DIARY FOR JUNE.

1. Sat... Open Day.
2. SUN.. *1st Sunday after Trinity.*
3. Mon.. Paper Day, Q. B. New Trial Day, C. P.
4. Tues.. Paper Day, C. P. New Trial Day, Q. B.
5. Wed.. Open Day, Q. B. New Trial Day, C. P.
6. Tues.. Open Day.
7. Fri... New Trial Day, Q. B. Open Day, C. P.
8. Sat... Easter Term ends.
9. SUN.. *2nd Sunday after Trinity.*
11. Tues.. General Sessions and County Court Sittings in each county.
14. Fri... Last day for Courts of Revision finally to revise assessment roll.
16. SUN.. *3rd Sunday after Trinity.*
20. Thur. Accession of Queen Victoria; 36th year of her reign commenced.
21. Fri... Longest Day.
23. SUN.. *4th Sunday after Trinity.*
29. Sat... *St. Peter.*
30. SUN.. *5th Sunday after Trinity.*

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THE

Canada Law Journal.

JUNE, 1872.

An Act has been passed by the Pennsylvania Legislature, extending the competency of persons to be witnesses in criminal cases. It provides that in proceedings where the crime is not above the grade of misdemeanor, the person charged shall, at his own request, but not otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, or comment made upon, such neglect or refusal, by the counsel in the case, during the trial. Proceedings in forgery and perjury are excepted from the operation of the Act.

Statutes similar to this are already in force in some of the other States; for example, New York and Maine. Attempts have been made, chiefly by Lord Brougham, to introduce such a law into the English system, but hitherto in vain. We should like to know how the clause which lays it down that "no presumption shall be created against any person withholding his testimony," is to be carried out practically. It would puzzle even the traditional "Philadelphia lawyer" to prevent such a course of conduct from raising a prejudice in the mind of the jury against the person incriminated. We apprehend, however, that no serious injury will result in such a case, as almost every innocent person will seize the opportunity of clearing himself upon oath. Much might be said both for and against this enlargement of the law of evidence, but it is not necessary now to dwell upon the subject.

Lawyers are often blamed by their clients for giving wrong opinions on points of law, or rather for expressing views which are not sustained when the cases come before the courts, and this, in the minds of the suitor, means the same thing. We should recommend complaining litigants to read the judgment of the Court of Appeal in *Forsyth* v. *Galt et al.*, where a question arose on the construction of a will as to the estate taken under it by a devisee, one C.

It was held by Draper, C. J., and Gwynne, J. that the gift to C. was an estate in fee simple, subject to an executory devise over in the event of his dying without issue; by Wilson, J., and Morrison, J., that C. took a fee simple absolute; and by Strong, V. C., that C. took an estate tail, with remainder over in the event of his dying without issue.

There would be, however, the advantage in this case, that it would be scarcely possible to have given an opinion that would not have received the support of at least *some* of the Judges on the Bench.

The following are the principal Bills of interest to the profession, which have, so far, been brought before the House of Commons this session: An Act to extend the right of appeal and new trials in criminal cases; an Act to repeal the Insolvent Acts, and an Act to amend the Insolvent Act of 1869; an Act to amend the Acts respecting the duties of Justices of the Peace out of sessions in relation to summary convictions and orders; an Act to amend the criminal law relating to violence, threats and molestations; an Act to correct a clerical error in the Act respecting malicious injuries to property, by striking out the word "not," in the last line but two of the third section; an Act for the avoidance of doubt respecting larceny of stamps; an Act to set at rest doubts as to the maturity of a note dated on the last day of a month, and payable at a month or months after date; an Act to extend the law as to the carrying of dangerous weapons; an Act respecting Trade Unions; an Act respecting Patents of Inventions, &c.

EQUITY IN COMMON LAW COURTS.

When Sir John Richard Quain was lately called to the dignity of Serjeant-at-law, preparatory to his elevation to the Queen's Bench, he gave rings with the motto, "*Dare, facere, præstare.*" Inasmuch as Mr. Quain was one of the most active and efficient members of the Judicature Commission, the English *Law Journal* predicts that his adoption of the motto of the Roman *prætor* indicates that he expects to administer equity as well as law. A marvellous prospect this, as compared with a characteristic scene of former days, when Erskine's joke pretty fairly represented the value of equity in the eyes of common law men. On one occasion, when Lord Kenyon, after deciding against the plaintiff's action, observed that he might resort to a court of equity for relief, Erskine was heard to ejaculate, in a tone of inimitable simplicity, "My Lord, would you send a fellow-creature there?" The spirit of Erskine is still alive, though without such justification as he had, among the common law Bench and Bar. Division of jurisdiction, leaving the two systems of law and equity to run in distinct channels, will, at least until a perfect system of fusion is discovered, secure more satisfactory results than the turbid admixture which even now is manifest as a result of the equitable clauses of the Common Law Procedure Acts. Judging by the experience of the past, the administration of law and equity by one and the same court, and by one and the same set of judges, is not very encouraging. When the English Court of Exchequer possessed equity jurisdiction, it was of all courts the most unsatisfactory, so far as the causes on the equity side were concerned. The ability of even an Alderson was taxed to the uttermost to fulfil the diverse duties devolving upon him; and it is not to be expected that by Darwinian or other selection, there will be a succession of such Judges in new courts of multifarious jurisdiction. The constitution of our own Court of Error and Appeal, where a preponderance of common law Judges entertain appeals from the Court of Chancery, is another and nearer example of the unfairness of submitting pure questions of equity to a common law tribunal.

Our attention has been called to this subject by the case of *Shier* v. *Shier*, 22 C. P. 147, where, upon the validity of an equitable plea, Mr. Justice Gwynne dissented from the other two members of the court. Ever since the right to plead equitably at law has been given, the majority of common law Judges have sought to restrict the right within the narrowest bounds and by the sheer weight of numbers, not of reason, they have prevailed. It is now, it seems, a cast-iron rule in England that a plea on equitable grounds can only be supported at law in cases where a court of equity would, under similar circumstances, decree an absolute, unconditional and perpetual injunction. Yet at the first, such Judges as Jervis, C. J., and Crowder, J. (in *Chilton* v. *Carrington*, 16 C. B. 206; and see S. C.

3 Com. L. R. 606), raised their voices in dissent, and in favour of a more liberal construction of the statute. In this Province, Mr. Justice Gwynne may be ranked among the number of able dissentients who have been outnumbered by their judicial brethren. Yet professional opinion is in favour of the minority. We cite what is perhaps the most remarkable expression of this opinion from an able article published in the *Law Magazine*, vol. vi. N. S. 252, part of which is as follows:

"The admission of equitable pleas and replications was the result of a laudable desire to save expense to both parties in cases wherein a suit at law would certainly be stopped in equity—in a word, to make the principles of one tribunal cooperative with, and no longer antagonistic to, the other. The words of the Act on this subject are large enough to let in any defence which shows matter for injunction; but the alleged necessity, or rather supposed convenience of the case, has induced the Judges to limit equitable defences to those cases in which the plea shows that an injunction absolute and unqualified would be granted in equity against the prosecution of the suit; but wherever something more would have to be done in equity than staying the action—as for instance a reforming of the contract, or taking an account—the courts of law have refused to allow an equitable plea, because they say that they have no machinery for working complete justice. If there be no machinery, however, it could be supplied readily and naturally by a proper development of the Master's office. At present, by repudiating the powers which were given to them, that they may do complete justice in any cause, the courts have either stultified the meaning of those who designed the provision for equitable jurisdiction, or have evaded a duty."

Shier v. *Shier* was an action for breaches of covenant in a farming lease. The covenant, as drawn, provided that the defendant should, during the term of five years, use in a proper manner upon the demised premises all the straw which should be raised thereon, and that he should not cut any standing timber, except for rails, buildings or firewood; and that he should not allow any timber to be removed from the demised premises. The defendant's pleas, on equitable grounds, were in substance that before the execution of the lease, the agreement of both parties was that the defendant should be allowed to remove straw from the demised premises to his own lot adjoining, provided he should use on the demised premises every second year, all the manure made on his own farm and the demised premises; which term, as to the manure, was expressed in the covenant: that through error of the conveyancer who acted as agent for both parties, and by mutual mistake, it was omitted to limit the covenant as to the straw; and that one of the alleged breaches was the defendant's removing the straw to his farm adjoining: that as to the timber, it was the agreement, &c., that the defendant should be allowed to cut down standing timber on the demised premises to burn at his own house on the farm adjoining, and that by mistake of the said conveyancer, he omitted to qualify the covenant accordingly, and the alleged breach was occasioned by the defendant cutting and removing wood from the demised premises for his own house on the farm adjoining. The majority of the court held, upon demurrer, that as the term was still current and the contract executory, complete justice could not be done between the parties in a court of equity without a reformation of the covenant, which, as a court of law, they had no power to enforce. Gwynne, J., dissenting, held that complete justice could be done between the parties to that action without any reformation of the covenant.

Admitting that the weight of authority is with the majority of the court, as they state the case, yet in one point of view they seek to be more equitable than the Court of Chancery itself. The effect of a reformation of the covenant would be to limit it, to curtail the plaintiff's legal rights in such a way that it is not supposable he would ask as a condition of relief, upon bill filed to restrain his action, that the covenant should be reformed. The covenant as it stands covers every stipulation intended to be made between lessor and lessee, and something more: the suit is in respect of that something more, which it is admitted is an unjust claim. The covenant as it stands protects the lessor against every possible breach by the lessee both in respect to what was agreed between them, and as to other matters not so agreed. It would not benefit the plaintiff to have the covenant reformed as to these other matters; it would not in any way enable him more effectually to assert his proper rights in any subsequent suit.

Under these circumstances, it is manifest that a court of equity would restrain the suit

in question; but it is not at all manifest that the lessor would ask a reformation of the unlimited instrument, or that a court of equity would impose a reformation upon him "in spite of his teeth," to use the vigorous judicial expression of Ventris, J., in *Thompson* v. *Leach*, 2 Ventr. 206. This point is adverted to by Gwynne, J., when he says, "for the doing which (*i. e.*, the reformation by a court of equity), for any practical purpose, no actual necessity appears to exist" (p. 159). On this point we should like to see the case go to appeal; but perhaps "*la jeu ne vaut pas la chandelle.*"

NEW TARIFF OF FEES.

It is not as a matter of information, but rather historically, that we refer to the new Common Law tariff of fees. It had long been thought that the former tariff, which was well enough in its way, many years ago, was simply absurd when looked at with reference to the increased price of everything, and the expense of living in these days. There has been an advance in everything except fees to lawyers; and to make things worse for them, much of the routine business, done formerly by professional men, has fallen into the hands of "conveyancers," (save the mark!) "collectors," "agents," *et hoc genus omne.* The Insolvent Acts have also done away with a large and lucrative class of business, the profits of which now go to make fat official assignees. We shall not pause now to discuss the folly of lawyers allowing themselves to be robbed by these unprofessional and unlicensed "spoilers," nor the helpless docility of creditors, who see their debtors' estates eaten up by the bills of official assignees before their eyes. But the result is that nothing is left to the profession but *special* business. This is paid for at prices that were considered fair for *routine* business that a junior clerk could do, when one's yearly expenses were less than half what they are now.

The old tariff was drawn up with apparently the most hazy ideas as to the practical working of it, though this may have been the result partly of the transition from the old practice to the new, and consequent uncertainty of it. The taxing officers, or at least some of them, did not mend matters, as they seemed to be under the impression that they were appointed, not to give a fair and reasonable interpretation to the tariff, but to cut down fees under every possible excuse by virtue of strained and impossible readings of the tariff. They were assisted in this by the ingenuity of smart managing clerks and short-sighted attorneys, striving to cut down their opponents' bills of costs.

Some time ago several energetic members of the profession, both in town and country, familiar with the subject, and knowing, from an extensive practice, the defects and unfairness of the old tariff, met together and drafted a new tariff of fees, which was submitted to the Judges. Their lordships responded to the appeal with much courtesy; but feeling themselves placed, as it were, between the public and the profession, thought it their duty to make some alterations in the proposed tariff, and to cut down some of the charges. We are not prepared to say that the changes which have been made make a perfect tariff; but it is a decided improvement upon the old one both in arrangement and in detail, and will be looked upon as a boon to an ill-paid class, whilst the public have been protected from those whom they affect to look upon as their natural enemies.

The new tariff speaks for itself. In some respects it is still defective, witness for example, the omission of any provision as to fees to professional men, surveyors, &c. This arose, we understand, from an omission by the person who copied for the printer the tariff as settled by the judges. This, however, is immaterial, as the old tariff can be looked to to supply the omission. The new tariff will not affect any business done before the 20th day of May, being the first day of this present Easter Term.

We are glad to say that the taxing-masters at Toronto have so far shown a desire to read and interpret it according to its "true intent and meaning" as a remedial measure, and therefore to be construed liberally in favor of those for whose benefit the changes were made. We trust practitioners, proverbially so careless of their own interests, being themselves officers of the Courts, will act as fairly to their brethren on taxation, as they do to their clients. More we do not want; but that we are entitled to.

COUNTY COURT APPEALS.

In cases of appeal from the County Court, we observe that the Court of Queen's Bench, in *Eddy* v. *The Ottawa City Passenger Railway Co.*, 31 U. C. Q. B. 569, have laid down two important rules of practice, one of which is new, the other old enough to be better observed than it seems to be. The Court has again declared that in future appeals will not be heard unless the grounds of appeal are entered on the appeal books when delivered. This rule should now possess great cumulative force, as it was first brought prominently into notice in *Smith* v. *Foster*, 11 C. P. 163; afterwards in *Portman* v. *Patterson*, 21 U. C. Q. B. 237; and its effect suspended, as a last act of grace, in *Severn* v. *Toronto Street Railway*, 23 U. C. Q. B. 254. Still the profession had better not presume any further upon the clemency of the Bench. Although the Judges are extremely unwilling to punish the client for the carelessness of his attorney, yet, on principle, it is better that a few individuals should suffer than that the regulations of the Court should be persistently disregarded. Perhaps the better course would be for the officer of the Court who receives the appeal books and enters the appeal, to reject all books not in proper form.

