DIARY FOR JULY.

1. Frid. Dominion Day. Long Vacation begins. Last day for County Treasurer finally to examine assessment rolls, &c.
3. SUN. *3rd Sunday after Trinity.*
4. Mon. County Court (except York) Term begins. Heir and Devisee sittings commence. Last day for notice of trial for County Court York.
9. Sat.. County Court Term ends.
10. SUN. *4th Sunday after Trinity.*
12. Tues. General Sess. and County Court sittings York.
17. SUN. *5th Sunday after Trinity.*
19. Tues. Heir and Devisee sittings end.
22. Frid. *St. Mary Magdalene.*
24. SUN. *6th Sunday after Trinity.*
25. Mon. *St. James.*
31. SUN. *7th Sunday after Trinity.*

THE

Canada Law Journal.

JULY, 1870.

LEX LOCI CONTRACTUS—LEX FORI.

By D. Girouard, Esq., *Advocate, Montreal.*

(*Continued from page* 144.)

And now on what grounds are based the objections to the *lex fori?*

Bateman (*Commercial Law*, p. 105, s. 143, *et seq.*) after admitting it to be well settled that that the plea of limitations is a plea to the remedy, and consequently is governed by the *lex fori*, makes this argument: "What is the essential or necessary difference between a discharge of the obligation of the contract, and a bar of the remedy upon it? In what manner are they related to each other? It is of the essence of the obligation that it shall be enforced; of moral obligation that it shall be enforced by moral means; of legal or civil obligation that it shall be enforced by such means as are given to courts of justice for that purpose. The exact relation of the obligation and the remedy to enforce it, then is that of an end to be attained and the means of attaining it; not that of an end to be attained, and the means of preventing its attainment."

Granting this to be so, as to the country where the contract is made; is it hence to be inferred that every other country is bound to do likewise, even in opposition to its laws of public order and policy?

The maxim of the Roman Law was *Interest reipublicæ ut sit finis litium*, and it has been recognized by the jurisprudence of modern nations.

"Les prescriptions," observes Domat, liv. 1, tit. 7, sect. 4, § 2 (Rémy's ed., p. 211), "ont été établies pour le bien public," and elsewhere he says, "afin de mettre en repos ceux qu'on voudrait inquiéter."—See also Pothier, *Obligations*, Nos. 676, 678; Broom's Legal Maxims, Am. ed. 1864, p. 600 *et seq.*

Blackstone, vol. 3, p. 307, says: "The use of these statutes of limitation is to preserve the peace of the kingdom." "They go," says Story (*Conflict of Laws*, ch. 14, § 576), "*ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects, or by or against foreigners. And there can be no just reason and no sound policy in allowing higher or more extensive privileges to foreigners than are allowed to subjects Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose to quiet titles, to suppress frauds, and to supply the deficiency of proofs, arising from the ambiguity and obscurity, or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished whenever they are not litigated in the proper forum within the prescribed period. They take away all solid grounds of complaint; because they rest upon the negligence or *laches* of the party himself. They quicken diligence by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulations of past times, which are unexplained, and have now from lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal, while men are mortal: *Ne autem lites immortales essent, dum litigantes mortales sunt.*"

Again (§ 578): "but if the question were entirely new, it would be difficult upon principles of international justice or policy to establish a different rule. Every nation must have a right to settle for itself the times, modes and circumstances, within and under which suits shall be litigated in its own Courts. There can be no pretence to say that foreigners are entitled to crowd the tribunals of any nation with suits of their own, which are stale and antiquated, to the exclusion of the common administration of justice between its own subjects. As little right can foreigners have to insist, that the times and modes of proceeding in suits, provided by the laws of their own country, shall supersede those of the nation in which they have chosen to litigate their

controversies, or in whose tribunals they are properly parties to any suit."

"A person," said Lord Tenterden, in *De La Vega* v. *Vianna*, "suing in this country must take the law as he finds it; he cannot by virtue of any regulation of his own country enjoy greater advantages than other suitors, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to."

Troplong and Massé urge that the *laches* of the creditor to sue must be considered as existing at the place of payment, and consequently must be dealt with according to the law of that place.

"La raison en est simple," says Troplong, No. 38, "la prescription afin de se libérer est, en quelque sorte, la peine de la négligence du créancier. Or, dans quel lieu le créncier se rend-il coupable de cette faute? C'est évidemment dans le lieu où il doit recevoir son paiement. Donc il encourt la peine établie dans ce lieu: donc la prescription qu'il doit subir se règle par la loi du même lieu."

"Ainsi," Marcadé repliés (sect. 6, p. 12), "soit une dette contractée par un Piémontais domicilié à Turin envers un Français domicilié à Paris, mais avec convention que le remboursement sera fait à Rome (où d'ailleurs il faut supposer qu'il n'a pas été fait élection de domicile par le débiteur, puisqu'alors la question n'existerait plus, Rome devenant ainsi le lieu du domicile); c'est d'après la loi de Rome, quoique le débiteur n'y eut pas de domicile, que la dette se prescrire, et la raison en est simple, dit M Troplong, puisque *c' est à Rome que le créancier a été négligent!* . . Comment! cet homme *qui n'a jamais quitté Paris*, vous me dites que pendant quinze ans, vingt ans ou plus, *il a été négligent* à Rome! C' est à Rome qu'il est resté dans cette longue inaction, à Rome qu'il s'est endormi dans cette insouciance prolongée, à Rome, *lui qui n'y a jamais* mis le pied! . . . . . Il faut donc ici encore, comme au No, IV., rappeler à M. Troplong que *priùs est esse quàm esse tale*, et que pour avoir été n'importe quoi à Rome, pour y avoir été nêgligent ou soigneux, insouciant ou vigilant, pour y avoir été tout ce qu'on voudra, il faut tout d'abord avoir été à Rome . . . . Qu'on nous dise que ce crêancier a négligé son affaire *de Rome*, à la bonne heure: mais cette affaire de Rome où l'a-t-il négligée? C' est à Paris."

Mr. Westlake modestly says that Lord Brougham's opinion in *Lippman* v. *Don*, rests on two fallacies:—

"First, 'the argument that the limitation is of the nature of the contract, suppose that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition.' But this is to confound the interpretation of the contract with the operation on it of the *lex loci contractus*. . . . . Secondly, 'it is said that by the law of Scotland'—the *lex fori*, which it was proposed to apply as governing the remedy—'not the remedy alone is taken away, but the debt itself is extinguished. . . . I do not read the statute in that manner. . . . The debt is still supposed to be existing and owing.' There is, however, little or no meaning in saying that a debt subsists that cannot be recovered."

As to the first of Mr. Westlake's objections, it would perhaps be sufficient to remark, that Lord Brougham referred merely to the intent of the parties, irrespective of the operation of the law upon their contract. The question, moreover, is not the effect or operation of the *lex loci contractus*, but of the *lex fori*; and if the contracting parties contemplated a breach of the contract, and a suit upon the same, they must have had reference to the law of the place where that suit would be brought, or for everything relating to that suit. But, as the noble jurist observes, and his observations are a complete answer to the remarks of Chief Justice Cockburn:

"Nothing can be more violent than that supposition that the breach of the contract is in the contemplation of the parties, and indeed nothing more contrary to good faith. It is supposing that when men bind themselves to do a certain thing, they are contemplating not doing it, and considering how the law will help them in the non-performance of a duty. If the law of any country were to proceed upon the assumption that contracting parties have an eye to the period of limitation, and only bind themselves during that period, it would be sanctioning a faithless course of conduct, and turning the provisions which have been made for quieting possession after great *laches* on the part of the creditors, and possible destruction or loss of evidence, into covers for fraudulent evasion on the part of debtors."

In the second place, Mr. Westlake cannot discern a distinction between a debt that cannot be recovered *en justice*, and a debt extinguished *in se*. There is a wide difference between the two. 1. It is well known that a debt extinct *in se* is not susceptible of payment, and the action *condictio indebiti* would then lie. But a debt declared prescribed may be paid, without danger of such an action; 2.

In a case like the present one, the debtor is still liable to an action in the country where the contract was made or is payable. These characteristics of a debt which is prescribed are so plain that we need not be called on to quote any authority, and they clearly show that prescription does not affect the contract, but the remedy.

This rule is distinctly laid down in all the books, and should be applied in cases of conflict of prescription. The Civil Code of Lower Canada, art. 2183, states the old law to be that "extinctive or negative prescription is a bar to the action;" and the same principle is held by all the American and English jurists, and likewise by the French commentators:

"La loi," observes Merlin, "qui déclare une dette prescrite, n'anéantit pas le droit du créancier en soi: elle ne fait qu'opposer une barriére à ses poursuites." Even Bullenois (Observ. 23, vol. 1, p. 530) properly remarks: "L'exception ne tombe que sur l'action et la procédure intentée." "Puisque," says Marcadé, "la prescription n'anéantit pas le droit du créancier par-elle-méme et *ipso facto*, mais procure seulement au débiteur une exception qu'il lui sera facultatif d'opposer à l'action, c'est donc par la loi du lieu où ce débiteur doit être actionné, c'est-à-dire du lieu de son domicile, que la prescription doit tout naturellement se régler. Il n'importe pas qu'un autre lieu soit désigné pour le paiement, où ait été celui de la passation du contrat; car selon la peusée d'Huberus, la chose capitale à considérer, la chose à laquelle la prescription se rattache intimement, puisqu'elle vient en opérer l'extinction, c'est l'action et non pas telle ou telle circonsantce de la convention: *jus ad actionem pertinent, non ad negotium gestum.*

The Court cannot supply a plea of prescription; it is personal to the defendant; and hence it must be ruled by the law of the place where he is served with process. "La prescription," says even Pardessus, "étant une exception qu'il est permis au débiteur d'opposer à la demande de son créancier, c'est naturellement dans sa propre législation qu'il doit trouver ce secours." (Félix, vol. 1, p. 221.)

In opposition to this plain, intelligible doctrine, Savigny, Massé and Westlake insist upon this other reason: that the *lex loci contractus* is the most reasonable rule, "because it excludes both the arbitrary power of the plaintiff to choose between competing forums that which allows the longest term of prescription, and the arbitrary power of the defendant to defeat his creditor by removing his domicile to the forum which allows the shortest term, and avoiding, while it runs, personal presence in the special forum of the obligation."

Massé calls the result of such uncertainty, *une conséquence déplorable.* But it is, certainly, more imaginary than real. No man can presume that when one removes from one country to another, his aim is to defeat his creditor by acquiring a shorter term of prescription. As to the arbitrary power of the plaintiff to choose between competing forums, it is certainly not a hardship to him, and with regard to the debtor, it suffices to remark that he is the best judge of his own interest, and to add with Story, s. 579, that "if he choose to remove to any particular territory, he must know that he becomes subject to the laws of that territory, as to all suits brought by or against him."

If, however, inconvenience can be urged as grounds of reasoning, I will merely state that if the *lex loci contractus* should be the rule in one country, for instance in Lower Canada, its citizens would be placed at a great disadvantage as regards their neighbours. In Ontario and in most of the bordering States, prescription in commercial matters is of six years, and we may at once suppose the case of a Lower Canadian removing to any of those countries, immediately after his liability on negotiable paper is terminated here by a prescription of five years. He would, therefore, notwithstanding his discharge here, remain liable to an action there, where the *lex fori* is the exclusive rule. This would be a more *déplorable conséquence* than that pointed out by Massé and others: it would be nothing less than a public inconvenience, and would be contrary to the policy of any commercial nation.

We learn with much pleasure that Mr. Gowan, Judge of the County Court of the county of Simcoe, and Chairman of the Board of County Judges, is about to take a trip to England and the Continent for the benefit of his health, having been granted a long leave for that purpose should he require it.

If ever a man earned a holiday Judge Gowan has; for twenty-seven years he has been unremitting in the discharge of his judicial duties, and we believe we are correct in saying that the whole extent of his leave

during that long period, except on official business, has scarcely exceeded in all four months. The members of the Bar and the officials of the County, on hearing of his intended departure, presented him with a farewell address conveying their feelings of respect and wishes for his future welfare. The Board of Public Instruction for the County also passed a resolution to the same effect.

We desire to join with his numerous other friends in wishing him a pleasant and beneficial voyage and a safe return.

The Court of Queen's Bench will sit on Monday, the 19th September next, at two o'clock, P. M., to give judgment in cases standing before them, and for the purpose of attending to such other business as the Court in its discretion may see fit to entertain. The Court of Common Pleas will not meet before Michaelmas Term.

A Judge in one of the Courts in the United States thus speaks of the folly of unnecessarily multiplying legal objections:—

"We have in this case twenty-six errors assigned to a single case of ordinary length, which is as much as to say the judge did not open his mouth unless to commit an error. This skill at multiplication is accomplished by dividing the charge into short paragraphs, and assigning error to each. The injustice of thus manipulating a charge by piecemeal is obvious; while a still more serious injury is done to the cause, by indiscriminate allegations of error and useless discussion. They distract our minds by diverting them to consider matters of no moment, and weaken the strong points, if any, by heaping upon them those that are feeble. Upon a writ of error it is much better to consider well the positions, which seem to be fairly tenable, and to present them alone. Then the argument spends its concentrated force upon that which commands consideration, and the attention of the judges is not diverted to that which is immaterial. In this way real error is apt to be detected, while in the other, the mind, wearied by unimportant exceptions and inconclusive discussion, is more likely to overlook material errors. We commend these remarks to those who practise before us."

AN ACT

To amend the Act imposing Duties on Promissory Notes and Bills of Exchange.

[Assented to 12th May, 1870.]

Whereas, it is expedient to repeal Sections Eleven and Twelve of the Act passed in the thirty-first year of Her Majesty's reign, chapter nine; therefore, &c.

I. The said sections are hereby repealed, and the following Sections substituted therefor:—

"11. If any person in Canada makes, draws, accepts, indorses, signs, becomes a party to, or pays any Promissory Note, Draft, or Bill of Exchange, chargeable with duty under this Act, before the duty (or double duty, as the case may be) has been paid, by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of one hundred dollars, and, save only in the case of payment of double duty, as in the next section provided, such instrument shall be invalid and of no effect in law or in equity, and the acceptance, or payment, or protest thereof, shall be of no effect; and in suing for any such penalty, the fact that no part of the signature of the party charged with neglecting to affix the proper stamp or stamps, is written over the stamp or stamps affixed to any such instrument, or that no date, or a date that does not correspond with the time when the duty ought to have been paid, is written or marked on the stamp or stamps, shall be *primâ facie* evidence that such party did not affix it or them, as required by this Act: but no party to, or holder of any such instrument, shall incur any penalty by reason of the duty thereon not having been paid at the proper time, and by the proper party or parties, provided at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays the double or additional duty as in the next section provided, as soon as he acquires such knowledge."

