residuary personal estate in trust for the children of the person who should at her death become tenant for life of the T. estate ("*other than* and besides *an eldest* or only *son for the time being entitled* in tail in remainder expectant on the decease of his parent" to the T. estate) who should attain twenty-one or marry; and if there be but one child beside such eldest or only *son for the time being entitled as aforesaid*, then in trust for that one child, with a gift over if there should be no such children, or if they should all die before any of them should attain a vested interest. J. survived the testatrix, neglected to reside on the T. estate for six months, and died leaving a posthumous son, D., who was his only child. *Held*, that D. was entitled to the residuary personal estate, as by reason of J.'s forfeiture before his birth, he never had been entitled in tail in remainder to the T. estate; and that being an only child he took a vested interest at his birth.—*Johnson* v. *Foulds*, Law Rep. 5 Eq. 268.

8. A testator gave his residuary real and personal estate in trust for his "five sons" as tenants in common, and by a codicil revoked and made void the said trust so far as the same related to R., one of the said sons, or his right therein, and in lieu thereof gave £15,000 in trust for R., his wife and children; and if R. should have no children, said legacy was to sink into the residue, but so that R. or his representatives should take no share or interest therein. *Held*, that the testator died intestate as to the trusts of one-fifth share of the residue, and that the £15,000 was not payable out of such share, but was payable before the residue was ascertained.—*Sykes* v. *Sykes*, Law Rep. 3 Ch. 301.

See Ademption; Administration; Advancement; Canada; Contingent Remainder; Exoneration; Illegitimate Children; Legacy; Marshalling of Assets; Power; Satisfaction; Trust; Undue Influence; Vested Interest, Witness.

Witness.

Bequest of £200 to B. church, to be disposed of as I. pleases. I.'s wife was one of the witnesses. *Held*, that as I. was a mere trustee, the attestation of his wife did not invalidate the bequest, under the Wills Act.—*Cresswell*, sec. 15, v. *Cresswell*, Law Rep. 6 Eq. 69.

Words.

"*Cause of action.*"—See Cause of Action.
"*Accident.*"—See Charter Party, 2.
"*Permanent use.*"—See Company, 4.
"*Lawfully begotten*"—See Conflict of Laws, 1.
"*House.*"—See Curtilage.
"*Out of my estate.*"—See Exoneration.
"*Office,*" "*Place.*"—See Gaming.
"*Next of kin.*"—See Illegitimate Children.
"*Increase.*"—See Mortgage, 1.
"*All the rest of my estate.*"—See Will, 2.
"*Received,*" read "*Vested.*"—See Will, 3.
"*Vested,*" read "*Indefeasible.*"—See Will, 4.
"*Surviving.*"—See Will, 5.

GENERAL CORRESPONDENCE.

To the Editors of the Canada Law Journal.

Privileged Communications—a curious case.

Messrs. Editors—I cut out from a newspaper a curious decision just given in the courts of the State of New York, respecting mercantile agency companies. The case comes under the law relating to privileged communications. Under this head of the law of evidence there have been, as you know, in recent times some sharp debates and discussions among legal men and in courts. It has been attempted (especially in Ireland) to lay down the doctrine, that what a person may disclose in the confessional to a Roman Catholic priest is *sacred* or *privileged*. English and American courts have generally (I think almost uniformly) refused to allow this privilege, that the confessional is not a place in which a man can confess a crime, and yet keep the priest's lips forever sealed. We know that courts hold that there are various privileged communications, and privileged speeches. Such for instance as the admissions of a client to his attorney, and the fair account that a master may give of the character of his former servant to one enquiring about him or her. We know that telegraphic communications may be privileged either by law or under peculiar circumstances. We know that the speeches of counsel at the bar, of members of Parliament, and of a witness in giving evidence in courts, as well as information given to the executive on complaints, are generally, unless in extreme cases, privileged. The formation of mercantile agencies is of very recent date, and I have not before noticed any case, in which the question of how far written or verbal communications to a mercantile agency, concerning a firm or a person, if slanderous or tending to injure it or him, if false, would be actionable. Here is the case to which I refer:

The Firm of Dun, Barlow & Co., known as Dun, Wiman & Co. in Canada, gave information to an enquirer in regard to another person, stating that the latter was in bad business odour, being the companion of counterfeiters, a dangerous customer, ect. The man found out the authors of the character so given to him, brought a suit for slander, but was non-suited in a New York city court, on the ground that the communication was privileged. The plaintiff took his case to the Supreme Court, when the judgment was sustained. It being of importance to business men, a portion of the judge's decision may be quoted:—"I cannot concede that, in the large population of a crowded city, and in a mercantile community where false representations, fraud, dishonesty and insolvency are easily concealed, and but imperfectly known, or known to but few when detected—where it is easy for strangers to practice upon the unwary or unsuspecting—a business is to be characterized as unworthy which aims only to give correct information to those whose interest entitles them to seek it wherever it may be had."