The new practice of allowing such appeals with costs is a beneficial change, which we are glad to see adopted in this country. Such is the almost universal English practice; and we take it to be extremely reasonable, in all cases of appeals from inferior Courts, as well as from subordinate judicial officers of the superior Courts, that costs should, in all but certain exceptional cases, follow the result. Besides the authorities given in the note to 31 U. C. Q. B. p. 576, the following cases may be referred to as showing the rule of the common law Courts in England: *Taylor* v. *Great Northern Railway*, L. R. 1 C. P. 430 (costs should be asked when the appeal is disposed of; an application afterwards will not be entertained, unless, perhaps, it be made during the term); *Budenburg* v. *Roberts*, L. R. 2 C. P. 292.

When the Chamber order of a Judge is successfully appealed from to the Court, costs are never given on setting aside the order, out of deference to the Judge's opinion: *Baylis* v. *LeGros*, 2 C. B. N. S. 332, per Cresswell, J.

SELECTIONS.

CHANGING THE VENUE.

The case of *Church* v. *Barnett and another*, reported in the May number of our Reports (40 Law J. Rep. (N.S.) C. P. 138), enables us to offer some comments on the practice of changing the venue in actions at law, at the instance of the defendant—comments rendered necessary by the conflict of opinion hitherto expressed on the subject, and by the inaccurate statements put forward in "Chitty's Archbold's Practice." Before the year 1853, if the plaintiff brought a transitory action in any other county than that in which the cause of action arose, the defendant, upon an affidavit "that the plaintiff's cause of action (if any) arose in the county of B. and not in the county of A." (where the action was brought), "or elsewhere out of the said county of B." could have the venue changed, as of course, to the county where the cause of action really arose. This affidavit, which was called the common affidavit, was sufficient in the great majority of actions, but there were certain actions in which special reasons for changing the venue had to be shown by a defendant. Where the plaintiff laid the venue in the county where the cause of action arose, an order for changing it would only be made where it was clearly made out, either that the defendant could not have a fair trial in the county, or that an immense saving of expense would be achieved by the change sought. Then came Rule 18, Hilary Term, 1853, in these words: "No venue shall be changed without a special order of the Court or judge, unless by the consent of the parties." The intent and meaning of this rule was discussed on June 10 in the same year in *De Rothschild* v. *Shilston*, 8 Exch. 503, 22 Law J. Rep. (N.S) Exch. 279. In the argument of that case, Baron Parke said that the new rule was intended to put a stop to the practice of changing the venue, as a matter, of course by a side-bar rule, and of bringing it back again by an undertaking to give material evidence; and that, according to the rule, no venue could be changed except upon special application to a judge. Mr. Justice Willes was counsel on one side in *De Rothschild* v. *Shilston*, and the present Attorney-General was counsel on the other side. Mr. Willes had obtained a rule *nisi* to rescind an order of Baron Platt for changing the venue from London to Devonshire, the order proceeding merely on an affidavit that the cause of action arose in Devonshire and not in London, to which affidavit there was no answer. The Court discharged the rule, thinking that the affidavit being unanswered was sufficient, and that the order was right.

The Lord Chief Baron, in delivering the judgment of the Court, said:—

"The general rule on this subject may be thus stated, and we may say that we believe

it may be taken as the general opinion of all the judges. The application for this purpose may be made before or after issue joined, as may be most convenient to the parties in the proper conduct of the case. 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 shown. It will be sufficient, however, for him to rely only on the fact that the whole cause of action arose in the county to which he desires to change the venue; but if he does so, he may be answered by any affidavits negativing this fact, or showing that the cause may be more conveniently tried in the county where the venue is laid. If made after issue joined, the affidavits in support of the application must show that the issues joined may be more conveniently tried in the county to which the party applying proposes to change the venue. Of course these affidavits are open to answer by the other party. In all these cases the Court or judge will decide, after hearing both sides, whether the venue is to remain, or will be changed as prayed, or be laid in some third county, according to its discretion."

His Lordship then read a rule which had been drawn up by certain of the judges to whom the matter was referred by the rest, which, although not promulgated as a rule of the Courts, was, as his Lordship said, one on which all the judges were disposed to act. The language of this rule was as follows, it being understood to apply only to the class of actions, in which, according to the old practice, the venue could be changed in the manner already explained:—

"The committee of judges to whom the question was referred as to the practice to be adopted, in consequence of Rule No. 18 in the Rules of Practice of Hilary Term, 1853, have to report:—

"First, that in their opinion it is more convenient, as a general rule, that the application to change the venue by rule or summons may be made before issue joined, provided that this shall not prejudice either party from applying after issue is joined to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county.

"Secondly, that a defendant, on his affidavit to obtain the rule *nisi* to change the venue, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of venue; but that he may, if he pleases, rely only on the fact that the cause of action arose only in the county to which he seeks to have the venue changed, which ground shall be deemed sufficient, unless the plaintiff shows that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed. To these resolutions the signatures of Baron Parke and Mr. Justice Wightman were attached."

The practice as explained by the Chief Baron in the above case was endorsed by the Court of Common Pleas in *Begg* v. *Forbes and others* (23 Law J. Rep. (N.S.) C. P. 222), and the Court of Exchequer in *Smith* v. *O'Brien* and *Julland* v. *Riches* (26 Law J. Rep. (N.S.) Exch. 30, 31, repeated and confirmed what it had said in *De Rothschild* v. *Shilston*. The last cases cited were decided in 1856, about which time there seems to have arisen a mutiny on the bench, for we find two years later in a case of *Helliwell* v. *Hobson and another* (3 C. B. (N.S.) 761), Mr. Justice Crowder laying down the rule that the plaintiff has the right to lay his venue where he chooses, and ought not to be deprived of that right unless there is a manifest preponderance of convenience in a trial at the place preferred by the defendant.

In January, 1860, in *Durie* v. *Hopwood*, 7 C. B. (N.S.) 835, Chief Justice Erle said:—"It is important that a cause should be tried where the cause of action arose; and I think it is advisable to act upon that principle so far as the interests of justice can be made to coincide with that course." In the same year, 1860, in *Jackson* v. *Kidd*, 29 Law J. Rep. (N.S.) C. P. 221, Mr. Justice Willes boldly says:—"Some judges do not consider themselves bound by the resolutions read in *De Rothschild* v. *Shilston*."

So much for the history of changing the venue since the year 1853, which terminates with the case just reported of *Church* v. *Barnett and another*, with regard to which, it is, for the present purpose, unnecessary to do more than quote a portion of the judgment of Mr. Justice Willes, who thus gives the death-blow to the alleged resolution of the judges as stated in *De Rothschild* v. *Shilston*, and who also defines what is unquestionably the existing rule of practice. His Lordship said:—

"With respect to the so-called resolution of the judges in *De Rothschild* v. *Shilston*, certainly it is not a rule in so far as it suggests that it is sufficient for the defendant, on an application to change the venue, to state in his affidavit as a ground for the change that the cause of action arose in some other county than that in which the venue is laid. After that case of *De Rothschild* v. *Shilston*, defendants in practically undefended actions attempted, but unsuccessfully, for the mere purpose of delay, to obtain an order to change the venue from London, where it had been laid, to some place in the country, on an affidavit that the cause of action arose there. That part of the so-called resolution was never adopted, and was not properly a resolution of the judges at all. If it had been adopted, it would have been made a rule of Court. There is, however, no such rule, and the plaintiff has a right generally to lay his

venue where he thinks proper; and when he has not exercised a capricious choice, it is to be considered that he has exercised a right, and it lays on the defendant to show that the preponderance of convenience is in favour of trying the case where the cause of action arose, rather than at the place where the plaintiff has laid the venue.*—*Law Journal.*

THE LEGAL IMMUNITY OF LIBELLERS AND IMPOSTORS.

The recent scandal which has ended so disastrously for one of the most eminent and respected members of the Bar, draws attention to the present position of the law of libel, which it seems to us is not so satisfactory as it might be. In the first place the old saying, "the greater the truth the greater the libel," would appear to have been based upon a most just estimate of human character. A great truth may prove to be maliciously defamatory in the very highest sense of the term; the truth may be one which concerns only the persons implicated; it may be spoken or published to gratify private animosity of the most detestable kind. How then does the law say that it shall be dealt with? Putting aside the civil action to which a plea of the truth of the libel is a complete defence, the 6 & 7 Vict., c. 96, s. 6 enacts that, on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such a plea as thereinafter mentioned—that is to say, a plea of justification on the ground of the truth of the libel, and that it was for the public interest that it should be published —the truth of the matters charged may be inquired into, but the plea shall not amount to a defence, unless it was for the public benefit that the matter should be published.

Now upon this statute this condition of things appears. A person actuated by the worst motives may publish the most gross and scandalous libels, and may add to his iniquity by pleading in justification that they are true. And these libels are to be inquired into; the torture of public inquiry, which means the investigation of private character before the domestic forum of every household in the kingdom by means of the public press, is to be endured, with what results, whether to the innocent or the guilty, we have lately seen. It would be difficult for the most upright amongst us to stand a searching public examination into our lives, such an examination being conducted by a malignant and utterly unscrupulous enemy. Therefore it strikes us as a mistake in the enactment referred to to say that the matter shall be inquired into, and that subsequently, when all the torture of a preliminary inquiry has been endured, and private character made the sport of a coward, then the law shall say whether the truth, if proved, shall amount to a defence, by applying the test whether the publication was for the public benefit. Why not provide that at the very outset a libeller shall prove to the satisfaction of a magistrate that it is for the public benefit that the libel was published? If there had been such an enactment on the statute book could Chaffers have enjoyed for so many days his detestable notoriety? On the contrary he would now have been undergoing the punishment which he so richly deserves.

But we pursue the same lenient course towards all persons who can establish even a presumption of legal right. Our Continental critics laugh at us for permittting the Tichborne claimant to make the possessions of an ancient family and a lady's fair fame the sport of an audacious and villainous ambition. Why, they ask, did not the Attorney-General, as the only public prosecutor we have, at once fix upon some point and break the neck of an imposture, and consign the claimant to the police? We can reply that had such a course been attempted, the Attorney-General would have been hounded down by the lovers of "fair play," for at the present time there are advocates in the Press who wish that the case "had been tried out." And had such a course been possible, the difficulties in the way would have been very considerable—difficulties which would not be encountered in adopting our suggestion as to libel. We reach the height of absurdity when we not only do not compel a libeller to justify at the outset, but furnish him with a statutory form for defaming private character.

We have seen it suggested that we should establish courts of preliminary inquiry, but although we approve of the suggestion we very much doubt whether our reverence for the liberty of the subject would allow us to carry it into effect. We now simply deter sham and vexatious actions by compelling security for costs or remitting to County Courts, but this does not prevent trials coming to the surface which ought to have been suppressed at the earliest stage of their career. We admit, however, the difficulties which would attend the attempt to control cases of the Tichborne type, but as regards libels we think the course is plain and simple. We ought at once to adopt measures to stop the foul mouth of the traducer before he makes a public court the vehicle of his calumnies, and if some such steps as we have indicated are not taken, there is no member of society who, is not subject to the caprice of any villain who can, or who thinks he can, hit a blot in his or her character, and who can bring upon his victim life-long ruin and misery. Cases such as those of Sir Travers Twiss ought not to pass with out leaving a lesson in legislation as well as in morality.—*Law Times.*

* The practice as laid down by Mr. Dalton in Chambers, in this country gives prominence to the question as to where the cause of action arose, as will be seen by a note of his decision in *Harper* v. *Smith, ante* p. 67.—Eds. L. J.

CANADA REPORTS.

ONTARIO.

CHANCERY.—MASTER'S OFFICE.

Re Baker—Bray's Claim.

Insolvent Act—Double Proof.

1. The doctrine against double proof applies only when both estates are being administered in insolvency.
2 A creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately endorsed the note.

[Master's Office, Dec. 8, 1871.—Mr. Boyd.]

Bray, the claimant, held notes made by Dawbarn & Co., and endorsed by Baker, a member of that firm. Baker died and his estate was being administered in Chancery by his widow, his executrix. Dawbarn & Co. went into insolvency, and Bray proved his claim upon the notes in the proceedings in insolvency. He then came in as a creditor to firm in the administration suit, and it was objected that he had elected to proceed against the joint estate of the parties.

S. G. Wood for Bray.

Snelling and *Keefer, contra.*

Mr. Boyd, Master in Ordinary.—Both parties cited and relied upon the decision of the Court of Queen's Bench in *Re Chaffey*, 30 U. C. Q. B. 64; but it was not very much help to a solution of the question discussed on this claim. That decision was upon the effect of certain clauses of the Insolvent Act of 1864. The facts were, that a partnership firm made a promissory note, which was endorsed by one of the partners to a creditor. The firm and the partner both became insolvent, and their joint and several estates were being administered in the Insolvent Court. It was held that the endorsement of the partner was a security for the payment of the creditor's claim, but not a security from the insolvent firm or from the estate of that firm within the meaning of sec. 5, subsec. 5, of that Act; consequently that that Act did not require the creditor proving on the partnership estate to put a value on this endorsement. In truth the case was not within the Act at all, but was governed by the general law as to securities held by a creditor, viz., that he can prove against the bankrupt estate retaining his security. Then the decision goes one step further—that if the partner's estate is in insolvency, the creditor retaining his security cannot rank upon the partner's separate estate as well as upon the joint estate of the partnership.

The case before me was argued as if the question arose entirely under the Insolvent Act of 1869. Assuming this for the moment, then section 60 of that Act supplies words sufficient to include the endorsement of an insolvent partner, *i.e.*, one who has been made an insolvent under the Act, not merely a person unable to pay his debts in full—one of an insolvent firm, under the foregoing state of facts, within the securities which are to be valued and dealt with by the Insolvent Court. In this view the question should have been raised before the Insolvent Court when Bray proved his claim there. But here the partner who endorsed is dead, and his estate is being administered, not in insolvency, but by the Court of Chancery, and the special provisions of the insolvent Act do not apply to the case. The rights of the creditors proving claims in this office are to be measured by the extent of their rights if they had been suing at law the executrix of the partner on his endorsement, after proving upon the partnership estate in insolvency, such proceedings in insolvency being instituted after the partner's death. Now, supposing Bray had been suing the executrix on her husband's endorsement, I know of no defence at law which she could set up: see per Mansfield, C. J., in *Heath* v. *Hall*, 8 Taunt. 328.