"12. Any subsequent party to such instrument or person paying the same, or any holder without becoming a party thereto, may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his signature, or part thereof, or his initials, or the proper date, on such stamp or stamps, in the manner and for the purposes mentioned in the fourth Section of this Act; and when upon the trial of any issue, or on any legal inquiry, the validity of any Promissory Note, Draft or Bill of Exchange is questioned by reason of the proper duty thereon not having been paid, or not having been paid by the proper party, or at the proper time, and it appears that the holder

thereof, when he became holder, had no knowledge that the proper duty had not been paid by the proper party, or at the proper time, such instrument shall, nevertheless, be held to be legal and valid, if it shall appear that the holder thereof paid double duty as in this section mentioned, so soon as such holder acquired such knowledge, or if the holder thereof, acquiring such knowledge at the trial or inquiry, do thereupon forthwith pay such double duty; or if the validity of such Promissory Note, Draft, or Bill of Exchange is questioned by reason of a part only of the requisite duty thereon having been paid at the proper time or by the proper party, and it appears to the satisfaction of the Court or Judge, as the case may be, that it was through mere inadvertence or mistake, and without any intention to violate the law on the part of the holder, that the whole amount of duty, or double duty, as the case may be, was not paid at the proper time, or by the proper party, such instrument, and any endorsement or transfer thereof, shall, nevertheless, be held legal and valid, if the holder shall, before action brought, have paid double duty thereon, as in this section mentioned, as soon as he reasonably could, after having become aware of such error or mistake; but no party, who ought to have paid duty thereon, shall be released from the penalty by him incurred as aforesaid."

2. This Act shall not apply to any suit pending when it comes into force.

AN ACT

To amend the Act respecting the Duties of Justices of the Peace out of Sessions in relation to Summary Convictions and Orders.

[Assented to 12th May, 1870.]

Whereas, it is expedient to amend Sections sixty-five and seventy-one of the Act respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders; therefore, &c.

1. Section sixty-five of the said Act is hereby repealed, and the following section substituted:

"65. Unless it be otherwise provided in any special Act under which a conviction takes place or an order is made by a Justice or Justices of the Peace, any person who thinks himself aggrieved by any such conviction or order, may appeal in the Province of Quebec or Ontario, to the next Court of General or Quarter Sessions of the Peace; or in the Province of Quebec, to any other Court for the time being discharging the functions of such Court of General or Quarter Sessions of the Peace in and for any district therein; in the Province of Nova Scotia, to the Supreme Court in the county where the cause of information or complaint has arisen; and in the Province of New Brunswick, to the County Court of the County where the cause of the information or complaint has arisen: such right of appeal shall be subject to the conditions following:

"1. If the conviction or order be made more than twelve days before the sittings of the court to which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction, or order, be made within twelve days of the sittings of such court then to the second sittings next after such conviction or order;

"2. The person aggrieved shall give to the prosecutor or complainant, or to the convicting Justice or one of the convicting Justices, for him, a notice in writing of such appeal, within four days after such conviction or order;

"3. The person aggrieved shall either remain in custody until the holding of the Court to which the appeal is given, or shall enter into a recognizance, with two sufficient sureties, before a Justice or Justices of the Peace, conditioned personally to appear at the said Court, and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded; or if the appeal be against any conviction or order, whereby only a penalty or sum of money is adjudged to be paid, the person aggrieved may (although the order direct imprisonment in default of payment), instead of remaining in custody as aforesaid, or giving such recognizance as aforesaid, deposit with the Justice or Justices convicting or making the order such sum of money as such Justice or Justices deem sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal; and upon such recognizance being given, or such deposit made, the Justice or Justices before whom such recognizance is entered into, or deposit made, shall liberate such person if in custody;

"And the Court to which such appeal is made shall thereupon hear and determine the matter of appeal, and make such order therein, with or without costs to either party, including the costs of the court below, as to the Court seems meet; and, in case of the dismissal of the appeal or the affirmance of the conviction or order, shall order and adjudge the offender to be punished according to the conviction, or the Defendant to pay the amount adjudged by the said order, and to pay such costs as may be awarded; and shall, if necessary, issue process for enforcing the judgment of the court; and in any case where, after any such deposit has been made as aforesaid, the conviction or order is affirmed, the Court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the Defendant; and in any case where, after any such deposit, the conviction or order is quashed, the Court shall order the money to be repaid to the De-

fendant; and the said court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court;

"In every case where any conviction or order is quashed on appeal as aforesaid, the Clerk of the Peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the Clerk of the Peace, or of the proper officer having the custody of the same, be sufficient evidence in all Courts and for all purposes, that the conviction or order has been quashed."

2. Section seventy-one of the said Act is repealed, and the following substitued therefor:

"71. No conviction or order affirmed, or affirmed and amended in appeal, shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant or commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

3. And whereas, in some of the Provinces of Canada, the terms or sittings of the General Sessions of the Peace or other Courts to which under section seventy-six of the said Act, Justices of the Peace are required to make Returns of convictions had before them, may not be held as often as once in every three months; and it is desirable that such Returns should not be made less frequently: Therefore it is further enacted, that the Returns required by the said seventy sixth section of the Act hereinbefore cited shall be made by every Justice of the Peace quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, to the Clerk of the Peace or other proper officer for receiving the some under the said Act, notwithstanding the General or Quarter Sessions of the Peace of the County in which such conviction was had may not be held in the months or at the times aforesaid; and every such Return shall include all convictions and other matters mentioned in the said section seventy-six, and not included in some previous Return, and shall, by the Clerk of the Peace or other proper officer receiving it, be fixed up and published; and a copy thereof shall be transmitted to the Minister of Finance in the manner required by the eighthieth and eighty-first sections of the said Act; and the penalties thereby imposed, and all the other provisions of the said Act, shall hereafter apply to the Returns hereby required and to any offence or neglect committed with respect to the making thereof, as if the periods hereby appointed for making the said Returns had been mentioned in the said Act instead of the periods thereby appointed for the same.

4. The form following shall be substituted for the form of Notice of Appeal against a conviction or order contained in the Schedule to the said Act.

GENERAL FORM OF NOTICE OF APPEAL AGAINST A CONVICTION OR ORDER.

To C. D. of, &c., and ——— (*the names and additions of the parties to whom the notice of appeal is required to be given*).

Take notice, that I, the undersigned A. B., of ———, do intend to enter and prosecute an appeal at the next General Quarter Sessions of the Peace (*or other Court, as the case may be*), to be holden at , in and for the District (*or* County, United Counties, *or as the case may be*) of , against a certain conviction (*or* order) beaoing date on or about the day of instant, and made by (you) C. D., Esquire, (one) of Her Majesty's Justices of the Peace for the said District (*or* County, United Counties, *or as the case may be*) of , whereby the said A. B. was convicted of having or was ordered to pay , (*here state the offence as in the conviction, information, or summons, or the amount adjudged to be paid, as in the order, as correctly as possible*).

Dated this day of , one thousand eight hundred and . A. B.

Memorandum.—*If this notice be given by several Defendants, or by an Attorney, it can easily be adapted.*

SELECTIONS.

NATURALIZATION.

The Royal Commission which reported on the laws of naturalization and allegiance on February 20, 1869, with greater fortune than some Royal Commissions which we could name, is likely to see its labours bear legislative fruit within a reasonable time. The bill introduced by the Lord Chancellor to amend the existing laws on this subject was read a second time in the House of Lords last week. No opposition was offered to the measure, and no real dissent from its principles or even details was expressed. Yet, after all, it is the play without Hamlet. We impute no fault to the bill on this head, but confessedly it abstains from any attempt to deal with the most fundamental point in the whole question—namely, what is to be the test of nationality? Let us see how this matter stands. At common law the place of birth is the only test of allegiance. All persons born within the dominions of the Crown are natural-born British subjects, and all persons born beyond the dominions are aliens. By statute British nationality extends to the second generation, so that the grandchildren of a British subject, wherever they or their fathers were born, are held within the allegiance of the Crown. We need not recapitulate the grounds upon which such a state of the law

requires amendment. It was on all hands agreed that an end must be put to a system which claimed subjects to the Crown *jure soli* and also *jure sanguinis* even to the second generation. Then arose a controversy as to the new rule to be adopted as regards children of aliens born within the dominions of the Crown. On the one side the majority of the Commissoners—namely, Lord Clarendon, Sir R. Phillimore, Sir R. Palmer, Sir Travers Twiss, Sir John Karslake, Mr. W. E. Forster, and Mr. Cardwell—proposed the following rule: 'All persons born within the dominions of the Crown to be British subjects, except children born of alien fathers and registered as aliens.' On the other side Mr. Baron Bramwell, Mr. Bernard, and Mr. Harcourt held that *parentage* not *place*, ought to determine nationality. In short, the majority said: 'Children of aliens born within the dominions of the Crown shall be aliens, with power to claim the rights of British subjects.' Immediately after the publication of the Report, we in our review of the same declared that we considered 'the position of the minority the more logical and the more expedient of the two.' After the lapse of some months the Lord Chief Justice published his admirable treatise on nationality, and he supported with singular force and authority the view taken by the minority of the Royal Commissioners. His Lordship says: 'It seems impossible to doubt that it would be for the common advantage of governments and subjects if a uniform rule were everywhere adopted. But then, what should that rule be? And first, as to nationality of origin. Should descent or place of birth be the determining cause? The nations of Continental Europe have decided in favour of descent. "Almost everywhere," says Dr. Bar, "the nationality of the parent decides, without reference to the place of birth; and this must be acknowledged to be the right rule, seeing that *nationality essentially springs from descent.*" . . . . Descent, therefore, affords the true rule for determining nationality. This being so, it is obvious that, in adapting our law to this principle, there would be the twofold advantage—first, that we should be placing the law on the right foundation; secondly, that we should accomplish the all-important object of bringing it into unison with the law of other countries: a result which cannot otherwise be obtained, inasmuch as it would be at once idle and presumptuous to propose to other nations to adopt a false principie in order to adapt their laws to others.' Such, then, being the state of the controversy at the opening of Parliament, we were a little curious to see in what way Her Majesty's Government proposed to get over the difficulties besetting this cardinal point in the matter. It was rather too much to ask the Lord Chancellor to throw over the Foreign Minister, a Secretary of State, the Vice-President of the Council, the Judge of the Admiralty Court, and three great lawyers. On the other hand the Lord Chief Justice had dealt such a deadly blow at the conclusions of the majority of the Commission, that it was absurd to attempt to revive them. So the Lord Chancellor, with laudable adroitness, cut the Gordian knot by leaving the whole question at large; and so here we have before us a bill to regulate the laws of nationality studiously abstaining from any declaration of the principle upon which nationality is to he based. As Lord Hatherley puts it, "It might have been thought at first that the best step to take in legislation would be to lay down a clear definition of what ought to be held to constitute nationality, and of what constitutes an alien; but the more this is looked into, and the more we see the inconsistency of different countries, the more clearly appears the impossibility of effectually attaining that object by any Act of Parliament; for we should be legislating in a manner which affects to bind those who are resident abroad, and under a totally different jurisdiction, over which we have no control. If any definition of that kind is to be laid down, as I hope it will be, it must be as it appears in the mode pointed out by the Lord Chief Justice and by the Commissioners, viz., by international accord and treaty rather than by legislation.' Without staying to inquire whether this is a perfectly just representation of the argument of the Lord Chief Justice, we may at least rejoice that the Legislature will not be asked to affirm the erroneous dogma advanced by the majority of the Commission, and we may ourselves enjoy the innocent reflection that we hit at the very outset the blot in their Report. We are, however, very far from denying that it is absolutely essential that the nations of Europe and America should come to some general understanding upon the question in order to avoid the conflict of jurisdiction arising out of double nationality. But though such accord is desirable and necessary, yet we hold that the Legislature should have been asked to lend its sanction to the general rule that nationality should spring from descent. This general rule would of course be subject to the exception pointed out by the minority of the Commission, under which a child born and brought up in a foreign country would be enabled to claim citizenship in the country of his birth, and to the further exception that the descendant of a foreigner in the second generation should be presumed to be a citizen of the country of his birth, with power to reclaim alienage. But, as is clearly explained by the Lord Chief Justice, these exceptions must be affirmed by the harmonious voice of civilised nations, or at least should only exist by way of reciprocity. But whether the exceptions are to be allowed or not, yet his Lordship, as we understand him, would establish and hold to the primary rule of nationality by descent, and we are very strongly of opinion that this is the true doctrine.

Passing now from what is not in the bill to what is in the bill, we find first certain enactments relieving aliens from existing disabili-

ties. Under these clauses an alien may acquire, hold, and dispose of real and personal property of every description, and title may be derived through him as effectually as if he were a natural-born British subject. This provision is not to affect any existing right, nor is to confer political rights or qualify for any franchise. Next follows a section giving power to naturalized aliens to divest themselves of their naturalization as British subjects, and to recover their status as aliens, in all cases where Her Majesty has made a convention with a foreign state enabling its citizens on naturalization as British subjects to divest themselves of their original allegiance. The fourth section, probably *consensu omnium*, abolishes juries *de medietate linguæ*. Then follows a section declaring that British subjects who have become naturalized in a foreign state shall be deemed to have expatriated themselves, but a right to return to the allegiance of the Crown within two years after the passing of the Act is reserved to all such persons. This section, if carried, will annihilate the time honoured maxim, *Nemo potest exuere patriam*, and destroy the allegiance to the Crown of some six or seven millions of persons; and yet here again we do not anticipate even the whisper of an objection. We have fought a costly war, had many a bitter quarrel, and consumed an absurd amount of valuable time and labour either in inflaming or quenching the disputes which have arisen from the old law. Its retention has, in fact, become impossible, and we have only endured its existence of late years by a studious disregard of all its practical effects.

The bill then proceeds to deal with naturalization of aliens as British subjects. At present, under 7 & 8 Vict. c. 66, the Secretary of State grants certificates of naturalization upon compliance with certain regulations issued from the Home office on August 1, 1847. On obtaining his certificate and taking the oath of allegiance, the party usually acquires all the rights of a natural-born British subject, except those of becoming a member of the Privy Council or of Parliament. These certificates were in 1851 so far limited that the rights of the holder were suspended while he was without the dominions of the Crown. The granting of the certificate is purely a matter of discretion with the Secretary of State. Under the new bill, an alien, to obtain naturalization, must have resided for five years in the United Kingdom, or have served under the Crown for five years, and must intend either to reside in the United Kingdom or to serve under the Crown. Application is to be made to the Secretary of State, whose decision is to be final, and who is not bound to assign any reason for his decision. The position of an alien so naturalized is thus defined:—

An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, and which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

The said Secretary of State may in manner aforesaid grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.

An alien who has been naturalized previously to the passing of this Act may apply to the Secretary of State for a certificate of naturalization under this Act, and it shall be lawful for the said Secretary of State to grant such certificate to such naturalized alien upon the same terms, and subject to the same conditions, in and upon which such certificate might have been granted if such alien had not been previously naturalized in the United Kingdom.

There are also provisions enabling an expatriated British subject to recover his nationality under a certificate from the Secretary of State, and power is reserved for the cancellation of such certificates as well as certificates of naturalization. All the propositions upon this portion of the subject are in strict conformity with those advanced in the Report of the Royal Commission, and seem to be equally consistent with the liberal spirit of the age and the due preservation of the safety and dignity of the State.

The national status of women and children is thus proposed to be defined in the bill, and we need only note that the clauses containing these definitions seem to be in harmony both with the report and with the opinions advanced by the Lord Chief Justice.

1. A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.

2. A widow being a natural-born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien, and may as such at any time during widowhood obtain a certificate of re-admission to British nationality in manner provided by this Act.

3. Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject.

