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BENCH AND BAR.

Those of the profession who took advantage of the long vacation and the demise of Trinity Term, to recruit their exhausted energies by voyages, long or short as the case might be, have returned, and again tackled to work. The Chief Justice of the Common Pleas, after his trip across the ocean, looks all the better for a brief sojourn in his native land. We trust the Chief Justice of Ontario is also better for his holiday, but it is certain that he must be careful not to overtax his strength, though he will be sorely tempted to take his full share of duty in the overworked Court of Queen's Bench.

The season's business—to use a mercantile phrase—has opened with a fair share of work in Chambers, indicative of the state of litigation in the country, and practitioners have awakened to the fact that the Assizes are upon them, and that applications for changes of venue, the settlement of pleas, security for costs, putting off trials, &c., have to be made and met without further delay, and in a space of time sometimes short from necessity, but often from procrastination. It is, however, well to know that, under the present mode of conducting Chamber business, the interests of suitors will suffer as little as possible, and less than was possible when a Judge was obtainable (during assize time) only at intervals, and then with but a few moments to devote to each case brought before him.

All parties—Judges, lawyers and suitors—are great gainers by the recent appointment of Mr. Dalton. But when we say *all* parties, we cannot include the Clerk of the Queen's Bench himself; for we understand that he receives no remuneration whatever for his increased labours. Probably many are not aware of this, but it is well that it should be known, so that it may be remedied. It may be assumed that Mr. Dalton received sufficient remuneration but no more for his services as Clerk of the Queen's Bench. When, therefore, his duties are practically doubled, and when these added duties can only be satisfactorily performed by a sound painstaking and experienced lawyer, it is only reasonable to expect that additional and adequate salary should be provided for the person doing the duty. When we consider, also, that the work, which was formerly divided among the six Judges, and was then complained of by some at least of them as too great a tax on time fully occupied with other duties, is now done by one person, it is not too much to suppose that a proper representation of the matter to the energetic, albeit economical head of the Government of Ontario, would put the matter right. One thing is certain—that the profession would not, after the relief they have experienced, tolerate a return to the inconvenience and hindrance to business resulting from the absence and other engagements of the Judges during Assize term.

There is another matter which it may not be amiss to refer to, when speaking of Chamber business, and it is this—though the bulk of it may be and is done before Mr. Dalton, there are very many matters of importance which can only be dealt with by the Judges themselves. And it often happens that there is difficulty in obtaining the services of a Judge, not from any desire on their part to shirk their work, but from their being no arrangement or system to enable parties to obtain a hearing before a judge without great loss of time, trouble and expense to practitioners and suitors. We admit the difficulty of providing adequate relief in the premises, but there is certainly a defect in the present system which should if possible be remedied.

One practicable remedy, so far as it goes, would be to enlarge the jurisdiction of the Clerk of the Crown as to some matters—indeed as to all except two classes of cases—1. Those relating to the liberty of the subject, which are excluded by the Act; and 2. That class of cases, such as appeals in Insolvency, motions for prohibition, and the like, which assume a jurisdiction over the Judges of the County Courts. That, we presume, could not be given to an officer of the Court with due regard to propriety and what philosopher Square calls the "eternal fitness of things." It might also be arranged that one of the Judges should be in his room at Osgoode Hall one or more days in the week, to hear cases which must necessarily be heard before a Judge.

SELECTIONS.

ADVICE TO LAW STUDENTS.

"Be honest with the court. I have said that you will be subjected to great temptations. In your early causes you will be far more anxious, and more deeply interested to succeed, than your client. To him it may be ten dollars, or fifty, or a hundred or two: with you it is success or failure, the admiration or the contempt of the bystanders, life or death professionally. In this fearful anxiety you will be sorely tried and tempted to conceal your blunders by coloring the facts, and to win your cause no matter how. I say you will be *tempted* to do this but I assume that you will have the manhood and integrity to rise above the temptation. If not, your failure at the bar is certain. A man who has never been tempted may be honest merely; but virtue, in the profession or out of it, is the fruit of temptation suffered, but overcome. Honesty is the best policy, and no man sees this proverb illustrated so frequently, and so vividly, as the lawyer. A trick or a falsehood may win a point or save a cause; but it is certain of discovery, and it will cost its author ten years of honest practice to allay the indignation it will excite in the breast of an honest judge.

"Be always deferential and respectful to the court. Meet their rulings, no matter how adverse or erroneous with the true dignity of professional obedience. But while you are always respectful, be always firm. Courts are composed of judges; judges are men; men who dine out late of nights; they come reluctantly at the summons of the court bell from an unfinished sleep; they are overworked, they are poorly paid and occasionally come to the bench in that impatient and petulant mood which 'sometime hath its hour with every man.' A judge in such a mood will 'whistle your case down the wind' before he has heard the first half of it. Under such circumstances, while you are to be courteous to the court, you must be as firm as a rock The best course for obtaining your rights before an impatient judge, is to acquire the art of clear and concise narration. In motions made, and incidental questions arising in a cause, half are decided erroneously, because the court does not understand the facts, or the state of the record, upon which the decision depends. I think one of the great deficiencies of the profession in daily practice, is the want of this art. To train yourselves in this particular, study the best models of historic composition. Take Kinglake's history of the Crimean war for example, and read the one or two hundred pages in which he describes the charge of the Light Brigade at Balaklava. Notice the innumerable incidents and trifling occurrences, and mark the consummate art with which they are so grouped and arranged as never to obstruct, but always to heighten the effect of the general narrative. The facts of a case before a jury may be very voluminous and very complicated, and there is nothing which so severely taxes the skill of a master as to make every fact available without so burdening the mind of the jury that they will forget the facts altogether. The most trifling and insignificant fact which is yet important enough to be given in evidence, should be brought to the mind of the jury in the argument of the cause; but the facts should be so marshalled with regard to subjects and order of time, that the jury can see the precise bearing of each. In an argument to the jury the facts should be stated by chapter and verse, presented by scene and act, as in Othello, one of the most artistic of Shakspeare's plays, where the least circumstance, even Desdemona's dropping her handkerchief, is made to contribute powerfully to the final and fatal catastrophe.

"Another important matter is the examination of witnesses. I believe that more causes are lost from unskilful examination of witnesses than from all other species of malpractice combined. Always know what your witness is called to prove; direct his mind to that particular object; get through with him as quickly as possible. In cross-examining witnesses, if I were to lay down one, and an invariable rule, it would be not to cross-examine at all. In nine cases out of ten, where a witness testifies against you, your cross-examination will make a bad matter worse. If you believe a witness is honest, and only mistaken, treat him courteously, never touch his pride, nor put him on the defensive. If you believe he is swearing falsely, go down upon him like an avalanche. In ordinary cases never put a question in cross-examination, unless it be to call out some new fact favourable to you; and even then, I think you had better wait and call him as your own witness, and thus win his favor by showing confidence in his integrity; and thus you will frequently get from him very comforting things."—*Extract from an address of Hon. M. H. Carpenter to the Columbian Law College.*

The New Lord Justice of Appeal.—Mr. George Mellish, the new Lord Justice of Appeal in Chancery who received the honour of knighthood on Tuesday, is the son of the late Very Rev. Dr Mellish, Dean of Hereford, and was born in the year 1814. He was educated at Eton and at University College, Oxford, where he took his Bachelor,s degree in 1837, and proceeded M. A. in 1839; he was called to the bar at the Inner Temple in 1848, and for some years went the Northern Circuit. In 1861 he was appointed a Q. C., and he has now been elevated to the bench, in the place of the late Right Hon. Sir George M. Giffard, as Lord Justice of Appeal, and sworn a member of the Privy Council.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

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

In re Richard B. Caldwell.

Extradition—Habeas Corpus—Forgery—Warrant—Evidence of accomplice.

Held: 1. It is not necessary under the Extradition Treaty and Act, that an original warrant should have been granted in the United States, for the apprehension in this country of the person accused, to enable proceedings to be effectively taken against him in this Province for an offence within the treaty.

2. The evidence of accomplices is sufficient to establish a charge for the purposes of extradition.

3. Where the crime comes within the treaty, it is immaterial whether it is, according to the laws of the United States, only a misdemeanour and not a felony.

4. A magistrate here holding an investigation for the purpose of extradition should not go beyond a bare enquiry as to the *primâ facie* criminality of the accused, and should not enquire into matters of defence which do not affect such criminality.

[Chambers, March 25, 1870—*A. Wilson, J.*]

A writ of *habeas corpus* was obtained on behalf of the prisoner, directed to the Sheriff of the County of York and others.

The return stated that the prisoner was detained under the warrant of the police magistrate of the City of Toronto, on a charge of forgery committed in the United States, against the laws of that country.

J. H. Cameron, Q. C., for the prisoner, urged the following points in favour of his discharge.

1. There was no charge made in the United States before or since this charge.

2. The charge is only on the evidence of an accomplice.

3. The offence charged is not forgery within the law of the United States.

4. The charge is not within the treaty, and is condoned by a statute of limitation in the United States, which period (two years) had expired before the charge was made.

See 1 Parker, Crim. Rep. 108: *Ex parte Martin*, 4 C. L. J. N. S., 198; 29-30 Vic. cap. 45, sec. 3.

M. C. Cameron, Q. C., *contra.*

The remedy is not by habeas corpus.

It is not necessary that the charge should have been made in the United States before proceeding here: *Reg.* v. *Anderson*, 4 C. L. J. N. S., 315; *Ex parte Martin, ubi sup.*: *The Queen* v. *Gould*, 20 U. C. C. P., 154.

Fugitives from justice are not entitled to the benefit of the limitation claimed, 5 Cranch 37; 1 Wharton's Am. Law, sec. 436.

The case was argued before Mr. Justice Adam Wilson, who prepared the following judgment, which, however, was delivered by the Chief Justice of the Common Pleas during the absence of the former learned judge on circuit.

A. Wilson, J.—It was objected that no charge had been made in the United States against the prisoner for the alleged offence, and that until criminal proceedings had been taken there, none could properly, under the treaty and our statutes passed for giving effect to the same, be initiated here.

The statute of the Dominion, 31 Vic. cap. 94, (Reserved Act; see 32, 33 Vic. p. xi) reciting the treaty, refers to "persons who being charged with the crime of murder, &c., within the jurisdiction of the high contracting parties, should seek an asylum, or should be found within the territories of the other, provided that this should only be done upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed, &c."

The *charge* may therefore be made within the jurisdiction of *either* of the high contracting parties, in case the evidence of criminality, "according to the laws of the place where the fugitive or person *so charged* should be found, would justify his apprehension and commitment for trial if the crime or offence had *been there* committed." The language of the enacting part, (sec. 1) is to the same effect.

I should have thought that the statute permitted a charge to be made here against a person who had committed an offence within the treaty in the United States of America, although no charge had been begun there against the person for that offence, and I should have thought it to be free from all doubt but for the second section of the act, which enacts, that "In every case of complaint and of a hearing on the return of the warrant of arrest, copies of the depositions upon which the original warrant was granted in the United States, certified, &c., may be received in evidence of the criminality of the person so apprehended." The Con. Stat. of Canada, ch. 89, sec. 2, referred to the original warrant, not as the warrant that *was* granted, but which "*may have been granted*"

I do not, however, consider the statute to require that no charge should be laid here, when the offence has been committed in the United States, until a warrant has been granted there.

The legal functionary is bound to act here "on complaint under oath or affirmation charging any person, &c.," with one of the treaty offences. And when the person charged is brought before the judge or other person who directed the arrest, the judge or other person is to examine on oath, "any person or persons touching the truth of the charge, and upon such evidence as according to the laws of this Province, would justify the apprehension and committal for trial of the person accused, if the crime had been committed here, the judge or other person shall issue his warrant for the commitment of the person charged, to remain until surrendered or duly discharged."

The judge or other person acting may proceed upon original *vivâ voce* testimony in like manner "as if the crime had been committed in this province." He may, however, also receive copies of the depositions on which the original warrant was issued in the United States in evidence of the criminality of the accused.

This, however, is an enabling act. There is no obligation on the prosecutor to produce such depositions. And I do not conceive that the statute requires there shall be first such depositions taken, and a warrant granted thereon in the United States, to give jurisdiction to the magistrate here.

The purpose of the statute was to permit the foreign evidence to be made use of here, and not to make it obligatory in the foreign country to have issued a warrant against the offender as a basis for our authority to act.

When once the foreign officers have the person accused surrendered to them for removal from this country it must be for themselves to justify their detention of the person in their own country.

It may be that in cases of felony there the detention may be justified by any one in like manner, and to the like extent that it may be justified here without a warrant at all. But whether it can or cannot, or whether the offence is there a felony or not, can make no difference here.

Our concern must be to deal with these foreign offences in our own country in like manner as if they had been committed here: to enforce the treaty effectually and in good faith, and to leave all questions of municipal law between the foreign authorities and their prisoner to be dealt with and settled by their own system with which in that respect we have nothing whatever to do.

I am therefore of opinion, that it was not necessary that an original warrant should have been granted in the United States for the apprehension of the person accused, to enable proceedings to be effectually taken against him in this Province, for an offence within the laws of the treaty.

The second objection was, that the direct evidence of criminality was that of two accomplices, and that such evidence was not sufficient to establish the charge without proper corroborative testimony.

I do not attribute much weight to this objection, the evidence of accomplices is admissible, and jurors may when the rule of law with respect to such persons has been explained to them, find a verdict on the evidence of accomplices alone. Justices holding such preliminary investigations, may assuredly do so, when the question is whether the accused shall be put upon his trial or not; and when all such questions, as to how far his accomplices are to be credited, will be duly and at the proper time considered, the objection is not sustainable.

It was thirdly alleged, that the facts did not shew that the offence of forgery had been committed. It appears to me the offence has been sufficiently charged and proved to constitute the crime of forgery.

If it be under the act of 1823 (see Laws of the United States, Dunlop, p. 678, ch. 38), the offence is a felony.

If it be under the act of 1863 (see United States Statutes at Large, 37th Congress, ch. 67), the offence will I presume be a misdemeanour.

And if it be under the act of 1866, 39 Congress, ch. 24, it is a felony.

But whether a felony or misdemeanour can be of no consequence—it is nevertheless the offence of forgery, and it is with that alone that the treaty and the statute deal.

It was lastly objected that the accused could not be legally apprehended here upon the charge, because the offence, if committed at all, was committed more than two years before the complaint was made against him, and by the law of the United States, the lapse of two years was a bar to the criminal prosecution.

The period of limitation was denied. It was said to be five years in cases which affected the United States revenue. If it be restricted to the term of two years, then it was said the case must fail.

It was answered on the other hand that it was a matter of defence only, and the defence might be repelled by showing that the accused was a fugitive from justice.

It appears to me that what the judicial officer in this country has to do, is to determine the *primâ facie* criminality of the accused, to determine whether the evidence is sufficient to sustain the *charge* or not.

It is not by any means determined in the United States whether a demurrer will lie, or a motion in arrest *of judgment* may be made, if the indictment show the offence to have been committed beyond the statutory period.

The accused is at liberty to take the benefit of the limitation under the general issue, and the prosecutor may show in reply, that the accused is not entitled to the benefit of the protection by reason of his flight from justice.

It appears to me it will be very inconvenient if the magistrate here is compelled to go beyond the law of enquiry as to criminality.

Suppose some pardoning statute to be relied on—with many execptions and special provisions—and the accused claims the benefit of it on the claim for extradition. Is the magistrate to try this collateral question, whether the accused is or is not within its provisions, or has or has not forfeited his claim to its protection?

The limitation is a matter of defence; the accused is entitled to the advantage of it by plea, or by some proceeding in the nature of a plea, and he may be precluded from getting the advantage of itby a proper replication, or by counter evidence in the nature of a replication.

It affects his liability to be prosecuted or convicted, it does not affect his criminality.

On the whole, I think the accused should be remanded generally to the custody from whence he came, to abide the decision of his Excellency the Governor-General under the statute.

Prisoner remanded.

Hatch v. Rowland.

Fi. fa.—Stock in incorporated company.