The rule laid down by Lord Lyndhurst, in *In re Plumner*, 1 Phil. 59, applies here: "If the creditor of a bankrupt *holds a security on part of the bankrupt's estate*, he is not entitled to prove his debt under the commission, without giving up or realizing his security. But if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound." Now, here the insolvent firm of Dawbarn & Co. are the makers, and Baker the deceased partner of that firm is the endorser; the claim of Bray is against the executrix of the endorser, clearly a third party as regards the partnership estate in insolvency. This is the opinion of the court in *Re Chaffey*, p. 70, though not necessary in that case for the decision of the appeal. See also *In re Sharpe*, 20 C.P. 82; and *Beasly* v. *Beasly*, 1 Atk. 97. My conclusion is, that the creditor is entitled to prove for his full claim, and that my duty is to report the circumstances specially to the court, that they on further directions may impose any conditions that they think advisable upon this creditor, in view of his proving on the Dawbarn estate in insolvency. As to the mere right to prove without being obliged to elect, I may remark that even in Bankruptcy it is held that a joint and separate creditor ought to prove against both estates, but elect which he will be paid out of before he takes a dividend: *Ex parte Beatty*, 2 Cox, 218.

The case of *Ex parte Thornton*, 3 De G. & J. 454, a note of which Mr. Snelling very properly handed me, though it makes against his contention, is quite in point, and confirms the view I have taken, as it establishes the principle that the doctrine against double proof applies only when both estates are being administered in Bankruptcy. I also refer to *Ex parte Baurman*, Mont. & Ch. 573; s.c. 3 Deac. 476; *Ex parte Stanborough*. 5 Madd. 89.

CHANCERY CHAMBERS.

Shaw *v.* Freedy.

Suits for trifling amounts—Jurisdiction of the Court of Chancery.

The Court of Chancery will not entertain a suit where the subject matter of litigation is a sum not exceeding £10.

Where, therefore, after default was made in payment under a decree in foreclosure, in a suit in which the bill was filed to enforce a mortgage securing $18.53, a final order was refused.

[Chan. Cham., 25th May, 1872.—Mr. Taylor.]

Powell moved for a final order of foreclosure.

Mr. Taylor. On looking at the decree issued by a Deputy Registrar under Gen. Order 38, I see that the suit is one to enforce a mortgage securing payment of the paltry sum of $18.53. A decree should never have been made in such a suit. *Gilbert* v. *Braithwaite*, 3 Chy. Cham. 413, is a decision of the full Court, that Lord Bacon's order of 9th January, 1618, is in force here. This had been previously held by the learned Chancellor in *Westbrooke* v. *Browett*, 17 Grant, 339. The expression used in that order is "shall not take jurisdiction in suits under the value of £10." As a decree has been made, and there is no application on the part of the defendant to dismiss the bill, I make no order to that effect, but I decline to interfere actively in favour of the plaintiff, and therefore make no final order of foreclosure as asked.

I may also observe that in this case there would, apart from the one I have already mentioned, be another reason for refusing the order. The amount the defendant is ordered to pay is incorrect, it being stated at a sum larger than the aggregate of the three sums principal, interest, and costs, when correctly added together amount to.

Order refused.

NOVA SCOTIA.

SUPREME COURT.

[Before the Chief Justice, Sir William Young, Kt.; Dodd, DesBarres, Wilkins, Ritchie, and McCully, JJ.]

Dodge v. The Windsor and Annapolis Railway Company.

The measure of damages where goods are injured in transitu —Payment into Court—Reduction of damages—New trial.

Where defendant, as a common carrier, tenders plaintiff at the place of destination, goods received to be forwarded, but injured so as no longer to be suitable for the purpose designed by the owner, the measure of damages to be recovered is their deterioration in value at the place of destination, in consequence of defendant's negligence, misconduct or neglect.

Plaintiff has no right to refuse to accept a deteriorated article, and claim the full amount of its value uninjured as damages.

[Halifax, Michaelmas Term, 1871.]

This cause came on for argument before the full Court in Banco, upon a rule *nisi*, granted by Mr. Justice Ritchie, who tried the same on the Western Circuit.

McCully, J., now (15th January, 1872,) delivered the judgment of the Court as follows:—

This was an action brought by plaintiff against defendant, tried before His Lordship, Mr. Justice Ritchie, at Kentville, in the Spring Circuit of 1871, and a verdict found for plaintiff. A rule *nisi* to set aside the verdict was obtained by the defendants, and was argued during this present Term. The grounds taken and relied on were that the verdict was against law and evidence, and for misdirection.

The action was brought against the defendants as common carriers, and sets out in the usual way in the first count a contract to carry for hire from Halifax to Middleton, in Annapolis County, goods to be delivered by plaintiff to defendants. Delivery is averred, and that all conditions performed, &c., and the breach assigned is non-delivery, whereby plaintiff was deprived of his goods for a long time, and the same were diminished in value.

The second count charges defendants as carriers for hire, and with having received of plaintiff a piece of oil cloth for the floor of plaintiff of the value of $30, to be carried from Richmond Station, Halifax, to Middleton aforesaid, and there delivered in good order and condition, &c., but that defendants did not use due care and skill in the carriage of said goods, but broke and damaged the oilcloth, whereby the same was wholly lost to plaintiff.

To this count, defendants pleaded ten pleas in all. First, that they did not promise as alleged. Second, goods not delivered to defendants for purposes, &c., as alleged. Third, goods were re-delivered to plaintiff within a reasonable time, &c. Fourth, goods improperly and negligently packed, which caused the damage and loss, &c. Fifth, goods damaged before they came to defendant's possession. Sixth, goods re-delivered in same condition as received of plaintiff. Seventh, denial that defendants were common carriers. Eighth, did not receive the goods for the purposes, &c., alleged. Ninth, defendants always ready to deliver plaintiff his goods in the same condition as received, and he refused to accept. Tenth, payment of money ($3) into Court under the usual plea. Plaintiff replied, money paid in not enough.

The facts of the case were substantially as follows:—Plaintiff was residing at Bridgetown, and had ordered a piece of oilcloth, 16½ feet square, from Halifax, to cover his dining-room. On its arrival by the defendant's railway, it was found to be broken or cracked, and more or less damaged. Its value was sworn to be nearly $30. Plaintiff, on seeing it and the condition it was in, asked the conductor, being defendant's officer in charge, "If the oilcloth was in as good condition as when received by the Company?" His answer was "No. It had been placed on some barrels of flour in place of putting it on the floor of the car. The barrels were standing on their ends, and they took the barrels from under the ends of the oilcloth, and the package dropped at one end. It was done at Wilmot, and that caused the damage." Plaintiff, thereupon, refused to accept possession. This statement of facts by plaintiff stands uncontradicted. Beales, one of his witnesses, estimated the damage at $10. The point was broken and peeled up. Morgan, another witness of plaintiff, says it was cracked through nearly at the middle. The acceptance being refused by plaintiff, the oilcloth was sent to Kentville to defendant's warehouse. This was plaintiff's case.

The defence was in no material point contradictory of, or inconsistent with plaintiff's case except as to the extent and amount of damage the oilcloth had sustained.

Vernon Smith, the Manager of the Road, estimated that a quarter of a dollar would repair the damage. Louis Dodge valued the damage at $2 50. S. Pratt had it unrolled, and got Robertson a first-class painter, to inspect it. Witness valued the damage at 50c, but con-

sidered that would be a high price to pay for repairing it. Witness was authorized to make plaintiff an offer, and offered him $2 as a compensation (it is to be assumed for the damages.) Walker, another of defendant's witnesses, says it could be repaired for 25c, and be equally serviceable. John Dodge, a house joiner, "the damage could be repaired for 50c." Bouth Reid, a cabinet-maker, examined the cloth, and gives a minute description and a diagram, and adds it could be repaired for 50c, so far as durability; it might not look as well. The plaintiff and other witnesses were re-called, but their testimony was not in contradiction to that of defendants' witnesses, and does not affect the issue materially.

His Lordship, on the plea of payment of money into Court, explained to the jury that if they thought the damage sustained by plaintiff did not exceed the sum of $3, they should find for defendant, otherwise for plaintiff. His further direction was that if the article in this case was not seriously damaged, and was repairable, the owner was bound to receive it, and could claim what would compensate him for the damage, but if it was so seriously injured *that it could not be thoroughly repaired, he might refuse to receive it, and claim its value.* That in this case, they would be at liberty to give the whole value of the oilcloth, deducting the amount paid into Court, if they should think that, taking into account the value of the injury and what has been said about its repair, the plaintiff could not reasonably have been required to accept it, having in view the object for which he had purchased it, and the use to which he intended to apply it. The jury found a verdict for $23 50, the full value after deducting the $3 paid into Court.

The main question for the Court to consider in this case is whether the jury were properly directed on the point of law, arising out of the foregoing state of facts. In this Province there being no statutes qualifying the Common Law in reference to the responsibilities and rights of common carriers or railway companies, the naked question presents itself, in case of non-fulfilment by this class of bailees for hire to complete their contract, as to the delivery of goods in the condition in which they received them—what is the law in reference to damage of goods by a common carrier, and in whom is the property of a damaged chattel, as in this case more or less injured, while *in transitu?* In other words is the owner of the goods, being himself the consignee, as in this case, justified in refusing to accept them in their damaged condition, and in claiming from the carrier the entire cost of the article by reason of his failing to perform his contract to deliver in good order; or is the proper measure of damage the mere deterioration in value of the article by reason of the injury, giving no election to the consignee to refuse accepting the property and right of property continuing in himself?

On the part of defendant it was contended that there had been a misdirection. Add. on Torts, 490, and other authorities were cited upon this point, but the cases they contemplate are an entire loss or destruction of the article—loss from non-delivery in time and the like. But if this action is to be sustained and the full value of the goods recovered, because of a partial injury, and that reasoning based upon the fact as it was put, that defendant has failed to fulfil his contract, the same reason should certainly apply when by carelessness or negligence or other unjustifiable cause, the carrier fails in his delivery as to time, and the plaintiff is injured by a decline of price in the market. Goods delayed may thus become comparatively valueless to the owner or consignee. But while cases as to the point in dispute here are difficult to find, and this may be, and probably is, because the plaintiff is attempting to establish a new principle; in other cases where carriers are in fault, as to delay in delivery, the amount of damage, and the principle as to measure and computation well settled and clear.

In *Simmons* v. *S. E. R. W. Co.*, 7 Jurist N. S. 849 Ex , Bramwell, B., said if goods are delivered too late by a carrier, the owner ought instantly to sell at market price and realize his loss, and the difference between the price he obtains by the sale at that time, and that which he would have obtained, is the only measure of damage, and see *Wilson* v. *Lancashire & York R. W. Co.*, 9 C. B. N. S. 632. What pretence or reason can be urged why if a carrier commits a breach of contract by neglecting to deliver goods in time (intended perhaps for exportation), which in consequence of a ship having sailed, or for other cause the consignee no longer requires, that in that case the damage must be ascertained by sale, and yet if the breach occur by carelessness so that the goods are deteriorated by a slight injury, there must of necessity be another measure of damage.

The numerous cases cited as between vendor and vendee, and the right to reject or retain property, have no application here, and I have searched in vain to find a single case to show that negligence, carelessness or misconduct of any kind on the part of a common carrier, does more than entitle the contractor to recover damages for the non-fulfilment of his contract to the extent of the depreciation produced by the carrier's default. There is a large collection of cases in Fisher's Digest, under the sub-section "Damages," p. 1,498, with nice and technical distinctions, touching delivery, falling markets, prospective profits, but nowhere do I find that the consignee or owner has an election that enables him to divest himself of the property or the right of property in goods carried, whether injured or belated, and claim the full value from the carrier. To show how uncertain and capricious the rule would be, if it rested with a jury to find when the consignee might or might not decide to abandon his goods, no better case could be cited by way of illustration than the present. Beales, plaintiff's own witness, spoke of damage as high as $10 or a little over one-third of the value of the article, but if plaintiff had called an auction and sold the cloth, as he might have done, or had the damages appraised by competent judges, judging from what the other witnesses testify, it is by no means certain that the value of the cloth was so much depreciated, even as Beales represented.

If the principle contended for by plaintiff had ever had the sanction of an English Court of

Law, viz., the right in special assumpsit to recover as here the entire value, surely some cases to that effect could be found in the books. My research has not rewarded me with any case or any principle that underlies or would countenance such a position, as is sought to be established. The absence of such, I remark, is only to be accounted for, I think, by assuming that the common law carrier, pretty well weighted with liabilities already, is not compellable at the election of the owner to take all goods damaged much or little, and account to him for their full value. I am, therefore, of opinion that his Lordship's direction upon this point cannot be upheld. It was then contended on the part of plaintiff's counsel that the payment of money into Court on the declaration *generally* was an admission, not only of the contract as laid, of all conditions fulfilled, and of the breach, but of the total loss as set out in the second count. This position was urged with a good deal of confidence, but the court on the argument expressed a pretty strong dissent from any such position.

The doctrine of payment of money into Court, and its effect upon the pleadings and the case is to be found very ably and clearly discussed in Taylor on Evidence, sec. 760 to 765, both inclusive, and it will there be seen that no such consequence follows from payment of money into Court, as that contended for by plaintiff's counsel. At sec. 766, it is said that although payment into Court admits the entire contract declared on, as also the specific breach in respect of which the payment is made, it does not admit any damages on that breach beyond the sum paid in, still less does it admit any other breach to which the payment does not apply. And the writer illustrates it thus, "payment of money into Court upon a count in a valued policy of insurance, which states a total loss by capture, admits the contract and the capture, but not the total loss; and the plaintiff therefore must still prove that he has suffered damage from the capture beyond the sum paid." The law upon this part of the case was properly put to the jury, and before the plaintiff was entitled to recover damages, ultra $3 paid in, it was incumbent on him to prove that he had sustained them.

