DIARY FOR AUGUST.

1. Sat. ..*Lammas.*
2. SUN..*8th Sunday after Trinity.*
9. SUN..*9th Sunday after Trinity.*
12. Wed..Last day for service for County Court.
14. Frid..Last day for Co. Clerks to certify County Rates to Municipalities in Counties.
16. SUN..*10th Sunday after Trinity.*
21. Frid..Long Vacation ends.
22. Sat. ..Declare for County Court.
23. SUN..*11th Sunday after Trinity.*
24. Mon..*St. Bartholomew.*
26. Wed..Appeals from Chancery Chambers.
30. SUN..*12th Sunday after Trinity.*
31. Mon..Last day for Notice of Trial for Co. Court. Last day for setting down for rehearing.

THE

Canada Law Journal.

AUGUST, 1868.

CHANGE OF VENUE.

The venue is an entry in the margin of the declaration, of the county wherein the action is to be tried, and from which the jurors are to be summoned to try it.

It is of two kinds, transitory and local: transitory, where the cause of action might be supposed to have happened anywhere, such as debt, detinue, slander, assault, and generally all matters relating to the person or personal property; local, where the cause of action could have happened in one county only, or is so made by statute, thus, trespass, *qare clausam fregit*, actions against magistrates, &c.

We propose to make some remarks as to change of venue in transitory actions.

The rule at common law was, that in a transitory action the plaintiff, being *dominus litis*, might lay the venue in whatever county he pleased; but this was found to create so much vexation, in consequence of plaintiffs laying venues at a great distance from the defendant's residence, that it was enacted by 2 Ric. 2, cap. 2, that the venue should be laid in the county where the cause of action arose.

The practice which sprung up after this statute was, to change the venue in a transitory action, on an *ex parte* application, before issue joined, upon a common affidavit that the cause of action, if any, arose in another county, and not in the county in which the venue was laid. Plaintiff's only course then was to bring back the venue to the county in which it was originally laid, upon an undertaking to give material evidence in that county. Defendant could, on special grounds, make an application, after issue joined, to change the venue.

Then came our Rule No. 19 (Har. C. L. P. A. 599), which provides that no venue shall, unless upon consent of parties, be changed without an order of the court or a judge, made after a rule to show cause, or judge's summons; but such order may nevertheless be made before issue joined, in those cases in which it could have been so made before this rule; and in all cases the venue may or may not be changed, according as it shall appear to the court or judge that the cause may be more conveniently and fitly tried in the county in which the cause of action arose, or that in which the venue has been laid.

This rule in no way takes away the right of a defendant to make the application on the common affidavit, but says that there must be a rule or a summons. The rule is simply prohibitory. It means that the order to change the venue shall not be a matter of course, but after a rule or summons to show cause. However simple and common the affidavit may be, if an order be made in pursuance of a rule or summons upon which the opposite party may be or has been heard, it is a special order within the meaning of the rule (per Maule, J., in *Begg* v. *Forbes et al*, 13 C.B. 614); the object being to obviate the necessity of resorting to the clumsy expedient of bringing back the venue upon an undertaking to give material evidence in the county where it was originally laid (per Maule, J., in *Clulee* v. *Bradley*, 17 C. B. 608). The application may be made, as formerly, either before or after issue joined. But whether made before or after issue joined, it would be well for the party applying to 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 If he rely on the fact that the cause of action arose in the county to which he desires to change the venue, he may be answered not merely by affidavits denying this fact, but showing that the cause may be more conveniently tried in the county where the venue is laid. (See *Smith* v. *O'Brien*, 26 L. J. Ex. 30; *Carruthers* v. *Dickey*, 2 U. C. L. J. 185; *Vance* v. *Wray*, 3 U. C. L. J. 69.) If the application be after issue joined, it 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 an answer by the other party. In all cases, the court or judge will decide, after hearing both sides, whether the venue is to remain, or be changed as prayed, or be laid in some third county, according to the discretion of the court or judge (per Pollock, C. B., in *De Rothschild* v. *Shelton*, 8 Ex. 503); and the court will in general refuse to review the exercise of the judge's discretion (*Scoble* v. *Henson*, 9 U. C. L. J. 131; *Begg* v. *Forbes*, 13 C. B. 614; *Cartwright* v. *Frost*, 3 H. & N. 278; *Schuster* v. *Wheelwright*, 8 C. B. N.S. 383; *Penhallow* v. *Mersey Dock Co.*, 29 L. J. Ex. 21.) Where a judge made an order to change the venue on a special affidavit showing a *prima facie* case, it was said that the proper course of the opposing party was, not to move to rescind the order, but to apply at Chambers on a counter-affidavit to bring back the venue. (*Brown* v. *Clifton*, 10 W. R. 86; see also *Cull* v. *The Hull Dock Co.*, 11 W. R. 284.)

If defendant be under terms to take short notice of trial, he cannot move on the common affidavit, but may do so on a special affidavit. (*Clulee* v. *Bradley*, 13 C. B. 604; *Jackson* v. *Kidd*, 8 C. B. N. S. 354.) In *Helliwell* v. *Hobson*, 3 C. B. N. S. 761, it was held that the court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there be a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue; and in *Durie* v. *Hapwood*, 7 C. B. N. S. 837, Willes, J., referring to that case, is reported to have said, "When the question arises again, perhaps that case may require some consideration." But the rule laid down in *Helliwell* v. *Hobson*, does not appear to have been successfully impeached in any subsequent case. (See *Moore* v. *Boyd*, 1 U. C. L. J. N. S. 184.) If it be made to appear to the satisfaction of the court or judge that there will be a great waste of costs in the trial of the cause at the place where the venue is laid, and much saving of costs at the place where it is sought to change the venue, the change will in general be made. (*Ib.*; see also *Channon* v. *Parkhouse*, 13 C. B. N.S. 341.) But twenty-five witnesses and a horse on one side, against ten witnesses on the other, was held not to be such "a preponderance" as to induce the court to bring back the venue from the place where the cause of action, if any, arose. (*Blackman* v. *Barnton*, 15 C.B.N.S.434.)

It is not a sufficient cause for change of venue, that either party has retained the most eminent counsel on the circuit, unless done oppressively. (*Curtis* v. *Lewis*, 12 W.R. 951.) Nor is the fact that one of the parties to the suit is a member of Parliament, supposed to have considerable influence in the county where the venue is laid, any ground for change of venue. (*Salter* v. *McLeod*, 10 U.C. L.J. 76.)

The occurrence of an accident preventing the trial of the cause in the county where the venue was laid, coupled with other special circumstances, was held sufficient reason for a change of venue at the instance of plaintiff (*McDonell* v. *Provincial Insurance Co.*, 5 U.C. L. J. 186), especially where shown that the recovery of the debt would be endangered by delay (*Mercer* v. *Vought et al*, 4 U. C. L. J., 47; *Bleakley* v. *Eastin*, 9 U. C. L. J. 23; *Lucas* v. *Taylor*, 4 U. C. Prac. R. 99.)

The change may be ordered on special terms as to payment of witnesses, &c., either on application of plaintiff or defendant. (See *Municipal Council of Ontario* v. *Cumberland*, 3 U. C. L. J. 11; *Ham et ux.* v. *Lasher*, 10 U. C. L. J. 74.)

It has been held that the Crown, in revenue cases, has the right to lay the venue in any county it sees fit, and that no change can be made without the consent of the Attorney-General. (*The Queen* v. *Shipman*, 6 U. C. L. J. 19; see also *Attorney-General* v. *Crossman*, 1 L. R. Ex. 381.)

JUDICIAL FORM OF EXPRESSION.

There is much sound sense in the following observations of the late Chief Justice of the Supreme Court of the State of Georgia—delivered by him on refusing an application for a new trial made on behalf of a man who had been convicted of murder:—

"All the evidence shews a vicious and depraved propensity to take human life—for the preservation of which human laws are enacted."

"In this age of recklessness and terrible demoralization of men—if men sow the wind they cannot expect courts and juries to interpose and prevent them from reaping the whirlwind—they must eat of the fruit of their own doings. It has been said heretofore that, few cases of murder in the first degree, such as poisoning and private assassination were committed by our people. But

if passion without sufficient provocation is to excuse men from the crime and guilt of murder, then is human life cheap indeed—of no more value than the sparrow's."

"I have lost faith very much in punishment as a means of amending the offender himself. Its reformatory effect is not much, I fear; still its punitive power must be felt; and while the glittering blade wielded by the strong arm of malice is mighty to destroy, still, *the small cord in the hands of the executioner of justice must be felt to be not less fatal and unerring.*" (*!*)

"This is an age of Cains and the voices of murdered Abels come up at every court crying aloud to the ministers of the law for vengeance. Let the stern response going out from the jury box and the bench be, who sheddeth man's blood without legal excuse or justification—*shall be hung by the neck till he is dead.*" (*!!*)

35th Georgia Reports, 169-170.

As a matter of taste—it would be a not agreeable surprise to hear from our Judges, similar forms of expression—however readily we might concur in the sentiments expressed.

SELECTIONS.

THE RIGHT TO BEGIN.

The question whether it is the plaintiff or the defendant that is entitled to begin, and, consequently, to reply, should evidence be called on the other side, is one of great practical importance. It is not, indeed, very creditable to the character of the tribunal provided by the common law of England for the decision of issues of fact that so much should depend upon the accident of having the last word with the jury. But so long as the public insists on having its lawsuits determined by men summoned for a day from the shop or the counting house, unaccustomed to analyse a complicated mass of evidence, and ready to be carried away by that view of the case which has been last presented to their minds with any degree of plausibility, so long will the right to begin be a privilege highly valued and eagerly contended for at Nisi Prius.

There seems to have prevailed at one time an impression that this was a point exclusively in the discretion of the judge who tried the cause, and not to be reviewed by the full court. Thus, in *Burrell* v. *Nicholson* 1 M. & R. 304, doubts were expressed whether a new trial could in any case be granted on account of a misdirection on this head. And it may be regarded as settled that a new trial will not be awarded *merely* on the ground that the unsuccessful party was deprived of his right to begin and to reply. But if it is more than a mere matter of form—if the evidence is doubtful and conflicting, and the case such that the fact of having the first and the last word with the jury might well be decisive of the issue, a new trial will be granted if the direction at Nisi Prius was erroneous: (*Ashby* v. *Bates*, 15 M. & W. 589; *Doe* v. *Brayne*, 5 C.B. 655.) "In some cases," we find it remarked by Pollock, C.B., in *Ashby* v. *Bates*, "the right to begin may be properly matter for the Judge's discretion, while there are others in which it is of the utmost importance that the suitor who, in point of practice, has a right to begin should exercise that right accordingly. It appears to me that in this case the plaintiffs were entitled to begin, but that, by a miscarriage at Nisi Prius, they were deprived of that right, and we think it possible that their case may have been injuriously or materially affected in consequence. We therefore think that there ought to be a new trial, in order that they may fully exercise that right." But should the court be of opinion that, from the nature of the case, it could be of little or no practical importance which party began and replied, or that, from the evidence adduced on behalf of the side for which the verdict was given, it is clear that the result would have been the same in any case, no new trial will be granted on the point of form: (*Edwards* v. *Mathews*, 11 Jur. 398; *Brandford* v *Freeman*, 5 Ex. 734.) The right to begin is important only in so far as it may affect the result, and unless the court is satisfied that an erroneous decision may have had that effect, it will not merely on this account again send the case down for trial.