Held, that stock in an incorporated company is only bound from the time when notice of the writ is given to the company by the sheriff under Con. Stat. Can. cap. 70, ss. 3, 4, and not from the time of the delivery of the writ to the sheriff.

[Chambers, March 10, 1870.—*Mr. Dalton.*]

This was an interpleader summons, obtained by the sheriff of the United Counties of Northumberland and Durham.

On the argument, the parties agreed to waive their right to an issue, and to leave the decision of the question in dispute to Mr. Dalton.

The matter in dispute was a small amount of stock in the Port Hope Gas Company, an incorporated company.

It appeared that on the 24th August, 1868, there were standing on the books of the company five and a half shares of its stock, in the name of the defendant, who on that day transferred the stock to James Clarke. It so remained until the 18th October, 1869, when Clarke re-

transferred it to the defendant. On the same day the defendant transferred it to the claimant, both the latter transfers being entered in the stock book of the company. This transfer to the claimant was in satisfaction of a judgment which the claimant had recovered against the defendant.

On the 10th January, 1870, the sheriff of Northumberlaad and Durham served on the secretary of the company a copy of the writ of *fieri facias* against the defendant's goods in this cause, at the suit of the plaintiff, which was then in the sheriff's hands, and had been in his hands continuously to that time from a day previous to the 18th October, 1869, and gave the notice of seizure, pursuant to sec. 8, cap. 70, Con. Stat. of Canada.

Rae appeared on behalf of the sheriff.

Mr. Greene (Patterson & Beatty) for the execution creditors.

McCaul for the claimant.

Mr. Dalton.—The question is, whether the stock, under the circumstances, was bound from the receipt of the writ by the sheriff; and I think it was not.

By Con. Stat. of Canada, cap. 70, sec. 1, "all shares and dividends of stockholders in incorporated companies shall be held to be personal property."

By sec. 3, the sheriff to whom any writ of execution is addressed, with directions to seize stock, "shall forthwith serve a copy of the writ on such company, with a notice of seizure, &c.; and from the time of such service, *no transfer of such stock by the defendant shall be valid*, until the seizure has been discharged."

Sec. 4 enacts that if a company has a place of business other than that where such notice has been served, such notice shall not affect the validity of any *transfer* or payment of any dividends or profits duly made and entered at such *other place*, so as to subject the company to pay twice, *or to affect the right of any bonâ fide purchaser*, until there has been time to transmit the notice.

As the first section of the act (and section 255 of the C. L. P. Act is to the same effect) declares shares to be personal property, and liable as such to be attached, seized and sold under writs of execution, it would probably be held, but for the other enactments of the statute, that the delivery of the writ of *fieri facias* to the proper sheriff would bind the property, as in the case of other personal property; but the second and third sections seem to show clearly that such is not the intent. It is the necessary implication that until the seizure, in the manner pointed out in the third section, the receipt of the writ by the sheriff cannot affect the rights of a *bonâ fide* purchaser, though he may purchase after such receipt. I should understand by the expression, *bonâ fide* purchaser, a purchaser for good consideration, without notice. I understand the claimant to be such purchaser.

Robinson v. *Grange*, 18 U. C. Q. B. 260, is consistent with this, though it does not expressly decide it.

I must therefore make an order declaring the property to be in the claimant Stanton, and protecting the sheriff as against the execution creditor; the execution creditor to pay the costs of the sheriff and of the claimant.

Order accordingly.

NEWFOUNDLAND REPORT.

SUPREME COURT, NEWFOUNDLAND.

Before the Honorables Hoyles, C. J., Robinson and Hayward, JJ.

(*Reported by* D. Girouard, Esq., *Advocate, Montreal.*)

Carter et al v. LeMesurier.

Election committee—Amenable to judicial authority—Writ of prohibition.

Held: That an election committee illegally constituted by the House of Assembly to try the return of members sitting therein, will be prohibited from proceeding in the said enquiry by a *writ of prohibition.*

[St. Johns, Newfoundland, May 20, 1870.]

On the 6th April last, *W. V. Whiteway*, Q C., moved for a writ of prohibition to be directed to Thomas Talbot and others, forming a committee appointed by the House of Assembly of Newfoundland to try the return of F. B. T. Carter and Edward Evans, members for the District of Burin; also to Henry LeMesurier and John Woods, upon whose petition the committee had been named, prohibiting the said committee from proceeding in the said enquiry, and the said petitioners from prosecuting the same.

The grounds of the motion were, that the House of Assembly on the 24th February last, the day appointed for considering the petition of Messrs. LeMesurier and Woods against the return of Messrs. Carter and Evans, omitted to call the House before proceeding with the order of the day, and upon finding that there were not twenty members present besides the speaker, adjourned for a whole week instead of to the following day, as required by law; and that by reason thereof, the said select committee had been illegally constituted and should be restrained from taking further proceedings in the matter

The court refused to order the immediate issuing of the writ, but granted a rule *nisi* upon the petitioners and the committee, with a stay of proceedings in the meantime. An application was then made by Mr. Whiteway for the compulsory examination of the Clerk and Solicitor of the Assembly. This also was refused, but with an intimation, that if the affidavits of these officers were not produced by the other side, the application might be renewed during the progress of the case, should their evidence appear to be necessary for establishing the truth upon any material points in controversy.

Upon the return of the rule, being the last day of April Term, the Attorney General appeared for the petitioners and the committee, and after protesting against the authority of the court to interfere with what, as he alleged, were the proceedings of the Assembly in a matter of which they alone had cognizance, took a preliminary exception to the rule *nisi* as not being in accordance with the terms of the sixth of the practice rules of the Supreme Court, which prescribes

larity shall state in the rule itself the grounds intended to be relied upon.

The court however were of opinion that the sixth rule had reference only to irregular proceedings in the Supreme and Central Circuit Courts and overruled this objection.

W. V. Whiteway, Q.C., in support of the rule.

The writ of prohibition should issue. The Supreme Court of Newfoundland is constituted under the act 5 Geo. IV. cap. 67, and has jurisdiction in Newfoundland and its dependencies as fully and amply, to all intents and purposes, as her Majesty's Courts of Queen's Bench, Common Pleas, Exchequer, and the High Court of Chancery have in England.

There is no court in Her Majesty's Colonies possessing more extensive powers within its jurisdiction than the Supreme Court of this island.

A writ of prohibition will lie to a pretended court, from the Queen's Bench. (*Per* Holt, C. J., in *Chambers* v. *Sir John Jennings*, 2 Salk. 553, Bac. Abr., Tit. *Prohibition*.)

The Queen's Bench may prohibit any court whatever: Viner's Abr. 50. The Courts of Westminster have jurisdiction over all courts, by writs of prohibition: Bac. Abr.; Wharton's Law Lexicon, Tit. *Prohibition*. The Queen's Bench may award prohibition against any Court usurping jurisdiction: Tom. Law Dict., Tit. *Court*. If the Commissioners for determining policies of insurance grasp at more power than they have, the Court of Queen's Bench will prohibit them: Bac. Abr., Tit. *Prohibition*. The Queen's Superior Courts have control and superintendence over inferior jurisdictions, and are to take care that they keep within bounds: Tom. Law Dict., Tit. *Court*; Waddilove's Abr., Tit. *Prohibition*; 2 Inst. 602; 2 Rolles' Abr. 819; 1 Ventris, 73; Fitzherbert's Natura Brevium; *Darby* v. *Cossens*, 1 T. R. 552; Bullen & Leake, 629; 3 Black. Com. 112.

Prohibition issued from the Court of Queen's Bench to Surrogates appointed by the Judge of the Court of Arches, he having exceeded his authority in appointing them: *Martin* v. *McConachie*, Moo. P. C. C., N S. 505.

Hoyles, C. J.—Was not the reason that the Judge who appointed the Commissioners had been counsel in the cause?

Mr. Whiteway.—I think that was not the reason for the prohibition. The ground upon which it was obtained was, that the Judge had not power to appoint.

Robinson, J.—Have you filed a suggestion?

Mr. Whiteway.—No, my Lord. Under the present practice, filing a suggestion is not necessary: Wharton's Law Lexicon, Tit. *Prohibition*. The practice is there stated.

The Court of Exchequer has power to issue a writ of prohibition to the Judicial Committee of the Privy Council: *Ex parte Smythe*, 2 C. M. & R. 749. Prohibition lies *pro defectu jurisdictionis* as well when a court has jurisdiction and exceeds it, as when it has no jurisdiction: *Smith* v. *Bradley*, Buller's N. P. 219 *b*.; Har. Dig. 3309. When a limited tribunal exercises jurisdiction not belonging to it, its decisions are nugatory: *Attorney-General* v. *Hotham* (*Lord*), 1 Turn. & Russ. 219.

The acts of the Court of Admiralty and of courts martial, may become the subject of an application to the Courts at Westminster for a writ of prohibition: *Grant* v. *Gould*, 2 H. Bl. 101.

An election committee of the House of Commons is a judicial tribunal: Warren's Election Practice, 629, 276, 277; May's Parliamentary Practice, 438, 442; Dwarris on Statutes, 229.

Election committees have, by statute, power to examine on oath, which the constitution denies to the House of Commons, lest that body should thereby attempt to become a court of justice: Bowyer's Com. on Constitutional Law, 90.

An election committee of the House of Assembly is a judicial tribunal, to be constituted by the House under statute 23 Vic. cap. 11, in the manner therein provided, to administer justice, under the sanction of an oath—bound by the law, over which it has no control. Parliament cannot exceed the law: Tom. Law Dict., Tit. *Parliament*; *Coundell* v. *John*, 2 Salk. 504; 4 Inst.

The appointment of an election committee was ruled to be illegal in *Bruyeres* v. *Halcomb*, 3 A. & E. 381. When an action of debt was taken for the costs, under the Speaker's certificate, the defendant objected that the committee was not legally constituted. In reply it was urged that the courts at Westminster could not enquire into the character of the proceedings as regards the appointment in such a case. The court decided that it was bound to enquire into the character of such proceedings, to ascertain whether the tribunal had been constituted according to law; for if not, its acts would be nugatory; the maxim would apply, *debile fundamentum fallit opus*, and in this case the petitioner not having been notified to attend at the time of the drawing of the committee, its constitution was ruled not to be in accordance with the Act 9 Geo. IV., cap. 22, and the plaintiff could not recover.

The learned counsel also referred to the recent Bridgewater cases, of which he stated he had no report, where a *mandamus* was granted to the commissioners appointed to enquire into the bribery charges, ordering protection certificates to be given to witnesses under certain circumstances alleged, showing the powers belonging to and exercised by the Superior Courts.

This statute, 23 Vic. cap. 11, ought to be construed strictly, as it creates a new jurisdiction, according to the authority in Dwarris on Statutes, 652; 10 Rep. 75; Stra. 258.

Affirmative words, if absolute, explicit and peremptory, showing no discretion was intended to be given, especially when jurisdiction is conferred, are imperative: Dwarris on Statutes, 611.

It would be difficult to use words more absolute, explicit and peremptory than those used in this Act.

The word "may," when the statute confers an authority to do a judicial act, is imperative on those so authorised: 11 Com. B. 773, 142, B. 474.

Here the learned counsel commented at length on the provisions of the local Election Act, 23 Vic. cap. 11, and the authorities quoted, and contended that the House of Assembly had appointed seven individuals to act as an election committee, who were presuming to act in the adjudication

of the rights of parties, not being legally constituted as a tribunal for that purpose.

Hon. R J. Pinsent, also in support of the rule:—No language can be more explicit, clear and imperative than that of the statute under which election committees are to be appointed. It is imperative; it prescribes not the mode of proceeding only in general terms, but that the adjournment shall be to the next day at a particular hour, and so on from day to day, &c. Here the adjournment was for a week. The essential character of the proceeding in principle, and the necessity of its being carried out according to the express words of the law, are manifest. If a judicial decision held otherwise, the consequence would be, for instance, that a number of persons in the Assembly in hostility to the sitting members, professing to adjourn for a week or other given time, might, after the members had dispersed, and as in this case gone to their homes at long distances, profess to hold a legal and competent House according to the statute, and proceed to the appointment of a packed committee, to try the rights of parties who were wholly unconscious of the proceedings. Here, after the House had adjourned for a week, a few persons met next day and professed to be the House of Assembly, with power to declare that something had been done the day before that had never taken place. It was an unprecedented and unheard of action of prerogative. If there be any part of the Act important and essential, this, which went to the foundation of the matter, is that part: *Debile fundamentum fallit opus.*

The learned counsel cited from May's Parliamentary Practice, page 59: "One House cannot create a disability unknown to the law;" page 87, "If orders be made beyond the jurisdiction, the enforcement of them may become a matter liable to question before the Courts of Law;" page 610 (speaking of the administration of the Election Law in England), "Every enactment is positive and compulsory; the House, the Committee, the Speaker, the members, are all directed to execute particular parts of the act; and, in short, it is not possible to conceive a legislative body more strictly bound by a public law over which it has no control, and in administering which it has so little discretion," p. 660, the Court of Chancery interferes by injunction to prevent petitioners proceeding irregularly with private bills before Parliament.

He contended that the House of Commons itself could not contravene the express mode of the statute for the formation of an election committee, without the committee so formed being subject to the process of the Courts of Westminster.

The following cases and authorities were cited in the course of the argument:—The local statutes; *Doyle* v. *Falconer*, 4 Moo. P. C. C., N. S., 203; *Chambers* v. *Jennings*, 1 Salk. 553, as to pretended court; Vin. Abr. 50; *Bruyeres* v. *Halcomb*, 3 A. & E. 381, shewing that certain irregularities in the formation of election committees avoided the recognizance; *Grant* v. *Gould*, 2 H. Bl. 101; Dwarris on Statutes, 611-652, shewing the imperative meaning of the words; also, *Attorney General* v. *Lock*, 3 Atkyns, 166; *Reg.* v. *McCowan*, 11 A. & E. 869-885; *Freeman* v. *Trannah*, 12 C. B. 407; *Reg* v. *Grimshaw*, 10 Q. B. 747; *St. John's College* v. *Todington*, 1 Burr. 193-8; *Rex.* v. *Jolliffe*, 4 T. R. 288; *Reg.* v. *Ledgard*, 1 Q. B. 623; *Gould* v. *Gapper*, 5 East 362-370; *De Haber* v. *Queen of Portugal*, 17 Q. B. 171, and *Wadsworth* v. *Queen of Spain*, 17 Q. B. 196; *Manning* v. *Farquharson*, 30 L. J. Q. B. 22; Addison on Torts, 1033-40; Arch. Prac. 1737; *Eversfield* v. *Newman*, 4 C. B. N. S. 418; Broom's Leg. Max. 843-86.

Hon. Mr. Little, Attorney-General, *contra.*—The rule should be discharged on some one or all of the following grounds:

1. The committee being a part of the Assembly itself, and being appointed by that body for the purpose of conducting and determining an inquiry into the claims of certain parties to seats in the House, to prohibit it from proceeding in accordance with the orders of the House would be an illegal interference with the exclusive powers and privileges of the Assembly, for which no authority or precedent could be found.

2. Before applying for a writ of prohibition, the promovents should have appeared in the Court below, which they had not done.

3. Assuming (what he neither admitted nor denied) that there had been no call of the House prior to reading the order of the day on the 24th February, and that the House had adjourned for a week on that day, the commission in the one case, and the proceeding complained of in the other, were mere irregularities which (the words of the statute being directory only and not imperative) could not affect the constitution of the committee.

The irregular adjournment was cured by the House meeting on the 25th of February, and continuing its sittings by regular adjournments until the day when the committee was appointed. In support of this position the Attorney General cited an instance from the Journals of the Assembly of 1852, in which after having adjourned from one day until two o'clock the next day, the Assembly nevertheless met at twelve on that day, by direction of the Speaker, for the purpose of considering as to the relief to be afforded to certain distressed sealers.

4. If, as alleged, the committee was in fact illegally constituted, it was in law no court at all, and a writ of prohibition would not therefore lie to it, and the promovents' remedy was to await its action and institute proceedings only when actually aggrieved.