Having carefully considered such of the cases cited on the argument as have a bearing upon the merits of this controversy, in my view of the matter, it falls within that category of which *Leeson* v. *Smith*, 4 N. & Man. 304, is an exponent. In that case it was decided where upon showing cause against a non-suit or a new trial, it appears that the verdict has been entered for an amount not warranted by the evidence the Court will make the rule absolute, unless the parties consent that the damages shall be reduced, in which case neither party pays to the other costs of the rule. See *Hussey* v. *Met. R. W. Co.*, 20 L. T. N. S. 612.*

[* There is a singular absence of cases upon the principal point decided in *Dodge* v. *The Windsor and Annapolis Railway Company*. We find none touching upon it in our own or the English Courts. In *Redfield on Railways*, vol. ii. p. 185, it is laid down in conformity with the judgment of McCully, J., that "when the goods are only damaged, the owner is still bound to receive them, and cannot abandon and go against the carrier as for total loss." The same view of the law seems to be taken in *Angell on Carriers*, 4th Ed., § 482, note A. It would appear that if the goods are so much damaged as to amount to destruction of them, or if the nature of the property is so altered through negligence that it would amount to a conversion, then the owner is entitled to bring his action for the full value, otherwise his damages will be limited to the diminution in value resulting from the carrier's carelessness. *Scoville* v. *Griffith*, 2 Kern. 509.—Eds. L. J.]

ENGLISH REPORTS.

EXCHEQUER CHAMBER.

Frost v. Knight.

Breach of promise of marriage—Repudiation of the contract before the time agreed upon for performance.

The defendant promised the plaintiff that he would marry her on the death of the defendant's father. Before the death of his father, the defendant announced his absolute determination never to fulfil the promise.

Held (reversing the decision of the Court of Exchequer), on the authority of Hochester v. De La Tour (2 E. & B. 678; 22 L. J. 455, Q. B.), that the plaintiff might at once regard the contract as broken in all its obligations and consequences, and sue for the breach thereon.

[Feb. 7, 1872.—26 L. T. N. S. 77.]

This was an appeal from the judgment of the Court of Exchequer, and was an action for a breach of promise of marriage, tried before Martin, B., at the Staffordshire Spring Assizes, 1870. Evidence was given to show that the defendant promised to marry the plaintiff on the death of his father, and also that he refused to perform the promise; while it was proved that defendant's father was still alive.

A verdict having been obtained for the plaintiff with £200 damages, *Powell*, Q. C., obtained a rule, which was afterwards made absolute, for a new trial, on the ground that the learned judge ought to have nonsuited the plaintiff, Martin, B., dissenting (39 L. J. 227, Ex.; 23 L. T. Rep. N. S. 714). The plaintiff having appealed, the case was reargued last Trinity Term in the Exchequer Chamber before Cockburn, C.J., Byles, Keating, Lush, and Smith, JJ.

June 20.—*A. J. Staveley Hill*, Q C., and *C. Dodd*, for the plaintiff, said: The simple question is whether plaintiff upon a contract by the defendant to marry her as soon as his father died, can sue the defendant in an action for the breach of that contract before the father's death. The rule in such cases is thus laid down in Leake on the Laws of Contracts, p. 462, "If, before the time appointed for performing the contract has arrived, the promiser wholly refuses to perform it, the promisee may be entitled to treat such refusal as an immediate breach of the contract, and to commence an action for damages in respect of it;" and the cases of *Hochester* v. *De La Tour*, 2 E. & B. 678; 22 L. J. 455, Q.B., and *The Danube and Black Sea Railway, &c., Company* v. *Xenos*, in error from the Court of Common Pleas, 5 L. T. Rep. N. S. 527; 13 C. B., N. S., 825; 31 L. J. 284, C. P.; are there cited as authorities for that proposition. So also, in the notes to *Cutter* v. *Powell*, 2 Smith's L. C., 6th edit., p. 39, the learned annotators, referring to the judgment of Parke, B., in the case of *Philpotts* v. *Evans*, 5 M. & W. 475, which is relied on by the defendant in the present case, say, "It is impossible, however, even on this ground," viz., by supposing that the judgment in *Hochester* v. *De La Tour* applied to cases in which, in consequence of the refusal,

something had taken place to interfere with the performing of the contract when the time arrived, "to reconcile the judgment of Parke, B., just referred to, in all respects with the more modern decisions; and, in *The Danube, &c., Company* v. *Xenos* (*ubi sup.*), it was held in accordance with these decisions, that where a contract is for the performance of a thing on a given day, and the person who is to perform it declares, before the day, that he will not perform it, then the other party has the option of at once treating this declaration as a breach of the contract." The contract of marriage is a peculiar one, and places the parties to it in a certain position and under obligations relatively to each other, and neither party is at liberty to do anything inconsistent with the existence of that mutual relation and those mutual obligations until the mutual contract is performed. As was well said by Pollock, C.B., in his judgment in the Exchequer Chamber, in *Hall* v. *Wright*, E. B. & E. 795; 29 L. J. 52, Q B., in error from the Queen's Bench, "a view of the law which puts a contract of marriage on the same footing as a bargain for a horse or a bale of goods is not in accordance with the general feelings of mankind, and is supported by no authority." In *Williamson and another* v. *Verity*, 24 L. T. Rep. N. S. 32; L. Rep. 6 C. B. 206; s. c. *nom. Wilkinson and another* v. *Verity*, 40 L. J. 141, C. P., Willes, J., in delivering the considered judgment of the Court of Common Pleas, says, "The rule that a cause of action arises once for all upon the first default is, however, not universal; for, in cases where a man undertakes to do an act upon a future day, and before the day arrives disables himself from performing the act, positively and absolutely refuses to be bound by or perform his contract, and, to speak, declares off the bargain himself, and absolves the opposite party, it is in the option of such party, at his election, to treat that conduct as of itself a violation and breach of the contract, or to insist upon holding the repudiating party liable, and sue him for non-performance when the day arrives. The misconduct of the party also acts in fraud of the bargain in such cases, and gives the other party thereto the election of suing either for the first violation or for non-performance at the day; and it does not furnish the wrong-doer with any answer to the latter. This principle was well maintained in *Hochester* v. *De La Tour* (*ubi sup.*) In delivering the judgment in that case, Lord Campbell, C J., thus stated the reason of the decision: "It seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it (the contract) as prospectively binding, for the exercise of this option well may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer." The same doctrine was received and approved by the Court of Exchequer Chamber in *Avery* v. *Bowden* (6 E. & B 953; 26 L. J. 3, Q.B.) Those observations of the learned judge strictly apply to this case. Here there was a deliberate and distinct refusal by the defendant to perform, or any longer to be bound by, his promise. At that moment the position and condition of the plaintiff were altered and injuriously affected by such refusal. [Cockburn, C. J.—How are you to assess the damages? I confess I cannot see how the court below distinguished *Hochester* v. *De La Tour*.] The rule as to damages is well laid down in the American authorities referred to by Mr. Sedgwick in his Treatise on Damages (2nd edit., pp. 208-210; 4th edit., pp. 233-235), and which rule was approved of by Willes, J., in *Smith* v. *Woodfine*, 1 C. B. N. S. 660. The case of *Philpotts* v. *Evans* 5 M. & W. 475, which was relied on strongly by the defendant below, has been reviewed by subsequent cases (see especially *Cort and another* v. *The Ambergate, &c., Railway Company*, 17 Q. B. 127; 20 L. J. 460, Q. B.), where Lord Campbell, C.J., says, with reference to it, that "the court cannot be considered as having decided that, if the notice had been received by the plaintiffs before the wheat was sent off from Gloucester, the plaintiffs might not, at their pleasure, have treated it as a breach of the contract, and commenced an action against the defendant for not accepting it, without tendering it to him at Birmingham." [Lush, J.—Does not the promise to marry involve more than the mere words, *e g.* a state of affiance between the parties?] Just so. [Cockburn, C. J.—It is a breach of the betrothal, but is it a breach of the contract to marry?] Lord Campbell, C. J., in *Hochester* v. *De La Tour*, puts as a possible case the very case now before the court. It is submitted that this case is clearly within the rule in *Hochester* v. *De La Tour*, which case was well decided and has been subsequently uniformly approved of. They cited also *Burtis* v. *Thompson*, (American) 42 New York Reports (3 Hand) p. 246, and judgment of Grover, J., at p. 248; *Thorne* v. *Knapp*, Ib. p. 474.

Powell, Q C. (*Streeten* with him), for the defendant.—When circumstances render the performance of an executor's contract impossible, no action lies till the time limited for the performance: (*Thomas* v. *Howel*, Skin. 301; see the remarks of Holt, C. J., on pp. 319, 320). *Hochester* v. *De La Tour* is questionable law. Lord Cranworth expresses a wish to see the decision appealed from. The judges in the court below distinguish it, but seem to feel hampered by the decision; *Atchinson* v. *Baker*, 2 Peake A C. 103, is in point. [Lush, J.—Suppose one of the parties had married?] Even then the breach is not until the time limited for the performance of the contract. *Non constat* that both parties might not be unmarried at the time of the father's death. *Short* v. *Stone* is distinguishable; there the time limited was a reasonable time, and what is a reasonable time for one may be presumed to be a reasonable time for the other also. In *Box* v. *Day*, 1 Wils. 59, there was an alternative, and it may be seen from the judgment of Lord Chief Justice Lee, in that case, if the condition had been simply the death of the father, the plaintiff would not have been entitled to judgment. Mercantile contracts are different, for the damages can be calculated with accuracy. Here that is not the case. And in mercantile contracts it frequently happens that one party can actually incapacitate himself for performance. Here there is no such incapacity: *Leigh* v. *Patterson*, 8 Taunt 450; *Lovelock* v *Franklin*, 8 Q. B. 371; *Philpott* v. *Evans*, 5 M. & W. 475; *Ripley* v. *Maclure* (*ubi sup.*), 359; *Xenos*

v. *Danube Company* (*ubi sup.*) Even if the plaintiff is entitled to a verdict, the amount of the damages is excessive. It was calculated as if the marriage were to take place at once, under existing circumstances, which were not the circumstances under which the contract would have been performed. Many changes might take place in the interval.

A. Staveley Hill, Q C , in reply.—*Hochester* v. *De la Tour* is good law, and has never been impugned; it was distinctly followed in *Wilkinson* v. *Verity*. He also referred to Pothier on Contracts (bk. 2, 230, 234), and to other authorities above cited.

Cur. adv. vult.

Feb. 8.—The judgment of Cockburn, C. J., Keating and Lush, JJ., was delivered by Cockburn, C. J.—This case comes before us on error brought on a judgment of the Court of Exchequer, arresting the judgment in the action on a verdict given for the plaintiff. The action was for breach of promise of marriage The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule *nisi* was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event no claim for performance could be made, and consequently no action for breach of the contract could be maintained. A rule *nisi* having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin B. dissenting. And the question for us is whether the judgment of the majority was right? The cases of *Lovelock* v. *Franklin* and *Short* v. *Stone*, which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil the contract, an action will at once lie. The case of *Hochester* v. *De la Tour*, upheld in this court in the *Danube and Black Sea Company* v. *Xenos*, went further, and established that notice of an intended breach of a contract to be performed in future had a like effect. The law with reference to a contract to be performed at a future time where the party bound to performance announced prior to the time his intention not to perform it, as established by the cases of *Hochester* v. *De la Tour* and the *Danube and Black Sea Company* v. *Xenos* on the one hand, and *Avery* v. *Bowden*, 6 E. & B. 953, and *Reid* v. *Hoskyns*. 6 E & B. 953, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations under it, and enables the other party not only to complete the contract if so advised, notwithstanding his previous renunciation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand the promisee may, if he thinks fit, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action on the breach of it; in which action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the prescribed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss. Considering this to be now settled law, notwithstanding anything that may have been held or said in the cases of *Philpotts* v. *Evans* and *Ripley* v. *Maclure*, we should have had no difficulty in applying the principle of the decision in *Hochester* v *De la Tour* to the present case, were it not for the difference which undoubtedly exists between that case and the present, namely, that whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, namely, the death of the defendant's father during the life of both the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself before the time of performance arises; but here we have a further contingency, depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise. After full consideration, we are of opinion that, notwithstanding the distinguishing circumstances to which I have referred, this case falls within the principle of *Hochester* v. *De la Tour*, and that consequently the present action is well brought. The considerations on which the decision in *Hochester* v. *De la Tour* is founded, are, that by the announcement of the contracting party of his intention not to fulfil it, the contract is broken; and that it is to the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time, and that an action may be at once brought, and the damages consequent upon nonperformance be assessed at the earliest moment, as thereby many of the injurious effects of such nonperformance may possibly be averted or mitigated. It is true, as is pointed out by the Lord Chief Baron in his judgment in this case, that there can be no actual breach of a contract by reason of nonperformance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in *Hochester* v. *De la Tour* proceeds on that assumption—a breach of a contract when the promisor repudiates it, and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests.

His right acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party and the announcement that it never will be fulfilled must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly. The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of future nonperformance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual nonperformance may therefore by anticipation be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must tend to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in such cases avert, or at all events materially mitigate, the injurious effects that would otherwise flow from the nonfulfilment of the contract; and, in assessing the damages for breach of performance, a jury will, of course, take into account whatever the plaintiff has done or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been or should have been diminished. It appears to us that the foregoing considerations apply to a contract, the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time, and we are therefore of opinion that the principle of the decision in *Hochester* v. *De la Tour* is equally applicable to such a case as the present. It is next to be observed that the law, as settled by *Hochester* v. *De la Tour* and the *Danube and Black Sea Company* v. *Xenos*, is obviously quite as applicable to a contract in which personal status or personal rights are involved as to one relating to commerce or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed in future. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to social status accruing on marriage, but a new status, that of betrothment, arises between the parties. This relation, it is true, has not by the law of England the same important consequences which attached to it by the canon law and the law of many other countries, nevertheless it carries with it consequences of the greatest importance to the parties; each becomes bound to the other; and neither can consistently with such a relation enter into a similar engagement with another person. Each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman more especially it is all important that the relation shall not be put an end to. Independently of the mental pain occasioned to the feelings by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions, nor could she admit of such approaches if made; while the breaking off of the engagement is too apt to cast a slur upon one who has been thus treated. We see therefore every reason for applying the principle of *Hochester* v. *De la Tour* to such a case, and for holding that the contract is broken on repudiation not only in its present but in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that as the desire for marriage and the happiness to be expected from it diminish with advancing years, where by the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished; and that consequently an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We cannot but think that in estimating the amount of injury, and the compensation to be made for it, the wasted years, if the contract were broken when the time for marrying had come and the impossibility of forming any other engagement during the intermediate time, should be taken into account and not merely the age of the parties and the then existing value of the marriage. It appears, therefore, manifest that it is better for both parties—for the party intending to break the contract as well as for the party wronged by the breach of it—that an express repudiation of the contract should be treated as a violation of it in all its incidents, and give a right to the party wronged to bring an action at once and have the damages assessed at the earliest moment. No one can doubt that morally speaking a party who has determined to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise is come. The reason is, that giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates the injury to the other party. It has been urged that there must be great difficulty in thus assessing damages prospectively; but this must always be more or less the case whenever the principle of *Hochester* v. *De la Tour* comes to be applied. It would equally exist where one of the parties by marrying another person gave rise to an immediate right of action. It cannot be said that the difficulty is by any means insu-

perable, and the advantages resulting from the application of the principle of *Hochester* v. *De la Tour* are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages. We are struck by the fact that the majority of the Court of Exchequer, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. But the rights and obligations of the parties arising here en irely out of contract, we are at a loss to see how such an action could be maintained. But be that as it may; as in such an action the damages would have to be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simplest course—the case being, as it seems to us for the reasons we have given, clearly within the decision in *Hochester* v. *De la Tour*—to hold that the present action for breach of contract may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the nonfulfilment of the promise, as though the death of the defendant's father—the event on which the fulfilment was to depend—had actually occurred. We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.

