DIARY FOR APRIL.

1. Thur. Local School Supt. term of office begins.
4. SUN. *1st Sunday after Easter.*
5. Mon. County Court of York Term begins.
7. Wed. Local Treasurer to return arrears of taxes due to County Treasurer.
10. Sat... County Court of York Term ends.
11. SUN. *2nd Sunday after Easter.*
18. SUN. *3rd Sunday after Easter.*
23. Fri... *St. George.*
25. SUN. *4th Sunday after Easter. St. Mark.*
30. Fri... Last day for non-residents to give list of lands or apportionments from assessment. Last day for Local Clerks to return occupied lands to County Treasurer.

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APRIL, 1869.

THE ACT AS TO SHORT FORMS OF CONVEYANCES.

This Act is taken from the Imperial Act 8 & 9 Vic., ch. 119, and its object is to relieve from the labor of inserting covenants at length, and all the estate clauses, &c., and give to a conveyance drawn under it, using the short forms, the same efficacy and effect as would have been given to it if drawn irrespective of the Act, with the use of the corresponding lengthy forms. A recent case, *Cameron* v. *Gunn*, 25 U. C. Q. B. 77, however, would seem to indicate that, under certain circumstance, a conveyance may be aided in its effect if expressed to be drawn "in pursuance of the Act to facilitate the conveyance of real property." In one case, *Nicholson* v. *Dillabough*, 21 U. C. Q. B. 595, an indenture dated in 1852 * expressed to be drawn in pursuance of the Act to facilitate, &c., for a consideration of £75, with a limited covenant for possession and further assurance, was held sufficient to pass the fee, though the only operative words were *quit claim* and *release*, and the releasee had neither possession nor estate whereon a release could operate. McLean, C. J., and Burns, J., particularly referred to the fact that the deed was expressed to be in pursuance of the Act to facilitate the conveyance of real property, and that it contained covenants for possession and further assurance.

In the case of *Cameron* v. *Gunn*, *supra*, the defendants, by deed, dated in 1865, *remised, released, and forever quitted claim* to the plaintiff for a consideration of 5s., and without covenants. The Court referred to the fact that the former case was expressed to be in pursuance of the Act, that it was for £75, and contained a covenant that the purchaser might enter and take possession, all which they said was wanting in the case before them, and the instrument was held inoperative as either a release, grant or bargain or sale. Considering that the Court merely distinguished the cases on the grounds above mentioned: considering also that to the validity of a bargain and sale, a consideration of 5s. is as sufficient as a consideration of £75, and that to the validity of a deed as a grant, no consideration is requisite (at least when expressed to be to the use of the grantee, so as to prevent the use resulting to the grantor), it would seem that the Court, in denying efficacy to the deed, must (if they recognized the former case as law) have relied on the fact that it was not expressed to be in pursuance of the Act to facilitate the conveyance of real property, and contained also no covenants for possession or further assurance, and probably chiefly on the latter grounds: (see the observations of Draper, C.J., and Morrison J., in *Acre* v. *Livingstone*, 26 U. C. Q. B. pp. 285, 288, 296, but see per Hagarty, J., 292.)

It should be remembered that there is no longer an Act entitled "an Act to facilitate the conveyance of real property;" the original Act of 9 Vic. so entitled having been consolidated, and entitled "An Act respecting short forms of conveyances"; a corresponding change was omitted, however, in the first schedule.

On the whole, it is submitted that at present a mere reference to this Act will not give a conveyance any greater efficacy than otherwise it would have, except as pointed out in the Act.

There is a singular mistake in this Act, in that the only operative word made use of is the word "grant," whereas lands, that is the immediate freehold, did not at the time of the passing of the Act lie in grant, nor was it till some time afterwards that lands acquired that capacity (14 & 15 Vic. c. 7, s. 2; Con. Stat. U. C. c. 90, s. 2; see however the effect of 12 Vic. c. 71, s. 2, repealed by 14 & 15 Vic. c. 7). The error arose from copying the English Act without attention to the fact at the time of the pass-

* The date given to the indenture in the report is a misprint; the date there given is 1842, but the Act was not passed till 9 Vic. The prior part of the report gives the correct date.

ing the Act in England, lands there did lie in grant. The error is important, because in some cases a conveyance may be found to fail entirely, and in other cases only to operate by the raising of a use when it was not intended, and thus causing the uses expressly declared, to be but uses on a use, and therefore trusts. Whatever doubt there may be as to whether words of release only may operate as a grant or bargain or sale, (see *Cameron* v. *Gunn*, and *Nicholson* v. *Dillabough*, supra, in the text and notes,) there can be no doubt that a deed using only "grant" as an operative word, may take effect as a bargain and sale, if on a pecuniary consideration, or as a covenant to stand seised if on a consideration of blood or marriage, or as a release if there be possession or a vested estate whereon it can operate, or as an assignment, surrender, and in other modes. The nugatory grant therefore might be valid as a bargain and sale, or covenant to stand seised, but in such cases, if uses were declared, it would be attended with the results above alluded to, of misplacing them and also the legal estate, by the use being raised, unintentionally, yet necessarily, in the bargainor or covenantor. Thus, if A, in anticipation of marriage, had by way of settlement, *granted* to B and his heirs, to the use of him, A, and his heirs till marriage, and thereafter to other uses declared, the instrument would have been void as a grant; and though if a pecuniary consideration had been expressed, it might have operated as a bargain and sale, then the fee would have been in B in trust for A, and not in A, as intended; and if the marriage had happend, the uses declared, which it was intended should confer legal estates, as being executed in possession by the Statute of Uses, would have been mere trusts. So also, if A had granted to B, in fee, to the use of him, A, and another, in fee, with a view to vest the estate in himself and such other jointly, (a case very likely to have occurred on appointment of a new trustee), the deed was either inoperative, or if it could have operated as a bargain and sale, the legal estate would have been in B. In the above and the like cases the intention was that the instrument should operate as a conveyance at Common Law, and that the first use raised should be in the grantee to uses, and this would be so, and the instrument would so operate now that lands lie in grant; but if it can only be supported as a bargain and sale, or covenant to stand seised, the first use raised is of course in the bargainor or covenantor.

If the instrument could be supported as a Common Law conveyance by way of release, it would work as intended, but this presupposes possession, or some vested estate, at least, in the releasee. Possibly the Act of 12 Vic. ch. 71. sec. 2 (repealed) might aid the want of possession, or of estate, in cases of grants after that Act; the construction of that section is, however, very obscure.

Great caution appears requisite in the use of this Act, as the forms in its schedules are, in strictness, appropriate only to the most simple conveyances. The form in the first schedule is that of a grant in fee simple, and the covenants in the second section are framed with reference to an assurance of that simple description; and it may be useful to impress upon parties who choose to avail themselves of the Act, that more than usual care will be necessary to have their deeds accurately engrossed. The Act gives a particular efficacy to a particular form of words, and the slightest deviation from that form will endanger the operation of the Statute with reference to the covenant in which the mistake occurs; and such covenant may then, under the second section, be left to the very doubtful effect it may have by its own independent operation.

Section 3 of schedule 2 authorizes the introduction of exceptions and qualifications of the covenants, but for the reasons above given it is dangerous to interfere with the forms, unless in very clear cases, for it may not be easy to determine what is the introduction of an exception or qualification. Thus the superadding to the covenant for right to convey free from incumbrance the words "except a certain mortgage dated, &c.," would clearly be within the authority; but in the very common case of *striking out* the words "notwithstanding any act of the said covenantor" with a view to render the covenant for right to convey, and all *subsequent* covenants *unqualified*, it is by no means clear that that is an *introduction* of an exception or qualification; it is rather the omission of that which is intended to enlarge the covenant and deprive it of its exceptional and qualified character, and render it according to the common expression "full and unlimited." If the forms of covenants in the Act did not, as in effect they do, except the acts of all other than the covenantor, and

were not confined only, as they are, to his acts, &c., and the words "notwithstanding any act of the covenantor" had accordingly been omitted in the Act, then the *insertion* of those words by the conveyancer would have been the introduction of an exception and qualification within the Act; and if this be so, the *omission* of those words cannot be the same thing, and be also an introduction of a qualification. Even though the omission of the words should be within the Act as regards the first covenant, it by no means follows that the effect of such omission would extend to the following covenants, and if not they would remain qualified (*Trenchard* v. *Hoskins*, Winch. 91, 1 Sid. 328; *Browning* v. *Wright*, 2 B. & P. 18.) The common practice in the profession is to strike out the words "notwithstanding, &c." under the belief that thereby all the covenants are to be read as in the second column, but unqualified, and without any acts or defaults of any one being excepted. If, however, the above remarks are entitled to any weight, it might be prudent in such cases to give the covenants at full length.

The forms of covenants adopted have received the sanction of the use of centuries, and as their effect is well understood, and they have been illustrated by many cases, it is very unwise to vary from them without necessity. It has been said, however, that in some respects the forms are not sufficiently extensive, and that they should extend to matters to which the covenantor may have been *party or privy*, for that these words are not included within the words "permitted or suffer ed Sug. Vend. 13 ed. 490.) Therefore where a mere trustee to bar dower (the purchaser taking the fee, subject to his interpose estate, joined with the purchaser in making a mortgage, having previously concurred with him in another conveyance, (*Hobson* v. *Middleton*, 6 Bar. and Cres. 295;) it was of course held that the latter conveyance was a breach of his covenant that he had done no act to encumber the estate, and the Court would not look to the value of his estate or the trust engrafted on it; but it was held that he was not responsible for the concurrence of the purchaser in the same deed, although he covenanted that he had not permitted or suffered any act whereby any incumbrance was created. The common words that he had been "party or privy," &c., would have given a remedy under the covenant, for of course he was party, and therefore privy to the conveyance, although the purchaser might have conveyed without him. So again the covenants only extend to acts, &c., knowingly or willfully suffered or permitted to the contrary, and not to all defaults of the covenantor, and the distinction is very material: (Sug. Vend., 13 ed. 490.)

It is not prudent to omit a covenant, as for instance, the covenant for quiet possession or further assurance, under the impression that the covenant for right to convey free from all incumbrances will afford in all cases an adequate remedy. Thus, larger damages may be recovered under the covenant for quiet enjoyment than under that for right to convey: (*Hodgins* v. *Hodgins*, 13 U. C. C. P. 146 Richards, J., diss.;) under the latter, unless in cases of actual or constructive frauds by the covenantor, defects in title through his default, or the right of some one claiming under him, and the like, no greater damages can be recovered, as a general rule, than the purchase money and interest. So, on the other hand, the remedies on the covenant for right to convey are not always supplied by the covenant for quiet possession, as under the latter no cause of action arises till disturbance. Under the covenant for right to convey only nominal damages are recoverable, unless there be proof of actual damage or eviction: (*Bannon* v. *Frank*, 14, U. C. C. P. 295; *Snider* v. *Snider*, 13 U. C. C. P. 158; *Grahame* v. *Baker*, 10 U C. C. P. 427.) A. L.

The illness of Mr. Justice John Wilson has assumed such an alarming character that his life is despaired of. He succeeded notwithstanding his illness in finishing the Goderich Assizes; but could do no more, and went to London to rest. Judges Hughes of St. Thomas took the Assizes for him at Chatham, and Judge Duggan of Toronto was sent to fill his place at Sandwich. It was at first hoped that perfect rest and change of air might restore his failing health, but his physicians now fear the worst. The sympathies of his many friends in the profession and out of it are with him in his sufferings.

SELECTIONS.

MODERN TEXT-BOOKS.

We have more than once had occasion to deplore the increase amongst us of what are called "Text-Books of the Law" upon particular subjects. They are for the most part the productions of young men, neither professedly versed in the law, nor seasoned by practice Indeed, it is because they are in quest of practice, and in the hope of obtaining it, that most of them, ill-advised there can be no doubt, go on rushing into print, until they are satisfied, by the result, of the folly of the experiment. With this large and, unhappily, increasing number of pretenders we have done for the time. We propose, however, to say a few words upon modern text-books of a higher order, the true use to be made of them, and the abuse of them which is made.

A text-book upon any branch of law is but a methodised digest of the law applicable thereto; a sort of *catalogue raisonnée* of cases, dicta, decisions, and enactments; concisely arranged, so as to instruct the learned reader who desires to go to the fountain-head, where the sources lie; and, withal, full and clear enough to be understood by the merest practitioner, and, in that regard, to merit at least the qualified commendation which Mr Carlyle once bestowed upon M. Thiers' "History of the Revolution," "That if you know nothing about it, it can tell you a good deal. We think that no text-book now in use amongst us, not even the very best of them, ought to be used for higher purposes than those very useful purposes to which we have enumerated. At all events we are quite sure that to treat them as having of themselves any authority, to consider them as the representatives of their originals, or to hold that the study of the old learning is in any way superseded by, or may in any degree be dispensed with in favour of the new compendium is a most pernicious mistake, and the more deplorable because of its growing prevalence. In that growth we cannot help seeing one of the actual symptoms of the decline of legal science.

It is no unfamiliar thing to hear a counsel, now-a-days, reciting to the court whole passages from the treatise of living writers, and these, it may be, writers highly respectable in their way, but certainly not arrived at the heights of the science, nor yet enjoying the prestige of the ermine. The laxity with which this lazy habit of the Bar is indulged by the Bench, is more noticeable in Courts of Equity than in those of Common Law; and we have heard it suggested that the reason is to be found in the hurry and fatigue, which the struggle to keep down the threatening mass of business under the Winding-up Acts has introduced into the bosom of those sometime slumbering establishments. This excuse, so far as it relates to the putting of "Lindley on Partnerships," for instance, upon the same footing with the cases which he cites in his foot notes, is unsatisfactory enough. Yet let the Bar of the Superior Courts have the benefit of it, so far as it goes. The mischief, however, is far more widely spread. There are now local courts and local bars in all the counties and great towns of England and Wales, not to speak of our transmarine empire. There are County Courts, Recorders' and Quarter Sessions' Courts, Magistrates' Courts, and Revision Courts;—(for as yet we have had no experience of the new Courts for Trial of Election Petitions), and, last but not least, there are the Parliamentary Committees, *quasi* courts of much influence and having their own bars. In each and all of them the bad habits which we reprehend is more or less prevalent. In each and all of them the fatal reaction of that habit upon itself is making itself felt. In each and all of them there is a want of tone in the system. The ring of the metal is getting less and less clear. If the habit lasts much longer, we shall hear of its being drawn into a precedent:—and when once that is so, the day of learned lawyers will be nearly done.

There remains an objection, still more serious, to be stated to this abuse—it is full of danger to the interests of the suitor. There is no safety in an indolent reliance of that kind. There is not one text-book known to lawyers which is beyond or above criticism, in respect of the accuracy of its analysis, or the completeness of its synthesis. The works neither of Lord St. Leonards, Lord Tenterden, nor Mr. Justice Williams, in this century, neither of Chief Baron Gilbert, nor Sir William Blackstone in the eighteenth century, nor yet of Lord Hale himself in the seventeenth, much less those of his learned but too fervid predecessor in the same century, Sir Edward Coke, can be pronounced to be entirely without errors, whether of omission or of commission; and on the contrary, those of Coke and Blackstone are particularly obnoxious to criticism on either ground. Yet amongst them all there is not one name to which the imputation of *cacoethes scribendi* is attached, or with which the fame of learning or exemplary labour is not associated to a degree which, in a mere book-making time like the year 1868, must seem prodigious. But if such as these must still be held unequal to the character of oracular infallibility, how can it be said that the men of the second rank are fitted to assume it? If we are to receive nothing upon trust, though it be from the noble and learned commentator of the Laws of Vendors and Purchasers, it surely must be very unsafe as well as unreasonable for any man, student, counsel, or attorney, to pin his simple faith to any work on the law of contracts, although it be that "standard work," as the provincial or practical mind esteems it, the treatise of Mr. Addison himself.

That it is not only unsafe, but dangerous in the highest degree, we think needs no proof.

Those who require it, however, we also think, can easily furnish themselves with the most convincing proof, by taking at random any single page, for instance, of Mr. Addison, and testing with the help of the Reports the value of his citations. But we are minded even to spare them even that labour. We have at hand two works (of the second rank, perhaps, but yet of the highest grade in that rank), both published within the last year, one of them indeed late in the summer of this year. Of both we have had occasion to express—what we felt and feel—the greatest admiration. They are, and in all probability must remain, not in name merely, but in fact, the standard works upon their respective subjects,—"The Law and Practice of Injunctions in Equity;" and "The Law of Mortgages and Securities upon Property." If then it be made clear to their readers that not even Mr. Williamson Kerr, nor yet Mr. William Richard Fisher, may be implicitly relied on, and that, on the contrary, it is absolutely necessary to probe and examine into the accuracy of either, before adopting his opinion, or acting according to his advice, in order to be quite safe, they will be the first to acknowledge that we have chosen two very striking illustrations of the perils which environ them.