At the close of the Attorney-General's argument, Mr. Whiteway again moved for the examination of the Clerk and Solicitor of the House, and the Court being of opinion, that owing to the ambiguous and unsatisfactory character of the Speaker's affidavit, some doubt existed as to the fact of the adjournment being to the third of March, such examination was ordered.

On its being entered upon, the Attorney-General, on behalf of his clients, admitted that the adjournment was for a week as alleged; but the inquiry was nevertheless proceeded with for the purpose of informing the court of the circumstances under which the House had, as was stated by the Speaker, met on the following day. It then appeared that on the 24th of February the House was not called over previously to the order of the day being read; that in conse-

quence of there not being twenty members present besides the Speaker, the House had adjourned to the 3rd of March; that after the House rose the legality of this adjournment was doubted, and that in consequence, the Speaker and certain members (three or four, as deposed by the Clerk, at least ten, but not twenty, as stated by the Solicitor) met the next day at the usual time and place, with the view of correcting this mistake, and continued to meet and adjourn daily until the 3rd of March, from which day the House regularly met and adjourned from day to day until the 2nd of April, when, the required number being present, the committee was appointed. It further appeared that the original notes of the proceedings of the 24th of February as taken officially by the clerk, correctly stated the adjournment according to the fact; but that the full journals untruly stated that the House had adjourned to the next day; that the journals were so made up by the Clerk, not of his own accord, but by direction of some whose orders he felt bound to obey, but whose names, the disclosure being objected to by the Attorney General, as irrelevant, did not appear, and that the succeeding Journals up to the 3rd of March were made up on the assumption of continued regular adjournments of the House from day to day.

After the evidence had been given Messrs. Whiteway and Pinsent, in support of the rule, were heard in reply. The Court reserved its decision until the 20th May last, when the following judgment was delivered:—

Hoyles, C. J.—The questions raised for determination, though not of so much difficulty as might at first be supposed, are yet novel and important. Novel, because for reasons presently to be noticed, no case strictly analogous to the present can be found in English jurisprudence, and I cannot learn that any one of a similar character has occurred in any of the colonies; and important, not only because it is supposed to concern the powers and privileges of the House of Assembly, but also by reason of the interests immediately involved in it, since if the rule be discharged, the sitting members may be compelled to defend their seats before a tribunal in which they profess to have no confidence; while if it be made absolute, the petitioners may, without any fault of their own, be deprived of the opportunity of having their claim to seats in the legislature investigated and possibly allowed.

With the novelty or importance of the case, however, we have nothing to do, further than as these circumstances should stimulate us to a more thoughtful consideration of it. Nor may we concern ourselves with the consequences of our decision. Our duty is simply to declare the law as we believe it to be, and in now doing so, it is satisfactory to reflect, that if we should be mistaken in our conclusion, a tribunal is at hand by which our errors may be corrected.

The application which has been made to us is for a writ of prohibition to be directed to an election committee of the House of Assembly to restrain it, and those who are suitors before it, from further proceeding with an enquiry into the Burin election.

This writ is defined to be, "a writ issuing out of Superior Courts at Westminster, directed to the Judge and parties to a suit in any inferior court, commanding them to cease from the prosecution thereof, on the ground that the case does not belong to that jurisdiction" (3 Steph. Com. 686); and it is grantable *ex debito justitiae* (though not of course) upon sufficient grounds: *Jackson and Beaumont*, 11 Ex. 300; *Barder* v. *Veley*, 12 A. & E. 263.

By sec. 1 of the 5 Geo. IV. cap. 67, commonly known as the "Judicature Act," the Supreme Court has within this Colony and its dependencies the same jurisdiction that the Courts at Westminster have in England. An election committee constituted under the local act 23 Vic. cap. 11, for the trial of controverted elections, being a place where justice is judicially administered (Coke on Litt. 68), is undoubtedly a court, and having only a limited jurisdiction (*Mayor of London* v. *Cox*, L. R. 2 H. L. Cas. 239) is an inferior court.

It necessarily follows, that if in the present case sufficient grounds have been shewn for this writ, we are bound to grant it, unless, as is contended by the Attorney General, there is something in the character or constitution of this inferior court, as emanating from the House of Assembly, which limits and supersedes our ordinary authority in this respect.

The case, then, resolves itself into this inquiry,—Is our authority here restricted, as the Attorney General maintains it is, and if not, have sufficient grounds been shown for the issuing of the writ?

To consider these questions in their order—An election committee, although composed entirely of members of the Assembly, chosen and put in motion by that body, is essentially a creature of the law, owing its existence and constitution wholly to an act of the Local Legislature, which declares and defines its functions and duties, and bestows upon it all the powers it possesses. *Prima facie*, then, like all other inferior legal tribunals, it would be subordinate and subject to the control of the law as administered by the Superior Courts. What is there that exempts it from their jurisdiction?

The argument of those who contend for such exemption is, that by reason of its composition, and the subject matter with which it deals, the election of members to the House of Assembly, it is responsible to the Assembly alone, and no other power can lawfully interfere with its proceedings; and it is said that during the whole time, nearly a century, during which the Grenville Acts were in operation, no instance occurred of a prohibition being even applied for against a committee appointed under their provisions, and that in this particular an analogy exists between the Assembly and the House of Commons.

It is to be observed, however, that in *Bruyeres* v. *Halcomb*, 3 A. & E. 38, cited with approval in *Ransom* v. *Dundas*, 3 Bing. N.C. 123, the Court of Queen's Bench reviewed the appointment of an election committee of the House of Commons, chosen under the Imperial Act of 9 Geo. IV. c. 22, on which our act is substantially based; and although it is true that no case can be cited of a prohibition issuing to an election committee of the House of Commons, that is so because, by the *lex et consuetudo Parliamenti*, itself part of the law of England, that House has always, and

in a manner peculiar to itself, had and exercised the sole and exclusive power of enquiring into and determining upon the election of its own members: 2 Steph. Com. 368.

But it has been decided too often to be now a matter of doubt or controversy, that the *lex et consuetudo Parliamenti* has no application to Colonial Legislatures. (See *Doyle* v. *Falconer*, and cases there cited, 4 Moore, P. C. C. N. S. 203.) And that the powers and privileges of these bodies are such only as, either expressly or by necessary inference, are conferred by the charters, Royal instructions, or other instruments to which they owe their origin, or are given by local enactments in amendment of these instruments (1 Chalmers' Opinions, 233, 263, 296); and I can find nothing in the commission and instructions under which our Legislature was first assembled, or in any of the acts passed in relation to it, which exempts either the Assembly itself or any of its committees from the control of the law or from responsibility for a wrongful act where they exceed their powers; and in the interests of public justice, I feel constrained to add, that having regard to the evidence before us of the manner in which the Journals of the Assembly have been dealt with in this case, and the danger to which, were such proceedings necessarily tolerated, the rights of individuals might be exposed, it would in my opinion be a very great misfortune if either branch of the Legislature had power to commit a private wrong and the courts of justice were powerless to afford redress.

The general principles of the common law, then, giving to the Supreme Court jurisdiction over an election committee, and the special exemption from control which prevails for election committees in England having no existence in this Colony, it is manifest that the Attorney General's contention in this respect cannot prevail, and I have now only to consider the grounds upon which our interference is sought.

The grounds relied upon are, that on the 24th February, the day on which, by the order of the House, the petition was to be taken into consideration, the House was not called previously to reading the order of the day; and that upon its appearing that the required number of members was not present, the House was improperly adjourned until the 3rd of March, instead of to the next day; and these grounds depend for their validity upon the true construction of the 5th sect. of the Local Act, 23 Vic. c. 11, which is as follows: "Previously to reading the order of the day for considering the petition, the House shall be called; and if there shall be less than twenty members present, the House shall forthwith adjourn to a particular hour the next day, when they shall proceed in like manner, and so from day to day, till there be twenty members present at the reading of such order, in which number the Speaker shall not be included."

While it is admitted as a general rule that powers given by statute must be strictly pursued (Viner's Abr., *Tit. Authority*; *Atkins* v. *Kelby*, 11 A. & E. 777; *Roberts* v. *Humby*, 3 M. & W. 125), there is yet a clear distinction between matters merely *directory* and matters *imperatives*: *Reg* v. *Loxdale*, 1 Burr. 447. The former, although they ought to be followed, are yet not so necessary as that their non-observance will render void all subsequent proceedings, while matters imperative are such as cannot be dispensed with, without producing that result. To determine whether an enactment is imperative or directory, we must consider the consequences that would flow from disregarding it, whether it is of the essence or substance of the proceedings, or merely formal, and what appears to have been the intention and object of the Legislature with respect to it.

The Attorney General contends that the directions to call the House, and in a certain event, to adjourn to the next day, are not imperative, and that notwithstanding a mistake in or departure from either, the House could at a subsequent time proceed to perfect the committee, and so far as regards the calling of the House, I am at present disposed to agree with him.

The expression "the House shall be called," means, as is evident from the context, not that every member shall be previously summoned, but that the names of those then present shall be called aloud, that it may be certainly known if the number requisite for the appointment of the committee are in attendance. If they are (a fact which may be ascertained with sufficient certainty without a name being mentioned), the object of the Legislature, the securing a competent number from whom to choose, is satisfied, and no possible injury, it seems to me, could arise from their names not having been enumerated aloud. It is not necessary, however, that I should determine this point, because as to the direction to adjourn to the next day, I have a clear and decided opinion that it is absolute and imperative, and of the very substance of the enactment.

This, I think, plainly appears; 1. From a consideration of the importance attached to time throughout the statute; thus, no petition can be presented after so many days; not only a day, but an hour is fixed for its consideration; if the petitioner is not *then* present, the petition shall be further proceeded with; 2. From the evident intention of the Legislature that the proceedings upon the appointment of the committee should be continuous and uninterruped; 3. From the implied prohibition against the transaction of any other business while the appointment of the committee is pending; 4. From a regard to the probable difference in the composition of a committee chosen on one day from what it might be if chosen on another, in consequence of its being to be taken from the members present, who might not be the same on one day as on the next; 5. From the obvious facility with which, by preconcerted adjournments, a committee might be packed, if the time of appointment were in the discretion of the majority present; 6. From the language of the statute being, with reference to the adjournment "*from day to day*," *de die in diem*, that is, from the day then passing to the day next succeeding, the word being used in its natural, legal sense, which would authorize an adjournment only over a *dies non*, such as Sunday; and, 7. From the fact that it seems to have been necessary specially to amend the English Act, to enable the House of Commons to adjourn over certain holidays, in the event of the day preceding them being the day of appointment, and of the requisite number of members not being present on that day.

I must therefore hold, that this case comes within the rule laid down in *Ransom* v. *Dundas*, 3 Bing. N.C. 123, above cited, namely, that if the appointment of the committee takes place in a manner contrary to or inconsistent with the essential requisites of the statute, there is no court, and the jurisdiction and all proceedings under it fail, ahd therefore, that the House of Assembly in adjourning to the third of March, committed a fatal error, working what in a suit at law is known as a discontinuance, which terminates the suit; that the subsequent appointment of the committee was invalid; that the taking of the oath of office by its members with the purpose of proceeding to try the case was nugatory, and that all subsequent proceedings had by them would be *coram non judice* and inoperative.

It is contended, however, by the Attorney General, that, admitting the adjournment for a week to be a violation of the Act, this error could be and was cured by the Speaker, officers, and some of the members assembling next day at the usual time and place, and continuing to meet from day to day until the appointment of the committee was completed

No authority was cited for this position, and I have been unable to find one. The only cases at all bearing upon the point are some in relation to corporations, pointing to a contrary conclusion — (see *Rex* v. *Chetwynd*, 7 B. & C. 695, and *Rex* v. *Langhorn*, 4 A. & E., 538, whence it appears that a defect in summoning even a single member of those entitled to be present could be cured only by all being actually present and consenting to waive the defect) and a statement in a newspaper brought under our notice since the argument, by the parties in this cause, to the effect that the House of Commons was unable to assemble during an adjournment. Newspaper statements, however, are for the most part, too general to be of much value as authorities in matters of law, and cases of corporation practice depend too much upon the terms of the respective charters of these bodies to be often applicable. In the absence, therefore, of all authority, I have to consider this point upon general principles.

When an Assembly is first elected, it cannot of its own accord meet for the despatch of business; it must be called and assembled by lawful authority, the Governor's proclamation, and so after being prorogued, it cannot again meet without the like authority. The same principle, it seems to me, must apply to adjournments. When being lawfully assembled, it adjourns to a future day, the House by a formal resolution declares that it will not meet or transact business until the time named, and discharges all parties from further attendance until then; and when that time arrives it meets and is lawfully assembled by virtue of the order lawfully made at the time of the adjournment.

If the Speaker and any number of members whether three or a quorum, could by voluntarily assembling in the mean time, reconstitute the House for the despatch of business (and if they could do this for one purpose they could for another, no matter how important) they would in effect rescind and overrule the resolution of the House made when lawfully assembled. But by a rule of law familiar to every student, the authority to undo an act must at least be equal to the authority by which it was done—and the Speaker and members would not be of equal authority with the House unless lawfully assembled. Where, then, is the lawful authority to assemble them, outside the Governor's proclamation, during an adjournment? The Speaker has it not, that I am aware of, nor have any number of the members, nor the Speaker and members conjointly. It follows that when voluntarily assembled they have no power in law, political or legislative, and consequently cannot overrule a former resolution of the House. In the commissions and instructions of our several governors, down to those of Sir Alexander Bannerman, there was contained a clause empowering the Governor to adjourn as well as to prorogue and dissolve the legislature. No one will contend that if, in the exercise of this power, the Governor had on any occasion adjourned the Assembly, the Speaker and members could assemble and proceed with business before the time appointed by the Governor for their reassembling, as such a proceeding would be in direct violation of the instrument to which the assembly owed its existence; and in what respect does the legal effect of an adjournment by the House itself differ from an adjournment so made by the Governor? It is not denied that within the law, the Assembly has power to regulate its own proceedings, but no rule of the House has been made to authorize the Speaker to call the House together under the circumstances here supposed. The solitary precedent cited from the Journals of 1852 is not in point, as no private rights were thereby affected, and the meeting of the members before the time fixed for their assembling was in fact but a declaration by the members present of their readiness to vote a sum of money for a benevolent object. The practical operation of such a power as the Speaker here attempted to exercise would be embarrassing and unjust, as the proceedings of the quorum called together at one time, might seriously conflict with the proceedings of another quorum composed of different members assembled at another, the right of absent members would be ignored, and the advantage of a formal adjournment, connecting in time and place each meeting with those preceding and following it, would be altogether lost.

Unless, therefore, I am shown some authority for this position of a character so weighty as to supersede all reasoning upon it, I cannot assent to it; nor can I concur with the Attorney General when he insists that it was incumbent upon the sitting members to have appeared and pleaded before the Committee before applying for this writ. There are, no doubt, many authorities to this effect, but there are also many to the contrary, and in a most recent case upon this point, *The Mayor of London* v. *Cox* (L.R. 2 H.L. Cas. 239) above referred to, all the authorities were reviewed, and it was held that where the Court below has no jurisdiction over the subject matter of the suit, it is not necessary to appear there, and that a party aggrieved may apply to the Superior Court in the first instance. It is not therefore necessary to consider the effect of the protest made by Mr. Whiteway against the committee proceeding.

The last objection taken by the Attorney-General was of greater weight; and were this point not *res judicata*, as after much consideration I think it is, would in my opinion be fatal to this application.

The Attorney General argued that the writ of prohibition could only go to a duly constituted court of recognized powers and authority, which had exceeded or was about to exceed its jurisdiction, and that if the committee was illegally appointed, it was in fact no court, and Messrs. Carter and Evans' only remedy would be by an action at law for any injury they might hereafter sustain by its proceedings. In support of this view the case of *Ex parte Death*, 18 Q. B. 647., may perhaps be cited where a prohibition was refused as against the Vice Chancellor of the University of Cambridge, for alleged illegality in the conduct of an enquiry made by him, with a view to putting in force a statute of the University, but the circumstance that there the inquiry was purely voluntary, distinguishes that case from the present one, which in my opinion falls within the principle of *Chambers* v. *Jennings*, 2 Salk. 553; s. c, 7 Mod. 125; *Carter* v. *Firmin*, 4 Mod. 51, and *Bishop of Chichester* v. *Harward*, 1 T. R. 650; and *In re The Dean of York*, 2 Q. B. 1.