Byles, J.—I think that the plaintiff below is entitled to recover both on principle and on authority; but as my judgment was prepared before I had the advantage of seeing that of the Lord Chief Justice, and as this is a case of great importance, I think I ought to deliver it. An express precontract of marriage, as already suggested by the Lord Chief Justice, places the man and woman in the condition or status of betrothment. In this state there are certain mutual duties. The woman, for example, may not, without a breach, marry another man, although it is possible that he may die before the future day appointed for the first intended marriage, whether already fixed or dependent on a future event. So I conceive the man cannot, during the stipulated period of betrothment, without a breach of contract marry another woman, though that woman may die in the mean time. So for one of the parties to break off the mutual engagement by an express refusal to perform it, though before the day, seems to me equally a breach of the contract, for it puts an end to the condition of betrothment, which according to the contract was to continue. In each of these three cases there is a repudiation of the duties springing from the new relation involved in the contract But independently of the peculiarities attending a precontract of marriage, the decision in *Hochester* v. *De la Tour* shows that in the analogous case of a precontract for future service the refusal of one of the parties to perform the contract, though before the time appointed for its fulfilment, is a breach. The decision in that case goes further than is necessary for our decision in this case, for there no status had been established like that involved in a precontract of marriage. Indeed, the Court of Common Pleas, in the case of *Wilkinson* v. *Verity*, and the court of error in *Xenos* v. *Danube Company*, 13 C. B. 825, have laid it down that absolute unconditional renunciation of a contract before the time of performance amounts to a breach at the election of the promisee.

Judgment of the Court of Exchequer reversed.

QUEEN'S BENCH.

Newby v. Von Oppen and others.

Foreign corporation—Service of writ—Common Law Procedure Act 1852, ss. 16 and 17.

The joint defendants were an American corporation, not incorporated, but having a branch place of business and their agent in this country. The latter managed all the business of the corporation in this country, but was authorized only to sell goods, and forward executory contracts to his principals for approval. The action was brought upon an alleged breach of a contract entered into in this country between the plaintiff and the agent. Two copies of the writ were served at the place of business, one directed to the agent, and the other to the corporation.

Held, upon application to strike the name of the corporation out of the writ and subsequent proceedings, that the service was good.

[Jan. 18, 31, 1872.—26 L. T. N. S. 164.]

This was an appeal from chambers. Master Unthank had, on the 28th June, 1871, made an order that the writ of summons and all subsequent proceedings thereon be amended by striking out the name of the Colt's Patent Firearms Manufacturing Company, who were co-defendants with the said Von Oppen. M. Smith, J., upon appeal, made no order, and referred the matter to the court.

E. Clarke had obtained a rule *nisi*, calling upon the company to shew cause why the order of the Master should not be rescinded. He relied upon some dicta of Lord St. Leonards in *The Carron Iron Company Proprietors* v. *Maclaren*, 5 H. of L. Cas. 416.

It appeared from the affidavit of the defendant Von Oppen that this action was brought against him and Colt's Patent Firearms Manufacturing Company as joint defendants to recover the sum of £180 claimed to be due from them jointly to the plaintiff for commission on sale of revolvers and rifles, as appeared by the writ of summons and the indorsements thereon.

Two copies of the said writ of summons, dated 21st June, 1871, by which this action was commenced, were served on the deponent personally on Wednesday, the 21st June instant. The person who so served the same stated that one copy of the said writ so served was intended for him and the other copy of the said writ so served on him was intended for the said company.

The co-defendants, the Colt's Patent Firearms Manufacturing Company, are a foreign corporation, incorporated in, and according to the laws of the United States of America, and of the State of Connecticut in and one of the said United States, and liable to be sued in the said United States upon all contracts made by them, whether so made in the said United States of America or elsewhere out of the said United States, and the said corporation's only manufactory and their principal place of business are at Hartford, in the county of Hartford, in the said State of Connecticut in the said United States of America; where the meetings of the directors and shareholders in the said corporation alone are and can lawfully be held.

The said company is not, nor has ever been registered as a joint stock company under or

according to any statute passed by the Legislature of the United Kingdom of Great Britain and Ireland, nor is it, nor has it ever been, incorporated in the said kingdom, or any part thereof, either by Royal Charter, Act of Parliament, or otherwise, according to the law of the said United Kingdom, or any part thereof.

The defendant Von Oppen is the only agent of the said corporation in the said United Kingdom, and he carries on the business of the said corporation at an office in London, at No. 14 Pall Mall, in the city of Westminster, but is not a member of the said corporation, nor has he nor anyone in the said United Kingdom any power or authority to receive process from the said corporation, or to appear to or defend any action brought against the said corporation, either alone or jointly with any other person or persons, or otherwise.

His authority for acting as the agent of the said corporation is a power of attorney granted to him by the said corporation, bearing date the 29th January, 1867, whereby he was only empowered to sell all the arms then on hand at the place of business of the said corporation in London, and all that might from time to time thereafter be sent by the said corporation to him for sale. Also to make executory contracts for the sale and manufacture of arms, but such executory contracts were not to be binding on the said corporation until they should have been ratified and approved by the said corporation in writing; and also to receive and collect all moneys that might be due to the said corporation, or that might thereafter become due to the said corporation, in the course of the business of the said sale of arms.

On the 23rd June instant, the defendant, Von Oppen, received a telegram from the said company, which authorized him to take proceedings for the purpose of setting aside the said writ, and the copies and service thereof, and all subsequent proceedings taken by the said plaintiff in this cause; and he instructed Geo. E. Thomas, one of the attorneys of this honourable court, accordingly.

Manisty, Q. C. and *Philbrick*, for the co-defendants, the Colt's Patent Firearms Manufacturing Company, shewed cause. It has been held in the case of *Ingate* v. *Austrian Lloyd's*, 4 C. B. N. S. 704, that sec. 16 of the Common Law Procedure Act 1852, does not apply to a foreign corporation. The words of that section are: "Every such writ of summons issued against a corporation aggregate may be served on the mayor or other head officers, or on the town clerk, clerk, treasurer or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any company of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred or other like district, on some peace officer thereof." By sec. 17, "The service of the writ of summons, wherever it may be practicable, shall, at heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge seem fit" In the case of *Evans* v. *The Dublin and Drogheda Railway Company*, 14 M. & W. 142, the private Act incorporating the defendants provided for the service of process upon a secretary or clerk, or by leaving the same at the office, or in case the same respectively should not be found or known, then by personal service upon any director of the company. The defendants had no office or agent in England, and it was held that the service of a writ upon one of the directors in London was null and void. At common law, clearly, service of a writ upon such an agent as this was of no avail, and by the Common Law Procedure Act, and these cases upon it, the company who are defendants here do not come within the provisions of the 16th section. In the case of *The Carron Iron Proprietors* v. *Maclaren*, cited upon the motion for the rule, the foreign corporation possessed real estate in this country, and yet the majority of the Lords held that an injunction against the corporation issued from the Court of Chancery, notice of which had been served upon the agent in London, and the manager in Scotland, could not be maintained. There is a query in the head note whether service of notice of injunction on an agent, when the principal is out of the jurisdiction, can be good service, especially when that agent is merely an agent for the sale is the goods of the principal. Although the point does not seem to have been mentioned before the Master, there is nothing to show that the contract here sued upon arose in this country.

Clarke supported the rule.—*The Carron Iron Company Proprietors* v. *Maclaren* was not decided upon the ground that the Court of Chancery had no jurisdiction; and the opinion of Lord St. Leonards, although he dissented from the final conclusion of the majority, may be taken upon this point to be that of the whole House (p. 449): "The first question is, were the appellants within the jurisdiction so as to authorise the court to enjoin their proceedings? They are incorporated, and they are called a Scotch corporation; their manufactories are in Scotland, but they have houses of business in England, which they necessarily carry on by agents or managers; and they have real as well as considerable personal property in England. The testator was a shareholder at his death, to the extent of £80,000; and his representatives are entitled to his shares, and are in truth partners in the concern. I think that this company may properly be deemed both Scotch and English. It may, for the purposes of jurisdiction, be deemed to have two domiciles. Its busine s is necessarily carried on by agents, and I do not know why its domicile should be considered to be confined to the place where the goods are manufactured. The business transacted in Eng-

land is very extensive. The places of business may, for the purposes of jurisdiction, properly be deemed the domicile. The corporation cannot have the benefit of its place of business here without yielding to the persons with whom it deals a corresponding advantage. The claim of the company is in respect of dealings here. Service on one member of a corporation is good service. Upon general reasoning, I think that the company may, for the purposes of the suit in Chancery, be treated as within our jurisdiction." Here, although not stated in the affidavit, the contract was made in London. [Cockburn, C.J. —That must be admitted at this stage of the case.] By the interpretation clause, sec. 227 of the Common Law Procedure Act 1852, "wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applicable to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it otherwise be provided, or there be something in the subject or context repugnant to such construction;" this being so, and it being admitted in Von Oppen's affidavit that the writ has come to the knowledge of his co-defendants, the court may order under the 17th section that the plaintiff be at liberty to proceed against all the defendants The case of *Ingate* v. *Austrian Lloyd's* is not in point, being a decision upon the 18th and 19th sections only, as to service out of the jurisdiction. [*H. Lloyd*, Q.C., as *amicus curiæ*, mentioned an unreported case of *Roberts* v. *The Grand Trunk Railway of Canada*, in which the service of a writ upon the chairman of the defendant's consultation board in London, the defendants being incorporated only in Canada, was upheld by the court of Exchequer.] *Cur. adv. vult.*

Jan. 31.—Blackburn, J., delivered judgment. This was a rule obtained to show cause why an order of Master Unthank, setting aside the writ and service, so far as regarded the Colt's Patent Firearms Manufactory Company. The facts do not appear to have been very distinctly brought before the master at chambers, but we take them to be as follows. The Colt's Patent Firearms Manufactory Company is not an English corporation. It is an American company incorporated by American law; but this foreign corporation has a place of business in England, and there *de facto* carries on business just as an English corporation might do, though their principal place of business and head office were in America. The contract, which plaintiffs allege to have been broken, was, as they allege, made in England by the foreign corporation thus carrying on business here. The writ was served on the manager of their business in England, who appears to be the head officer, and, indeed, the only officer of their English branch, but who certainly was not the head officer of the American corporation in the United States. Two points were raised and argued before us. It was said that a foreign corporation cannot be sued as defendants in an English court at all. If so there is no remedy at all in an English court to enforce a contract made with a foreign corporation, inasmuch as the individual, who constitute the foreign corporation cannot be made liable personally on its contracts or for its torts: See *General Steamboat Navigation Company* v. *Guillou*, 11 M. & W. 877 There can be no doubt since the cases of *The Dutch West India Company* v. *Van Moses*, 1 Strange 612, and *Henriquez* v. *The Dutch West India Company*, 2 Lord Raymond 1532, one of which was a proceeding against the bail of the defendant in the other case, and it was affirmed in the House of Lords, that a foreign corporation can sue as plaintiff. Lord Raymond in a note tells us that the original case was tried at *nisi prius* before Lord King, when Chief Justice of the Common Pleas at *nisi prius* in 1734, when it appeared that the cause of action accrued in Ireland, and adds, "And upon the trial Lord Chancellor King told me he made the plaintiffs give in evidence the proper instruments whereby by the law of Holland they were effectually created a corporation there. And after hearing the objections made by the counsel for Jacob Senior Henriquez, Van Moses, he directed the jury to find for the plaintiffs, which they accordingly did, giving them £13,720 damages. And afterwards a motion was made in the Common Pleas to set aside the verdict, but by the unanimous opinion of that court the motion was denied." This points to a difficulty which arose both in the *General Steam Navigation Company* v. *Guillou* and in *Ingate* v. *Austrian Lloyd's*; for it must often be a nice and difficult question whether a continental company is really by the law of its own country a corporation or not. But no such difficulty arises where the company is one belonging to Scotland or one of our own colonies, or to those parts of the United States where the common law prevails. In the *Carron Iron Company Proprietors* v. *Maclaren*, the Master of the Rolls had granted an injunction against the defendants, a Scotch, and therefore a foreign corporation. The injunction was dissolved on the ground that the appellants were foreigners, and as such entitled to the advantage which the law of their own country gave them; but no objection was raised on the ground that the court of equity could not treat a foreign corporation as a defendant. It is true that we are not aware of any reported case in which a foreign corporation has been sued in a court of law, but it seems to follow from their being permitted to sue as plaintiffs, that they must be suable as defendants. It is, however, enough to say that we will not on this ground prevent the plaintiffs from proceeding. The corporation may, if so advised, raise the question after appearing on the record. The other and more difficult question is whether the corporation has been properly served, supposing them to be suable. It was argued that the American corporation was resident in America, and must be served, if at all, as a foreigner resident out of the jurisdiction, subject to the difficulties which are pointed out in *Ingate* v. *Austrian Lloyd's*. This could be so if the foreign company had merely employed an agent here who made a contract for them. But we think it is different where the foreign corporation actually has a