4. Where the father, or the mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents.

5. Where the father or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject.

The bill proposes to retain to the Crown the right to grant letters of denization. It further declares that nothing in the Act shall qualify an alien to be the owner of a British ship. On this last point we may make an observation. The matter, in view of the costly and at times embarrassing protection which the Crown is compelled to afford to British subjects, is one deserving much consideration; and, strangely enough, the Report of the Commission is silent thereon. By section 18 of the Merchant Shipping Act, persons made denizens or naturalized can only be owners of British shipping provided that, during the whole period of their being so, they are, and continue to be, resident in some place within Her Majesty's dominions; or, if not so resident, members of a British factory or partners in a house actually carrying on business in the United Kingdom or some other place within Her Majesty's dominions, and have taken the oath of allegiance. The Lord Chief Justice seemed to be of opinion that this proviso furnishes sufficient security without denization or naturalization, but suggests that a license from the Board of Trade might also be insisted on as further security. On the whole the proposition of the bill seems to be the safer one; but perhaps the above section of the Merchant Shipping Act might be repealed, having regard to the strict conditions upon which naturalization is in future to be obtained and retained.—*Law Journal.*

THE POWER OF ONE PARTNER TO BIND THE FIRM BY SEALED INSTRUMENT.

That one partner cannot bind his co-partners by any instrument under seal, is a general rule firmly established, and we believe not questioned by any decision, either in England or America. The leading case is *Harrison* v. *Jackson*, 7 Term Rep. 207, decided by the Court of King's Bench, in 1797. In delivering the opinion of the court, Lord Kenyon, C. J., said: "The power of binding each other by deed, is now, for the first time insisted on. * * * Then it was said, if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed; but I deny that consequence just as positively as the former; for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world; if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners."

The same point had already been decided in Pennsylvania, thirteen years earlier, in *Gerard* v. *Basse et al.*, 1 Dallas, 119. In that case one partner had executed a bond and warrant to confess judgment, to which there was one seal, and the signature "John A. Soyer, for Basse & Soyer." Judgment was entered on the bond against both partners, and the court held it good only as to the one signing, and gave the plaintiff leave to strike out the name of the other. In delivering the opinion of the court, Shippen, President, said: "there can be no doubt that in the course of trade, the act of one partner is the act of both. There is virtual authority for that purpose, mutually given by entering into partnership, and in everything that relates to their usual dealings each must be considered as the attorney of the other. But this principle cannot be extended further to embrace objects out of the course of trade. *It does not authorize one to execute a deed for the other;* this does not result from their connection as partners; and there is not a single instance in the books which can countenance such an implication."

The principle thus laid down in these two cases has been very rigidly adhered to in England, but in the United States there has always been more or less disposition to limit its generality, and though, as a general rule, it has not been shaken, yet several important exceptions may now be considered as firmly established in most of the states. Thus in *Hart* v. *Wither*, 1 Penn. Rep. 285, though the Supreme Court of Pennsylvania decided that the other partners were not bound by the deed, nothwithstanding it had been given in a transaction in the course of business of the firm, and the benefit had been received by them, yet Huston, J., dissented, and stated his reasons so briefly and pointedly, that they are well worth reproducing in his own language. "The grounds on which one partner is not permitted to bind the other by deed, in England do not exist, or at least, all of them do not exist here. They are: 1st. That the consideration of a deed cannot be inquired into—here it can. 2nd. That a bond will bind the lands of any partner who has lands, after his death—here a common note, nay account, is recovered after the death of the debtor out of land. It is admitted, even there, that one partner may bind another by bond, sealed in his presence, although with but one seal. This must be solely because his assent is clearly proved by his being present and agreeing, not dissenting; now I cannot see why assent clearly proved in one way is not as effectual as

assent clearly proved in another. Here, the offer was to prove that each of the partners, who were iron masters, and had lands in partnership, as well as chattles, were in the constant habit of making contracts under seal, which were ratified by the others, and the benefits enjoyed by them—that this contract, on the face of it for wood, was for wood for their iron works, and was actually used at them and the benefit enjoyed by them all. I would then have permitted this to go the jury, and if they found a clear assent either before or after, I would hold them bound. One partner is often bound in equity, differently from what he is at law, because he has received the benefit: *Lang* v. *Keppele*, 1 Bin. 123. I would confine the power to partnership transactions, and to property which came into partnership, and was enjoyed by them under a contract which they knew was made by one of the firm."

Subsequent cases, not only in Pennsylvania but in most of the other states, have established the law in substantial conformity with the principles of Judge Huston's opinion. The leading cases on this point, are *Gram* v. *Seton*, 1 Hall, 262, and *Cady* v. *Shepherd*, 11 Pickering, 400. In the former case the Superior Court of New York City, determined that one partner cannot make a sealed instrument, even though it be necessary in the usual course of business of the firm, unless authorized by the other partners, but authority need not be given expressly or under seal, but may be implied from the nature of the business or the conduct of the partners. The instrument sued on in that case was a charter party, but an elaborate opinion was given by Jones, C. J., covering the whole class of sealed instruments. In the other case, *Cady* v. *Shepherd*, the Supreme Court of Massachusetts held, that the instrument would be valid and bind the firm, if previously authorized or subsequently ratified by them, and that such authority or ratification may be by parol. It may now be taken as settled law in most of the states, that either previous authority to a partner or subsequent ratification, will make his deed valid to bind the firm, and that such authority or ratification may be by parol: *Fichthorn* v. *Boyer*, 5 Watts. 159; *Bond* v. *Aitkin*, 6 W. & S., 165 (overruling *Hart* v. *Withers*, 1 Penn. 285, and adopting the reasoning of Huston, J., already quoted); *Mackay* v. *Bloodgood*, 9 Johns. 285; *Smith* v. *Kerr*, 3 Comst, 144; *Swan* v. *Stedman*, 4 Met. 548; *Pike* v. *Bacon*, 8 Shepl., 280; *Fleming* v. *Dunbar*, 2 Hill, S. C., 532; *Fant* v. *West*, 10 Rich. Law, 149; *Drumright* v. *Philpot*, 16 Ga. 424; *Grady* v. *Robinson*, 28 Ala 289; *Gwin* v. *Rooker*, 24 Mo. 290; *Price* v. *Alexander*, 2 Greene, Iowa, 427; *Haynes* v. *Seachrest*, 13 Iowa, 455; *Henderson* v. *Barbee*, 6 Blackf., 26; *Day* v. *Lafferty*, 4 Pike, 450; *McDonald* v. *Eggleston*, 26 Vt., 154; *Remington* v. *Cummings*, 5 Wis., 138; *Wilson* v. *Hunter*, 14 Wis., 683; *Shirley* v. *Fearne*, 33 Mi., 653; *Fox* v. *Norton*, 9 Mich. 207; *Charman* v. *McLane*, 1 Or., 339; *Lowry* v. *Drew*, 18 Tex. 786.

In a few of the states, however, it would seem that the strict technical reasoning of the English cases has prevailed, and it is held that to make the deed good there must be express authority (or ratification) *under seal: Little* v. *Hazzard*, 5 Harrington, 291; *Turbeville* v. *Ryan*, 1 Humphreys, 113; *Napier* v. *Catron*, 2 Hump. 534. In Kentucky the question hardly seems settled. The early cases of *Trimble* v. *Coons*, 2 A. K. Mars, 275, and *Cummings* v. *Carsily*, 5 B. Mon., 74, held that the authority must be under seal, but the latter case of *Ely* v. *Hair*, 16 B. Mon. 230, goes upon the ground that parol authority or ratification will be sufficient, but does not notice or expressly overrule the previous decisions.

Trimble v. *Coons*, *Peirson* v. *Carter*, 3 Murphy, 321, and a few other of the earlier American cases, appear to sanction the English rule (founded on the ancient decisions, that the same piece of wax might serve for the seals of several obligors), that if the deed was sealed by one in the *actual presence* of the other, it would bind both, thus making a most singular confusion of the authority itself, and the evidence by which it is proved, the foundation of an unsubstantial distinction effectually disposed of by a few words in the opinion of Huston, J., in *Hart* v. *Withers*, already quoted This distinction is now, however, abandoned in most of the American cases. In *Modisett* v. *Lindley*, 2 Blackf. 1 19, it is expressly held that presence is merely evidence of consent, for there the partner, though present, not having knowledge of the act, was held not bound. But in *Gardner* v. *Gardner*, 5 Cush. 483, it is held that signing by one person (whether partner or not) for another *in his presence*, and by his express direction, is a good signing by the latter; the opinion of Shaw, C. J., though very brief, and apparently not much considered, appearing to sustain the soundness of the distinction between an act done in or out of the presence of the party sought to be charged. In *Lambden* v. *Sharp*, 9 Humphreys, 224, it was held that where there are more signatures than seals, the court will presume that several of the parties adopted the same seal, but this presumption may be rebutted by evidence, and it will then be a question for the jury, whether the instrument is sealed by all. And if the signature be in the firm name only, it will be presumed to be the several signature and seal of all the partners, but open to rebuttal by plea and evidence as in other cases. To the same effect are *Davis* v. *Burton*, 3 Scam., 41, and *Hatch* v. *Crawford*, 2 Porter (Ala.), 54.

In all the foregoing cases it is to be borne in mind that the instrument must be made in the firm name, and purport to be the act of the firm. For if the partner though authorized to execute a deed in the partnership name, does in fact make it in his own name merely, it will bind himself only, and will moreover

merge the firm debt, if the latter be on a simple contract, so as to discharge the other partners: *United States* v. *Ashley*. 3 Wash. C. C., 508. And the same effect will follow according to the authority of some cases, if the partner signing the firm name is not authorized to do so. In such case the suit should be against the party signing as on his individual obligation: *Clement* v. *Brush*, 3 Johns. Cas. 180; *Button* v. *Hampson*, Wright (Ohio), 93; *Nannely* v. *Doherty*, 1 Yerger, 26; *Waugh* v. *Carriger*, Id., 31; *Morris* v. *Jones*, 4 Harring. 428. And if the bond be declared on against both as a joint obligation, no recovery can be had even against the one who signed: *Lucas* v. *Sanders*, 1 McMullan, 311. In an action by a firm, however, on a sealed instrument, the defendant cannot plead that it was executed by one partner only, for the suit is a ratification by all who are joined in it: *Dodge* v. *McKay*, 4 Ala. 346.

The doctrine that a bond in the firm name by a partner not authorized to make it, merges a simple contract debt of the firm and substitutes the sealed obligation of the partner signing, has not, however, commanded universal assent. In *Doniphan* v. *Gill*, 1 B. Mon. 199, it was expressly rejected, the court holding that there was no merger where it appeared on the face of the instrument that there was no such intention in the minds of the parties at the time of execution. To the same effect, apparently, are *Fronebarger* v. *Henry*, 6 Jones, Law, 548, and *Despatch Line* v. *Bellamy Man. Co.*, 12 N. H. 235.

All of the foregoing cases, moreover, assume that the transaction in which the bond is made is one arising in the due course of the partnership business. Otherwise the partner is on the same footing with any stranger, and to validate his act it must appear to have been expressly authorized under seal. Thus, in *Ruffner* v. *McConnel*, 17 Ills., 212, it was held that one partner, even though expressly authorized by parol, cannot convey land or make a contract specifically enforcible against the others. See also *Bewly* v. *Innis*, 5 Harris, 485, and *Snyder* v. *May*, 7 Harris, 235. For the same reason bonds of submission to arbitration, and warrants to confess judgment, have been uniformly held invalid, unless authorized by sealed instrument; they are not in the regular course of business, and therefore not partnership transactions: *Karthaus* v. *Ferrer*, 1 Pet., 222; *Crane* v. *French*, 1 Wend., 311; *Armstrong* v. *Robinson*, 5 G. & J., 412; *Barlow* v. *Reno*, 1 Blackf., 252; *Sloo* v. *State Bank*, 1 Scam. 428; *Mills* v. *Dickson*, 1 Richards, 487. But if an award be made, and the money received by both, or by one in the firm name, the acceptance will be good either as a release or as accord and satisfaction: *Buchanan* v. *Curry*, 19 Johns. 137; *Lee* v. *Onsott*, 1 Pike, 206.

Having thus considered how one partner may bind his co-partners by sealed instrument *with their consent*, and how that consent may be proved, we come now to how he may bind them *without their consent*. And first, he may *release a debt* by sealed instrument. This is well settled both in England and the United States: *Bowen* v. *Marquand*, 17 Johns, 58; *Smith* v. *Stone*, 4 Gill & J. 310; *Morse* v. *Bellows*, 7 N. H., 549; and he may authorize an agent, under seal, to release: *Wells* v. *Evans*, 20 Wend., 251; S. C., 22 Wend., 324. So he may sign a composition-deed with a debtor of the firm: *Beach* v. *Ollendorf*, 1 Hilton, 41. The reason that a release is good is stated by Kent, C. J., in *Pierson* v. *Hooker*, 3 Johns, 68, to be that the deed is good as to the partner signing, and a release by one of joint creditors is good as to all, citing *Ruddock's case*, 6 Co., 25. Perhaps an equally satisafctory reason is, that the rule itself which makes the deed of one partner in the partnership name bad, extends only to those cases in which the effect of the deed would be to charge the partners with a new liability.

A second class of cases, where a partner may bind his co-partners under seal without their consent, express or implied, was marked out by Chief Justice Marshall at an early day. In *Anderson* v. *Tompkins*, 1 Brock, 456, he said: "The principle of *Harrison* v. *Jackson*, is settled. But I cannot admit its application in a case where the property may be transferred by delivery under a parol contract. But I cannot admit that a sale so consummated is annulled by the circumstance that it is attested by a deed." The principle thus enunciated has always been favorably regarded by the American courts, and it is now well settled in most of the states, that if the act done would have been valid without a seal, the addition of the seal does not vitiate it: *Tapley* v. *Butterfield*, 1 Met. (Mass.), 515; *Milton* v. *Mosher*. 7 Metc., 244, *Everitt* v. *Strong*, 5 Hill (N. Y.), 163; *Robinson* v. *Crowder*, 4 McCord, 537; *Dubois' Appeals*, 2 Wright (Penn.), 236, *Deckard* v. *Case*, 5 Watts, 22; *McCullough* v. *Sommerville*, 8 Leigh, 415; *Forkner* v. *Stuart*, 6 Grattan, 197; *Lucas* v. *Bank of Darien*, 2 Stew., 280; *Human* v. *Cuniffe*, 32 Mo., 316. In Kentucky, however, and perhaps in the other states where the strict ruling of the English cases is followed, this exception is not allowed. Thus in *Montgomery* v. *Boone*, 2 B. Monr., 244, Robertson, C. J., says: "The principle thus settled as to *deeds*, seems to have been recognized as applicable to all contracts under seal to pay money, even though a seal was not essential to the obligations of such contract. This may have been a perversion or extension of the principle as to *deeds* which was probably applicable at first only to such writings as would be ineffectual without a seal, and not to such as might be as binding and effectual without as with a seal. All judicial questions, however, has been concluded on this subject also by this Court."

In conclusion, we may regard the American decisions as now pretty well harmonized on the general principle, that a sealed instrument,

executed by one partner only, in the firm name, is not valid to create a new liability on the part of the other partners, unless such liability is one which the partner could have created without seal, or unless his act was previously authorized or subsequently ratified by the other partners; and that such authority or ratification may be by parol, and may be inferred by a jury from the acts of the parties or the course of the business.—J. M. L.—*The American Law Register.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

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

Smith v. Smith et al.

Costs—Certificate—Discretion of arbitrator.

A case was referred to arbitration, the costs of the action to abide the event of the award, the costs of reference and award to be in the discretion of the arbitrator, who was to have all the powers as to amendment and *otherwise* of a judge at Nisi Prius. The award ordered the defendants to pay the costs of the reference and award, and the arbitrator certified "to prevent the defendants deducting costs."

