DIARY FOR JUNE.

1. Wed. New Trial Day, Common Pleas.
3. Frid. New Trial Day, Queen's Bench.
4. Sat.. Easter Term ends.
5. SUN. *Whit Sunday.*
6. Mon. Last day for notice of trial for County Court.
11. Sat.. *St. Barnobas.* Last day for service for County Court, York.
12. SUN. *Trinity Sunday.*
14. Tues. General Sessions and County Court Sittings in each County except York Last day for Court of Revision finally to revise assessment rolls.
19. SUN. *1st Sunday after Trinity.*
20. Mon. Accession of Queen Victoria, 1837.
21. Tues. Longest Day.
22. Wed. Declare for County Court York.
24. Frid. *St. John Baptist.*
26. SUN. *2nd Sunday after Trinity.*
29. Wed. *St. Peter.*
30. Thur. Half-yearly School returns to be made. Replicatious County Court York to be filed. Deputy Registrar in Chancery to make return and pay over fees.

THE

Canada Law Journal.

JUNE, 1870.

LEX LOCI CONTRACTUS—LEX FORI.

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

(*Continued from page* 118.)

The law of prescription in force in Lower Canada being borrowed from the English one, it ought to be governed by the same rules in case of conflict of prescription, viz., by the *lex fori*; and such was the opinion of the *Codificateurs* (3rd report, *Title Prescription*, Art. 8), and their opinion is moreover in accordance with our jurisprudence.

In the case of *Côté* v. *Morison*, 2 *L. C. Jurist*, p. 206, a note made in Mackinaw, State of Michigan, was declared to be subject to our quinquennial prescription (12 Vic. chap. 22), by the Superior Court of Montreal, and in Appeal that judgment was confirmed on other grounds, the Court remaining silent on the question of prescription.

In the case of *Fenn* v. *Bowker*, 10 L. C. J. p. 121, the Court of Appeals maintained a plea of prescription of five years in an action on a promissory note made at Rochester, State of New York.

In the case of *Adams* v. *Worden*, 6 L. C. Rep. p. 237, an action was brought upon a promissory note made at Plattsburg, New York. The defendant pleaded the Statute of Limitations of the State of New York. To this plaintiff demurred: 1. Because the defendant cannot set up any foreign law or statute of Limitations; 2. Because in Lower Canada there is no such law of prescription as is alleged in the exception. On the 15th December, 1852, judgment was rendered by the Superior Court at Montreal, composed of Day, Smith and Mondelet, J.J., dismissing the said plea of limitation, on the ground "that the laws of the State of New York whereby the pretended limitation is created, have no force or operation in this Province." In appeal the Court held this judgment premature, because the statute of the State of New York had not been proved.

In all the above cases, no place of payment was specified, but the above decisions do not the less conclusively lay down the principle that prescription is governed by the *lex fori* and not by the *lex loci contractus.*

What could have been the cause of the conversion of Chief Justice Mondelet from the opinion he held in *Adams* v. *Worden?* In his decision in *Wilson* v. *Demers*, the learned judge does not even notice his judgment in the former cause.

Finally with regard to Lower Canada, the decision of Mr. Justice Mondelet was overruled in Review, by Messrs. Justices Mackay and Torrance, at Montreal, on the 30th of November, 1868: "Volumes, said Mr. Justice Mackay for the Court, have been written on the domicile of the debtor, as affecting the remedy or the suit; about his domicile, at the time of the contract, at the time of the suit; on the place of the contract, the place for payment, &c. The Bar is familiar with the reasonings *pro.* and *con.* As many authors are on one side as on the other. The old ones were divided, and so are the new. *Pothier* has been attacked for his opinions by *Troplong*, and lastly *Troplong* by *Marcadé.* A refuge can be found only in the old general rule, that the *lex fori* must prevail in cases of personal action such as the present one."

It must, however, in justice, be added that the said judgment has been appealed from, and is now pending before the Court of Queen's Bench, the highest Court in the Province.

In Louisiana, another French colony, which like Canada, has been transferred to a nation governed by the common law of England, and which, like Lower Canada, has adopted many of the commercial laws of Great Britain, it is not surprising to find the English principle

of the *lex fori* fully adopted: *Union Cotton Manufactory* v. *Lobdell*, 9 Martin, 435 (1828), Matthews, J.; *Erwin* v. *Lowry*, 2, An. Louis, R. 314 (1847), Slidell, J.; *Newman* v. *Goza*, 2 *ib.*, 643 (1847), Slidell, J., *Lacoste* v. *Benton*, 3 *id.*, 220 (1848), Slidell, J.; *Brown* v. *Stone*, 4 *id.*, 235 (1849), Rost, J.; *Bacon* v. *Dahlgreen* (1852), 7 An. Louis, Rep. 599, Eustis, C. J.; *Succession Lucas*, (1856), 11 *id.* 296, *per* Spofford, J.; *Walworth* v. *Routh* (1859), 14 *id.* 205, *per* Merrick, C. J. Mr. Justice Slidell remarked in *Lacoste* v. *Benton:* "There is a general principle which has been so frequently recognized by the Courts of this State as to be now beyond dispute. It is that prescription is a question affecting the remedy, and is controlled by the *lex fori.* The rule is not peculiar however to our Courts, but has become a universal one in international jurisprudence."

It seems clear that in no British colony can a different conclusion be arrived at, supposing the English jurisprudence to be decisive in favor of the *lex fori.* This question, in effect, bears upon the relations of foreigners with British subjects, and consequently is a question of public law, to be decided by the rules of the English jurisprudence. And so the Privy Council held, in 1852, in the case *Ruckmaboye* v. *Mottichund*, 8 Moore, Privy Council Rep., p. 4, on appeal from a decision of the Superior Court of India, which had fully applied the English rule to that colony. Per Sir John Jervis: "The arguments in support of the plea are founded upon the legal character of a law of limitation or prescription, and it is insisted, and the committee are of opinion, correctly insisted, that such legal character of the law of prescription has been so much considered and discussed among writers upon jurisprudence, and has been so often the subject of legal decision in the Courts of law of this and other countries, that it is no longer subject to doubt and uncertainty. In truth, it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomination, is a law relating to procedure having reference only to the *lex fori.*"

The courts of the Province of Ontario also have adopted the doctrine of the *lex fori:* 2 Q B. U. C. Rep. 265; *Darling* v. *Hitchcock*, referred to in 10 L. C. Jurist, p. 268, but since reversed by the Court of Appeals at Toronto. In the latter cause, a note made in Ontario, payable in Montreal, was prescribed by the law of Quebec, but not by the law of Ontario, and the defendant pleaded the Lower Canada prescription. The question principally was, whether a Court of Justice in Ontario was bound to enforce the Promissory Note Act (12 Vict. chap. 22) enacted by a legislature common to both Provinces, and declaring that all notes "due and payable in Lower Canada" should be considered as absolutely paid, unless sued on within five years from maturity. But as the note was made payable in Montreal generally, without the words "only, not otherwise and elsewhere," as required by the laws of Ontario, the same was considered as not payable in Lower Canada, and judgment did go for the plaintiff. Chief Justice Draper, however, on delivering the judgment of the court, fully recognized the soundness of the *lex fori.* He said: "I take it to be equally true as a general proposition that a plaintiff has the full period prescribed by such local law (the law where the action is brought), for bringing his suit before it would be so barred." He then quotes Story, *De la Vega* v. *Vianna*, *British Linen Co.* v. *Drummond*, and *Hubert* v. *Steiner.*

What we have said would seem to be sufficient to show that in England, the rule of the *lex fori* is well established. It is, however contended, upon the authority of Westlake, *Private International Law*, § 250 *et seq.*, and Bateman, *Commercial Law*, § 143 *et seq.*, that the English decisions rest, 1. upon the authority of Story, *Conflict of Laws*, and 2. on fallacies.

The case of the *British Linen Company* v. *Drummond*, decided on the 22nd May, 1830, has been often cited as a leading one bearing upon the question in controversy, and the principle therein laid down has been followed in many cases anterior to the publication of Story, Conflict of Laws, as the *De La Vega* v. *Vianna*, 1 B. & Ad. 284, 1830; *Trimbey* v. *Vignier*, 1 Bing. N. C. 151, 1834; and *Hubert* v. *Steiner*, 2 Bing. N. C. 203, 1835; and it had been also admitted long previous to these cases, particularly in *Williams* v. *Jones*, 13 East. 439, 1811, and other cases cited in *Lippmann* v. *Don*, decided in the House of Lords on the 26th May, 1837, 2 S. & M. 682: and although in this instance, Lord Brougham mentions the name of Story in conjunction

with the names of Huber and Paul Voet, we will soon have occasion to shew that the doctrine laid down by his Lordship rested, not upon fallacies or upon the *dictum* of Story, but upon the soundest reasoning, Suffice it to say at present, that, notwithstanding the objections of Westlake and Bateman, the decision in *Lippmann* v. *Don* has been recognizen as an authority in both Great Britain and the United States, and is taken, along with the other precedents, as fixing the law of those countries, as the following array of authorities will show:

13 Peters, 327; 2 B. & Ad. 413; 1 id. 284; 10 B. & Cresw. 903; 3 Burge's Com. on Col. and For. Laws, 883; 4 Cowen, 528, note 10; Id. 530; I Gall 371; 2 Mason, 151; 6 Wend, 475; I Green's N. J Rep. 68; 3 Peters, 270, 277; 5 id. 466; 8 id. 361? 13 id. 312; 13 id. 378; 13 Serg. & R. 395; 2 Rand. 303; 3 J. J. Marsh, 600; 8 Vern, 150; 3 Gilman, 637; 1 Meigs, 34; 7 Missouri, 241; 9 How, U. S. 407; 7 Maine, 337, 470; 36 Maine, 362; 1 Penn. State R. 381; 2 Mass. 84; 13 id. 5; 17 id. 55; 3 Conn. 472; 2 Bibb. 207; 2 Bailey, 217; 1 Hill, S. C. 439; 2 Dall. 217; 1 Yeates, 329; 1 Caines, 402; 1 Johns, 139; 3 id. 190; 3 id. 263; 11 id. 168; 4 Conn. 49; 2 Paine, C. C. 437; 2 S. & M. 682; 1 Ross' Leading Cases, 559-605; Angell on Limitations (ed. 1869), p. 52-64, No. 64-68; Parsons on Bills, p. 381-391 (ed. 1867); Phillimore on International Law, vol 4, p. 573; Dickson on Evidence, pp. 532-537; Tait on Evidence, 3rd ed. pp. 460-465; Henry on Foreign Law, appendix, p. 237; 5 Johnson, N. Y., 152; 10 B. & C. 816; 1 Smith, Leading Cases (ed. 1866), p. 954, N. 786; Story, Conflict of Laws, § 576, p. 766 and *seq* (ed. 1865); Wheaton, International Law, p. 187; 1 Bing. N. C. 111; 2 id. 202; 3 Conn. 54; 1 Wis. 131; 10 Pick. 49; 11 id. 36; 6 Cush. 238; 13 East, 439; 2 Q. B. Rep. U. C. 265; 9 Martin's Rep. 435; 2 an. Louis. Rep. 315; id. 646; 3 id. 221; 4 id. 235; The English Jurist, 1851 to 1855, p. 122; *Ruckmaboye* v. *Mottichund* (1852), 8 Moore, Privy Council, p. 4,

That the *lex fori* is still the English rule is evident from the following authorities.

In the second edition of his Leading Cases on Commercial Law (1868), Mr. Tudor in reviewing the English jurisprudence on the matter, says (280): "The limitation of actions clearly does not belong to, and will not be determined by, the law of the country where the contract was entered into, but by the law of the country where proceedings are taken to enforce."

Mr. Forsyth in his Opinions on Constitutional Law, just published in London (1869), also remarks, (p. 249): "The *lex fori* applies to all modes of enforcing rights, and governs as to the nature, extent and character of the remedy, including statutes of limitation."

In the case of *Harris* v. *Quine*, L. R. 4 Q. B. 653, decided in the Court of Queen's Bench, 7th June, 1869, by Cockburn, C.J., and Blackburn and Lush, JJ., the authority of *Huber* v. *Stayner*, and other cases above cited were fully sustained. It must be admitted that the Chief Justice felt inclined to adopt the *lex loci contractus*, but he would not undertake to derrogate from the well settled jurisprudence of England. "If the matter," he said, "were *res integra* and I had to form an opinion unfettered by authority, I should be much inclined to hold, when by the law of the place of contract, an action on contract must be brought within a limited time, that the contract ought to be interpreted to mean: 'I will pay on a given day or within such time as the law of the place can force me to pay.'" His decision was, however, was in the following terms: "On the question as to whether the judgment on the plea in the Manx Court is a bar to bringing an action in the courts of this country. I think we are bound by authority that it is not, *Huber* v. *Stayner*, and other cases, having decided that such a statute of limitations, as the present simply applies to matters of procedure, &c., not to the substance of the contract."

The Judges Blackburn and Lush, while concurring in the decision of the Chief Justice, expressed no opinion as to the soundness of the rule of the *lex fori*, but merely admitted the same to be the law of England.

In Scotland, however, the *lex fori* does not appear to be well established, and, there, another system, which has not yet been noticed anywhere else, was in former times strongly supported. Mr. Guthrie, in his late translation of Savigny, Conflict of Laws, (1869), Note B., p. 219, says:—

"The Scottish Courts, since the middle of last century, decidedly preferred the prescription of the debtor's domicile . . . But they looked not to the debtor's domicile at the time of the action,

but rather to the debtor's domicile *during the whole currency of the term of limitation.*"

Mr. Guthrie, who quotes several Scottish decisions previous to *Lippmann* v. *Don*, as supporting this view, is of opinion that it is the *real Scottish rule*, but concludes his remarks by stating that "the case of *Lippmann* v. *Don*, renders it imperative to apply the *lex fori*, without respect to the domicile of the debtor, except in so far as this may fix the place where the action is brought." And so the Courts there held since. See cases cited by Guthrie, p. 220, and decided in 1839, 1843 and 1854.

It may here be observed that Bateman, who wrote in 1860, on the Commercial Law of the United States, is not even noticed in *Power* v. *Hathaway*, decided 5th December, 1864, by the Supreme Court of the State of New York, and reported in Barbour, vol. 48, p. 217. By the Court, Smith, J.: "It is a settled principle of international law that all suits must be brought within the period prescribed by the local laws of the country where they are brought. The *lex fori* governs all questions arising under the Statutes of Limitations of the various States of this country."

Merlin, Marcadé and Bar merged the rule of the *lex fori* in that of the *lex domicilii debitoris*, because the domicile of the debtor being the place where, by the common law, the action is brought, the two rules are really the same in their result. This, however, although true in most instances, is not so in the case where a foreigner, for instance, transiently in Lower Canada, or against whom jurisdiction is found by the possession of property therein, is sued in that country. As remarked by Mr. Guthrie, since the decision in *Lippmann* v. *Don*, the judgment would, in Scotland, be the same as if the defendant were domiciled within the jurisdiction of the Court. There is thus always regard to the forum, not to the debtor's natural and permanent forum, but to the forum in which the action is instituted. There is, however, no doubt that the French jurists who maintain the rule of the *lex domicilii debitoris*, meant in reality the *lex fori*, inasmuch as by the common law of France, no action can be brought only before *le juge du domicile du débiteur*, and that a foreigner cannot implead another foreigner before the French tribunals, unless there has been abroad some decree or judgment of a court declaratory of the right of the claimant. The Cabinet Lawyer for 1864, p. 411; 1 N. Pigeau, p. 150.