Let us commence with Mr. Kerr, the earliest in order of publication; and first let us open his pages on "Titles to Light," under the Prescription Act.

The reader of the treatise is *not* informed of the statutory abrogation of all customs to the contrary; and he is informed that, "after an obstruction has lasted for a year," without proceedings being taken, "the custom of London or other local custom will prevail" (p. 357); a most erroneous method of stating what must have been Mr. Kerr's meaning—viz., that the obstruction in the case supposed will have the effect given to it by that statute.

With respect to "patents," we find it said that (p. 423) "*until entry of registration* the original patentee is to be deemed and taken to be the sole and exclusive proprietor of the patent;" and (Ibid) "*the registration of a patent* will complete an inchoate title;" and for these manifestly erroneous propositions, the 15 & 16 Vict., c. 83, s. 35, is cited. Turning to that section, however, we find that the "registration" there spoken of is that of "*assignments of* patents;" which is quite another thing. With even greater inaccuracy it is denied, on the supposed authority of the cited cases, that (p. 408) "the plaintiff has any right to the discovery of particulars on which the plaintiffs relies, as shewing a user of the thing patented prior to the date of the patent;" the true point decided being that he has no right to such discovery as to the like particulars when relied on by the *defendant.*

A still stronger contrariety between, the learned author's note of the point of decision, and the decision itself, occurs at p. 643, where Lord Romilly, M.R., is made to hold that "an injunction restraining a defendant, his servants, and agents, does extend to his tenants;" his lordship having expressly holden the very contrary—viz., that it does not extend to the tenants, and will not be enlarged so as to extend to them.

The authority of 1 Railw., C. 616, is cited for the startling position that (p. 632) "the question, whether there has been a misrepresentation or concealment of material facts upon the application for an *ex parte* injunction, *cannot* be taken into consideration, *on appeal from an order* made by the court in which the injunction was granted, or by which it was continued." The marginal note—as usual, a very inaccurate one—does certainly favour that erroneous reading of the judgment. But the report shews the true reading to be simply this:—That, to entitle the party objecting to an order to dissolve on that ground, he must lose no time after discovering the fact in moving the court below, and if he neglects to do so (*e.g.* as in the principal case, during the whole of the long vacation), neither that court, nor, on appeal, the court above, will entertain his application.

A student—if he be led to believe (what he is told at p. 498) that "*it is not necessary*, in order to render such evidence (*i.e.*, parol evidence of particular meaning of phraseology) admissable, that there should be any ambiguity *on the face of the instrument*, which has to be construed,"—will certainly be very much misled. And if, notwithstanding, he should hold to the familiar distinction of *ambiguitas patens* and *ambiguitas latens*, it will probably be that, to borrow the words of an epilogue of Lord Coke, he has "at some other time, and in some other place," found the requisite instruction. We do not for a moment suppose —and far less wish others to suppose—that Mr. Kerr really intended to lay down the proposition in question. All that we mean to say of this instance of inaccuracy, and of those which have gone before, as also others which we had selected, but to which we must for brevity's sake be contended to refer in a foot-note,*—that there is a great want of precision in the language of the abstract, and that, here and there, it is too evident that the toil of compilation has given place to the easier labour of transcription.

It is always toward the end, or at least the middle, of a great work like Mr. Kerr's otherwise valuable treatise, that these blemeshes first appear or become frequent. We cannot help thinking that the real secret is there. It is in the literal meaning of the hackneyed phrase to "the hurry of composition" that

* The following cases appear to have be more or less misunderstood—viz., *Coutts* v. *Gorham*, *Needham* v. *Oxley*, *Sweet* v. *Benning*, *Reade* v. *Conquest*, *Reade* v. *Lacy*, *Pollard* v. *Clayton*, and *Grand Junction Canal Co.* v. *Dimes*, at pp. 355, 437, 454, 464, 526, and 641 of Mr. Kerr's. Of points imperfectly stated, the cases of *Wynne* v. *Griffith*, at p. 537, of v. *The Attorney-General* v. *G. N. R. Co.*, and *Hare* v. *L. & N. W. R. Co*, at p. 543, of *Beeching* v. *Lloyd*, with its sister cases at p. 551, and of *Thornhill* v. *Thornhill*, at p. 640, may serve as examples.

the fault is mainly due. The printer wants "copy;" the publisher is importunate; the author is busied about many things; but the publication cannot now be deferred any longer —a constellation of chances full of ill omen for the credit and usefulness of the coming book.

Let us next turn to Mr. Fisher's treatise. It is certainly a work of even higher reputation than that of Mr. Kerr, whether we regard the length of time during which it has been received as the best text book upon the law of mortgages, or the fact of its having recently attained the honours of a second edition. It is nevertheless open to much the same animadversions. Let us not be misunderstood. With all the deductions which we are going to make from the commendation of which we have never been niggards towards Mr. Fisher's very laborious, learned, and useful treatise, we still see no reason to retract those commendation or reduce their measure. And it is precisely because his book deserves so thoroughly the character it has won, of being the only good and complete repertory we have of "The Law of Mortgages and other Securities upon Property," that we select it to illustrate our present censures, in preference to scores of others much more obnoxious to them, and to which those censures must, therefore *à fortiori*, be considered to attach. For if our sciolists are made to discover that not even the standard law books are implicitly to be relied on, their faith in the common run of compilers cannot fail to wax cold:—

> "And this ensample added yet thirto,
> That if gold ruste, what should iron do?"

With respect to the following selections from Mr. Fisher's book, we need scarcely explain that our references are to the edition of the present year.

Upon the important question of the nature of the possession which supports possessory lien, one doctrine is laid down (p. 158) which certainly is in open contradiction to the law; viz., that *the mere possession* of goods by a factor or other agent will confer no lien, if by the terms of the contract, by his own permission, or by legal construction, they evidently remain under *the dominion* of the principal;" —and *Haggard* v. *Mackenzie*, 25 Beav. 493, is cited in support. On referring to that case, however, Lord Romilly, M.R., will be found to have emitted no such view subversive of the whole of the law of lien. On the contrary, what he decided was, that even a servant entrusted with goods in a place under his master's control may, before the bankruptcy of the latter, acquire a lien upon them by simply removing them to another place, not being under his master's control;—but that, until then, his master continues to have them, through him, in his order and disposition; although he calls the servant his factor or agent.

In treating of notices of sale by mortgages under their powers of sale, the point decided by Vice-Chancellor Stuart, in *Ford* v. *Healy* (or *Heely*), 3 Jurist, N. S., 1116, and 5 W. R., 517, is stated to be that (p. 503) "the express notice clause (in the mortgagee's power of sale) would not help the purchaser unless the contract were vaild:" on which the author proceeds to remark, that "as this was the question for decision, it does not appear how the clause could be made useful." Now it is very obvious that the Vice-Chancellor did give effect to "the express notice clause" in that case; for he directed the usual references as to title. And we find, on looking into his last edition of Vendors and Purchasers, that Lord St. Leonards, with his usual accuracy, has stated it thus, c. 1, s. 5, pl. 38, p. 68;—"It was held that the mortgagee himself could make a good title; yet he was clearly liable to the creditors (viz., under a trust deed executed by his mortgagor after default) for selling contrary to his power. The contract itself shewed that the proper notice could not have been given; yet equity at his suit enforced the contract."

Of the power of sale in general, Mr. Fisher says (p. 505): "The power may be extended, by reference to property not specifically included in it;"—a position which may, or may not, be approved by the court, but which certainly, was not laid down in the solitary case of *Ashworth* v. *Mounsey*, 9 Exch. 175, which he cites to support it. There the only question being whether the purchaser was entitled to recover his deposit, and the sufficiency of the vendor's power of sale coming incidentally under consideration, it was held, upon the peculiar wording of the power, that it was intended to apply *à priori* not only to the part of the estate then charged, but also the rest of the estate, which it was also then agreed to charge by an equitable mortgage thereafter to be made, and which afterwards was made. And it was also held that, even if that were not so, the purchaser could not recover his deposit; the true nature of his vendor's interest having been correctly described in the conditions of sale.

Of the pawnbroker's power of sale in particular, it is said, on the authority of the 39 and 40 Geo. III., c. 99, that after sale, "the overplus on the price is to be paid to the pawnee or his representative." It may be that "pawnee" is an error of the press for "pawnor." But, in that case, it would have to be explained why the condition is omitted that the claim be made within three years, as also the penalties of fine and forfeiture by which performance is enforced.

A mortgagee in possession, it is said (p. 886), "is not obliged to defend the possession of property which the exercise of a strict legal right has thrown into his hands." The proposition is too wide, and as lawyers would say, "bad for the excess." Confined within the limits which the two authorites cited by Mr. Fisher (*Perry* v. *Walker*, 1 Jur. N. S. 746, and *Cocks* v. *Grey*, 1 Giff. 77) impose, viz.: that the mortgagee in possession is not bound to defend it "against lawful owners,"

and especially where the law is not clear, the proposition is reasonable and right.

The point decided in "The Change," Swabey's Adm. R., 240 (quoted by the author from 29 L. T. 147), has been likewise misunderstood —at least, we cannot find in either report any trace of the refusal of evidence of which Mr. Fisher makes mention (p. 933), viz: "of the rate of interest agreed to be taken on a bottomry bond." It is unlikely, indeed, that the court have refused to take such evidence, if the silence of the instrument itself had been the only difficulty.* But, in truth, the question was not raised, and all that Dr. Lushington there determined, was to refuse a motion for leave to alter the bond, by filling up the blanks which had been left for the insertion of those rates; the only evidence upon which the motion was founded, being an exhibit purporting to be sworn at Calcutta, and to be the notarial certificate or affidavit of a practitioner there, by whom it had been draughted, and which stated that the agreed rates had been omitted by him in mistake.

At p. 968, the case of *Green* v. *Briggs*, 6 Hare, 632, is thus stated:—"Where the bankrupt devisee of an equity of redemption disclaimed, and the bankrupt was joined, he had no costs from the mortgagee; for, it seems, by the disclaimer, the assignee's interest became re-vested in the bankrupt." It is a mass of error. The assignees disclaimed; and therefore the bankrupt, in whom the equity was thereby re-vested, was joined, but had no costs from the mortgagees.

A still greater puzzle has been, naturally enough, occasioned at p. 1035 by the substitution of "receive" for "pay." As it stands, the reader learns from the *placitum* in question (1874), that "if the person entitled attends (at the time and place of payment) by his agent, the agent ought to be authorised by a power of attorney to receive the money; and, for want of such authority, the court has refused to make the order absolute, although no person appeared to *receive* the money (*Whitehead* v. *Lyall*, 2 Jur., N. S. 671;) 3 Sm. & G. 314."

There is, at p. 624, a similar blunder ("to" for "by"), which combined with a singular want of precision in the wording of the whole sentence, will certainly justify mankind in using Mr. Fisher's name for these two pernicious heresies: (1.) Purchase-money is payable by, not to, the vendor; and (2.) Where the title is deduced by recital from him, a subsequent purchaser will not be affected with notice of non payment. It is only by dint of much dislocation and transposition of the verbiage that we arrive at the real meaning of the cases cited in the foot-note to that passage, which is this:—"A subsequent purchaser will not be affected with notice of non-payment of the purchase money *to* the original vendor, *merely because* the title is deduced by rental from him; *for* the recital does not show the non-payment.

* See *Dickenson* v. *Heron*, V. & P. (14th edn.) p. 643, and other cases there cited.

We had marked a number of almost parallel passages to those above presented, but the laws of space are inexorable when the conduct of a quarterly is question. We must therefore content ourselves with a simple reference to each, by *placitum* and by page.* Let us also say, that we do so quite as much in the hope of attracting the attention of the learned author to the blemishes upon his otherwise admirable work, of which these are so many specimens, as because they serve the purpose for which we noted them—that of illustrating and justifying what we have said concerning the perils of reliance upon text-books.—*Law Review.*

SERJEANTS' INN AND ITS PORTRAITS.

The superb re-decoration of the Hall of Serjeants' Inn, in Chancery Lane, and the cataloguing of its portraits, call public attention just now to that ancient and time-honored edifice. Mr. Serjeant Bain, the treasurer of the Inn, deserves great credit for his management of the re-embellishment, and for his publication of the Catalogue of Portraits. Before entering into details, we had better give a general account of Serjeants' Inn itself, and we cannot do that better than by extracting what Mr. Timbs has so ably written on the subject, in his recent popular work, entitled "Curiosities of London:"—

"There were," says Mr. Timbs, "originally three inns provided for the reception of the judges, and such as had attained to the dignity of the coif, viz., first, Scroop's Inn or Serjeants' Place, opposite St. Andrew's Church, Holborn, now long deserted by the Serjeants; secondly Serjeants' Inn, Fleet Street, which was held by lease under the dean and chapter of York, and is now deserted as an inn for serjeants; and thirdly, Serjeants' Inn, Chancery Lane, the only place that can with propriety be at present called serjeants' Inn. Scroop's Inn belonged to John, Lord Scroop, and was afterwards known as Scroop's Court. After his death, it was let out to some serjeants, who adopted it as their place, whence it was called Serjeants' Inn, in Holborn. After they disused it, the site was let for tenements and gardens. The serjeants about the beginning of the reign of Henry VI., and not before, resorted to the Fleet Street Inn, which had a very fine chapel and hall, and a stately court of tall brick buildings. It likewise retained a steward, a master cook, a chief butler, with other attendants and servants, and a porter. The old inn in Holborn having been sold, and the Fleet Street Inn having become dilapidated, the serjeants were quite ready to entirely emigrate to Chancery Lane, the third and chief inn to which one need invite attention. It bore once the name of 'Faryndon Inn,' and it

* Pl. 339, *ad calc*; (p. 202) 475, *ad calc*; (p. 269) 1122, *ad calc*; (p. 610) 1143; (pp. 621-22) 1205, *ad calc*; (p. 654) 1377; (p. 768) 1381; (p. 770) 1443; (p. 799) 1453, *ad calc*; (p. 803) 1455, note (*s.*); (p. 805) 1489; (p. 824) 1640; (p. 904).

was known as early as the 17th Richard II., when the inheritence belonged (and has done since) to the Bishop of Ely and his successors. In the 'accompt' of the Bishop's bailiff, 12 Henry IV., it was called 'Faryndon Inne,' and it was stated 'that the serjeants-at-law had lodgings there.' In 1416, 7 Henry V., the whole house was demised to the judges and others learned in the law. The freehold after having passed through various hands, came to be held for three lives by Sir Anthony Ashley, Knight, under whom the judges and serjeants continued to rent it. Eventually the serjeants negotiated with the Bishop of Ely for the purchase of the fee simple of the property and the same was ultimately vested in the society by an Act of Parliament, creating the Society of Serjeants' Inn, Chancery Lane, for the purpose, a corporation, upon the annual payment for ever of a fee farm rent to the Bishop and his successors. The officers belonging to this inn are similar to those in Fleet Street—namely, a steward, a master cook, a chief butler, and their servants, and a porter. In 1837-8 the inn was rebuilt (under the auspices of Serjeant Adams, the then treasurer) by Sir Robert Smirke, R.A., except the old dining hall of the society, which was then fitted up as a court for Exchequer Equity sittings, but is now used as the state dining room of the serjeants, including the common law judges, who are always serjeants-at-law. The handsomest room is, however, the privite dining-room, which contains one of the finest collections of legal portraits in the kingdom, including those of Sir Edward Coke, by Cornelius Jansen; of Lord Mansfield, Lord King, Sir Francis Buller, Chief Justice Tindal, Lords Eldon, Denman, and Lyndhnrst, all by painters of note. The windows (containing the armorial ensigns of judges and serjeants) are finely executed. The chambers where the judges of the common law sit to hear summonses and other private matters are in this inn. The arms of Serjeants' Inn are, *or*, a stork, *ppr.* This Serjeants' Inn is the exclusive property of the serjrants-at-law, or *servientes ad legem*, who are the highest degree in the common law.

"The other, but obselete inn, in Fleet Street, already described, still bears the name of Serjeants' Inn, and this is liable to be mistaken for the now only real Serjeants' Inn in Chancery Lane. The Fleet Street Inn was destroyed in the Great Fire, was rebuilt in 1670, and again rebuilt, as we now see it, with a handsome stone fronted edifice, by Adam the architect. This inn is now let in private chambers to any one who likes to rent them."

So far Mr. Timbs; but since he has written, not only the picture-room and its contents have been thoroughly renovated, but the State-hall and other apartments have undergone complete restoration. The State-hall is now rendered suitable to the dignified company who frequent it. It has been refloored, repainted, and the old cumbersome stove has been removed, to make place for heating by hot-water pipes. Two gas-burners from the ceiling brilliantly illuminate the room, throwing a picturesque light upon the antique carvings, armorially stained windows, and on the grim bust of Charles II., placed above the table of honour. Here the judges and serjeants may in thorough comfort dine, according to custom, on the first and last days of Term.