In *Chambers* v. *Jennings*, as reported very briefly in Salkeld, an action for words was brought in a Court of Honor, and a prohibition being moved for, Holt C. J. doubted if there was such a court, but said that the writ should go to a pretended court, and in the same case, as more fully reported in 7 Mod., while the legal existence of the court seems to have been questioned, the prohibition went, not only because an action for words would not lie in a Court of Honor, but because that court was then held before the Marshal only, and not before the Constable and Marshal, as it ought to have been, if held at all —that is to say, a prohibition lay because for one reason the court below was illegally constituted, which is the very ground upon which the present application was based.

This case is referred to as an authority in Bac. Abr., Com. Dig., and *In re The Dean of York*, 2 Q. B. 1.

In *Carter* v. *Firmin*, the court were of opinion that a prohibition ought to issue to an inferior court in the city of London, originally constituted for temporary purpose, which had been satisfied some years before, but the jurisdiction of which an attempt was improperly made to revive.

In the cases of *The Bishop of Chichester* v. *Harward*, and of *The Dean of York*, prohibitions issued to certain ecclesiastical functionaries, to restrain them from the exercise, to the prejudice of third persons, of visitorial powers which they did not legally possess

These cases seem to establish the principle that a prohibition will go to restrain the colorable assumption of judicial authority, such as that which the committee in the present case are about to exercise, and if so, they dispose of the objection I am now considering.

For all these reasons, I am of opinion, that this court has the power which has been ascribed to it, of restraining the committee from further proceedings, that sufficient grounds have been shown for the exercise of that power, and that this rule should therefore be made absolute.

Robinson, J.—In deference to the novelty and importance of the legal questions arising in this case, it seems proper to state the reasons which have influenced my judgment; and before doing so I wish to acknowledge the material assistance I have derived from the arguments and research of the learned counsel engaged in the cause.

To support the plaintiff's right to a writ of prohibition the following propositions must be established: 1st, That an election committee under the statute either was or assumed to be "an inferior Court;" 2nd, That the Supreme Court has authority to examine the constitution of such inferior tribunal, and to confine its action within the limits of law; 3rd, That the Committee now under consideration has not been created in pursuance of the statute, and is therefore inoperative.

It is true that the application for a writ of prohibition to an election committee has not been supported by any direct precedent, but it should not on that account alone be refused; in every series of decisions there must be a beginning, and the first must be determined, as we desire to determine this case, by the application of general principles. It may however be observed, that since the beginning of the present year, the Court of Queen's Bench in England, issued to the Bridgewater Election Committee a mandamus, which is a kindred writ to a prohibition, and did so unhesitatingly, although its authority to interfere with a Parliamentary Committee was questioned by the Attorney General of England.

Reference was made at the bar to some alleged privileges of the House of Assembly of the colony, which the action of this court, in granting a rule *nisi*, was supposed in some way to have invaded; but what those privileges are, or how the House was at all affected by our interference was not shown. As however the matter has been mooted, I think it would be unbecoming to evade an expression of our opinion upon it, and without in the least desiring to abridge the legitimate power of the Legislature, I would observe, that I am not aware of the existence of any privileges or immunities which the law confers upon either branch of our Colonial Legislature beyond those enjoyed by all legally constituted bodies who meet for a lawful purpose, and pursue it in a lawful manner.

Both Houses of the Assembly possess, as incident to their existence, all rights necessary for the due discharge of their legitimate functions, but the judgment of the Judicial Committee of the Privy Council, in a case which arose in Newfoundland thirty-two years ago, *Kielley* v. *Carson*, and has been affirmed by several other decisions in the same High Court of Appeal, has denied and for ever set at rest the pretensions which once were raised by Colonial Legislatures, that, under the assumption that the "Law of Parliament" applied to them, their will was law, and their proceedings were unexaminable by the Superior Courts. It is altogether visionary to imagine that any Legislative Assembly, body or person, possesses under British rule supremacy over the law in any particular whatsoever. Even the prototype of Colonial Legis-

latures does not claim for itself any such power, for in a recent work of no ordinary ability upon Parliamentary Government in England, I find the following passage: "No mere resolution of either House, or joint resolution of both Houses, will suffice to dispense with the requirements of an Act of Parliament, even although it may relate to something which directly concerns but one Chamber of the Legislature:" Todd's Parliamentary Government, 260.

It is unnecessary to advert to the inherent authority which the House of Assembly might have exercised in conducting its own internal proceedings with relation to its own members alone, and in determining the right of persons to sit within its walls, provided no act of the whole Legislature had limited that authority and prescribed a particular mode of procedure with reference to controverted elections, but as such an act has been passed, it regulates the action of the House, and to its requirements that body, and all persons in the colony, must of necessity conform.

The statute to which I refer was passed in 1860, and is entitled, "An Act to regulate the trial of controverted elections, or return of members to serve in the House of Assembly," 23 Vic. c. 11.

This act was framed upon the model of the Grenville Act, many of the provisions of which it adopted; it prescribes the time within which petitions must be presented, the mode in which recognizances must be perfected, the method by which a Committee of seven members shall be constituted, and the manner in which such tribunal—when duly constituted—shall discharge its functions. It directs that the members thereof shall be sworn "well and truly to try the matters of the petition, and a true judgment give according to the evidence." And it invests the committee with the power to summon witnesses, administer oaths, hear counsel, and "make a final determination upon the matter."

If there had been no precedent upon the subject. I should have held, that such a committee —when created in accordance with the statute— would be, to all intents, a court of justice, and as such would immediately become subject to all the incidents that attach to courts of that description. In May's Parliamentary Guide *passim*, and in *Ransom* v. *Dundas*, 3 Bing. N. C. 123, such a tribunal is expressly recognized as a court.

2ndly. Now one of the characters of all inferior courts, of what nature soever, in England is, that they are subject to the superintending control of the Queen's Superior Courts at Westminster, whose especial duty it is to take care that such inferior courts keep within their bounds—Bac. Abr. 583—and where such courts are proceeding, or assume the right to proceed in a matter, or in a manner in which they either never had any jurisdiction at all, or have exceeded that which they had, prohibition may be awarded: 6 Bac. Abr; *Bierley* v. *Windus*, 7 D. & R. 564.

It is also an indispensable element in the very existence of an inferior court emanating from an act of Parliament, that the essential requirements of such an Act be strictly observed, otherwise, there is no court at all, and every thing done by it is *coram non judice* and a mere nullity —*Bruyeres* v. *Halcomb*, 5 N & M. 149; *Ransom* v. *Dundas*, 3 Bing N. C. 123.

Such being the law in England, the question arises, does the Supreme Court here possess the same powers as the Superior Courts there, and this will be determined by a reference to the Imperial Statute which established this court. The 5 Geo. IV. cap. 67, authorized the King to institute a Superior Court of Judicature in Newfoundland, and declared that it should be called "the Supreme Court," and should be "a court of record, and should have all civil and criminal jurisdiction whatever in Newfoundland, as fully and amply to all intents and purposes as his Majesty's Courts of King's Bench, Common Pleas, Exchequer and High Court of Chancery in England have, and the Judges of the said Supreme Court should respectively have and exercise the like powers and authorities in Newfoundland, as any judge of any of the said courts, or as the Lord High Chancellor of Great Britain hath or exercises in England."

Pursuant to that Act a Royal Charter instituted this Court with the jurisdiction and obligations aforesaid, and has imposed upon the judges thereof the duty of entertaining and determining the question now before us. Nor is this a novel assumption, for so far back as the year 1720, I find it authoritatively affirmed in 2 Chal. Op. 209, "that the power of granting writs of prohibitions is one which may be, and constantly has been exercised by the Superior Courts in the Colonies."

3rdly. The last point that remains for consideration is—whether the Committee has been brought legally into existence? If it has, we have no power—from anything as yet appears—to interfere with it in the discharge of its functions; if it has not, it possesses no functions to discharge.

A brief examination of the statute will shew what necessary preliminaries are prescribed, and how far an observation of days and times in the procedure of the House to constitute an election committee, is made essential.

The first section directs, that when a petition complaining of an undue election, &c., shall be presented, an order shall be made by the House appointing a *day* and *hour* for the consideration thereof, and at such time the petitioner shall appear under penalty of the order being discharged. The 2nd section limits the time within which recognizances shall be perfected, under penalty of the dismissal of the petition.

The 5th sec. directs, that *on the day* appointed, previously to reading the order of the day for considering the petition, the House shall be called, and if there be less than twenty members present exclusive of the Speaker, the House shall forthwith adjourn to a *particular hour* the *next day*, when they shall proceed in like manner, and so on from *day* to *day* until the requisite number of members shall be present, when the committee shall be drawn, &c.

How far this carefully prescribed order of procedure has been observed is a matter of fact, and will be seen by the evidence laid before the court in the affidavits of the plaintiffs' agents, in the admission of the Attorney General on behalf of the defendants, and in the *viva voce* examination of Mr. Stuart, the Clerk, and of Mr. Hayward, the Solicitor of the House, by which the following details are established—

That the day and hour appointed by the Assembly for taking into consideration the petition of Messrs. LeMesurier and Woods, against the return of Messrs. Carter and Evans, was Thursday, 24th February, at 4.30 o'clock—that there were not on that day twenty members present, and on the fact being ascertained, the House resolved itself into a Committee of Privilege, and directed a "call" for March 3rd, and ordered that the petition be taken into consideration on that day;—that, having doubts about the next step to be taken, the members took counsel together and then adjourned the House to the 3rd March—that the Clerk made an entry at the time in his usual manner, upon memoranda of such adjournment to the 3rd March, and of such order to take the petition into consideration on that day, from which memoranda he is in the habit of transcribing the proceedings into the Journals of the House, but did not do so on that evening, nor send a copy of such proceedings to the Governor, by reason of an engagement, but he stated that if he had not been so engaged, he would have written the Journals conformably with the truth, and would also on that evening have sent a true copy to the Governor—that on the evening of Thursday, or morning of Friday, it was ascertained that the House should on Thursday have adjourned to the "next day," and not for seven days, whereupon recourse was had to the following expedient: the Clerk was ordered to exclude from the Journals the entry of the adjournment on Thursday for a week, and to substitute in lieu thereof an entry declaring the House had adjourned to the following day at 4 o'clock, and had ordered that the election petition should be proceeded with at 4.30 o'clock on that day; he produced in court the Journal containing these fictitious entries, and he frankly admitted that they were untrue, but that he had made them under orders; he also stated that he had transmitted to the Governor a copy of them, purporting to be the actual proceedings of the House.

It did not transpire in court by whom such orders were given, but the fair inference is that they proceeded from some authority which the Clerk was expected to obey, and it did appear that on Friday afternoon at 4 o'clock the Speaker and three other members of the Assembly whose names were mentioned, met in the Assembly Room (the Solicitor said he thought there were five or more) when the erroneous journal was read and approved by those present; and this subsequent ratification was equivalent to an antecedent command and sufficiently identified the authority—that the Speaker and members assuming to be the House, adjourned to the next day, and some members continued to meet and adjourn in the same manner from day to day, until Thursday 3rd March, when the House met—that the members were then called pursuant to the order made on the preceding Thursday, and the requisite number not being present, the House adjourned to the next day, and so on day after day till the 2nd April, when twenty members beside the Speaker being present, the order of the day to take the petition into consideration was proceeded with, and the Election Committee now under consideration was drawn, reduced and sworn—that Messrs. Carter and Evans were notified to attend, but did not do so, and had protested against the proceedings as irregular and void.

It does not appear that the House at any time repudiated the acts of its four members, or corrected the untrue Journal; those, therefore, who tacitly acquiesced in such acts may be considered willing to divide the responsibility incurred thereby, but their acquiescence cannot rectify any error in relation to the adjournment.

I do not believe there was an intention of injuring any one by that adjournment. I think it arose from mere inexperience and in itself involved no dishonor, but for good or for evil it stands a confessed fact and cannot be varied. By no alchymy can a week be transmuted into a day. All the expedients resorted to seem to me only trifling with the matter. It is to the actual condition of things we must apply the law, and the question for our determination remains—What legal effect had that adjournment for a week, instead of for a day, upon the constitution of the Election Committee, subsequently drawn?

The plaintiffs contend that it was a substantial and fatal variance from the statute. The defendants contend, on the contrary, that it was an immaterial mistake, speedily discovered and practically remedied.

The proceedings of the House in relation to the Journals, as detailed in the evidence, are matters upon which—in their moral aspect—I have no need to express my opinion, because they do not affect my decision; but they possess a legal significance to this extent, that they demonstrate the sense entertained by the House itself of the consequences of an adjournment for a week when they have had recourse to measures so extreme to avert them.

In my judgment a strict observance of the days and times prescribed by the Act, was intended to be, and has been made compulsory; it is reasonable that such should be the case; amidst the rivalry of parties, each striving for the mastery and neither knowing whose turn might first come, it was to be expected that the consent of the whole Legislature should be given to denude the representative branch of all discretionary power to postpone the consideration of election petitions, and that an adjournment from day to day until justice should be done, would be rigidly imposed. The language used in the statute to express these intentions is plain; it is the same substantially as was used in the Grenville Act, and so strictly was that Act construed that statutable permission was required to enable the House of Commons to adjourn over Sunday, Christmas Day and Good Friday, when either happened to be "the next day."

The Attorney General, feeling the force of this enactment, submitted that the concurrence at the assembly room of the Speaker and a few members already referred to, was practically a meeting of the House, and a compliance with the law. To that proposition I cannot for one moment assent; it is alike opposed to principle and to practice. An adjournment is a public and solemn act of the whole body, done in its collective capacity. It is one which is jealously guarded and not delegated to any subordinate authority—not even a committee of the whole, although every member might be present, can

adjourn the House—and when once adjourned to a certain day there is no power in this Colony, except by the agency of a prorogation, that could legally convene it on an earlier day. A statute was passed in the 39th year of Geo. III. to enable the sovereign, by proclamation, to convene the English House of Commons in an emergency, upon an earlier day than that to which it had adjourned, but no corresponding enactment is in existence here.

That three or four members, voluntarily meeting at a time different from that appointed by the House, and it might be secretly, behind the backs of other members, could—by calling themselves "the House"—override the deliberate action of the whole body previously adopted in open session, is a doctrine that—if tenable—would involve consequences of the gravest, most dangerous character. I do not believe it has the slightest foundation in law, but as it has been openly propounded I will cite a few authorities upon the subject. In Tomlinson's Law Dict. adjournment is defined to be "putting off until another time, and the substance of it is to give license to all concerned to forbear their attendance *till such time.*" In a corporation, which is a body possessing functions analogous in some respects to those of a Colonial Assembly created by Royal authority, corporate business can only be transacted at corporate meetings; and in 4 Com. Dig. Tit. *Franchise* (F. 33), a case is reported, wherein a burgess was removed for continuing in Court and attempting to make an order "after the Court had adjourned." (*Yates' Case*, Styles 48.)

In *The Mayor of Carlisle's Case*, 1 Stra. 384, it was determined by the Court of King's Bench in England, that the Mayor and Aldermen must meet in their distinctive capacity to enable them to discharge a duty they were empowered to perform, and although they were all present in another meeting, yet could they not then and there execute their functions; an irregular adjournment of a court of justice is sometimes fatal to a proceeding before it, and it was solemnly decided by the High Court of Parliament in *Lord Delamere's Case*, 36 L. J. Q. B. 313; 17 L. T. N. S. 1, that an unauthorized adjournment, even by that supreme tribunal, would render "all proceedings after such adjournment void."

To one other argument urged by the Attorney General I will briefly advert—he asked, if this Committee be no court at all, why should this Court take any notice of it, and issue a writ to prohibit its action? The answer seems to be that whenever a body of men, with some plausible show of jurisdiction, assume to exercise judicial functions, whereby the rights of the subject are endangered, the Queen, who is the fountain from which alone all justice in the realm flows, will, through her Superior Courts, stay such usurped authority, by granting a prohibition, as Lord Chief Justice Holt did to a "pretended Court" in *Chambers* v. *Sir John Jennings*, 2 Salk. 553.