(*To be continued.*)

STAMPS ON BILLS AND NOTES.

As the law regulating Stamps on Bills and Notes is governed by several statutes which affect distinct periods of time, we think it will not be amiss, and may save time to some of our readers, to give a general epitome of the statute law of the Province bearing upon the subject.

The matter may be divided into four heads or periods; 1st. The period before legislation on the subject; 2nd, Under the Statutes of 1864, 27 & 28 Vic. cap. 4; 3rd, Under the Act amending the last Act, viz.: 29 Vic. cap. 4; and lastly, under the Act at present in force, 31 Vic. cap. 9.

1st. With reference to the period before the first of August, 1864, we need only say, that any Bill, Draft or Note, accepted, drawn or made before that date required no stamp to be affixed to it, or duty levied on it.

2nd. The Statute of 27 & 28 Vic. cap. 4, required that duty should be paid on all promissory notes, drafts or bills of exchange for $100 or upwards (this act does not affect notes, drafts or bills, under that amount), and it provides that the duty shall be levied and collected as follows:

On each note, draft or blll, executed singly, a duty of three cents for the first $100, and a further duty of three cents for each additional $100 or fraction of $100:

When a draft or bill of exchange is executed in duplicate, a duty of two cents on each part for the first $100, and a further duty of two cents on each part for each additional $100 or fraction:

When such draft or bill is executed in more than two parts, the duty shall be one cent on each part, in the same manner and ratio as when drawn in two parts:

The duty shall be paid by affixing an adhesive stamp:

The stamps shall be obliterated by the signature or initials of the maker or drawer, or some integral or material part of the instrument written upon the stamps:

The stamps shall be affixed by the maker or drawer when the instrument is made or

drawn in this Province, and by the acceptor or first indorser within the Province where the instrument is made or drawn without the Province:

In case the duty has not been paid as before mentioned, any subsequent party to such instrument, or person paying the same, may render the same valid by affixing stamps to double the amount of duty required, and writing his signature or initials on the stamp or stamps so affixed.

This Act governs the period of time from 1st of August 1864 to 1st of January 1866.

3rd. The Act 29 Vic. cap. 4 amends the last Act. It makes a duty payable on all notes, drafts and bills, even if less than $100, as follows: if the note, draft, or bill does not exceed $25, that is, for $25 and under, a duty of one cent is imposed, when over $25 and not exceeding $50 a duty of two cents, and a duty of three cents if over $50 and less than $100. This portion of the amending Act came in force on the 1st of January, A.D. 1866, and continued to regulate payment of duty on notes drafts, and bills, under $100 until the first day of February, A.D. 1868.

29 Vic. cap. 4 also amends 27 & 28 Vic. cap. 4, by providing that it shall not be necessary to obliterate any stamp by writing the signature or initials upon it, but that the person affixing such stamp shall, at the time of affixing, write or stamp thereon the date when it was affixed. This last amendment regulates obliteration of stamps, from 1st October, 1865, to 1st February, 1868.

4th. We now come to the Act regulating the law as it now is, and has been since the first day of February, A.D. 1868. We would premise, first, that this Act does not affect notes, drafts, or bills under $25, and, that as regards such notes, drafts and bills, no duty is now payable. The duties payable by this Act are, for notes, drafts, or bills which *amount* to but *do not exceed* $25, a duty of one cent; over $25 but not exceeding $50, two cents; over $50 but not exceeding $100, three cents; when drafts or bills are executed in more than one part, the duty is payable in the same ratio as provided by the Act of 1864, 27 & 28 Vic. cap. 4, before set out. The duty shall be paid by stamps, which are to be obliterated by signature, initials, or some material or integral part of the instrument written thereon, in the same way as mentioned in reference to the Act of 1864, or they may be obliterated by writing or stamping thereon the date of affixal?

It is necessary under all the statutes referred to, when any interest is made payable at the maturity of the bill, draft, or note, that it should be added to the principal amount when calculating the amount on which duty is to be paid.

We might draw attention to the great necessity there is for seeing that the stamps are properly cancelled. A case lately argued in the Court of Queen's Bench (*Young* v. *Waggoner*, 29 U. C. Q. B. 37) decides that even if there are sufficient stamps on the note, draft, or bill, still if they are not *all* cancelled they might as well not be on the note, so that it would be well where one stamp is placed over another, as is often done, (though we think it a bad practice), to see that the under one is cancelled.

Another point to be observed is, that if a note, draft, or bill comes into a holders hands insufficiently or improperly stamped, the double duty must be paid by affixing the stamps at once, as otherwise it is of no avail: *McCalla* v. *Robinson et al.*, 19 U. C. C. P. 113.

Such defences as want of stamps, or improper cancellation and the like come under the head of statutory defences, and in Division Courts where the defendant wishes to get the benefit of the statutory Act, he must serve the necessary notice that he intends to take such objection at the trial, otherwise he will be unable to avail himself of his defence.

ATTORNEY'S COSTS.

A Bill has been introduced into the British House of Commons, for amending the law relating to the remuneration of attorneys and solicitors, which, if passed, will effect a radical change in the present system. We have not heard what has been the result of the proposed measure, but it is worthy of passing notice even if it has not become law.

It is proposed by the Bill to give attorneys and solicitors increased rights in contracting with their clients, both with respect to costs and to their liability for negligence. It is an approach to the system, almost universal, we believe, in the United States, where the attor-

ney agrees for a certain sum of money to conduct a suit to termination, or to perform some other business of a professional nature, and where a tariff of fees is unknown, though there the fees come out of the plaintiff.

It is provided that such sum as may be agreed upon between the attorney and his client, shall not be liable to taxation, except in some peculiar cases referred to in the Act; and there are other provisions as to deduction being made from the sum in case the agreement has not been completed or performed by the attorney, either in consequence of his death or otherwise; but it is not proposed to effect in any way the present system as to the recovery of costs from, or payable to the client by any other person. An attorney may take security from his client for his future fees, charges, and disbursements to be ascertained by taxation or otherwise. In determining the amount of remuneration to an attorney for his service, the taxing officer is to have regard not only to the length of documents prepared, or the time occupied, but also to the skill, labour, and responsibility involved.

Speaking of the Act, the *Solicitor's Journal* remarks with much truth, "that the present system affords a temptation to multiply technicalities, simply because much real work is remunerated on quite an inadequate scale."

If this remuneration is inadequate in England, how much the more here, especially when our tariff was made years ago, when the expense of living was half what it is now.

The following gentlemen were, during last term, admitted to practice as attorneys, in addition to those whose names we mentioned last month, viz.:

Messrs. Frederick C. Martin, Toronto; Fred. W. Johnston, Toronto; and A. S. Wink, Dundas.

A Bill has been introduced into the English Parliament "with respect to the revesting of Mortgaged Estates in Mortgagors," which proposes to do by a statutory form of receipt what we have for many years done by means of the certificate of discharge under our Registry Acts.

SELECTIONS.

RIGHT OF LANDLORD TO REGAIN POSSESSION BY FORCE.

(*Continued from page* 124.)

It is apparent therefore, as the clear result of English authority, that an entry by force by the landlord, or his forcible expulsion of the tenant, are illegal only to the extent of the penalties expressly annexed to the act by the statute, and no further, and that no color of authority exists for holding the possession so gained generally unlawful, or for founding thereon any common-law action by inference from the statutory prohibition. Still less can the special *qui tam* action of trespass be transmuted into a general action of trespass. The precise form is given by Fitzherbert, (2 Nat. Brev. 248 F.) and is founded only on the statute. In *Davison* v. *Wilson*, *supra*, the attempt was made to bring the action of trespass *qu. cl.* under the statute, by adding to the declaration in trespass in common form, that the entry and expulsion were "with the strong hand and against the form of the statute;" bnt even these words were held insufficient. It has moreover been uniformly held that the statutory action can only be maintained by one who has a freehold, the action only being given on disseisin; *Rex* v. *Domry*, 1 Ld. Ray. 610; *Cole* v. *Eagle*, 8 B. & C. 409; and does not lie against one who has a freehold and right of immediate entry; Year Book 9 Hen. VIII. fo. 19, pl. 12; 15 Hen. VII. fo. 17, A, pl. 12. And it need hardly be added that the restitution directed by the statutes of 8 Hen. VI. c. 9, s. 3; 21 Jac. I. c. 15, to freeholders and tenants for years, can only be made when and to those to whom it is directed by those statutes, and cannot be waived and replaced by an action of trespass. The restitution moreover is the fruit of a criminal proceeding.

The American cases therefore, which have based an action of trespass, whether *qu. cl. fregit*, for assault, or *de bonis asportatis*, on the supposed authority of the English law, wholly fail of support; and can only be sustained, if at all, on some distinct authority given by the terms of their local statutes. It will suffice if, instead of specially reviewing these enactments, we examine such authorizing clauses, when relied on by the courts to sustain the action in question. Except so far as qualified by such enactments, the doctrine that possession obtained by force is a lawful one, seems as clear on principle as we have seen it to be on authority. The tenant who, after his own possessory right is determined, seeks to hold his lessor as a trespasser for entering upon him with force, must in establishing his own possessory title disclose its defective character as against the title relied on by the lessor in entering; for the common law action of trespass is an assertion of the

plaintiff's individual possessory right, and not an action for a public wrong; whereas, as against a stranger, mere possession being sufficient, no title subordinate to the defendant's is in any way disclosed in the action. And this was the ground generally taken by the American courts, when the point actually arose for decision, and an action of trespass was with great unanimity of authority held not to lie. Thus in Pennyslvania, *Overdeer* v. *Lewis*, 1 W. & S. 90; South Carolina, *Johnson* v. *Hannahan*, 1 Strob.313; Kentucky, *Tribble* v. *Frame*, 7 J. J. Marsh. 599; North Carolina, *Walton* v. *File*, 1 Dev. & B. 567; ank in New York in repeated decisons: *Wilde* v. *Cantillon*, 1 Johns. Cas. 123; *Hyatt* v. *Wood*, 4 Johns. 150; *Ives* v. *Ives*, 13 Johns. 235; *Jackson* v. *Morse*, 16 Johns. 197; justifying the emphatic language of Nelson, C. J., in *Jackson* v. *Farmer*, 9 Wend. 201: "Statutes of Forcible Entry and Detainer punish criminally the force, and in some cases make restitution, but so far as civil remedy goes there is none whatever." And these earlier cases have been reaffirmed by recent adjudications: *Livingstone* v. *Tanner*, 14 N. Y. 646; *People* v. *Field*, 52 Barb. 198, 211. So in Vermont, in *Beecher* v. *Parmele*, 9 Vt. 352, Redfield, J., says, "it is now well settled that an intruder, in quiet possession of land, may be forcibly expelled by the owner, so far as the land is concerned. If the owner is guilty of a breach of the peace and trespass on the person of the intruder, he is liable for that, *but his possession is lawful*;" and actions of trespass were accordingly held not to lie in *Yule* v. *Seely*. 15 Vt. 221; *Hodgeden* v. *Hubbard*, 18 Vt. 504.

In a few States some cases have lately departed from this rule and held trespass *qu. cl.* maintainable; but they will be found to rest almost without exception, on the supposed authority of the English law as set forth in the long since exploded cases of *Newton* v. *Harland* and *Hillary* v. *Gay*; though, as will be remembered, no such action was countenanced even by these decisions, and their authority for trespass for assault has, as we have seen, been wholly overruled. *Moore* v. *Boyd*, 24 Maine, 242, and *Brock* v. *Berry*, 31 Maine, 293, frequently but erroneously cited as sustaining this action, do not apply, for in both the tenancy was at will, and the tenant's possessory right had not terminated, and in the latter case, had the tenant been at sufferance, as he was mistakenly called by the counsel, the facts presented exactly the case of *Meader* v. *Stone*, 7 Met. 147; *Mugford* v. *Richardson*, 6 Allen, 76; *Argent* v. *Durrant*, 8 T. Q. 403, where no action was held to lie. In *Larkin* v. *Avery*, 23 Conn. 304, the landlord, having a right of re-entry, entered in the tenant's absence and resisted with force his attempt to repossess himself of the premises, and was held liable in trespass for assault. A clearer case could hardly be put of the landlord's right to use force, as a legal possession had been gained, and force was only employed to defend it; and this point has so been held wherever the case has arisen elsewhere; *Todd* v. *Jackson*, 2 Dutch 525; *Mussey* v. *Scott*, 32 Vt. 82; *Davis* v. *Burrell*, 10 C. B. 821. *Hilbourne* v. *Fogg*, 99 Mass. 11; even by courts which have denied the right of forcible re-entry. The court distinguish the case before them from trespass *qu. cl.*, and seem to think that trespass for assault is supported by the Massachusetts law in *Sampson* v. *Henry*, 11 Pick. 379, being misled by Judge Wilde's *dictum* above cited, that being a case of excessive force, but mainly rely on the exploded doctrine of *Newton* v. *Harland*, which they conceived to be the English law.

In *Dustry* v. *Cowdrey*, 23 Vt. 631, the court which had repeatedly enunciated a different doctrine,* altered their opinion, moved thereto, we presume, by the then recent decisions of *Newton* v. *Harland* and *Hillary* v. *Gay*, and sustained an action of trespass *qu. cl.* As this decision was a very elaborate effort to support this action, including all the grounds which have been urged in its support, and has since been followed as a leading case by the court of another State, it claims a more extended examination. The facts simply were, that the plaintiff, a tenant at will, had agreed at the inception of his tenancy to "leave at a certain day, and that if he did not the defendants might put him out in any way they chose." The day fixed for his quitting passed, and on his refusal then to go the defendants entered peaceably and dismantled the premises, and after a further refusal on his part to go, removed him and his family, but gently and with no more than neeessary force. It would seem as if the agreement on the tenant's part for his ejection was an ample warrant for his removal with due and proper force. This point has been expressly so held in England, and in all the American courts where it has arisen, and such removal has been held justifiable under a plea of leave and license and no breach of the statute: *Feltham* v. *Cartwright*, 7 Scott, 695; *Kavanagh* v. *Gudge*, 7 M. & G. 316; *Fifty Assoc.* v. *Howland*, 5 Cush. 214; *Page* v. *Dopey*, 40 Ill. 506. But the point was neither taken by counsel nor noticed by the court. Having overlooked a ground decisive of the case in favour of the defendant, the court then proceed to pronounce judgment for the plaintiffs, placing their decision mainly on the ground, supposed to be conclusively established by *Newton* v. *Harland* and *Hillary* v. *Gay*, that a legal possession could not be gained by a prohibited act. After a full statement of these two cases, they say, p. 644, "This is the latest declaration of the courts of Westminster Hall upon this subject. . . . . We have no disposition to add any thing in regard to the true construction of law as derived from the decisions of the courts of Westminster Hall, and we think the decisions of

* *Beecher* v. *Parmele*, 9 Vt. 352, and other cases, *supra*.