Held, that the order conferred upon the arbitrator the power of certifying for costs, which impliedly took away the jurisdiction from a Judge in Chambers.

[Chambers, March 28, 1870—*Mr. Dalton.*]

This was an application made to set aside an *ex parte* order for Superior Court costs made by Mr. Dalton.

The action was referred to an arbitrator under the Common Law Procedure Act by the learned Chief Justice of the Common Pleas, sitting in Chambers; and by the order the costs of the action were to abide the event of the award, and the costs of the reference and award were to be in the discretion of the arbitrator, who was to direct by whom, to whom, and in what manner the same should be paid. And it was ordered that the arbitrator should have all the powers as to amendment of pleadings, and otherwise, of a judge sitting at Nisi Prius.

The award was that, after deducting the defendants' set-off, the arbitrator found them indebted upon the cause of action referred, in a balance of $90 44; and as to costs, that the defendants should pay the plaintiff his costs of the reference and award; and the award concluded thus: "in the exercise of the power of a judge sitting at Nisi Prius, conferred upon me by the said order, I do hereby certify to prevent the defendant's deducting costs."

Mr. Reeve (*Richards & Smith*) for plaintiff.

J. K. Kerr for defendants.

Mr. Dalton—The case is one in which from the nature of the claim and the amount recovered a certificate should be given, unless the facts take away jurisdiction.

The words of the power conferring upon the arbitrator "*all the powers*" as to amendment of pleadings and *otherwise* of a judge sitting at Nisi Prius, must be held to convey the power of certifying for costs. It cannot be supposed that the learned Chief Justice by these general words of his order, did not mean to include so prominent, and beneficial a power, so frequently discussed, as that of certifying, and I think the arbitrator had that power. The arbitrator himself evidently thought so, and I agree with him. He has by his award certified under his power.

Several English cases to which I have been referred do not apply to the particular circumstances here. The cases which do apply are, *Calder* v. *Gilbert*, 3 P. R. 127, and the cases cited in that case.

In *Calder* v. *Gilbert* the arbitrator having the power did not certify, but it does not follow from that that he had not come to a decision on the point, and it was held that the power of certifying having been delegated to him, was impliedly taken away from a judge. Here the arbitrator has certified.

It would surely be an absurd conflict of authority that I should adjudicate upon a question which the arbitrator having full authority has already determined.

If these facts had been known to me I should not have made the order for Superior Court costs, and I now discharge it.

Grover & Baker Sewing Machine Company v. Webster.

Commission to examine witness—Evidence Act.

An order for a commission to examine a party to a cause will not be granted, notwithstanding 33 Vic. cap. 13, unless the applicant shews some great and pressing inconvenience preventing his personal attendance.

[Chambers, March 30, 1870—*Mr. Dalton.*]

The plaintiffs obtained a summons calling on the defendant to shew cause why a commission should not be ordered to issue for the examination of one of the plaintiffs on their behalf.

Alex. McDonell shewed cause.

Mr Dalton—The words of our statute authorizing the issue of a commission are permissive: the court or judge "may" order.

Our evidence act, 33 Vic. cap. 13, makes a party to a cause a good witness, either upon *viva voce* examination or depositions, and the cases in England are clear that a commission may, under proper circumstances, issue for the examination of a party to the cause on his own behalf.

Such a means of taking evidence is always unsatisfactory in comparison with an examination in open court at the trial, and the objection applies with far greater force to a party than to an ordinary witness. The affidavit of the plaintiff's attorney here does not disclose the fact that the witnesses are plaintiffs; that comes from the other side, and no particular reason is shown why these plaintiffs, sought to be examined, cannot personally attend.

The expense of two witnesses from Boston one would suppose not greater than that of a commission.

In the ordinary case of examining a witness unconnected with the suit, residing in a foreign country, we know that parties have no means of compelling personal attendance, and a written examination must suffice, because it is all that can be had.

But for all that appears these parties can come. They are to testify in their own interest and have control of the cause. Then why should they not come? It is very important for the ends of justice that witnesses should be personally examined before the jury; and this applies with much greater force, as I have said, to parties to the cause establishing by their evidence their own case. Preëminently in their case there should be cross-examination before the jury, where it is possible.

I think the plaintiffs, to entitle themselves to this commission, should have shown some great and pressing inconvenience preventing their personal attendance; but they shew nothing but the fact that they reside abroad. *Castelli* v. *Groome*, 18 Q. B. 490, completely justifies my dismissing this summons. Costs to be costs in the cause to the defendant.

Summons discharged.

See Ch. Arch. 12th ed. 330, 337; *Fischer* v. *Hahn*, 32 L. J. C. P. 209; *Castelli* v. *Groom*, 18 Q. B. 490, 21 L. J. Q. B. 308.

Lewis v. Teale et al.

Replevin Act—C. L. P. Act—Pleading several matters—Interlocutory judgment.

The provisions of the Common Law Procedure Act as to pleading several matters apply to replevin.

A plea of the general issue by statute and a plea denying the property of the plaintiff in the goods cannot be pleaded together without leave.

An interlocutory judgment is well signed in replevin by following the directions given in Rule 26 H. T., 13 Vic.

[Chambers, April 4, 1870—*Mr. Dalton.*]

Replevin by the colonel of a volunteer regiment against two of his captains for some band instruments.

The defendant Macdonald pleaded, without leave obtained: 1. *Non cepit*, by statute; 2. *Non detinet*, by statute; 3. Goods not the plaintiff's; and the defendant Teale pleaded in addition, also without leave, as a fourth plea: No notice of action.

The plaintiff thereupon signed interlocutory judgment as on default of plea by filing in the proper office a copy of the declaration, with the words "Interlocutory judgment signed this eighteenth day of March, A.D. 1870," in the margin, and signed by the Deputy Clerk of the Crown.

J. A. Boyd, for the defendants, applied to set aside the interlocutory judgment with costs, on the grounds—1. That the pleas were properly pleaded under the Replevin Act. sec. 15, no leave being necessary. 2. That, even if leave necessary, plaintiff should have moved to set the pleas aside, and should not have signed judgment. 3. That as to the defendant Macdonald, the pleas are allowable without an order by the 112th sec. of C. L. P. Act. 4. That the judgment is irregular in form, it not appearing to be a judgment of *nil dicit*, and in not praying for assessment and return of the goods.

The following authorities were cited on the argument: C. L. P. Act, sec. 113; Con Stat. U. C. cap. 29, secs. 15, 16; 23 Vic. cap. 45, sec. 9; *Wakefield* v. *Bruce*, 5 Prac. R. 77; *Stewart* v. *Lynar*, 1 Ir. L. R. 193; *Reid et al* v. *New*, 4 Prac. Rep. 25; *O'Donohoe* v. *Maguire*, 1 Prac. Rep. 131; *Johnstone* v. *Johnstone*, 8 U. C. L. J. 46; *Leeson* v. *Higgins*, 4 Prac. Rep. 340; *Chadsey* v. *Ransom*, 17 U. C. C. P. 629.

Mr. Dalton—The first question is in substance whether the provisions of the Common Law Procedure Act apply to pleadings in the action of replevin.

If the 15th section of the Replevin Act stood alone, no doubt the defendant might plead several pleas without leave of the court, but the evidence is, to my mind, very strong that the provisions of the Common Law Procedure Act as to pleadings are intended to apply to replevin. It was passed after the Replevin Act, and the expressions in the 96th, 113th and 114th sections shew such intention. The judges thought so, for in Rule No 2 of the rules passed in pursuance of the Common Law Procedure Act, avowries and cognizances are put upon the footing of other pleadings.

Mr. Boyd has referred me to a decision of the late chief justice of the Queen's Bench—*Leeson* v. *Higgins*, 4 Prac. Rep. 340—as to the Ejectment Act, which would from analogy bear upon the present question; but, on the other hand, it has been decided by the court of Common Pleas, in *Chadsey* v. *Ransom*, *ante*, that the 222nd section of this act does apply to proceedings in ejectment, and the judgment in that case justified the act of the judge in allowing at *Nisi Prius* a new claim of title to be added for the plaintiff.

All considerations of practical convenience are against the construction Mr. Boyd contends for.

Then the proper mode of taking advantage of a breach of the rule is to sign judgment: section 113.

As to the pleas of defendant Macdonald, I think they are not within the 112th section. The general issue by statute has a very different meaning from any plea mentioned in that clause

The form of interlocutory judgment allowed by Rule 26 of H. T. 13 Vic. I have always understood to apply to every case where the judgment to be signed was interlocutory.

As to the merits, the judgment should be set aside on payment of costs.

The Union Permanent Building and Savings Society v. The Citizens Insurance and Investment Co.

Service on foreign corporation—Contract.

Service of process was effected on an insurance company whose head office was in Montreal, out of the jurisdiction, by serving the manager there. The insurance, however, was effected, and the policy delivered in Toronto, though signed and sealed by the Company in Montreal. *Held*, that the service was good.

[Chambers, May 11, 1870.]

J. F. Smith obtained a summons on behalf of defendants calling on the plaintiffs to show cause why the writ of summons and the service thereof on the manager of the defendants, at the head office in Montreal, should not be set aside on the grounds, 1, that the defendants are a foreign corporation, domiciled out of the jurisdiction: 2, that the cause of action arose out of the jurisdiction; and 3, that the policy on which the

action was founded was signed and sealed in Montreal, out of the jurisdiction.

W. M. Clark, for the plaintiffs, showed cause, and filed an affidavit setting forth, that the defendants were incorporated by acts of the Province of Canada, and were authorised to do business throughout the whole of the then Province, and to open agencies or branch offices for the transaction of their business; that the application for insurance was made, and the premium therefor paid to the defendants' agent in Toronto, and that the policy was delivered to the plaintiffs in Toronto by the agent of the defendants.

Mr. Dalton—The cases in which a foreign defendant may be served out of the jurisdiction are, 1, where the action is brought for a cause of action which arose in Ontario—which would mean in this case both contract and breach—or, 2, for breach of a contract made in Ontario—and I think this policy of Insurance was so made. In *Chapman* v. *Cottrell*, 3 Hurl. & Colt. 865, a promissory note made, as far as writing and signing could make it without delivery—in Palermo—was sent by the maker to his own agent in London and there delivered to the payee, that was under this statute held to be a contract made in England. Baron Martin in that case puts the case of a deed. He says: "Suppose a deed signed and sealed, and sent to an agent to deliver, but before he does so the delivery is revoked, that is no valid deed."

I shall, therefore, discharge the summons with costs.

Summons discharged with costs.

ENGLISH REPORTS.

COMMON PLEAS.

Sykes and Others, Executors, v. Sykes and Another.

Executor de son tort—*Agent*—Fi. fa.

The executor and executrix of S. appointed C., the husband of the executrix, to continue to carry on the business of S. before probate. A judgment was entered up against C. as executor of S.

Held, that the sheriff could not seize goods of S. in the possession of C. as manager for the executors.

[18 W. R. 551.]

This was an action by Albert Sykes and Hannah Shaw, executor and executrix of Ellen Sykes, against the sheriff of the West Riding of Yorkshire, and against Love, an execution creditor of W. H. Shaw, who had entered up judgment against W. H. Shaw and issued execution against W. H. Shaw as executor of Ellen Sykes. The declaration was for trover and trespass. The defendants severally pleaded the general issue and a justification under a writ of *fi. fa.* on a judgment entered up against W. H. Shaw as executor of Ellen Sykes.

It appeared at the trial that Ellen Sykes carried on the business of manufacturing chemist in the West Riding of Yorkshire, and that W. H. Shaw managed the business for her. She died in 1868 and by her will appointed Albert Sykes, resident in Scotland, executor, and Hannah, the wife of W. H. Shaw, executrix. W. H. Shaw continued to manage the business. In March, 1869, Love obtained judgment by default against W. H. Shaw as executor of Ellen Sykes on a bill of exchange. A writ of *fieri facias* was sued out and delivered to the sheriff of the West Riding of Yorkshire, against W. H. Shaw as executor of Ellen Sykes. The officer, in execution of this writ, entered the chemical manufactory occupied by W. H. Shaw, seized and sold goods sufficient to satisfy the judgment. After the seizure and sale of the goods, Albert Sykes and Hannah Shaw proved the will as executor and executrix of Ellen Sykes. At the trial of the present action there was conflicting testimony as to whether W. H. Shaw was managing the business as manager and servant of the executor and executrix, or as executor *de son tort*. The jury found that the goods were in his hands as agent of the executors. A verdict was entered against the sheriff for £100, leave being reserved to enter a verdict or nonsuit on the ground that the sheriff was justified under the *fi. fa.* in seizing the goods and a verdict was entered for the defendant Love, the execution debtor.

Field, Q C., having obtained a rule accordingly for the sheriff, and *Kemplay* having obtained a rule calling on the defendant Love to shew cause why the verdict found for him should not be set aside and a new trial had, on the ground of misdirection of the learned judge in ruling that there was no evidence to fix Love with liability for the seizure of the goods by the sheriff

Kemplay shewed cause against the rule obtained by the sheriff—The jury have found that the executors continued the business. The executors, although they did not prove the will till after the seizure, yet their title relates back to the death of the testator. They could appoint an agent. He cited Williams' Executors, 6th ed. 247, 291. The executors have the same power to deal with the property before probate as subsequent to it: 5 Coke, 28. An executor may, before probate, appoint an agent: Williams on Executors, 251, 253; *Paull* v. *Simpson*, 9 Q. B 3 5; *Hall* v. *Elliott*, 3 Peake N. P C. 119; *Hooper* v. *Summersett*, Whitwick, 16. The other side are precluded from saying that a man cannot be his wife's servant; *Sharland* v. *Mildon*, 5 Hare, 469. [Bovill, C. J.—In *Padgett* v. *Priest* there was no rightful executor.] *Cottle* v. *Aldrich*, 4 M. & S. 175, is the nearest case to this; but the jury found the other way: *Hill* v. *Curtis*, 14 W R. 125, 35 L. J. Ch. 183.

Field, Q C., and *Forbes*, in support of the rule.—The only evidence of Shaw being the agent to the executors is the statement of the Scotch executor that he was so: *Webster* v. *Webster*, 10 Ves. 93 [Bovill, C.J.—You must make out that Shaw, who intermeddles with the estate as agent of the executors is a *tort-feasor*.] The goods were in Shaw's possession. *Sharland* v. *Mildon*, 5 Hare, 469, is clearly an authority in my favor.

Bovill, C. J.—The judgment in the original action was against Shaw as executor of Ellen Sykes. The writ of execution directed the sheriff to levy goods of Ellen Shaw in his hands as executor. The sheriff accordingly seized and sold the goods in question. There is no doubt

that they were the goods of Ellen Sykes, and that they were in Shaw's possession. The question is if they were in his hands to be administered by him, as executor, at the time of seizure. The executors, who had been appointed by the will, had acted, but they did not prove the will until after the goods were levied under the writ of execution. The question left to the jury was whether the goods were in the hands of Shaw to be administered by him as executor *de son tort*, or whether they were in his hands as the agent of the plaintiffs in the present action, the executors named in the will. There was evidence on both sides, and the jury found that the goods were in Shaw's possession as the plaintiffs' agent. We must take their verdict as conclusive in these facts. This was the proper question to be left to the jury, and is the same question as was left to the jury in *Cottle* v. *Aldrich*, for the question there was whether the evidence showed that the defendant was acting merely as the agent of one of the executors who had not proved the will. The jury found that he voluntarily interfered as executor without authority. Notwithstanding the finding of the jury in the present case, it has been argued that in law, as Shaw had possession of the goods, he is executor *de son tort*, and must be treated as such. The questions, therefore, arise if Shaw can be treated as executor *de son tort*, and if the goods were in his possession in that character. Now, in point of fact, the jury have decided that Shaw acted as agent for the executors named in the will, and said that the goods were in his possession in that capacity. If Shaw had brought the present action it would not have been competent for him to deny that he was executor, because he suffered judgment to be recovered against him in that character. No doubt, in the former action, if he dealt with the goods of the deceased without any authority, and goods of the deceased are in his possession, the defendant was right in seizing them. But that is not the case here. Are the executors before probate wrong-doers in dealing with the goods? For if so, Shaw, their agent, is also a wrong-doer, and is consequently executor *de son tort*, and the sheriff acted rightly in seizing the goods. This depends on what the position is of executors before they have obtained probate. Executors obtain their title from the will itself. Whereas administrators only obtain their title from the Ordinary.