What, then, is the rule for determining whether the plaintiff or the defendant should have the advantage of opening the case? The canon generally laid down in the books is that that party begins against whom the verdict must pass, should no evidence be adduced on either side. But this test is a very misleading one. Wherever the only plea on the record is one in confession and avoidance, the defendant would, on this view, be entitled to begin, since he has admitted a cause of action in the plaintiff, and must suffer a verdict, with at least nominal damages, should he fail to make out his plea in avoidance; whereas it is in comparatively few cases that the defendant can obtain this privilege by confining himself to affirmative pleas. It is more correct to say that the plaintiff will be entitled to begin if he has to adduce any evidence either in support of his case or as to the amount of damages before he can obtain the verdict which he desires, while, on the other hand, the defendant will have the first word if he has admitted the plaintiff's case and the amount of compensation to which he will be entitled should the defendant fail to establish his affirmative pleas. If merely nominal damages are claimed, or the damages are liquidated and appear in the body of the declaration, the defendant must begin, if his pleas are in confession and avoidance only; but if the plaintiff claims substantial damages, the amount of which will have to be proved, the

plaintiff begins, although the affirmative lies upon the defendant on the record. In other words, he begins who, in the absence of proof on either side, would fail in the action; for, where heavy damages were sought, a verdict for a mere nominal sum is a victory for the defendant. That this test is more accurate than that usually suggested will appear from an examination of the reported decisions.

In actions upon bills and promissory notes, or upon policies of life insurance, the amount which the plaintiff seeks to recover is liquidated and appears on the face of the declaration. If the defendant has not traversed any allegations therein contained, the plaintiff's case—and the amount of his claim in consequence of it—stand admitted upon the record; and upon this admission, without adducing any further evidence, the plaintiff would be entitled to a verdict for the sum really claimed by him, should the defendant fail to make good his pleas in avoidance. There is no doubt that, under such circumstances, the defendant is entitled to begin: (*Mills* v. *Barber*, 1 M. & W. 425; *Geach* v. *Ingall*, 14 M. & W. 95.) And even where in an action on a promissory note interest not made payable upon the face of the note was claimed, the only plea being one of coverture, the defendant was held entitled to begin, on the ground that a note of itself carries interest, and that the plaintiff's right to it appeared on the declaration as admitted on the record without any evidence: (*Cannam* v. *Farmer*, 3 Ex. 698.)

But the case is very different if the action, instead of being on a bill or on a policy of life insurance, is in tort, as for a trespass or libel, or on a policy of fire insurance, which, as distinguished from a life policy, is a contract of indemnity, or in the ordinary *indebitatus* counts, since in all these cases the plaintiff, even if his right of action stands admitted upon the record, will have to adduce evidence to show the amount to which he is entitled. The plea in confession and avoidance carries no admission of the sum to be awarded the plaintiff should the defence not be made good, since the amount mentioned at the foot of the declaration is merely nominal, and the affirmative lies upon the plaintiff on this point. In the absence of evidence on either side the plaintiff would fail in the action, in this sense, that he would get a verdict for merely nominal damages. At one time, however, the defendant was sometimes allowed to begin in such cases if the pleas were such as to throw the affirmative upon him. Thus, in *Cooper* v *Wakley* (1 M. & M. 248), an action for libel, the only plea being one in justification, Lord Tenterden, after consulting with two of his colleagues, ruled that the defendant should begin. This decision was, according to Lord Denman, universally felt in the Profession to be erroneous, and gave rise, some years afterwards, to a resolution of the Judges, that "in actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant." (5 Q.B. 462). In accordance with this resolution was decided the case of *Carter* v. *Jones* (1 M. & R. 281), when the plaintiff was held entitled to begin in an action of libel, with no plea on the record but one of justification.

The applicability of the principle on which this resolution of the Judges rests to cases other than those which strictly fall within its terms, we propose to consider in our next number.—*Law Times*, July 11, 1868.

We drew attention last week to the principle determining the question whether it is the plaintiff or the defendant that is to have the first and the last word with the jury—a question which (as was remarked by Pollock, C. B. in *Ashby* v. *Bates*, 15 M. & W. 589), the increasing intelligence of juries may in time render of small importance, but which, as matters at present stand, is in a vast number of cases practically decisive of the issue. The ruling in *Cooper* v. *Wakley*, 1 M. & M. 248, that, even in such actions as those for libel or personal injuries, in which a great part of the evidence and of the speeches of counsel, whatever may be the pleas on the record, must have reference solely to the quantum of damages, the defendant might deprive his antagonist of the formidable advantage of opening the case by pleading only in avoidance and abstaining from the general issue, led to the resolution of the Judges reported by Lord Denman, 5 Q. B. 462. This resolution was in its terms confined to libel, slander, and injuries to the person, and, no doubt, it is precisely in cases of this description that it is of the greatest consequence to the plaintiff that he should retain his right to begin, although the affirmative issue lies on the defendant. In several Nisi Prius cases accordingly we find it laid down that, except in such actions as those mentioned in the resolution, the right to begin is with him upon whom the pleadings have cast the affirmative issue. In *Reeve* v. *Underhill*, 1 M. & R. 440, and in *Wootton* v. *Barton*, 1 M. & R. 518, it was held that in an action of covenant, though the damages are unascertained, the defendant is entitled to open the case if he has pleaded only in confession and avoidance. Tindal, C. J. remarked in the former of these cases that the new rule was never meant to apply under such circumstances; that hardly ever in actions for the breach of special agreements could the damages be said to be precisely ascertained; but that in such cases they were mere matter of calculation, and not liable to be increased by what the plaintiff could urge in aggravation, as in actions for libel or other malicious injuries. These decisions however, are entirely overruled by that of the full court in *Mercer* v. *Whall*, 5 Q. B. 447. It is there observed (pp. 456, and 467), that the sole reason for the fact that the judges confined the rule to injuries of a personal kind is, that it was only in such cases that a doctrine op-

posed to that embodied in their resolution had been laid down, and that its terms were framed merely with reference to the class of cases which had thus been brought under the consideration of those who drew it up. The principle, it was pointed out, on which the rule in question rests is, that if the plaintiff has anything to prove, either as to his case itself, or as to the amount of damages, he should begin, and this principle obviously applies to a host of cases of contract as well as of tort. Thus it was said by Patteson, J.: "I have always thought the general rule to be that, if on the defendants proof failing, the verdict might be given directly for the plaintiff, as would be the case where the damages were fixed, or merely nominal, the defendant should begin.". *Mercer* v. *Whall* was an action for breach of covenant in dismissing an apprentice; the plea alleged misconduct justifying the dismissal, and the plaintiff was allowto begin, on the ground that he went in for substantial damages, the amount of which he would have to prove. "The natural course would seem to be," it was said by Lord Denman, C. J., "that the plaintiff should bring his own cause of complaint before the court and jury in every case he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damages to which he conceives the proof of such facts may entitle him." In actions of contract no less than of tort, the plaintiff who desires more than nominal damages may have to prove the amount to which he is entitled, even where it stands admitted on the record that he has a right of action. It is in tort, indeed, that the privilege of opening and replying is more particularly valuable, the amount of damages being left more to the discretion of the jury, which may account for the circumstance that the resolution so often quoted is confined to cases of this kind, but the reason on which the resolution rests is of much wider application.

The doctrines so clearly laid down in *Mercer* v. *Whall* are also exemplified in *Absalom* v. *Beaumont*, (1 M. & R. 441, note), an action upon a policy of fire insurance where, although the affirmative issue lay upon the defendants, the plaintiff began on the ground that he would have to prove the amount of compensation to which he was entitled under a policy which is a contract to indemnify. And the result is the same where the declaration is in the ordinary *indebitatus* counts the defendant, by a plea in avoidance which he fails to prove, admits that he is indebted to the plaintiff but not the amount of his indebtedness. The plaintiff will have to prove the value of the work done, or of the articles supplied, in order to get a more than nominal verdict, and so retains his right to begin: (*Morris* v. *Lotan*, 1 M. & R. 233; *Lacon* v. *Higgins*, 3 Starkie, 178.) In all these cases, it will be observed, the application of the test usually suggested, that he begins against whom in the absence of proof on either side the verdict must pass, would lead to the erroneous conclusion that the defendant is the party to begin.

The plaintiff is, of course, *primâ facie* the party who should open the case, and he will retain this right so long as there is a single material issue, the affirmative of which lies upon him and as to which he means to adduce evidence. In *Rawlins* v. *Desborough*, for example (2 M. & R. 328), where the declaration was upon a policy of life insurance with the ordinary money counts and the pleas were in avoidance and, to the money counts, "never indebted," Lord Denman ruled "that the plaintiff should begin, on the ground that there was a traverse of the *indebitatus* counts as to one of which his counsel stated that there really was evidence to be adduced on behalf of the plaintiff." The rule is the same in replevin, although there, when there is an avowry or cognizance, either party may be said to be plaintiff. Apart from any considerations as to the proof of damages, the real plaintiff, he who has brought the action, is entitled to begin whenever the affirmative is with him as to any material plea, although all the others lie upon the defendant: (*Collier* v. *Clarke*, 5 Q. B. 467; *Curtis* v. *Wheeler*, M. & M. 493). In the latter of these cases there was an avowry to which the plaintiff pleaded traverses of the tenancy and of the fact that rent was due, and also a plea, the affirmative of which was held to lie upon the plaintiff. It was argued that, since in replevin both parties are actors, the plaintiff should not have his usual privilage of beginning whenever any single issue lies upon him; but Lord Tenterden replied that he could make no distinction between replevin and other forms of action, and that the principles applicable to all were the same.

The defendant, however, who has pleaded none but affirmative pleas, will have the privilege of opening the case when the action has been brought really to try a right, and the plaintiff would be satisfied with merely nominal damages. Under such circumstances, if the true nature and object of the action appear to be at all doubtful, the plaintiff's counsel will be asked whether he really goes for substantial damages, and even when the reply is in the affirmative the Judge will exercise his discretion as to whether this is really so. Thus in *Mercer* v. *Whall*, in answer to the observation that the right of the plaintiff to begin could hardly well depend on his having to prove the amount of his damages, since in many cases it was almost impossible to say beforehand whether substantial damages were really sought, it was said by Lord Denman, "The Judge takes upon himself to say whether the plaintiff really proceeds for damages, or whether a right only is in question;" "the Judge, perhaps, decided this matter without very adequate materials, but he would not have done so at all, if the right depended on the issue as it appeared on the record." In such cases if the plaintiff's counsel decline to

pledge himself to go for more than nominal damages, it will be assumed that the plaintiff wants only to have the question of right decided; under these circumstances, in the absence of any proof on the part of the defendant of his pleas in confession and avoidance, the plaintiff would be at once entitled to the verdict which he desires; he has nothing to prove either as to his case or as to the amount of damages, and the defendant begins (*Chapman* v. *Rawson*, 8 Q. B. 673.) That the statement of the plaintiff's counsel will not be accepted as conclusive appears from *Bastard* v. *Smith*, 2 M. & R. 129. This was an action of trespass for diverting water; the only plea was one in justification under a custom. The plaintiff's counsel announced that his client sought to recover substantial damages, but Tindal, C. J. said, "No special damage is averred in the declaration beyond that arising from the simple fact of trespass complained of, viz., digging a trench of a certain length and depth; and indeed it appears from what is alleged as to the equity procedings (and which is not denied on the other side), that substantial damages are not in the contemplation of these parties. I think it falls within the general rule that as the affirmative lies on the defendant, he has the right to begin." This decision shows that in order to settle who shall open when the affirmative issue is on the defendant, the Judge must in the exercise of his discretion, and having regard to all the circumstances of the case, determine whether substantial damages are *bond fide* the object of the suit.—*Law Times*, July 18, 1868.

CRIMINAL LIABILITY WHERE THERE IS NO CRIMINAL INTENTION.