English courts as to the common law or the construction of ancient statutes are to be regarded of paramount authority." We fully agreee with the court in this conclusion, and since both the latest and uniform doctrine of the English courts is, as we have shown, the reverse of that enunciated by the court in this case, we do not doubt that it will be as readily adopted by them; especially as their conclusion in this case meets little more support from American than from English authority. The court rely on the cases of *Moore* v. *Boyd*, and *Brock* v. *Berry*, which, we have shown, do not apply; and cite the *dictum* of Wilde, J., from *Sampson* v. *Henry*, 11 Pick. 379, but do not refer to the decision in the same case, 13 Pick. 36, that trespass *qu. cl.* would not lie, nor to the express adjudication by the same learned judge in *Miner* v. *Stevens*, 1 Cush. 485, that the lessor might regain possession by force without liability to an action by the lessee, and his unqualified assent to the New York and English law accordingly.

One further ground is dwelt on at length by the court, in support of the action of trespass; that, as the statute of Vermont had re-enacted the English statute, 8 Hen. VI. c. 9, which gave restitution and a *qui tam* action with treble damages to the ousted party, he might waive these rights and bring trespass *qu. cl.* instead. The court, in assimilating their statute to that of 8 Hen. VI. do not seem aware that by the latter restitution and the *qui tam* action were given only to freeholders, *Cole* v. *Eagle*, *supra*; 1 Hawkins Pl. A. B. I., c. 28, sec 15. The same limitation was put on the New York statute by the court of that State; *Willard* v. *Warren*, 17 Wend. 257, 261: hardly, therefore, furnishing a precedent for the assertion of these rights by a tenant at sufferance. But had such rights been expressly given to such a tenant by the Vermont statute, it is a novel doctrine that special proceedings in a statute can be waived at will by the party who may be entitled to their benefit, and in lieu thereof an action be maintained which did not lie at common law and was not given by the statute. So far as the restitution is concerned, it is much the same as if in Massachusetts the executors of a person, killed by the negligence of a common carrier, should waive the indictment given by Gen. Stat. c. 180, sec 34, and claim to recover in tort, because they would have been entitled to the fine imposed upon a conviction. "The form," the court remark, "is immaterial." An extremely convenient but somewhat perilous doctrine. And it should further be observed that, while these statutory rights are expressly limited by the Vermont enactment to the party who has successfully maintained his complaint, the doctrine of the court would allow him in return for giving up rights which he had not shown he was entitled to, to bring an action neither conferred by the statute nor maintainable without it.

In arriving at this conclusion, the court had to surmount another difficulty, namely, that not merely must the plaintiff under the English statute show a freehold, but if the defendant justifies his entry by title, the *qui tam* action fails. This restriction on the maintenance of the action, the court seem to consider to have arisen from "a blunder, to call it by no severer name," between the statute 5 Rich. II. which did not, and the statute 8 Hen. VI. c. 9, which did give this action. But Fitzherbert, 2 Nat. Brev 248 H. says, "If a man enters with force into lands and tenements to which he hath title and right of entry, and put the tenant of the freehold out, now he who is so put out shall not maintain an action of forcible entry against him that hath title and right of entry because that that entry is not any disseisin of him." To this a note, said to be by Lord Hale, is appended; viz., "He shall not maintain it on the stat. Rich. II.; sec. 9 Hen. VI. fo. 19, pl. 12, but the party shall make fine to the king for his forcible entry." The meaning of Lord Hale doubtless was, that the action was no more maintainable on the statute of Richard than it was declared to be by Fitzherbert on the statute of Henry, on which this author was expressly commenting. This is clear from the case which is cited by Lord Hale from the Year Books, decided the year after the passage of the statute of Henry, which held expressly, that if the entry of the defendant was with title, no action lay: "but for the force the party entering shall make fine to the king." The decision is exactly given in Lord Hale's note; it runs, "On n'aura action quand il est ouste ove fortmain par un autre, ou entre fuit congeable [justifiable]; per ceo quod pur le fortmain le party convict fera fine au Roy. . . Et purceo quod le breve reherce le statut . . et pur ceo qu'il ne dit ubi ingressus non datur per legem, le breve a batist; car si le entre fuit congealable sur le plaintiff, il n'ad cause d'action:" The careful reader will be somewhat surprised to find that Lord Hale's note is quoted by the court: "He shall not maintain it by the statute Rich. II. *but may by the statute of* Henry VI.," thus converting a decision from the Year Book, expressly denying the action, into a statute authorising it, by the deliberate insertion of the words italicized, not one of which is to be found in the author cited. In any tribunal less respectable than the court of Vermont, this might be called by even a "severer name" than "blundering." It may be added, that the law laid down in the case from the 9 Hen. VI. is reaffirmed in 15 Hen. VI. fo. 17, pl. 13.

The general ground on which this case proceeded, that the entry by force being prohibited could confer no legal possession, must be considered as overruled in Vermont by the later case of *Mussey* v. *Scott*, 32 Vt. 82, where the landlord having a right of eutry, violently broke into the premises during the temporary absence of the tenant, and was nevertheless held to have acquired a lawful possesion thereby, which he might defend by force against

the tenant. The court distinguish *Dustin* v. *Cowdrey* on the ground that the act here was not within the Statutes of Forcible Entry. But this was not so. Breaking violently into a dwelling-house is as indictable as force to the person. *Rex* v. *Bathurst*, 3 Burr. 1701 and 1702. We must therefore regard this decision as a return to the earlier doctrines held by this court. In Illinois, however, in the cases of *Page* v. *Depuy*, 40 Ill. 506, *Reeder* v. *Purdy*, 41 Ill. 279, the court considering the English authority equally balanced and the American cases conflicting, adopt the conclusions of *Dustin* v. *Cowdrey*, which they consider established by incontrovertible arguments. As these cases rest therefore mainly on authority, we leave them to stand or fall with the cases on which they rely. It is merely to be remarked, that the court is consistent in its view of the effect of the statute, and consider that any violent entry, even after the tenant has abandoned the premises, is equally within the prohibition of the statute, and subjects the landlord to an action of trespass, a conclusion which no other court has ventured to adopt, and which is distinctly repudiated even by those which have sustained the action of trespass in other cases, but which is, nevertheless, the logical result of implying from the statute a liability not therein expressed; the absurdity of the conclusion not lying in the means by which it is reached, but in the doctrine from which it is drawn.

In Missouri, the true distinction is drawn, and it is held that whatever remedy the ousted tenant may have by the statutory process of restitution, he cannot maintain trespass against the landlord. *Krevet* v. *Meyer*, 24 Mo. 107; *Fuhr* v. *Dean*, 26 Mo. 116.

In Massachusetts, notwithstanding some general *dicta* or decisions not duly limited, the law is clearly in accordance with the English law, and an action lies by the tenant neither for a forcible entry nor for forcible expulsion if no unnecessary force is used. The early case of *Sampson* v. *Henry*, 11 Pick. 379, in which the *dictum* of Judge Wilde occurs, which he quoted at the beginning of this article, was trespass for assault. The plaintiff was beaten with a pitchfork by the landlord while the latter was effecting an entry; and the language used by the court so far from announcing the doctrine, sought to be derived from it, of the general unlawfulness of force, was immediately preceded by the statement, that the defence claimed was "the right not only of breaking open the house and entering therein with force and violence, but also of committing an assault with a dangerous weapon." The whole simply means that as improper force was used, trespass for assault lay. That trespass *qu. cl.* did not lie, was held in the same case in 13 Pick. 36. In *Miner* v. *Stevens*, 1 Cush. 482, 485, the same judge cites the English and New York cases, which had held that possession could be regained by force, and that no action lay, and declares this to be the law of Massachusetts. In *Meader* v. *Stone*, 7 Met. 147, an action of trespass *qu. cl* was held not maintainable by a tenant at sufferance against his lessor. The same decision was made in *Curtis* v. *Galvin*, 1 Allen 215, where the tenant was forcibly removed, and in *Moore* v. *Mason*, *Ib.*406, where the entry was forcible. In *Commonwealth* v. *Haley*, on indictment against the landlord for assault on the tenant with a hatchet, the court held, that the landlord, if resisted in taking possession, must desist, and did not limit this proposition as they should, to the case of a criminal proceeding; but in *Mugford* v. *Richardson*, 6 Allen, 76, an action of tort in the nature of trespass was held not to lie against a landlord, who, after taking peaceable possession of part of the premises, overcame with force the tenant's resistance to his repossession of the remainder. The same law was laid down in *Winter* v. *Stevens*, 9 Allen, 526, 530, where the circumstances where even stronger, entry being made by the owner accompanied by five men and the tenant being ejected with force. The general doctrine that expulsion was mere aggravation in trespass *qu. cl.*, and answered by plea of title, was declared in *Merriam* v. *Willis*, 10 Allen, 118, and the right to expel with necessary force affirmed in *Pratt* v. *Farrar*, *Ib.* 519, 521, and decided in *Morrill* v. *De la Granja*, 99 Mass. 383. Clearly, therefore, no civil action is maintainable in Massachusetts by inference from the general prohibition of the statute.

It will have been apparent from the cases cited in this discussion and the principle upon which they have gone, that no such distinction exists as has sometimes been intimated, restricting the right to expel to cases where the entry has been peaceable. No such distinction has ever been decided to obtain, but the doubt has arisen from the language of the courts; as, for instance, in *Mugford* v. *Richardson*, *supra*, where it is said, "the landlord being in peaceable possession had the right to use force," &c., whence the inference has been suggested that such peaceable possession was a condition precedent to the right to expel. But it has been clearly established from the cases, that the possession gained by force is as legal as if gained peaceably and equally efficient to revest title, the criminal liability in no way affecting the efficacy of the entry civilly.

A doubt might also arise from a hasty perusal even of some of the cases which authorise a forcible repossession by the lessor, from the terms employed by the courts to describe the amount of force permissible. Thus in *Winter* v. *Stevens*, 9 Allen, 526, 530, it is said that a tenant at sufferance may be ejected "by force if reasonable and without a breach of the peace, and not disproportionate to the exigency." But any force applied to a person against his will is an assault and a breach of the peace. The exception intended is merely excessive force. The language of Parke, B., above

cited, is clearer, and admits of no such ambiguity. See *Harvey* v. *Brydges*, *ante*.

If excessive force is used, the landlord is liable for such excess, but only in an action of trespass for assault. Such excess, whether occurring in the entry or subsequent expulsion, does not affect the legality of that entry or of the possession thereby acquired, but merely fails to receive from that possession the protection which a proper use of force would have had. Thus, in *Sampson* v. *Henry*, 11 Pick. 379; 13 Pick. 36, the landlord though liable for the excess of force in trespass for assault, was not liable in trespass *qu. cl.*. It has been intimated that by such excess of force the landlord becomes a trespasser *ab initio*, as his authority to enter is one given "by law" within the distinction taken in the *Six Carpenters' Case*, 8 Co. 146 a; *Whitney* v. *Sweet*, 2 Fost. 10. But this seems to be a misapprehension. Even if the authority of the lessor to enter, arising from the contract of demise by the expiry of the tenant's title in accordance with its nature or its terms, could not be regarded as given by "the party" rather than by "the law," still "the abuse of the authority of law which makes a trespasser *ab initio* is the abuse of some special and particular authority given by law, and has no reference to the general rules which make all acts legal, which the law does not forbid:" *Page* v. *Esty*, 15 Gray, 198. It was accordingly held in this case that the right of the owner to expel, flowing from title, was not such a special and particular authority, and that the owner was liable only for excess of force. A similar rule was applied in *Johnson* v. *Hannahan*, 1 Strob. 313, and the doctrine of trespass *ab initio* was limited to cases where the act without a license would be a trespass, such as the right to distrain, and did not apply where the entry was under title.

But while it is clearly the English law, and the undoubtedly preponderating opinion in the American courts, that no civil action lies against a landlord for regaining with force the demised premises, unless there is excess of force, and then only for such excess; yet in regard to the statutory process for restitution, we apprehend that in America the prevailing rule is the reverse, and that by this proceeding the landlord may be compelled to give up a possession obtained by violent means. In England, restitution was always the fruit of a criminal process, it being awarded only where the party forcibly entering had been convicted, or at least an indictment had been found, or where the force had been found on inquisition before a justice of the peace,—an officer of purely criminal jurisdiction. See Dalton's Justice, c. 44.* In no case, moreover, was restitution made, except to a freeholder under the Stat. 8 Hen. VI., or to a tenant for years under the Stat. 21 Jac. 1. Under these statutes, where a writ of restitution was sought it was requisite for the title of the plaintiff to be truly set out, and mere possession made a *prima facie* title, only if not traversed; *Rex* v. *Wilson*, 8 T. R. 357, 360; 2 Chit. Crim. Law, 1136. But in the United States almost universally restitution is given on a summary civil process. We do not propose here to give in detail the various enactments by which this is conferred, but it may be said generally with substantial accuracy that a bare peaceable possession without title suffices for its maintenance. Taylor, Land. & Ten. (5th ed.) sec. 789, n. 5. This is especially true of the Western States, where this statute was regarded as the means to prevent entirely the use of force in the assertion of title, an evil mainly to be apprehended in a new country; and if force was used, restitution was awarded irrespective of title, the intention being to compel title in all cases to be settled by due process of law: *King* v. *St. Louis Gas Light Co.*, 34 Mo 34. In some States it was incorporated into the act, giving the process, that title should not be inquired into therein; Alabama Rev. Code, 1867, sec. 3307; New Jersey, Nixon's Dig. of 1861, p. 301; Iowa Code, sec. 2362; and where not so expressly enacted, the same rule was held to prevail at law. Thus, in the case last cited, following *Krexet* v. *Meyer*, 24 Mo. 107, "lawfully possessed" was constructed to mean merely, "peaceably possessed," and no proof of want of title in the complainant was admissible. The effect has been to produce in some degree the evil sought to be avoided, and a scramble for the possession is the result, as the party first in actual possession, however defective his title or clear his want of one, can only be ousted by the slow process of a real action; and the court will go through the circuity of restoring possession to a tenant at sufferance, whom they will immediately thereafter dispossess on a like summary proceeding brought by the landlord under the other branch of the statute

But, however widely elsewhere this doctrine may prevail, we doubt if it is the true construction of the statute in Massachusetts. By Gen. Stat. c. 137, sec. 1, it is enacted that "no person shall make entry, &c., except where his entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner." By sec. 2, "When a forcible entry is made," &c., "or the lessee holds over," &c., "the person entitled to the premises may be restored to the possession." The language here is unlimited, and every forcible entry is prohibited and made cause for restitution. The words used are only "*may* be restored,"

* "Restitution is made by the justice, or he may certify the finding before him as a presentment or indictment to the King's Bench, as the highest criminal court. In 3 Blac'st. Comm. 179, it is said that restitution is made for the 'civil injury,' and a fine for the 'criminal injury. This merely refers to the person who is to receive the penalty imposed, but does not make the proceeding in any way civil any more than the indictment against common carriers for negligence causing death is under the Massachusetts statute, because the fine goes to the representatives of the deceased."

but this could hardly be considered to give a discretion. It is apparent, however, that every forcible entry is not ground for restitution, as, for instance, on the possession of a servant: *State* v. *Curtis*, 4 Dev. & B. 222; for there the possession is in admitted subordination to the title. By the Massachusetts statute, restitution is to be made, not to the "complainant," but to the "person entitled." But no special weight can be attributed to this difference of language, as this particular expression was not part of the original Statute of Forcible Entry, Stat. 1784, c. 8, but was introduced from the Stat. of 1835, c. 89, which gave summary process against tenants, when these two acts were incorporated in one in chap. 104 of the Revised Statutes. By the Stat. of 1784, c. 8, restitution was to be made to the "complainant;" and there is no ground for attributing to the legislature, from their adoption of the expression in question, any intention to limit the class of persons who could have restitution, to those who showed title. By the Stat. of 1784, c. 8, it was given to any person dispossessed; for although the general prohibition of force in sec. 1 of chap. 137 of Gen. Stat. was not in the Act of 1784, but was first introduced by the revising commissioners in 1836, yet it was expressly stated by them to have been part of our common law, and its enactment to be merely declaratory; Commissioners' notes to chap. 104; and this has been affirmed in *Commonwealth* v. *Shattuck*, 4 Cush. 141, 144. Hence, though the provincial statute of 13 William III. gave restitution only to a *disseisee*, that is, to a freeholder,—for this statute was derived from and receives the same construction as the statute 8 Hen. VI., see *Presby* v. *Presby*, 13 Allen, 284,—it is clear that the literal construction of the statute of 1784 authorized restitution to every one who complained of dispossession with force.