place of business, and trades in this country. This is a point of considerable practical importance. There are already several Scotch banking corporations that have established branches in London. We see from this case that there is at least one American corporation that has set up a branch business here, and there will probably soon be more. Such a corporation does for many purposes reside both in England and in its own country. In the case of the *Carron Iron Company Proprietors* v. *Maclaren*, Lord St. Leonards, taking a different view of the facts from that taken by Lords Brougham and Cranworth, thought the Scotch corporation was resident in England. We think that there is great good sense in what Lord St. Leonards states to be the law on his view of the facts; he says (p. 459): "If the service upon the agent is right, it is because in respect of their house of business in England they have a domicile in England. And in respect of their manufactory in Scotland, they have a domicile there. There may be two domiciles and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction—one in Scotland and one in England; and, for the purpose of carrying on their business, one is just as much the domicile of the corporation as the other." The majority of the Lords took a different view of the facts, and thought that though the corporation possessed property in England, and had agents there, they did not carry on business there, but we do not find that they differed from Lord St. Leonards' view of the law, if they had agreed as to his facts; and in the present case the fact is clear that the American Company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there. One more point was to be noticed. At common law the service of a writ on a corporation aggregate, which, from the nature of the body, could not be personal, was by serving it on a proper officer, so as to secure that it came to the knowledge of the corporation, and then proceeding by distress: (See 1 Tidd's Practice p. 119, edit. of 1824.) The 2 Will. 4, c. 39 s. 13, and the 15 and 16 Vic. c. 75, s. 18, in fact only re-enact the old law as to what should be service on a corporation. The clerk or officer must be in the nature of a head officer, whose knowledge would be that of the corporation. We think that when once it is established that the corporation is to be treated as resident in England, the proper officer is the officer at the English branch, and that it is not necessary to serve the process on the officer at the head office abroad. We have been furnished by the courtesy of Mr. Lloyd, as *amicus curiæ*, with the papers in a case of *Roberts* v. *The Grand Trunk Railway of Canada*. It appears that the defendants, being a Canadian corporation, had a board of directors who acted for them in England. The writ was served on the secretary of that board, and on an affidavit of service, judgment was signed. Crowder, J., at chambers, stayed all proceedings on the judgment, on the terms that the defendant should bring money into court. The case was therefore in its circumstances very similar to the present. The present Chief Justice of the Common Pleas, on the affidavit of these facts, and an affidavit of merits, obtained in the Exchequer a rule *nisi* to set aside the judgment. The rule was made absolute—the defendants to appear in ten days; the money to remain in court to abide the order of the court or a judge. Costs of the application to be costs in the cause. If we could be sure that this was the judgment of the court pronounced *in invitos*, it would seem clear that the Court of Exchequer thought the judgment regular, and only to be set aside on terms, and it would therefore be an authority in favor of the view we take. But we rather think that the matter was settled by the agreement of counsel, without the court being called on to pronounce any opinion on the subject, and therefore we do not rely on this as a decision. The result is that the rule in the present case must be made absolute. *Rule absolute.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

(*From the American Law Review.*)

FOR NOVEMBER AND DECEMBER, 1871, AND JANUARY, 1872.

Acceptance.—See Bankruptcy, 2.

Action.—See Common; Pleading.

Admiralty.—See Piracy; Pleading; Salvage.

Adultery.—See Condition.

Adverse Possession.

A. and B. occupied a copyhold let to them by a tenant for life. At the death of said tenant for life, B. was entitled to an undivided third for life, and A. and C. were each entitled to one-third in possession, and a moiety of the other third in reversion expectant on B.'s death. A. and B. continued in possession of the whole copyhold, thereby holding one-third unlawfully, for more than twenty years after the death of said tenant for life, when B. died. *Held*, that after the death of the tenant for life, A. and B. held as joint tenants, and that therefore B. had no interest which he could devise. *Ward* v. *Ward*, 6 Ch. 789.

See Landlord and Tenant.

Agency.—See Principal and Agent.

Allotment.—See Company, 2, 3.

Ambiguity.—See Evidence.

Ancient Light.

To obtain an injunction restraining the building of a house, because of its diminishing ancient light and air, a substantial diminution must be shown. It appears that in such case a house is entitled not merely to a certain quantity of light sufficient for it, and no more, but to the quantity that has been anciently enjoyed. —*Kelk* v. *Pearson*, L. R. 6 Ch. 809.

Annuity—See Bequest, 1, 10; Devise, 4.

Apparel.—See Salvage, 2.

Appeal.—See Pleading.
Appointment.—See Power.
Arbitration.—See Broker, 1; Contract.
Assignee.—See Husband and Wife.
Assignment.—See Surety, 1.
Attorney.—See Mortgage, 4.
Average.—See Insurance, 1.
Award.—See Contract.
Baggage.—See Salvage, 2.
Bank.—See Company, 1.

Bankruptcy.

1. The Plaintiff gave the defendant a guarantee as follows: "I guarantee payment of goods which you may supply E., but so as my liability shall not exceed £250." E. became bankrupt; the defendant proved the whole amount due him, and then the plaintiff paid him, as agreed, £250. E.'s estate declared a dividend: *Held*, that the plaintiff was entitled to the dividend on the amount of £250.—*Hobson* v. *Bass*, L. R. 6 Ch. 792.

2. A. consigned goods to B. for sale, drawing on him against the goods, and indorsed the bills to a bank, giving it the bills of lading as security. B. accepted the bills, "payable on delivery of the bills of lading." B. became bankrupt before the notes became payable, and the bank offered to prove the whole value of the notes: *Held*, that, as B. accepted only the bills of lading being delivered to him, the bank's security was in fact on B.'s property, and that the bank could prove the notes only on deducting the security.—*Ex parte Brett*, L. R. 6 Ch. 838.

3. The rescission and abandonment by an insolvent firm, of a speculation in which it is interested jointly with another firm, while the result is still uncertain, is in no way a fraudulent preference of the second firm.—*Miller* v. *Barlow*, L. R. 3 P. C. 733.

See Surety; Proof.

Bequest.

1. A testator bequeathed to his executors and trustees his interest in premises in which he carried on his trade, and his stock in trade, &c., in trust to permit his son to carry on the business "upon the terms and conditions following," that his son should pay certain annuities to his wife and daughter. An action was brought against the son and daughter by the sole executor and trustee for administration, alleging that the son had not paid the annuities, and the son filed an answer stating that no application for the same had been made to him by the daughter, and that he intended to pay to the wife her annuity. The daughter then brought the present bill against the son, praying a declaration that she was entitled to her annuity, for an account, for a declaration that the defendant was a trustee of said premises, stock in trade and profits, for payment of the annuity, and for further relief. Defendant demurred, on the ground that he had offered to account for the property in the former suit, so that this bill was unnecessary; and that should the above bequest be in trust to pay annuities, then the executor had not assented to the bequest, and was a necessary party; and he answered farther that he claimed said premises, stock in trade, &c., to hold subject to the terms of the will. *Held*, that the defendant had incurred a personal liability for said annuity, and had confessed an equity, and that the executor was not a necessary party. Demurrer overruled.—*Rees* v. *Engelbach*, L. R. 12 Eq. 225.

2. Testator bequeathed stock to trustees in trust to pay the dividends to his wife during her life. "And as to the rest, residue, and remainder of my estate, between my four sons . . . share and share alike, with benefit of survivorship, unless they shall die leaving issue, then the property shall go to his or their issue." It was claimed that said sons had a life estate only, with remainder in their issue: *Held*, that "if they shall die leaving issue," meant if they shall die, leaving issue, before the period of distribution, which was, in this case, the death of the tenant for life; and that said sons took absolute estates if they survived said wife, though they had children.—*In re Hill's Trusts*, L. R. 12 Eq. 302.

3. Testator bequeathed leaseholds to trustees to pay the rent to three nieces for life; and after the decease of each, her third in trust for her children living at her decease; if either should die without children surviving her, her share in trust for all testator's nephews and nieces then living, and the children of those dead. Trustees to have power to sell for the purpose of division and distribution. The trustees renounced, and a nephew was appointed administrator with the will annexed. One of said three nieces died childless, and the court decreed that her share had passed to the nephews and nieces, and that the leaseholds be sold: *Held*, that the legal estate was in the administrator, and not in the beneficiaries.—*Wyman* v. *Carter*, L. R. 12 Eq. 309.

4. A testatrix bequeathed £1400 in trust to pay the income to M. for life, remainder in trust for her children, exclusive of her two eldest sons, surviving her and attaining twenty-one; and £1500 to said two eldest sons; the remainder of her property "to M., and such of

her children as should attain twenty-one, including her two eldest sons, in equal shares and proportions for their respective own absolute use and benefit:" *Held,* that M. took a life interest in the residue.—*In re Owen's Trusts,* L. R. 12 Eq. 316.

5. Bequest of money upon trust to divide the same "among such of my grandchildren as shall attain the age of twenty-one equally, such children to have a vested interest at twenty-one." *Held,* that only such children as were alive on the eldest attaining twenty-one were entitled to a share, and that afterborn children were excluded.—*Gimblett* v. *Purton,* L. R. 12 Eq. 427.

6. A testator gave all his property to his wife "for the use of herself and all my children, whether born of my former wife, or such as may be born of my present wife." *Held,* that the wife was tenant for life with remainder to the children as joint tenants.—*Newill* v. *Newill,* L. R. 12 Eq. 432.

7. A testator bequeathed his property as follows: "As for my worldly goods and chattels I bequeath them as followeth: to my daughter all moneys both in the house and out of it." *Held,* that the daughter did not take shares in a building society, nor consolidated bank annuities.—*Collins* v. *Collins,* L. R., 12 Eq. 455.

8. A testator left shares of his property "to each of his two daughters to be settled on themselves at their marriage." The daughters attained twenty-one, being unmarried. *Held,* that they were entitled to their shares absolutely.—*Magrath* v. *Morehead,* L. R. 12 Eq. 492.

9. A testator, by a codicil, bequeathed to certain persons sums respectively equal to, greater, and less than sums bequeathed to said persons by a former codicil. *Held,* that such bequests in the absence of evidence to the contrary, were cumulative.—*Wilson* v. *O'Leary,* L. R. 12 Eq. 525.

10. A testator directed trustees in case there should be surplus income after payment of certain annuities, to invest the same yearly, and after the death of the survivor of the annuitants, to convert the trust fund into money and stand possessed of the same in trust to pay and divide the same among five public charities named, according to the amounts set after their respective names. The testator had no next of kin. Provision had been made for payment of the annuities, and there was a large surplus of pure and impure personalty. *Held,* that said charities were entitled to the pure personalty in equal proportions, but that the same must accumulate until further order. Also, that the impure personalty be paid to the Crown.—*Harbin* v. *Masterman,* L. R. 12 Eq. 559.

11. A testator bequeathed his residuary estate to A. and B. In a codicil he directed that A., B., and C. should be inserted in place of A and B., so that C. "shall and may participate in such bequest, free from legacy duty, with the said A and B." *Held,* that the word "participate" showed that the testator intended to create a tenancy in common between A., B., and C.—*Robertson* v. *Fraser,* L. R. 6 Ch. 696.

12. A testator beqeathed his property in trust for his niece for life, and after her decease the trustees to pay the principal "unto and amongst all and every the children of my said niece, born or to be born, which shall be living at the time of her decease, if more than one, equally, share and share alike; and if only one, then wholly to such only child, and the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one years, but not to be transferred until after the decease of my said niece. *Held,* that only those children who survived the niece and attained twenty-one, took vested interests. —*Williams* v. *Haythorne,* L. R. 6 Ch. 732.

13. Part of the assets of two partners consisted of leaseholds, the legal estate in which was vested in them as joint tenants. One partner died bequeathing all his share of the leasehold premises to his partner. The partnership assets were insufficient to pay its debts, though each partner's estate was amply solvent after paying such debts. *Held,* that the surviving partner took a moiety af the assets subject to the application of the same in payment of partnership debts, and that he could not call on the testator's estate to exonerate the assets from such charge.—*Farquhar* v. *Hadden,* L. R. 7 Ch. 1.

See Devise; Joint Tenancy; Mortmain.

Belligerent.—See Prize; War.

Bill in Equity.—See Equity Pleading and Practice, 2.

Bill of Lading.—See Bankruptcy, 2; Charter-party, 3.

Bills and Notes.—See Bankruptcy, 2; Equity, 2; Proof—Surety.

Broker.

1. The defendant, as selling broker, made a contract for his principal in the following terms: "October 26, 1869. Sold by order and for account of P. [his said principal] to my principals, S. & Son, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker, to be de-

livered here in London, at 22s. per cwt. D. pd. Shipment, November or December, 1869." Raisins arrived, which the defendant rejected as not of fair average quality, though it appeared they were of fair average quality for the year 1869. *Held*, that whether by the contract the raisins were only to be of fair average quality for the year 1869, or fair average quality generally, the defendant had acted merely as a *quasi* arbitrator, and was in no event liable for an error of judgment. *Pappa* v. *Rosa*, L. R. 7 C. P. 32.

2. A broker purchased hemp for B., signing a contract note as follows: "Bought for B. of our principals 200 tons of hemp," and signed by the broker. The broker had no principal, but B. had no notice of the fact. *Held*, that the broker could not sue B. on said contract note, as the contract was with an unnamed principal and not with the broker; and as the broker, if one of contracting parties, could not sign as agent of B., the other party.—*Sharman* v. *Brandt*, L. R. 6 Q. B. (Ex. Ch.) 720.

See Charter-party, 1.

Canal.—See Statute.

Capture—See Charter-party, 2, 3; Prize.

Cargo —See War.

Carrier.—See Lien.

Charge.—See Power, 1.

Charitable Institution.