The legal maxim of *Actus non facit reum, nisi mens sit rea*, though in criminal cases of general, is not of universal application, since there are many violations of the criminal law in which it forms no excuse whatever. To instance only the well known principle so often declared from the judgment-seat when some poor wretch, in extenuation of his conduct, asserts that when he did the act for which he has been prosecuted he was drunk — that drunkenness is no excuse for crime, it will at once be understood that the absence of a criminal intention is not always an excuse for an act which the criminal law forbids. No doubt "it is," as said by Lord Kenyon in *Fowler* v. *Paget*, 7 T. R., 514, "a principle of natural justice and of our law that the intent and the act must both concur to constitute the crime." And as remarked by Erle, C. J., in *Bruckmaster* v. *Reynolds*, 13 C. B., N. S., 68, "a man cannot be said to be guilty of a delict unless to some extent his mind goes with the act." But, as observed Mr. Broom in his Legal Maxims, "the first observation which suggests itself in limitation of the principle thus enunciated is, that whenever the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it willfully or in some cases even ignorantly; and consequently the doing it may form the subject-matter of an indictment, information, or other criminal proceedings *simpliciter*, without any addition of the corrupt motive." The observations of Ashurst, J., in *Rex.* v. *Sainsbury*, 4 T. R. 427, puts the doctrine in a very clear point of view. He says: "What the law says shall not be done, it becomes illegal to do and is therefore the subject-matter of an indictment without the addition of any corrupt motives. And though the want of corruption may be the answer to an application for an information which is made to the extraordinary jurisdiction of the court, yet it is no answer to an indictment where the judges are bound by the strict rule of law." Where a statute in order to render a party criminally liable requires the act to be done feloniously, maliciously, fraudulently, corruptly, or with any other expressed motive or intention, such motive or intention is a necessary ingredient in the crime; and no legal offence is committed if such motive or intention be wanting; but where the enactment simply forbids a thing to be done, motive or intention is immaterial so far as concerns the legal criminality of the act forbidden.

A recent illustration of this important principle is to be found in the case of *Rex* v. *The Recorder of Wolverhampton*, 18 L. T. Rep. N. S. 395. That was a case which arose out of a violation of the 20 & 21 Vic., c. 83 (Sale of Obscene Books Prevention Act), the 1st section of which enacts that it shall be lawful for any two justices upon the complaint that the complainant has reason to believe that any obscene books are kept in any house, &c., for the purpose of sale or distribution, complainant also stating that one or more articles of the like character have been sold, distributed, &c., so as to satisfy the justices that the belief of the complainant is well founded, and upon such justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, &c., to enter and to search for, and seize all such books, &c., as aforesaid found in such house, &c., and to carry the articles so seized before the justices issuing the said warrant, and such justices are then to issue a summons calling upon the occupier of the house, &c., to appear within seven days before any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier shall not appear at the said time, or shall appear, and the justices shall be satisfied that such articles or any of them are of a character stated in the warrant, and that they have been kept for any of the purposes aforesaid, it shall be lawful for them to order the articles so seized, except such of

them as they consider necessary to be preserved as evidence in some future proceedings, to be destroyed at the expiration of the time thereinafter allowed for lodging an appeal.

It appeared that one Henry Scott, who was a tradesman, living at Wolverhampton was a member of a body called "The Protestant Electorial Union," the object of which was "to protest against those teachings and practices of the Romish and Puseyite systems which are in England immoral and blasphemous: to maintain the Protestantism of the Bible and the liberty of England, and to promote the return to Parliament of men who will assist them in those objects, and particularly to expose and defeat the deep-laid machinations of the Jesuits and resist grants of money for Romish purposes." In furtherance of the objects of this body, Mr. Scott had made considerable purchases of a pamphlet called "The Confessional Unmasked," which purported to show the supposed depravity of the Romish priesthood, and the iniquity of the confessional; and it did so by extracts from the works of certain Romish theologians who had written on the practice of auricular confession, in which matters of a most obscene and disgusting character were discussed as proper subject for inquiry at the confessional. Mr. Scott had, to promote the objects of his society of bringing down condemnation of the Roman Catholic confessional, sold publicly, at prime cost, a vast number of these pamphlets, when proceedings were taken against him under the section of the 20 & 21 Vic., c. 83, above quoted, and a great quantity of unsold pamphlets were seized at his house, and were in due course ordered by the justices to be destroyed. Having appealed against this decision, the case came on before the Recorder of Wolverhampton, who found "that the appellant did not keep or sell the said pamphlet for the sake of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he sold the pamphlets as a member of the said Protestant Electoral Union to promote the objects of that society, and to expose what he deems to be the errors of the Church of Rome, and particularly the immorality of the confessional." The learned recorder further said that he was of opinion that under the cricumstances the sale and distribution of the pamphlets would not be a misdemeanor, nor be proper to be prosecuted as such, and accordingly that the possession of them by the appellant was not unlawful within the meaning of the statute; and he therefore quashed the order of justices and directed the pamphlets seized to be returned to the appellant, but granted a case for the opinion of the Court of Queen's Bench upon the subject.

It will be observed that the right of the justices to seize the books was dependent upon the fact that they were of such a charactor and description that the publication of them would be a misdemeanor and proper to be prosecuted as such. Upon the case being argued in the court above, the judges differed from the recorder in his opinion upon the subject, holding that the publication of the pamphlets would be a misdemeanor, and proper to be prosecuted as such. In giving his judgment, Cockburn, C. J., says: "He (the recorder) reversed their decision upon the ground that, although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the information, yet that the immediate intention of the appellant was not so as to affect the public mind, but to expose the practices and errors of the confessional system of the Roman Catholic Church. Now, we must take it upon this finding of the learned recorder that such was the motive of this publication—that its intention was honestly and *bonâ fide* to expose the errors and practices of the Roman Catholic Church in the matter of confession. Upon that ground the learned recorder thought that an indictment could not have been sustained inasmuch as to the maintainance of an indictment it would have been necessary that the *intention* should be alleged, namely that of corrupting the public mind by the obscene matter in question. In that respect I differ from him. I think that, if there be an infraction of the law, and an intention to break the law, the criminal character of such publication is not affected or qualified by there being some ulterior object which is the immediate and primary object of the parties in view, of a different and honest character.... I take it, therefore, that, apart from the ulterior object which the publisher of this work had in view, that the work itself is in every sense of the word an obscene publication, and that consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it, therefore, that the publication itself is a breach of the law. But then it is said, 'Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the confessional.' Be it so; but then the question presents itself in this simple form. May you commit an offence against the law, in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is emphatically, 'No.'..... I take it that where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from the act, and that as soon as you have an illegal act thus established *quoad* the intention and *quoad* the act itself, it does not lie in the mouth of a man who does it to say, 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' The law does not allow that. You must abide by the law, and if you accomplish your object you must do it in a legal manner or let it alone; you must not do it in a manner which is illegal." Other learned judges expressed similar views.

It will be observed that the right of the justices to seize and destroy publications as mentioned in the case, depended solely upon whether or not they were of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such. It was necessary therefore for the judges to decide whether or not this publication, admitted to be obscene and calculated to prejudice good morals, would support an indictment, the publisher not disposing of the pamphlets for the sake of gain, nor in fact to prejudice good morals, but to promote a lawful object. The language of the Chief Justice, in holding that it would support an indictment was not more emphatic than it was sound. The maxim of "You shall not do evil that good may come" is (as was said by the Bench) applicable in law as well as in morals. Indeed if the converse of such a doctrine were permitted, the man who gives another a dose of poison to terminate bodily suffering and put a a speedy end to a painful, fatal malady, would stand excused of crime, and it would be an available plea in the mouth of a man who blew out the brains of another who was struggling in the jaws of death, that he did it, as he commonly done to the lower animals, to release him from a state of suffering which could not but speedily terminate in death. The case we have made the principal subject of these remarks cannot but be looked upon henceforth as a leading authority.—*Law Times.*

MARRIED WOMEN.

The Bill "to amend the law with respect to the property of married women," prepared and brought in by Mr. Shaw Lefevre, Mr. Russell Gurney, and Mr. J. S. Mill, contains only fourteen clauses, and bears evidence of having been carefully prepared. We think that upon the whole it is an advance, though unquestionably by a somewhat long stride, in the direction in which legislation and the practice of the Court of Chancery have been tending for years past, although the framer of the preamble seems disposed to deny any merits whatever to the existing law. The preamble states that the "law of property and contract, with respect to married women, is unjust in principle, and presses with peculiar severity upon the poorer classes of the community." The latter part of the preamble is unfortunately true, as an application to the Court of Equity by a married woman of the poorer classes is a serious step, yet the only one by which she can obtain assistance from those equitable doctrines which have displeased the common law as regards husband and wife. On the former part of it we do not in this place express any opinion. It is then enacted (section 1), that a married woman shall be capable of holding, alienating and devising property and of contracting as a *feme sole*, and (section 2) that property of women married after the Act, which is to come into operation on the 1st January, 1869, whether belonging to them before marriage or accquired by them after marriage, shall be held by them free from the debts of their husbands, and from their control or disposition, as if unmarried.

It is clear that the best advice that it is in our power to give to a woman about to be married must be, "Wait until the 1st of January, 1869." That the wife's property should be exempted from the husband's debts is highly desirable, but how are you to exempt it from his control? We fear that it is beyond the power, even of Parliament, to do that. Suppose the case of a husband and wife under the new law, being of that class where of all others a settlement of the wife's property is most desirable, the class of traders. Under the law, as it is to be, the wife retains her property; before long, without doubt, she will be asked to put it into the business, possibly to become a partner in it, to which we can see no legal objection under the new state of things. Would not ninety-nine women out of a hundred, in such a case, put their fortunes into their husband's hands to do what he liked with? and is not that the very evil which settlements were meant to avert? It is however, still open to a woman on marriage to make a settlement.

Section 3 extends to women already married the right to hold, as if unmarried, property acquired by them after the Act, subject to any settlement which they may have made of it, and to any vested rights of their husbands in it.

Section 4: the earnings of a married woman to be her personal estate; is a valuable provision, extending to all married women the protection which, under the 20 & 21 Vic., c. 85, deserted wives only were enabled to obtain. This provision will undoubtedly be a great boon to the lower classes of society.

Section 5: a husband shall not be liable for his wife's debts incurred before marriage, or for any wrong committed by her.

Section 6 repeals in part the existing law of distribution, giving the husband the same distributive share in the personalty of his intestate wife as she would take, on his dying intestate, in his personalty.

Section 7 reserves the tenancy by the curtesy.

Section 8 provides for a state of things that will, no doubt, often occur. Questions between husband and wife as to chattels are to be decided in a summary way, either by the Court of Chancery or by a County Court, as the case may be, the right being reserved to the petitioner of applying to the county courts, whatever the amount at stake may be. It is probably by an oversight that no provision has been made as to the amount that may be adjudicated upon in the Superior Court and County Court respectively. As the bill stands, the *forum* will be entirely in the option of the petitioner, irrespectively of the amount at stake.

Section 9, however, prevents one class of these questions from being raised, by providing that a husband shall not be liable to account for his wife's income and personalty received by him with her sanction; although we can conceive a good many nice questions being raised as to what amounts to such sanction on her part.

Section 10 contains a saving of existing settlements, and power to make future settlements, and does away with the doctrine of restraint on anticipation as a bar to the claims of the creditors of the wife, where such restraint is contained in any future settlement.

Section 11 extends the principle of the Infants Settlement Act, 18 & 19 Vic., c. 43, enabling a girl (even if under seventeen apparently) to make binding settlements with the consent of her parents or guardian, and of her intended husband, and saves the husband's covenant for settlement of wife's after-acquired property made before the Act comes into operation.

We have thus endeavoured to give a short sketch of the principal features of this Act, which, however it may be amended, must, if it passes, modify to a great extent, if not revolutionise, the position of married women in England as regards property.—*Solicitors Journal.*

THE 'LAW TIMES' AND THE 'LAW REPORTS.'

Our cotemporary, the *Law Times*, has, with that complacency which never forsakes him under the most trying circumstances, reviewed the conditions and prospects of the two rival monthly Reports, the 'Law Journal Reports,' and the 'Law Reports.' He has learned with sorrow, though not with surprise, that the balance sheet of the 'Law Reports' displays a considerable deficiency. But the sorrow is alleviated by the reflection that after all a balance can be struck by a curtailment of the salaries of the reporters to the tune of about 4,000*l.*; and that, as those gentlemen embarked in the concern on speculation, their misfortune, is of no particular account. Independently of this very trifling question of paying the real labourers in the vineyard, the *Law Times* declares emphatically that the *concern is solvent, and both ends are made to meet.* Three weeks ago, another legal contemporary gave its readers an insight into the report of one of the auditors of the 'Law Reports' and we ventured to cite that statement in our own columns. But it appeared that the deficiency on the two years 1866 and 1867 stood at '4,007*l.*, exclusive of 3,862*l.* 10*s.*, due to reporters, and the sum of 571*l.* paid by the Inns of Court and Law Society.' So that, beyond the insignificant detriment to the purses of the reporters, there was a loss of more than 4,500*l.* on the general working of the concern for two years. It follows that in the opinion of our cotemporary the *Law Times solvency* means a dead loss exceeding 2,000*l.* per annum.