Executors have power to deal with the property before probate as well as subsequent to it, their title is just as good, they have nearly the same powers except in certain matters regarding suits when probate is required as evidence of their title. If acts done by executors before probate are lawful acts; acts done by their agents are equally lawful. It is equally true, that a person cannot be charged as executor *de son tort* when the will is proved, if he intermeddles with the estate; but that if he intermeddles with the estate before probate, he can be so sued. The reason is apparent: if persons act as executors before probate, they cannot afterwards deny they are so; when an executor is sued before probate it is not stated in the writ that he is executor *de son tort*, he is only estopped from denying at the trial that he is executor, and is called executor *de son tort*. But it does not follow from that that either he or his agents are *tort-feasors*, they are not. If his acts are lawful, his agent's acts are also lawful, if they are acts that might have been done and are authorised by him. If an executor proves a will and employs a person to intermeddle, the agent cannot be treated as an executor *de son tort*. And also if an executor is named in a will, he has a legal title, and can appoint an agent to act for him, and when the agent has so acted he cannot be treated as an executor *de son tort*.

In *Hooper* v. *Summersett* it was assumed that the husband and wife were acting together, and that the husband acted on his own behalf, and not as his wife's agent. If it could have been made out that he was acting as the agent of his wife, the case would have been differently decided, and it appears that is correct by the case of *Cottle* v. *Aldrich*. The question there was whether after the death of J. A., the defendant voluntarily interfered as executor of C. A. without authority, or merely acted as an agent of the executor before probate. From the case of *Hall* v. *Elliott* it appears that a man who possesses himself of the effects of the deceased, under the authority and as agent for the rightful executor, cannot be charged as executor *de son tort*. Where a person intermeddles in an intestate's affairs, and his servant, by his orders, sells goods of the deceased, and pays over the money to him, not only the master would be a *tort feasor* and liable to be sued as executor *de son tort*, but also his servant. That was so decided in the case of *Padgett* v. *Priest and Porter*. The rule, however, is subject to the qualification, stated by the present Lord Chancellor in *Hill* v *Curtis*, that if an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account. In that case, in answer to a bill filed for an account against an executor *de son tort*, the defendant pleaded that he acted as agent of the rightful administratrix, and had subsequently accounted to her for all the assets of the deceased which had come to his hands. The Lord Chancellor said, "Here the agency did exist, supposing the lady acting at that time was acting rightfully. She was acting wrongfully, and therefore, at that period there could be no agency; but the moment she acquired a rightful title the title related back to all her intermediate acts. If so, was he not the agent of the lady, and properly suable only by her? It is not necessary to inquire into what the rule may be as regards a person employed by an administrator before administration, except that if the rule laid down by the Lord Chancellor is correct, *a fortiori*, would the agent of an executor before probate be relieved. The case of *Sharland* v. *Mildon* was the case chiefly relied upon by Mr. Field. There the widow of the deceased person, intending to obtain representation to her husband, began to collect his assets before she had obtained such representation, and employed Hewish to collect the debts owing to the testator. The Vice-Chancellor, Wigram there treated the widow as a *tort-feasor*. But that is not the case here, for here the executors are not proved to have been *tort feasors* at all, for if that had been proved, Shaw would certainly have been liable.

Sharland v. *Mildon* was decided on *Padgett* v. *Priest*, but that was a case of intestacy, and therefore Priest and Porter (the agents of the administrators) were wrongdoers; but here Shaw was appointed manager and agent by the persons named as executors in the will. If there was any analogy between *Sharland* v. *Mildon* and *Padgett* v. *Priest* it was rightly decided. *Sharland* v. *Mildon* is cited by the Lord Chancellor as rightly decided, but he applied the doctrine of trusts in the case of an agent acting for a person before she has obtained administration. The rule must therefore be discharged as far as the sheriff is concerned, and the verdict must stand; for the executors before probate could lawfully appoint an agent to carry on their business.

Montague Smith, J.—Love entered up judgment by default against Shaw, as executor of Ellen Sykes, and then a *fi. fa.* is directed to the sheriff which in terms followed the judgment. The sheriff then seizes and sells the goods in possession of Shaw. There is no doubt that the judgment binds Shaw, and if he had brought the present action against the sheriff he could not have denied that they were his goods or the goods of Ellen Sykes. The present plaintiffs are the executors of Ellen Sykes, and they say that the goods in the possession of Shaw belong to them as her executors, that they are in his possession as their agent, and that they are not in his possesssion as executor of Ellen Sykes.

The question here is, if these goods were in the hands of Shaw as executor of Ellen Sykes, so as to be liable to be taken by the sheriff on a *fi. fa.* issued against him as such executor. Shaw was employed by the plaintiffs to manage the business of Ellen Sykes, and was their agent for that purpose, and this was so found by the jury. It is then said that, notwithstanding that the goods were liable to be seized in execution because probate at that time had not been taken out by the executors, that they could not appoint an agent, and that therefore Shaw was liable to be sued as an executor *de son tort*, and the goods were rightly seized. There is no doubt that he was not in possession of the goods as a *tort-feasor*, but under the authority of the rightful executors; and, unless the mere fact of executors acting before they have obtained probate makes them *tort-feasors*, and therefore makes Shaw executor *de son tort*, the sheriff does not establish his defence to this action. But executors have the same power to act before obtaining probate as subsequently to having obtained it. Probate is only the evidence of their title under the will, and not the title itself. This is clearly shown in this way:—Executors may issue a writ and proceed with their action before they have obtained probate, and it is sufficient if they obtain it before they go to trial. It therefore follows that executors can rightly dispose of property before probate, and that subsequently they can appoint agents for that purpose. This act of theirs cannot be treated as a wrongful act; they were no wrongdoers. Doubts have arisen in cases like the present, and it seems to be thought by some that, as an executor before probate must be sued as an executor *de son tort*, that therefore he has committed a wrongful act. Where an executor named in a will is sued before probate on account of his having intermeddled with the property, he is estopped from denying that he is executor, and I should say that is a more proper term to use than executor *de son tort* in that case would be, executor by estoppel. Then it appears that this misapprehension has arisen from treating an executor *de son tort* as a wrongdoer. When that term is applied to an executor before probate it is a wrong term to use. These goods were not leviable by the sheriff because they were not in Shaw's hands as executor.

Brett, J.—It has been argued that Shaw was to be considered as an executor *de son tort* although he acted only as servant to the executors, because the executors were wrongdoers before probate of the will; and that they must be treated as such until the will is proved. Executors named in a will can never be treated as wrongdoers. Mr. Field was obliged to argue that the question left to the jury in *Cottle* v. *Aldrich*, as to whether the defendant voluntarily interfered as executor of C. A. without authority or acted merely as an agent was wrong. If *Sharland* v. *Mildon* is treated in the same way and the conclusion was arrived at, that Hewish intermeddled with the debts not only as servant to the testator's widow, it is intelligible. Besides that there are reasons why a court of equity should decide that such a person must remain a party to a suit. The rule must therefore be discharged against Love. The rule obtained by the plaintiff was not argued, and was therefore discharged.

Rule discharged.

IRISH REPORTS.

Margaret Leahy (*a minor*), by John Leahy, *her next Friend* v. James Phelan.

Practice—Obtaining extension of time to plead—Taking a step in the cause after notice of irregularity—179th General Order.

Obtaining an extension of time to plead is not a waiver of the defendant's right to move to set aside the plaint for irregularity.

[18 W. R. 584.]

Motion by defendant that the filing of the plaint be set aside as irregular, as no consent in writing by any person to act as next friend of the minor plaintiff had been lodged in the proper office of the court pursuant to the statute.

The plaint in this case was filed on the 18th February, 1870. On the 1st March, 1870, the defendant obtained an order extending the time for pleading, and on the 4th March the time was further extended up to the 8th March.

It was admitted that the filing of the plaint was irregular for want of the proper consent, and the only question was whether this irregularity had been waived by obtaining an extension of time for pleading.

Lyster, in support of the motion.—It may be contended that, as the defendant obtained an extension of time to plead after notice of the irregularity, that he has waived his right to have this irregularity amended under the 179th General Order, 1854. This order is to the effect that no application to set aside proceedings for irregularity shall be allowed if the party applying have

taken a fresh step after knowledge of the irregularity. Obtaining an extension of time to plead is not a "step in the cause," so as to waive defendant's right to set aside the filing of the plaint. There is no exact decision on the point, but the principle is recognised in the rule which has now become settled practice, that obtaining an extension of time to plead is no waiver of the defendant's right to move for security for costs: *Clarke* v. *Riordan*, 9 Ir. C. L. App. 34; *Stewart* v. *Ballance*, 10 Ir C. L App. 1.

Kavanagh, for the plaintiff.—The defendant is now precluded from making the objection. He has taken a fresh step after notice of the irregularity, and the 179th General Order is a bar to this application. The cases cited do not apply. They were not decided on the principle that obtaining an extension of time is a "step in the cause," but on the special nature of the applications. This motion comes too late; the 179th General Order directs that applications of this nature should be made within a reasonable time: *Roche* v *Wilson*, 3 Ir. C. L. 252; *Price* v. *Powell*, 6 Ir. Jur. 277.

Lyster in reply.

Lawson, J.—It has been clearly decided that obtaining an extension of time to plead is no waiver of a defendant's right to obtain security for costs. This case is somewhat different and raises a point which has not yet been decided. I think that obtaining an extension of time to plead should not operate to prevent the defendant from moving to set aside a plaint for irregularity, especially when that irregularity, as in this instance, is a matter of substance. I must, therefore, grant this motion.

Motion granted.

UNITED STATES REPORTS.

Friedman v. Railroad Co.

The dying declaration of the deceased, as to the cause of the accident, is not evidence in an action for negligence.

Opinion by Hare, P. J., July 2, 1870.

This was an action brought by a widow and her children to recover damages for the death of her husband, who was fatally injured by the wheels of a passenger car belonging to the defendants. The plaintiff offered to prove the dying declaration of the deceased, that his death was due to the negligence of the conductor. This evidence was objected to and admitted under an exception. The point is now before us on a motion for a new trial.

A death-bed declaration is a statement made out of court and brought before the jury indirectly through the testimony of witnesses. It is therefore contrary to the rule which forbids hearsay evidence. The reason for this exception has been differently stated. The law, it has been said, presumes that a dying man can have no motive to falsify the truth, and standing in the shadow of another life does not need the sanction of an oath.

If this were the foundation of the doctrine, no declaration made in the immediate view of death could be shut out, and a man might be convicted of theft or arson, on evidence that he had been charged with the offence by some one who was about to leave the world. The authorities, however, seem to agree, that such proof can only be adduced in trials for murder, and to show the cause of the death. It is therefore the nature of the offence, and not the situation of the witness, which justifies the relaxation of the rules of evidence. The fear of detection naturally prompts the murderer to choose an occasion when his victim is alone; if the statements of the latter were not admissible the crime might go unpunished for want of proof. This argument was felt with peculiar force in earlier times when violence was more common than it is at present, and a practice to which necessity seems to have introduced, has grown inveterate through the lapse of time.

It is obvious, that a doctrine which is so strictly limited in criminal cases can hardly apply in civil. Conceding that the statements of a dying man carry as much weight with them as if they were under oath, there are other considerations which should not be overlooked. To render testimony safe it must be subject to cross-examination. It is not enough that the witness desires to speak the truth, there should be an opportunity to sift his statements, and elicit facts and circumstances that may have been overlooked from inadvertence. The suppression of a seemingly immaterial incident may lead to error without an intention to deceive. The deceased is said to have declared in the present instance, that his death was caused by the fault of the conductor, and the jury may have thought that his conclusion was one which they were not at liberty to disregard. If he had been required to state the grounds upon which this opinion was based, it might have appeared that the conductor was free from blame, and that the accident was due to his own negligence. There is another danger that the statements of the dying man will not be faithfully repeated by those who hear them. Their passions or interests may lead them to suppress certain portions of the story, and give undue prominence to others. The authorities afford but little light on a point which is of so much importance that it should be well settled.

Dying declarations have been treated in some instances as admissable under all circumstances and for every purpose: *Clymer* v. *Setler*, 3 Bur. 1244; *Farrund* v. *Shaw*, 2 N. C. Repository, 402; while they have been viewed in others as an exceptional growth of the criminal law which has no place in civil jurisprudence: *Wilson* v. *Howen*, 15 Johnson, 284. In *Fallom's Adm'r.* v. *Ammon*, 1st Grant's Cases, 125, cited at the argument for the plaintiffs, the declarations were admissable on other grounds, and did not require the aid of the principle under consideration. There is seemingly but one decision bearing on the only question which admits of a reasonable doubt; whether such statements can be received to show the cause of the death when it is material to the issue. I refer to the case of *Daily* v. *The New York and New Haven Railroad*, 32 Conn., which is identical with the present, and where the court excluded the evidence. The silence of the reports is significant of the opinion of the profession. If, in the innumerable cases in which actions have been brought to recover damages for fatal accidents, it had been thought possible to introduce the last words of the deceased

as proof of negligence, we should not have been at a loss for a guide in this instance.

It results, from what has been said, that the rule for a new trial must be made absolute. If the point were a doubtful one, we should have preferred to let the record go for review to the court above. When, however, there is a moral certainty that the judgment will be reversed, it is due to the cause of justice, and the best interests of all concerned, that the issue should be tried again while the facts are still fresh in the memory of the witnesses.

Rule absolute.

—*Philadelphia Legal Intelligencer.*

SUPREME COURT.

The Pennsylvania Railroad Co. v. William Kerr.

A warehouse, situated near defendants' track, had been ignited by sparks emitted from a negligently placed locomotive of defendants; the burning warehouse in turn communicated fire to the plaintiff's building, distant some thirty-nine feet, destroying it. *Held:* That the proximate cause of plaintiff's loss was the burning warehouse; that the defendant's negligence was but the remote cause; and that therefore the defendant's were not liable to the plaintiff.

Error to the Common Pleas of Huntingdon County.