The first of next Term will indeed be somewhat remarkable, as at the dinner on that occasion four new serjeants will be admitted—namely, two judges, Mr. Justice Brett and Baron Cleasby, and two serjeants-at-law, Mr. Sargood and Mr. Sleigh.

Serjeant Bain has not been content with the re-embellishment of the hall internally (the exterior has been made also very handsome), but has added literary light to the institution, in the publication of a catalogue *raisonné* of all the portraits, whether pictures or prints, in the building. This catalogue, which he has brought out with the assistence of Mr. Serjeant Burke, is very comprehensive.

Beyond a record of the portraits contained in this ancient and unique hall, the resort of the various serjeants-at-law for ages past, it is not our province to offer any artistic judgment on the merits of any particular one, save those of the eminent Sir Edward Coke, Knt., by Cornelies Jansen, and Sir Francis Buller, Bart., by M. Browne, which carry with them the reputation of being the most magnificient among the whole collection. These paintings are in the best style of the artists of the day.

The catalogue does not describe how in every case the portraits of eminent judges found their way to the hall. In all probability, in the majority of instances, they were the presents of the judges themselves; but in some the Inn is indebted to the liberality and forethought of descendants, relatives, and even private individuals, for the honour done them by placing under their safe custody the only remaining resemblances of those who were once the great expounders of the law, and are now the time-honoured monuments of the study of that science, upon whose exponents all lawyers look back with reverence. The portrait of Lord Lyttleton, who was Lord Keeper in the of Charles I., was presented by a Mr. Ray, as was also that of Sir John Powell, Knt., one of the Judges of the Court of King's Bench, who presided at the trial of the seven bishops. But for the munifience of this gentleman, those noble effigies might have been lost to the world, or have decorated the walls of some obscure mansion where their historical associations might have been wholly unknown or unappreciated. At the Board of Green Cloth, November 2nd, 1847, Lord Denman is stated to have moved a resolution, thanking the Marquis Camden for the present of a portrait of his ancestor, Sir John Pratt, Knt., who was Lord Chief Justice of the King's Bench from 1717 to 1725, the year of his death. And on the 31st January, 1839, a vote of thanks was

passed to Sir William Horne for the present of the portrait of the celebrated lawyer, Lord Mansfield, who for thirty years presided over the Court of King's Bench. Owen's picture of Lord Tenterden was presented, in 1850, by the present Lord Tenterden; and in 1839 Mr. Bayley presented the likeness of his father, Sir John Bayley, to the Inn; and in the same year Lord Lyndhurst presented the Society with the portrait, by Phillips, of himself. The Society has also a fine portrait of the late Lord Chancellor Truro, by T. Y. Gooderson, after Grant, R.A.; of this the following is a minute of the Board of Green Cloth, November 3rd, 1861:—

"Mr. Serjeant Manning, the Treasurer, stated that Lady Truro had presented a portrait of Lord Truro, which in reliance upon the gallantry of the Judges and Serjeants, Serjeant Manning had taken upon himself to suspend in the Hall. Resolved that the present be acknowledged by a deputation consisting of the Junior Judge, Mr. Serjeant Storks, and the Treasurer."

The only portrait of a modern Serjeant (not a Judge) suspended to the walls is that of Mr. Serjeant Adams, for many years Acting-Treasurer to the Society, and Chairman of the Middlesex Bench of Magistrates, and Assistant-Judge of the Sessions. This portrait was partly the substitute for a presentation of a piece of plate to the Serjeant, in consequence of his able management of the rebuilding of the Inn, and in token of his exertions for many years, in the interest of the Society. At the Board of Green Cloth, January 15th, 1839, it was resolved:—

"That the Judges and Serjeants, Members of this Society, are deeply grateful to Mr. Serjeant Adams for the ability, the judgment, and the unwearied zeal, which he has exerted in the enfrachisement of their ancient site, to which they chiefly attribute the happy results which have been finally reported to-day; and as a small memorial of their appreciation of so noble a service, they solicit his acceptance of a a piece of plate of the value of 100 guineas, to which they will all contribute, which the Treasurer will procure; for which Mr. Baron Alderson will supply an appropriate inscription; and which they trust Mr. Serjeant Adams will esteem, not with reference to its unworthiness in the point of value, but to the cordiality with which it is offered him."

But at a subsequent meeting of the Board it was resolved to request, in its place, the Serjeant to sit for his portrait, to be placed in the hall, the additional expense beyond 100 guineas to be defrayed out of the funds of the Society.

We believe that the last portrait presented to the Society is that of Sir William Erie.

In addition to the oil paintings which decorate the walls of the hall, there are three or four water-colour drawings and a large collection of very valuable and scarce prints in frames, executed by the leading artists of the day, most of which have been copied and engraved from coloured portraits. There are also a large number collected together in a portfolio, only remaining there for want of space to exhibit.

The catalogue gives the whole in numerical order, and no small pains have been taken to make it in every way complete; great attention having been paid to the correctness of the dates of births, appointments, and deaths.

In fine, this attention paid to the structure of Serjeants' Inn and to its history, speaks well for the prosperity and permanence of this most ancient and honourable Society, whose well-being is of moment to all members of the legal profession. The serjeants-at-law are, be it remembered, independent of the Crown, and have been at all times the staunch upholders and defenders of the law, the constitution, and the liberties of this country. Their ranks should always be well filled, and it is a pity that there should be now any vacancies left open in the appointments of their leaders, the Queen's Serjeants, who are an old institution of the State.—*Law Review.*

ST. LEONARDS ON CAMPBELL.

Misrepresentations in Campbell's lives of Lyndhurst and Brougham corrected by St. Leonards. London: John Murray.

The nonagenarian ex Chancellor is as plucky and almost as vigorous as was the Sir E. Sugden of half a century ago. Last week the learned and venerable lord appeared in the witness-box and gave his evidence not only with lucidity, but he also showed the counsel who cross-examined him that he could still hold his own in a legal fight. A yet more conspicuous witness of the unfailing powers of Lord St. Leonards is his reply to some of the misrepresentations in Campbell's lives of Lyndhurst and Brougham. Before the posthumous volume of Lord Campbell's work was nine days old, Lord St. Leonards was out with his rejoinder. We are of opinion that the learned lord need not have been at the pains of answering the statements of a work which has been, so far as we know, censured by the whole world of critics. The lives of Lyndhurst and Brougham are such a gross caricature that no one can be deceived. It seems that Lord Campbell could not think well or write fairly of any lawyer who was contemporary with him. It was his opinion that his rivals were vastly inferior in intellect and moral character to John Campbell, and it was his apparent object in preparing the last volume of his Lives to inform a benighted world that in the nineteenth century there was only one great and worthy lawyer, and that eminent and exceptional individual was John, Lord Campbell. However, we can hardly be surprised that Lord St. Leonards could not resist the temptation of exposing some of the misrepresentations that especially relate to himself.

Lord Campbell tells a story about a dispute in Court between Lord Chancellor Brougham and Sir E. Sugden, and he adds that the latter was laughed at. This Lord St. Leonards denies, and tells us what really occured. Lord Brougham was in the habit of reading and writing letters in Court, and Sir E. Sugden very properly refused to go on with an argument whilst the Lord Chancellor was plainly and even ostentatiously engaged in letter-writing. The Lord Chancellor made a testy remark, but there was no demonstration; and afterwards, if he had occasion to write a letter, he did so on the open note-book, and in a manner that did not attract attention.

There was an unfortunate difference between Lord Chancellor Brougham and Sir E. Sugden, which was the subject of a sharp debate in the House of Commons, the report of which is copied from 'Hansard,' and given as a supplement to this little book. Lord Brougham attacked Sir E. Sugden, and used a very improper epithet. Even before Lord Brougham went out of office the quarrel was adjusted, and says Lord St. Leonards: —'Lord Campbell knew that for many years Lord Brougham and I were on terms of friendship, but as his book would not be published until after Brougham's death, he was safe in reviving in its most odious form an attack which Lord Brougham had lived to regret and to atone for.' No doubt the account of Lord Campbell is one-sided, and, we must say, exceedingly spiteful. Lord St. Leonards remarks, 'His object was to strike *at me.* This he dared not do during our joint lives; but it might be partially accomplished by leaving his book as a legacy to be published after his own death, without regard to what was due to me, if living.' We shall not comment on the rest of the misrepresentations exposed by the learned and venerable lord, as we have already devoted considerable space to a review of the volume by Lord Campbell. Whilst living, Lord Campbell professed much friendship and admiration for Lord St. Leonards. So he did for Lord Brougham, but that did not prevent him preparing a vituperative biography. Lord St. Leonards is indignant with the treatment of Lyndhurst and Brougham, and remarks that 'their lives remain to be written.' We shall soon have the biography of Lord Brougham, and meantime Lord St. Leonards may rest assured that no one will think any the worse of either Lord Brougham or Lord Lyndhurst on account of the misrepresentations of Lord Campbell.—*Law Journal.*

SOLICITOR'S DUTY OF KEEPING ACCOUNTS.

Re Lee, L.J., 17 W. R. 108.

A Solicitor stands in this respect upon a very different footing from an ordinary agent. It is the duty of the latter to keep regular accounts and preserve the vouchers, at the peril of being disallowed every claim which he cannot possibly substantiate. If he does not do this, it amounts to a fraud in equity. But a solicitor, though it is very reprehensible of him not to keep accounts, will not be treated in the same way as an ordinary agent or receiver, if he has not done so. Considering how complicated is the relationship between solicitor and client, extending over so many years, as it often does, it would be strange indeed if the solicitor did not meet with more consideration in the eye of the Court than an ordinary agent under such circumstances. Irregularity in keeping accounts as a solicitor, Lord Elden said, in *White* v. *Lady Lincoln*, 8 Ves. 363, "is not a ground for saying that he shall make no demand. It will press him with more difficulty in making the demand, but if finally he can make it out by documents and proofs which the Court can receive, he must be paid." The Lords Justices took the same view of tne rule in equity in deciding the present case, namely, that the omission to keep accounts was not a ground for depriving the solicitor of his proper taxed costs for the business done. In *White* v. *Lady Lincoln*, it is true, Lord Eldon refused to allow a charge for business done by a solicitor, who had kept no regular accounts. But it is to be observed that this solicitor had acted as auditor, steward, and agent also, had kept no regular accounts in any of those capacities, and had kept no vouchers except those in his own favour; and was therefore treated as a general agent, bound in duty to keep regular accounts. But in the present case the business done by special arrangement had been paid for separately, and was distinguishable from the general business, in respect of which no formal account, item by item, could be rendered. From a comparison of the present case with *White* v. *Lady Lincoln*, it would seem that if a solicitor acts as an agenl oui of his professional sphere, like any other agent he must keep formal accounts at his peril; but in charging for ordinary professional business it is enough if, in the absence of formal entries in his books, he can make out that the business has been actually done, by such secondary evidence as the Court can receive, and he will not be permitted ot lose his costs altogether, merely because he has failed to keep his books with mercantile regularity.—*Solicitors' Journal.*

EVIDENCE OF FOOTMARKS.

About four years ago, as we learn from a paragraph in the *Times*, a man named Harris was convicted of cutting out the tongue of a neighbour's horse by night. The evidence was solely that of footmarks. The sentence was eighteen months' imprisonment, which told so on the prisoner that he died. Since then his innocence has, it is said, been completely established.

Of all evidence habitually adduced before magistrates, at quarter sessions, and at assizes, there is scarcely any so common as that of

footmarks, and certainly none so worthless. "I found footmarks,—I compared them with the prisoner's boot;—They corresponded exactly." If the tracks *do* exactly fit the boots, they are the strongest evidence that the boots, with probably the prisoner in them, assisted at whatever was done when the tracks were made. Unless the tracks fit *exactly*, they are no evidence at all. Now the value of the above statement, as usually received in evidence from the mouth of a rural policeman, or other witness, will be more correctly appreciated if you consider the process which would be requisite in order to determine that the tracks do fit exactly. A mere eye comparison of the shape of the sole with the edge of the track is clearly not enough, because scores of men may wear their boots into very much the same shapes, especially if made by the same maker. Nor is it enough to count the hob nails, because a country cobbler will very likely have a set pattern and a set number of nails for all boots of a certain size. The orthodox plan, when the print is yet plastic, in wet clay or garden mould for instance, is, we believe, to press the boot down into the print, and then stand aside and see if the fit looks all right. It is true that the sole is the crucial test, and that while in the print no one can see the sole; but the plan has this advantage, that the firm pressure in the soft soil produces in the old print a new one, which, *ex necessitate*, must correspond exactly with the boot. In many cases a very accurate admeasurement with compasses would be necessary to test the correspondencies of the two, and in many other cases, from the imperfection of the print the test is impraticable.

The prisoner's advocate ought always to examine the witness minutely as to the process by which he satisfied himself that the boot corresponded with the track. A few months ago a case occured in which a prisoner, being charged before a clerical magistrate, on the evidence of a constable who deposed in the usual form that the prisoner's boot fitted the footmark to a nicety, the worthy clergyman took the boot in his own hands and personally compared it with the marks. The first thing he did was to look at the nailmarks, when to his surprise he found that neither in number nor pattern did they correspond with the nails in the boot. The prisoner, of course, was acquitted; but, unless the magistrate had made this discovery, he would, in all probability have been committed on this blundering evidence.—*Solicitors' Journal.*

A wife cannot execute a deed; which is, perhaps, the reason why Shakspeare, who was a first-rate lawyer, made Macbeth do the deed, which lady Macbeth would have done so much better, had not a deed done by a woman been void to all intents and purposes.—*Comic Blackstone.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

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

Diamond v. Gray.

Change of venue—Preponderance of convenience and expense.

A defendant when applying to change the venue on the ground of preponderance of convenience and expense, should suggest in his affidavit the number of witnesses the plaintiff is likely to call, and where they reside. Cases on applications of this kind considered.

[Chambers, March 6, 8, 1867.]

The defendant obtained a summons to change the venue from the County of Lennox and Addington to Prince Edward, on an affidavit which stated, amongst other things, that the action was brought for the conversion of plaintiff's goods; that the declaration had been served but no plea pleaded; that the cause of action, if any, arose in the County of Prince Edward and not elsewhere: that deponent had "reason to believe and does verily believe that at least ten witnesses will be called to support the defence in this action;" that it would probably be very difficult to reach the County Town of Lennox and Addington, and that the trial would be attended with very much greater expenses if tried there than if tried at the County Town of Prince Edward.

Osler shewed cause, referring to Ch. Arch. 12 ed., pp. 1352, 1353.

Gwynne, J.—*Dr. Rothschild* v. *Schilston*, 8 Ex. 503, decides, in accordance with a report made by a committee of Judges to whom the subject was referred, that the application to change the venue may be made either before or after issue joined, as may be most convenient, but if the application be made before issue joined it is requisite that the party applying should state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause is shewn. He may, however, if he choose, rest his application that the cause of action accrued in the county to which he wishes to remove the case, but if he does he may be answered by any affidavit negativing this fact, or shewing that the cause may be more conveniently tried in the county where the venue is laid. If the application is made after issue joined, the party applying must in his affidavits, in support of the application, shew that the issues may be more conveniently tried in the county to which it is proposed to change the venue. *Smith* v. *O'Brien*, 26 L. J. Exch. 30, is to the same effect. There it is said the general rule is to try the cause where the witnesses reside; but to this rule, however numerous the witnesses may be, and however great the expense in procuring their attendance, there is an exception, as if it can be made to appear that a fair trial cannot be had in the county to which it is sought to be changed: *Penhallow* v. *Mersey Harbour and Dock Co.*, 26 L. J. Ex. 21.

When the ground of the application is the expense attending the trial in the county where the venue is laid, the preponderance of convenience must be very great. In *Thornhill* v *Oastler*, 7 Scott, 272, the rule was refused, although

the defendant stated that in order to establish a set off which he had pleaded it would be necessary to unravel accounts of eighteen years' standing: that he had sixty witnesses to examine, all of whom resided in the county to which he sought to remove the case, and that the additional expenses of trying it where the venue was laid would be more than £2,000, which he was wholly unable to bear. Tindal, J., here says, "The plaintiff's right in a transitory action to lay the venue where he pleases is undoubted; and before we deprive him of it we must be clearly satisfied that justice cannot be done between the parties unless we do so." From *Johnson* v. *Berrisford*, 2 C. & M. 222, it would seem to be necessary to shew that the defendant has a defence: and from *Helliwell* v. *Hobson*, 3 C. B. N. S. 761, it would seem, unless the case is imperfectly reported, that the defendant applying to change the venue upon ground of convenience must shew that the convenience greatly preponderates in his favor, and that for that purpose he should give some evidence of the number of the plaintiff's witnesses so as to shew that the probable expense to him, for in that case the rule was refused, although the defendant swore the additional expense of his own witnesses, if the trial should take place in the county where the venue was laid, would be £80 more than in the county to which he wished to change it, although there were no affidavits by plaintiff shewing the number of his witnesses. Crowder, J., says, "The plaintiff had a right to lay his venue when he chose, and it is not shewn what witnesses he may have. I therefore do not think the defendants have made out any case to entitle them to a rule. It should at least *be made to appear* that the convenience greatly preponderates in defendants' favor."