But the disease having been thus analysed, and described in language of singular modesty, the prescription for a cure follows in due course. The 'Law Reports' cannot flourish unless they can add one thousand names to their subscription list, and that feat, says the *Law Times*, they will not accomplish. There is a hint thrown out that the first year is the best year which the 'Law Reports' have seen, or ever will see. Curiosity and novelty attracted a body of subscribers. The reaction has come, and that, too, at a time when the profession is very poor, and when cash is unusually scarce among its members. Even the *Law Times* cannot get in its money. So what possible chance have the 'Law Reports,' which insist on *payment in advance.* Therefore the 'Law Reports' must cut down expenditure by abolishing the Weekly notes and Statutes, and after that tremendous jettison their ship may possibly gain the port. This is the statement and the advice of the *Law Times*, and it assuredly is not for us to express any opinion on the efficacy of the suggested remedy. It is enough to say that whatever may be the exact state of legal business, our experience in the payment of accounts does not coincide with that which is so naively and piteously disclosed by the *Law Times;* and we suppose that, if the profession is really as poor as it is averred, we ought to render very hearty thanks for the prompt manner in which our subscribers discharge their dues toward us.

But has the whole case as to the 'Law Reports' been stated? We have refrained hitherto, and intend to refrain, from anything like hostile comment on that publication, but at least we shall be guilty of no breach of decorum in quoting a passage from a report dated June 17, 1867, and signed by no less a person than Sir Roundell Palmer. The words are these: 'The accounts for the year ending December 31, 186[illegible], have been duly audited; and after taking *credit for the stock on hand at the subscription price*, the expenses of the year including the additional cost of the Weekly Notes and the Statutes, and payment in full of the salaries of the editors, secretary, and reporters have been met.' It would, therefore, at first sight appear that the enormous deficiency of 8,000*l.* has been incurred in the year 1867. But the real construction of this somewhat ambiguous clause seems to be that a clean balance sheet was shown by taking credit for unsold copies just as if they had been sold, a method of computation concerning which we forbear to say more than that the same result would have been achieved, if not a single copy had ever been sold. On this principle, the Council might have reprinted a few extra thousand copies every year, taken credit for them at *full subscription price*, and shown a balance in their favour to all eternity. Quitting, however, this question, of which time will be the best exponent, we hasten to see

what the *Law Times* has to say of ourselves. For once we are driven to believe that our eyes are no longer to be trusted. Besides the method of cure already proclaimed, the *Law Times* has a sovereign remedy for the maladies of his patient. 'Let the "Law Reports" buy up the Law Journal.' The *Law Times* says there is no room for two monthly reports. We deny the axiom, holding that free trade in reporting and fair competition are absolutely essential. Monopoly would produce delay, inferior work, and increased price. But even if monopoly was desirable, what could be more extraordinary than the proposition of the *Law Times?* Of course, if solvency means a series of dead losses, power to purchase may be equivalent to inability to pay debts. But of all the brilliant suggestions ever offered to a concern, none ever exceeded the notion of buying up an immense rival business with the sum of 8,000*l.* *debts.—Law Journal.*

CONFLICT OF JUDICIAL DECISION.

It is a great evil when cases disagree as they do so conspicuously in many departments of our law. We are sure, however, that it is not a greater evil when by reason of the divergence of judicial opinion causes go undecided or decided only in a partial and unsatisfactory manner. Recently, the Common Law Courts, which can alone give us examples of this, have been very prolific, and we shall direct attention to one or two instances.

Very numerous are the cases in which a single member of the court stands alone in his opinion, as did Bramwell, B. in a most important shipping case reported this week; and as did Bovill, C. J. in a case of equal moment affecting deeds of composition, also reported this week. Where this incident takes place in the court below, we are not so much disposed to complain, because it shows a healthy state of thought and an independence of opinion which is of advantage to the community. But it is otherwise when a division arises in a court of error, so as exactly to cut the court in two, and leave the decision appealed from *in statu quo.* A glaring instance of this is noticed by our reporter in the Court of Exchequer Chamber. The question involved the intrusion of the sheriff. In the Court of Exchequer Barons Martin and Bramwell decided against the privilege, contrary to the judgment of the Lord Chief Baron. Upon the appeal, three Justices of the Queen's Bench concurred with the judgment of Barons Martin and Bramwell, whilst three Justices of the Common Pleas concurred with the judgment of the Lord Chief Baron. Thus the appeal fell through. If an appellate court thus divides itself in such equal proportions is it surprising that twelve jurymen should sometimes find it difficult to agree?

But this is not all. Upon the question what are and what are not necessaries, the court of appeal was equally at sea, and after deliberating for three quarters of an hour, it was announced that judgment must remain suspended, further time being required for consideration. We sincerely hope that when judgment is delivered we shall not find one Judge reading the opinion of himself and two others, and the fourth Judge reading the opinions of himself and the remaining Judges, but that care will be taken to arrive at some unanimous judgment, even if some concession has to be made upon one side or the other.

We do not say that these divisions reflect upon the capacities of the Judges, but we feel bound to say that they make our system of administering justice appear very contemptible at times, and would induce us to wish that single Judges should preside as in equity, were it not that we see manifest disadvantage attaching to such a tribunal at common law. Every effort should be made to give at least a semblance of authority to the judgments of the Court of Exchequer Chamber. Its present mode of conducting its business is the strongest argument in favour of its abolition, and the adoption of the House of Lords as the only court of appeal.—*Law Times.*

The Opinion of the Profession.—When a text-writer, an advocate, or a partisan is put in the wrong or otherwise annoyed by a judicial decision, he consoles himself by saying that the 'opinion of the profession' is the other way. So Mr. Whalley says that the judgment of the Queen's Bench, in condemning the 'Confessional Unmasked,' has excited murmurs in Westminster Hall. There are always one or two wrong headed men in every profession, upon whom the united authority of any number of judges would have no effect; but it is our belief that, with some such possible exceptions, the decision has elicted universal approbation.—*Law Times.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

Ex. Parte George Henry Martin.

Extradition—Ashburton Treaty—Con. Stat. Can., cap. 89—Stat. 24 Vic. cap. 6—29 & 30 Vic., cap. 45—Regularity of Proceedings—Admissibility of Evidence.

Where a prisoner in custody under the Ashburton Treaty obtained a *habeas corpus* and *certiorari* for his discharge, it was held that the argument as to the regularity or irregularity of the initiatory proceedings, such as information, warrant, &c., was a matter of no consequence; the material question being, whether—being in custody—there was a sufficient case made out to justify the commitment for the crime charged.

It was held that certified copies of depositions sworn in the United States, after proceedings had been initiated in Canada, and after the arrest in Canada, were admissible evidence before the Police Magistrate.

[Chambers, June 29, 1868.]

McMichael obtained a *habeas corpus* directed to the Gaoler of the Gaol in Hamilton, where the prisoner was confined, to have his body before the presiding judge in Chambers, &c., and at the same time he obtained a writ of *certiorari* under 29-30 Vic. cap. 45, addressed to the Police Magistrate of the City of Hamilton, for a return

of the informations, examinations and depositions touching the prisoner's commitment.

It appeared by the return to the *habeas corpus*, that the prisoner was in custody under a warrant of commitment issued by the Police Magistrate of Hamilton, upon a charge of robbery committed in the United States, and for the purpose of extradition, and that he was detained until surrendered according to the stipulations of the Ashburton Treaty, &c.

The examinations and depositions returned with the *certiorari* shewed that, early on the morning of the 1st of May, two persons broke into an express car on the Hudson River Railway, on its way to New York,—one Browne, an express messenger of the Merchants' Union Express Company, being in charge of a safe containing a large amount of money and securities. Browne at the time was asleep. They seized him, handcuffed him, threatened his life, tied his hands and legs together, and himself to a stove in the car, took the keys from his pocket and rifled the safe of its contents, and, as the train approached New York, having gagged him, they leaped from the car, taking with them, with other property, over $100,000 in United States Bonds. Browne swore that although they had dominoes partly secreting their faces, that he had an opportunity of noticing their appearance, so as to be able to describe them, and in his deposition he states their sizes, complexion, color of hair, whiskers, eyes, and voice. The numbers of the bonds and their description being known to the parties who entrusted them to the care of the company, they were described in a printed circular, which was sent to brokers and others, and some of these circulars came into the possession of a Mr. Wilson, a broker in Hamilton. On the 20th of May, the prisoner came to this broker's office, and offered to sell $500 of coupons and five United States five-twenty Bonds. Mr. Wilson, referring to the circular, noticed that the numbers of the bonds corresponded with those of the stolen bonds, and he declined to purchase, telling the prisoner why, and shewing him the circular, and, at prisoner's request, gave him one of the circulars. The prisoner then left the broker's office—his movements were watched, and he was seen to pass through various streets, and eventually go into an uninhabited house, when the person watching missed him. The same evening he was arrested under the warrant produced, which described him as "a man, name unknown." He denied having any of the bonds or coupons, or that he offered any for sale to the broker; none were found on his person—the circular which he received from the broker he had with him. Upon a search at the vacant house he was seen to enter, the Chief of Police found the bonds and coupons secreted between the siding and wall of the coach house. On the following day the Assistant Secretary of the Company arrived in Hamilton, and deposed against the prisoner, by the name of Martin, as being a person answering to the description of one of the robbers. On his examination a good deal of evidence was taken, for the purpose of establishing that bonds bearing the numbers, &c., of those found were delivered to the Express Company, and in their charge in transit on the night of the robbery.

Upon reading the return to the writ of *habeas corpus*, and the examinations, depositions, &c., returned with the *certiorari*, *M. C. Cameron*, Q.C., *Dr. McMichael* with him, moved that the prisoner be discharged.

They contended that the prisoner was entitled to his discharge on various grounds; among others, that the original information and warrant issued by the Police Magistrate, and upon which the prisoner was arrested and charged, was made against "a man, name unknown," and that as the 2nd sec. of 24 Vic. cap. 6, only authorised the Police Magistrate to issue his warrant upon complaint charging any person (that is, by name) found within the limits of the Province, &c, the Police Magistrate had no jurisdiction and the proceedings were void. That certain depositions made in the United States after the arrest of the prisoner here, were not receivable in evidence before the Police Magistrate, and without these there was no evidence of a robbery committed. And further, that if these depositions were receivable, still there was no evidence of the identity of the prisoner as one of the robbers, and no evidence to shew that the property seen with the prisoner, or in his possession, was any of the property alleged to have been stolen.

The depositions to which exceptions were taken were depositions made and sworn to on the 30th of May, in New York, and upon which a warrant was issued on the 1st of June, by the Recorder of that city, against the prisoner, for robbery. The prisoner having been arrested on the 21st May, in Hamilton, and being under examination for committment under the Treaty and our statute, upon the same charge of robbery, and during his examination these depositions were received against him by the Magistrate on the 4th June, under the provisions of the 3rd sec. of 24 Vic., cap. 6, as it was conceded that unless these depositions could be received, the prisoner was entitled to be discharged, as without them there was no evidence of the robbery.

Harrison, Q.C., appeared on behalf of the Express Company, and

James Paterson on behalf of the Minister of Justice and Attorney-General for the Dominion, and opposed the discharge.

They contended that the only question for determination was, whether there was sufficient evidence to justify the committal of the prisoner. They submitted that the depositions taken on the 30th May, were properly received by the Police Magistrate, and after receiving the evidence at length, they argued that there was evidence of identification of the prisoner, and that property alleged to have been stolen was found in his possession shortly after the robbery.