Opinion by Thompson, C J. July 8th, 1870.—It has always been a matter of difficulty to judicially determine the precise point at which pecuniary accountability for the consequences of wrongful or injurious acts is to cease. No rule has been sufficiently defined and general as to control in all cases. Yet there is a principle applicable to most cases of injury which amounts to a limitation. It is embodied in the common law maxim, *causa proxima, non remota spectatur*—the immediate and not the remote cause is to be considered: Pars. on Cont., Vol III., p. 198, illustrates the rule aptly by the suppositive case of debtor and creditor, as follows: "A creditor's debtor has failed to meet his engagements to pay him a sum of money, by reason of which, the creditor has failed to meet his engagement, and the latter is thrown into bankruptcy and ruined. The result is plainly traceable to the failure of the former to pay as he agreed. Yet the law only requires him to pay his debt with interest. He is not held for consequences which he had no direct hand in producing and no reason to expect. The immediate cause of the creditor's bankruptcy, was his failure to pay his own debt. The cause of that cause was the failure of the debtor to pay him, but this was a remote cause, being thrown back by the interposition of the proximate cause; the non-payment by the creditor of his own debt." This, I regard, as a fair illustration of what is meant in the maxim, by the words "*proxima*" and "*remota*." See also Notes, same volume, p. 180.

In *Harrison* v. *Berkley*, 1 Strobh. S. Car. Rep. 548, Mr. Justice Wardlaw indulges in some reflections on this point worth referring to in this connection. "Every incident," says he, "will, when carefully examined, be found to be the result of combined causes; to be itself one of various causes, which produces other events. Accident or design may disturb the ordinary action of causes. It is easy to imagine some acts of trivial misconduct or slight negligence, which shall do no direct harm, but sets in motion some second agent that shall move a third, and so until the most disastrous consequences shall ensue. The first wrong-doer, unfortunate, rather than seriously blameable, cannot be made answerable for all these consequences."

It is certain that in almost ever considerable disaster, the result of human agency and dereliction of duty a train of consequences generally ensue, and so ramify as more or less to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. This is one of the vicissitudes of organised society. Every one in it takes the risk of these vicissitudes Wilfulness itself cannot be reached by the civil arm of the law for all the consequences of consequences, and some sufferers necessarily remain without compensation. The case of *Scott* v. *Shepherd*, 2 Wm. Blac R. 893, the case of the squib, is sometimes cited as extending the principle of the maxim, but it is not so. The doctrine of proximate and remote causes was really not discussed in that case. One threw a squib in the market place amongst the crowd. It fell on the stall of one who immediately cast it off to prevent it exploding there, and it struck a third person and exploded, putting out his eye. The question was, whether the defendant could be made answerable in the form of action adopted, which was trespass Chief Justice De Grey held that the first thrower, the defendant, was answerable, for that in fact the squib did the injury by the first impulse. In this way the action of trespass was sustained. It is no authority against the principle suggested. There must be a limit somewhere. Greenl. in Vol. II., s. 256, touches the question thus: "The damages to be recovered must be the natural and proximate consequence of the act complained of." This is undoubtedly the rule. The difficulty is in distinguishing what is proximate and what remote. I regard the illustration from Parsons already given, although the wrong supposed arises *ex contractu*, as clear as any that can be suggested. It is an occurrence undoubtedly frequent, that by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third is by the second, and so on, it might be, for the length of a square or more. It is not in our experience that the first owner is liable to answer for all these consequences, and there is a good reason for it. The second and third houses, in the case supposed, were not burned by the direct action of the match, and who knows how many agencies might have contributed to produce the result? Therefore, it would be illogical to hold the match chargeable as the cause of what it did not do, and might not have done. The text books, and, I think, the authorities, agree that such circumstances define the word "*remota*" removed, and not the immediate cause. This is also Webster's third definition of the word remote. The question which gives force to the objection that the second or third result of the first cause is remote is put by Parsons, Vol. II., 180, "did the cause alleged produce its effects without another cause intervening, or was it made to operate only

through or by means of this intervening cause?" There might possibly be cases in which the causes of disaster, although seemingly removed from the original cause, are still incapable of distinct separation from it, and the rule suggested might be inapplicable; but of these when they occur. The maxim, however, is not to be controlled by time or distance, but by the succession of events.

The case on hand is a claim against the defendant under these circumstances, briefly: A warehouse of one Simpson, situate very near the track of the company's road, was set on fire by sparks emitted from a locomotive engine of the defendants, so negligently placed as to set it on fire. The burning of the warehouse communicated fire to a hotel building situated some thirty-nine feet from the warehouse, which, at the time, was occupied by the plaintiff as tenant, and it was consumed, with its furniture, stock of liquors and provisions, and for this the plaintiff sued and recovered below Several other disconnected buildings were burned at the same time, but this is in no way involved in this case. No doubt the company was answerable for tFe destruction of the warehouse, resulting from the negligence of the company's servants in the use of the engine. The authority to the company to use steam on their road does not exempt it from liability for injury resulting from the negligent use of it: *Lackawanna and Bloomsburg R. R. Co.* v. *Doak*, 2 P. F. Smith, 379. The learned judge charged that the defendant was liable to the plaintiff to the extent of his his loss, by reason of the burning of the hotel, although by fire communicated from the warehouse, if the latter was set on fire by the negligence of the defendant's servants, in the manner mentioned. To this charge the defendants excepted, and assign it for error, and this presents the question of this case.

This charge was of course the equivalent of holding, that a recovery for all the consequences of the first act of negligence of the defendants, was in law allowable. We are inclined to think in this there was error, for the reasons already given, and others that will be given. It cannot be denied but that the plaintiff's property was destroyed, but by a secondary cause, namely, the burning of the warehouse. The sparks from the locomotive did not ignite the hotel. They fired the warehouse and the warehouse fired the hotel. They were the remote cause,—the cause of the cause of the hotel being burned. As there was an intermediate agent, or cause of destruction, between the sparks and the destruction of the hotel, it is obvious that that was the proximate cause of its destruction, and the negligent emission of sparks the remote cause. To hold that the act of negligence which destroyed the warehouse, destroyed the hotel, is to disregard the order of sequences entirely, and would hold good if a row of buildings a mile long had been destroyed. The cause of destruction of the last in that case, would be no more remote, within the meaning of the maxim, than that of the first, and yet how many concurring elements of destruction there might be in all of these houses, and no doubt would be, no one can tell. So to hold, would confound all legitimate ideas of cause and effect, and really expunge from the law the maxim quoted, that teaches accountability for the natural and necessary consequences of a wrongful act, and which should, in reason, be only such that the wrong-doer may be presumed to have known would flow from his act. According to the principle asserted, a spark from a steamboat, on the Delaware, might occasion the destruction of a whole square, although it never touched but a single separate structure. No one would be likely to have the least idea of such accountability, so as to govern and control his acts accordingly. A railroad terminating in a city, might, by the slightest omission on the part of one of its numerous servants, be made to account for squares burned, the consequence of a spark communicating to a single building. Were this the understanding of the extent of liability under such circumstances, it seems to me that there might be more desirable objects to invest capital in, than in the stock of such a railroad. But it never has been so understood or adjudged. Lowrie, J., in *Morrison* v *Davis & Co.*, 8 Har. 171, illustrates the argument against such liability most strikingly, by reference to a well known fact. In the case he was treating, a horse in a canal boat team was lame, in consequence of which the boat was behind time in reaching the Juniata river, and in consequence of that was overtaken by a flood in the river which destroyed the boat with its freight The carrier, the owner of the boat, was charged with being negligent in using a lame horse, the occasion of the delay. In treating of this as only the remote cause of the disaster, the learned Judge said: "There are often very small faults which are the occasion of the most serious and distressing consequences. Thus, a momentary act of carelessness set fire to a little straw, and that set fire to a house, and by an extraordinary concurrence of very dry weather and high winds, with this little fault, one-third of a city (Pittsburgh) was destroyed; would it be right that this small act of carelessness should be charged with the whole value of the property consumed?" The answer would and ought to be: No, it was but the remote cause of it. Innumerable occasions must have occured in this commonwealth for asserting liability to the extent and upon the principle claimed here, yet we have not a solitary precedent of the kind in our Books. This is worth something as proof against the alleged principle. It was Littleton's rule, "that what never was, never ought to be:" 1 Vern. 385.

The question in hand has not been adjudicated in this State, and but seldom discussed in any of the other States; yet we have a case decided in the Court of Appeals of the State of New York, in 1866, which is directly in point in support of the doctrine we have been endeavouring to advance above. It is the case of *Ryan* v. *The New York Central Railroad Co.*, (8 Tiffany,) 35 N. Y. 210. The facts in that case briefly were, that the defendant, by the carelessness of its servants, or through the insufficient condition of one of its locomotive engines, set fire to its own wood shed with a large quantity of wood therein. The plaintiff's house, situated some 130 feet from the shed, took fire from the heat and sparks of the burning shed and wood, and was entirely consumed A number of other houses and buildings were destroyed by the spreading of the fire.

The plaintiff brought suit against the Company for his loss On the presentation of these facts at the trial, the Circuit Judge non-suited the plaintiff, and at the general term of the Supreme Court of the Fifth District, the judgment was affirmed. The case was then removed to the Court of Appeals, where the judgment was unanimously affirmed in an elaborate and exhaustive opinion by Hunt, J. Every position taken by the counsel for the defendant in error here, was taken there, and examined and answered fully in the opinion. All the English and American cases supposed to have any bearing on the point in dispute there on the same question we have here—are noticed by him, and the doctrine clearly deduced, that the railroad company was not answerable to the plaintiff for the loss of his house being burned by fire communicated by the burning shed. That case is not distinguishable in principle, or in the manner of destruction, from this. It is on all fours with this case.

But it seems to have been thought that the *Insurance Co.* v. *Tweed*, 7 Wal. (U. S. Rep.) 45, conflicts with the above case. I do not think it does, when understood. It was an action on a policy of insurance against fire, in which there was an exception of several matters, viz., invasion, insurrection, military and usurped power, *explosion*, earthquakes, &c. An explosion took place in a warehouse on the opposite side of the street from the insured property, and scattered fire and burning fragments upon the insured property and destroyed it. The decision of the Supreme Court was, that the loss was within the exception of loss by fire occasioned by explosion. To me it seems that it would have been rather more rational to have held that the destruction was by fire, *per se*. But the court interpreted the terms of the contract of the parties in this way. We must remember that there may be a difference between interpreting the obligation of a contract, and defining liability under the laws of social duty. Certain it is, the laws are not the same. One does not necessarily rule the other. I may say further, that there is no evidence, in the opinion of Mr. Justice Miller, that he had specially in view the same question, so ably discussed by Mr. Justice Hunt, or if he had, that his investigations extended so far as did those of the last-named Judge. He does not even refer to the New York case at all.

The question here involved does not seem to have been definitely determined in England; why, I am at a loss to know. There have been decisions, it is true, imposing liability against the reasons we have expressed above, but in none of them is the question of proximate and remote cause of the injury discussed at all. Such is the case in *Piggot* v. *The Eastern Counties R. R. Co.*, 54 Eng. C. L. Rep. 229, cited by the counsel for the defendant in error; and such is the recent case of *Smith* v. *The London and South-western R. R. Co.*, Law Rep., March, 1870, p. 98. In this case, Boville, C J., and Keating, J., affirmed the recovery. Brett, J. dissented. Both these cases were before the Court of Common Pleas. I find no review of the question in the Exchequer Chamber. I regard these cases as passing over the question that was decided in the Court of Appeals in New York, and which is before us now, *sub silentio*. Hunt, J., expresses, to some extent, my experience, when he says, "I have examined the authorities cited from the Year Books, and have not overlooked the English Statutes on the subject, or the English decisions, extending back for many years. It will not be useful further to refer to the authorities, for it will be impossible to reconcile some of them with the views I have taken." I entirely agree, that if they shed any light, it is too uncertain and dim to be followed with safety; while, on the other hand, the concurrence of principle, with a just measure of responsibility, we think, is best subserved by the rule we suggest. With every desire to compensate for loss when the loser is not to blame, we know it cannot always be without transcending the boundaries of reason, and, of course, law. This we cannot do; and we fear we would be doing it, if we affirmed the judgment in this case. The limit of responsibility must lie somewhere, and we think we find it in the principle stated. If not found there, it exists nowhere. We have not been referred to any case, in any of the States and courts, excepting those noticed, and I have not myself discovered any, which, in the least militates against the foregoing views; we are therefore constrained to follow the result of our conclusions, and reverse the judgment in this case. At present we will not order a *venire de novo*, but if the plaintiff below and defendant in error desire, we will order it on grounds shown for it, if made in a reasonable time.

—*Ibid.*

Judgment reserved.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR FEBRUARY, MARCH AND APRIL, 1870.

(Continued from page 165.)

ACTION.

A lessee can maintain an action against the assignee of his assignee for the defendant's breaches of the covenant to repair in the original leases, after having paid the lessor the damages which such breaches occasioned. (Cleasby, B., *dissentiente*).—*Moule* v. *Garrett*, L. R. 5 Ex. 132.

See SLANDER; WAY.

ADMINISTRATION.—*See* EXECUTOR AND ADMINISTRATOR.

AGENT.—*See* PRINCIPAL AND AGENT.

AGREEMENT.—*See* CONTRACT.

ANCIENT LIGHT.

Defendant built a wall projecting at right angles to the back wall of the plaintiff's house for twelve feet, on the north. The wall was already thirty feet high, and was to be higher. The plaintiff at the same time by enlarging his own premises, was shutting off some light from the south and south-west, and was also opening new lights in addition to the ancient ones

which he maintained. *Held*, that he was entitled to an injunction.—*Staight* v. *Burn*, L. R. 5 Ch. 163.

Annuity.—*See* Forfeiture; Novation, 1; Security, 2.

Assignment.—*See* Action; Fraudulent Conveyance; Security, 2.

Assumpsit.—*See* Husband and Wife, 1; Insurance, 4.

Attorney.—*See* Limitations, Statute of, 2; Solicitor.

Bailment.—*See* Carrier.

Bankruptcy.

1. The English Bankruptcy Act of 1861 is made applicable to "all debtors, whether traders or not." A person having privilege of parliament, and not a trader, was held not exempt from their operation.—*Ex parte Morris. In re Duke of Newcastle*, L. R. 5 Ch. 172.

2. A drawer of a bill of exchange, who has taken it up after an act of bankruptcy committed by the acceptor, but before adjudication, has a debt, on the strength of which he may petition for adjudication against the acceptor.—*Ex parte Cyrus*, L. R. 5 Ch. 176.

See Costs; Forfeiture; Inspection of Documents; Mortgage, 1; Power, 1; Sheriff; Winding Up.

Bills and Notes.

1. To an action by the payee against the drawer of a bill for the accommodation of the acceptor, the defendant pleaded an agreement made at the time of the delivery of the bill, between the plaintiff, defendant and acceptor, that the acceptor should deposit with the plaintiff certain securities, to be held by the plaintiff for the due payment of the bill, and that until these should be sold, and the proceeds applied, the defendant should not be liable to be sued upon the bill; and that the acceptor deposited the securities with the plaintiff, but that the plaintiff had not sold, but still held them. *Held* (Willes, J., *dubitante*), that oral evidence of this agreement was inadmissible, as tending to vary the written contract.—*Abrey* v. *Crux*, L. R. 5 C. R. 37.

2. After B. had paid one bill, of which M. was the holder, and to which B.'s signature had been forged as acceptor, M. sued B. on another similar bill. The acceptance was not written, authorized or adopted by B., nor did B. know that M. had held the former bill, or lead M. to believe that the acceptance sued on was B.'s. *Held*, that B. was not estopped to deny that the bill sued on was accepted by him, by having paid the other, and that the judge was not bound to rule that M. was entitled to a verdict as a matter of law.—*Morris* v. *Bethell*, L. R. 5 C. P. 47.