The defendants contend that whatever may be the strict law, the parties litigant before the House have not sustained any practical damage from the error of the Assembly; although I might perhaps agree with them on that point, there may possibly be a different opinion entertained by the plaintiff, but be that as it may, a court of justice cannot speculate on such points. We are bound by the law and cannot dispense with its provisions. In all such cases a suitor may claim that if he is subject to the penalties, he should also be entitled to the protection of a statute, and I can discover no reason to warrant a denial of such claim. The case of *Freeman* v. *Trainah* 12 C. B. 406, cited at the bar, is in point where, in a case of admitted hardship, the Court would not, because it could not properly, strain the law to afford redress even upon a point of practice.

Lastly—It may be said, why interdict the proceedings of this Committee until it has done some act to the prejudice of the plaintiffs? The answer is that no man is bound to wait to be injured where peril is plainly impending. Moreover, the mere fact of a court that possesses no jurisdiction over a question assuming to exercise judicial functions therein, is of itself a wrong against which the law will protect the party concerned by a prohibition: *Byerley* v. *Windus*, 7 D. & R. 564.

It has been objected that the House did not observe the prescribed mode of procedure on being called over, "previously to reading the order of the day," and that it transacted other business and did not "adjourn forthwith."

Upon the first point there is some conflict of evidence, in which conflict the House is, in my opinion, entitled to the benefit of the doubt, upon the legal maxim, "*omnia presumuntur rite acta*," Upon the second point I am not satisfied, that under our statute, which in this respect differs from the Grenville Act, the House might not legally have transacted some routine business before adjourning.

My conclusions from the whole case are that the adjournment for a week was a substantial violation of the statute—that the meeting of the Speaker and some members on intermediate days was illusory and utterly inefficacious—that the subsequent proceedings of the House to constitute an Election Committee were null and void; that the supposed Committee had therefore no legal existence, and its attempt to exercise jurisdiction was an unlawful assumption of judicial functions to the possible prejudice of the subject which this Court, being moved thereto, is bound *ex debito justitiæ* to prohibit. In reference to this case I say advisedly *ex debito justitiæ*, for whilst it is incumbent upon the Judges of a Supreme Court of Judicature to administer justice and maintain truth to all persons and at all times, it is in an especial manner a sacred duty imposed upon them to interpose the shield of the law between public bodies and private individuals whenever judicial power is illegally claimed by the strong over the weak, and sure I am that if such a tribunal did not exist, and was not ready whenever necessary to exercise its authority with independence, it would be recreant to the trust confided to it; neither person nor property would long be respected, legal rights would be speedily assailed, and civil society would soon lose those characteristics which every one living under British law has a right to expect.

The plaintiffs are entitled to the writ of prohibition, and the rule should be made absolute,

but in my opinion without costs, because it would not be just or proper to impose them upon Messrs. LeMesurier and Woods, who were only pursuing their rights, and had done no wrong, nor upon the supposed Committee, who were compulsorily put into action by the House of Assembly, nor upon the House of Assembly, because they are not parties before the Court.

Hayward, J.,—This application for a Writ of Prohibition came before us during the last sitting of this Court.

It was fully argued by counsel on both sides, and evidence was produced in support of the allegations set forth.

The application being a novel one, and many important points and principles involved, we took time for due consideration and investigation, with a view of arriving at a conclusion and delivering a judgment which we believe to be fully borne out by law, under all the authorities bearing on the subject.

After such consideration carefully given, I arrived at the same conclusion as that expressed by my learned brothers of this court, that the committee of the House of Assembly, for the trial of the case between the parties to this proceeding, was not appointed or constituted according to law, and therefore that it is the duty of this court to restrain them from proceeding in the trial of the election petition, by granting a writ of prohibition for that purpose.

I do not, in this judgment, intend to enter fully into the statement of the case submitted by the parties, or the particular points of law bearing upon it, as, since my return from holding the term of the Northern Circuit Court at Harbor Grace, I have had the opportunity and benefit of perusing the decisions of the Chief Justice and Judge Robinson, reduced by them to writing, and I could only repeat in mine, if I enlarged, that which they have so fully and clearly stated and expressed.

Agreeing, therefore, as I do with them in every particular in the law bearing upon this case, I am of opinion that the rule *nisi* should be made absolute.

Rule absolute, without costs.

ENGLISH REPORTS.

COMMON PLEAS.

Coates v. The Parkgate Iron Company.

*Practice—Appeal from County Court—Notice of appeal and security—Waiver—*13 *&* 14 *Vic. c.* 61, *ss.* 14, 16.

By 13 & 14 Vic. c. 61, s. 14, a party aggrieved may appeal from a county court to a superior court of common law, "provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security," &c. By the 16th section no judgment of a county court shall be removed by appeal, "save and except in the manner and according to the provisions hereinbefore contained."

Held (*dubitante* Keating, J.), that omitting to give the notice and security required by the 14th section was an irregularity which could be waived.

[18 W. R. 928.]

Appeal by the defendants from a decision of the judge of the Rotheram County Court.

Kemplay, for the plaintiff, obtained a rule to strike the case out of the special paper of this court, on the ground that the defendants, being the appellants, had given neither the notice of appeal nor the security, required by 13 & 14 Vic. c. 61, s. 14.

By the County Courts Act, 13 & 14 Vic. c. 61, s. 14, a party aggrieved may appeal to a superior court of common law, "provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security, to be approved by the clerk of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant and the appeal be dismissed."

By section 15 "such appeal shall be in the form of a case, &c., and such case shall be transmitted by the appellant to the rule department of the master's office of the court in which the appeal is to be brought."

Section 16. "And be it enacted that no judgment, order, or determination, given or made by any judge of a county court, nor any cause or matter brought before him or pending in his court, shall be removed by appeal, motion, writ of error, *certiorari*, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned."

Quain, Q C., showed cause, and contended that by the conduct of the parties the notice and security had been waived; that as the conditions of notice and security were introduced for the respondent's own benefit, and not for the good of the public, and as no rights of any third party were affected, the omission to comply with those conditions was a mere irregularity which the respondents could waive: *Graham* v. *Ingleby*, 1 Ex. 656; 5 D. & L. 737; Broom's Maxims, 4th ed., p. 670; Quilibet potest renunciare juri pro se introducto; and p. 137: Consensus tollet errorem. It is true that in *Morgan* v. *Edwards*, 5 H. & N., 415, sending up the case and giving notice were held to be conditions precedent to the right to appeal; but the case was distinguishable because it was an appeal from justices under Jervis' Act, 20 & 21 Vic. c. 43, and therefore was in the nature of a criminal proceeding.

Field, Q C., and *Kemplay*, in support of the rule, cited also *Furnival* v. *Stringer*, 1 Bing. N. C. 68; *Stone* v. *Dean*, 6 W. R. 602, 1 E. Bl. & E. 504; 27 L. J. Q. B. 319; *Woodhouse* v. *Woods*, 29 L. J. M. C. 149; *Peacock* v. *The Queen*, 4 C. B. N. S. 264; 27 L. J. C. P. 224; 6 W. R. 517.

Bovill, C. J.—On the facts the notice and security were waived, if they could be waived. The question, therefore, is whether on the construction of the Act of Parliament they could be waived. The 14th section confers on a party aggrieved a power of appeal, provided that, within ten days of the decision, he gives to the other party notice of appeal, and that he also gives security. Then the 16th section enacts, that no judgment of a county court judge shall be removed by appeal into any other court "save and except in the manner and according to the provisions hereinbefore mentioned." No doubt that is a prohibitory enactment, but it must be

read with the previous provisions of the Act, and I think it may be satisfied by restricting the appeal as respects the special case, which is to be the form of appeal by the 15th section, and as respects the amount. The notice and security under the 14th section are more in the nature of procedure and practice, and are solely for the benefit of the respondent in the appeal, the public not being interested in them. If so the case falls within the general rule that a party may waive what has been provided for his own benefit and protection; and so is within the principle of *Graham* v. *Ingleby* (*loc. cit*). In appeals under Jervis' Act it has been held that when certain provisions have not been complied with the court has no jurisdiction. But some of those cases were strictly of a criminal nature, and in the others the proceedings were in the nature of criminal proceedings. The rule must therefore be discharged.

Keating, J.—I entirely agree that if the objection taken could be waived, it has been waived; but I doubted in the course of the argument, and I still very strongly doubt, how far the Act of Parliament can be read as the Chief Justice has read it, viz., how far the 16th section can be confined to the statement of a case, and the amount. The court can have no jurisdiction to hear this appeal but by the provisions of the act, for the policy of the Legislature is that the county court judge should hear, and finally hear, these cases. No doubt the notice and the security are for the benefit of the litigant party; but at the same time our jurisdiction to hear the appeal entirely depends on the 14th and 15th sections; and then follow the very strong words contained in the 16th section, "that no judgment, &c., shall be removed . . . into any other court whatever, except in the manner"—if it had stopped there, I might have doubted how far the section might not be confined to the form of the case and the amount; but it goes on—"and according to the provisions hereinbefore mentioned." It was argued, and I think with great force, that there "provisions" must include the notice and the security. The rest of the court, however, clearly think otherwise, and therefore I am not disposed to dissent from their judgment.

Smith, J.—If the objection that there was no notice and no security goes to the jurisdiction of the Court, it cannot be waived; but if the condition is entirely for the benefit of the respondent it can be waived. No doubt there was sufficient evidence that it was waived here if it could be waived, and the question is entirely whether it could.

The reasonable construction of the 14th, 15th, and 16th sections is, that the provisions requiring notice to the party and security to the party, are entirely for his benefit, with which no public interest is mixed up, and that according to the ordinary maxim he may renounce them. No doubt the words of the 16th section are strong: "manner" relates to the mode of stating and sending up the case, things in which the court is interested to see that its practice is properly carried out; the other provisions are solely and entirely in the interest of the respondent, and therefore, though the words of the section are negative, they may as regard procedure be read as confined to procedure. At first sight the cases on 20 and 21 Vict. c. 43, seem to have a considerable analogy; but they are distinguishable on the ground that they relate to proceedings in the nature of criminal proceedings, in which a party cannot waive what the law directs. In *Morgan* v. *Edwards*, though the court thought they had no jurisdiction, they threw out a suggestion that in certain cases where the appellant had done all he could to comply with the act he might be entitled to have the appeal go on.

Brett, J.—I think there was a clear waiver in fact. If the notice and security are essential to the jurisdiction of the court to hear the appeal, it is clear they cannot be waived; but if they are a mere mode of procedure, and the enactments are simply in favour of the respondent, and if non-compliance with them would be no detriment to the public, then they can be waived. On the affirmative provisions of the act, I think the conditions of notice and security are entirely in favour of the respondent, and do not go to the jurisdiction but to procedure; but then there is the negative section, and the question is whether that is not expressed in such wide terms as to include the previous provisions. I think that it does not, and that it has no relation to matters of procedure for the benefit of the respondent, and in which the public has no interest.

Rule discharged.

CHANCERY.

Freeman v. Pope.

Voluntary Settlement—Intent to delay, hinder, or defraud creditors—Statute 13 Eliz. c. 5—Creditor subsequent to date of settlement.

In order to set aside a voluntary settlement under the statute 13 Eliz. c. 5, it is not necessary to show that there was in the mind of the settler an actual intent to defraud his creditors. It is enough to show that the necessary result of the execution of the settlement was to prevent the creditors getting payment of their debts.

Where a man, by making a voluntary settlement, renders himself insolvent, a creditor whose debt was contracted after the execution of the settlement has a right to file a bill to set it aside if any debt which existed at the date of the execution of the settlement remains unpaid.

The *dictum* of Lord Westbury in *Spirett* v. *Willows*, 13 W. R. 329, 3 De G. J. & S. 302, that "if the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement," considered as an abstract proposition, went too far. Decision of James, V. C., 18 W. R. 399, affirmed, but on different grounds.

[18 W. R. 906.]

This was an appeal by the defendant, the Rev. George Pope, from a decree of Vice-Chancellor James, setting aside as fraudulent and void as against creditors a voluntary settlement executed by the Rev. John Custance on the 3rd of March, 1863. The hearing of the cause before the Vice Chancellor is reported *ante*, p. 399, but in consequence of the judgment of the Court of Appeal being based on different grounds from that of the Vice-Chancellor, it is necessary to state the facts somewhat more fully than they are stated in the previous report.

By the settlement in question, Mr. Custance assigned to trustees a policy of insurance for

£1,000 upon his own life, in trust for such person or persons as Julia Thrift (afterwards the wife of the defendant, the Rev. George Pope) should appoint. The settlor covenanted to pay the premiums.

One of the trustees was Mrs. Walpole, the housekeeper of Mr. Custance. She was the mother of Julia Thrift.

When he executed the settlement Mr. Custance was the rector of two livings in the county of Norfolk, which produced a net income of £815. He was also possessed of a Government annuity of more than £180 for his life, and he was seized of a copyhold cottage in Norfolk. His only other property was his furniture. When he executed the settlement he owed considerable sums of money to various creditors, and in order to pay them he, on the 3rd of March, 1863, borrowed of Mrs. Walpole the sum of £350, as a security for which he gave her a bill of sale of his furniture. He also, in consideration of £50, covenanted to surrender to her his copyhold cottage. Among other debts which he then owed was one of £489 to his bankers, the Messrs. Gurney, of Norwich. He at the same time made an arrangement with them that he should pay off this debt by half-yearly payments of £50. His tithe agent, a Mr. Copeman, was to receive the tithes, and out of them pay the £50 half-yearly to the bankers. This arrangement was carried out, and when Mr. Custance died on the 21st of April, 1868, there remained due to the bankers only about £50 of their debt, though there was also due to them a further sum in respect of subsequent advances.

In February, 1868, Mr. Custance had borrowed £600 of a Mrs. Howes, giving her as security a bill of sale of his furniture, Mrs. Walpole having consented to postpone her bill of sale to that of Mrs. Howes. When the settlor died he was considerably indebted, but the only debts due at the time of the execution of the settlement which remained unpaid when this suit was instituted were the balance due to the bankers, the debt due to Mrs. Walpole, and a small sum due to a publican.

Shortly after the death of Mr. Custance Mrs. Howes sold the furniture under her bill of sale, and the sale produced about £520, which was not enough to satisfy her debt. There being no other assets, the plaintiff in this suit, who was a creditor for £62 12s. 8d. in respect of groceries supplied to Mr Custance after the date of the settlement, filed the bill to administer his estate, and to set aside the settlement of the policy as fraudulent and void as against the creditors of Mr. Custance under the statute 13 Eliz. c. 5. The bill was filed on behalf of the plaintiff and all other the unsatisfied creditors of the settlor. It should be mentioned that Mr. Custance had executed a settlement of the policy in favour of Julia Thrift in 1853, reserving to himself a power of revocation. This power he exercised in 1861 in order that he might receive a bonus which had been declared on the policy. Mrs. Pope on the 3rd of June, 1868, appointed the sum assured by the policy to her husband.

The Vice-Chancellor expressed his opinion that the settlor when he executed the settlement had no intention of cheating his creditors, but His Honour considered himself bound by the decision of Lord Westbury in *Spirett* v. *Willows*, 13 W. R. 329, 3 De G. J. & S. 293, to set the settlement aside when it was shown that its existence was in fact a hindrance to the payment of the creditors, some of whom were creditors at the time when it was executed.

From this decision Mr. Pope appealed.