Morrison, J.—I have carefully read all the testimony, including the depositions taken in the United States, and I am of opinion, assuming that they were all receivable on the hearing before the Police Magistrate, that he was warranted in committing the prisoner for the purpose of his extradition, and that a sufficient case was made out against the prisoner to justify his apprehension and committal for trial, if the crime of which he was accused had been committed in this Province; and the circumstances proved are so suspicious that if the robbery had taken place

here the magistrate would not have been justified in discharging the accused. It is not the province of the Police Magistrate to determine the questions of fact, if he finds sufficient evidence to justify a commitment. Whether there is a probability of the prisoner being eventually convicted of the offence, after a trial, is not a question for his or for my consideration.

I shall now consider the legal objections to these proceedings.

As to the first, that the Police Magistrate had no jurisdiction, by reason of the original arrest and warrant being irregular and defective, I see nothing in the objection. Assuming that the initiatory proceedings were irregular and unjustifiable, in my judgment it is a matter of no moment and beside the present enquiry, whether the prisoner originally was arrested upon a void warrant, or without complaint or warrant, or whether, as contended, the warrant was for a charge of robbery of $20,000 and it turned out to be $20,000 in United States Bonds; the material question is, being in custody, whether a sufficient case was made out to justify his commitment for robbery, with a view to his extradition. It is obvious that offenders flying from the United States into this Province in order to elude arrest, would, when discovered here, in many cases, escape in consequence of the impossibility of obtaining the necessary proof at the moment, to authorise a warrant for their apprehension, unless some peace officer, satisfied of the guilt of a party, would assume the responsibility of his detention, until the regular proof was forthcoming. And it would be discreditable to our laws to hold that because in a case of this nature the original arrest was technically irregular (after the case was heard and the prisoner committed) the whole proceedings should be declared to be *coram non judice*, and the prisoner discharged.

Then, as to the objection that the depositions taken in New York, on the 30th May, were not receivable in evidence under the provisions of the 3rd sec. of our act, I had on the argument some doubts as to their admissibility, but upon consideration have come to the conclusion that the objection is untenable. The question resolves itself into this, whether when an offender is arrested in this Province for a crime committed in the United States for the purpose of extradition, can depositions taken in the United States after his arrest here and upon which a warrant issued against him in the United States upon the same charge, be received as evidence against the accused, upon the hearing of the case before the Police Magistrate.

It is admitted that the proceedings against the prisoner, may be originated in this country. It cannot be doubted that before or after his arrest here, a warrant may be issued in the United States founded upon depositions taken there. On the argument no reason or authority was adduced against using depositions taken in the United States during the pendency of the proceedings against the prisoner before the Police Magistrate, except by a very critical reading of the 3rd sec. of our statute, to shew that the framer of that section intended that before its provisions should apply, the depositions should be made, and a warrant issue in the United States, before the arrest of the accused in this country; but in construing and applying that section we must look at the spirit of the provision, not the mere letter, and in the language of our Interpretation Act, Con. Stat. of Canada, we must give it "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the act and of such provision or enactment, according to their true intent, meaning and spirit." What the section evidently intended was, that any depositions made in the United States, before proper authority and upon which a warrant issued for the arrest of the accused, should be received as evidence of his criminality in the hearing before the Police Magistrate. The main object contemplated by the enactment, was to sanction the use of depositions and to avoid the necessity of bringing the deponents here. The referring to or connecting the depositions with the warrant in this section, was, in my opinion, for the purpose of ensuring that they should be such depositions as would be taken before competent authority, and in relation to the particular crime and the offence specified in the foreign warrant, and that the time when the warrant issued was immaterial. The value of the objection is apparent, when we consider that if the Police Magistrate had given effect to the objection, when taken before him by the prisoner's counsel, all that was necessary to be done was to issue a new warrant and begin the proceedings all new, and so get rid of the technicality—and if I were now to discharge the prisoner on this objection, practically I should do so upon the ground that the Police Magistrate did not go through the farce of abandoning the proceedings *pro forma*, saying to the prisoner, I release you for the purpose of re-arresting you, in order to read the depositions taken in New York against you. To discharge the prisoner from custody on such grounds, while it would be contrary to the spirit and intention of the Treaty and the provisions of our statute, would be a scandal and reproach to the administration of the law.

It was contended very strongly and zealously by Dr. McMichael, that the case was one of great hardship against the prisoner: that the true object of his extradition was for some purpose other than his trial for the robbery. I see no ground for apprehending that such is the case and I have not the slightest doubt that the prisoner will be fairly dealt with by the Government of the United States, as well as the courts of law there, and that nothing will be done against the prisoner contrary to the spirit and object of the Treaty—nor am I pressed with any serious doubts as to the propriety of the view taken of the case by the Police Magistrate. The prisoner's conduct from the time he offered the securities for sale, until and after his arrest, without explanation, is quite inconsistent with innocence, and indicates forcibly guilty knowledge. It may turn out, as suggested, that he is only a receiver of the stolen property, but the facts disclosed would be evidence to some extent to go to a jury against the prisoner, for a taking by him. I am therefore of opinion that I should not discharge the prisoner, but that he should be remanded, to be dealt with as His Excellency the Governor-General, may be advised.

Prisoner remanded.

ENGLISH REPORTS.

COMMON PLEAS.

Leete v. Hart.

False imprisonment—Giving person in custody found committing offence—24 & 25 Vict. c. 96, s. 103.

A person found committing an offence against the Larceny Act may be immediately apprehended by any person without a warrant, provided, according to the rule laid down in *Herman* v. *Seneschal*, and adopted in *Roberts* v. *Orchard*, the person so apprehending honestly believes in the existence of facts, which, if they had existed, would have justified him under the Statute.

Held, that this belief must rest on some ground, and that mere suspicion will not be enough.

[16 W. R. 676; April 2, 1868.]

This was an action for false imprisonment. Plea.—Not Guilty by Statute, 24 & 25 Vict. c. 96, ss. 51, 103, 104, and 113.

At the trial before Byles, J., at the last Guildhall sittings, it appeared that the defendant, who lived in a suburban villa, had been on several occasions alarmed by attempts made to break into his house during the night. On the night of the 5th of October last, about half-past twelve, he was in a back room on the ground floor, and and on looking out of the window he saw a man at his back door, who, he concluded, was trying to effect an entrance. He at once ran up stairs to his bedroom to fetch a sword and pistol, and alarmed his wife, who had already gone to bed. She ran down out of the front door screaming police, and seeing a man standing at the garden gate in front of the house, gave him in custody to a policeman who came up at the moment. This man was the plaintiff. Shortly afterwards the defendant came down with his sword and pistol, and saw his wife standing with the policeman at the gate. The wife, pointing to the plaintiff, said, 'that is the man," or words to that effect, and the defendant thereupon gave him into custody; but after they had proceeded some fifty yards on the way to the police station the defendant, on the plaintiff's assurance that he was a respectable man and a neighbour of his, expressed his wish to withdraw the charge; they, however, went on to the police station. The plaintiff it appeared lived in the same row of houses as the defendant, and was walking home along the pavement, and was within a stone's throw of his own house, when he heard the defendant's wife screaming police, and stopped at the garden gate to learn what was the matter, and was then given in custody. A centre bit was found next morning at the back of the house. On these facts, no witnesses being called for the defence, the jury found for the plaintiff, with £10 damages.

Foard now moved, pursuant to leave reserved, to enter the verdict for the defendant.

The plea is founded on sections 51, 103, 104, & 113, of the Larceny Act, 24 & 25 Vict. c. 69. The 51st section defines the crime of burglary; by the 103rd section "any person found committing any offence punishable either upon indictment or upon summary conviction by virtue of this Act except only the offence of angling in the day time, may be immediately apprehended with a warrant by any person," &c. By the 104th section "any constable or peace officer may take into custody without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act," &c.; and the 113th section provides that in an action for anything done in pursuance of the Act, notice shall be given to the defendant, and that he may plead the general issue, and give this Act, and the special matter, in evidence thereunder.

The Act was intended to protect those who have by mistake exceeded their duty; and the defendant here *bonâ fide* believed that an attempt at burglary had been committed: *Roberts* v. *Orchard*, 12 W. R. 253, 2 H. & C. 768; *Read* v. *Coker*, 1 W. R. 413, 13 C. B. 850; *Heath* v. *Brewer*, 15 C. B. N. S. 803; *Hermann* v. *Seneschal*, 11 W. R. 184, 13 C. B. N. S. 392; *Downing* v. *Capel*, 15 W. R. 745, L. R. 2 C. P. 461. He was misled by an existing state of facts, over which he had no control.

Bovill C. J.—I am of opinion that this rule should be refused. *Roberts* v. *Orchard*, did not introduce any new law on the point, but the case must be decided on the law as previously laid down, and especially in *Hermann* v. *Seneschal*. In *Roberts* v. *Orchard*, the question was whether the judge should have asked the jury if the defendant honestly believed that the plaintiff had taken the money, and that in giving him into custody, he was exercising a legal power; and it was decided that it would not be enough to ask them that, but that they should also be asked whether the defendant honestly believed that the plaintiff had been found committing the offence. But as to the rule of law, the Exchequer Chamber adopted what had before been laid down by Williams, J., in *Hermann* v. *Seneschal*, viz., that the defendant has the protection of the statute "if he honestly intended to put the law in motion, and really believed in the existence of the state of facts, which, if they existed, would have justified him in doing as he did." That I take to have been the rule before *Roberts* v. *Orchard*, and it was not interfered with by that case, and must be applied here. Did the defendant then in this case to adopt the words of Williams, J., in *Roberts* v. *Orchard*, "honestly believe in the existence of those facts which, if they had existed, would have afforded a justification under the statute?" It is clear that it is not necessary that an offence should have been committed under the statute by any one, here there was certainly no such offence committed by the plaintiff, and there is nothing to satisfy me that the defendant did believe facts which, if they had existed, would have justified him, or that the plaintiff was found committing any offence under the Act. There was no entry, no robbery, and no attempt; and further an attempt at robbery is not within the statute. The case is not brought either within the 51st or the 58th section; and there is no evidence of any such belief as is required on the part of the defendant, or of any other circumstance to bring the case within the Act.

Byles, J.—I am of the same opinion, and will only add one further on *Roberts* v. *Orchard*. My brother Willes there says, "it is clear to my mind, from the defendant's evidence in answer, that he was acting on mere suspicion." Mere suspicion will not do for belief is a state of mind which

rests on some ground, and therefore I doubt whether *Roberts* v. *Orchards*, has much changed what was considered to be the law on the subject before. *Hermann* v. *Seneschal* was a case in which the plaintiff was given into custody on the suspicion of passing bad money; and Erle, C.J., says, "the jury having found that the defendant did really believe that the plaintiff had passed him a counterfeit coin, and did honestly intend to put the law in force against him, and as I am clearly of opinion that the facts were sufficient to justify that conclusion, I do not think that the other part of the finding, viz., that the defendant had no reasonable ground for such his belief, entitles the plaintiff to retain the verdict." *Roberts* v. *Orchards*, therefore reposes on the same ground as that case, for there were no facts there sufficient to justify the belief.

Keating, J.—I am of the same opinion. The rule in *Roberts* v. *Orchard*, is not meant to be impinged upon by any judgment of ours. Did the defendant honestly believe in a state of facts which, if true, would justify him? That is the question. If he acted upon what he had been dreaming, that would not be sufficient. I cannot see what the facts are which he believed in, and which if they had existed would have justified him. There is no evidence that any offence had been committed on that night by anyone; much less that any one had been found committing any offence. How could the defendant honestly believe in facts which, if true, would justify him?