But though neither the history nor the construction of secs. 1 and 2 of the Gen. Stat. c. 137, discloses any restriction on the class of persons "entitled" to restitution, we think such a restriction is clearly implied from another section of the same statute. It is provided by sec. 9, following sec. 13 of c. 120, that if the title is drawn in question in this proceeding by plea or otherwise, the case shall be removed and the title determined by a higher court. That this cannot refer to the clauses of this chapter relating to process against tenants holding over, is evident, for the estoppel of the tenant in this process, to contest by any plea his lessor's title, has been repeatedly recognized: *Coburn* v. *Palmer*, 8 Cush. 124; *Oakes* v. *Munroe*, *Ib.* 282; *Green* v. *Tourtellott*, 11 Cush. 227. The right to introduce the issue of title can only therefore apply to the process of forcible entry; and title seems recognized by implication as a sufficient answer to the force, and to restitution therefor.

This view is strengthened by the recent decisions, which hold that in this summary proceeding, if the plaintiff's title determines *pendente lite*, judgment for possession will not issue: *King* v. *Lawson*, 98 Mass. 309; *Casey* v. *King Ib.* 503. These were, it is true, cases between landlord and tenant; but the principle upon which they proceed seems clearly to be, that, where the question of title is examinable, possession will not be awarded on a summary proceeding to one who at the time of judgment is not entitled to the premises, whatever right he may have had to institute the proceeding. The title, it may be observed, which determines the right to possession is not merely, as under the English statutes, above referred to, a subsisting freehold or term for years; but is any existing possessory right, which would authorize an action of trespass, and for this a tenancy at will is sufficient; *Dickinson* v. *Goodspeed*, 8 Cush. 119. The construction of the statutes which we suggest, does not therefore trench on the right of possession under any valid title, however slight, and it seems to be a correct conclusion, that in Massachusetts restitution by the summary statutory proceeding will not be given in any case where there is not title enough to maintain trespass; and a landlord may safely regain possession by force if he use no more than is necessary, and will incur no more liability to the statute process than to an action of trespass *qu. cl.* or for assault.—*American Law Review.*

ONTARIO REPORTS.

ELECTION CASE.

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

Reg. ex rel. Flater v. VanVelsor.

Municipal election—Qualification of candidate—Effect of incumbrances.

Held, that the fact of the property on which a candidate seeks to qualify being incumbered, cannot be taken into consideration for the purpose of reducing the amount for which he appears to be rated on the roll, which must be taken to be conclusive as to his property qualification. [Chambers, March 16, 1870.—*Mr. Dalton.*]

It was alleged in the statement of the relator, that Daniel J. VanVelsor had not been duly elected, and had unjustly usurped the office of deputy Reeve in the said Township of Harwich in the County of Kent, under the pretence of an election held on Monday, the 3rd of January, 1870, and it was declared that he, the said relator, had an interest in the said election as a voter, and the following cause was alleged why the election of the said VanVelsor to the said office should be declared invalid and void, namely: That the said VanVelsor was not duly or legally elected or returned, in that he was not qualified, not having sufficient property qualification, he being assessed and rated as a freeholder on the last revised Assessment Roll of the Township, for certain lots, which were assessed and valued in the whole on the said Roll, at the sum of $470; and all the said lots were, at and before the said election, encumbered by a mortgage made by the said VanVelsor, to secure payment of $1125, and

which was still unsatisfied and undischarged, and, also by a writ of *fieri facias* against the lands and tenements of the said VanVelsor and others, and which, at the time of the said election, remained for execution in the hands of the Sheriff of the County of Kent, having been delivered to him on 1st April, 1869, and these incumbrances were much more than the value of the said property.

A number of affidavits were filed on both sides, on which there was much discussion, but the main facts necessary for the consideration of the case, and on which it turned, as found by Mr Dalton, were as follows: That the defendant was assessed as above, at $470: that the mortgage spoken of was entirely paid before the election: that the above judgment was paid or assigned to the defendant since the election: that, at any rate, since November last, the defendant had in his possession goods liable to the execution to an amount greater than the amount of the judgment; but both the writ against goods and lands still remained in the sheriff's hands.

John Patterson, for the defendant, shewed cause. The defendant having paid the mortgage, that objection falls. The defendant has goods sufficient to cover the execution, and as the writ against goods must be satisfied first, the writ against lands is really no incumbrance.

O'Brien for the relator. The defendant has up to the present time pretended that these incumbrances were *bona fide* charges on his property, and it is only when it suits his purpose, that they are pretended to be paid or assigned; but the *fi. fa.* lands is in fact an incumbrance, even if there are goods to satisfy the claim, it binds his interest in the lands, though no sale can take place until the goods are exhausted. [Mr. Dalton—Can the fact of an incumbrance on the property, whereon it is sought to qualify, be taken into consideration here?] The statute is silent on the point, but it contemplates the necessity of the candidate having a property qualification: see 29–30 Vic. cap. 51 sec. 70; and in *Blakely* v. *Canavan*, 1 U. C. L. J. N. S., 188; it seems to be taken for granted that the incumbrances are to be deducted from the value as rated. There is, however, no express decision on this point.

Mr. Dalton.—Substantially the defendant was qualified. Is he technically so under the statute?

At the time of the election the judgment and the writ against lands remained a charge. To satisfy that judgment the defendant had goods, sufficient in amount, and a writ upon the judgment against goods was in the hands of the sheriff.

The enactment as to qualification is sec. 70 29–30 Vic. cap. 51: "The persons qualified to be elected Mayors, Aldermen, Reeves, Deputy Reeves, and Councillors, or Police Trustees, are such residents of the municipality within which, or within two miles of which, the municipality or police village is situate, as are not disqualified under this Act, and have, at the time of the election, on their own right, or in the right of their wives, or proprietors, or tenants, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipality, or police village, to at least the value following—(Then follow the amounts in different cases, and in this case to $400 freehold, or leasehold to $800) "And the qualification of all persons where a qualification is required under this Act, may be of an estate either legal or equitable."

Now if the defendant's assessed qualifications of $470 is to be affected by the charge of the *fi. fa.* lands, that is, if the amount of the judgment is to be deducted from the assessed value in computing the amount, it would perhaps be difficult to decide that the possession of goods by the defendant could avoid that result. For though the goods must first be exhausted before the lands can be sold to satisfy the judgment, or even though the defendant had money in the bank for that purpose, still, if liens and encumbrances are to be taken into account, the *fi. fa.* lands, so long as the judgment is unsatisfied remain a lien—and it would perhaps require some express provisions to enable me to set first against that lien other countervailing assets, and thus to free the land.

But can charges of this nature be taken into account at all? I have looked for cases upon this point but find none—I find the point taken in argument, and in one case noticed in the judgment, but never that I can see decided.

The words of the statute are, "have at the time of the election in their own right, or in the right of their wives, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipality &c." If the clause means such a thing, no word is said as to the *value beyond incumbrances*, or any thing at all of value, except the value as "rated" by the assessor. The facts necessary in strict grammatical construction are, that they shall have the estate at the time of the election, and that it was rated in their names at the proper amount on the last revised assessment roll.

But how is it held in analogous cases? Take the case of voters at municipal elections—their right depends upon the 75th section (now varied by the Statute of Ontario, but not as affecting the present matter)—they must be severally, but not jointly rated on the then last revised assessment roll, for real property held in their own right or that of their wives, as proprietors or tenants—and the clause declares such rating absolute and final. Certainly in this case the law permits no enquiry into incumbrances.

The only oath that can be administered to a freeholder appearing on the roll to have the proper qualification is, that he is of the full age of twenty-one years, is a natural born or naturalized subject, that he has not before voted at that election and that he is the person named in the Roll: see *Reg. ex rel. Ford* v. *Cottingham*, 1 U. C. L. J. N. S. 214; *Reg. ex rel. Chambers* v. *Allison*, Ib. 264.

Then as to parliamentary elections (section 51) the law is as I take it the same. The requirement is, that they should be entered on the last revised assessment roll, as the owner or occupant of real property, of the actual value &c. No encumbrance affects the right. There can be no enquiry as to qualification except as to the identity of the party with the name on the roll.

I will notice two other cases where the legislature has intended an opposite effect, and has expressed it very clearly.

As to candidates at parliamentary elections, the qualification is to the value of £500 sterling, expressed to be "over and above all rents, charges, mortgages and incumbrances, charged upon and due and payable out of or affecting the same;" Imp. Stat. 3–4 Vic. cap. 35, sec. 28. No one can have doubt or hesitation here.

Then take the case of magistrates. By Consol. Stats Canada, cap. 100, sec 3, the qualification must be "over and above what will satisfy and discharge all incumbrances affecting the same, and over and above all rents &c., payable out of or affecting the same."

Looking at the careful and explicit language used in these cases, it seems not reasonable to conclude that in the case of municipal candidates the legislature meant any more than the grammatical meaning of the language used conveys, and I therefore think that the defendant being rated in his own name on the last revised assessment roll for a freehold estate—of the proper value—and having that estate at the time of the election, is properly qualified, and that the judgment standing against him does not affect it.

I must give the costs against the relator, as it does not appear that exertions were made to ascertain whether the incumbrances charged as affecting the valuation were existing at the time of the election.

Judgment for defendant with costs.

Regina ex rel. Gibb v. White.

Municipal election — Disqualification — Indians — Enfranchisement.

An Indian, who is a British subject and otherwise qualified (in this case by holding real estate in fee simple to a sufficient amount), has an equal right with any other British subject to hold the position of Reeve of a municipality, even though not enfranchised, and receiving as an Indian a portion of the annual payments from the common property of his tribe.

[Chambers, March 23, 1870—*Mr. Dalton.*]

O'Brien, for the relator, obtained a *quo warranto* summons to try the validity of the election of the defendant to the office of Reeve of the Township of Anderdon, in the County of Essex

The statement of the relator complained that Thomas B. White had not been duly elected to the office of Reeve in the Township of Anderdon and usurped the office under the pretence of an election held on the first Monday in January; and that Dallas Norvell of Anderdon aforesaid, merchant, was duly elected thereto, and ought to have been returned at the said election; and the following causes were stated why the election of the said T. B. White to the said office shou'd be declared invalid and void, and the said Dallas Norvell be duly elected thereto, namely:—That the said Thomas B White was an Indian, and a person of Indian blood, and an acknowledged member of a tribe of Indians, and not in any way enfranchised or exempted from the disabilities of Indians, and as such was disqualified from holding the property qualification necessary to entitle him to such office, and that therefore he had not the necessary qualification, either of property or otherwise, and that the said Dallas Norvell was the only other candidate for the said office, and should be declared elected.

There appeared to be no dispute about the facts of the case. The defendant was born in Ontario, as was his father before him; he was the son of the Chief of the Wyandotts, or Huron Indians, of Anderdon; he was never "enfranchised" under our statute, and from time to time received his portion of the annual payments from the property of his tribe; he had for the last twelve years been engaged in trade — latterly rather extensively; he had been for some years the owner in fee simple of patented lands in Anderdon, on which he lived; but these lands were not allotted to him from the lands of the tribe, but were acquired by himself. The value was beyond the necessary qualification.

Osler, shewed cause.

O'Brien, contra.

Con. Stat. Can. cap. 9; Con. Stat U C. cap. 81; 31 Vic. (Can) cap. 42; 32, 33 Vic. (Can.) cap. 6; Treaty and Proclamation in Public Acts, 1763 to 1834, [20], [32]; *Reg.* v *Baby*, 12 U. C. Q B. 346; *Totten* v *Watson*, 15 U C. Q. B. 394; *The Chorokee Nation* v *The State of Georgia*, 5 Peters 60; 2 Kent's Com. 72, 73, 3 *Ib.* 381, were cited on the argument.

Mr. Dalton.—There is a marked difference in the position of Indians in the United States and in this Province. There, the Indian is an alien, not a citizen, see the case in 5 Peters 1, 27, 58, 60: "The Act of Congress confines the descriptions of aliens capable of naturalization to *free white persons*. * * * It is the declared law of New York, South Carolina and Tennessee, and probably so understood in other States, that Indians are not citizens, but distinct tribes, living under the protection of the government, and consequently they can never be made citizens under the Act of Congress."—2 Kent's Com. 72, 73.

In this Province they are subjects Con. Stat. Can. cap. 9, so speaks of them (see preamble, and sec. 1, also the 16th sec. of the Act of last session) But authorities are needless for such a proposition. Chapter 9 (now repealed), was the Act in force for many years down to 1869, declaring the rights, and providing for the management of the property of the Indians, and its provisions have much to do with the present matter The word *Indian* in that Act (sec. 1) is defined to mean only Indians, or persons of Indian blood, or intermarried with Indians acknowledged as members of Indian tribes or bands, residing upon lands which have never been surrendered to the Crown, or which having been so surrendered, have been set apart, or are reserved for the use of any tribes or band of Indians in common, *and who themselves reside upon such lands*. But any Indian (sec 2) who is seized in fee simple in his own right of patented lands in Upper Canada, assessed to $100 or upwards, is excluded from the definition, and is not an Indian within the meaning of the Act. The Act goes on to provide means for the "enfranchisement" of the Indians, meaning the class so defined, and the apportioning to those enfranchised parcels of the lands of the tribe, to be held by such enfranchised Indians in severalty. And it confers certain immunities on the Indians, and subjects them to certain disabilities, always having reference, as I understand, to the above description of the class to which the Act applies. If this Act were now in force, whatever effect it might have on

the defendant's position to be within it, I suppose he would not be within it, for he does not live with the tribes on their reserved land, but is the owner in fee simple of patented lands of greater assessed value than $100, not set apart from the lands of the tribe, but acquired by himself.

That Act however is repealed, and the Acts now in force are 31 Vic. cap. 42, and 32 & 33 Vic. cap. 6 of Canada. The only immunities or disabilities of an Indian now, whether enfranchised or unenfranchised, relate to the property he acquired from the tribe, and that no person can sell to him spirituous liquors, or hold in pawn anything pledged by him for spirituous liquors. But Indians may now sue and be sued, and have, except as above, so far as I can see, all the rights and liabilities of other subjects.