A preponderance of convenience greatly in favor of a defendant can scarcely *be made to appear* unless the cost and convenience to the plaintiff is taken into consideration, and if he abstains from producing any affidavit how can it be said to be made to appear? It would seem therefore that in order to institute some comparison it is incumbent upon a defendant to suggest at least what number of witnesses the plaintiff is likely to have to call, and where they reside; and this is done in some of the cases reported, while in others there is an avertment that the general cost of trial at the one place would be much greater than at the other.

In the case before me, there is an affidavit filed both on behalf of the defendant and the plaintiff, and forming what opinion I can upon them, the balance of convenience appears to me to preponderate in favor of letting the venue remain where it is, which appears more convenient, taking into consideration the convenience of all parties. The summons will therefore be discharged, costs to be plaintiff's costs in the cause.

Order accordingly.

Lowe v. Morrice.

Costs—Consent to verdict—Rule silent as to costs.

Verdict for defendant—Rule for new trial unless defendant should consent to verdict for plaintiff for nominal damages, no reference being made as to costs. The defendant consented, and plaintiff asked for the costs of the rule.

Held that plaintiff was entitled to the costs of the application for new trial and the rule granted thereon.

[Chambers March 9th 1869].

This was an action on a bond, three breaches being assigned. The plaintiff recovered on the first breach, defendant on the second and third, The plaintiff moved in term for a new trial because of misdirection as to the second and third breaches. The court said the rule would be made absolute, unless the defendant, who had in fact paid the claims under these two last breaches, but who was not in strict law entitled to get the benefit of the payment by plea, should consent to a verdict being entered on these breaches for the plaintiff with nominal damages. The defendant consented to this and the rule was drawn up accordingly.

The Master declined to allow to the plaintiff the costs of the application in term and the rule finally granted thereon.

Against this decision of the Master the plaintiff appealed, and a summons was taken out to revise the taxation by allowing to the plaintiff the plaintiff's costs of moving the rule *nisi* for a new trial, and of the argument thereof, and of the rule absolute granted to enter a verdict for the plaintiff in this cause, as in said rule absolute mentioned, or such of the costs of said proceedings as the presiding judge should think fit.

Harrison, Q. C., shewed cause, citing *Marshall* on costs 153; *Wilson* v. *L. & Y. R. W. Co.*, 9 B. N. S. 647; *Patterson* v. *Corporation of Grey*, 18 U. C. Q. B. 189.

Jno. B. Read contra, cited *Robertson* v. *Liddel*, 10 East 416; *Jackson* v. *Hallam* 2. B. & Al. 317; *Delisser* v. *Towne* 1 Q B. 333; *Stewart* v. *Mathieson*, 10 U. C. L. J. 245.

Adam Wilson, J.—I entertained on the argument, before the cases were cited, a strong opinion against the application. The authorities referred to for the plaintiff show that in such a case the consent given in term that the verdict should be entered for the plaintiff should be considered as having been given at the trial, and the plaintiff having succeeded should get the costs of the rule.

Perhaps the better way of putting it is, that the consent of term has put an end to the cause; the result is that the defendant has failed; the plaintiff has succeeded in the cause and therefore gets the costs of the cause, and the costs of the application in term are part of the costs of the cause, for by and through such proceedings the cause has been successfully terminated for the plaintiff.

This is a matter of practice which when once settled should be followed, and it is I think settled by the decision before mentioned. It is not an unreasonable view to take as between the parties, for the defendant has confessed himself entirely as the wrong. Such is not the conclusion at which I should have arrived without the precedents already mentioned.

The order will therefore be granted for a revision but without costs.

Order accordingly

In re Rumble v. Wilson.

Contract or tort—Jurisdiction.

A plaint charging that the defendant hired of plaintiff a horse, &c., to go from A. to B. and back, and agreed to take good care of same as a bailee, &c., with an averment that the defendant so carelessly, &c., drove said horse, &c., that horse was killed, &c., is a plaint in contract and not in tort.

[Chambers, March 10, 1869.]

Summons issued on 29th January last, calling on parties to shew cause why a writ of prohibition should not be issued after judgment pronounced. The statement of the cause of action was as follows:

"For that the defendant hired of plaintiff a horse, harness, and buggy, in October, 1868, to go from Maple Village to Pine Grove and back, and undertook and agreed to take good care of the same as a bailee, and the plaintiff alleges that the law required him so to do, and to return the said property in safety to him again. And the plaintiff further states that the said Albert Wilson so carelessly drove and used the said property that the said horse, harness, and buggy, were not returned in safety to him, nor were the same used with care, but on the contrary with negligence and carelessness, in consequence of which the horse was killed, the buggy was broken to pieces, and the harness broken, whereby further the plaintiff saith he hath suffered damage to the amount of $85." The cause was tried before a jury who found for the plaintiff.

It was said that a new trial was moved for but refused, and that this was the second action that had been brought, the plaintiff having been non-suited in the first because he happened unavoidably not to be present; and that no question of want of jurisdiction was ever raised.

Boyd shewed cause, and contended that the plaint was not in tort, but in contract: *Mayer of London* v. *Cox*, L. R. 2 E. & J. app. 280; *Morris* v. *Cameron*, 12 U. C. C. P. 422; *Jennings* v. *Rundell*, 8 T. R. 335; *Jones* on Bailments, pp. 69 to 68; *Story* on Bailments, 411; *Lloyd's* C. C. Prac. 221; *Noys'* Maxims, (Bythewood's ed. 791.) If objection had been taken at the trial the particulars could have been amended.

F. Wright, in support of the application, argued that the Division Courts Act recognizes the distinction between contracts and torts, and that the question was whether the action was maitainable without reference to any contract, and is founded on contract though framed in tort: *Bullen & Leake*, 102, notes 2nd ed., 121 3rd ed., citing *Pozzi* v. *Shipton*, 8 A. & E. 963; *Marshall* v. *York &c., R. W. Co.*, 11 C. B. 655; *Tatton* v. *G. W. R. Co.*, 2 E. & E. 844; *Legge* v. *Tucker*, 1 H. & N. 500; *Ansell* v. *Waterhouse*, 6 M. & S. 385; and in such a case the Judge should look at the actual facts as well as at the plaint and particulars: *In re Miron* v. *McCabe*, 4 Prac. Rep. 171.

A. Wilson, J.—In *Jennings* v. *Rundall* it was decided that a cause of action founded on contract cannot be declared on as a tort so as to exclude the plea of infancy; that to such a tort infancy may be pleaded because it is founded on contract. In that case the defendant was charged with immoderately driving the plaintiff's horse, by means of which it was injured. The count was, "that the plaintiff on, &c., at the request of the defendant, delivered to the defendant a certain horse of the plaintiffs, to be moderately ridden, yet defendant contriving and maliciously intending, &c., wrongfully and injuriously rode the horse, &c."

The authorities to which I have been referred, shew that the plaintiff could not have proved his case without first of all proving a contract for the particular act of hiring. In this respect an action against a common carrier differs from ordinary bailments, for against the common carrier there is a special customary common law obligation, which renders him liable upon his duty independently of contract altogether.

In this case, suppose there had been two persons who had hired the horse, and only one had been sued, could he not have pleaded the nonjoinder of the other? I think he could.

The plaint or particulars here shew that the defendant "undertook and agreed to take good care, &c.," which is certainly a contract: *Chitty* on Pleading (6th ed. 87.)

The fact that the defendant got a non-suit on this same complaint, which he could not properly have got if the court had no jurisdiction, and the fact that he moved for a new trial—which he could not have got either—shew, as the fact is alleged, that the defendant never set up the want of jurisdiction, and therefore that no want of jurisdiction ever appeared by the evidence, and none, I think, appear on the face of the proceedings, but the contrary.

I have delayed this in consequence of the pressure of term business, and not for any difficulty in coming to a conclusion, for the opinion I express now is the same as that which I stated during the argument.

Summons discharged without costs.

INSOLVENCY CASES.

Sharp & Secord v. Robert Mathews.

Insolvent Act 1864, sec. 3, cl. e. and sub-sec. 7—Writ of attachment, Grounds for—Affidavit—Form of, and who can make.

The mere intention on the part of a debtor to dispose of his property, and the apprehension of his sole creditor that he will not then, although perfectly able, and owing no one else, pay the creditor his debt, does not bring the debtor within sec. 3, clause e., of the Insolvent Act, 1864.

In entitling affidavits for an attachment under the Insolvent Act, 1864, form F. should be followed.

Sec. 3, ss. 7, is complied with, although the creditor or his agent who swears to the debt is also one of the two persons testifying to the facts and circumstances relied on as constituting insolvency.

[Chambers, Jan. 26, 29, 1869.]

On the 6th of January, the Judge of the County Court of the county of Wentworth made an order for a writ of attachment to issue out of that Court against the above named defendant, as an insolvent, at the suit of the above plaintiffs. On the 7th of January the writ was served. On the 9th of January the defendant filed his petition in the County Court praying that the writ of attachment might be set aside. The petition was accompanied with the affidavits of the defendant, and of two other persons, testifying to the *bona fides* of the transaction, which the plaintiffs assailed as exposing the defendant to

compulsory liquidation under the Insolvent Act. The petition also assailed the proceedings of the plaintiffs as defective in the following particulars: 1st. That the affidavits filed by plaintiffs disclosed no grounds to warrant the order and writ of attachment. 2nd. That they shewed that defendant was not insolvent. 3rd. That they afforded no sufficient evidence that he had parted with his estate and effects with intent to defraud, defeat, or delay creditors. 4th. That the said affidavits are entitled in a cause, whereas there was not, until the issuing of said writ, any cause in Court.

Upon this petition a summons was issued, calling upon the plaintiffs to shew cause why the writ of attachment should not be set aside. Upon this summons being heard, the Judge, on the 19th day of January, made an order setting aside the writ of attachment, and all subsequent proceedings on the merits.

Notice of an application for allowance of an appeal from this order was given. On its return,

J. B. Read opposed the allowance, as well on the grounds stated in the defendant's petition in the County Court as on the merits disclosed in the affidavits filed by the defendant with that petition.

Gwynne, J.—I am of opinion that no appeal should be allowed in this case, and that the order of the Judge setting aside the writ of attachment was a proper one to be made in the premises. The affidavits filed, on which the writ of attachment issued, do not, in my opinion shew that the estate of the defendant has become subject to compulsory liquidation. It appears by the affidavit of the plaintiff, George Reid Secord, that the plaintiffs are the defendant's sole creditors: that within a few days preceding, the defendant had sold and disposed of real estate in the city of Hamilton for $1,900, receiving in payment therefor cash and mortgages, and that he is now about to assign said mortgages with intent, as the deponent believes, to defraud the plaintiffs of their said debt: that the defendant has not, to the best of deponent's knowledge and belief, any other assets or property of any value that are or can be made liable for the payment of the said debt: that the debt has been overdue for some time — that, in brief, he has the means of paying the plaintiffs' debt, which is the only debt due by him, and that he refuses to pay it, or to give the plaintiff any satisfaction as to what he is going to do with the proceeds of the sale of the land further than that he would pay his debts, and that, with reference to the plaintiffs' claim, defendant said that he would pay just as much as he had a mind to. The affidavit has attached to it a copy of a letter from a gentleman acting as solicitor of the defendant, in which the defendant disputes the correctness of the amount of the plaintiffs' claim and offers, without prejudice, $200 for a discharge in full. There was also an affidavit of the plaintiffs' book-keeper, deposing to the correctness of the amount claimed by the plaintiffs, viz , $509. This deponent also swears as follows: "I am credibly informed and verily believe that the defendant has lately disposed of his property and is now about to assign and dispose of the mortgages taken by him for the balance of the purchase money thereof, with intent to defraud the plaintiffs of their debt." There was also an affidavit of Mr. Gibson, a solicitor, who deposes as follows: "I am aware of the defendant having, during the past week, sold lot number three in Moore's survey of this city, a portion thereof to one George Matthews for the sum of $700, and the remainder of the said lot to one Robert Kelly for the sum of $1200. The said Robert Kelly paid in cash the sum of four hundred dollars and gave a mortgage to the said defendant for the balance of $800. I am not aware what amount was paid down by the said George Matthews, but I think there was about $300, and a mortgage was given by the said George Matthews to the defendant for the balance. In the carrying out of said sale I acted for Robert Kelly, one of the purchasers, and in the course of the transaction, Mr. Sadleir, solicitor for said defendant, said, in my presence, that he would want to have access to the abstracts of title as he was going to negotiate the mortgages."

Now these affidavits show that the sale of the land was *bona fide* for value, and all that the application for the attachment rests upon is the affidavit of the plaintiff Secord and that of his book-keeper, that in their belief the defendant is about to assign them with intent to defraud the plaintiffs of their claim, without any facts or circumstances being stated or at all shown to lead to that belief, unless it be what is stated in Mr. Gibson's affidavit that Mr. Sadleir said he would want to have access to the abstracts of title as he was going to negotiate the mortgages. Now if the intended disposition of the mortgages is by actual sale of them and not a *fraudulent* disposition of them, I apprehend that the entertaining such an intent to make an actual sale would no more expose a person to compulsory liquidation than the actual sale itself would. The whole gist of the affidavits of plaintiff and his book-keeper must, I think, be taken to be merely that the defendant intends to make sale of his property, that is, an actual out and out sale; but that they apprehend he will not then, although perfectly able and owing no one else anything, pay the plaintiffs their debt. I do not think the entertaining such an intent brings the party entertaining it within the clause *c* of the 3rd sec. of the Insolvent Act. But then, in his petition to set aside the writ of attachment, the defendant swears that he sold the land to pay off a mortgage upon it, by which he was subject to 10 per cent interest: that he has paid off that mortgage, and that he does intend to sell the mortgages taken by him for balance of purchase money for the purpose of paying the plaintiffs what he believes he owes them and of supporting his family, and he denies that he owes the plaintiffs anything like the amount claimed by them to be due. This affidavit is accompanied by affidavits of George Matthews and Kelly, who swear that their purchases were *bona fide* and made for full value. I can see nothing in the affidavits to justify a suspicion of fraudulent disposition of property, of an attempt fraudulently to dispose of property within the meaning of the Insolvent Act.

I have been asked to express my opinion upon two minor points which in the view I take

are not necessary to be decided in this case, namely, whether the affidavits filed in the application for the attachment are properly entitled, and whether sub-sec. 7 of sec. 3 requires that the two persons to speak to the facts and circumstances constituting insolvency within the meaning of the Act, must or not be other persons than the creditor or his agent testifying to the debt. I entertain no doubt that it is proper to entitle the affidavits with the names of the plaintiffs and defendants as in the form F given in the statute. The 13th sub-sec. of sec. 11 enacts that the forms appended to the Act, or other forms in equivalent terms, shall be used in the proceedings for which such forms are provided, and it appears to me to be always best to follow the forms given by an Act. The very first paragraph of the affidavit speaks of a cause, although, strictly speaking, there is none until the writ issues, and of a plaintiff in the cause. The second speaks of "the defendant" as likewise does the third. These expressions plainly point to the cause in the title of the affidavit, and if this should be omitted the frame of the body of the affidavit would be insensible.

It appears to me also that sub-sec. 7 of sec. 3 is complied with, although the creditor or his agent deposing to the debt should be also one of the two persons testifying to the facts and circumstances which are relied upon as constituting the insolvency. I see no reason why we should introduce into the statute the word "other," which the legislature has not thought fit to introduce between the words "two" and "credible persons" so as to make it read "and also shew by the affidavits of two other credible persons," &c. It might be that a creditor and his clerk could give the clearest evidence of insolvency and liability to compulsory liquidation from the lips of the debtor himself to them in private which could not be established otherwise, and in such case, although there were two credible persons, the attachment might be deferred injuriously to the creditors, but whether it would be desirable or not desirable to have two persons other than the creditor to speak to the acts of insolvency it is sufficient to say that, in my opinion, the statute does not say that it is requisite. It is said that the preceding clause indicates the intention of the legislature that in Upper Canada the creditor should not be one of the two because it provides that in Lower Canada the creditor alone may prove the debt and the acts of insolvency. Why the creditor alone should be deemed sufficient in Lower Canada and not in Upper Canada I cannot say, but I see no necessary inference from that, that he cannot be one of the two required in Upper Canada. If the legislature intended to exclude him it would have been very easy to have done so by the insertion of the word "other," moreover the form of affidavit given is the same in Lower Canada and Upper Canada for the creditor to make, and plainly contemplates that he may state the facts relied upon as rendering the debtor insolvent.