Osborne Morgan, Q C., and *H. A. Giffard*, for the appellant, contended that after the execution of the settlement the settlor remained perfectly solvent. His debts, besides the debt to Mrs. Walpole, which was secured, were not more than £500, and his means, taking into account the amount of his life income, were ample to pay them. The Vice-Chancellor's decree was really founded upon what was said by Lord Westbury in *Spirett* v. *Willows*, 13 W. R. 329, 3 De G. J. & S. 293, which went further than any previous case. The previous cases showed that it is necessary to prove either a direct intention to defraud the creditors, or circumstances from which such an intention must necessarily be inferred. In *Spirett* v. *Willows* there was such evidence, which did not exist in the present case. They cited *Jenkyn* v. *Vaughan*, 4 W. R. 214, 3 Drew. 425; *Stephens* v. *Olive*, 2 B. C. C. 90; *Richardson* v. *Smallwood*, Jac. 552; *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Holmes* v. *Penney*, 3 K. & J. 90, 5 W. R. 132; *Thompson* v. *Webster*, 9 W. R 641, 7 Jur. N. S. 531; *Adames* v. *Hallett*, L. R. 6 Eq. 468; *Stokoe* v. *Cowan*, 29 Beav. 637, 9 W. R. 801; *Townsend* v. *Westacott*, 2 Beav. 340.

Kay, Q C., and *Cozens-Hardy*, for the plaintiff, were not called upon.

H. Fellows, for the administrator, a creditor, who was a defendant to the suit.

LORD HATHERLEY, L. C.—The principle on which the statute proceeds is this, that in all matters persons must be just before they are generous, and that debts must be paid before gifts can be made.

The difficulty the Vice-Chancellor seems to have felt was that he conceived that if he were to sit as a juryman and be asked, as he expressed it, as a special juryman this question, whether there was any actual intention on the part of the settlor to defeat, hinder, or delay his creditors, he should come to the conclusion that he had no such intention whatever. He says, "I am satisfied that he had not any idea whatever of defrauding or cheating his creditors by making this settlement in favour of his god-daughter of the policy of assurance which he had made several years before in her favour, when there was no pretence for supposing that he was in embarrassed circumstances" With great deference to the view of the Vice-Chancellor James, and with all the respect which I most unfeignedly entertain for his judgment, it appears to me he does not exactly accurately put the question in supposing that it would ever be left to him as a special juryman to find, *simpliciter*, whether the intention of the settlor was to defeat, hinder, or delay his creditors without a direction from the judge that, if the necessary effect of the instru was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention. A jury would undoubtedly be so directed lest they should fall into the apprehension that they were to look for any

special matter passing in the mind of the settlor (a matter which can never be satisfactorily arrived at by any one), and should pass by the necessary consequences of his act, which consequences can always be estimated from the facts of the case. Of course there may be instances, and several of the cases cited have been such, perhaps *Spirett* v. *Willows* may be considered as an instance of the kind, in which there is direct and positive evidence of an intention to defraud independently of the events which may have occurred, or which at least may be expected to have occurred, from the act which has been done. In the case of *Spirett* v. *Willows*, the man who settled the property, being solvent at the time, but having a considerable debt which would be falling due almost immediately or within a few weeks after his making the voluntary settlement by which he withdrew a large portion of his assets from the payment of debts, collected the rest of his assets, and apparently in the most reckless and profligate manner spent them, and deprived the expectant creditors of the means of being paid. In that case the evidence was clear and plain of the intention to be imputed to him. But case after case has occurred (and this case seems to be one exactly of that character) in which it has been said that if a person unable at the time to meet his debts (I am not saying here it is necessary to go so far, but I am only speaking of the facts of that case as I find them)—If a person unable to pay his debts subtracts from the property which is the proper fund for the payment of those debts that amount of property without which the debts cannot be paid, then as the necessary consequence of his so subtracting that property some creditors must remain unpaid, and those creditors must necessarily be delayed or hindered, and any judge would inform the jury that in that state of circumstances they must infer the intent of the settlor who had so subtracted his property from the result of his act (that property being applicable to the payment of his debts before he professed to give it by way of bounty), and accordingly bring it within the statute of Elizabeth.

Now, what are the circumstances which we find here? They are these. This gentleman was being pressed by his creditors, as appears clearly, on the 3rd of March, 1863. He was a clergyman with a very good income, but a life income only. He had an annuity of somewhat between £180 and £190 a-year, and besides that, he had an income from his benefices; and the two sources together produced about £1,000 a-year; but at the same time his creditors were pressing him, and he had to borrow from Mrs. Walpole, who lived with him as his housekeeper, a sum of £350, wherewith to pay the pressing creditors. That accordingly was done, and he handed over to her the only property he had in the world, beyond his income, and beyond the policy which is now in question—his furniture. It is said, however, that the value of the furniture exceeded, and I will take it to be so, by about £200 the amount of the debt which was secured to Mrs. Walpole. That debt may be put out of consideration now, not only on that account, but because Mrs. Walpole being herself a trustee of the instrument in question, cannot be heard to complain of it. But the other debt he owed was more serious. He owed at the time of this pressure a debt of £339 to his bankers at Norwich, and he required for the purpose of clearing the pressing demands upon him, not only the sum of £350, which he borrowed from Mrs. Walpole, but an additional sum of £150, which sum the bankers agreed to furnish him with, making their debt altogether at the date of the settlement a debt of £489. They arranged with him that they would give him this assistance, and this was most probably in a great measure a friendly act towards a gentleman who was seventy-three years of age, and the duration of whose life, therefore, could not be expected to be very long according to the tables, although, as a matter of fact, he did live five years after that. They were desirous also that their debt should be in some way provided for, and they said, "If you will set apart from your income £100 a-year, and pay us that, we will at present (for it could not be held to be more than a present arrangement) stay any proceedings we might take," for they were, in fact, pressing for the debt. [His Lordship then commented on the details of the arrangement with the bankers, and proceeded—] That arrangement was made but at the same time there was no covenant or bargain on their part that they would not sue at any time they might think fit, while on the other hand they had nothing in the shape of security for the payment of their debt. They had not proceeded against him by taking out sequestration, and there could be nothing in the shape of a charge upon the livings except through the medium of sequestration.

What then was the state of circumstances when he proceeded to dispose of the only other property he had beyond his life income? That other property was this policy for £1,000, payable at his decease, upon which he had a considerable premium to pay—namely £62 per annum. Having assigned that by voluntary gift, for the benefit of his god-daughter, Mrs. Pope, he stood in this position, that he had literally nothing wherewithal to give as security for this debt of £489, which he owed, beyond the surplus value of the furniture, which must be taken to be about £200, and he was clearly and completely insolvent the moment he executed this settlement. He was absolutely insolvent even if you assume (and I asked the question because I was desirous of seeing in what way the matter could be put) that some portion of his tithes and the annuity was then due to him. I see that there was a payment of the tithes made in January, and you could not suppose that there was more than the £200 then owing to him which was paid in May, two months after the deed; and if you even added that to the £200, the value of the furniture, and added something also for the annuity, which likewise was partly payable, the whole put together would not reach the £489. He in truth was at that time insolvent, and there I put it more favourably than I ought to put it, because he could not lay his hands upon that sum, so as thereby to satisfy the debt, if he died at any time between March and May. It is quite one of those cases in which, if in any case there could be any question, it seems that no question could arise, because this gentleman was plainly and distinctly insolvent at the time when

the instrument was executed, and being so insolvent, he took away from his creditors the only fund out of which this debt could possibly be paid. That appears to me to be exactly the case in which you must say that the intention is to be assumed from the act.

Then the Vice-Chancellor seems to have felt himself very much pressed by the case of *Spirett* v. *Willows*, and one or two *dicta* of Lord Chancellor Westbury in that case. The first of these *dicta* was certainly put in rather larger terms than was neeessary for the decision of the case, and probably in larger terms than the case itself would warrant. The first of these *dicta* is—"If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." This is put in very wide terms, and the Vice-Chancellor seems to have thought himself bound by the words there imputed to the Lord Chancellor, and only upon those words, to hold that in this case the settlement should be set aside. But certainly that expression of opinion on the part of the Lord Chancellor was by no means necessary for the decision of this case, in which it is plain that the settlor was not solvent at the date of the execution of the settlement; and still less was it necessary in the case of *Spirett* v. *Willows*, where, being solvent, he was at the same time guilty of a plain and manifest fraud. On the facts there stated, the fraudulent intention was plain and distinct, and therefore required no allegations in general terms, because the mere fact of delaying creditors would be sufficient. Although he might be solvent at the time, the fact of a creditor being delayed might be proved against him. It seems to me, I confess, that the whole misconception in this case has been the necessity of proving an intention where the facts are such as to evidence the necessary result of the acts which have been done. If you were to ask the question about the intention, no doubt, as has been said by the counsel who last addressed us, this gentleman was not thinking about his creditors at all, but was thinking at the moment only about the lady whom he wished to benefit. His whole mind was given to that point, and in thinking of his kindness and generosity towards her, he forgot his creditors; he forgot that they had higher claims upon him, and he provided for her without providing for them. It does not make any real difference that the Messrs. Gurney seem to have been willing at the time to forego the immediate payment of their debt, but the question one would like to ask is this—whether they could not within a month or less after the execution of the settlement, if they had been so minded, have called in their debt, and overturned this settlement? Beyond all possibility of doubt they could have done so, and one has not to look at what was passing in the mind of the settlor, as to whether he was thinking more of one thing than another, which it really is impossible for any human being to fathom. I am willing to say that there was not the slightest immoral intent in the sense of deliberately depriving his creditors of that fund to which they were entitled. On the other hand, the only conclusion that one can come to is this—that he had done an act which in point of fact withdrew from his creditors that fund to which they were entitled, and dealt with it by way of bounty. That being so, I come to the conclusion that the decree of the Vice-Chancellor is right. The appeal must be dismissed with costs.

Giffard, L.J.—I quite agree with the Vice-Chancellor in thinking that if you take the propositions laid down in *Spirett* v. *Willows* as abstract propositions they go too far, and beyond what the law is. But if you take them in connection with the facts of *Spirett* v. *Willows*, then undoubtedly there is abundance to support the judgment; because in *Spirett* v. *Willows* there was, first of all, a voluntary settlement by a man who at the date of the settlement was solvent, but who immediately after he had made the voluntary settlement realized the rest of his property and denuded himself of everything. Of course, the irresistible conclusion from that was that the voluntary settlement was intended to defeat the subsequent creditors. That being so, I do not think that the Vice-Chancellor need have felt any difficulty about the case of *Spirett* v. *Willows*. But he seems to have laid it down that there must have been an actual and express intention to defeat creditors when there is a voluntary settlement. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved; that is where, as in *Holmes* v. *Penney*, there is value given for the settlement, and where you have such a case as *Perry-Herrick* v. *Attwood*, 6 W. R. 204, 4 Jur. N. S. 101, where the facts were held sufficient to show that there was an actual and express intention. But when you have a settlement which is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for payment of the settlor's debts, then the law infers intent, and it would be the duty of the judge, in leaving the case to a jury, to tell them that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay his creditors. Now in this case, at the date of the settlement Mr. Custance was really insolvent, and if at the date of the settlement the bankers had insisted on payment and had issued execution they could not have got a present payment unless they had resorted to the policy. That being so, it seems to me that the facts of this case bring the matter entirely within the decided cases, and it is enough to say that at the date of this settlement Mr. Custance was not in a position to make any voluntary settlement whatever. That being so, the appeal must be dismissed, and with costs, for I can see no reason for saying that the decree was not right in giving the whole costs of the suit. There was previously to this case a decision of Vice-Chancellor Kindersley laying down the rule that where a subsequent creditor institutes a suit and proves the existence of a debt antecedent to the settlement, he can maintain a suit such as

this; and therefore this is not a new case. There can be no reason for doubting the propriety of that case as decided by the Vice-Chancellor Kindersley either in point of principle or justice.

IRISH REPORTS.

Rutledge v. Davies.

Pleading—Defence confessing part of a plaintiff's demand without bringing amount into court—Practice.

A defence confessing part and traversing the residue of the plaintiff's demand, in an action for a liquidated sum, is good, although the amount so confessed is not brought into court

Tudor v. *Furlong*, 16 W. R. 981, followed.

[18 W. R. 929.]

Motion on behalf of the plaintiff that the defence filed in the cause be set aside.

The declaration contained the ordinary *indebitatus* counts, and the endorsement of particulars claimed £138 6s. 8d. for board, lodging, and other necessaries supplied to the defendant.

The defence was—

The defendant appears and takes defence to the action of the plaintiff, and as to so much of the causes of action in the declaration contained as relate to the sum of £28 6s. 8d., parcel, &c; the defendant admits the plaintiff's claim, and hereby confesses the plaintiff's cause of action as to the said sum; and as to the residue of the causes of action the defendant says that no board, lodging, &c, &c, was provided by the plaintiff for the defendant as alleged.

James Murphy, Q.C. (*Keogh* with him), for the motion.—This plea is embarrassing. A plea confessing part of the plaintiff's demand without bringing the amount so confessed into court was held bad in *Defries* v. *Stewart*, 11 Ir. C. L. App. 18; and Monahan C.J., says in that case, "we cannot allow this defence, as the result would be to alter the practice of the court, and to render the payment of money into court unnecessary in such cases." In *Dunsandle* v. *Finney*, 10 Ir C. L. 171, an action was brought for £116 16s. rent under a lease; and the defendant, taking "defence to the action," pleaded as to parcel of the sum claimed in the first count of the summons and plaint certain matters in bar concluding, "and, therefore, he defends the action;" and it was held by the Court of Exchequer that the defence was embarrassing as being in form pleaded to the entire cause of action, and not confessing in terms the portion left unanswered. *Tudor* v. *Furlong*, 16 W. R. 981, will be relied on by the defendant. In that case the Court of Queen's Bench decided that a defence confessing part and traversing the residue of the plaintiff's demand was good, although the amount so confessed was not brought into court. *Defries* v. *Stewart*, is, however, a direct authority for this motion, and this court will not be bound by the decision of the Queen's Bench in *Tudor* v. *Furlong*, as it has intimated in some recent cases. If this motion be refused it will have the effect of doing away altogether with the necessity of paying into court.

Carton, for the defendant.—The rule is now clearly established by *Tudor* v. *Furlong*, that a plea of confession is the same as a plea of payment into court, and this defence is good.

Keogh in reply.

Monahan, C J.—We are of opinion that this motion must be refused, notwithstanding the case of *Tudor* v. *Furlong*. We think that this motion was rightly brought forward, as a difference of opinion has existed for some time between this court and the Queen's Bench on this important question of pleading. It is true that this court in a very recent case refused to be bound by the decision of *Tudor* v. *Furlong*, but we have now changed our opinion, and in deference to the views entertained by the Queen's Bench, and by the Chief Baron in the case of *Dunsandle* v. *Finney*, in some of the observations which he makes in his judgment, we now hold that this plea is good. A plea confessing part of the action is the same as if the defendant had paid money into court to that portion of the plaintiff's demand, and the plaintiff had marked judgment for that sum. We, therefore, refuse this motion, but without costs.

Motion refused.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR FEBRUARY, MARCH AND APRIL, 1870.

(Continued from page 196.)

Malice.—*See* Slander.

Marriage Settlement.

A., after his marriage to B., settled lands in trust, after their death, for such persons and uses as A. should by will appoint, and in default of appointment "for all and every the . . . children" of A. "But" (after some intervening clauses) "if there should not be any child begotten by A. on B.," then for A. absolutely. B. died, leaving four children. Then A., reciting his intent to give up his interest and forego his power, by a new deed granted to the old trustees his life-estate in trust for his four children, made a voluntary covenant with said trustees that he would not make any will whereby the new trusts might be defeated, and released them from the old trusts. Later, A. married C., by whom he had seven children, and died leaving all his property to C. for life, remainder to her children. *Held*, that A.'s covenant, &c., with the old trustees wholly released A.'s power, and that the children of both marriages took equally under A.'s first settlement, by the clause "for all, &c., the children of A."—*Isaac* v. *Hughes*, L. R. 9 Eq. 191.

See Limitations, Statute of, 1; Power, 1, 4; Voluntary Conveyance.

Married Woman.—*See* Husband and Wife.

Merger.—*See* Fishery.

Military Officer.—*See* Libel.

Mortgage.

1. A. agreed to let B. a house, into which B. was to put fittings worth £500, and then, upon payment of £1000, to take a lease for twenty-one years of the premises so fitted up. A. was also to lend B. on "the said premises as fitted up," &c., £1000. B. fitted up the premises, and became bankrupt before the lease was made or money paid. *Held*, that A. was equitable mortgagee of the premises for the £1000, and entitled to the fittings as against B.'s assignee. (Exch. Ch.)—*Tebb* v. *Hodge*, L. R. 5 C. P. 73.