In *Totten* v. *Watson*, 15 U. C. Q. B., 392, the Court of Queen's Bench, in the time of Sir John Robinson, decided that the prohibition of sale of land by Indians, applied only to reserved lands, not to lands to which any individual Indian had acquired a title; and from this case and sec. 2, cap. 9, Con. Stat. Can., it is quite plain that an unenfranchised Indian might purchase and hold lands in fee simple. The defendant then has the necessary property qualification. Being a subject he must have all the rights of a subject which are not expressly taken away; then why is he not qualified to be Reeve of a township? it is certainly for the relator to show why. I think that he is qualified, and that judgment must be for the defendant with costs.

Judgment for defendant with costs.

ENGLISH REPORTS.

COMMON PLEAS.

Yglesias v. The Royal Exchange Assurance.

Evidence—Commission to examine witnesses abroad—Costs of sending a barrister from England.

In cases of great importance and intricacy the master may allow the successful party, on taxation of costs, the expenses of sending out an English barrister on a commission to examine witnesses abroad.

[C. P. 18 W. R. 381, Jan. 29, 1870.]

This was an action on a marine policy of insurance on cochineal from the Canary Islands to this country, and at the trial before the Chief Justice at the Guildhall a verdict was found for the plaintiff. The defence raised was that the plaintiff, who had made advances on the cochineal and represented the shippers, had fraudulently shipped barley instead of cochineal, barley being of far less value than cochineal, and had then jettisoned it, and made this claim on the defendants for the sum insured on the cochineal. At the instance of the defendants criminal proceedings had been taken against the shippers in the Spanish courts.

Before trial the plaintiff obtained a commission to examine witnesses in the Canaries to prove the fact of the shipment of the cochineal, and appointed three commissioners, two of whom were mercantile men residing in the islands, and the other was an English barrister sent out from this country. The latter was the only commissioner for the plaintiff who actually sat. The defendants also sent out a barrister from this country as a commissioner, and he cross-examined the plaintiff's witnesses, but called none himself though he was at liberty to do so. The examination itself occupied twenty-two days. On taxation of costs for the plaintiff the master allowed a claim amounting to £575 for his legal commissioner going to the Canaries and sitting there.

Watkin Williams moved for a rule to review the taxation, on the ground that the master ought not to have allowed the costs of an English barrister going to the Canaries to conduct a commission. He contended that from the proceedings in the Spanish criminal courts the details of the case were well known, and that the plaintiff ought to have been satisfied with one of the mercantile men on the spot as his commissioner. He cited *Potter* v *Rankin*, 17 W. R. C. L. Dig. 31, 38 L. J. C. P. 130, L. R. 4 C. P. 76.

J. C. Matthews showed cause in the first instance, and contended that it was a matter in the discretion of the master.

Bovill, C. J.—The Court cannot lay down any rule that shall be applicable to all cases. Generally speaking the master would never think of allowing the expenses of a barrister sent out from this country. But there may be cases of overwhelming importance in which it would be necessary to send one out. There is no rule against it, but it must depend entirely on the nature and circumstances of the case. This was a case of overwhelming importance to the plaintiff and the shippers whom he represented, and the investigation was very complicated and of the most minute description. Over 800 questions were put in cross-examination by the commissioner for the defendant, and when the trial came on before me it lasted five days, and mainly turned on the interrogatories. The matter was in the discretion of the master, who investigated it with the papers and briefs before him, and before we interfere it must be clearly shown that he has exercised his discretion wrongly. So far from that being the case, I think he was positively right in allowing these expenses.

Montague Smith, J., concurred.

Brett, J.—As a rigid rule must very often lead to injustice, it is best for the master to act on his discretion. Yet the Court is not to act on a rigid rule of not interfering.

Rule discharged.

Penton v. Murdock.

Negligence—Contagious disease—Glandered horse.

Declaration that defendant knowingly delivered a glandered horse to the plaintiff to be put with his horses without telling him it was glandered; whereby the plaintiff, not knowing it was glandered, was induced to and did put it with his horse, *per quod* his horse died.

Held, after verdict for plaintiff, a good declaration, though no concealment or fraud or breach of warranty was averred.

[18 C. P. W. R. 382, Jan. 25, 1870.]

Declaration—For that the defendant wrongfully kept a horse well knowing the same to be glandered and to be in a contagious, infectious, and fatal disease called glanders, and well knowing the premises wrongfully deliv red the said horse to the plaintiff, to be kept and taken car of by the plaintiff for the defendant in a stabl

of the plaintiff with another horse of the plaintiff, and without informing the plaintiff that the said horse was glandered or had the said disease; by means of which premises the plaintiff, not knowing that the said horse of the defendant was glandered or had the said disease, was induced by the defendant to and did place the same in the said stable of the plaintiff with the said horse of the plaintiff, and the said disease was thereby communicated by the said horse of the defendant to the said horse of the plaintiff, *per quod* the plaintiff's horse died, &c.

On verdict found for the plaintiff,

Waddy moved in arrest of judgment, on the ground that the declaration disclosed no cause of action, inasmuch as it did not state any concealment, or fraud, or breach of warranty on the part of the defendant He cited *Hill* v. *Balls*, 5 W. R. 740, 2 H. & N. 299, 27 L. J. Ex 45, and relied on the following passage in the judgment of Martin, B., in that case:—"In my view of the law, where there is no warranty, the rule *caveat emptor* applies to sales, and, except there be deceit, either by a fraudulent concealment or a fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor upon the sale of a horse or other animal."

Bovill, C.J.—The case is different from *Hill* v. *Balls*. There Martin, B., says, "It is consistent with everything averred in this declaration that the defendant told the auctioneer that the horse was glandered, and to sell him as such, and, indeed, that the plaintiff may have been so told, but that, relying on his own judgment, he believed the horse was sound, and bought him notwithstanding that he had notice that the horse was unsound." Any such supposition is excluded by the averments in this declaration, and the defendant must be held to have contemplated the consequences of his act, which were that the plaintiff's horse caught the disease and died.

Montague Smith, J.—The declaration avers that the defendant induced the plaintiff to put the defendant's horse in a stable with a horse of the plaintiff, the defendant knowing, and the plaintiff not knowing, that the defendant's horse was glandered. I do not see what more there can be to constitute the cause of action. The plaintiff's ignorance is clearly averred, and, therefore *Hill* v. *Balls* does not apply.

Brett, J.—We must take it now that the defendant delivered the horse to the plaintiff for a particular purpose—viz., to be kept in a stable with another horse of the plaintiff, and that the defendant induced him to take it for that purpose. If the defendant did so, and knew that his horse was glandered, and knew that it was a contagious and fatal disease, that would raise a duty on his part to tell the plaintiff of it, and it averred, not only that he did not tell the plaintiff, but that the plaintiff did not know it. The case is distinguishable from *Hill* v. *Balls*, because there was no averment there that the horse was delivered to be put near any other horse at all, and, as Martin, B., pointed out, allegations were wanting of the plaintiff's ignorance.

Rule refused.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR NOVEMBER AND DECEMBER, 1869, AND JANUARY, 1870.

(Continued from page 138.)

False Pretences—*See* Fraud.

Family Name.

An illegitimate son of a former slave of the DuB. family in St. Lucia assumed their name and did business under it for over ten years. The DuB.s now seek to restrain him. *Held*, that the action did not lie, especially after such long delay. *Semble*, that by the law of England the assumption of a family name by one who was never before called by it is a grievance for which there is no redress.—*DuBoulay* v. *DuBoulay*, L. R. 2 P. C. 430.

Felony—*See* Venire de Novo.

Fishery.

A several fishery in a tidal river, the waters of which have permanently receded from one channel, and flow in another, cannot be followed from the old to the new channel.—*Mayor, &c., of Carlisle* v. *Graham*, L. R. 4 Ex. 361.

Fixture.

In the absence of special contract, tenants' fixtures cannot be removed after the termination of the lease by breach of condition and re-entry.—*Pugh* v. *Arton*, L. R. 8 Eq. 626.

Foreign Judgment—*See* Limitations, Statute of.

Foreign Office.

The funds voted by Parliament to the Foreign Office and received by the latter from the treasury, are not trust funds, of the application of which Chancery has any jurisdiction to take an account.—*Grenville-Murray* v. *Earl of Clarendon*, L. R. 9 Eq. 11.

Forgery.

It is forgery to make a deed fraudulently with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed.—*The Queen* v. *Ritson*, L. R. 1 C. C. 200.

Fraud.

If A., by fraudulent representations that the drawer and acceptor of a bill are solvent, and that A. intends to advance a sum upon it, induces B. to hand him a sum, nominally, to be advanced on the same, in fact, as a scheme to obtain the money for A.'s own purposes,

there is jurisdiction in equity as well as at law.—*Ramshire* v. *Bolton*, L. R. 8 Eq. 294.

See Company, 1, 2; Partnership; Power, 3.

Frauds, Statute of.

G, a broker, signed the following, in which the words in italics were erased: "M. C. & Co., having refused to see Mr. H. into the 'Builders' Arms,' New Road, for £50, Mr. H. now informs me he can muster £60 cash; such being the case, *subject to their approval*, I hereby agree to get the lease and every thing, for such sum of £60 cash." G had no interest in the public house in question. *Held*, (1) Keating, J., *dubitante*, that the contract was within the Statute of Frauds, s. 4; (2) that the memorandum was sufficiently definite. The lease referred to might be shown orally, and "every thing" explained by a previous agreement. A new trial was ordered to determine at what time the erasure was made.—*Horsey* v. *Graham*, L. R. 5 C. P. 9.

Freight—*See* Bottomry Bond.

Highway—*See* Dedication.

Husband and Wife.

An agreement between a husband and the father of his wife, on her behalf, executed also by the wife, that the husband and wife should live apart, and that the husband should execute, when required, a deed of separation, to contain all usual and proper clauses, and also to secure £40 a year for the maintenance of his wife and child, was decreed to be specifically performed.—*Gibbs* v. *Harding*, L. R. 8 Eq 490.

See Alimony; Connivance; Costs, 5; Cruelty; Desertion; Maintenance; Marriage Settlement; Negligence, 1.

Illegal Contract—*See* Bond, 1; Covenant.

Illusory Suit.

A bill filed by a member of a society against the directors to restrain proceedings alleged to be *ultra vires*, was ordered to be taken off the file upon evidence that the plaintiff was a person of small means who had purchased one share in the society (for £2) for the purpose of instituting the suit, and that the suit was really instituted by his solicitor, who was not a shareholder, to annoy two of the directors.—*Robson* v. *Dodds*, L. R. 8 Eq. 301.

Incumbrance—*See* Tenant for Life and Remainder-man.

Injunction—*See* Illusory Suit; Trade-mark.

Insolvency—*See* Bankruptcy; Partnership; Winding Up.

Inspection of Documents.

Before moving the court for an order for inspection of documents, previous application should be made to the parties in possession of them; unless the applicant does so, he may be condemned in costs.—*The Memphis*, L. R. 3 Ad & Ec.

Insurance.

Defendant insured plaintiff's goods by a policy containing the usual suing and laboring clause. On the voyage the vessel was seized and carried into a United States prize court. This the plaintiff elected to treat as a partial loss. But when, after judgment against them, the captors appealed, the plaintiff gave notice of abandonment, which defendant refused to receive. Afterwards the goods were sold, as plaintiff and defendant both declined to give bail for their value, estimated in paper currency at 180 per cent. discount. *Held*, that the appeal by the captors was not such a change of circumstances as to authorize the plaintiff to change his election and abandon, but that the sale was a total loss occasioned by the seizure, for as a conclusion of fact, a prudent uninsured owner would not have given bail as above to prevent it.—*Stringer* v. *English, &c., Insurance Co.*, L. R. 4 Q. B 676.

See Contract, 1; Reformation of Instruments.

Interest.

A deposit of title-deeds to secure a loan, without more, entitles the lender to interest. Four per cent. allowed.—*In re Kerr's Policy*, L. R. 8 Eq. 331.

See Apportionment; Damages, 2, 3; Tenant for Life and Remainder-man.

Investment—*See* Company, 2.

Jurisdiction—*See* Company, 1; Foreign Office; Fraud; Statute; Voluntary Association.

Landlord and Tenant—*See* Fixture.

Larceny.

A., the auctioneer at a mock-auction, knocked down some cloth for 26*s* to B., who had not bid for it, as A. knew. B. refused to take the cloth or to pay for it, whereupon A. refused to allow her to leave the room unless she paid. B. then paid, because she was afraid, and took the cloth. *Held*, that these facts would sustain a conviction for larceny, and that under the circumstances it did not matter that the jury were not instructed that the taking must have been against the will of B.—*The Queen* v. *McGrath*, L. R. 1 C. C. 205.

Legacy.

1. A testator bequeathed a leasehold house to A. and £100 to B, describing each as "one of my trustees and executors hereinafter named," and appointed them as such. B. died

without having proved the will or renounced the trusts. *Held*, that B. was entitled to the £100. The inequality of the gifts to A. and B. rebutted the presumption that they were given to them as executors only.—*Jewis* v. *Lawrence*, L. R. 8 Eq. 345.

2. A. was appointed executor of a will, and a legacy was left him for his trouble. A., being in Australia, sent home a power of attorney to B., who administered the estate and received rents under the same. A. died without proving the will. *Held*, that A. had sufficiently shown his intention to act as executor to entitle his representatives to the legacy.—*Lewis* v. *Mathews*, L. R. 8 Eq. 277.

3. A testator directed his executors to appropriate so much consols as would produce the clean income or sum of £100 a year, and pay such income or yearly sum to a charity. *Held*, that the legacy was given free of duty.—*In re Coles' Will*, L. R. 8 Eq. 271.

4. A testator, among other legacies, gave £1,000 on certain trusts for A. and B., and failing these, the sum was to become part of the residuary estate, which was left to B., C., *et als.* By a codicil he gave one pecuniary legacy, and declared that in case his personal estate at the time of his decease should be insufficient to pay all the legacies in full, they should abate proportionably. The personal estate was insufficient, and there was £598 to answer the £1,000, the trusts as to which failed. *Held*, that the £598 was to be divided among the pecuniary legatees, excluding the residuary legatees.—*In re Lyne's Estate*, L. R. 8 Eq. 482.

See Charity; Contribution; Legacy Duty; Mortmain; Power, 1, 2; Revocation of Will; Will, 2–13.

Legacy Duty.

Under a will, the income of a fund directed to be laid out in real estate, was paid to A. for life, then to B. for life; and then, by the will, the fund became due to C., the heir of the testator, who refused to receive either income or principal. The fund, which had never been laid out in land, was now payable to the heir of C. *Held* (*per* Kelly, C.B. & Channell, B.), that duty was payable under the Legacy Duty Act (36 Geo. III. c. 52). *Per* Bramwell & Cleasby, BB., that it was payable under the Succession Duty Act (16 & 17 Vict. c. 71), as on a succession from C. as "predecessor." The principle of equitable conversion applies. *Per* Kelly, C.B.: It does not. *Per* Bramwell, B.: It comes to the same thing either way, A., B., and C. having died since St. 55 Geo. III. c. 184.—*In re DeLancey*, L. R. 4 Ex. 345.

See Legacy, 3.