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* The defendant shortly afterwards sold the mortgages and absconded from the country.—Rep.

COUNTY COURT CASES.

Bailey v. Bleecker.

(In the County Court of the County of Hastings, before His Honor Judge Sherwood.)

Trespass—Jurisdiction—Title to land—Ousting Jurisdiction.

One H. sold to defendant timber standing on his land, and afterwards conveyed and gave possession of the land to plaintiff. The defendant proceeded to take off the timber. *Held*, that the title to land was not in question, and that trespass to land would lie in the County Court.

This was an action of trespass. The declaration contained two counts: 1st. trespass to the N. W. ¼ of lot 26, in the 13 con. township of Huntingdon. 2nd, That defendant converted to his own use and possession certain trees of the plaintiff's.

On the trial the plaintiff after proving that defendant entered on the N. W. ¼ of lot 26, in 13 con. of Huntingdon, and cut down and cut into saw logs a certain number of trees and took them away, put in a deed from one Hicks to the plaintiff of this portion of lot 26. He also gave evidence that plaintiff had also used acts of ownership over it, by taking off building timber, staves, and waggon spokes; and that there was a fence between this and the remainder of the lot occupied by Hicks. The plaintiff finding his evidence applicable to lot 6 instead of 26 mentioned in the declaration, asked leave to amend and the defendant's counsel asked leave, if leave to amend, granted to plead anew, which was granted, on condititon that he should be at liberty to do so. The plaintiff's counsel declined the amendment on these terms. On the part of defendant, his foreman swore that he purchased the timber from Hicks, and paid him for it. The lot was shewn from the evidence to be a wild lot, not enclosed.

At the close of plaintiff's case, defendant's counsel moved for a nonsuit, on several grounds which were overruled. The case went to the jury, and verdict for plaintiff.

In last term defendant moved for a new trial on the grounds: 1st. that plaintiff did not prove that he ever possessed the land on which the alleged trespass was committed, *nor any title thereto.*

2nd. That the judge permitted plaintiff to produce and prove the consideration of a deed from one Hicks to plaintiff, without which no right of action could have been made out in plainiff. He also asked for a stay of proceedings, on the grounds that the title to lands came in question, and that on production and proof of the title from Hicks' title was at once brought in question.

Sherwood, Co. J.—It appeared in evidence that Hicks was in possession of the whole of lot number 6, as much as any person could be in possession of a wild lot, and that while in such possession, he conveyed the north-west quarter, on which the trespass was committed, to the plaintiff. This appeared to me at the trial (and I have seen nothing since to change my opinion), to give him a sufficient possession, taken with the acts of ownership exercised by himself to enable him to maintain this action. He proved a *prima facie* title, which was not in any way controverted by the defendant.

The question of jurisdiction is an important one, and on the whole, I cannot say, I am free from doubt. The County Court Act gives to that Court, jurisdiction in any action except the cases

referred to in the 16th sec.; and the first of them is where the title to land comes in question.

In order to the proper decision of this case, we must enquire if the title to land is here brought in question.

It is laid down in the books that the mere assertion of a title without proof of it, is not to be taken by a court as ousting it of jurisdiction. In the present case no evidence of title in the defendant was given. It is true that evidence was given, that the foreman of the defendant purchased the standing timber on the lot in question from Hicks. There was nothing to shew that he, after his conveyance to the plaintiff, had any title in it. The mere fact of a person having sold the timber to the defendant, whether he once owned the land on which it stood, or not, is not evidence of title. The counsel for the defendant did state that the land had been conveyed to the plaintiff by Hicks, his stepfather, to enable him to vote at an election, but no evidence was given to substantiate it. It is doubtful if there had been evidence to that effect, if it would have been evidence of title.

The County Court Act seems to me to authorize this court to try trespasses to land, as well as other suits in which the title does not come in question. I think that no further than by the assertion of the want of title in the plaintiff by the defendan the title came in question, and I do not consider that sufficient to oust this court of jurisdiction.

The defendant is entitled, I think, to judgment, on the issue to the first count. The verdict should be amended to correspond, as it was a mistake for it to be taken as general. I discharge the rule on condition of this being made a part of the rule.

Snider v. Bank of Toronto.

Interpleader—Claimant—Execution creditor—Insolvency—Bill of sale—Fraud—Defeating or delaying creditors—Fraudulent preference—Change of possession—Jurat.

Bill of sale of merchandize executed by S. and G., the consideration of which was for a pre-existing debt and cash he then advanced by S. to them. It was admitted, that they were unable to pay their debts in full. S and G. made the transfer at the request of the plaintiffs; and with the cash they received, they paid one debt they owed by 10s. in the £, and other small debts they paid in full in cash. The rest of the cash they offered, though not accepted, to pay 10s. in the £ to C. & C., who were holders of the notes sued on by the defendants in the original action.

The jury were told that if the object of the sale was merely to prevent other creditors from enforcing their claims, or of giving plaintiffs a preference as against the defendants or other creditors, it would be void.

Held, on the authority of *Wood* v. *Dixie*, 8 Q. B., 892, and *Graham* v. *Furber*, 14 C. B., 414, that it should have been left to them to say whether the sale to plaintiff was *bona fide*, for the purpose of relieving the execution debtors from the necessity of a forced sale of their goods, or for the mere purpose of protecting them from the claims of other creditors, in which latter case it would be void. But as the jury found generally for the plaintiffs, a nonsuit was refused.

Held, that it was no objection to the jurat of an affidavit that it did not shew that the two bargainees were severally sworn.

Sherwood, Co. J.—Interpleader to try the ownership of property seized on an execution, against the goods of Henry Colborne Snider and Nehemiah Gilbert, who formerly were in the business of grocers: and contracted the debt for which judgment was obtained against, and for which the execution issued. These parties commenced business in October, 1867, and in the month of May following sold and transferred to plaintiff by bill of sale, duly registered, the goods they then had on hand, at the invoice price amounting to the sum of nine hundred dollars or thereabouts; the consideration was paid partly by notes, which plaintiff had endorsed, and retired previous to the sale and partly by notes paid by them afterwards in cash. The defendants in the original action were examined as witnesses, and stated that finding themselves unable to pay their debts, at the request of the defendants, they made the transfer, and with the cash they received they paid one debt, they owed ot the rate of ten shillings in the pound, and other small debts in cash, and the balance of cash they divided between them, having first offered to pay Messrs. Clark & Clayton, who were at that time holders of one of the notes, and at the rate of ten shillings in the pound. They further stated that the business had been carried on in the same place by the plaintiffs, and Henry Colborne Snider went into their employment as clerk. The bill of sale was put in and proved.

The counsel for the defendants objected to the bill of sale as insufficient. The case went to the jury. I directed them that if they thought the younger Snider & Gilbert were unable to pay their debts, at the time of the execution of the bill of sale and the sale was made with the intention of delaying the defendants, or of giving preference to the plaintiff or other creditors in the recovery of their debts, the sale was void; and their verdict should be for the defendant, as far as the articles in the schedule attached to the record were transferred by them. On the other hand, if they found they were not insolvent and did not transfer for the purpose above mentioned, they must find for the plaintiffs.

In January term, 1869, defendant moved for a new trial, on the grounds that the verdict was contrary to law and evidence, that it was perverse and against the weight of evidence and contrary to the judge's charge. And for misdirection or non-direction in my not having decided that the evidence shewed that young Gilbert & Snider were unable to pay their debts in full, when the assignment was made and for not telling the jury that the evidence and case of plaintiffs shewed that the transfer was made for the purpose of defeating or delaying the creditors, of the transferrer, or with the intent of giving one or more of their creditors a preference. And that I should have directed a verdict for the defendants, at any rate, for the goods and chattels found to have belonged to the transferrers, and transferred. And that the transfer relied on was void under the statute by reason of the affidavit of execution being defective. And that I was wrong in charging the jury to distribute the verdict, in case they found the several questions submitted to them in the plaintiffs favor.

With respect to the misdirection or non-direction, it appears to me the questions of insolvency and the transference of the property, to delay creditors or for giving preference to one or more creditors, was a question entirely for the jury and not for me to decide. I left it to them, and I think all the cases bear me out in it. The case

of *Wood* v. *Dixie*, 7 Q. B. 892, which has been accepted as a leading case, both here and in England decides that the charge of the judge—that although the conveyance was *bona fide*—if there was an intention to defeat an execution creditor, the conveyance was void, was incorrect and going too far.

It does not make any difference since the jury found generally for the plaintiff, whether I directed them wrongly or not, as to the distribution. If the verdict had been for the defendants for any portion of property in question, then this question would have properly arisen.

With the respect to the objection to the affidavit, on the bill of sale. The objection is to the jurat and that it should have stated that the vendees were severally sworn. In the absence of any case upon this point, I am not prepared to pronounce the instrument void, on that account; and, even if it was, there is evidence I think of change of possession sufficient to meet the requirements of the law.

With respect to the objection that the verdict is contrary to law and evidence, and perverse, and against the weight of evidence, I must confess I have had great difficulty in coming to a conclusion, but on the whole, when I recollect that the plaintiffs paid full value for the goods—that the transfer was not only for the consideration of debt, already accrued, but for money advanced at the time of the execution of the bill of sale, I am not prepared to say that the jury was wrong in coming to the conclusion, that the transfer was not made with the intention of defeating or delaying the defendants, or giving a preference to the plaintiffs or other creditors.

I discharge the rule.

PROBATE.

In re goods of Snidef, deceased.

(In the Surrogate Court for the County of Hastings.)

Deed—Testamentary paper—Will revocable—Cancellation of administration—Probate.

One S. died in 1867, leaving his next of kin, who, believing that S. died intestate, obtained administration. G. afterwards found an agreement and will under seal of S. in the same paper in the possession of F. the only witness to its execution. By this paper S. agreed to convey part of a lot of land to G. on certain conditions. S. owned at the date of the paper, the other half of the same lot, and also some personalty. By this paper, in case the conditions were performed, S. devised *all his real* and personal estate to G. and his heirs. Some years after the date of the paper, S. conveyed the other half of the lot to G. the devisee and took a mortgage for the balance of the unpaid purchase money.

Held, that this paper was a will and not a deed and therefore not revocable, but although the subsequent conveyance to G. and reconveyance by way of mortgage to S. might have the effect of revoking *pro tanto* the will relating to the realty—yet it had not the effect of revoking it as to the personalty.

Held, also, that it was a good will of the personalty, notwithstanding it devised real estate and only one witness of its execution.

Held, also, that the letters of administration must be brought in and cancelled, and the paper admitted to probate.

Sherwood, Co. J.—The petitioner David Glover asks to have the letters of administration of the estate of Snider granted to James Cole, on the 11th February, 1868, revoked, on the ground that the said Snider made a will in his favor dated 1st March, 1860. He files a writing of that date made by Snider in the presence of one James Farmer, who was called and proved its execution. He states that petitioner and Snider came to him and stated an agreement that they had entered into between them, and that Snider afterwards came to him to have it reduced to writing, which he did, and after it was read over to him, Snider signed it. The writing sets forth a sale of one half the lot Snider was then living on to the petitioner, his wife's brother, for the sum of eight hundred dollars, to be paid at such time as Snider might want it, to enable him to pay his lawful debts. It states a further agreement, that petitioner was to come and live in Sniders house, and to work his land with such help as Snider might be willing to afford him. That petitioner was to dispose of anything that the farm might produce, to pay debts, and if there should be anything left after paying up all debts, (I understand it Sniders debts), petitioner was to give Snider one half. Snider further agreed not to sell or let his part of the land to any person without petitioners consent, and he further agreed, after his death whatever property he might be the owner of, either real estate or otherwise, he did bequeath to the petitioner, his heirs and assigns for ever; with this provision, that in case his wife Maude, should live longer than himself that petitioner should support her as long as she might live. He further agreed to leave the agreement with James Farmer the witness to keep for him, and that he was not to give it up unless petitioner and he should require him to do so, and also, that if petitioner should fulfil the conditions of this agreement, and that they should not call on Farmer to give up the agreement, then that the written agreement should be his last will and testament, and whatever property he might be the owner of at his death, either real or personal, he gave to the petitioner, his heirs and assigns forever. Evidence was given by the petitioner of payment of debts, by him due by Snider, and there was no evidence that Snider ever asked for the agreement, that Mrs. Snider died before Snider. On the part of the administrator it was shown that Snider had conveyed the lot (mentioned in the writing as sold to the petitioner), and had taken a mortgage for a part of the purchase money; and that he afterwards sold the rest of his land to the petitioner, taking back a mortgage for the unpaid purchase money, that Snider lived with petitioner until his wife's death, when he went to live with Cole the administrator, with whom he lived until his own death. Declarations of Snider to the effect that petitioner was to have all the property at his death made by him at different times were given in evidence to shew, that he never intended to revoke his will if it be one. On the other side it was given in evidence, that about the time of the funeral the petitioner expressed himself as having no claim on Sniders estate, and that he knew of no will. And Cole (who was examined by consent of both parties), stated, that Snider had promised to leave to him his property, and if he left him to pay him at the rate of $3 per week for his board. It was stated that Snider told him he left petitioner because he was lonely after his wife's death and that Glovers children annoyed him.

The question is, can the writing put in evidence, or any part of it, be considered a will? If so,

was it conditional,—have the conditions been complied with? In Williams on Executors it is stated, "There is nothing that requires so little solemnity (said Lord Hardwicke) as the making of a will of personal property, according to the ecclesiastical laws of this Realm for there is scarcely any paper writing which they will not admit as such. It is enough if the paper writing contains a disposition of the property to be made after death, though it was meant to operate as a settlement or a deed of gift, or a bond, and though such paper writing was not intended to be a will."

It appears to me that the writing comprises both an agreement and what was intended for a will; that the evidence shews that the agreement which was for the sale of a portion of Sniders land was carried out by the parties, and that petitioner did pay debts for Snider, and it does not appear that Snider at any time complained, that the petitioner had not performed his par of this agreement. It also appears in evidence that the agreement or writing, never was called for by the parties to it. There is evidence to satisfy me that the conditions have been performed. As respects the real estate, I suppose there can be no doubt, that this instrument could not be considered a valid will. But, with this we have nothing to do. The question is, is it a will or testament as regards the personalty. I do not understand that if the writing is a will, that any objection was made to its due execution. Under the statute of Victoria in England, the execution of this will as regards personalty would not be sufficient. The law here is still the same as in England previous to the passing of that act.

I think I am justified by the authorities cited, in looking upon the latter part of the writing proved as a will, sufficient to pass the personalty, and must therefore order a revocation of the letters of administration to Mr. Cole, and direct that letters with the will annexed be issued to the petitioner.

Costs of former letters, and of this contestation to be paid out of the estate.

ENGLISH REPORTS.

COMMON PLEAS.

Pegler v. Gurney and Hoare.

The expression "twenty-one days" in clause 2, of section 6, of 31 & 32 Vict. c. 125, means twenty-one days exclusive of all Sundays.

[17 W. R. 316, Jan. 11, 1869.]

This was the case of the Southampton election petition. A rule was moved for to-day on the part of the respondent Hoare, calling upon the petitioner to show cause why the petition should not be taken off the file, on the ground that it had not been presented within twenty-one days, as required by 31 & 32 Vict. c. 125, s. 6.

The facts were these:—The petition had been presented within twenty-one consecutive week-days, but not within twenty-one consecutive days if Sundays were counted as days.

Staveley Hill, Q. C. (*Jelf* with him), for the respondent Hoare.—The section which is against my contention is section 49 of 31 & 32 Vict. c. 125, which is as follows:—"In reckoning time for the purposes of this Act, Sunday, Christmas-day, Good Friday, and any day set apart for a public fast or public thanksgiving, shall be excluded." I read that section as meaning that Sunday is not to be counted where the last of the twenty-one days happens to be a Sunday. [Montague Smith, J.—The Act says "in reckoning time."] The word in the Act is Sunday, and not Sundays. There are two periods mentioned in clause 2 of section 6 within which, according to circumstances, the petition must be presented; one period is the twenty-one days we are discussing, and the other is the period of twenty-eight days. I contend that these periods mean respectively three weeks and four weeks, and that if Sunday comes on the last day, then, but only then, it shall not be counted.

Bovill, C.J.—I am of opinion that section 49 excludes all Sundays in reckoning the twenty-one days. Your rule must, therefore, be refused as to that particular ground.

Byles, Keating, and Smith, JJ., concurred.

Chorlton v. Lings.

Mary Abbott's Case.

A woman cannot, either at common law or by statute vote for a member of Parliament to represent a borough. *Semble*, it is the same in the case of a county.

[17 W. R. 284, C. P. Nov. 7, 9.]