Montagu Smith, J.—I am of the same opinion. In *Read* v. *Coker*, Jervis, C.J., lays it down broadly that "to entitle a defendant to a notice of action it is enough to show that he *bonâ fide* believed he was acting in pursuance of the statute for the protection of his property." Perhaps the rule stated in those general terms may be too wide; but the rule laid down by Williams, J., in *Roberts* v. *Orchard*, is enough for us in disposing of this case, and the defendant has not brought himself within it; and the meaning of the rule is, the defendant must not only believe that he is right in law but that those facts exist, which if they had existed, would justify him; and that was the view of Parke, B., in *Hughes* v. *Buckland*, 15 M. & W. 346, where the plaintiff was apprehended while fishing, for he says, "The defendants, in order to be protected, must have *bonâ fide* and reasonably believed Colonel Pennant to be the owner of the place where the plaintiff was fishing, and that the trespass was committed within the limits of his property;" and so it was held in *Downing* v. *Capel*. Here I am not satisfied that the defendant believed, indeed I think that he did not believe, that his house had been broken into. The defendant himself might have satisfied the jury as to the state of his mind, but he did not choose to undergo the ordeal.

Rule refused.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR FEBRUARY, MARCH AND APRIL, 1868.

(*Continued from page 155.*)

Action.—*See* Banker.

Administration.

1. A bankrupt was indebted to the estate of A., and was entitled as one of the residuary legatees of A., and also as next of kin to another residuary legatee. The executor of A. proved the debt under the bankruptcy, and received a dividend. *Held*, that the executor had thereby abandoned the right to retain the debt out of the direct or derivative shares of the bankrupt in A.'s estate. — *Stammers* v. *Elliott*, Law Rep. 3 Ch. 195.

2. In an administration suit by a residuary legatee, the court has jurisdiction to compel the plaintiff to refund, for the purpose of paying pecuniary legatees who are not parties to the suit, assets paid to the plaintiff by the executor before the suit.—*Prowse* v. *Spurgin*, Law Rep. 5 Eq. 99.

3. A testator domiciled in England gave his personal property, situate in England and Scotland, to two of his sons, and appointed his three sons executors. The will was proved in England by two of the sons, and also recorded in the Scotch Consistory Court. At the testator's death, the other son, one of the residuary legatees, was indebted to a company carrying on business both in Scotland and England, who obtained a judgment in Scotland against such son, and proceeded there against the executors to arrest the amount in their hands to which the indebted son was entitled. The court, upon the executors undertaking to obtain forthwith an administration decree in England, enjoined the proceedings against the executors in Scotland.—*Baillie* v. *Baillie*, Law Rep. 5 Eq. 175.

Admiralty.

Under a statute giving the Admiralty jurisdiction "over any claim of damage done by any ship," the Admiralty has jurisdiction of a cause of damage for personal injuries done by a ship.—*The Sylph*, Law Rep. 2 Adm. & Ecc. 24.

See Award, 2; Collision; Costs.

Agent.—*See* Custom; Equity Pleading and Practice, 3; Factor.

Agreement.—*See* Contract.

Annuity.—*See* Bankruptcy, 1; Will, 3.

Arbitration.—*See* Award.

Assignment.—*See* Company, 1.

Assumpsit.—*See* Ship, 2.

Attorney. — *See* Costs; Equity Pleading and Practice, 3; Necessaries, 1; Partnership.

Award.

1. A cause and all matters in difference were referred by an order which provided that the costs of the reference should abide the event of the award. The arbitrator decided the cause for the defendant, and, with regard to the matters in difference, awarded that the plaintiff had a valid claim against the defendant, and the defendant a valid claim against the plaintiff of a larger amount, and directed the plaintiff to pay the defendant the difference. The claims were unliquidated, and could not have been set off against one another in an action. *Held*, that the event of the award was wholly in the defendant's favor, and that he was therefore entitled to the costs.—*Dunhill* v. *Ford*, Law Rep. 3 C. P. 36.

2. A diver, having been injured by a ship, brought an action against the owners, which was referred to arbitration, under an agreement that all the rights of the plaintiff should be reserved, in case the award was not performed. The arbitrator awarded compensation, but the defendants never paid. *Held*, that the plaintiff was not debarred from proceeding *in rem* in the Admiralty.—*The Sylph*, Law Rep. 2 Adm. & Ecc. 24.

Banker.

Whether by virtue of the relation between banker and customer any legal duty is imposed on the banker not to disclose his customer's account, except on a reasonable and proper occasion, so as to give a cause of action without special damage, *quære*.—*Hardy* v. *Veasey*, Law Rep. 3 Ex. 107.

Bankruptcy.

1. A husband covenanted in a deed of separation to pay an annuity to his wife, the annuity to cease in the event of future cohabitation by mutual consent. *Held*, that the value of the annuity was not capable of calculation, and that the annuity was therefore not provable under the Bankrupt Acts.—*Mudge* v. *Rowan*, Law Rep. 3 Ex. 85.

2. A trader, being indebted to the defendant, gave him his acceptance for the amount due. Three days before the acceptance was due, he agreed to give the defendant a bill of sale of all his goods, in consideration of the defendant taking up the acceptance, and in order to cover any further advance by the defendant. The defendant took up the acceptance, and afterwards advanced the trader £64, on the understanding that it should be secured by the bill of sale. The bill of sale was subsequently executed, whereby all the personal estate of which the trader was or should in future become possessed, was assigned to the defendant as security. The trader's property was worth about £115. Less than a year after the date of this bill of sale, but more than a year after the date of the agreement to give it, the trader was adjudicated bankrupt. In trover by the assignee for the goods included in the bill of sale, some of which had been acquired after the agreement, *held*, that the £64 was a fair present equivalent for the assignment, and that the plaintiff could not recover (Exch. Ch.)—*Mercer* v. *Peterson*, Law Rep. 3 Ex. 104.

See Administration, 1; Priority; Stamp.

Bill of Lading.

In an action on a bill of lading by an indorsee against the ship-owners, the plaintiff put in the bill of lading, and proved that the consignors had indorsed and delivered it to A., and that A. had indorsed and delivered it to the plaintiff for value. *Held*, *prima facie* evidence of such an indorsement and delivery of the bill of lading as to vest the property in the goods in the plaintiff; and so transfer to him the right of action under the 18 & 19 Vic. cap. 111, sec. 1, which enacts that every indorsee of a bill of lading to whom the property in the goods passes by reason of the indorsement, shall have transferred to him the same rights of suit as if the contract in the bill had been made with him.—*Dracachi* v. *Anglo-Egyptian Navigation Co.*, Law Rep. 3 C. P. 190.

Bills and Notes.—*See* Company, 1; Conflict of Laws; Contract, 1; Embezzlement; Mistake; Sale.

Bond.—*See* Company, 1.

Bonus.—*See* Tenant for Life and Remainderman.

Broker.—*See* Custom.

Capital.—*See* Tenant for Life and Remainder man.

Charity.

A bequest to trustees, in trust for "such charities and other public purposes as lawfully might be in the parish of T.," is a good charitable gift.—*Dolan* v. *Macdermot*, Law Rep. 5 Eq. 60.

Cheque.—*See* Embezzlement.

Club.

The rules of a club authorized the committee to call a general meeting, "in case any circumstance should occur likely to endanger the welfare and good order of the club," and provided that any member might be removed by the votes of two-thirds of those present at such meeting. On a bill by a member so removed,

praying to be reinstated, *held*, that as, in the judgment of the court, the meeting was fairly called, and the decision was arrived at *bona fide*, and not through caprice, such decision was final, and the court could not interfere.—*Hopkinson* v. *Marquis of Exeter*, Law Rep. 5 Eq, 63.

Collision.

The owners of a foreign vessel claimed damages for a collision between their vessel and an English ship, in Belgian waters. The defendants, owners of the English ship, pleaded that, by the Belgian laws, pilotage was compulsory in the place where the collision occurred. *Held*, that the plaintiffs might plead in reply, that, by the same laws, the owner of the vessel in fault, though compelled to take a pilot, continued liable for damages.—*The Halley*, Law Rep. 2 Adm. & Ecc. 3.

Company.

1. B. agreed with the promoter of a company for the delivery to B. of debentures of the company, payable to bearer. The articles of the company adopted this agreement, and directed it to be carried out. Debentures were accordingly issued to B., under the seal of the company, by each of which the company covenanted to pay the sum mentioned therein to "B., his executors, administrators and assigns, or to the holder hereof." These bonds were delivered by B. to Z., a *bona fide* holder, for value. *Semble*, that at law Z. could not sue on these debentures in his own name; and, *quære*, whether they were good at law as bonds or not; but, *held*, that, as they were conformable to the above-mentioned agreement, effect must be given to them in equity according to their tenor, and that therefore, in the winding up of the company, Z. could prove on them in his own name, and free from any equities between the company and B.—*In re Blakely Ordnance Co.*, Law Rep. 3 Ch. 154.

2. A. owned a house on a highway. A railway company, under powers given by statute, made an embankment on the highway opposite the house, thereby narrowing the road from 50 to 33 feet, thus materially diminishing the value of the house for selling or letting, and obstructing the access of light and air. *Held*, (1) that A. had sustained particular damage from the works; (2) that the damage would have been actionable if it had not been authorized by statute; (3) that the injury done was an injury to A.'s estate, and not a mere obstruction or inconvenience to him personally or to his trade; and that, these three things concurring, A. was entitled to compensation under 8 Vic. caps. 18 & 20.—*Beckett* v. *Midland Railway Co.*, Law Rep. 3 C. P. 82. See *Ricket* v. *Metropolitan Railway Co.*, Law Rep. 2 H. L. 175 (2 Am. Law Rev. 273).

See Contract, 2.

Conflict of Laws.

On a bill of exchange payable to order—drawn, accepted, and payable in England—the contract of the acceptor is to pay to an order valid by the law of England; and an endorsee can sue the acceptor in England, under an indorsement valid by the law of England, though the indorsement was made in France, and by the law of France gave the indorsee no right to sue in his own name, and though the indorser (who was also drawer and payee) and the indorsee were, at the time the bill was made and indorsed, domiciled and resident in France.—*Lebel* v. *Tucker*, Law Rep. 3 Q. B. 77.

See Administration, 3; Collision; Equity Pleading and Practice, 1.

Contempt.

In a suit for having removed human bones and portions of the soil from a churchyard to a field belonging to the defendant, the Court of Arches issued a monition directing the defendant to replace, before a certain day, the bones and earth removed. The defendant failed to comply with the order, alleging that he was unable to do so, because said field was no longer in his occupation or possession. *Held*, that his conduct amounted to contempt of court.—*Adlam* v. *Colthurst*, Law Rep. 2 Adm. & Ecc. 30.

Contract.

1. Where a bank has issued a letter of credit, on the terms that the bills which they agree to accept are to be covered by bills of lading, suspension of payment by the bank before there has been time for the letter of credit to be used, is not a breach or repudiation of the contract; because the liquidators, under the winding up of the bank, might have received permission to negotiate the bills, and a claim by the holder of the letter of credit for damages for the alleged breach was disallowed.—*In re Agra Bank*, Law Rep. 5 Eq. 160.

2. The plaintiff agreed through a broker to sell his shares in a company to a jobber for £200. By the usage of the Stock Exchange, the transfer would not be made till a future day, and in the interval the shares might again be sold till a certain day, when the original buyer must name the person to whom the shares should be transferred. Accordingly, the shares were finally sold to the defendant for £145 (a call having been made in the meantime), and the plaintiff gave the defendant a

deed transferring the shares to him, the consideration named in which was £145, the difference being paid to the plaintiff by the jobber. The defendant never registered the transfer, and an order was made for winding up the company. The plaintiff was compelled to pay calls on the shares, and filed a bill for specific performance and repayment, alleging a purchase by the defendant for £200. *Semble*, that there was a contract between the plaintiff and the defendant, and that the making of the call did not invalidate the contract; but *held*, that the alleged contract to purchase for £200 was not proved.—*Hawkins* v. *Maltby*, Law Rep. 3 Ch. 188.

See Custom; Damages; Frauds, Statute of; Mistake; Parties; Sale; Ship, 2; Specific Performance; Vendor and Purchaser of Real Estate, 2; Warranty.