2. A mortgagee is bound to convey and to hand over the title deeds to any person having an interest in the equity of redemption, though only partial, by whom he is paid off. But the conveyance should be expressed to be subject to the rights of redemption of all the persons who hold other interests. When the party redeeming has only contracted to purchase an interest in the premises, the mortgagee need not convey until the party has accepted the title.—*Pearce* v. *Morris*, L. R. 5 Ch. 227; s. c. L. R. 8 Eq. 217.

See Fixtures; Power, 1; Redemption Suit.

Name.—*See* Injunction, 1.

Necessaries.—*See* Husband and Wife, 2.

Negligence.

Defendants, in pursuance of a contract, laid down a gas-pipe from the main to a meter in the plaintiff's shop. Gas escaped from a defect in the pipe, and the servant of a third person, a gas-fitter, went into the shop to find out the cause, carrying a lighted candle. The jury found that this was negligence on his part. The escaped gas exploded, and damaged the shop. *Held*, that, irrespective of any question as to the form of action, a verdict in favor of the plaintiff for the damages sustained should not be disturbed because of the negligence of a stranger both to him and to the defendant.—*Burrows* v. *March Gas & Coke Co.*, L. R. 5 Ex. 67.

See Carrier; Public Exhibition; Railway; Solicitor.

New Assignment.—*See* Pleading, 1.

Next Friend.—*See* Husband and Wife, 4.

Notice.

If the purchaser under a contract for the sale of land knows it to be occupied by a tenant, he is affected with notice, as against the vendor, in case the tenant has a lease, although he did not know it in fact; and he cannot maintain a bill for specific performance with compensation against the vendor.—*James* v. *Lichfield*, L. R. 9 Eq. 51.

See Bills and Notes, 3; Company, 5.

Novation.

1. Company X. granted an annuity charged on its assets to A. Afterwards X. transferred its assets and liabilities to Z.; and A., knowing that X. and Z. "were one," received some payments from Z., and gave some receipts to it. His certificates of identity referred to him as described in a grant from X, and said grant was never exchanged for one from Z. *Held*, that, as a conclusion of fact, A. had not accepted Z. as his debtor in place of X.—*In re Family Endowment Society*, L. R. 5 Ch. 118; *In re National Provincial Life Assurance Co.*, L. R. 9 Eq. 306.

2. A., the holder of a policy of life insurance issued by Company X., after he knew that X. had transferred its assets and liabilities to Z., and had ceased to carry on business, paid the premiums on his policy to Z. for thirteen years, and on the dropping of the life sent in a claim to Z. *Held*, that A. had released X., and had accepted Z. as his debtor instead.—*In re National Provincial Life Assurance Co.*, L. R. 9 Eq. 306.

3. A., the holder of a policy of life insurance issued by Company X., received notice that X. had been dissolved, and had transferred its liabilities and assets to Z., and that he was entitled to have his "policy exchanged for a new one, or an indorsement made thereon, on the part of Z., guaranteeing its due fulfilment." A. thereupon sent his policy to Z., and Z. indorsed it, charging the property of Z. with liability under it, provided future premiums were paid to Z. A. paid one premium, and on the dropping of the life sent in his claim to Z. *Held*, that A. had released X., and accepted Z. as his debtor instead.—*In re International Life Assurance Society & Hercules Insurance Co.* L. R. 9 Eq. 816.

Parish.—*See* Way.

Parties.

Vendors of land filed a bill for specific performance or rescission of the agreement, and made a sub-purchaser of a part of the land a defendant. The sub-purchaser now brings a bill for specific performance against his vendor, and makes the original vendors defendants, who demur. *Held*, that as they had made the plaintiff a defendant to their bill, he was right in joining them.—*Fenwick* v. *Bulman*, L. R. 9 Eq. 165.

Patent.

1. The object of a patent was described as "being to produce a glazed lamp, the flame of which shall throw little or no shadow, and yet possess the requisite strength, and also facilities for lighting and cleaning;" and protection was claimed for the arrangement and combination of parts as described. One feature in the lamp was a sliding spherical door. *Held*, that as this would not have been patentable singly, it was not protected as part of the combination.—*Parkes* v. *Stevens*, L. R. 5 Ch. 36; s. c. L. R. 8 Eq. 358.

2. E. had an English patent for a machine for making cast tin-foil, with the right to "the whole profit, benefit, commodity and advantage" of his invention. B. made tin-foil by the same process abroad, and consigned it to England, where it was sold. *Held*, an infringement.—*Elmslie* v. *Boursier*, L. R. 9 Eq. 217. See *Wright* v. *Hitchcock*, L. R. 5 Ex. 57.

3. A. took out a patent for "improvements in the manufacture of frills or ruffles, and in the machinery or apparatus employed therein." The specifications described a process of making frills, ruffles, or "trimmings" (the last word was not in the provisional specification), by means of a reciprocating knife, in combination with a sewing-machine. The claims were: "1. The construction, &c., of machinery, &c., for producing crimped, &c., frills, &c., in a sewing-machine. 2. The application, &c, of a reciprocating knife for crimping fabrics in a sewing-machine. 3. The peculiar manufacture of crimped, &c, frills, or trimmings, as hereinbefore described," &c. B. took out a letter patent which substantially imitated A.'s reciprocating knife, without the sewing machine. C. bought and sold, in the way of trade, articles manufactured by B.'s process, described as "B.'s patent machine-made plaiting." The jury found a verdict for A. against C. on the issues of novelty and of infringement. *Held*, that the verdict should not be disturbed. There was evidence of infringement by C. A.'s patent was for the process, and not limited to manufacture by the knife in combination with the sewing-machine, and it was not invalidated by the insertion of the word "trimming," hence B.'s process was an infringement.—*Wright* v. *Hitchcock*, L. R. 5 Ex. 37.

Payment.—*See* Company, 5; Interest.

Piracy.—*See* Copyright, 1.

Pleading.

1. Trespass for breaking and entering a certain close described by abuttals, and breaking certain gates. Pleas, a public footpath, and that defendant was using the same, and pulled down the gates because they were across the path, and obstructed it. Replication, denying the whole plea. At the trial the plaintiff admitted the footpath, but offered to prove that the trespasses were committed elsewhere, and that there were no gates across the footpath, but that there were gates pulled down by the defendant where the trespasses were committed. *Held* (Willes, J., *dubitante*), that, the plaintiff not having new-assigned, the evidence tendered by him was inadmissible. (Exch. Ch.)—*Huddart* v. *Rigby*, L. R. 5 Q. B. 139.

2. To a plea bad for want of a material allegation, the plaintiff demurred, and also replied (under the Common Law Procedure Act), denying the material fact not alleged in the plea. After judgment for the plaintiff on the demurrer, verdict was for the defendant on the replication. *Held*, that the defendant was entitled to judgment and the *postea*. The denial in the replication, with the contrary finding of the jury, supplied what was wanting in the plea.—*Digman* v. *Bailey*, L. R. 5 Q. B. 53.

See Indictment.

Pledge.—*See* Security.

Power.

1. A. settled freeholds, the legal estate in which was outstanding, upon trust to pay the "rents, issues and profits to A.'s wife, B., for life, then to A. for life, and after the death of A. and B., to C., the trustee, to renew leases for lives, and take fines on renewals, but so as not less than the usual rents should be reserved. It was expressly provided that C. should hold any fine to be taken by him in trust for the child who, &c. A. afterwards mortgaged his interest under the settlement to B., and, later, became bankrupt. *Held*, that A. was entitled to the fines on renewals for his own benefit, and that, as the legal estate was outstanding, he could come into equity for a declaration of his right to the fines as against B. and C., who claimed them; also that A. could still grant renewed leases with the concurrence of the mortgagee and assignee.—*Simpson* v. *Bathurst*, L. R. 5 Ch. 193.

2. The donee of a power to appoint to children exclusively, appointed to trustees to pay the income during the life of child A. to A. or his children in their discretion, and then to such of A.'s children as A. should appoint, and in default to child B. "And I appoint, &c., all my, &c., estate not hereinbefore appointed, &c., to B." *Held*, that the first

appointment being bad, the last clause executed the power in favor of B., and that there was no case of election.—*Wallinger* v. *Wallinger*, L. R. 9 Eq. 301.

3. A share of a residue was left in trust to pay the income to C. for life, and then the trust for M. provided that the trustees might, if they thought it desirable, purchase with such share an irredeemable annuity for the life of C. and for his benefit. No annuity was purchased, but the acting trustee, from time to time, paid C. three-fourths of the capital of the share. *Held*, that the power was well exercised *pro tanto*, and that M. was only entitled to what was left.—*Messeena* v. *Carr*, L. R. 9 Eq. 260.

4. A., having a power of appointment in favor of children, who were entitled equally in default of appointment, after the appointment to his first daughter, discussed in s. c. L. R. 8 Eq. 312; 4 Am. Law Rev., 477, but now discussed on appeal, appointed one-fourth of the fund to his second daughter B., on her marriage, she being still an infant. But B.'s fund, like the one settled on the first daughter, was to go to A., in default of issue of the marriage. A. also gave bond for a like sum, to be held on like trusts, on which considerable sums had been paid. *Held*, that the reservation to A. of an ultimate interest in the fund appointed was not, on its face, a corrupt bargain to induce A. to appoint, but an exclusion of the rights of B.'s husband, and was not a fraud upon the power.—*Cooper* v. *Cooper*, L. R. 5 Ch. 203.

5. A. settled funds in trust for his daughters, B. and C., or one of them, as his son D. should appoint, and in default of appointment, the dividends to be paid B. and C. in equal shares during their joint lives, &c. A. died, C. married, and D. appointed the income of the fund to B. for life, reserving a power of revocation, and not informing B. of the appointment. D., in this, was carrying out A.'s orally expressed intention in the event of C.'s marriage, of which he disapproved. One-half the income was applied by B. to her own use; one-half was accumulated, and held in suspense. This appointment having been held void as a fraud on the power, D. appointed the income to B. during the joint lives of B. and C. absolutely, and B. was formally notified. There was no agreement between B. and D. as to the disposition of the income. *Held*, that, as it appeared to the court that D. had not a real intent that B. should deal with the whole fund as her own, but that B. was a mere instrument to effect D.'s purposes, the second appointment was void.—*Topham* v. *Duke of Portland*, L. R. 5 Ch. 40.

See Husband and Wife, 4; Limitations, Statute of, 8; Marriage Settlement; Voluntary Conveyance; Will, 10.

Practice.—*See* Costs, 3–5; Pleading, 2; Privileged Communication.

Prerogative.—*See* Fishery.

Presumption.—*See* Death.

Principal and Agent.—*See* Husband and Wife, 2.

Principal and Surety.—*See* Action.

Privileged Communication.

Plaintiffs having claimed damages for injuries alleged to have been sustained by them on the defendants' line, defendants sent their medical officer before suit brought or expressly threatened, to report to them as to said injuries, that they might determine whether or not to yield to the claim. *Held*, that the report was privileged from inspection by the plaintiffs.—*Cossey* v. *London, Brighton & S. C. Railway*, L. R. 5 C. P. 146.

See Libel.

Privity.—*See* Action; Parties.

Production of Documents.—*See* Inspection of Documents; Privileged Communication; Vendor and Purchaser of Real Estate.

Property.—*See* Copyright, 1; Injunction, 1; Security.

Proximate Cause.—*See* Negligence; Railway, 3.

Public Exhibition.

A., on behalf of himself and certain others, made a contract by which a builder was to erect and to let to them a grand stand for the Cheltenham races. Afterwards A., on behalf of the same parties, admitted persons to the stand, and among them the plaintiff, receiving 5*s*. each, which went to the race fund. A. employed a competent builder, and did not know that the stand was negligently built; but it was so, and in consequence fell, and injured the plaintiff. *Held*, that A. was liable. As in the case of carriers of passengers, there was an implied understanding that due care had been used, not only by him, but by independent contractors employed by him to construct the stand.—*Francis* v. *Cockrell*, L. R. 5, Q. B. 184.

Public Policy.—*See* Restraint of Trade.

Railway.

1. A railway company was held (mainly on the authority of previous cases) liable for an injury received by a passenger in its train, but on the line of another company, solely through

the negligence of the latter, which wholly controlled the traffic arrangements.—*Thomas* v. *Rhymney Railway Co.*, L. R. 5 Q. B. 226.

2. A railway company is not liable to the owner for the loss of luggage which is delivered to the company, with the owner's knowledge, as part of the ordinary luggage of another person, a passenger.—*Becher* v. *Great Eastern Railway Co.*, L. R. 5 Q. B. 241.

3. Hedge trimmings, &c., were left in heaps near defendants' railway by their servants for fourteen days in very hot weather. A fire broke out in the heaps just after two trains had passed, and was carried by a high wind along an adjoining hedge, over a stubble field and a public road, to plaintiff's cottage, two hundred yards from the line, and burned the same. There was no evidence that the engines were improperly constructed or driven. *Held* (Brett, J., *dissentiente*), that there was evidence to go to the jury of negligence on the part of the defendants.—*Smith* v. *London & S. W. Railway Co.*, L. R. 5 C. P. 98.

See Company, 4; Privileged Communication.

Redemption Suit.

A suit for redemption, in which the right to redeem is denied, is a redemption suit.—*Powell* v. *Roberts*, L. R. 9 Eq. 169.

Release.—*See* Marriage Settlement.

Remedy and Right.—*See* Statute.

Restraint of Trade.

A manufacture carried on partly under patents, and partly by secret processes, was sold, and the vendors covenanted not to carry on the same, nor to allow it to be carried on in any part of Europe, nor to communicate the process "so as in any way to interfere with the exclusive enjoyment by [the purchasers] of the benefits hereby agreed to be purchased." *Held*, that this covenant could be enforced by injunction.—*Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345.

See Embezzlement.

Revocation.—*See* Voluntary Conveyance.

Revocation of Will.—*See* Will, 8.

Security.

1. A., an army agent, to secure balances from time to time due to him from B., an officer, took out in his own name and paid for policies on B.'s life, but charged B. in his books with the premiums paid, &c. A. drew on B. for round sums, more than the balance due from B., including the premiums, and B. accepted the bills (the Chancellor thought merely as a means to raise money), but they were afterwards dishonored. No account had been sent to B. charging him with the premiums, nor did it appear that he knew he was so charged. *Held*, reversing the decree below, that A. was entitled to the whole proceeds of the policies, without accounting to B.'s representatives.—*Bruce* v. *Garden*, L. R. 5 Ch. 32; s. c. L. R. 8 Eq. 430. 4 Am. Law Rev. 465.

2. An annuity was granted which, besides interest on the purchase-money, was large enough to pay premiums on a policy taken by the annuitant on the life of the grantor. The grantor was bound to aid in effectuating the policy, but the annuitant could have kept the money instead of obtaining the insurance, had he so desired. The grantor afterwards repurchased the annuity, as he had a right to do by the terms of sale, and demanded an assignment of the policy in the hands of the annuitant, which Stuart, V. C., refused on the authority of *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440, against his own opinion.—*Knox* v. *Turner*, L. R. 9 Eq. 155.

Separate Property.—*See* Husband and Wife, 3, 4.

Separation Deed.—*See* Desertion.

Settlement.—*See* Fraudulent Conveyance; Limitations, Statute of, 1; Marriage Settlement; Power, 1, 4; Voluntary Conveyance.

Sheriff.

A certificate of the filing and registration of a deed under sec. 192 of the Bankruptcy Act of 1861, is, by sec. 198, available to the debtor for all purposes as a protection in bankruptcy, but it was *held*, nevertheless, that the sheriff was not liable in trespass for arresting or detaining a debtor after production of such a certificate. This case contains some interesting discussion outside the words of the act.—*Ames* v. *Waterlow*, L. R. 5 C. P. 53.

Shifting Use.—*See* Forfeiture.

Ship.