This was an appeal from the decision of the Revising Barrister. The following was the case:—

At a court held at the town hall in the city of Manchester on the 15th day of September, 1868, for the revision of the list of voters for members of Parliament in the parliamentary borough of Manchester, before John Hosack, Esq., the Revising Barrister, Mary Abbott, appearing on the list published by the overseers of claimants to votes in the township of Manchester, was duly objected to by Matthew Chadwick, a person on the list of voters for the said parliamentary borough.

The name of the said Mary Abbott appeared upon the list of claimants in the following manner:—

Abbott, Mary	51, Edward-st.	House	51, Edward-st.

It was admitted that the said Mary Abbott was a woman of the age of twenty-one years and unmarried, and that she had for twelve months previously to the last day of July, 1868, occupied a dwelling-house stated in the said claim with the said claim within the said township for such occupation, and that she had paid the rates for the relief of the poor assessed in respect of such dwelling-house before the 20th day of July last, and in other respects had complied with the requirements of the Registration Acts.

On behalf of the claimant it was contended that under the existing statutes the claimant was duly qualified and entitled to be registered as a voter and when registered to vote in the election of a member of Parliament, and that women for the purpose of being registered electors and voting in elections for members of Parliament are not subject to any legal incapacity.

It was maintained, on the part of the objectors, that under the existing statutes the claimant was disqualified on account of her sex.

The revising barrister held that Mary Abbott, being a woman, was not entitled to be placed on the register, and her name was erased from the said list of claimants.

There were also struck out of the list the names of 5,346 whose names and qualifications are set forth in the schedule, and as the validity of their claims depends on the same point of law as that raised in the case of Mary Abbott the appeals were consolidated.

If the Court shall be of opinion that the said Mary Abbott is not entitled to have her name inserted in the list of voters for the said borough of Manchester then such names and the names referred to and set forth in the schedule above mentioned will remain erased; but if the Court shall be of opinion that the said Mary Abbott is entitled to have her name inserted in the said list of voters then her name and the said names referred to and set forth in the schedule are to be restored.

The following are the appellant's points for argument:—

1. That there is no disability at the common law whereby a *feme sole* otherwise duly qualified is prevented from voting in the election of a member or members of Parliament.

2. That the Representation of the People Act, 1867, section 3 confers the right to be registered, and when registered to vote for a member or members to serve in Parliament for a borough, on every man who is qualified as in such section is mentioned.

That in the 13 & 14 Vic. c. 21 (Lord Romilly's Act), it is declared by section 4, 'that in all Acts words importing the masculine gender shall be deemed and taken to include females unless the contrary is expressly provided.' That the words 'every man' denote the masculine gender, and that in the Representation of the People Act, 1867, the contrary is not expressly provided. Therefore, the words include 'every woman' and that a *feme sole* duly qalified according to the provisions of the said last mentioned Act is entitled to be registered, and when registered to vote for members of Parliament.

Coleridge, Q. C., (*Dr Pankhurst* with him), for the appellant.—My main argument is this—women have this right at the common law, they have in ancient times exercised it, and no statute has ever taken it away. This is my main argument, and I shall enter upon it at once, though, of course, I also rely upon the construction of the word "man" in the Representation of the People Act, 1867. I shall, however, make that point last. Now, as to the position that at common law women have this right, and have in ancient times exercised it, the argument as to sex cannot be local; if, therefore, I can satisfy your Lordships that in counties the right was anciently exercised by women, that argument will avail for the present case, though it is the case of a borough. The fitst statute affecting the franchise in counties is 7 Hen. 4, c. 15. The words are, "From henceforth the elections of such knights shall be made in the form as followeth; (that is to say) at the next county to be holden after the delivery of the writ of the Parliament, proclamation shall be made in the full county of the day and place of the Parliament, and that all they that be there present, as well suitors duly summoned for the same cause as other. shall attend to the election of the knights for the Parliament, and then in the full county they shall proceed to the election freely and indifferently, notwithstanding any request or commandment to the contrary; and after that they be chosen, the names of the persons so chosen (be they present or absent) shall be written in an indenture under the seals of all them that did choose them, and tacked to the same writ of the Parliament, which indenture so sealed and tacked shall be holden for the sheriff's return of the said writ, touching the knights of the shires."

Now, here the suitors are those who are to have the franchise, and why not female suitors as well as male suitors? In 1 Hen. 5, c. 1, again, the words used are large enough to include both sexes. and I shall show as a matter of evidence, that women did in fact exercise the franchise. Now the elections for counties were held in the county court: 1 Bl. 178. What was this county court? It was a court where the freeholders were judges: 1 Reeves, 47. [Bovill, C. J.—In Saxon times there is no mention of anything in their Parliaments except of wise *men*.] I am not speaking of the Witenagemote, but of the county court, to which clearly women as well as men must have been suitors, and it was in these county courts that the elections for the knights of shires were held. Now I contend that it is for my learned opponents to show that the county court held for the election of the knights of shires was different from the ordinary county court which tried causes. If the statute of Marlbridge, 52 Hen. 3, c. 10, be referred to, it will be seen that women attended the county court on some occasions, for the following passage is to excuse the attendance of nuns on certain occasions, namely, when members of Parliament were to be elected: "De turnis vicecomitum provisum est, ut necesse non habeant ibi venire archiepiscopi, episcopi, abbates, priores, comites, barones, nec aliqui viri religiosi, nec mulieres, nisi eorum presentia ob aliquam causam specialiter exigatur." Now if we go back to early parliamentary history, we shall find that the method of returning members was by indenture; the electors, or some of them, executing the indenture. Copies of such indentures are to be seen in Prynne's Brevia Parliamentaria Rediviva, 152, 153. I have also here certified copies of such indentures from the Record Office, one or two of which I refer to. They contain the names of women as returning the members. The several dates of these returns are, 13 Hen. 4; 2 Hen. 5; 7 Edw. 6; 1 & 2 P. & M.; 2 & 3 P. & M. [Willes, J.—In the last case, the woman is the only person who executes the indenture. That looks rather as if she was the returning officer, which she undoubtedly might be]. But that will not account for the case in 7 Edw. 6. There, the woman is mentioned in conjuuction with others as sending up the members. [Bovill, C. J.—The writ in the case in 2 & 3 P. & M., is directed to the lady. Would not that make her the returning officer?] It is not so in the case in 1 & 2 P. & M. Heywood, in his treatise on County Elections, 2nd ed, p. 255, says that it is usual to cite Coke's 4th Inst.

against the right of women to vote. Now, I maintain that all the other exceptions in that passage (4 Inst. 5) are erroneous. For example, he says that clergymen labour under a legal incapacity to vote. [Bovill, C. J.—Have you any example of clergymen voting before Lord Coke's time?] There is an archbishop in one of the writs I have cited. I am speaking without book, but I think there is no doubt that the clergy had given up their right to tax themselves separately before 1664 (3 H. C. H. 243, 10th ed.). I have the most unfeigned respect for Lord Coke's learning, but he had his weaknesses like other men, and one of them may have been a dislike of the clergy. He had no special reason to like women. Heywood goes on to say that notwithstanding my Lord Coke's opinion, women have as a fact in ancient times exercised the franchise, and in the note to p. 256 he gives at length a return for a borough by dame Dorothy Packington in the 14 Eliz. [Bovill, C. J.—There is another passage in Heywood, at p. 255, in which he states what the law was in 1812, and that is against you.] In 2 Luders, 13, there is cited a burgess and freeman's roll of the 19 Eliz. for the borough of Lyme Regis on which the names of three women stand as burgesses and freemen. This is important, because this list would have been used to prove the right to vote at elections. [Bovill, C. J.—Yes, but these entries of the women's names might have been for the mere purpose of securing the right of voting for their future husbands.] Supposing the right to have once existed, I now come to the question, has any statute ever taken it away? Because if not, mere nonuser cannot have such an effect. The statute 8 Hen. 6, c. 7, is the well known statute restricting the right to vote in counties to forty-shilling freeholders. Assuming that up to this time a woman had the right to vote, what is there in this statute to deprive her of that right, if she but had a forty-shillang freehold? There is nothing. The word in the statute, which of course is in Norman-French, is "Gens." [Bovill, C. J.—Have you read the title of the statute?] Yes. It is there "men." But the title is in English; it was probably added later on. You cannot rely on translation in such a case, and even though the heading were made in English at the time the statute was passed, yet it forms no part of the enactment. [Willes, J.—Treby, J., says that the old statutes had no headings.] Now this statute being in restraint of the franchise, had it been in view to take it from women, that would have been expressly done. As to the subsequnt statutes dealing with the franchise, while I do not contend that they specially refer to women, I yet maintain as to all of them, that they contain words large enough to include women. Such statutes are 10 Hen. 6 c. 2; 7 & 8 Will 3, c 4, 25; Anne c. 23; 2 Geo. 2, c. 24; 20 Geo. 3, c. 17. Next, as to the construction of the word "man" in the Representation of the People Act, 1867. There is a vast number of statutes in which the word "man" is used in the sense of both man and woman. Hence if no reason be shown in the present case why it should have a different meaning the more ordinary statutory sense must be given to it. Consider sections 18 and 19 of the Reform Act, 1832; 2 & 3 Will. 4, c. 45. If we compare the phraseology of the sections I think we must conclude that where women already had votes as freeholders or burgesses they were meant to retain them, but that where fresh votes were conferred on copyholders, then women copyholders were not to acquire the right of voting, but men only were to do so. The late Reform Act, I contend, leaves the rights of women as compared with those of men where it found it. The great point which will doubtless be made on the other side is that for centuries no woman as a fact has voted. All that Lord Coke's opinion and the opinion of those lawyers who have followed his dictum amonnt to, is this, that for centuries the current of opinion has been against the right of women to vote, not throughout all the time, but at the particular time when the particular opinion was given. But it is hardly necessary to maintain that if the right once existed, non-user could not take it away. As to the application of Lord Romilly's Act, 13 & 14 Vict. c. 21, s. 4, to the interpretation of the word "man," as used in the Representation of the People Act, 1867, we must remember that Lord Romilly's Act was passed in 1850, some time after the Reform Act of 1832, and therefore at a time when the claims of women to vote had at least been heard of and discussed in modern times. Lord Romilly's Act may, therefore, be said to have been passed with a consciousness that it might very probably be employed before long to the very purpose to which I seek to apply it to-day. [Keating, J.—Does is appear on the case that the appellant here claims under the franchise created by the Act of 1867?] [*Mellish, Q. C.*—It does not appear on the case, but it is the fact.] In *Olive* v. *Ingram*, 7 Mod 263, Stra. 1114, the decision did not require the *dictum* upon which I rely; but in the judgment of Lee, C. J., a MS. case is cited in which the *dictum* was necessary. The case of *Olive* v. *Ingram* decides that a woman may be a sexton, and may vote for the election of a sexton. Now, I admit that of 7 Mod, is not of high authority. But the case was so *decided*, as we learn from Strange, who was then Solicitor-General, and in the case. [Willes, J.—Have you any case where a woman, as the suitor to the county court, acted as judge?] I am not aware of one. Again, in *King* v. *Stubbs*, 2 T. R. 395, the question was whether a woman might be overseer of the poor. Now, the case itself does not carry the matter any further; but the reason given by the Court for its decision is most important. The decision is put on the ground of the phraseology used in the 43 Eliz.—"The only qualification required by 43 Eliz. is that they shall be *substantial householders;* it has no reference to sex:" 2 T. R. 406. Again, in *R.* v. *Crosthwaite*, 17 Ir. C. L. Rep. 157, 463, women were held entitled to vote for a town commissioner, as being included in the description "every person of full age who, &c.," contained in a certain section of a certain Act. That case was, it is true, reversed on appeal to the Irish Exchequer Chamber. But of the entire Bench taken together it will be seen that a majority were in favour of the original decision. If the present question be regarded as one of constitutional law, and it is difficult to see how that can be avoided, we must remember that all great constitutional writers make English free-

dom to depend to a great extent on the connections between the right to vote and the liability to taxation. Why are women to form a striking and un unfair exception to this rule?

[The learned counsel then proceeded to discuss the fitness of women for the exercise of political rights; but as in this part of his argument he did not introduce any additional legal matter, it is not here given.]

Mellish, Q. C. (*R. G. Williams* with him), for the respondent.—This is a case where the lady claims to vote for the borough of Manchester. That borough was created by the Reform Act of 1832. Now, my learned friend admits that the phraseology of that Act cannot be strained so as to include women among the electors to whom the franchise is given for the first time by that Act. Therefore, so far as the borough of Mancaester is concerned, and, therefore, so far as the present case is concerned, the contention of my friend must rest on the construction of the Representation of the People Act of 1867.

Now it is admitted that, when that Act was passed, the common opinion was that women had not the right to vote, and therefore that Act was passed in view of that opinion. But I contend that the opinion which has prevailed for so long on this subject, both among lawyers and among ordinary persons, is strictly in accordance with the common law. In the first place, this common opinion is proof of what the common law is, in the absence of any proof to the contrary. Of course there may exist strong evidence which will rebut this presumption, but I submit that no such evidence has been adduced to-day by my friend.

There are two questions as to section 3 of the Act of 1867. First, does "man" include woman? and, secondly, is sex an "incapacity"? I can't see that, without Lord Romilly's Act, my friend has any case, though he seemed to think but poorly of the assistance he was to derive from that Act. Now the Act to be construed is not Lord Romilly's Act, but the Act of 1867. If your Lordships can gather in any way permitted to the judicial mind that the Legislature did not intend to include women by the Act of 1867 your conclusion cannot be affected by any difficulties of construction consequent on Lord Romilly's Act. Now, if the Legislature had intended to make this change, would they have done it in this way, this very vague and uncertain way. The 56th and 59th sections of the Act of 1867 throw some light on this point. By these sections, the two Acts of 1832 and 1867 are to be construed together. How can we possibly read these Acts together if Lord Romilly's Act, which was passed in 1850, is to be applied to interpret the one Act and not the other.

The word "man" no doubt itself admits of two constructions (1) in opposition to angels and beasts, and (2) in opposition to infants and women. If it is used in the latter sense in section 3, the contention is at an end. Surely that is what it does mean. If you take it in connection with the Reform Act of 1832 how could it mean anything else. By "male person" in the Act of 1832 the Legislature clearly meant this, and it must therefore have meant the same in section 3. For example, section 27 of the Act of 1832 applies to males only, but to males in warehouses, &c. Whereas the Act of 1867 applies to dwelling-houses only. So, if section 3 were held to include women, we should have an absurd inequality; sex would in some instances operate as an incapacity, and in some instances it would not. Now clearly the Legislature could never have deliberately intended this. Consider the Mutiny Act, 30 & 31 Vict. c. 152. The expression there is that so many thousand "men" shall be raised. Would that authorize a recruiting serjeant to enlist women? I submit not. Yet this is since Lord Romilly's Act.

But if we leave the consideration of the late Act, and examine what the state of the law was anterior to its passing, I must say I rely equally with my friend on the phraseology of the early statutes. He says truly that the words in those statutes are very general, and in each case capable of including women as well as men. Quite so, but as a matter of fact such a construction as that contended for by my friend never was put on any of those statutes, as is sufficiently proved by the uniform practice that women did not vote at elections as far back as legal memory goes. For I contend that my friend has made out no case that they ever have voted in ancient times, and to that point I am coming in a moment. The statute 8 Hen. 6, c. 7, was a restraining statute. But I admit that that statute did not take away any franchise from women. If women had a right to vote before that statute they have it still if they are forty-shilling freeholders. And as to the latter statutes I equally concede to my friend that no rights were taken from women by them, for they are not disabling Acts at all. Now, I submit that whatever may have been the correctness of the opinion that women have not the right to vote at elections, at at any rate all the authorities show that in point of fact from the time of Coke to the present day women did not vote. What is the evidence with which my friend meets the presumption raised by this concurrent testimony? How does he seek to rebut the great opinion of Lord Coke? His authorities are very ambiguous. As to women being suitors to the county court, the fact of their being bound to come to the county court does not prove that they went there as suitors. Others than suitors we know were bound to go. The extracts from Prynne only show that in four or five cases women seemed to have signed the indentures. Now, if it be as my friend contends we have a married woman appointing an attorney, and that attorney voting for her, as will appear on looking at the returns. In these cases the women were probably the patrons of the borough, and in one case it is not certain that she was not the returning officer. You have thus three or four ambiguous signatures against the uniform usage and opinion of the last 300 years. It does not appear, indeed, except in the case where the woman's was the only signature, that the returns were disputed, and in that case the return was held bad. There is nothing to show that superfluous signatures would vitiate the return. In the case of *Olive* v. *Ingram* the dicta are more for me than they are against me, as will be seen by reading the judgment. Lee, C. J., it is true, gives contradictory opinions in different parts of his judgment, but in the conclusion he is in my favour. Therefore, in that case the authority of

the judges and the ground of the decision are in my favour. How, then, can you, in such a report as 7 Mod., attach any importance to the alleged production of a MS. case.