3. A bill drawn by A., accepted by B, indorsed to C., and by C. indorsed to D., was dishonored at maturity. The next morning D., not knowing A.'s address, applied to C. for it, and, C. then being from home, called again at 5½ P. M., got the address, and, after 6, sent A. notice of dishonor. It was not received that night, as it would have been if posted before six. All the parties lived in London. D. sued A., and the jury found that he had used reasonable diligence in forwarding the notice. The court refused to disturb a verdict for the plaintiff.—*Gladwell* v. *Turner*, L. R. 5 Ex. 59.

See Bankruptcy, 2; Consideration; Damages, 2.

Burden of Proof.—*See* Death.

Carrier.

The plaintiff was induced by the fraud of A. to send goods by defendants' line to the Z. Company (which had in fact ceased to carry on business), at a certain address. The goods were tendered there and refused. The defendants then addressed a notice to the Z. Company, that they held the goods to their order, subject to warehouse charges, and asking directions. A. afterwards produced this note, and a delivery order signed by A. for the Company, and obtained the goods. The same thing happened a second time, except that no notice was sent. It was left to the jury whether the defendants had acted reasonably and without negligence as to the goods, and in delivering them to A. *Held*, that a verdict for the defendant should not be disturbed.—*Heugh* v. *London & North-Western Railway Co.*, L. R. 5 Ex. 51.

See Public Exhibition; Railway.

Cesser.—*See* Forfeiture.

Charity.—*See* Limitations, Statute of, 3.

Commission.—*See* Surveyor.

Common Carrier.—*See* Carrier.

Common, Tenancy in.—*See* Injunction, 2.

Company.

1. P. signed the memorandum of association of a company for 1,350 shares, and F. and J. for 50 shares each. P. sold a business to the company, to be paid for in part by 1,500 paid-up shares. By P.'s directions, 50 of these shares were alotted to F., and 50 to J. *Held*, that this did not satisfy F.'s and J.'s subscriptions.—*Forbes & Judd's Case*, L. R. 5 Ch. 27.

2. The agent of a company, being requested to take shares in it, offered to apply for 100,

if all moneys which might be payable in respect of them might be deducted from his commission. The manager of the company told him that he would be "allowed the privilege of paying them up as convenient;" whereupon he took the shares, and was registered as holder, but never paid any money on them, or received any dividends. He also signed and sent to the manager a proxy paper, but wrote to him that it was on condition that he did not thereby cancel the agreement to allow him to pay calls for commissions. He attended two meetings. His commission was not sufficient to pay for the shares. *Held*, that he was liable as a contributory. The above agreement was not a condition to the subscription, but was collateral. Also, having held himself out as a shareholder, to induce others to take shares, he was precluded, as against them, from denying it.—*Bridger's Case*, L R. 9 Eq 74

3. When a shareholder, who has notice of misrepresentations of the company, which entitle him to avoid his subscription, says nothing, but stands by, while he sees other shareholders bringing suit for relief on like grounds, he cannot long afterwards elect to avoid his contract.—*Ashley's Case*, L. R. 9 Eq. 263.

4. A. owned shares in Railway Company X., and also stock in Company Z. He gave his address at B.'s bank to X Co., and at a club to Z. Co. B, who had charge of the certificates, fraudulently sold them, and forged transfer deeds. X. Co. and Z. Co. wrote to A., informing him of the transfers (X. Co. receiving no answer, Z. Co. receiving one forged by B.), and then registered the transfers, and delivered new certificates. On bills against X. Co. and Z. Co. and the purchasers: *held*, that A. was entitled to delivery up of the certificates, to have the transfers cancelled, and to have dividends then or thereafter to be due, but without costs. Decree without prejudice to any question at law or in equity between the co-defendants.—*Johnston* v. *Renton*, L. R. 9 Eq. 181.

5. The broker of a bank, by order of the directors, bought shares in the same, to be taken by the directors of the company, and was credited for the price paid by him in his banking account, kept with the same bank. The bank was afterwards wound up. *Held*, that, although the transaction was *ultra vires* of the directors, the broker was to be allowed the item of the above credit in the balance for which he proved.—*Zulueta's Claim*, L. R. 9 Eq. 270.

See Damages; Novatim; Privileged communication; Winding up, 4.

Compensation.—*See* Notice.

Compound Interest.—*See* Limitations, Statute of, 2.

Compromise.—*See* Husband and Wife, 5.

Condition.—*See* Company, 2; Forfeiture.

Conditional Limitation.—*See* Forfeiture.

Consideration.

A. gave a note for £520 on demand, with interest, to B. Afterwards B. signed an agreement that the £520 should be repaid at £25 each quarter, with interest. In a suit by B.'s administratrix for the £520, *held*, that the agreement was without consideration, and no defence.—*McHanus* v. *Bark*, L. R. 5 Ex. 65.

See Voluntary Conveyance.

Construction.—*See* Bankruptcy, 1; Covenant; Damages, 1; Guaranty; Infant; Insurance, 2, 3; Marriage Settlement; Novation, 3; Patent, 3; Power, 1, 2, 3; Sheriff; Ship; Statute; Will, 3–6, 8–12.

Contract.—*See* Action; Bills and Notes, 1; Company, 1–3; Consideration; Guaranty; Husband and Wife, 1–3; Interest; Limitations, Statute of; Mortgage, 1; Novation; Parties; Public Exhibition; Restraint of Trade; Security; Trust.

Contributory.—*See* Company, 3.

Conversion.—*See* Legacy Duty.

Copyright.

1. The proprietor of a newspaper has, without registration under the Copyright Act, such a property in its contents as will entitle him to sue in respect of a piracy. But the piracy of "a list of hounds" is not a case for an interlocutory injunction, as a correct list is easily got, and it is liable to frequent changes.—*Cox* v. *Land and Water Journal Co.*, L. R. 9 Eq. 324.

2 Plaintiff wrote an essay for the "Welsh Eisteddfod," to prove that the English are the descendants of the ancient Britons, which he published. Defendant afterwards did the like. His book was like plaintiff's in theory, arrangement, and, to a great degree, in the citation of authorities. The latter facts were explained by both parties having taken their references from Pritchard, and the theory by the occasion of writing. Two authorities were seemingly taken from the plaintiff, and certain results were based upon his tables. The writing was the defendant's. *Held* (reversing the decision of James, V. C., on the facts), the plaintiff was not entitled to an injunction.

Defendant had a right to take authorities even though sent there by plaintiff's book, which took the same.

An author has no monopoly in a theory propounded by him.

Per James, V. C. In cases of literary piracy, the defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's.—*Pike* v. *Nicholas*, L. R. 5 Ch. 251.

3. Although a rival publisher is not justified in copying slips cut from a Directory previously published by another party by having sent out canvassers to verify them, and to obtain the leave of those whose names were on the slips to publish them in that form, he may use such slips to direct his canvassers where to go for the purpose of obtaining the addresses anew.—*Morris* v. *Wright*, L. R. 5 Ch. 179.

Corporation.—*See* Company.

Costs.

1. A defaulting trustee is entitled to his costs of a suit for the execution of the trusts incurred after his bankruptcy, or after the registration of a composition deed executed by him.—*Bowyer* v. *Griffin*, L. R. 9 Eq. 340.

2. When an executor, who pays a particular fund into court under the Trustee Relief Act, has in his hands the general residuary estate, the court has jurisdiction to order him to pay out of the residue the costs of proceedings relating to the particular fund.—*In re Trick's Trusts*, L. R. 5 Ch. 170.

3. One who moves for leave to inspect documents without applying to the party in possession of them, must pay costs.—*The Memphis*, L. R. 3 Adm. & Ecc. 23.

4. To a suit for restitution of conjugal rights, the wife replied cruelty, &c., but abandoned the charges at the hearing. A decree was made against her, but could not be served, as she was out of the jurisdiction. On proof that the wife had a separate income of £760, the court ordered that she should pay the costs of the proceedings.—*Miller* v. *Miller*, L. R. 2 P. & D 13.

5. Although a man having no defence enters no appearance to a suit for dissolution of marriage, he may attend before the registrar on the taxation of his wife's costs.—*Letts* v. *Letts*, L. R. 2 P. & D. 16.

See Husband and Wife, 4; Pleading, 2; Solicitors; Statute; Surveyor.

Covenant.

A. covenanted on the marriage of his daughter B., that if B. should survive him, or, dying, leave any children or issue, A. would devise or otherwise settle an equal part with A.'s other children, of the property A. should have at his death, to the use of B.'s husband for life, then to B. for life, then to the children of the marriage with a clause of survivorship and accruer in the event of children dying under twenty-one without issue. The children of B.'s marriage all died without issue before A., only one of them, C., having attained twenty-one. B. survived A. A.'s will followed the covenant, but did not protect the interest of such of B.'s children as reached twenty-one from lapse. *Held*, that A. was not bound to do so, and that C.'s representatives took nothing.—*In re Brookman's Trust*, L. R. 5 Ch. 182.

See Action; Limitations, Statute of, 1; Marriage Settlement; Trust.

Creditor.—*See* Security.

Criminal Law.—*See* Embezzlement; Indictment; Infant.

Crown.—*See* Fishery.

Cruelty.

Force, whether physical or moral, systematically exerted to compel the submission of a wife, in such a manner, to such a degree, and during such a length of time, as to injure her health and render a serious malady imminent, is legal cruelty.—*Kelly* v. *Kelly*, L. R. 2 P. & D. 31.

Damages.

1. By the articles of association of a company, L. was to be manager, and if he should be "at any time deprived of or removed from his office for any other cause than gross misconduct, the directors shall pay to him as compensation for loss of office" a certain sum, "within one month from the time of such removal." The company was ordered to be wound up. *Held*, that this event entitled L. to said sum, and that he could prove for the whole sum without any deduction on the ground that L. might get another appointment.—*In re London & Scottish Bank*, L. R. 9 Eq. 149.

2. Defendants at L. undertook by a letter of credit to accept bills for plaintiffs at A., plaintiffs to provide funds to meet the bills before maturity. Defendants, after having accepted bills for which plaintiffs had provided funds, stopped, and notified plaintiffs that they could not pay. In action on the letter of credit: *Held*, that expenses of necessary telegraphing from A. to L., of protesting the bills, and commissions paid for taking up the bills at L.,

could be recovered.—*Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Ex. 92.

3. When a sale of real estate goes off through the fault of the vendor, the purchaser can recover the expense of investigating the title.—*Frend* v. *Buckley*, L. R. 5 Q. B. 213.

See Copyright, 2; Negligence; Notice.

Death.

Those who found a right upon the fact that a person, who has not been heard of for seven years, survived a particular period, must establish that fact affirmatively by evidence.

A., a testator, died January 5, 1861, and left a residue to his nephews. The last that was known of B, one of his nephews, was that he was entered in the books of the American Navy as having deserted June 16, 1860, while on leave. *Held*, that B. was not shown to have survived A., and that his personal representatives could not claim a share under A.'s will —*In re Phené's Trusts*, L R 5 Ch. 139.

Debtor and Creditor.—*See* Bankruptcy, 2.

Desertion.

A wife, who, after her husband has deserted her, but within the statutory time, becomes a party to a deed by which she agress to live apart from him, and he agrees to pay her an allowance, although she has never been paid the allowance, can no longer establish the desertion.—*Parkinson* v. *Parkinson*, L. R. 2 P. & D. 25.

Devise.—*See* Covenant; Limitations, Statute of, 3; Will, 6–12.

Divorce.—*See* Cruelty; Desertion.

Dower.

A mother entitled to dower in land of an infant, which was taken by a railway company, and the value paid into court under the Lands Clauses Act, was held entitled to be paid the value of her right of dower out of the *corpus* of the fund, instead of receiving one-third of the dividends for life.—*In re Hall's Estate*, L. R. 9 Eq. 179.

Easement.—*See* Ancient Light.

Election.—*See* Company, 3.

Embezzlement.

The officer of a friendly society may now be punished for embezzling their money, although some of their rules are in restraint of trade.—*The Queen* v. *Stainer*, L. R. 1 C. C. 230.

Equitable Conversion.—*See* Legacy Duty.

Equitable Mortgage.—*See* Mortgage, 1.

Equity.—*See* Husband and Wife, 1; Power, 1; Solicitor.

Equity Pleading and Practice.

1. A married woman cannot present a petition of appeal without a next friend, although another person joins in the petition, and the suit relates to her separate estate.—*Picard* v. *Hine*, L. R. 5 Ch. 274.

2. A married woman, administratrix, filed a bill against an accounting party to the estate of the intestate, by her next friend, and made her husband a co-defendant. The other defendant not having demurred, as he might have done, and not taking the objection till the hearing, an amendment was allowed making the husband a co-plaintiff.—*Burdick* v. *Garrick*, L. R. 5 Ch. 233.

See Costs, 1, 2; Husband and Wife, 4, 5; Inspection of Documents; Parties; Trust.

Estoppel.—*See* Bills and Notes, 2; Company, 2, 3.

Evidence.—*See* Bills and Notes, 1; Death; Pleading, 1; Privileged Communication; Railway, 3; Slander; Will, 5.

Executor and Administrator.

1. The payment of one legacy by executors out of their own money, as a gratuity, is not an admission of assets for the payment of others. Neither is a payment out of the estate of one of two executors who were also residuary legatees, by his representatives, to the survivor in compromise of his claim as such residuary legatee. (*See* Limitations, Statute of.)—*Cadbury* v. *Smith*, L. R. 9 Eq. 37.

2. Executors before probate directed A., the manager of the testatrix's chemical works, to continue to manage them, which he did. Goods of the testatrix thus in A.'s hands as agent of the executors were seized on *fi. fa.* on the ground that he was executor *de son tort*. The executors afterwards proved the will. *Held*, that A. was not executor *de son tort*.—*Sykes* v. *Sykes*, L. R. 5 C. P. 113.

See Costs, 2; Equity Pleading and Practice, 2; Limitations, Statute of, 2, 3; Will, 5.

Executor de son tort.—*See* Executor and Administrator, 2.

Executory Devise.—*See* Forfeiture.

Fine.—*See* Power, 1.

Fishery.

A forfeiture of "liberties and free usages" does not include a several fishery. (*Per* Kelly, C. B., and Pigott, B.)

Such a fishery, if resumed by the crown, does not merge in the royal prerogative, so as not to be regrantable.—*Duke of Northumberland* v. *Houghton*, L. R. 5 Ex. 127.

Fixtures.

Trade fixtures, which are annexed to a building by bolts and screws for the single purpose

of steadying them when in use, and which can be removed without injury to the freehold, pass to the mortgagee under a previous equitable mortgage.—*Longbottom* v. *Berry*, L. R. 5 Q. B. 123.

See Mortgage, 1.

Forfeiture.

A clause of forfeiture of an annuity, on bankruptcy or alienation, does not operate when the bankruptcy is annulled before the first payment becomes due.—*Trappes* v. *Meredith*, L. R. 9 Eq. 229.

Forgery.—*See* Bills and Notes, 2.

Franchise.—*See* Fishery.

Fraud. — *See* Company, 2, 4; Injunction; Power, 4, 5.

Fraudulent Conveyance.

A. made a voluntary assignment of a policy on his own life, without any intent to defraud creditors. In the event, however, prior creditors were delayed in getting paid. Then a subsequent creditor sued to set the conveyance aside. *Held*, on authority (3 De G. J. & Sm 293; 3 Drew. 419), rather than on reason, that he could, under St. 13 Eliz. c. 5.—*Freeman* v. *Pope*, L. R. 9 Eq. 206.

Freight.—*See* Insurance, 1, 2.

Friendly Society.—*See* Embezzlement.

General Average.