A testatrix left property, consisting of pure and impure personalty, to the Dominican Convent at C., and to the Sisters of the Charity of St. Paul at S., payable to the superior for the time being in each case. The convent was an institution of Roman Catholic females living together by mutual consent in celibacy, under a common superior, for the purpose of sanctifying their souls by prayer; and said Sisters of Charity formed an institution consisting of women living together by mutual consent, whose primary object was personal sanctification, and who as a means thereto employed themselves in works of piety and charity. *Held*, that the gift to the Convent was good as to both the pure and impure personalty; and that the gift to the Sisters being to a charitable institution was good only as to the pure personalty.—*Cocks* v. *Manners*, L. R. 12 Eq. 574.

Charity.—See Bequest, 10.

Charter-party.

1. A Norwegian vessel was advertised in England to sail as a general ship by parties signing themselves "brokers." The plaintiff, in accordance with agreement with said brokers, put goods on board to be carried at a certain freight, but the master refused to sign bills of lading except subject to the terms of a charter-party between the owners and the above brokers who were the charterers. The charter-party, of whose existence the plaintiff was ignorant when he entered into the agreement with the brokers, gave the owner a lien for freight, dead freight, and demurrage. The owners claimed a lien for demurrage. *Held*, that the plaintiff was not bound to inquire whether there was a charter-party, and that the owners had no lien.—*Peek* v. *Larsen*, L. R. 12 Eq. 378.

2. The master of a German vessel agreed with a firm in Constantinople by charter-party in the English language to carry a cargo, stopping at Falmouth for orders, and thence within certain limits as directed, the act of God, the queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during said voyage, always mutually excepted. After signing the charter-party and bills of lading, war was declared between France and Germany. The vessel arrived at Falmouth, August 8, and then communicated with the charterers' agents. On September 3, the master received orders to go to Leith, which he said he would do on the first favorable opportunity. He waited for a wind which would be fair for leaving the port and enabling him to run if he saw a French cruiser. There were at the time French cruisers in the neighborhood, and there was a real risk of capture. Suit was instituted against the vessel September 15, for not proceeding, and she was arrested September 21. *Held*, that by either English or German law the delay of the master was justified by the terms of the charter-party.—*The Heinrich*, L. R. 3 Ad. & Ec. 425.

3. *The Patria*, a German vessel, was chartered to a German firm for a voyage from the west coast of Central America back to certain ports on the continent, or in Great Britain, and the charter-party provided that the master should not be responsible for events caused by high powers. While the vessel was at Gautemala, coffee was shipped on her by a Spaniard, who, having no notice of said charter-party, received from the master bills of lading in English, under which the coffee was to be delivered at Hamburg, dangers of the seas only excepted. The vessel touched at Falmouth, and there learned that war had broken out between France and Germany, and that Hamburg was blockaded. Correspondence ensued between the master aud the consignees, and the latter did not require the vessel to sail during the

continuance of the blockade, which lasted until September 18. After this date the consignees required deliverance of the coffee at Hamburg, or at Falmouth, they offering to pay full freight. The master refused to deliver, and remained at Falmouth until November 7, when this suit was instituted. Up to and after this date French cruisers in the British channel subjected German vessels to the risk of capture. *Held*, that neither by English nor German law could the terms of a charter party, of whose existence the shipper was ignorant, be imported into the bill of lading, and that the vessel was bound to proceed to Hamburg in spite of risk of capture. Also, that by English law the consignees were entitled to the coffee, either with or without payment of *pro rata* freight, on the master's refusing to proceed to Hamburg; and that under either the general maritime law or the law of Germany, payment of full freight entitled the consignees to the coffee.—*The Patria*, L. R. 3 Ad. & Ec. 436.

Class.—See Bequest, 5, 12.

Codicil.—See Devise, 1, 2.

Collision.

A collision occurred between two vessels, the G. and the E., by fault of the former, and the latter's main and fore mast soon went by the board. Afterward a pilot-boat fell in with the E., and attempted to tow her, but failed; the seaman of the E. might have got on board this vessel at great peril, but they stayed by the E., which was subsequently wrecked. Two of the E.'s men were drowned, and the others were injured. One of the drowned men left a widow with a child *en ventre sa mere*. *Held*, that the deaths and injuries were the natural and proximate consequences of the collision That it was the seamen's duty to stay by the ship while there was reasonable chance of preserving her, but that if they would have been justified in going on board the pilot-boat, the danger therein created an alternative peril, and that therefore there was no negligence, in the seamen, whichever alternative was adopted. Leave was reserved to the infant *en ventre sa mere* to claim damages if born alive within due time.—*The George and Richard*, L. R. 3 Ad. & Ec. 466.

See Damages, 2.

Common.

1. Where freeholders have for a long-continued duration enjoyed a right of common the court will if possible find a legal origin of such right. Where certain freeholders sued on behalf of themselves and all the other tenants of a manor for infringement of rights of common, it was presumed that there was a grant common to all with rights in common, and that they were therefore entitled to join in said action. Such freeholders did not forfeit their rights by ceasing to pay quit rents or render suit and service.—*Warrick* v. *Queen's College, Oxford*, L. R. 6 Ch. 716.

2. In a case similar to the above, it was *held* that a freeholder might sue on behalf of the freeholders only, even though there were copyholders with rights co-extensive with those of the freeholders; and he might sue on behalf of both.—*Betts* v. *Thompson*, L. R. 6 Ch. 732.

Common Carrier.—See Lien.

Company.

1. In 1864 the M. and L. banks entered into agreement for dissolution of the latter with transfer of its good-will to the M. bank. The M. bank to increase its capital, and 10,000 shares at £10 per share to be allotted at par to the directors of the L. bank for distribution among its shareholders. The directors paid the £100,000, but only 9,740 of the 10,000 shares were taken by the shareholders. In 1866 a call was made by the M. bank, but not paid on the 260 shares not taken. In November, 1867, the L. bank asserted a right to a "large number of shares that had not been applied for," but the M. bank replied that it could not now admit that right. In 1868 the L bank demanded allotment of said 260 shares, which was refused. In 1869 the M. bank was wound up, returning £5 per share to its stockholders, and the L. bank claimed such sum per share on said 260 shares. *Held*, that the agreement had been that if there were 10,000 shares there should be 10,000 subscribers, and that said agreement was now incapable of specific performance. Claim dismissed.—*In re Mercantile and Exchange Bank. Ex parte London Bank of Scotland*, L. R. 12 Eq. 268.

2. A bank issued a prospectus stating falsely among other things that 80,000 shares had been subscribed. In June, 1865, W. trusting in said statement, was allotted shares in said bank, and in July obtained a certificate certifying that he was a holder of the shares and was registered a member of the bank. An application by the bank to the Stock Exchange for a settlement day was refused, and subsequently the shareholders resolved that all persons to whom shares in the bank had been allotted, were entitled to have their allotments cancelled and their money returned. W. returned his share certificates, and received on November 2, a check for the amount paid by him upon his allotment. In the register of

shareholders was written opposite his name, "Money returned and allotment cancelled." By articles of said bank the directors had the power to accept the surrender of shares. On November 22, the bank was ordered to be wound up. W. did not until after this day discover said misrepresentations in the prospectus. It was *held* (see *in notis*), that W. should not be put on the "A" list of contributories as the said cancellation was tantamount to a surrender. On the present application to place W. on the "B" list (of those who had been shareholders): *Held,* that W. must be placed on said "B" list, as he had not, before winding up began, elected to have his *allotment* cancelled because of said misrepresentation in the prospectus.—*Wright's Case,* L. R. 12 Eq. 331.

3. The name of H. appeared as director in a prospectus of a company, and he was present at a meeting of the board of directors where a committee was formed to make allotment of shares. Fifty shares, necessary by the articles of association to qualify a director, were allotted to H. without his knowledge, or notice given him. He had not read said articles. H. also signed a check as director, but his name was treated by the bank as insufficient as it had not been sent in as sufficient for that purpose. *Held,* that H. had acted as director, and incurred the obligation of taking said fifty shares. —*In re Great Oceanic Telegraph Co., Harward's Case,* L. R. 13 Eq. 30.

4. By articles of association a company's funds were not to be applied to expenses until a certain number of shares were subscribed, and the plaintiff was to be paid for services as promoter of the company, "so soon as the company shall be in a position to commence business." The shares were subscribed. *Held,* that the company was in a position to commence business, although it had not even a site for its proposed buildings.—*Touche* v. *Metropolitan Railway Warehousing Co.,* L. R. 6 Ch. 671.

5. The A. company by consent of all its shareholders and agreement with the M. corporation amalgamated and transferred its business to the latter. The company had no power by its deed of settlement to effect this amalgamation. Subsequently the company executed a deed with the corporation for resuscitating the former, and terminating its previous agreement. A former stockholder in the company after said deed transferred his shares. *Held,* (MELLISH, J., dissenting), that by said amalgamation and transfer, the shares in the A. company ceased to exist as such, and there could be no resuscitation and subsequent transfer of the same.—*In re Accidental Death Insurance Co., Chappell's Case,* L. R. 6 Ch. 902.

6. R. agreed to become district manager of an association, a condition precedent being that he should take twenty-five shares in the association, R. applied for the shares, paying a deposit of £1 per share, and they were allotted to him; he was appointed manager and received notice of the appointment and accepted the same. *Held,* that there had been sufficient notice of allotment.—*Richards* v. *Home Assurance Association,* L. R. 6 C. P. 591.

See EQUITY, 1; LIEN, 1; SECURITY, 1; ULTRA VIRES.

CONCEALMENT.—See INSURANCE, 3.

CONDITION.

A testatrix gave certain property to the wife of H., who lived at S., and in a codicil directed that said property should go over in case the wife should not cease to reside at S. within eighteen months of the testatrix's death. *Held,* that the condition being to omit what was a duty, was void.—*Wilkinson* v. *Wilkinson,* L. R. 12 Eq. 604.

See BEQUEST, 1; SALE.

CONDONATION.

Condoned incestuous adultery is revived by adultery not incestuous, and, it appears, by any other marital offence.—*Newsome* v. *Newsome,* L. R. 2 P. & D. 306.

CONSOLIDATION.—See COMPANY, 1.

CONSTRUCTION.—See BEQUEST; BROKER, 1; CHARTER-PARTY, 2, 3; COMPANY, 4; DAMAGES, 1, 2; DEVISE; EXECUTORS AND ADMINISTRATORS, 2; LIEN; LIMITATIONS, STATUTE OF, 1; PARTNERSHIP; POWER, 1; PRIZE; RAILWAY; RESERVATION; REVERSIONARY INTEREST; STATUTE; TRUST, 1; ULTRA VIRES; WAY, 4.

CONTINGENT INTEREST.—See REVERSIONARY INTEREST.

CONTRACT.

Where it was provided in a contract between a builder and his employer that questions between them should be settled by award of the architect of the building, and the architect had agreed with the employer that the building should not cost over a certain sum, which agreement was unknown to the builder, it was *held* that the above provision was not binding. —*Kimberley* v. *Dick,* L. R. 13 Eq. 1.

See BROKER; CHARTER-PARTY, 2-4; COMPANY, 4, 5; FRAUDS, STATUTE OF; LIMITATIONS, STATUTE OF; SALVAGE, 1; SPECIFIC PERFORMANCE, 1; ULTRA VIRES.

CONTRIBUTION.—See BEQUEST, 13.

Contributory.—See Company, 2.
Conveyance.—See Reservation.
Copyhold.—See Common, 2.
Corporation.—See Company, 5.
Counsel.—See Mortgage, 4; Trust, 2.
Covenant.—See Surety, 1.
Cumulative Legacy.—See Bequest, 9.

Damages.

1. By statute, a company must keep water pipes charges with water at a certain pressure and allow persons to use the same for extinguishing fires; failing in such duty the company to be liable to a penalty, and a forfeiture of 40s. per day to every rate-payer. *Held*, that a person whose premises were burned by reason of neglect of the company to provide water, might sue for damages for the same under the act, although a penalty and forfeiture were provided in such cases; and that the damage was not too remote.—*Atkinson* v. *Newcastle & Gateshead Waterworks Co.*, L. R. 6 Ex. 404.

2. By statute, the Admiralty court has jurisdiction over any claim for damage done by any ship. *Held*, that a claim for personal injury resulting from the death of the master of a vessel, caused by collision of said vessel with another, was not "damage" within the statute. —*Smith* v. *Brown*, L. R. 6 Q. B. 729.

See Collision; Pleading.
Debenture.—See Trust, 1.
Dedication.—See Way, 2.
Deed.—See Mortgage, 3.
Defamation.—See Libel.
Demurrer.—See Bequest, 1; Equity Pleading and Practice; Libel; Negligence.

CORRESPONDENCE.

Attorney and Client—Privileged communications.

To the Editors of the Canada Law Journal.

Gentlemen,—I have carefully read over your observations respecting privileged communications between attorney and client in criminal matters, and you will excuse me for saying that I am not satisfied with them, and that they do not appear to bear upon this question at all. So far as such communications apply to matters of a civil nature, I agree with you that they are privileged. But the question is very different when it has reference to transactions affecting the public, and which public policy requires should not be concealed. In other words, such transactions are not privileged. The privilege which you appear to contend for, on behalf of attorney and client, does not extend to the members of any other calling or profession, and why, as a matter of abstract right, should it be granted exclusively to the members of the legal profession? The same arguments which you make use of in favour of the latter, might be used with greater force in reference to ministers of religion, because in the latter case a criminal might claim the right of unburdening his guilty conscience to his spiritual guide with a view of spiritual advice and reformation, while, in so far as members of the legal profession are concerned, such communications are solely made for the purpose of legal defence against a public demand for conviction and punishment. I do not think that the exercise of the privilege which you contend for, would be in any way advantageous, morally speaking, to the members of the legal profession, or that they should exclusively claim the privilege. Members of the legal profession are also members of society, and, as members of society, they cannot, by simply assuming their particular calling, divest themselves of their obligations to the public and claim thereby privileges which, upon considerations of public duty they ought not to possess.