One can easily conceive a case where a private individual or a firm might be greatly injured, perhaps ruined in a pecuniary point of view, by a secret enemy giving information which after all is false, concerning him or it. I cannot see why in such a case the injured individual should not have a remedy, or why any such circumstances should be privileged. I knew a recent case where "A." a trader, had been in poor even bankrupt circumstances. The above mercantile agency kept his name on the list of doubtful cases long after he had settled his difficulty, and he could not get a note discounted in consequence. A professional man was employed to get the company to set the thing right. Is "B." who slanders "C." by giving false information to the above mercantile agency, such for instance as that he had been charged with embezzlement or obtaining goods under false pretences, or perhaps making a fraudulent sale of all his goods—to go free—and "C." be without legal remedy simply because a mercantile agency company registers it in a Secret Book, seen in all parts of Canada and the United States? "B." goes to New York or to Montreal, and every reader of the secret books of the mercantile agency look on him with suspicion. He knows not the reason unless he too is in the secret.

An agent of this company may *negligently* or dishonestly give a false account of a man's position and seriously injure his business, and will the law give no remedy? I trust this is not the law in Canada.

There are maxims in the common law which ought not to be trampled on or forgotten. Such as "*sic utere tuum ut non alienum.*" The mercantile agency may be useful, but because it is so, it should be careful to know facts—to ascertain the truth, before it publishes anything; otherwise pay damages for its mistakes. Every injury to an innocent man should have a legal remedy.

October 22ad, 1868. Justitia.

To the Editors of the Canada Law Journal.

Gentlemen,—My attention has been directed to a letter in the last number of the *Law Journal*, signed "LL.B.," criticising, in very questionable spirit and tone, the report of the case, "*In re Moore* v. *Luce*," contained in the current volume of the Common Pleas Reports. I may not be doing more than I am called upon, in answer to your querulous correspondent, when I say that the report in question was submitted, before publication, for the approval of the same able and pains-taking judge who wrote and delivered the judgment of the court in the case, and who did not deem it necessary that the judgment of the County Court (the omission of which, as you say, forms the gravamen of the complaint made) should be given in any more extended form than it was.

There may be a redundancy of statement in one part of the report, as your correspondent charges, but that is, after all, a matter of opinion; and there may be an inaccuracy as to the disposition of the costs in the court below, though my sources of information ought to have been as reliable as your correspondent's, which appear to have been mere hearsay; but there being no question of the kind before the appellate tribunal, it was just as unimportant as if it had been stated that the judge below delivered his judgment in a standing instead of a sitting posture.

There is, I believe, another exception taken to the report, which seems to be equally trifling.

As to the judgment itself, from which your correspondent makes several quotations, and complains that the reporter "does not explain" this (!) and "does make the judge say" that (!!); as it would have been the height of presumption, on the reporter's part, to have done either the one or the other, it would be equally presumptuous now, were I to attempt a defence either of the worth or the phraseology of that judgment, both of which your correspondent is bold enough to call in question, though safely enough, to be sure, under his anonymous subscription. No doubt, however, the court itself will, if its attention is called to his letter, at once see the error it has fallen into in both respects, and, if possible, take the earliest opportunity and means of putting itself right.

Inaccuracies, as well of the pen as of the tongue, are more easily detected than avoided, as your correspondent, with his hypercritical acumen, will no doubt find *on carefully revising his own letter*. As you truly observe, the work of reporting is no easy matter, and errors will creep in, however great the care bestowed upon it, though to none can this be more annoying than to the reporter himself. It is so with the leading reports in England, as may be seen by the numerous *errata* at the end of some of the volumes of the present series of "Law Reports," as well as by examining the text itself, inaccuracies in which have in many instances been overlooked altogether. Where, however, there is, on the whole, an honest desire evinced on the reporter's part to do his work well, a profession distinguished, *as a rule*, for its generosity, should extend to him, as it no doubt will, that indulgence and forbearance—in the case, at any rate, of unimportant defects—which he ought to feel himself entitled to expect.

I am, Gentlemen, yours, &c.,

S. J. Van Koughnet,

Toronto, Nov. 1868. *Reporter C. P.*

REVIEWS.

Georgia Reports, vol. 35. December Term 1866; and a Table of Cases, reported in the first 31 volumes of the Georgia Reports: By L. E. Bleckley, Esq., late Reporter of the Supreme Court of Georgia. Atlantic Ga., 1868.