A ship, while still in port, was driven ashore, and in order to get her off the cargo was unshipped, landed, and warehoused, under the superintendence and control of the ship-owner's agents. After one unsuccessful attempt, the vessel was floated, and was taken into port and repaired. The cargo was then reshipped and the voyage completed. *Held*, that the owners of the cargo were not bound to contribute to the expenses of getting the vessel off, as general average. (Exch. Ch.)—*Walthew* v. *Mavrojani*, L. R. 5 Ex. 116.

Gift.—*See* Voluntary Conveyance.

Guaranty.

A., being liable to B. on an existing guaranty for £2,200 and for £1,500 on two bills, signed this agreement: "Whereas C. is . . . indebted to you in the sum of £2,205, &c., . . . I do, . . . in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of, and agree to become responsible for, any sum of money for the time being due from the said C. to you, whether in addition to the said sum of £2,205 or no." Former guaranties used the words "amount for the time being due," to signify indefinite sums to become due thereafter. *Held*, that this guaranty was unlimited in time and amount.—*Coles* v. *Pack*, L. R. 5 C. P. 65.

See Novation, 3.

Highway.—*See* Way.

Husband and Wife.

1. Money advanced for, and applied to, the support of a married woman who has been deserted and left without support by her husband, may be recovered of him in equity.—*Deare* v. *Soutten*, L. R. 9 Eq. 151.

2. B., the wife of A., a lunatic, ordered necessary repairs for a house in which B. lived, and which A. had covenanted in his lease to keep in repair. B. received out of A.'s income and other sources money sufficient for all purposes, including repairs. *Held*, that A. was not liable for them.—*Richardson* v. *Du Bois*, L. R. 5 Q. B. 51.

3. When a married woman, living separate from her husband, contracts a debt which she can only satisfy out of her separate estate, that estate will be liable for it in equity.—*Picard* v. *Hine*, L. R. 5 Ch. 274.

4. A., a married woman, who was entitled to the income of property held on trust for her separate use, without power of anticipation, joined with her husband in a power of attorney to B. to receive and sue for any moneys due to them or either of them. B. demanded payment of A.'s separate income from the trustee, and, being refused, began a useless administration suit in A.'s name, acting as next friend, without consulting A. *Held*, that the power was a nullity, the suit unauthorized, and that B. should pay all the costs.—*Kenrick* v. *Wood*, L. R. 9 Eq. 333.

5. The court has jurisdiction to sanction, on behalf of a married woman, a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which the married woman has a reversionary interest.

Upon a petition to that effect, the married woman should appear separately from her husband.—*Wall* v. *Rogers*, L. R. 9 Eq. 58.

See Costs, 4; Cruelty; Desertion; Equity Pleading and Practice; Will, 7.

Illegal Contract.—*See* Restraint of Trade.

Indictment.

An indictment charged A. with having made a false declaration before a justice that he had lost a pawnbroker's ticket, whereas he had not lost the said ticket, but "had sold, lent or deposited it" with one C., as A. well knew. *Held*, that the indictment was not bad for uncertainty, as the words quoted were surplusage.—*McQueen* v. *Parker*, L. R. 1 C. C. 225.

Infant.

A., the mother of a child five weeks old, and B., put the child into a hamper, wrapped up in a shawl, and packed with shavings and cotton wool. A then, with the connivance of B, took the hamper to M., four or five miles off, and gave it to the clerk of a railway station there, told him to be very careful of it, and to send it to C., by the next train, which would leave in ten minutes, and paid for the carriage. A. did not tell the clerk the contents of the hamper, which was addressed to C. "with care; to be delivered immediately." The train left M. at 7.45 P.M., and the hamper was delivered to C. at 8 40 P.M. The child died three weeks afterwards from other causes. *Held* (by a majority of the fifteen judges), that A. and B. were properly convicted of "abandoning and exposing" the child, "whereby the life of the said child was endangered," under 24 & 25 Vic. c. 100, sec. 27.—*The Queen* v. *Falkingham*, L. R. 1 C. C. 222.

Injunction.

1. Plaintiff had an established business in Pall Mall, under the name of the "Guinea Coal Company." In March, 1869, defendant set up a business under the name of "Pall Mall Guinea Coal Company," in the Strand, and in August moved into Pall Mall. Nov. 24, plaintiff, finding that his customers were misled, filed a bill to restrain defendant from using any name which was a colorable imitation of his own. An injunction against the use of the name "Pall Mall Guinea Coal Company," in Pall Mall, was upheld to prevent a fraud on the plaintiff, although there were other Guinea coal companies. There had been no undue delay. *Semble*, if it had been proved, as alleged, that plaintiff was wont to sell short weight or inferior coal under a good name, the injunction would have been refused.—*Lee* v. *Haley*, L. R. 5 Ch. 155.

2. After a decree for sale in a partition suit, a defendant who occupied the property proposed to sell the hay and turnips from off the land. This was contrary to the custom of the country as between landlord and tenant, but the defendant was not in that relation. An injunction was refused. The proposed act was no tort.—*Bailey* v. *Hobson*, L. R. 5 Ch. 180.

See Ancient Lights; Copyright; Restraint of Trade.

Insanity.—*See* Husband and Wife, 2.

Insolvency.—*See* Winding Up.

Inspection of Documents.

L., in a suit against his former partners, obtained an order for production of the books, with leave to inspect. L. became bankrupt, and B., his assignee, revived the suit, and applied for the benefit of the order. The books were very voluminous, and the accounts were kept in Indian currency. *Held*, that B. might have the benefit of the order, and take in L. as accountant. Later, it was further *held* that L., if accompanied by a duly authorised clerk of B's solicitors' firm, was at liberty to inspect.—*Lindsay* v. *Galdstone*, L. R. 9 Eq. 132.

See Costs, 3; Privileged Communication; Vendor and Purchaser of Real Estate.

Insurance.

1. The plaintiff chartered his ship Z., now at A., for a voyage from B. to C; the ship to be at B. by a certain date, or the charterer to have the option of declaring the charter void Afterwards plaintiff effected an insurance upon Z., from A. to B, and thence to C., on freight chartered or otherwise, with liberty to sail to, &c., any ports whatsoever, without prejudice. The ship sailed from A., in ballast, for B., but suffered a constructive total loss before getting there. *Held*, that the interest in the freight on the charter from B. to C. had attached, although the plaintiff was not bound to have sailed direct from A. to B. had he chosen otherwise.—*Barber* v. *Fleming*, L. R. 5 Q. B. 59.

2. A vessel previously chartered for a voyage from A. to B. was chartered to proceed on her present voyage to B., and having discharged her cargo there, to go to C. for rice, and thence, &c. Insurance was obtained "at and from" B. to rice ports, and thence, &c., on chartered freight. The vessel was lost at B. before the cargo of the voyage thither was discharged. *Held*, that the assured could recover on the policy. (Exch. Ch.)—*Foley* v. *United Fire & Marine Insurance Co.*, L. R. 5 C. P. 155.

3. The risk in a policy on a ship was described in writing to be "at and from L. to C, and for thirty days after arrival," and then followed the usual printed words "upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety." The vessel arrived at C. so damaged as to require constant pumping to keep her afloat, and with her steering apparatus badly out of gear. The currents, &c, at C. are dangerous, especially to vessels with steering apparatus out of order. The vessel was securely moored Oct. 28. Her cargo was safely unloaded by Nov. 8, and the water became entirely under

command of the ship's pumps. On the 12th she was taken to a dry dock for survey and repairs, and was there destroyed by an accidental fire on the 5th of December. *Held*, that the risk had terminated at the time of loss. The vessel had moored twenty-four hours "in good safety," and the loss was more than thirty days even from the end of that time —*Lidgett* v. *Secretan*, L. R. 5 C. P. 190.

4. A policy of insurance was effected for £6000 on the ship H., valued at £6000. The H. was run down and sunk by another ship, and the underwriters paid the owners the £6000 as for a total loss. Afterwards £5000 was recovered in the Admiralty in respect of the H. against the owners of the other ship. The H. was not further insured, and was worth £9000. *Held*, that the underwriters were entitled to the £5000 damages, the valuation being conclusive between them and the assured.—*North of England Insurance Association* v. *Armstrong*, L. R. 5 Q. B. 244.

See Novation, 2, 3; Security.

Interest.

A. agreed to buy land for £38,500, with interest at five per cent. until payment, and he was let into possession. Difficulties having arisen in completing the purchase, A. paid £38,000 into a bank to a separate account, and gave notice to the vendors that he had done so, and would not pay interest until the contract. The vendors replied that they disputed the sufficiency of the notice, but did not point out that the sum fell short £500. A., on discovering the fact, paid in £500, with interest at five per cent. *Held*, that A. was not liable for interest after the time of paying the £38,000 into the bank —*Kershaw* v. *Kershaw*, L. R. 9 Eq. 56.

See Winding Up, 1.

Jurisdiction.—*See* Costs, 2; Power, 1.

Laches.—*See* Company, 3; Injunction, 1.

Landlord and Tenant.—*See* Action; Notice.

Lease.—*See* Action; Notice; Power, 1; Vendor and Purchaser of Real Estate.

Legacy.—*See* Covenant: Executor and Administrator, 1; Limitations, Statute of, 3; Power, 3; Will, 6–12.

Legacy Duty

Under a will, the income of a fund directed to be laid out in real estate was paid to A. for life, then to B for life, and then by the will the fund became absolutely due to C., the heir of the testator, who refused to receive either income or principal. The fund, which had never been laid out in land, was now payable to the heir of C. *Held*, that duty was payable under the Legacy Duty Act (36 Geo. III. c. 52). (Exch. Ch.)—*Re DeLancey*, L. R. 5 Ex. 102; s. c. L. R. 4 Ex. 345. *Ante*, p. 473.

Letter of Credit.—*See* Damages, 2.

Libel.

Libel. Plea, that defendant, in the ordinary course of his military duty, as the superior officer of the plaintiff, and because it was his duty, and not for any other reason, forwarded letters of the plaintiff complaining of an order given by defendant, and for the information of the commander-in-chief, accompanied the letters with a report on the subject of complaint and on the incompetency of the plaintiff, addressed to the proper officer, and on a proper occasion, which was the libel complained of. Replication, that the libel was written by the defendant of actual malice, and without any reasonable, probable, or justifiable cause, and not *bona fide*, or in the *bona fide* discharge of the defendant's duty as such superior officer Demurrer. *Held* (Cockburn, C. J., *dissentiente*), that the replication was bad. Words written by a military officer, in the ordinary course of his duty as such, are absolutely privileged in the civil courts.—*Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94.

Lights.—*See* Ancient Lights.

Limitations, Statute of.

1. A postnuptial settlement made in 1814, in pursuance of an antenuptial agreement, recited that A., the settlor, had paid £1000 to B., and B. therein covenanted with A. that he would hold the £1000 upon trust, "with the approbation of" A., to "invest the same . . in the public funds, or . . . government or real securities," in the names of A and B, for the benefit of A. and his wife during their respective lives, and then for their children. And A. covenanted to pay to B £1000 more twelve months from date, to be held on like trusts. B. died in 1821, and A. died after his wife in 1868. Neither the sum of £1000 was really paid to B., or invested in the names of A. and B. *Held*, on a claim by the children to rank as creditors, that A. had made himself trustee as to the first £1000, and the Statute of Limitations was no bar; but the claim to the second £1000 rested in covenant, and was barred.—*Stone* v. *Stone*, L. R. 5 C. 74.

2 A., a London solicitor, held a power of attorney from B., his principal in America, to sell his property and invest the proceeds in B.'s name, or in trust for him. A received moneys under the power in 1859, which he

paid into his firm's general bank account. B. died intestate the same year. In 1867. B.'s widow took out administration to his estate, and in 1868 filed a bill against A. for an account. *Held*, that the Statute of Limitations was no bar, because A. held the moneys on a direct trust, and if he had not, the statute would not have begun to run till administration was taken out. But the mere fact that the money was mixed with the solicitor's general account did not make him liable for compound interest.—*Burdick* v. *Garrick*, L. R. 5 Ch. 233.

3. A. left real and personal estate upon trust, to convert the same, and pay the income to B. for life, and then to pay the fund as B. should appoint. B., by will, appointed the fund to her executors, who were her residuary legatees, and also trustees under A.'s will, upon trust, to pay certain charitable legacies, including £1000 to X. Hospital. Thirty years after B.'s death, a bill was filed for the payment of this sum. There had been no admission of assets (see Executor and Administrator), and no sum set apart. *Held*, that there was no trust, and the statute was a bar, although the legatees did not know of the legacy, or that the will was proved.—*Cadbury* v. *Smith*, L. R. 9 Eq. 37.

See Statute.

Lunatic.—*See* Husband and Wife, 2.

GENERAL CORRESPONDENCE.

Form of indictment.

To the Editors of the Law Journal.

Gentlemen,—As in the interests of "the profession" you invite reports of cases decided in our local Courts, I beg to transmit you the following. I feel it would be extreme arrogance on my part to make any remarks thereon. It sufficiently commends itself to the notice of the profession.

At the last General Sessions of the Peace for a Western County a person was committed for trial for a misdemeanour, in obstructing a public highway; a true bill was found against him at the last Assizes. The indictment was drawn by an eminent Queen's Counsel, and was this:—

County of ——, *To wit:* } "The jurors for Our Lady the Queen, &c. . . . . (*reciting as usual the existence of the highway, its situation, &c., and its being used as such*) until on the first day of April in the year of our Lord one thousand eight hundred and seventy one J—— B—— did unlawfully and injuriously build and construct a fence with rails &c." . . . .

On the arraignment of the defendant he pleaded not guilty. His learned counsel thereupon moved to quash the indictment on the ground that the offence was charged to have been committed in 1871. The Crown Attorney urged the absurdity of such an objection, and shewed that the "one" must be taken in connection with J—— B——, and that it was not 1871, but "one J—— B——."

The learned Chairman, however, sustained the objection, and delivered the following judgment: "*As offence is charged to have been committed in* 1871, *we quash the indictment.*"

I give this judgment to the legal profession for their attentive consideration, and if, by the publication and perusal thereof, the Attorney General will be induced to be more careful in future in selecting competent Queen's Counsel to conduct Crown business, and in a proper manner make timely recognition of the services of this judge—this legal "gem of purest ray serene"—my services as reporter will be amply repaid.

Yours, &c., K.

Chatham, June 18th, 1870.

Santee v. Santee.—A testator bequeathed the interest of $1,000 to his widow for life, and also certain specific articles, as hay, wheat, &c., to be paid by the devisee of a tract of his land "during her life," and also the occupancy of certain rooms in his dwelling-house "during her lifetime or so long as she may choose to occupy the same herself." The devisee of the land gave the widow his bond conditioned for the payment of the interest and specific articles at the times they became due. *Held*: 1. That the widow's right to the receipt of the interest money, and the hay, &c., was not limited to the time of her occupancy of the rooms in the homestead. 2. That where the time of delivery and the particular articles to be delivered are fixed by contract, it is the duty of the obligor to seek the obligee to make the delivery. 3 If the obligee is out of the commonwealth, but his whereabouts is known to the obligor, then, although the latter is not obliged to follow him out of the State, yet it is his duty to inquire by letter as to what reasonable place he will appoint at which to receive the goods.—*Philadelphia Legal Gazette.*

In a suit for divorce recently tried before Judge Patchen, of Detroit, it was decided that a farm should be equally divided between the severed couple, on the ground that the woman, by her hard work, had done as much as the man to acquire the property.