In Taylor on Evidence, 3rd ed., p. 752. "If from independent evidence it should clearly appear that the communication was made by the client for a criminal purpose, as for instance, if the attorney was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence, it is submitted that, on the broad principles of penal justice, the attorney would be bound to disclose such guilty project. Nay, it may reasonably be doubted whether the existence of an illegal purpose will not also prevent the privilege from attaching, for it is as little the duty of a solicitor to advise his client to evade the law as it is to contrive a positive fraud." And in Note 2, same page, reference is made to several cases bearing upon the subject. Also, same note, "In *Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1229, Serjt. Tindall," in argument, lays down the rule thus: "If the witness is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it. No private obligations can dispense with the universal one, which lies on every member of society, to discover every

design which may be formed, contrary to the laws of society, to destroy the public welfare. For this reason, I apprehend, that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a case wherein he is concerned, the obligation to the public must dispense with the private obligation to the client." Two of the learned judges, who tried that remarkable case, Bowes, C.B. and Mounteney, B., expressed the same sentiments, p. 1240, 1243. See also *Gartside* v. *Outram*, 26 L. J. Ch. 115, per Wood, V.C.

In Greenleaf on Evidence, 11th ed., p. 332, note 3: "This general rule, privilege, is limited to communications having a lawful object, for if the purpose contemplated be a violation of law, it has been deemed not to be within the rule of privileged communications, because it is not a solicitor's duty to contrive fraud, or to advise his client as to the means of evading the law." *Russell* v. *Jackson*, 15 Jur. 1117; *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. R. 528.

Other authorities might also be given, but I consider the above sufficiently establish my proposition. A.

[Our correspondent asks why privilege should be granted to members of the legal profession, as a right, respecting communications with their clients in criminal matters? Whole essays have been written upon this subject; at present it is enough for us to reply in the language of Lord Brougham: "It is founded on a regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case." *Greenough* v. *Gaskill*, 1 M. & K. 103. A. cannot surely seriously argue for a return to the old law when prisoners were not allowed counsel—he cannot mean to contend that the Statute granting them this right was a mistake and should be repealed. What proposition of A.'s do his authorities establish? That a counsel, after being retained by a person charged (for example) with murder, after having heard all the details of his story under the seal of professional confidence, is forthwith to tender himself as a witness and convict his unhappy client? The language of Mr. Baron Mounteney, in one of the cases A. cites, confutes this: "Whatever either is or by the party concerned can naturally be supposed necessary to be communicated to the attorney in order to the carrying on any suit or prosecution in which he is retained, that the attorney shall inviolably keep secret." *Annesley* v. *Anglesea*, 15 St. Tri. 1242. The question is not as to whether the retainer is or is not to be accepted, but one in which the professional relationship exists. Now, what is established by A.'s citations is just neither more nor less than what we adverted to in our former article: *ante* p. 75. We said, "If the communication is made not as between client and professional adviser, nor in the usual course of business, or for a fraudulent or illegal purpose, then it is not protected." Now, it is not in the attorney's usual or proper course of business to concoct a fraud or give advice upon the way to evade the law, or to assist a man in contravening the law. In such cases the solicitor is viewed by the court as a co-conspirator, and no privilege attaches. See *Charlton* v. *Coombs*, 4 Giff 380. So in the case from the State Trials, one of the defendant's declarations to his attorney was, (speaking of the plaintiff,) that "he did not care if it cost him £10,000 if he could get him (the plaintiff) hanged." The judges held that this was not such a communication as any man living could possibly suppose to be necessary for the carrying on of the prosecution in question. Therefore, according to Mounteney, B., the attorney was not only at liberty to disclose it, but it was his duty to make it known, as indicating an abominable endeavour to make away with a man's life. According to Dawson, B., the client went beyond what was necessary, and entrusted the attorney with a secret, *not as an attorney, but as an acquaintance*, so that the privilege did not attach. As we said before, the law is well settled on the subject, and may be found in any text book, as A.'s letter demonstrates. If, however, A. is not satisfied, and thinks that an attorney should be a competent

witness in criminal trials against his own client upon a matter affecting the guilt charged, we advise him to get the point before the judges, by tendering himself on a suitable opportunity before, say, Chief Justice Hagarty or Mr. Justice Galt.]—Eds. L. J.

Married Women—Replevin.

To the Editors of the Canada Law Journal.

Gentlemen,—E. H., a married woman, on the 3rd May, 1872, put up at the hotel of J. T., bringing with her trunks containing her clothing and that of her children, who accompanied her, and some books. Upon leaving, J. T. refused to allow her to take her trunks, claiming a landlord's lien thereon for a hotel bill owing him by her husband for board, &c., which debt had been contracted by him some time previously. E. H. applied to the County Judge of the county of Peterboro' for an order for a writ of replevin, upon her affidavit, following Con. Stat. U. C. cap. 29, and 23 Vic. cap. 45, stating that she was the owner of the trunks, containing, &c. (describing the principal articles), the value of the goods, and that the same were in the possession of J. T., who wrongfully detained them, claiming, &c. (as above). The Judge granted a summons in the first instance, and, upon the argument, refused to make the order, on the ground that it should appear from plaintiff's affidavit how she, being a married woman, acquired the goods as owner. Plaintiff's attorney contended that plaintiff, having made the affidavit required by law, had made a *prima facie* case, and was entitled to the order, unless J. T. could show an existing lien in law; but the contention was overruled. Plaintiff is now driven to an action of detinue or trover.

Would you kindly give the above a place in your next issue, with your opinion as to the correctness of the learned Judge's ruling, and as to whether there is any other form of affidavit prescribed by law to meet the case of married women, plaintiffs in replevin: also whether the Act of last session, with respect to the rights of married women, places them upon any different footing than they formerly were with regard to applications of this kind?

And greatly oblige yours, &c.,

Attorney.

Peterboro', May 8, 1872.

[As we understand it, the affidavit in this case was drawn so as to be within the provision of 23 Vic. cap 45, sec. 1, sub-sec 1. Under this clause it is to be *shewn to the satisfaction of the judge* that the person claiming the property is the owner, or is lawfully entitled to the possession thereof. We cannot say that the judge was wrong, as a matter of practice within his decision, in requiring that the facts shewing the title of the married woman to the property, and giving her the right to claim its recovery in her own name should be set forth on the affidavit. Before the Ontario statute of last session, she would not have had the right to sue as a *feme sole*—she can by virtue of that Act sue in her own name for the recovery of property declared by that or any other Act to be her separate property. We think she should shew sufficient facts in her affidavit to bring her within the Act. As she would have to establish such a state of facts at the trial, the judge was not unreasonable in requiring something more than her mere affirmation that she was the owner, especially as his order to replevy is equivalent to a judgment in the first instance.—Eds. L. J.]

Insolvency—Double proof.

To the Editors of the Canada Law Journal.

Gentlemen,—In the case of *Re Dodge et al., Insolvents, and Budd, an Insolvent*, reported in your February number, p. 51, and referred to in March number, p. 57, has not the effect of the 60th section of the Insolvent Act of 1869 been overlooked?

The language of the judgment of the court in *Re Chaffey*, 30 U. C. Q. B. 64, leads almost irresistibly to the conclusion that had the court been able to decide that case under the Act of 1869—in other words, had the proceedings therein been taken subsequently to that Act coming into force—the double proof would have been allowed, subject to deduction in respect of the value of the endorsement.

Compare subsection 5 of section 5 of the Insolvent Act of 1864, with section 60 of the Act of 1869. It may be useful in this connection to remark that the rule against double proof has been refused to be extended to a case where one of the proofs was made under a decree for the administration of the trusts of a deed for the benefit of creditors, *ex parte Thornton*, 3 De G. & J. 454, followed by the Master of the Court of Chancery for Ontario

in the recent case of *In re Baker*, *Baker* v. *Dawbarn*, not yet reported, where one of the proofs was made under an administration order granted under 467 of the Consolidated Orders in Chancery.

Useful summaries of the law on this point, at it stood before the Act of 1869, with reference to the cases, may be found in 1 Archb. Bankruptcy Laws, 673, et seq.; 2 Doria & Macrae Law of Bankruptcy, 831, et seq.; 1 Deacon, Law of Bankruptcy, 845, et seq.

Yours truly,

S. G. Wood.

Toronto, May, 1872.

[We are indebted to the courtesy of the learned Master of the Court of Chancery for a report of the case of *In re Baker*, referred to by Mr. Wood. We publish it in the present number, as a valuable addition to the learning on the subject referred to.]—Eds. L. J.

REVIEWS.

Registration of Written Instruments affecting Title to Real Estate. By Samuel D. Sewards, LL.D. New York: Baker, Voorhies & Co., 1872.

This is a brief essay of 26 pages, which deals with the subject under three heads. (1) Historical sketch of the recording of written instruments. (2) Defects in the system of recording prevalent in the States. And (3) Proposed plan of improvement. We learn that in the Plymouth Colony conveyances, including mortgages and leases, were required to be recorded as early as 1636. In 1641, Massachusetts, by statute, required all deeds of conveyance, whether absolute or conditional, to be recorded, that "neither creditors might be defrauded nor courts troubled with vexatious suits and endless contentions." This sounds very like a practical anticipation of Cromwell's advice, that the laws should be "plain, short, less chargeable to the people, and for the good of the nation."

According to our author, the great defect in the system is that which was predicted by Lord St. Leonards, (who, by the way is always styled "Lord St. Leonard") viz.: "That the number of deeds requiring registry would destroy the plan by its own weight." The proof he adduces is, that in the Registry Office of the City of New York, the record of *conveyances* alone, in the City and County of New York, fills a vast library of nearly twelve hundred books, averaging six hundred pages each, over a foot and a half long by a foot wide, of closely-written registrations, which are the accumulations of the last few years only. Add to this a like number of of books containing the registration of incumbrances, and others for powers of attorney and miscellaneous instruments. The consequence is that everything depends on a correct index. If any mistake occurs the holding of the courts is that the false and misleading index is no defence to the person led astray.

One chief means of improvement proposed is the discarding, in conveyancing forms, of all matter which is redundant, inexpressive and useless. As a further mode of simplifying the deed, it should contain the names of the covenants only, and to this end legislative interference is invoked to provide a short statutory form. This, in effect, is just recommending such an amendment of the law as has long been in force in this province by our adoption of the English Acts relating to "Short Forms." No doubt these statutes are open to many objections on the part of the scientific lawyer; and are specially unsuitable to the complicated state of title which is the rule in England. But for practical purposes, and in the light of expediency, these statutes are by no means to be held in contempt, and they really serve suitably almost every purpose in a new country such as ours, where land is more an article of commerce than it is in "the old country."

The other suggestion is that the deeds be not copied *in extenso*, but that the originals be filed, certified copies returned to the holder, and that reference be made to their principal parts in one book for all conveyances and incumbrances. This book is to be so arranged that every parcel of land shall have its separate folio, containing the description of the property and the name of the owner, who, on the principle of mercantile book-keeping, is to be credited with the title he possesses, and charged with the incumbrances thereon. A condensed record would thus be obtained, which would shew at a glance the state of the title, or give, as it were, a bird's eye view of it. It will be seen, again, that this is very much the result which is reached by our pre-

sent registry system. It speaks well for the forethought of the registrars of Ontario (who, we understand, framed the scheme which is embodied in our last Registry Act) that they have planned a system which is not only the most advantageous and easy of reference for the present time, but one which is likely to be efficient when we have cities rivalling New York in magnitude.

There are many hints scattered through this essay which will be useful to those engaged in the work of registration. We can speak favourably of it as the fruit of experience and much well-expended research.

The Maryland Law Reporter. Baltimore. No. 1. 1872.

We welcome into the field of legal journalism a new venture, styled *The Maryland Law Reporter*, a daily paper, published at Baltimore. It certainly sets forth a most ambitious programme, and indicates a more advanced enterprise than any other professional publication. Whether it will pay or not, the future will prove; but if all subsequent numbers are like the first, which is before us (of date May 13th), we can be assured of one thing—that it deserves adequate pecuniary support. The legal news is varied and well selected; while in point of the early reporting of important decisions, it will be manifestly ahead of all its hebdomadal contemporaries. From its pages we make the following extract, which manifests how awkward it may be to have the progress of a criminal trial interrupted by Sunday:

"A remarkable legal point has been raised in the case of Marlow, the Jamestown murderer, who was to have been hanged a few weeks ago, but obtained a stay of proceedings, granted by Judge Barker of the Supreme Court. It appears that a Sunday intervened during the trial and after the evidence was closed. By order of the court the jury were kept together in the custody of the officers, who permitted them to attend the Baptist church in Maysville. This afforded an opportunity not to be neglected by the clergyman who officiated on that occasion, and he proceeded to preach a sermon having a practical application to the case which the jury had under consideration, taking for his text the words, "Release unto me Barabbas; now Barabbas was a robber." During his discourse the minister said, "Some in this house may think I am pleading for mercy for the man now being tried for his life in this village. Such is not the case, for I believe the man's hands are reeking with blood; also his wife's and her mother's reeking with blood. I have read and carefully examined the evidence, and from that have come to this conclusion." Marlow's counsel very naturally assumes that it was not fair to his client that the jury should have been preached to in such a strain, and he has obtained a stay of proceedings on that ground."

And also this other selection, which affords an apt illustration of the maxim, "*Summum jus, summa injuria*," not commented upon in Broom, but which, according to Sir Henry Hobart, is "spoken of elegantly in Ecclesiasticus, chap. 19" (Hob. 125 a):

"A singular case has lately been decided in the United States Supreme Court. John Henderson had bought one hundred barrels of whiskey in a bonded warehouse, in Missouri, from the distiller, and had paid the regular Government tax on it. But after he had bought the whiskey and paid the taxes, and after the Government, through its collector, had received the taxes, a seizure was made of the goods, on the ground that their former owner, the distiller, in removing them from the distillery to the bonded warehouse, had intended to defraud the Government. It was not alleged that any fraud was accomplished, or that the owner of the whiskey, at the time it was seized, had been privy to the alleged unfulfilled intent to defraud. The goods were at no time beyond the supervision and control of the Government officers, and every dollar of taxes due on them had been paid by Mr. Henderson before removing them from the bonded warehouse. And yet, under the fourteenth section of the Internal Revenue Act, the collector declared the goods forfeited in consequence of an intention, not an act, of the previous owner; and the majority of the Supreme Court has sustained this proceeding. The result is, that the United States gets the full tax on the spirits and the spirits besides; the innocent owner loses his whiskey and the taxes he has paid on it; while the only person connected with the transaction who is charged with doing, or intending to do wrong, goes free and retains the money he received from Mr. Henderson for the whiskey which the Government has taken. The Chief Justice, Justice Field and Justice Miller dissented from this apparently unjust decision."