There is a unanimous decision of the Scotch Court of Session of Otober 30, 1868, in my favour though Lord Romilly's Act applies to Scotland. As to my friend's observations on the fitness of women for the franchise, I wholly decline to follow him into that question.

Colerige Q. C., in reply.

Cur. adv. vult.

The judgments were delivered on November 9. Those of Byles and Keating, JJ., were written, and are given here *verbatim.* Those of his Lordship and of Willes J., are taken from the short-hand writer's notes of what they said

[We have only space for the judgment of the Chief Justice.—Ed. L. J.]

Bovill, C. J.—It is quite unnecessary to consider the question, whether it is desirable that women should posses the franchise of voting at the elections of members of Parliament. What we have to determine is, whether by law they now possess that right. In the present case, it is agreed, the right of the appellant to be placed on the list of voters for the borough of Manchester must depend on the construction to be placed on the Representation of the People Act, 1867. Under that statute two questions arise, one whether women are included under the words "every man," and the other, whether women are subject to legal incapacity. If women are not included in the terms of the Act, or are so incapacitated, our judgment must be in favour of the respondent.

On the quesiion of whether they are incapacitated Mr. Coleridge, on the part of the appellant, contended that women had a right to the franchise at common law, that nothing has taken it away from them, and that they were therefore not incapacitated from voting. Indeed, in the first instance, I rather understood him to contend that the present appellant was entitled to the franchise as a common law right, and he fully argued that question.

The appellant has failed to produce before us any reported decision of any Court in favour of the right of women to the exercise of the franchise, in voting for members of Parliament, with the exception of the notes of cases which are referred to in 7 Mod. Mr. Coleridge was obliged to admit that for several hundred years no instance is to be found of the exercise by women of any such right. This alone is sufficient to raise a very strong presumption against the existence of the right in point of law.

It is true that a few instances have been brought before us where in ancient times—namely, in the reigns of Henry II., Henry V., and Edward VI., women appear to have been parties to returns of members of Parliament; and, possibly, other instances may be found in early times, not only of women having voted, but also of their having assisted in the deliberations of the Legislature, and, indeed, it is mentioned by Selden in his England's Epinomis, c. 2, s. 19, that they did so. But these instances are of comparatively little weight as opposed to uninterrupted usage to the contrary for several centuries. What has been commonly received and acquiesced in as the law, raises a strong presumption of what the law is. At least those who question it have the burden of proving that it is not what it has been so understood to be.

The statute 52 Hen. 3, c. 10, in relieving women from attending at the sheriff's tourn does not prove that they were entitled to or did vote at the elections. Neither is this shown by the names of women being included in the roll of burgesses and freemen of the borough of Lyme Regis as mentioned in 2 Luders. The records that were produced of the time of Philip and Mary show that dame Elizabeth Copely was a party to an indenture as returning officer, and that may possibly be the explanation of the previous return in the reign of Edward VI.

The same observation applies to the case of Lady Packington joining in an election for Aylesbury, as appears trom 7 Mod. 268. The precept was directed to her as lady of the manor to return two members of Parliament. With regard to the two cases mentioned in the report of *Olive* v. *Ingram*, 7 Mod. 263. they appear to have been cited from a MS. by Hakewell. The statement of them varies in different parts of the report, and though the argument was several times adjourned it does not appear that anything satisfactory was discovered respecting them. They are not even mentioned in the report of the same case by Sir John Strange, and I think that very little weight is to be attached to them. If there was any such decision—and one of the cases is said to have been decided in 14 James 1—it is difficult to understand why no further notice or trace of it is to be found or why it should not have been acted upon.

At this distance of time we have not the means of ascertaining accurately the particulars of those cases, or under what circumstances the returns produced to us were made, or whether any question was ever raised respecting them. The decisions as to what offices women may hold, and whether they come within the description of particular statutes does not materially affect us in this case. On the other hand Lord Coke, 4 Inst. 5, treats it as clear law, in the time of James 1., that women were incapacitated from voting, and in the case of *Olive* v. *Ingram* (temp. 12 Geo. 2) the majority at least of the judges, notwithstanding the two cases referred to, seem to have been of the same opinion.

In the work (published in 1812) of Mr. Serjeant Heywood, who was well acquainted with election law, women are classed among those who are incapacitated from voting. The same view has been accepted by Mr. Hallam and others in modern times, and was to some extent recognised in the Act of 1832, by the Legislature when it conferred the franchise on "male persons"

There can be no doubt that at the time of the passing of the Act of 1867 the common understanding both of lawyers and laymen was that women were incapacitated from voting, and the Legislature must, I think, be presumed to have acted under that impression.

The 56th section of the Act of 1867 also expressly preserves all laws, customs, and enactment then in force.

Mr. Coleridge has very forcibly contended that if women were ever entitled to the franchise

nothing has occurred to take it away. But the fact of its not having been asserted or acted upon for many centuries raises a strong presumption against its having legally existed, and considering that no reported decision or authority can be produced in favour of the right, that there are the opinions against it to which I have referred, and that there has been such long and uninterrupted usage to the contrary, I have come to the conclusion that there is no such right, and that women are legally incapacitated from voting within the meaning of section 3 of the Act of 1867.

Assuming, however, that the claimant was not legally incapacitated within the meaning of the late statute, the question then would arise, whether the franchise has been conferred by that Act and by force of the provisions of Lord Romilly's Act? This depends upon the construction to be placed upon the language of the Legislature in section 3 of the Act of 1867. It enacts that every "man," with certain qualifications, shall be entitled to the franchise.

In the Act of the 13 & 14 Vict. c. 21, s. 4, it is enacted that all words signifying the masculine gender shall be taken to include females, the singular shall include the plural, and the plural the singular, unless the contrary as to the gender or number is expressly provided. Now, in construing the third section of the Act of 1867 regard must be had to the whole of the enactment with a view to ascertaining whether the word "man" is there used in the sense of a person, or is equivalent to the expression "male."

By the 56th section of the Act of 1867 it is provided that the franchises conferred by the Act shall be "in addition to and not in substitution for, &c., &c."

By the 59th section it is enacted that the Act, so far as is consistent with the tenor thereof, is to be construed as one with the enactments for the time being in force relating to the Representation of the People and with the Registration Acts. By the Reform Act of 1832 the occupation franchise in boroughs is expressly given to "male persons" who shall be qualified as therein mentioned.

By section 33 of the Act of 1832 it is enacted, "That no person shall be entitled to vote in the election of a member or members to serve in any future Parliament for any city or borough, save and except in respect of some right conferred by this Act, or as a burgess and freeman, or as a freeman and liveryman, or in the case of a city or town being a county of itself, as a freeholder or burgage tenant as hereinbefore mentioned."

It is quite clear that women would not become entitled to the franchise under that Act. Now the two Acts are to be construed as one, and therefore we should endeavour, as far as possible, to put such a construction upon the latter Act as will make it consistent with the provisions of the former statute.

There is no doubt that in many statutes "men" may be properly held to include "women," whilst in others it would be ridiculous to suppose that the word was used in any other sense than as designating the male sex. We must look at the subject-matter, and at the general scope of the provisions of the later Act, as well as at its language, in order to ascertain the meaning of the Legislature. I do not think, from the language of the Act, that there was any intention to alter the description of the persons who were to vote. I should rather conclude that the object was to deal with their qualifications. If so important an alteration of the personal qualification was intended to be made as to extend the franchise to women who did not then enjoy it, and in fact were excluded from it by the terms of the former Act, I can hardly suppose that the Legislature would have made it by using the term "man." Indeed, in the very next Act, where it was intended to extend the Factory Act, females are expressly included.

The conclusion at which I have arrived is that the Legislature used the word "man" in the same sense as "male person" in the former Act, and that the word was intentionally used in order to designate expressly the male sex, and that it amounts to an express enactment and provision that every man, as distinguished from every woman possessing the qualifications, was to have the franchise.

In that view Lord Romilly's Act does not apply to this case, and does not extend the meaning of the word "man" so as to include women.

On this part of the case the decision of the Scotch Court of Session is also in point, and in that decision I entirely concur.

On both grounds, therefore, first, that women were legally incapacitated for voting for members of Parliament; and, secondly, that the section is limited to men and does not extend to women, I think that women are not entitled to the franchise, and that the decision of the revising barrister must be confirmed in this case and in the other cases which depend upon this case. But it is not a case in which costs should be given.

CHANCERY.

Briant v. Tibbut.

Practice—Leave to move to vary chief clerk's certificate, after expiration of time for moving—15 & 16 Vict. c. 80, s. 39.

Leave given to move to vary chief clerk's certificate, although application was not made until after the expiration of the eight days allowed by the order; the omission to make the application having arisen from pressure of business, and mistake as to time on the part of solicitor.

[17 W. R. 274, Jan. 15, 1869.]

This was an application on behalf of the plaintiff in the cause for leave to move to vary the chief clerk's certificate notwithstanding eight clear days had elapsed since the filing thereof.

The certificate was dated on the 17th of June, and filed on the 23rd of June last.

On the 22nd of June the plaintiff's solicitor received a report from an engineer relating to the finding of the chief clerk. The solicitor had a conference with the plaintiff on the same day, and received instructions to take the opinion of counsel. The solicitor, immediately after such conference, went to counsel's chambers, but not being able to meet with him, left the papers for his advice.

The solicitor, on the 29th of June, received a message from counsel asking for an interview, but was not able, in consequence of important business out of town, to see counsel until the 1st of July, when after a long conference, counsel advised proceedings to be taken to vary the cer-

tificate. The solicitor then found that the time for making the application to vary the certificate expired on that day, and leaving the chambers of counsel at about 3 30 p.m. he immediately proceeded to the chambers of Vice-Chancellor Giffard, to whose court the cause was at that time attached, and arrived there a few minutes afterwards, but found the chambers closed.

His Honour received a communication from the chambers of Vice-Chancellor Giffard to the effect that they were never closed before 4 p.m., even though all business was eompleted.

The following cases were cited:—*Ware* v. *Watson*, 4 W. R. 36, 7 De G. M. & G. 739; *Howell* v. *Keightly*, 4 W. R. 477, 8 De G. M. & G. 325; *Ashton* v. *Wood*, 5 W. R. 271, 8 De G. M. & G. 698.

Malins, V. C., was satisfied that the solicitor arrived at the chambers of the Vice-Chancellor after 4 p.m., but on the balance of convenience it was right to give the leave asked, for if the plaintiff was right on the merits he ought to succeed; if he were wrong the Court would so decide. To refuse the application wonld be too severe on the plaintiff. He must, however, pay the costs of the application.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Lorin Palmer v. George S. Harris.

A trade-mark having upon it a false statement which did not, and could not produce any effect upon the purchasers of the article, is nevertheless so tainted by the falsehood that equity refuses to protect it.

A trade-mark for a brand of segars, manufactured in New York, had upon it in Spanish words, which interpreted into English, mean: "Factory of segars from the best plantations de la Vuelta Abajo, calle del Agua, Habana." Equity refused, on the ground of the falsehood, to enjoin a printer from counterfeiting the device, and supplying the trade with his imitations.

This was an appeal from a decree of the Court of Common Pleas of Philadelphia, which refused to grant an injunction to restrain Harris from counterfeiting Palmer's trade-mark.

The facts were that Palmer, a dealer in segars, designed a label for a particular brand which he manufactured, and which had acquired an extensive popularity in the United States as the "Golden Crown." The label contained a golden crown, surrounded by a green wreath, and underneath this the words,

"Fabrica de Tabacos de las mejores Vegas,
de la Vuelta Abajo,
Calle del Agua No. 73, Habana."

Harris, the defendant, printed the imitation of the design, containing the same words, and supplied dealers in the segar trade with the counterfeits, and thus enabled them, by attaching the imitation to their own segars, to avail themselves of the reputation which Palmer had acquired, and deprive him of the exclusive use and benefit of his trade-mark. Palmer's design was copyrighted under the Act of Congress, February 3, 1831, 4 Stats. 436, sec. 1. The imitation was not denied, but the defence was, that the segars being made in New York, the label contanied a false and fraudulent representation, which equity would not protect. The court below dismissed the bill.

James Parsons for the appellant.—A trade-mark is a species of property. *Bradley* v. *Norton*, 33 Conn. 157: and entitled to protection (*Colladay* v. *Baird*, 4 Phila. 139; *Burnett* v. *Phalon*, 11 Tiff. (N. Y.) s. c. 3 Tr. App. 167, by injunction against one who imitates the trade-mark so nearly that a purchaser might be misled; a substantial similarity is sufficient; *Bradley* v. *Norton, supra; Coats* v. *Holbrook*, 2 Sand. Ch. 586, and cases cited; *Taylor* v. *Carpenter*, Id. 603, s. c. in error 611; *Partridge* v. *Heuck*, Id. 622; *Williams* v. *Johnson*, 2 Bosw. 1; *Stokes* v. *Landgraff*, 17 Barb. 608; *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sand. S. C. 599; *Wolfe* v. *Goulard*, 18 How. Pr. R.; *Clark* v. *Clark*, 25 Barb. 76; *Brooklyn White Lead Co.* v. *Masury*, Id. 416; *Walton* v. *Crowley*, 3 Blatch. C. C. 440.

The assertions on the label are in a foreign language, and the law presumes, until the contrary is proved, that they were not understood, at least when to assume that the statements were comprehended would charge the person who uttered them with liability: 2 Starkie on Slander, 52; Cook on Defamation, pp. 14, 87.

If the words were understood, positive knowledge of what he was buying was nevertheless brought home to every purchaser, and their effect neutralized by, 1st, Palmer's public declaration that he was a citizen or permanent resident of the United States, and consequently that the segars which he manufactured were a domestic product, involved in taking out a copyright of his design: *Casey* v. *Collier*, 56 Niles' Reg. 262, Judge Betts, 1839; *Keene* v. *Wheatley*, 9 Am. L. R. 45, Judge Cadwalader, 1860.

2nd. The internal revenue and customs regulations. The internal revenue stamp on the box of segars states the kind, quantity, date of inspection, *collection district they are manufactured in*, and the inspector's name: Act of Congress, July 13th, 1866; Boutwell's Manual, p. 51, sec. 91. And the law imposes upon the purchaser, under a penalty, the duty of ascertaining that the inspection has been made: Id. sec. 92.

3rd. The requirement, which excludes the possibility of mistake, that *imported* segars must be inspected and stamped before removal from public store or bonded warehouse: Act of Congress, July 28th 1866, Stats. at Large, 1865-6, p. 328.

The assertions, therefore, are innocent in the effect which they produce upon the public. In *Edlesten* v. *Vick*, an article was described as "patented," which signified that it was protected by a patent, though the patent had, in fact, expired. Vice-Chancellor Wood drew the inference that the dealers in the trade knew that the term had expired, and were not injured by the falsehood; he did not enter into and canvass the motives which induced the plaintiff to assert the untruth: 11 Hare 78, 1853. And in *Dale* v. *Smithson*, the plaintiff put upon his trade-mark a fictitious name as that of the manufacturer of the article. The court decided that, *as the public was not in fact deceived*, the plaintiff was entitled to their protection: 12 Abbott Pr. R. 237. Until a purchaser has been deceived, no act has been done which gives the law a pretext to interpose

A naked intention to deceive is not a ground for legal action of any kind—least of all for the infliction of a penalty or forfeiture. Intention by itself, unembodied in an act, does not come within the purview of jurisprudence; it is only when coupled with an act that it becomes an important element in determining its character: 2 Austin's Jurisprudence 147; Lord Mansfield, *R.* v. *Scofield*, Cald 397; *R.* v. *Higgins*, 2 East 5; Lindley, Juris. xxx., 2; *Smith* v. *Bowler*, Disney, Rep. 520-26.

Equity lends its aid to make a legal right more effectual: *Farina* v. *Silverlock*, 6 DeG. M. & G. 214; s. c. 39 E. L. & E. 514, 1856. If the title is contested, equity suspends its aid until the legal right is established: *Pidding* v. *How*, 8 Simons 477; *Singleton* v. *Bolton*, 3 Doug. 293; *Perry* v. *Truefitt*, 6 Beavan 66. This is the practice; under liberty granted by Vice-Chancellor Wigram, *Rodgers* v. *Nowill*, was tried in 1848: 5 M. G. & Sc. 109.

A test case at law by the purchaser against the proprietor would require a false representation by the proprietor, his knowledge of its falsity, ignorance on the part of the purchaser that the representation was false, and his acting upon it in the belief that it was true, and injury resulting from such action: *Sykes* v. *Sykes*, 3 B. & C. 541, 1824; s. c. 5 D. & R. 292; *Singleton* v. *Bolton*, *supra*; *Crayshaw* v. *Thompson*, 4 M. & G. 357, 1842; *Rodgers* v. *Nowill*, *supra*; *Behn* v. *Kemble*, 7 C. B. N. S. 260; Eden on Injunction, by Waterman, 25, note 1.