Lex Loci—*See* Bottomry Bond, 1; Limitation.

Libel—*See* Action; Privileged Communication, 2.

Lien—*See* Railway, 3.

Life Insurance—*See* Contract, 1.

Limitations, Statute of.

1. In an action brought in the Isle of Man on a Manx contract, judgment was for the defendant, on the ground of the Statute of Limitations. An action was then brought in England where the statute had not run. *Held*, that the Manx judgment was no bar.—*Harris* v. *Quine*, L. R. 4 Q. B. 653.

2. The period of limitation of actions is determined by the *lex fori*.—*Ib.*

A statute (19 & 20 Vict. c. 97, s. 10) which did away with the exception from the old Statute of Limitations in favor of parties beyond seas, where their cause of action accrued, was *held* to apply to cases where the cause of action accrued before the statute was passed, although other sections of the statute had been held not retrospective.—*Pond* v. *Bingham*, L. R. 4 Ch. 735; s. c. L. R. 6 Eq. 485; 3 Am. Law Rev. 688.

3. The statute does not begin to run against an attorney's bill for conducting a suit when judgment is given in the courts where it was begun, if an appeal is brought which is conducted by the same attorney.—*Harris* v. *Quine*, L. R. 4 Q. B. 653.

4. The Statute of Limitations is not a bar to a bill to dissolve a partnership and take the usual accounts, although the partnership has been discontinued more than six years.—*Miller* v. *Miller*, L. R. 8 Eq. 499.

See Trust, 2.

Maintenance.

After a decree for judicial separation for the husband's adultery, the custody of the children being given to the wife until the court should otherwise direct, an order was made for maintenance, although the husband asked that the children might be given up to his father and sister, who offered to bring them up at their own cost.—*Milford* v. *Milford*, L. R. 1 P. & D. 715.

Marriage—*See* Equity Pleading & Practice, 2.

Marriage Settlement.

1. Husband and wife covenanted to "concur and join in" conveying upon the trusts of a settlement all property to which the wife, or the husband in her right, might thereafter become entitled by the will or intestacy of, or

by gift from the wife's father, or any other person. *Held*, that the covenant applied to a sum which vested in interest, under the wife's father's will, before, and in possession after the husband's death, but not to property left to the wife by the husband's own will.—*Dickinson* v. *Dillwyn*, L. R. 8 Eq. 546.

2. So a joint and several covenant to settle property to which the wife, her executors or administrators, or the husband, his executors or administrators, in her right, should "at any one time hereafter" become entitled, does not apply to property received by her under her husband's will.—*Carter* v. *Carter*, L. R. 8 Eq. 551.

Master—*See* Bottomry Bond, 1.

Master and Servant—*See* Contract, 2.

Merger—*See* Will, 10.

Minister.

Trustees held a house and other property for the use of a dissenting congregation, and to permit the minister for the time being to occupy the house. The church members invited G. to become co-pastor with the then minister. Afterwards they voted to dismiss him, and a majority of the trustees concurred. G. claimed to hold for life, no misconduct being charged. *Held*, that G. was rightfully dismissed.—*Cooper* v. *Gordon*, L. R. 8 Eq. 249.

See Voluntary Association.

Misdemeanor.

The taking a false oath on a material point where an affidavit is required for the purposes of a statute, is punishable as a misdemeanor at common law.—*The Queen* v. *Hodgkiss*, L. R. 1 C. C. 212.

Misrepresentation—*See* Trade Mark; Vendor and Purchaser, 1.

Mistake—*See* Reformation of Instruments.

Money Had and Received—*See* Fraud; Trust, 1.

Mortgage.

1. A direction to trustees to raise money by mortgage of an estate in such manner as they shall think fit, authorizes them to give a mortgage with a power of sale.—*In re Chawner's Will*, L. R. 8 Eq. 569.

2. When a mortgagor had executed an agreement to deliver up possession of the mortgaged property, and to release all his interest to the mortgagee, and after twelve years had elapsed without the agreement having been acted on, the property was sold: *Held*, that the mortgagor was entitled to the surplus of the purchase-money.—*Rushbrook* v. *Lawrence*, L. R. 5 Ch. 3.

See Interest; Priority; Will, 10; Winding Up.

Mortmain.

A legacy "to be given, used or employed . . . toward the erection of a new Wesleyan chapel at H., instead of the one now in use, when such an erection shall take place," is void under the Statute of Mortmain. *Booth* v. *Carter*, L. R. 3 Eq. 757; 2 Am. Law Rev. 118; denied.—*In re Watmouth's Trusts*, L. R. 8 Eq. 272.

Name—*See* Family Name.

Navigable Water.—*See* Fishery.

Negligence.

1. J. G. and E. G. sued S., alleging that J. G. bought of S., as a hair-wash for the use of E. G., his wife, a chemical compound made up of ingredients known only to S., and by him represented to be "fit and proper to be used for washing the hair," and that S. knew that the purchase was made for the use of E. G.; yet that the defendant so negligently, &c., conducted himself in making and selling the said compound, that, by reason thereof, it was unfit to be used for washing the hair, whereby E. G., who used it for that purpose, was injured. Demurrer. *Held*, that E. G. had a good cause of action.—*George* v. *Skivington*, L. R. 5 Ex. 1.

2. Plaintiff, intending to travel by defendants' road, asked a porter at their station about the time of the train's leaving, and was directed to look at a time-table inside the station. While he was doing so, a plank and a roll of zinc fell through a hole in the roof and injured him, and at the same time the legs of a man appeared through the hole. *Held*, that there was no evidence of defendants' negligence to go to a jury.—*Welfare* v. *London & Brighton Railway Co.*, L. R. 4 Q. B. 693.

3. In consequence of a defect in the lock of a railway-carriage door, which was owing to the negligence of the defendants, the door would not stay shut, and in shutting it for the fourth time a passenger in the carriage fell out and was hurt. He could have sat away from the door, or have got into another carriage, as the train stopped thrice after the door first opened and before the accident, and, in three minutes after it, reached the next station. *Held*, that the accident was not the immediate result of defendants' negligence, and that they were not liable.—*Adams* v. *Lancashire & Yorkshire Railway Co.*, L. R. 4 C. P. 739.

See Company, 1; Principal and Agent; Ship, 1; Telegraph.

New Trial—*See* Venire de Novo.

Notice—*See* Bills and Notes; Priority; Registry of Deeds.

Parent and Child—*See* Maintenance.

Parish—*See* Minister.

Parties—*See* Railway, 3.

Partition.

1. A., and B. her husband, a bankrupt, mortgaged A.'s share in real estate, of which she was tenant in common in fee, to C. Then A, B and C filed a bill for partition. Afterwards C. got in the estate outstanding in B.'s assignee, and the bill was amended. *Held*, that such a suit could not be maintained by a tenant in common in remainder; and that an interest in possession, acquired after the bill was filed, could not be set up.—*Evans* v. *Bagshaw*, L. R. 8 Eq. 469.

2 A decree for partition was made, declaring that the plaintiffs were entitled to an undivided moiety of a field, although the defendants disputed the title, and objected that the title claimed was legal.—*Giffard* v. *Williams*, L. R. 8 Eq 494.

Partnership.

The firm of K. & Co. was insolvent. K., wishing and being entitled by the partnership articles to withdraw £4000. received from the firm the first of three sets of bills for £4000, made payable to the order of the firm, and indorsed to him. K. died before the bills were paid, and the first set were lost. The surviving partners executed a creditor's deed, and the second set of bills, which were not indorsed, were claimed by the trustees. *Held*, that K. was not entitled to withdraw the £4000 when the firm was insolvent; and that, as the money had not actually reached his hands, it belonged to the joint creditors.—*In re Kemptner*, L. R. 8 Eq. 286.

See Limitations, Statute of.

Patent.

1. In a bill to restrain the infringement of a patent, an express averment of the novelty of the invention protected by the patent is not necessary.—*Amory* v. *Brown*, L. R. 8 Eq. 663.

2. The object of a patent was described as "being to produce a glazed lamp, the frame 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 slidi g, 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. 7 Eq. 358; s c. L. R. 5 Ch. 36.

See Action.

Payment

A limited company and a firm employed A. to build a ship for them; payment to be one-third cash, and balance by the company's acceptance at four months, or, at A.'s option, by the firm's acceptance. A. took the firm's bills, which were dishonored, but he gave no notice to the company. *Held*, that A. could prove against the company for the debt for which the bills were given.—*In re British and American Steam Navigation Co.*, 1 L. R. 8 Eq. 506.

See Appropriation of Payments; Contract, 1.

Perjury—*See* Misdemeanor.

Photograph—*See* Copyright.

Pilot—*See* Costs, 4; Ship, 2.

Pleading.

The rule that pleadings are to be taken most strongly against the pleader, does not apply to a matter peculiarly within the knowledge of the other party, in an equitable plea, which has been demurred to.—*Murphy* v. *Glass*, L. R. 2 P. C. 408.

See Award, 3; Patent, 1.

Pledge—*See* Winding Up.

Power.

1. A. having a power of appointing a fund which was limited over in default of appointment, gave pecuniary legacies to B. *et al.* and bequeathed the residue of her property, subject to the payment of her debts, to her sisters. A. did not mention the power, but left no other property. *Held*, that the will operated as an appointment, and that the legacies were payable out of the fund.—*In re Wilkinson's Settlement Trusts*, L. R. 8 Eq. 487.

2. A. having a power of appointment among her children and the children of any deceased child, appointed by will parts to B., C and D., her children, and part to a daughter of a deceased son, E., but did not provide for three other children of E., and did not exhaust the fund. And as to all other the real or personal estate over which she had a disposing power, and all her real and personal estate and effects, she appointed, gave, demised and bequeathed the same, and every part thereof, to B. *Held*, that as A. was bound to provide for the other children of E, the residuary appointment in favor of B. was bad, and that that part of the fund went among A.'s children and grandchildren. In other respects the above dispositions

were valid.—*Bulteel* v. *Plummer*. L. R. 8 Eq. 585.

3. A. having a power of appointment in favor of children, on the marriage of his daughter B. to C., in 1832, appointed a part of the fund to her absolutely, but B.'s marriage settlement, made after the appointment, contained an ultimate limitation of the fund to A. in default of children of the marriage. A. at the same time gave his bond, *bona fide*, for a like sum to be held on like trusts, on which considerable sums had been paid. C. died without issue, and in 1841 B. married D., and a settlement was made of B.'s interest under the former one, and D. took the benefit of the same. In 1866 the trustee of the deed giving A. the power paid B.'s share to the trustee of her settlement, and D. gave the former a release. *Held*, that the reservation of a remote interest to A. was not a fraud on the power, considering A's bond; also that D. was estopped from disputing the settlement.—*Cooper* v. *Cooper*, D. R. 8 Eq. 312.

See Covenant; Mortgage, 1; Voluntary Conveyance.

Practice—*See* Bail; Costs, 4, 5; Cruelty; Inspection of Documents; Tender; Venire de Novo.

Principal and Agent.

The steamer T. fell in with the steamer S. at sea, disabled, and the master of the T. agreed to tow the S. back to port for a certain sum In trying to do so the T. negligently ran into the S. and sunk her. The policy of insurance upon the T. and her bills of lading provided that she might assist and tow vessels in all situations. The master of the T. had never received any instructions from the owners as to performing salvage services. *Held*, that the owners of the T. were liable for the damage caused by the negligence of the master, who was acting within the general scope of his authority.—*The Thetis*,, L. R. 2 Ad. & Ec. 365.

See Contract, 2; Privileged Communication.

Principal and Surety—*See* Set-Off.

Priority.

The tenant for life of a fund in court mortgaged his interest, and afterwards became bankrupt. After the bankruptcy, the mortgagee obtained a stop order on the dividend, which the assignee neglected to do. *Held*, that the mortgagee was entitled to priority over the assignee.—*Stuart* v. *Cockerell*, L. R. 9 Eq. 607.

Privileged Communication.

1. Communications with an unprofessional agent in anticipation of litigation, and with a view to the prosecution of, or defence against, a claim to the matter in dispute, are privileged. —*Ross* v. *Gibbs*, L. R. 8 Eq. 522.

2. Upon the question of privileged communication or not, the judge is bound to ask the jury whether the matter was published *bona fide*. If they find that it was, it is for the judge to say whether, under all the circumstances, it is or is not privileged.—*Stace* v. *Griffith*, L. R. 2 P. C. 420.

See Solicitor.

Privity—*See* Trust.

Promissory Note—*See* Bills and Notes.

Property—*See* Family Name.

Proximate Cause—*See* Negligence, 3.

Race—*See* Award.

Railway.

1. A railway company forbidden to charge more than 3*d*. per ton per mile, may charge for the whole number of miles traversed in reaching a point, although the usual and reasonable way of doing so is to go to another point and then to return part way over the same track, before going on to the destination. —*Myers* v. *London and S. W. Railway Co.*, L. R. 5 C. P. 1.

2. A covenant by a railway company with the vendor of land that a certain portion of the same should be "forever thereafter used and employed as and for a first-class station or place for the purpose of taking up and setting down passengers travelling along the railway," was decreed to be specifically performed, by supplying rooms, &c., and by stopping all ordinary or fast trains, other than mail, express or special trains, at said station, but with liberty to defendants to apply for a relaxation as to the latter point if stopping fewer trains would be sufficient accommodation.— *Hood* v. *North Eastern Railway Co.*, 1 L. R. 8 Eq. 666.

3. A railway company, obliged by their act to build certain works subject to a waiver by A., agreed, in consideration of the plaintiff's obtaining the waiver and conveying the land, to make a carriage-road between certain points, and a wharf at the end, with proper mooring posts, the same to be sixty feet long, and of a suitable and convenient height. The consideration having been performed: *Held*, on demurrer, that specific performance of the agreement might be enforced, that it was not *ultra vires*, and that the fact that the plaintiffs contracted "on their own behalf and as representing the

inhabitants of" the district, did not make the Attorney-General a necessary party.—*Wilson* v. *Furness Railway Co.*, L. R. 9 Eq. 28.

4. Upon petition of an unpaid vendor of land who had obtained a decree against a railway company for specific performance, and declaring his lien for the balance of the purchase-money, an order was made, pending a scheme of arrangement filed by the company, for sale of the land and payment of any deficiency, with an injunction until payment against continuing in possession. Order not to be enforced until a certain day —*Munns* v. *Isle of Wight Railway Co.*, L. R. 8 Eq. 653.

See Negligence, 2, 3.

Realty or Personalty—*See* Will, 2.

Receiver—*See* Annuity.

Reformation of Instruments

Insurers, after a loss, sought to reform the policy from a slip, which was signed by their agent, and from which the policy was made out with the accidental omission of a material term. The slip was not a binding contract; and the insured testified that the policy expressed their intent, and that they would not have accepted a policy other than that they got. Bill dismissed with costs —*Mackenzie* v. *Coulson*, L. R. 8 Eq. 368.

Registration.

A., residing at Madras, in 1856 conveyed land in India to B. by deed, with covenants for further assurance. The deed was not registered under the Indian Registration Act, 1864, which provides that if such a deed be not registered, it shall not be received in evidence in any court in India. In 1866 A. mortgaged the land to C., who had notice of B.'s deed, and C. registered the mortgage under the Indian Registration Act, 1866. B. filed a bill to enforce the covenants for further assurance against C., which was dismissed.—*Hicks* v. *Powell*, L. R. 4 Ch. 741.