By Stat. 24 Vic. cap. 10, sec. 13, "whenever any . . . vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have" certain powers. In a case where proceedings *in rem* had been instituted in said court against a vessel, and bail had been given for it, but the vessel had never been under actual arrest: *Held*, that the court had said powers.—*The Northumbria*, L. R. 3 Adm. & Ecc. 24.

See General Average; Insurance.

Slander.

A.'s widow gave B., as security, a bill of sale of certain of A.'s goods, without having taken out administration. C. took out administra-

tion, and told the defendant, B.'s agent, that the bill of sale was invalid, as A.'s widow had no title. Afterwards, when C. was about to sell the same goods at auction, the defendant notified those present that he held a bill of sale in favor of B., and forbade the sale. In an action by C. for slander of title: *Held*, that there was no evidence of malice to go to the jury, and that the plaintiff was properly nonsuited.—*Steward* v. *Young*, L. R. 5 C. P. 122.

See Libel.

Solicitor.

The plaintiff invested money on security, the value of which depended, as he knew, on building operations. In this he followed his solicitor's advice, which was founded on the opinions of competent surveyors. These opinions also were submitted to the plaintiff. A bill against the solicitor charging improper motives was dismissed with costs.

Semble, that equity can give relief when a client has sustained loss by the gross negligence of a solicitor.—*Chapman* v. *Chapman*, L. R. 9 Eq. 276.

See Limitations, Statute of, 2; Statute.

Specific Performance.—*See* Notice; Parties.

Statute.

By 6 & 7 Vic. cap. 73, sec. 26, no person who, as solicitor, shall carry on any proceedings in certain courts, "without having previously obtained a stamped certificate which shall then be in force, shall be capable of maintaining any action or suit at law or in equity, for the recovery of any fee," &c. A client took out an order of course for taxation, by which he submitted to pay what should be found due. The taxing master disallowed items for business done when the solicitor's certificate had not been renewed. *Held*, that they should have been allowed. The act did not extinguish the debt, but only the remedy.—*In re Jones*, L. R. 9 Eq. 63.

See Bankruptcy; Fraudulent Conveyance; Infant; Sheriff; Trust; Will, 3.

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

Subrogation.—*See* Insurance, 4.

Succession Duty.—*See* Legacy Duty.

Surety —*See* Action.

Surveyor.

It seems that a practice of paying surveyors by commission on the amount of the purchase money ought not to be disturbed.—*Attorney-General* v. *Drapers' Company*, L. R. 9 Eq. 69.

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

Tender.—*See* Interest.

Title.—*See* Security; Slander.

Tort.—*See* Injunction, 2.

Trade Mark.—*See* Injunction, 1.

Trade Secret.—*See* Restraint of Trade.

Trespass.—*See* Pleading, 1; Sheriff.

Trover —*See* Carrier.

Trust.

A., a vendor, covenanted in the usual way to surrender copyholds to B., the purchaser, but without words declaring a trust for B. until surrender, and the purchase money was paid. A. died before surrender, and his customary heir was of unsound mind. *Held*, that, as the contract was executed, a suit was not necessary to declare the heir a trustee, and that a person might be appointed without it, under the Trustee Act, 1850, to convey to B.—*In re Cuming*, L. R. 5 Ch. 72.

See Husband and Wife, 5; Limitations, Statute of; Security; Voluntary Conveyance.

Ultra Vires.—*See* Company, 5.

Valued Policy.—*See* Insurance, 4.

Vendor and Purchaser of Real Estate.

Upon a sale of leasehold property without any condition protecting the vendor against the production of deeds, the vendor is bound to produce a lease recited in one of the deeds contained in the abstract as the root of his title, although the lease is more than sixty years old. (Exch. Ch.)—*Frend* v. *Buckley*, L. R. 5 Q. B. 213.

See Damages, 3; Fixtures; Interest; Mortgage, 1; Parties.

Voluntary Conveyance.

A., a woman, settled her property at the time of her marriage, after other trusts, on the children of any future marriage, and if she had no children, then on her nephews and nieces, without any power of revocation being reserved. A. was not accustomed to business, and it was not explained to her that the above trusts were irrevocable. Furthermore, the settlement gave no powers of leasing or otherwise controlling the property to A. A. now seeks to set aside the deed, the above trusts being the only ones subsisting. A long time had elapsed since A. knew the terms of the deed, but the situation of the parties interested had not changed. *Held*, that as the above trusts were voluntary, and did not appear to have been intended to be irrevocable, they could be set aside, and in this case lapse of time made no difference. — *Wollaston* v. *Tribe*, L. R. 9 Eq. 44.

See Fraudulent Conveyance.

Waiver.—*See* Consideration.

Warehouseman.—*See* Carrier.

Warranty.—*See* Public Exhibition.

Way.

Semble, an action can be maintained for an injury arising from the non-repair of a highway by a parish, only where the right has been exceptionally given by the legislature to persons sustaining an injury in a particular district.—*Gibson* v. *Mayor of Preston*, L. R. 5 Q. B. 218.

Will.

1. The testator requested one person to attend and witness his will, and another to witness a paper. They both attended at the time and place appointed, when the testator produced a paper so folded that no writing on it was visible, and informed them that in consequence of his wife's death it was necessary to make a change in his affairs, and he asked them to sign their names to it, which they did. The testator did not sign in their presence, nor did they see his signature. The paper had an attestation clause upon it, in the handwriting of the testator, not quite in the ordinary terms, but showing knowledge of what forms were required in executing a will. *Held*, that the will was properly executed.—*Beckett* v. *Howe*, L. R. 2 P. & D. 1.

2. G. made a will, and with it a paper of directions to executors to form a part of it. By a later will, revoking all former wills and codicils, his executors were to dispose of all the chattels in the rooms occupied by G. at the time of his decease, "according to the written directions left by me, and affixed to this my will." There were no such directions affixed; but the above paper was found in G.'s private room. *Held*, that it could not be included in the probate.—*Goods of Gill*, L. R. 2 P. & D. 6.

3. At the foot of his will, the deceased duly executed in the presence of two witnesses a memorandum that "this will was cancelled this day," &c. *Held*, that this was not a will or codicil, but only a "writing" (1 Vic. c. 26, s. 20), which could not be admitted to probate.—*Goods of Fraser*, L. R. 2 P. & D 40.

4. "Being obliged to leave England to join my regiment in China, ... I leave this paper containing my wishes. . . . Should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, to be divided," &c. The deceased returned from China to England. *Held*, that the above will was conditional on the party's death in China.—*Goods of Porter*, L. R. 2 P. & D. 22.

5. "I appoint my nephew, J. G., executor." There were living at the date of the will a son of the testator's brother, and a nephew of the testator's wife, both named J. G. He hardly knew of the former, while the latter lived with him, managed his business, and was always spoken of by him as his nephew. *Held*, that, as the word "nephew" in a popular sense applied to the latter, the above facts could be considered in interpreting it.—*Grant* v. *Grant*, L. R. 2 P. & D. 8.

6. A testator left all his property to two persons, whom he appointed executors (one being a neighboring farmer, the other a surgeon, called in during his last illness to make the will), "in and for the consideration of" paying over the rents and profits to his wife for life: *Held*, that the executors did not take beneficially, but that the estate, subject to the widow's life-interest, was undisposed of.—*Bird* v. *Harris*, L. R. 9 Eq. 204.

7. A woman, after a Scotch divorce, invalid in England, and before the death of her husband, made a will purporting to dispose of her separate property. Her estate was about £800, consisting in part of savings from an annuity settled on her, her executors, &c., for life, by her husband after marriage, and in part of a legacy paid to her after the divorce. Her husband died, but she did not republish the will. Probate was granted, limited to the separate estate of the deceased; the applicant to file an affidavit, stating of what, in his belief, it consisted.—*Goods of Crofts*, L. R. 2 P. & D. 18.

8. A. devised his lands in trust for W., the eldest son of A.'s brother, B., in tail; then for the first and other sons of A.'s brother, C., in tail; then for the first and other sons of A.'s brother D. in tail; then for the second and other sons of B. in tail. He empowered his trustees to grant leases "during the minority of any infant tenants in tail," "or other persons for the time being entitled," and to manage the estates, &c., during the minority of any tenant for life, in tail, or in fee, "entitled to the present possession." A. also left a residuary fund to his nephews and nieces living at his decease, except W., "or others the person or persons entitled" to the lands. W. died before A., an infant, and unmarried. B. died unmarried after A. The second son of B. was now of age, and tenant in tail expectant on the death, without sons, of C., who was sixty-eight, and unmarried. There were other nephews and nieces of A. *Held*, that B.'s son was not so "entitled" to the lands

that he could not share in the funds.—*Umbers* v. *Jaggard*, L. R. 9 Eq. 200.

9. Testatrix gave a share of residuary personal estate to such of her four grand-children, A., B., C. and D., as should be living at the death of E. But if any of the said four grand-children should die in the lifetime of E., leaving issue, "the share or shares of such of them so dying shall be assigned and transferred to such issue respectively, in equal shares and proportions, on their attaining the age of twenty-one years, and the dividends and proceeds thereof in the mean time to be applied in or towards their maintenance and education. C. died in the lifetime of E., leaving issue, of whom several died under twenty-one. *Held*, that C.'s share vested in such of C.'s issue only as attained twenty-one.—*In re Ashmore's Trusts*, L. R. 9 Eq 99.

10. A. gave a residuary estate to be equally divided amongst his children. He afterwards gave the dividends for the use of each of his children during their respective lives, and, if they had children, then the principal to be at the disposal of the parent of such children. If any of A.'s children should leave no children, his share to revert into the residuum.

A.'s daughter B., by her will, expressed her intention of appointing her share under A.'s will to her children, but gave them a part only, and after directing debts and legacies to be paid, gave to her son the residue of the personal estate which belonged to her, or which she had any general power to dispose of. *Held*, that B. took a life-estate under A.'s will, with a power of appointment among her children; that B. had not fully exercised the power; and that the part not expressly appointed was divisible among B.'s surviving children.—*Butler* v. *Gray*, L. R. 5 Ch. 26.

11. A testator left his residuary personal estate in trust for his wife during her life, and at her death for his children "or their heirs." One of the children died before the wife, having assigned his share. *Held*, that the next of kin of the deceased child took, and not the assignee.—*Finlason* v. *Tatlock*, L.R. 9 Eq. 258.

12. A testator left a residue to trustees, to collect, &c., and then to divide the whole among his four children, A., B., C. and D., "with benefit of survivorship in case any of them should die without issue," and if any of them should die leaving children, "the share, whether original or accruing, of him . . . so dying, shall go, belong, and be divided between such children," &c. A., B., C. and D. all survived the testator. *Held* (reversing the decision of Malins, V. C.), that they did not thereby acquire indefeasible interests.—*Bowers* v. *Bowers*, L. R. 5 Ch. 244; s. c. L. R. 8 Eq. 283. *See* 4 Am. Law Rev., 484.

See Covenant; Limitations, Statute of, 2, 3; Power, 2, 3.

Winding up.

1. The *Warrant Finance Co.'s Case*, L. R. 4 Ch. 643; 4 Am. Law Rev., 283, was not merely a rule for the future, but a declaration of the law as it then stood.—*Ebbw Vale Co.'s Case*, L. R. 5 Ch. 112.

2. But the rule in that case does not prevent a creditor who holds a security (although on the estate against which the proof is made) from receiving dividends to the full amount of the principal, and at the same time realizing his security until the full amount of principal and interest has been satisfied. — *Warrant Finance Co.'s Case* (*No.* 2), L. R. 5 Ch. 88.

3. Nor from receiving dividends for the same debts from the estates of two companies in liquidation until the full amount of debt and interest has been satisfied.—*Warrant Finance Co.'s Case*, L. R. 5 Ch. 86.

4. Upon a petition to wind up a canal company, presented by the company, the corporation of a town within which part of the canal was situated, and a canal company whose canal communicated with that of the petitioning company, were heard in opposition to the petition.—*In re Bradford Navigation Co.*, L. R. 9 Eq. 80.

See Company, 1; Damages, 1.

Witness.—*See* Will, 1.

Words.

"*Abandon and expose.*"—See Infant.
"*All debtors.*"—See Bankruptcy, 1.
"*All not hereinbefore appointed.*"—See Power, 2.
"*Arrest.*"—See Ship.
"*At and from.*"—See Insurance, 2.
"*Children or their heirs.*"—See Will, 11.
"*Codicil.*"—See Will, 8.
"*Entitled.*"—See Will, 8.
"*In consideration of.*"—See Will, 6.
"*In good safety.*"—See Insurance, 3.
"*Nephew.*"—See Will, 5.
"*Rents, issues and profits.*"—See Power, 1.
"*Suit for redemption.*"—See Redemption Suit.
"*Trimming.*"—See Patent, 3.
"*Will.*"—See Will, 3.
"*With benefit of survivorship.*"—See Will, 12.

GENERAL CORRESPONDENCE.

To The Editors of the Law Journal.

Gentlemen,—A man bequeathes his personal property to his daughters, leaving his real estate to an only son, making a proviso that the son shall maintain his mother during life, or as long as she remains the widow of the testator. Please state in the next number of the *Journal* if she will be obliged to comply with the conditions of the will, or will she have power to set aside the will and claim one-third of the real estate. Also, if a work entitled the "Canadian Domestic Lawyer" is recognised by the profession as good authority.

Hoping that you will favor with an early reply, I remain your obedient servant,

Inquirer.

Sheffield, Sept. 7th, 1870.

[The question of law put by our correspondent is not one that comes within our rule to answer. He must consult a lawyer. We are not acquainted with the book referred to, and therefore can give no opinion upon it. The profession have, however, in a measure, a kindly feeling to the authors of "law made easy" books, as their tendency is in a general way (not from any mistakes that may be in them, but from the "penny wise and pound foolish" economy of those who trust them alone) to put money in the lawyers' pockets.

Eds. L. J.]

REVIEWS.

The Canadian Illustrated News. George E. Desbarats: Montreal.

This illustrated weekly makes its regular and welcome appearance. We are glad to see the marked improvement in its illustrations, and to hear that the enterprising publisher is encouraged by the patronage he has received to increase his exertions to make it a first-class periodical. The difficulties in starting, and when started, in keeping up an illustrated paper, especially when its circulation must of necessity be somewhat limited, are great, but success, we trust, will be the result. As a Canadian paper we wish it success, which its intrinsic value, especially in the reading matter it contains, fully merits.

Every Saturday. New York: Sept. 10. A handsome illustrated paper, containing various European war pictures. It has besides a fine portrait of Mademoiselle Sessi, and some well executed summer pictures. Its literary contents comprise some interesting editorials on The Balance of Power, An Empire's Bull Run, &c. It has two additional chapters of "The Mystery of Edwin Drood," and other readable articles.

OBITUARY.

John Roaf, Esq.

The subject of our notice was born at Wolverhampton, England, on the 12th of January, 1827, and resided in that place until 1837, when with his father, the late Rev. John Roaf, he came to Toronto, where he resided until his death, which took place on the 29th of August last.

Mr. Roaf was educated at Upper Canada College, and the University of Toronto. After taking his degree, he commenced the study of the law in the office of the late Judge Sullivan, and entered his name on the books of the Law Society on the 16th of June, 1846. In February, 1849, he was admitted as an attorney and solicitor, and was called to the Bar in Easter Term of the same year.

His ability and attention to business soon brought him a large practice, which he conducted with much success, almost entirely devoting himself to Chancery. His office business was successively in connection with Mr. J. Harvey Price, Mr. Oliver Mowat the present Vice-Chancellor, and subsequently with Mr. Downey and Messrs. English & Foster.

On the 22nd of December, 1864, he was appointed one of Her Majesty's Counsel, and in Michaelmas Term, 1866, he was appointed a Bencher. He was an able and industrious lawyer with sound judgment, with first rate standing at the Equity Bar, and it is more than likely, if his health had not declined, that he would some time since have been placed on the Chancery Bench.

In 1849, he married the youngest daughter of the Rev. James Richardson, by whom he had three children.

At the request of the Treasurer and Benchers of the Law Society, the Bar attended his funeral in their robes, which was not merely a mark of respect to a member of the Bench, but an evidence of the esteem and kind feeling of those who knew him.