Conversion.—*See* Ship, 2.

Corporation.—*See* Company; Tax.

Corpus.—*See* Tenant for Life and Remainderman.

Costs.

A proctor's lien for costs on a fund in court is not displaced by a garnishee order.—*The Jeff. Davis*, Law Rep. 2 Adm. & Ecc. 1.

See Award, 1.

Covenant.—*See* Specialty Debt; Vendor and Purchaser of Real Estate, 1.

Criminal Law.

A statute provided that whoever should steal, or cut with intent to steal, the whole or any part of any tree, or any underwood (in case the value of the article or articles stolen, or the amount of injury done, should exceed £5), should be guilty of felony. *Held*, that, in estimating the amount of injury done, the injury to two or more trees might be added together, provided the trees were cut at one time, or so continuously as to form one transaction.—*The Queen* v. *Shepherd*, Law Rep. 1 C. C. 118.

See Embezzlement; Malicious Wounding.

Custom.

One who employs a broker to sell shares for him on the Stock Exchange or other general market, impliedly authorizes him to deal according to the general and known usages of that market, though he himself be not aware of their existence. But the usage relied on must be proved to exist, and to be so general and notorious, that persons dealing in the market could easily ascertain it, and must be presumed to be aware of it; and, to bind persons not aware of it, it must also appear to be reasonable.—*Grissell* v. *Bristowe*, Law Rep. 3 C. P. 112.

Cy prés.—*See* Will, 2.

Damages.

Where, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another and more obvious purpose, though the buyer cannot recover, as damages for non-delivery according to the contract, the loss of profit which might have been made from the purpose for which he intended it, he can recover the loss of profit which might have been made from the purpose supposed by the seller, provided he has actually sustained damage to that or a greater amount.—*Cory* v. *Thames Iron Works Co.*, Law Rep. 3 Q. B. 181.

See Banker; Company, 2; Contract, 1; Patent; Pleading; Vendor and Purchaser of Real Estate, 2; Warranty.

Debenture.—*See* Company, 1.

Deed.—*See* Parol Evidence; Power.

Devise.—*See* Will.

Discovery.—*See* Equity Pleading and Practice, 1; Production of Documents.

Discretion.—*See* Club.

Divorce.—*See* Husband and Wife, 2.

Election.

A testator, in pursuance of a power, appointed a fund to his three daughters, who were objects of the power, in equal shares: he gave his residuary personal estate to the same daughters in equal shares, and he directed the share of each daughter under the will and appointment to be held in trust for her for life, remainder to her children; such children were not objects of the power. *Held*, that the daughters took absolute interests in the appointed fund, and that no case of election was raised against them in favor of their children.—*Churchill* v. *Churchill*, Law Rep. 5 Eq. 44.

Embezzlement.

A statute provides that it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security, and that such allegation shall be sustained, if the offender shall be proved to have embezzled any amount; though the particular species of coin or valuable security of which such amount was composed shall not be proved. *Held*, that, under this statute, an allegation of the embezzlement of money was not sustained by proof that a cheque only had been embezzled, if there was no evidence that the prisoner had cashed it.—*The Queen* v. *Keena*, Law Rep. 1 C. C. 113.

Equity.—*See* Mistake; Partnership.

Equity Pleading and Practice.

1. To a bill by the United States, praying an account of all moneys received by the de-

fendant as agent in England of the so-called Confederate States, and for consequential relief, the defendant pleaded to the whole of the discovery and relief, that, by an act of Congress, the property of all agents of the Confederate Government was liable to confiscation, and that proceedings *in rem* were pending in the United States to confiscate his property on the ground of such agency. *Held*, that the plea was good as to the discovery, but bad as to the relief.—*United States* v. *McRae*, Law Rep. 3 Ch. 79.

2. To set aside for fraud a decree signed and enrolled, actual, positive fraud must be shown. Mere constructive fraud is not sufficient,—at all events after long delay.—*Patch* v. *Ward*, Law Rep. 3 Ch. 203.

3. A solicitor, acting on behalf of his client, contracted to pay the plaintiff a certain sum, such sum to be a charge on the client's land. The plaintiff filed a bill against the client and solicitor, alleging that the client was bound by the contract, but that the client denied that he was bound, on the ground that the solicitor had no authority to enter into such contract; and the bill prayed specific performance by the client, or otherwise, if it should appear that the solicitor was not authorized, then that the solicitor might be declared personally liable to perform the same. A demurrer by the solicitor was allowed, on the grounds, (1) that the plaintiff did not himself allege that the client was not bound; (2) that alternative relief could not be prayed against one defendant in case relief could not be obtained against another defendant; (3) that the remedy agaiast the solicitor was at law.—*Clark* v. *Lord Rivers*, Law Rep. 5 Eq. 91.

See Contract, 2; Injunction.

Estate Tail.—*See* Tail, Estate in.

Evidence.—*See* Bill of Lading; Frauds, Statute of; Mistake; Necessaries, 2; Parol Evidence; Production of Documents; Stamp.

Executor and Administrator.—*See* Administration.

Executory Trust.

By deed it was agreed that A. should raise out of certain hereditaments £800, and invest the same in the names of trustees on trusts to be declared for the benefit of R. for her life, remainder to her children, and as to R. for her separate use, and with all the powers for maintenance, and other powers and trusts usually inserted in a money settlement of the like nature, and, till such declaration should be made, A. to retain the £800 upon the like trust. No subsequent declaration of trust was ever made. *Held*, that the deed was executory only, and that the settlement so directed ought to have limited the £800, after the death of R., amongst the children as tenants in common, and not as joint tenants.—*Mayn* v. *Mayn*, Law Rep. 5 Eq. 150.

Factor.

Cotton was consigned for sale by A. to B. B. deposited the bill of lading with C., and authorized him to receive and sell the cotton, and subsequently made a further pledge to D. of the balance of the net proceeds of the cotton by written order, assented to by C. *Held*, that the pledge to D. was valid as against A. under the Factor's Act (5 & 6 Vic. cap. 39).—*Portalis* v. *Tetley*, Law Rep. 5 Eq. 140.

Fixtures.

Looms put up by the lessee of a mill during his term, and fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the stone floor, are, though easily movable without injury to the freehold, fixtures which pass under an assignment of "the mill, fixed machinery, and hereditaments, with all looms and other machinery, fixed or movable," without the registering of the assignment under the 17 & 18 Vic. cap. 36, which requires all assignments of chattels to be registered.—*Boyd* v. *Shorrock*, Law Rep. 5 Eq. 72.

Foreign State.—*See* Equity Pleading and Practice, 1.

Forfeiture.—*See* Equity Pleading and Practice, 1

Frauds, Statute of.

On a purchase of flour, J. W., an agent of the defendant, made the following entry in a book belonging to N.: "Mr. N., 32 sacks at 39*s*., to wait orders. J. W." In an action by N. for non-delivery of the flour, this entry was proved; and it was proved by parol evidence that N. was a baker, and the defendant a flour merchant; and a correspondence subsequent to the purchase was put in, relating to the delivery of the flour by the defendant to N. *Held*, that the entry was a sufficient memorandum to satisfy the Statute of Frauds; for that the parol evidence of the relative trades of the parties was admissible, and, independently of the correspondence, showed that the defendant was the seller, and N. the buyer, of the flour. *Vandenburgh* v. *Spooner*, Law Rep. 1 Ex. 316, considered.—*Newell* v. *Radford*, Law Rep. 3 C. P. 52.

Garnishee.—*See* Costs.

Husband and Wife.

1. The court will not settle the whole of a wife's fund on her and her children, where the husband is not insolvent, and has not been

guilty of adultery, cruelty or desertion. In determining the proportion to be settled, the court is bound by no fixed rule, but will exercise a judicial discretion, according to circumstances. The court refused to interfere with the husband's right to the fund in default of children, in case of his surviving his wife.—*In re Suggitt's Trusts*, Law Rep. 3 Ch. 215.

2. A woman, entitled to a fund in court, applied for a loan on the security of the fund. Before the transaction was completed, she married, and the money was advanced to her and her husband, who both joined in mortgaging the fund. The fund was then carried over to the joint account of husband and wife, and a stop put on it in favor of the mortgagee. In June, 1867, the wife obtained a decree *nisi*, for dissolution of the marriage, which became absolute in January, 1868. In the interval, the mortgagee presented a petition, on which an order was made by a vice-chancellor for payment of his debt out of the fund. *Held*, (1) that the mortgage did not bind the wife's right by survivorship, and that her pre-nuptial negotiation made no difference; (2) that the carrying over the fund to the account of husband and wife was not a reduction into possession by the husband; (3) that, on the decree for dissolution becoming absolute, it took effect from the date of the decree *nisi*, and so the order on the petition was of no avail to reduce the fund into possession.—*Prole* v. *Soady*, Law Rep. 3 Ch. 220.

See Bankruptcy, 1; Necessaries, 1.

Income.—*See* Tenant for Life and Remainderman.

Infant.—*See* Necessaries, 2, 3.

Injunction.

1. Proceedings in one suit in equity may be restrained by an injunction obtained in another suit.

If there are two claimants to a fund, and one files a bill against the holder of the fund without making the other a party, the holder of the fund may file an interpleader bill, and restrain the proceedings in the former suit.—*Prudential Assurance Co.* v. *Thomas*, Law Rep. 3 Ch. 74.

2. A local board of health withdrew its opposition to a railway bill on the insertion in the act of a clause that no bridge carrying a road over the railway in their district should have an approach with a slope of more than 1 in 30. To make such a slope required an encroachment on the land of a person who obtained an injunction to prevent such encroachment, and the company thereupon made the approach with a slope of 1 in 20. *Held*, that, to an information by the Attorney-General, it was no answer, that a slope of 1 in 30 could not be made without stopping the road, and a mandatory injunction was granted.—*Attorney-General* v. *Mid-Kent Railway Co.*, Law Rep. 3 Ch. 100.

3. The plaintiff, a maker of cocoa-nut matting, using chloride of tin in bleaching, complained that his fabrics were injured by reason of the chloride of tin being discolored by sulphuretted hydrogen thrown off from the adjoining factory of the defendant. The evidence showed that, owing to the defendant's precautions, on three occasions only had an appreciable escape taken place, and then only from accidental defects, which were immediately remedied. An injunction was refused, without prejudice to an action at law.—*Cooke* v. *Forbes*, Law Rep. 5 Eq. 166.

See Administration, 3.

Insurance.

A policy of fire insurance provided that the insurers would not be liable for loss or damage by explosion, "except for such loss or damage as shall arise from explosion by gas." In the insured premises, which were used for the business of extracting oil, an inflammable and explosive vapor, evolved in the process, escaped and caught fire, setting fire to other things. It afterwards exploded, and caused a further fire, besides doing damage by the explosion. *Held*, (1) that "gas," in the policy, meant ordinary illuminating gas; (2) that the exemption of liability for loss by explosion was not limited to cases where the fire was originated by the explosion, but included cases where the explosion occurred during a fire, and that the insurers were not liable either for the damage from the explosion, nor from that from the further fire caused by the explosion.—*Stanley* v. *Western Insurance Co.*, Law Rep. 3 Ex. 71.

Interpleader.—*See* Injunction, 1.

Joint Tenancy.—*See* Executory Trust.

Jurisdiction.—*See* Admiralty; Equity.

Landlord and Tenant.

1. By a statute, the occupier of premises may deduct out of the rent due in respect of the premises the money which he pays to the vestry for works done by them under the statute. *Held*, that the money could not be deducted unless actually paid; and therefore that a distress for rent which became due after service of a notice from the vestry, made before payment to the vestry, was not illegal.—*Ryan* v. *Thompson*, Law Rep. 3 C. P. 144.