Remainder—*See* Partition, 1.

Rent—*See* Annuity.

Res Adjudicata—*See* Award.

Resulting Trust—*See* Contract. 1.

Retrospective Law—*See* Limitations, Statute of, 2.

Revivor—*See* Costs, 3.

Revocation of Will.

A testator who died seised of certain lands subject to mortgages on which he was not personally liable, gave his personal estate for payment of his debts, and the surplus to his wife. He afterwards gave his lands to be sold to raise such sums "as my personal estate shall prove insufficient for payment of my debts, &c., and of the existing mortgages and charges upon the said" lands, and subject thereto, to his sons. *Held*, that the express bequest to the wife was not revoked by the implication of the terms of the devise.—*Kerr* v. *Baroness Clinton*, L. R 8 Eq. 462.

Right of Defence—*See* Bankruptcy, 3.

Sale.

April 14. A. made a contract, subject to the laws of the Stock Exchange (see *Grissell* v. *Bristowe*, 3 Am L. Rev. 691), to be performed May 15, to buy fifty shares in Z Co. of B., a jobber. May 10, Z Co. stopped payment, and thereafter the directors refused to register transfers. May 16, B. nominally bought, but in fact received a bonus for taking of C. on the Stock Exchange, thirty shares, and appropriated ten to his contract with A. C. executed a transfer of these shares to A., which was delivered to A.'s brokers, and by them to A. A. also repaid his brokers, who had paid the purchase-money. C. sued A. to recover calls which C. had been forced to pay, alleging a contract by A. to purchase the shares of C., and to indemnify him against calls. *Held* (*per* Kelly, C. B. and Pigott, B.), that A. was liable on the contract alleged; (*per* Channell & Cleasby, BB. *dissentientes*), that there was no privity of contract between A. and C, whatever other remedies C. might have.—*Davis* v. *Haycock*, L. R 4 Ex. 373.

See Negligence, 1; Payment; Stoppage in Transitu; Vendor and Purchaser of Real Estate.

Salvage.

The plaintiff A. was temporary master of a steam tug in the place of B, and without any extraordinary exertion or peril rendered salvage services to a vessel in distress. The tug belonged to a company whose main business it was to render such services, and whose seamen were paid fixed wages and five per cent. on salvage by special agreement. A. knew that B. was employed under this agreement, but now sued for salvage independently of it. *Held*, that, as on all the facts the agreement was not inequitable, A. was bound by it.—*The Ganges*, L. R. 2 Ad. & Ec. 370.

Scienter—*See* Negligence, 1.

Separation Deed—*See* Connivance; Husband and Wife.

Set-Off.

In an action against a surety, it is a good equitable plea as to £4,606, part of the amount claimed, that a dispute as to the consideration of the promise had arisen between the plaintiff and the defendant's principal, and had

been referred to arbitration in accordance with the original agreement, and that £4,606 was awarded to said principal, which before suit he offered to set off against an equal amount of the present claim.—*Murphy* v. *Glass*, L. R. 2 P. C. 408.

See Bond, 2.

Settlement—*See* Marriage Settlement.

Ship.

1. A cargo, through the careless stowage of the master and crew, was damaged in the course of the voyage. The bill of lading, which was not signed until after the cargo was stowed, but before the voyage commenced, contained a clause exempting the ship from liability to make good loss from, *inter alia*, "negligence or default of master or mariners' or others performing their duties." *Held*, that the ship-owner was exonerated by the above clause, which was not unreasonable, even if the owner was a common carrier.—*The Duero*, L. R. 2 Ad. & Ec. 393.

2. The payment of a fare is necessary to constitute a "passenger," whose presence on board imposes the obligation, under the Merchant Shipping Act (17 & 18 Vic. c. 104, s 388), of taking a pilot.—*The Lion*, L R. 2 P. C. 525; s. c L. R. 2 Ad. & Ec. 102; 3 Am. Law Rev. 716.

See Bail; Bottomry Bond; Costs, 4; Damages, 2, 3; Principal and Agent; Salvage; Statute.

Slander—*See* Action; Privileged Communication, 2.

Solicitor.

When the mother of wards of the court had absconded with the wards, her solicitor was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the post-marks.

So, in a similar case, to answer the question, "Where is she now?"—*Ramsbotham* v. *Senior*, L. R. 8 Eq. 575; 576 n. (1)

See Appropriation of Payments.

Specific Performance. — *See* Husband and Wife; Railway, 2, 3; Vendor and Purchaser of Real Estate, 2.

Statute.

The High Court of Admiralty has jurisdiction, under a statute giving it "over any claim for damage done by any ship," in a cause of damage instituted against a ship for personal injury.—*The Beta*, L. R. 2 P. C. 447.

See Annuity; Bankruptcy, 1, 2; Bond, 1; Copyright; Costs, 1, 2, 4; Damages, 2, 3; Dower; Legacy Duty; Limitations, Statute of; Railway, 1; Ship, 2.

Statute of Frauds—*See* Frauds, Statute of.

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

Stock Exchange—*See* Sale.

Stop Order—*See* Priority.

Stoppage in Transitu.

A firm did business in England under the style of L. & S., and in China under that of L., S. & Co. L. & S. purchased goods for L., S. & Co., and accepted bills for the price, a long credit being given, that remittances might be made from the proceeds of sale in Hong Kong, to meet the acceptances. L & S. then employed agents to secure tonnage in the M., and to receive the goods from the vendor and forward to Hong Kong, which was done. Before the goods or bills of lading reached Hong Kong, L., S. & Co., being insolvent, assigned to their bankers, in consideration of an antecedent debt, "the whole of their property, &c., specified, &c., with all the estate, right, title, interest, claim or demand of L., S. & Co., arising thereout or therefrom," *inter alia*, "bills of lading, &c., for all goods now on the way hither." The above bills were afterwards indorsed to the bankers, who then knew the insolvency of L., S. & Co. The vendors stopped the goods at Hong Kong. *Held*, that the *transit* was not at an end; and that an antecedent debt was not a sufficient consideration to support the transfer, and that the assignment wae not to be interpreted as conveying any greater rights than the assignors had, but was made subject to the vendor's right of stoppage.—*Rodger* v. *Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393.

Succession Duty—*See* Legacy Duty.

Surety—*See* Set-Off.

Tax—*See* Legacy Duty.

Telegraph.

Plaintiff A., having ice, wrote asking B. to make an offer by telegraph. B. answered by the defendants' telegraph, "We can give you 23*s*.," &c., and paid for the message. By custom, when such offers are accepted, the cost of the message is repaid to the vendee by the vendor. By defendants' mistake, "27*s*." was sent in place of "23*s*." A. accordingly sent on the ice, which B. refused to accept at 23*s*. A. sues the telegraph company for the consequent damage. *Held*, that the action could only be maintained by reason of privity of contract, which did not subsist between A. and the defendants. One to whom a telegraphic message is sent, cannot be said to have a

property in it.—*Playford* v. *United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706.

Tenancy in Common—*See* Partition.

Tenant for Life and Remainder-man.

The obligation of the tenant for life of an estate subject to encumbrances, to keep down interest on the encumbrances, exists only as between him and the remainder-man, and not as between him and the encumbrancers.—*In re Morley*, L. R. 8 Eq 594.

See Appointment—Costs, 1, 2.

Tender.

The defendant in a cause may, by act in court, tender a sum of money in satisfaction of the plaintiff's claim, and reserve the question whether he is liable to pay costs.—*The Hickman*, L. R. 3 Ad. & Ec. 15.

An injunction was granted against the imitation of a trade-mark of linen thread, by which the thread, although not patented, was called "patent thread." it being sworn that that was the designation used on a certain class of thread by the trade, irrespective of its being patented.—*Marshall* v. *Ross*, L. R. 8 Eq. 651.

Trust.

1. The acceptor of a bill paid the amount to his bankers in order to meet it, but died indebted on his general balance on the day the bill matured, and the bankers dishonored it. The drawer, having been forced to pay it, brought a bill to compel the bankers to make good the amount, as having received money in trust for the purpose. *Held*, that there was no privity between the plaintiff and defendants, and the bill was dismissed.—*Hill* v. *Royds*, L. R. 8 Eq. 290.

2. A trustee, who had committed a breach of trust, died in 1847, leaving real and personal property to his widow for life, remainder to his two sons. The widow proved the will, but refused to take steps which it was her duty to take to make good the breach. She died in 1865, and her sons, who had notice of the breach of trust, took out administration to her, and received the property left by their father. *Held*, that the assets of the father, in the sons' hands, were liable to make good the breach of trust; that lapse of time was no defence; and that the father's estate was sufficiently represented in the suit.—*Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 514.

See Appropriation of Payments; Charity; Company, 2, 3; Contract, 1; Costs, 1, 3; Equity Pleading and Practice, 1; Foreign Office; Minister; Mortgage, 1; Priority; Vendor and Purchaser of Real Estate; Will, 12, 13.

Ultra Vires—*See* Bank; Company, 1, 2, 3; Railway, 3; Voluntary Association.

Vendor and Purchaser of Real Estate.

1. At a sale by auction, the property sold was stated to contain "753 square yards, or thereabouts," whereas it contained about 573. By the conditions of sale, if any error, &c., in the particulars should be discovered, no compensation was to be allowed in respect thereof, and the right to rescind the contract was taken away. *Held*, that compensation for so large a deficiency was not excluded; and it was allowed.—*Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

2. A. agreed to buy land in fee of B, supposing him alone to own the same. In fact B. had an estate *pur autre vie*, and C., B.'s wife, the remainder in fee. D., without notice of A.'s contract, took a conveyance of said land from B. and C. *Held*, that A. was entitled to a conveyance of B.'s interest, and to compensation for C.'s interest.—*Barnes* v. *Wood*, L. R. 8 Eq. 424.

See Damages, 1; Railway, 3.

Vendor's Lien—*See* Railway, 3.

Venire de Novo.

After a prisoner had been tried on a good indictment, and by a competent tribunal, and had been convicted of a capital felony, and the judgment entered upon the record, the Supreme Court of New South Wales ordered a *venire de novo*, upon an affidavit that one of the jury had told the deponent that, pending the trial and before verdict, the jury had access to newspapers which contained a report of the trial as it proceeded, with comments thereon. *Held*, that in a case of felony, like the above, the court could not grant a *venire de novo*, and that if they could, the evidence did not justify their doing so.—*The Queen* v. *Murphy*, L. R. 2 P. C. 535.

Voluntary Association.

A court of law will not interfere with the rules of a voluntary association, unless to protect some civil right or interest which is said to be infringed by their operation. On this principle, a civil suit by a clergyman of the Scotch Episcopal Church, to set aside certain canons passed by a general synod in 1863, and now alleged to be *ultra vires*, was dismissed, no damage being proved to the court to have accrued.—*Forbes* v. *Eden*, L.R. 1 H.L. Sc. 558.

See Minister.

Voluntary Conveyance.

A married woman of middle age and infirm

health appointed the bulk of her property in favor of a volunteer, by a deed which was drawn by his solicitor at his costs, and which reserved no power of revocation. It was sworn that she was told that the deed was irrevocable, but her subsequent acts indicated that she was not aware of the fact. *Held*, that the deed must be cancelled. Where under such circumstances the volunteer's solicitor is employed, it is his duty to insist upon the insertion of a power of revocation The want of one is a strong ground for setting aside the deed.—*Coutts* v. *Acworth*, L. R. 8 Eq. 558.

Ward of Court—*See* Solicitor.

Watercourse—*See* Fishery.

Way—*See* Dedication.

Will.

1. A codicil concluded as follows: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary." The wife elected against the codicil, whereupon it was not included in the probate. —*Goods of Smith*, L. R. 1 P. & D. 717.

2. A testator gave real and personal estate to A., charged with the payment of annuities to the testator's six children, "or their heirs respectively." One of the children was dead at the date of the will. *Held*, that her statutory next of kin were entitled. The annuity was personal estate. — *Parsons* v. *Parsons*, L. R. 8 Eq. 260.

3. 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 of him so dying to go to such children. A., B., C. and D all survived the testator. *Held*, that they took indefeasible interests. Dying in the lifetime of the testator was meant.—*Bowers* v. *Bowers*. L. R. 8 Eq. 283.

4. A testator gave a residue to trustees to assign, &c., to, &c., such child or children of M. as should be living at testator's decease, to be equally divided among them, if more than one, when they should attain the age of twenty-one, and if there should be but one who should attain the age of twenty-one, then the whole to such child. The trustees had a power of maintenance during the minority of the children, and during the suspense of absolute vesting were to accumulate the rest of the income for the benefit of the persons who should become entitled to the principal. *Held*, that no child of M. who did not attain twenty-one could take a vested interest.—*Merry* v. *Hill*, L. R. 8 Eq. 619.

5. Testator bequeathed a legacy to his first cousins, to be equally divided between them. The shares of those "who may die in my lifetime, unto all and every the children of all my first cousins who may so die in my lifetime, share and share alike, such shares to be taken *per capita* and not *per stirpes*." *Held*, that the children of a first cousin, who had died before the date of the will, took nothing by the legacy.—*In re Hotchkiss's Trusts*, L. R. 8 Eq. 643.

6. A testator directed his executors, after the death of his wife, A., to invest one-sixth of a residue in an annuity during the life of B. for his support; and in case B. should anticipate, assign, charge or encumber the annuity, or become a bankrupt or insolvent, the annuity was to go to the other residuary legatees. B. died in A.'s lifetime, without having assigned &c., or become bankrupt, &c. *Held*, that the gift to B. failed, and that that one-sixth was undisposed of at A.'s death.—*Power* v. *Hayne*, L. R. 8 Eq. 262.

7. A testator made a gift of "all my ready money, bank and other shares, freehold property, ... and any other property that I may now possess." *Held*, that personal property acquired after the date of the will passed by the bequest.—*Wagstaff* v. *Wagstaff*, L. R. 8 Eq. 229.

8. A testator holding three messuages in X. by separate leases, and two more in X. and one in Z by one lease, bequeathed his "*four* leasehold messuages in X.," with other tenements in trust out of the rents to pay the ground-rents of the same and of that in Z, and to pay over the surplus. *Held*, that the five messuages passed.—*Sampson* v. *Sampson*, L. R. 8 Eq 479.

9. A., an executor, was entitled to residue X., subject to a legacy to B. in trust for C. No sum was appropriated to the legacy, but A. paid interest on it. B. had, however, invested part of X on mortgage in his own name, with A.'s assent. A. died, leaving a bequest of "all my money and securities for money of every description." *Held*, that B.'s investment did not pass; neither did bank stock nor canal shares; but a part of X. remaining invested on mortgage, in the name of A.'s testatrix, did.—*Ogle* v. *Knipe*, L. R. 8 Eq 434.

10. A. borrowed part of a fund which was settled on him absolutely, subject to a life-estate in his wife if she survived him, and mortgaged his Z. estate for its repayment.

A. afterwards devised Z. to his wife for life, remainder to B. in fee. A. also bequeaths "all and every the . . . sums of money . . . upon government or real securities which I shall die possessed of, or in anywise entitled to," in trust for his wife for life, remainder to B. for life, remainder to B.'s wife for life, remainder to B.'s children absolutely. There was also a residuary clause. A. died before his wife. *Held*, that the mortgage debt did not merge in the Z. estate, and that A.'s interest in said fund passed by the specific bequest.—*Wilkes* v. *Collin*, L. R. 8 Eq. 338.