There can be no deception until somebody is deceived; 1 Starkie on Evidence 374; Adam's Equity 176 and note; Story's Equity, sec. 191, 202-3; Broom's Maxims 358.

When the legal title is established at law, as in *Stewart* v. *Smithson*, 1 Hilt. 119, equity enforces the right: *Dale* v. *Smithson*, *supra*; which is vested, and can be forfeited only on legal ground. It is better fortified than the right to a contract which equity rescinds only when an action of deceit could be maintained at law; Sugden on Property, in H. of L. 597-8-9, 406-8, 64 L. L. 398-9; Sugden on Vendors 180, ch. 5, sec. 111, pl. 41; 204, ch. 5, sec. 5, pl. 3; Fry on Specific Performance, ch. xii., p. 191; xiii., 206, L. L. 100

The result of the broad proposition that a false statement vitiates the title would be, 1st. To forfeit in this kind of property, though in no other, a man's title, for the slightest taint of fraud.

2nd. To give the benefit of this penalty to a confessed pirate, in spite of the Act March 8th, 1855, Pamph. L. 514, Purd. Dig. 1155.

3rd. To put outside the pale of law property which has at any time been falsely represented in the market, and thus the object of law, to preserve society from internal disorganization, is, to the extent of this excluded property, frustrated.

Theodore Cuyler, for appellee.—Protection is asked from a court of equity for a tradesman's label which is confessedly false, and both calculated and *intended* to deceive and mislead the public.

It is gravely argued that this label, however intended, does not in fact deceive, because of the words obscurely printed below, "Entered according to the Act of Congress."

So, too, it is said the law requires an imported article to have upon the boxes certain marks of inspection, the absence of which from these boxes shows the label is untrue, and prevents it from deceiving the purchaser.

But the motive is still present, and the fact too, even if this be so—that the unwary and ignorant are, in fact, deceived and *intended to be deceived.*

The authorities upon this question are very clear and well settled.

Mr. Daniels, speaking of trade-marks, says: "With respect to these cases, it may lastly be observed, that the remedy given in equity is discretionary, and will be withheld if there has been any improper conduct on the part of the plaintiff. On this principle the court has refused to grant an injunction, in the first instance, where the plaintiff has made false representations to the public concerning the article which he seeks to protect;" 3 Daniel's Ch. Practice, p. 1755; and again, p. 1754: "He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

2 Story's Eq. sec. 951; *Perry* v. *Truefit*, 6 Beavan 66; *Millington* v. *Fox*, 3 M. & K. 338; *Clark* v. *Freeman*, 11 Beav. 112; *Hogg* v. *Kirby*, 8 Ves. 226; *Walcott* v. *Walker*, 7 Id. 1; *Pidding* v. *How*, 8 Simons 477.

[Mr. Justice Read.—There is a recent case decided upon this point by the House of Lords, which has not been mentioned, *The Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. 523.]

In *Fowle* v. *Spear*, 7 Penna. Law Journal 176, the United States Circuit Court refused to protect by injunction the manufacturers of *quack* medicines. A court of equity will not protect worthless articles, or countenance fraud or immorality.

Parsons, in reply.—*The Leather Cloth Co.* v. *The American Leather Cloth Co.*, cited by Mr. Justice Read, was decided upon the point of similarity; the resemblance was not sufficiently close to make the defendants' stamp a colorable imitation.

There is no doubt that courts of equity refuse to protect quack medicines and noxious drugs: *Woodruff* v. *Smith*, 48 Barb. 438; but in such cases no attempt is or could be made to anticipate and counteract the evil effect; the antidote does not accompany the poison. But in this case it is demonstrated that the assertion never in a single instance produced any effect.

The opinion of the court was delivered by

Sharswood, J.—The plaintiff, according to the statements of his bill, is the manufacturer of a cigar, known as the "Golden Crown," and he has devised a trade-mark, which he uses in its sale. He charges that the defendant, who is a printer by trade, has counterfeited this mark, and sells copies of it to persons engaged in the manufacture and sale of cigars, by whom they are used to his damage. The answer of the defendant admits these allegations; but sets up as a ground for the non-interference of the court, that the articles thus sold by the plaintiff were manufactured in the city of New York, and that the trade-mark in question contains upon it the declaration that they are the product of a "factory of cigars from the best plantations de la Vuelta

Abajo, Calle del Agua, Habana." The case having been heard on bill and answer, the bill was dismissed with costs.

The maxim which is generally expressed, "He who comes into equity must come with clean hands," Snell's Principles 33, but sometimes in stronger language, "He that hath committed iniquity shall not have equity," Francis' Maxims 5, has been often applied to bills to restrain by injunction the counterfeiting of trade-marks. The ground on which the jurisdiction of equity in such cases is rested, is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another: *Croft* v. *Day*, 7 Beavan, 232. "It is perfectly manifest," said Lord Langdale, "that to do this is a fraud, and a very gross fraud." It is plain that there is no class of cases to which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trade-mark, which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have accquired in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal, constituted to administer equity, for the purpose of securing to him the profits arising from his fraudulent act. Thus in *Pidding* v. *How*, Simons 477, the plaintiff had made a new sort of mixed tea and sold it under the name of "Howqua's Mixture;" but as he had made false statements as to the teas of which his mixture was composed, and as to the mode in which they were procured, the court refused an injunction: Vice-Chancellor Shadwell, remarking, "It is a clear rule laid down by courts of equity not to extend their protection to a person whose case is not founded in truth." In *Flavel* v. *Harrison*, 10 Hare, 467, an injunction was refused, when an article was sold by the name of Flavel's Patent Kitchener, for which there never had been a patent. In *Leather Cloth Company* v. *American Leather Cloth Company*, 11 House of Lords Cases 533, though decided on the ground that the mark used by the defendants was substantially different from that of the plaintiffs, yet it may be fairly inferred from all the opinions that, if necessary, the decree of Lord Chancellor Westbury would have been affirmed on the broader ground. Thus, a company which had gained reputation by a particular manufacture, on discontinuing their business, transferred their stamp or trade-mark, which indicated them as the manufacturers, to other parties; and it was the opinion expressed that such assignees would not be protected in equity in the use of that mark on goods manufactured by themselves. "So," said Lord Cranworth, "in the cases of bottles or casks of wine stamped as being the growth of a celebrated vineyard, or of cheese marked as the produce of a famous dairy, or of hops stamped as coming from a well-known hop-garden in Kent or Surrey, no protection would be given to the sellers of such goods, if they were not really the produce of the place from which they purported to come." It is contended, however, that this case is different, because there were marks or words used with these labels inconsistent with the idea that they were held forth as manufactured in Havana. On the label is printed, "Entered according to Act of Congress, A.D. 1858, by Lorin Palmer, in the Clerk's Office of the Southern District of New York." Apart from the fact that this is in such very small type, and so abbreviated, that it would probably escape the observation of every one whose attention was not specially directed to it, a circumstance which rather strengthens the evidence of an intention to mislead the public, what is there in the fact that the design or engraving had been copyrighted in the United States, inconsistent with the declaration that the cigars, contained in the box, were manufactured in Havana of Cuban tobacco? But, again, it is said that the United States internal revenue stamp would at once undeceive the purchaser, there being a difference between the stamp used for articles imported and for those of domestic manufacture. Few persons would stop to notice this difference: and besides, as it is alleged, the trade-mark is pasted on the inside of the lid, and when the box is open for the purpose of retailing, the trade-mark is brought directly in the view of persons wishing to purchase, and the revenue stamp is not seen unless the lid is turned down, and the box examined on the outside. It is contended, further, that the falsehood is in a foreign language, of which it is to be presumed that the plaintiff's customers are ignorant. Yet there is certainly enough to convey to every one, who can read, that the cigars are from "Havana." It is true, that when a slander is uttered in a foreign tongue it is necessary, in an action for damage, to prove that the hearers understood the language; for it will not be presumed that, being ignorant of the meaning of the words, they afterwards repeated them to those who understood them: 2 Starkie on Slander 52; but there is no such rule in an action for libel in a foreign language, for *litera scripta manet;* that may be read and explained by those who do, to those who do not understand it. The case of a written or printed libel has a much closer analogy to the point before us than that of spoken slander. But above all this, it is not necessary that any one person has been actually deceived or defrauded; it is enough that it is a misrepresentation, calculated to have that effect on the unwary and unsuspicious.

Decree affirmed, and appeal dismissed at the costs of the appellant.—*Am. Law Register.*

NOTES OF RECENT DECISIONS IN PROVINCE OF QUEBEC.

Bank Agent—Guarantee Society.

Held, that the allowing by a Bank Manager of overdrafts without security, but (in the opinion of the Court) under a discretionary power possessed by him, and without fraudulent intent, is not an irregularity within the meaning of a policy guaranteeing the Bank against such loss as might be occasioned to the Bank by the want of integrity, honesty, fidel-

ity, or by the negligence, defaults or irregularities of the manager.—*The Bank of Toronto* v. *The European Assurance Society*, 13 L. C. Jurist, 63.

Corporation.

Held, That a city corporation may be sued in damages for assaults committed by its servants, such as policemen, when the assaults are approved and attempted to be justified by the Corporation.—*Doolan* v. *The Corporation of Montreal*, 13 L. C. Jurist, 71.

Insolvency.

Held, that an insolvent may validly make a voluntary assignment to any official assignee, whether resident or not within the county wherein such insolvent has his place of business.—*Brown* v. *Douglas*, 13 L. C. Jurist, 29.

Insolvency—Secretion.

Held (Torrance, J., dissenting), 1st. Where a trading partnership obtained advances from a bank under an agreement, that the moneys derived from the sale of hemlock bark extract, manufactured by them, should go in liquidation of the debt to the bank, and the said partnership, while in a state of insolvency and largely indebted to the bank, sold a quantity of bark extract, and applied the proceeds to the payment of other debts; that such act did not amount to secretion.

2nd. That there cannot be constructive secretion.—*The Quebec Bank* v. *Steers et al.*, 13 L. C. Jurist 75.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—Are clerks of the Superior Courts—or deputies—or clerks of the County Courts, authorised in issuing subpœnas in cases depending in their courts, without the production and filing of a præcipe by the party making the application.

Yours, &c.,

Chatham, April 6, 1869. One, &c.

[The practice in the Crown offices in Toronto is not to require præcipes for the issue of subpœnas. We presume the same rule should be observed in the outer counties.—Eds. L. J.]

REVIEWS.

The Law of Railway Companies, comprising the Companies Clauses, the Lands Clauses, the Railway Clauses Consolidation Acts, the Railway Companies Acts, 1867, and the Regulation of Railways Act, 1868. With notes of all the decided cases on these Acts, &c. By Hy. Godefroi, of Lincoln's Inn, and John Shortt, of the Middle Temple, Barristers-at-Law. London: Stevens & Hagues, Law Booksellers and Publishers, 11 Bell Yard, Temple Bar, 1869.

We have to thank the publishers for an early copy of this work. The editors appear to have acquitted themselves well. The notes are terse and yet sufficiently full to give the desired information as to judicial interpretation of the sections annotated. Annotated editions of important acts of Parliament are of great service to the profession, and for purposes of ready reference are preferable to treatises. The aim of an editor of an annotated edition of a statute should be to avoid loading his notes with details as to facts. What the reader of such a work wants is the marrow of the decision, and that expressed in the fewest possible words. The editors of the work before us have not been unmindful of this requisite. By observing it they have succeeded in presenting to the profession a great body of law on subjects of very general importance in a portable form, considering that our Railway Clauses Consolidation Act is in great part taken from the English Act, the value of this work to all interested in Canadian railways is obvious; with many railways constructed, others in course of construction, and yet others projected, there is already much "railway litigation" among us. The duties and obligations of railway companies to "adjoining proprietors," and the public are not at all times easily ascertained or easily defined. The consequence is daily increasing litigation, and daily increasing necessity for a work like that now before us. Its cost is so moderate as to place it within the reach of all. The facility it affords for reference to decided cases is so great that the possessor of it must save time, and "time saved" to a man of good practice in our profession is "money made." The index is truly exhaustive. By means of succinct notes and an elaborate index no real

difficulty can be experienced in finding that which is sought. The volume proper contains no less than 552 pages. Added to this is an appendix, 364 pages, containing all material acts relating to railways and the standing orders of the Houses of Lords and Commons, and the index. The latter alone is so comprehensive as to embrace 80 pages. The mechanical execution of the work by the law publishers, under whose auspices the work is issued is all that could be expected from a firm so well known and so eminent as Messrs. Stevenson & Hagues. Their agents in Toronto are Adams, Stevens & Co. and Messrs. W. C. Chewett & Co. Orders left with either firm will receive prompt attention.

Mr. Dickens and the Peerage.—It is the privilege of literary men to blunder about legal matters, but Mr. Charles Dickens has abused the privilege. In his speech at the Liverpool banquet he vindicated himself from the charge of disparaging the House of Lords, and explained to his audience that he enjoyed the friendship of many members of that House, not least among whom was *Lord Chief Justice Cockburn.* Now Mr. Charles Dickens has known Sir Alexander Cockburn for many years, and even if for a portion of that time he had imagined that the Chief Justice was a peer, we should have supposed that the truth might have dawned on him in December last, when his illustrious friend was offered and declined a peerage. Up to the delivery of the Liverpool speech we had believed that the celebrated 'Pandects of the Benares' could not be eclipsed; but anything is possible when a *littérateur* of the loftiest pretensions does not know whether the man 'whom he loves more than any other in England' is a commoner or a peer.—*Law Journal.*

The law is preserved in reports, of which there are many thousand volumes; so that any one in ignorance of the law has only to purchase or borrow these, compare the different decisions, and apply them all to his own case, when he will either be right, or have the happiness of correcting the law by a fresh decision telling him that he is wrong.—*Comic Blackstone.*

What an attorney is, everybody who has got an attorney will no doubt be aware, but those who are ignorant on the point may feel assured that ignorance is unquestionably bliss, at least in this instance. We, however, are far from intending to stigmatise all attornies as bad—and the race of roguish lawyers would soon be extinct if roguish clients did not raise a demand for them. No man need have a knave for his attorney unless he chooses; and when he g es by preference to a roguish lawyer, it must be presumed that he has his reasons for not trusting his affairs to an honest one.—*Comic Blackstone.*

Baron Penzance.—The elevation of Sir James Plaisted Wilde, who has held the office of Judge-Ordinary of the Probate and Divorce Court since July 1863, to the peerage will give unqualified satisfaction to the legal profession and to the general public. There is no judge on the Bench whose conduct can be so easily criticised and so clearly appreciated by the suitors, because the principles and the procedure of the Courts of Probate and Divorce are perfectly intelligible to the non-professional community. Indeed, the Judge-Ordinary of the Divorce Court needs rather the possession of great moral qualities than high legal attainments, and we are unable to call to mind the name of any judge who, in temper, discretion, and good sense, has excelled Sir James Wilde. Old men can remember the time when judges seemed to forget the very existence of the suitors, and to imagine that a cause or an argument was a mere forensic struggle, in which judges and Bar had to take part for the better sharpening of their wits, or the better elucidation of the law. Sir James Wilde has taken precisely the opposite view of the duty imposed upon a judge. He has kept his attention steadily fixed on the suitor, and he has ever laid himself open to the charge of creating or encouraging irregularities in practice by his unfailing anxiety to save expense and do justice. We need not here enlarge on his legal acumen, his elegant diction, his lucidity of expression, and his accurate perception of human charcter. The honour of the peerage has never been more fairly earned by a judge. His Lordship takes the style and title of Baron Penzance, of Penzance, in the county of Cornwall. It will not be forgotten that Baron Penzance is the nephew of the first Lord Truro.—*Law Journal.*

Judges on Horseback.—The number of judges who have suffered from accidents in riding is somewhat remarkable. The lamentable accident to Sir Cresswell Cresswell will not easily be forgotten. Sir William Erie, who has always been conspicuous as a rider, has had more than one awkward fall, and we believe that Sir Rowland Williams has not been more fortunate. The present Chief Justice of the Common Pleas was, a short time ago, carried by his horse into a position of much peril at Working, and during the present assize the Chief Justice of England and Mr. Justice Hayes have both sustained falls.—*Law Journal.*

Newspaper Directory. — G. P. Rowell & Co., the New York Advertising Agents, are about issuing a complete American Newspaper Directory. It is a compilation much needed, since no thing of the kind having any claims to completeness have ever been published. Messrs. Rowell & Co. have spared no pains or expense to make the forthcoming work complete. We understand the book will be a handsome octavo volume of about 300 pages, bound in dark cloth, and sold for $5 00 per copy. As the publishers are Advertising Agents, their issuing a work containing so much information, usually jealously guarded by those in that business, shows that they are confident of their ability to be of service to advertisers, or they would not so readily place in their hands the means of enabling every one to communicate direct with publishers if they so desire.