We have to acknowledge the above through the courtesy of Mr. Bleckley.

The cases seem to be carefully reported, and many of them decide points of interest, more especially to the American people—such, for example, as the case of *Clarke* v. *The State of Georgia*, which is an authority, founded on an act of the Legislature, that persons of color are competent witnesses in all cases, just as white persons are; a proposition which to us seems sufficiently reasonable, and beyond discussion, though the lesson has been a difficult and a bitter one for Southerners to learn.

The reporter gives, in an appendix, some decisions of Judge Erskine, of the same State. The first of these must have been felt as a relief to the exasperated feelings of honorable men in the South, whatever the ultimate result of it may have been. In *Ex parte William Law*, he held that an attorney or

counsellor, duly admitted to practice in a court of the United States, and practising there prior to the late civil war, and who has received and accepted a full pardon from the President, &c., may resume his practice in the said court, without taking the oath prescribed by the act of Congress, which act required an oath, in certain cases, that the person had not borne arms against the United States, or submitted to the authority of the Confederate Government, &c.; such act being, in its application to such person, in the opinion of the judge, unconstitutional and void.

The American Law Register, October, 1868. Philadelphia; D. B. Canfield & Co., 430 Walnut Street.

We again extract largely from this much valued legal periodical. The writers are we understand, some of the best men of the Bar in the United States, and they receive from various sources interesting decisions of late date. We notice that the price is raised to $5. We are surprised that this was not done before.

The Chicago Legal News. Vol. I., Nos. 1, 2 & 3.

It is a refreshing instance of the march of civilization in general, and of its progress in a westerly direction in particular, that a weekly legal paper of "eight four column pages" has been started, under the editorial management, not, as we unenlightened Britishers might suppose, of a learned counsel or even of a judge, but under the sprightly management of *Mrs. Myra Bradwell*, the "better half," it may well be supposed, of the judge of the County Court of Cook County, Illinois. When the editress speaks of "*our* husband" we may hope that there is every probability of his being kept strictly in the way wherein an upright judge should walk.

The learned editress has evidently secured the good will of the Bench and Bar in her neighbourhood, as they seem to assist her with many contributions in the way of articles, reports and selections, in which by the way as might be supposed, the rights of women figure rather largely.

We wish our sister (of the Press) all success in her, to our old fashioned eyes, novel undertaking.

A Romantic Law Case.—The courts of law will in all probability be occupied early in the ensuing session with one of those remarkable cases which so often occur in romances, and so seldom in real life. It appears that about a hundred and twenty years ago a large estate close to one of the most important of English manufacturing towns, was in the possession of the great-grandfather of the parties to the present litigation. Since that time the land has been built upon to a great extent, and now forms the most wealthy suburb of the town in question. At the death of the owner, his eldest son, finding that there was no will, naturally claimed the estate. The children of a second marriage, however, who had never lived on good terms with their half-brother, protested against his title on the ground that his parents had never married, and that he was consequently illegitimate. It seemed at first that there was no ground for this statement. The parents had always been received in society, and no one had ever heard of any scandal in connection with them. On making inquiry it was, however, found impossible to discover any trace of the marriage, and the eldest son was forced to submit, and leave the home he had always considered his own, without a shilling. He went into town and embarked in trade, apparently without much success, for his grandson is at the present time a shoemaker in a back street, and in a very small way of business. The tradition of the lost estate has, however, always been preserved, and some time since this descendant of the elder son recommenced the search for proof of the marriage in question. After much trouble he succeeded in getting at the copies of the registers which are preserved in the Chancery at Chester, and there, in the index, he discovered, somewhat easier than was expected, the names of the original possessor of the estate and his first wife. There was, however, no such entry in the body of the book. At last, however, in going through it for the last time, it was discovered that two leaves had been fastened together, and on their being separated a copy of the entry of the marriage from the books of a Manchester church was duly found. On referring back to the church itself, the book was produced, but the entry was not there. Further examination showed, however, that this book had been tampered with, but in a different way—a leaf had been cut out with scissors, and the marks were even then distinctly visible. On these facts the action will be brought, and when it is remembered that the present family have been in possession for nearly a century, and that they are highly respected, and their members married amongst the wealthiest people in the county, it may readily be imagined that the matter is creating a good deal of interest. The value of the property at stake is between one and two hundred thousand pounds.—*Western Morning News* (*English*).

TO CORRESPONDENTS.

"A Student."—Our rule is not to notice letters unless verified by the signature of the writer.

"F. W. O."—Thanks—Was any written judgment given by the Court of Chancery, and when, &c. It would be advisable to give further information with respect thereto.

"St. Thomas."—Insolvency case received with thanks, will appear in December Number.