11. A testator gave property in trust to pay annuities, &c., and subject thereto to the "sole use of my daughter H. and her assigns." H. was unmarried, and a devise to a married daughter was expressed in words apt to create a trust for her separate use. There were further gifts to H., which clearly did not exclude the marital right. H. afterwards married. *Held*, that "sole" did not mean free from the control of any husband. "Sole," in a will, without the word "separate," has not a technical meaning, unless the rest of the will furnishes evidence of that intent.—*Massy* v. *Rowen*, L. R. 4 H. L. 288.

12. A Frenchman left all his property to A., B. and C., his executors, in trust to sell, and the moneys arising from the said sale, &c. . . . after payment of . . . debts [and other expenses], shall be paid by my said trustees, and I hereby give and bequeath the same to D. absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted." Testator had, before the date of the will, told D. (to whom he was engaged) his wishes, and repeated them after the date of the will, and D. wrote them down on a paper not shown to him. *Held*, that D. took the fund beneficially, subject to the performance of the above wishes. Parol evidence of an intent to make a beneficial gift to D. excluded.—*Irvine* v. *Sullivan*, L. R. 8 Eq. 673.

13. A testator, in 1841, gave lands to Sidney Sussex College, Cambridge, and Trinity College, Oxford, for the only use of education in piety and learning, of ten descendants of the brothers and sisters of the testator, and of his two wives, and in default of such to their poor kindred. An intention to benefit the colleges appeared. *Held*, upon the construction of the will, confirmed by the unvarying usage of the two colleges, that the descendants claiming the benefit by the gift, must be educated at one of the colleges, as members, and that, subject to that trust, the colleges were entitled to the lands in equal moieties.—*Attorney-General* v. *Sidney Sussex College*, L. R. 4 Ch. 722.

See Apportionment; Charity; Contribution; Covenant; Dower; Legacy; Mortmain; Power, 1, 2; Revocation of Will.

Winding Up.

A creditor of a company who holds its acceptances for his debt, and also its debentures as collateral security, cannot prove for more than the amount of his debt when the company is winding up.—*In re Blakely Ordnance Co.*, L. R. 8 Eq. 244.

See Payment.

Witness—*See* Commission.

Words.

"*Aggrieved.*"—See Copyright.

"*Beer-house.*"—See Beer-house.

"*Contracting a debt.*"—See Bankruptcy, 2.

"*Damage.*"—See Statute.

"*Investing in securities.*"—See Company, 2.

"*Leakage.*"—See Bill of Lading.

"*Money and securities for money.*"—See Will, 9.

"*Other heirs.*"—See Will, 2.

"*Patent thread.*"—See Trade-mark.

"*Property I now possess.*"—See Will, 7.

"*Sole.*"—See Will, 11.

"*Sums which I shall die entitled to.*"—See Will, 10.

"*With benefit of survivorship.*"—See Will, 3.

REVIEWS.

The History of Law of Tenures of Land in England and Ireland, with particular reference to Inheritable Tenancy, Leasehold Tenure, Tenancy at will, and Tenant Right: By W. H. Finlason, Esq., Barrister at-law: Editor of Reeves' History of English Law. London: Stevens and Haynes, Law Publishers, Bell Yard, Temple Bar, 1870.

In every page of this work we recognise the exhaustive industry of Mr. Finlason, shewing his capacity for immense research and endless labour. His work is described as a History of the Law of Tenures of Land in England and Ireland. He well observes at the conclusion of the work, that the history of law involves far more than a mere account of the laws that have been actually passed; that its most important province is, to disclose the causes that lead to changes in the law. Fully appreciating his own conception of what the history of law should be, no exertion on his part has been spared to make his history what every history of law should

be, a full, clear, and comprehensive account of the several changes in the law, and the causes which from time to time produced and made necessary the changes.

The relation of landlord and tenant has, in all civilized countries, been a subject of much nicety, and much difficulty; and, in no country have the changes been so slow as in Ireland. While in England great and permanent changes were made in obedience to the demands of progressive civilization, Ireland was comparatively inert. Any system which fails to give the tenant a certain interest in the soil which he cultivates is a barbarous system. The only way to secure the energy, stimulate the industry, and secure the goodwill of the tenant, is to give him a secure tenure of his land, or a sure hope of payment for his improvements when his tenure ceases. Some effort has been made in this direction in the north of Ireland, by means of what is there known as Tenant Right. But this right has not the positive obligation of law, resting rather on the good nature of the landlord than any actual right of the tenant as against the landlord. Besides, it is not uniform; in some counties, while it is equal to twenty years' purchase, in others it is not more than five.

The sales of estates by the Encumbered Estate Commissions, though it has been of great benefit in many ways, has not improved the condition of Irish tenants as a class. Some few tenants have themselves become owners of the land. But, in many cases the new landlords have purchased for profit, and in a hard commercial spirit refuse to do more than compelled by positive law, and where not restrained by law do not scruple to take possession of improvements made by tenants without payment or compensation of any kind. It may be said, why not leave parties to make their own contracts, and why not allow these matters of detail to be regulated by contract? But the land tenure in Ireland is a question too complicated to be disposed of in the brief space we can now devote to it. The landlords as a class are rich and powerful, the tenants poor and weak. Many of the landlords are absentees, and care little for the land except for the revenue which it yields. Most of the tenants love the land, and hate to pay rent, looking upon landlords as their natural enemies, living in the past, and holding fast the traditions of the cruel injustice of a by-gone age.

Mr. Finlason, by shewing what the law of England is as to tenures, shows, what in his opinion the law of Ireland ought to be. It is not, however, to be forgotten, that there is more than mere tenure involved in "the Irish land question." The bulk of the land in Ireland is not only in the hands of a few persons as in England, but, while the majority of the landholders in Ireland are Protestants, the majority of the tenants are Roman Catholics, and there is an antagonism of creed more bitter than any antagonism of race, and worse still, the Roman Catholic tenants in many parts look upon their Protestant landlords as the descendants of conquerors and oppressors. The traditional feeling of hatred that in some parts of Ireland is found to exist, makes the land question one of peculiar difficulty. Statesmen for more than half a century have endeavoured to supply a remedy, but no efficient remedy has yet been discovered, and perhaps time alone can remedy the evil. But this is no reason why attempts should not be made to lessen the discontent by removing as much as possible some of the causes of it. One cause no doubt is the uncertainty of tenure, and this operates almost as injuriously upon the landlords as the tenants. While the tenants prosper the landlords prosper. While the tenant suffers the land suffers, and through impoverished land the landlord suffers. Land well farmed is worth more rent than land ill farmed, and a tenant who farms well is better able to pay his rent than a tenant who is unable to farm well, or unwilling because discouraged, knowing, that he is simply by his labour improving the property of another without benefitting himself.

It is to be hoped that the present government may do something for the relief of Ireland on the land question. The perusal of the work before us by any statesman, will give him a better idea of what is needed than any work of the kind that we have seen. The author in his introduction, shews the differences between the tenure of land in England and in Ireland, and the causes of the differences. His first chapter is devoted to a general history of tenure in England, and especially of inheritable tenure. His second chapter, is the history of leasehold tenure in England. His third chapter is the history of the yearly tenancy in England; and his fourth and last chapter, which is the most extensive in the

volume, is the history of the land tenure in Ireland. Each page has its foot notes, giving in detail the authorities for the propositions stated in the text.

We have read the book with great interest, and look upon it as a valuable book of reference, both for the lawyer and the legislator. The author is not a mere theorizer, but a matter of fact writer. He does not aim so much to entertain as to instruct; and, no man can read his book without deriving instruction which nowhere else can be found in form so convenient, and in substance so reliable. The typography of the book is elegant. It adds much to the pleasure of reading a book to find it printed in good type and on good paper. The name of the well known law publishers on the title page (Messrs. Stevens and Haynes), is a guarantee that the last mentioned qualities will be found in any book of which they are the publishers.

Harrison's Common Law Procedure Act and other Acts relating to Practice and the Rules of Court, with explanatory Notes, &c. Second Edition. Copp, Clark & Co., Toronto.

Part V. completes the Common Law Procedure Act proper. We then have the Act respecting Writs of Mandamus and Injunction, originally a part of the Common Law Procedure Act of 1856. The text is explained by numerous lengthy and excellent notes, and a vast collection of cases.

This number concludes with the commencement of the Act respecting absconding debtors, also originally a part of the Common Law Procedure Act, and though, as the Editor remarks, not so much in use as it was before, the Insolvent Act of 1864 is nevertheless not obsolete, and is properly reproduced with its appropriate notes.

The Law Magazine and Law Review. May, 1870. London: Butterworths, 7 Fleet St.

This number opens with an article on the subject of the Civil Code of New York, to which writers in England have paid much more attention than its intrinsic merits warranted, but this is in accordance with the usual desire of Englishmen to praise everything that emanates from a country which dislikes and despises England in an equal ratio to the amount of senseless adulation that the latter on every conceivable occasion bestows on everything American.

The writer, however, in the *Review* before us, has the audacity to prefer something Colonial in the shape of codes—giving the palm to the Indian code in preference to that of New York. It thus concludes its remarks on the latter:

"In conclusion we can only express our deliberate opinion as to the merits of the Code. It is this. The Civil Code of New York is in a high degree meagre, ambiguous, and inaccurate. It has not yet received the sanction of the Legislature. Should it ever do so, it may be useful to students as an elementary text-book. It may also be of service to laymen desiring to obtain some notion of the general principles of the law. To the practitioner it will, except so far as it effects alterations in the exisisting law, be absolutely useless. So far as it alters the existing law, it will, from its meagreness and imperfections, be productive of extensive litigation, and will require to be wrought into shape by a vast amount of judicial interpretation."

The next article discusses the distinction between The Law Military and Martial Law. Then there is rather a lengthy notice of the diary of a Barrister, which gives some pleasant reading for a spare half hour. The speech of Hon. W. B. Lawrence on the Marriage Laws of various countries as affecting the property of married women, delivered at the British Congress of the Social Science Association in October last, is interesting and useful for reference. We commend it to the champion of women's rights in the West, the enterprising Editress of the *Chicago Legal News*.

Mr. Justice Hayes, lately one of the Judges of the Queen's Bench in England, and whose sudden death last November was much deplored, is highly spoken of in the next article. He is described as a deeply read lawyer, with an acute intellect and subtle mind, as well as a man of great and varied accomplishments, and in social life a universal favorite. Some of our readers may have heard of the celebrated case of the "Dog and the Cock," descriptive of a trial where a country jury acquitted a prisoner who was found with a newly killed fowl in his possession, on the suggestion of an ingenious counsel that a dog, whom no witness had seen or heard—but as to whom "there might have been a dog although you didn't

see it"—had worried the fowl, that the prisoner had come up and rescued the fowl, wrung its neck to put it out of pain, and put it in his pocket "just to give the prosecutor;" it is said that a song written upon this by Mr. Hays', and occasionally sung by himself, was a thing never forgotten by those who heard it.

There are also articles on Friendly Societies —A M. S. of Vacarius—Church Patronage in England and Scotland—The Lord Chancellor's Judicature Bills, &c.

The Law Times and Law Times Reports. 10 Wellington St., Strand, London, W. C.

The Solicitors' Journal and Weekly Reporter. 59 Carey Street. Lincoln's Inn. London, W. C.

The Law Journal. 5 Quality Court, Chancery Lane, Holborn, London.

These standard periodicals make their welcome weekly appearance with regularity. They seem to vie with each other in giving their readers, in their different styles, the legal news of the world and the professional chit-chat of the empire. The two former discuss at greater length the leading cases decided from time to time, thereby giving much light and assistance in reading the reports.

The Lower Canada Jurist. John Lovell, Montreal.

This collection of decisions in the Province of Quebec is published monthly, under the editorial management of a committee composed of the following gentlemen of the profession: S. Bethune, Q.C., P. R. Lefrenaye, J. L. Morris, and James Kerby.

It is not often, for obvious reasons, that cases in that Province can afford us much assistance, but we have from time to time noticed the decisions that have any bearing upon our law.

We also acknowledge,

Bench and Bar. Chicago.

American Law Register.

Chicago Legal News, and a pamphlet by the Editress, entitled, "A Woman cannot practice Law or hold any Office in Illinois."

The Scientific American. Excellent as usual in its particular line.

The Canadian Illustrated News. Geo. E. Desbarats, Montreal.

We trust the enterpise of the publisher will be duly appreciated. The difficulties lying in the path of those who undertake the publication of an illustrated paper are immense, and we excuse defects in some particulars in appreciation of its excellence, under the circumstances, as a whole.

The Legal Gazette. Philadelphia.

The Legal Intelligencer, &c.

The European Mail, &c.

Lately in London Samuel Chas. Boulter, aged seventeen, living at 17, Clifton St., was charged before Alderman Gibbons with counselling a pressman, in the service of Messrs. Eyre and Spottiswood, printers, to commit a felony, by inciting him to steal an examination paper belonging to the Incorporated Law Society. It appeared that the prisoner was an intending candidate for the preliminary examination held this week at the Law Institute. He stated (we copy the *Times* report) that he had been ill-advised, and he hoped he would be dealt with leniently. Alderman Gibbons said the prisoner had very improperly tried to get information before the time when it would be given to him. Looking at his age, and the serious consequences that imprisonment would be to him, he would not send him to prison, but bind him over, in his own recognizances in £20 to appear if called upon.

The storekeeper of the printers said it was not their wish that the prisoner should be severely dealt with, but they were compelled to take these steps against him because their workpeople were so frequently tempted by candidates to get proofs of the questions for examination. Messrs. Eyre & Spottiswoode deserve credit for bringing this offender forward. The chance of a candidate slipping through an examination which he was really incompetent to pass is as nothing compared with that of a person being admitted to the responsibility and status of a solicitor, who could be guilty of so dishonourable an act as to attempt surreptitiously to anticipate examination questions. Is it possible that the storekeeper of Messrs. Eyre and Spottiswoode was correct in stating that such dishonourable attempts are *frequently* made?—*Solicitor's Journal.*

APPOINTMENTS TO OFFICE.

ADMINISTRATOR OF THE GOVERNMENT.

THE HON. EDWARD KENNY, a Member of the Queen's Privy Council for Canada, to be Administrator of the Government of the Province of Nova Scotia, and to execute the office and functions of Lieut-Governor during the absence of Lieut-General Sir Charles Hastings Doyle, the Lieut-Governor of the said Province. (Gazetted May 13, 1870.)

JUDGE—SUPERIOR COURT—QUEBEC.

LOUIS EDWARD NEPOLEON CASAULT, of the City of Quebec, in the Province of Quebec, Esq., one of Her Majesty's Counsel, learned in the Law, to be a Puisne Judge of the Superior Court, for Lower Canada, now the Province of Quebec, in the room and place of the Hon. Felix Adilon Gauthier, resigned. (Gazetted May 27, 1870.)

NOTARY PUBLIC.

CHARLES E. HAMILTON, of the Town of St. Catharines, Esq., Barrister-at-law. (Gazetted May, 21, 1870.)