2. The lessee of premises covenanted to pay "all taxes, rates, duties and assessments what-

ever, which during the term should be taxed, assessed or imposed on the tenant or landlord, in respect of the premises demised." The parish vestry, having paved the street on which the premises abutted, assessed the sum payable by the owner as his proportion of the estimated expenses thereof, gave the occupier a notice, under the 25 & 26 Vic. cap. 102, sec. 96, requiring him to pay it, and, on his failure to do so, took proceedings against the owner, and compelled him to pay. *Held*, that the owner could recover from the tenant the amount paid.—*Thompson* v. *Lapworth*, Law Rep. 3 C. P. 149.

Larceny.—*See* Criminal Law.

Legacy.—*See* Will.

Letter of Credit.—*See* Contract, 1.

Lex Loci.—*See* Conflict of Laws.

Liquidated Damages.—*See* Vendor and Purchaser of Real Estate, 2.

Malicious Wounding.

A prisoner may be convicted under a statute punishing the malicious "wounding" of cattle, though the wound was inflicted by the prisoner's hands, without any instrument.—*The Queen* v. *Bullock*, Law Rep. 1 C. C. 115.

Married Woman.—*See* Husband and Wife.

Mistake.

A renewed bill of exchange was drawn out, with a blank for the drawer's name, by an agent of the plaintiff, who, by mistake, inserted, above the place where the drawer's name was afterwards inserted, the name of the plaintiff; the signatures of the drawer and acceptor were afterwards added, and the bill indorsed to the plaintiff; the plaintiff sued the drawer at law, and, on the defendant pleading that the plaintiff's name appeared as drawer on the bill, the plaintiff filed a bill in equity for rectification. A demurrer to this was overruled, (1) on the ground that evidence to prove the real contract was not admissible at law, and (2) on the ground of the established jurisdiction of equity to correct mistakes.—*Druiff* v. *Lord Parker*, Law Rep. 5 Eq. 131.

See Will, 1.

Mortgage.—*See* Parol Evidence; Ship, 2; Specialty Debt.

Necessaries.

1. The legal expenses of a deserted wife, (1) preliminary and incidental to a suit for restitution of conjugal rights; (2) in obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement; (3) in obtaining advice as to the proper mode (*a*) of dealing with tradesmen who were pressing her to pay for necessaries supplied to her since she was deserted, and (*b*) of preventing a threatened distress on her husband's furniture in the house she occupied, are necessaries for which she can pledge her husband's credit.—*Wilson* v. *Ford*, Law Rep. 3 Ex. 63.

2. The plaintiff sold to the defendant, a minor, a pair of jewelled solitaires, which might be used as sleeve buttons, worth £25, and an antique silver goblet, worth £15, which last the plaintiff knew the defendant intended for a present. The defendant was the younger son of a deceased baronet, with no establishment of his own, and an allowance of £500 a year. In an action for the price of these articles, the question whether they were necessaries was left to the jury, who found that they were. *Held* (by Kelly, C.B., and Channell and Pigott, BB.), that the question was rightly left to the jury, but that the finding as to the goblet was wrong, and that therefore there ought to be a new trial. Per Bramwell, B., that neither article was a necessary, and that both findings were wrong.

At the trial, the defendant offered evidence, that, when he bought the solitaires, he was already sufficiently provided with similar articles; but he did not offer to show that the plaintiff knew the fact. *Held*, that the evidence was properly rejected.—*Ryder* v. *Wombwell*, Law Rep. 3 Ex. 90.

3. Unless special circumstances are shown, tobacco is not a necessary to any infant.—*Bryant* v. *Richardson*, Law Rep. 3 Ex. 93, note.

Notice.—*See* Priority; Sale.

Nuisance.—*See* Injunction, 3.

Parol Evidence.

The plaintiff mortgaged goods to the defendant, to secure the payment of £62 by instalments of £5 on Monday, May 22, and on each succeeding Monday till the whole was paid. The mortgage deed provided, that, if the mortgagor should make default in payment of the said £62, or any part thereof, when and as the same should become due and payable, the mortgagees might take possession of the goods and sell them. In an action against the defendant to recover the value of the goods which he had taken and sold for an alleged default in payment, the plaintiff offered parol evidence to show, that, the previous instalments having been paid, on Monday, August 28, the plaintiff asked the defendant to wait payment till Sept. 11, when she would pay £6; the defendant assented, and, on September 11, the plaintiff tendered the money, but the defendant had previously taken the goods. *Held*, that the parol

evidence was admissible, and showed that there had been no "default," within the meaning of the deed.—*Albert* v. *Grosvenor Investment Co.*, Law Rep. 3 Q. B. 123.

See Frauds, Statute of; Mistake.

Parties.

C. & Co., merchants in Spain, gave one J. a power of attorney to sell certain mines belonging to them, J. to receive half of the price obtained above a certain amount. J. contracted to sell the mines to the defendant company by an agreement purporting to be made between "J., acting for himself, and also, under a letter of attorney, for A., B. and C., all three co-proprietors with him of various mines, and in co-partnership with him under the style of C. & Co.," of the one part, and the defendants of the other part. In the body of the agreement, C. & Co. were described as "the vendors," and the vendors were to give a good title to the mines. The agreement was signed by J., "for self and partners," and was sealed with the defendants' seal. *Held*, that J. alone could not maintain an action for breach of the agreement, but that A., B. & C. must be joined as plaintiffs.—*Jung* v. *Phosphate of Lime Co.*, Law Rep. 3 C. P. 139.

Partnership.

The plaintiff, being entitled to a fund in court, gave the firm of solicitors who had acted for him in the matter a joint and several power of attorney to receive the money. The plaintiff was in the habit of addressing his letters to B., one of the firm, individually, and not to the firm, and he sent the power addressed to B., who, under it, received the money, signed the receipt in his own name, paid the money into his private bank account, and soon after absconded with it. On a bill seeking to make S., the other partner, liable to repay the money, but not praying an account, *held*, (1) that there was jurisdiction at equity, though there might be also at law; and (2) that a decree should be made that S. should repay the amount with interest.—*St. Aubyn* v. *Smart*, Law Rep. 5 Eq. 183.

See Club.

Patent.

A patentee of an invention applicable to part of a machine, who, himself a manufacturer, has been in the habit of allowing other manufacturers to use his invention, on payment of a fixed royalty for each machine, having obtained against an infringing manufacturer a decree (amongst other things) for damages "by reason of the user or vending" of the invention, cannot claim, by way of damages, a manufacturing profit, in addition to his ordinary royalty; and certain persons (not being manufacturers) who had used unlicensed machines, fitted by the defendant with the invention, having paid the plaintiff his ordinary royalty, no further royalty in such cases can be recovered from the defendant.—*Penn* v. *Jack*, Law Rep. 5 Eq. 81.

Payment.—*See* Sale.

Penalty.—*See* Vendor and Purchaser of Real Estate, 2.

Pilot.—*See* Collision.

Pleading.

To a declaration for goods sold and delivered, claiming £120, the defendant pleaded: 1. Never indebted; 2. "And for a further plea," that after the commencement of the suit, and after the last pleading, it was agreed that the plaintiff should accept from the defendant £60 in settlement of the debt sought to be recovered in the action; and the defendant paid and the plaintiffs accepted £60 in satisfaction and discharge of their said debt. On demurrer to the second plea, *held*, that the plea, being pleaded generally, must be taken to be pleaded to the whole causes of action; and as it alleged the payment, after action brought, to have been in satisfaction of the debt only, it was bad for leaving unanswered any damages to which the plaintiffs might be entitled.—*Ash* v. *Pouppeville*, Law Rep. 3 Q. B. 86.

See Equity Pleading and Practice; Parties.

Pledge.—*See* Factor.

Power.

A testator gave an estate on trust for sale the proceeds to be held on such trusts as his widow—by deed or instrument sealed and delivered before his youngest child should attain twenty-five years—should appoint, and, in default, for his children (except the eldest son) equally. The widow, by will, executed before the youngest child attained twenty-five, appointed the estate by name to the eldest son. She died after the youngest child attained twenty-five. *Held*, that the will, having come into operation after the prescribed period, could not take effect as an appointment under the power; and that this was not such a defective execution as would be aided in equity.—*Cooper* v. *Martin*, Law Rep. 3 Ch. 47.

See Election.

Practice.—*See* Equity Pleading and Practice.

Principal and Agent. — *See* Custom; Equity Pleading and Practice, 3; Factor.

Priority.

Formal notice to the trustee of a fund, in which an insolvent is interested, is necessary to give the assignee in insolvency priority over

subsequent incumbrancers who have given notice. Knowledge of the insolvency, acquired *aliunde* by the solicitor of the trustees, is insufficient to give priority to the assignee.—*In re Brown's Trusts*, Law Rep. 5 Eq. 88.

See Costs.

Proctor.—*See* Costs.

Production of Documents.

To an action of executors to recover damages for the death of their testator, caused by the alleged negligence of the defendants, the defendants pleaded not guilty, and that the deceased had accepted £75 in discharge of all claims against them. The defendants had sent a clerk and their medical officer to see the deceased, ascertain his state, and negotiate as to the compensation to be made him. *Held*, that the plaintiffs were entitled to have inspection and copies of the reports made to the defendants by these officers of their interviews with the deceased.—*Baker* v. *London & S. W. Railway Co.*, Law Rep. 3 Q. B. 91.

Proximate Cause.—*See* Insurance.

Railway.—*See* Company, 2; Injunction, 2.

Sale.

The plaintiff sold to the defendants goods, to be paid for in cash or "approved bankers' bills." The defendants paid for them by an "approved banker's bill." The bill was subsequently dishonored. The defendants were not parties to the bill, and received no notice of dishonor. In an action for the price of the goods, *held*, that the defendants' liability was not more extensive than it would have been had they indorsed the bill, and that they were therefore discharged, not having received due notice of dishonor.—*Smith* v. *Mercer*, Law Rep. 3 Ex. 51.

See Custom: Damages; Frauds, Statute of; Vendor and Purchaser of Real Estate; Warranty.

Set-off.—*See* Administration, 1.

Share.—*See* Contract, 2; Tenant for Life and Remainderman.

Shelley's Case, Rule in.—*See* Will, 2.

Ship.

1. A. engaged to serve on a ship as a seaman, for a long voyage out and back. The captain having died soon after the ship sailed, the first mate assumed the command, appointed A. second mate, and agreed that he should receive the pay of a second mate. The ship subsequently touched at several ports, and returned home, A. continuing to act as second mate. *Held*, that the agreement with A. was binding on the ship-owners.—*Hanson* v. *Royden*, Law Rep. 3 C. P. 47.

2. A., the owner of a ship, mortgaged it to B., and afterwards, with B.'s acquiescence, agreed with C. that C. should work the ship for A. till further notice, paying all expenses and receiving all profits; A. to indemnify C. against loss, if any, on a periodical statement of accounts. After this agreement, B. notified C. of the mortgage, and demanded possession. The ship was then at S., under engagements by C. with third parties for a voyage. At the end of the voyage, the ship was given up to B. At the time of the delivery, C. owed the crew a large sum for wages; to recover which, soon after the delivery, the crew proceeded against the ship in the Admiralty Court, and the ship was seized by the officers of the Court. B., after much delay and loss, paid the wages and obtained possession of the ship. In an action of trover and for money paid, brought by B. against C., *held*, (1) that C. was entitled to keep possession till the end of the voyage, in order to fulfil the engagements entered into before notice; (2) that, as there had been a delivery of the ship, notwithstanding it was subject to a lien for wages, B. could not recover in trover; but (3) that B. could recover the amount of the wages under the count for money paid.—*Johnson* v. *Royal Mail Steam Packet Co.*, Law Rep. 3 C. P. 38.

See Admiralty; Award, 2; Collision.

Signature.

The 6 Vic. cap. 18, sec. 17, requires the notice of objection to a voter to be "signed by the person objecting." An objector affixed his name to the notice of objection by a stamp, on which was engraved a *fac simile* of his ordinary signature. *Held*, a sufficient signing.—*Bennett* v. *Brumfitt*, Law Rep. 3 C. P. 28.

Solicitor. — *See* Costs; Equity Pleading and Practice, 3; Necessaries, 1; Partnership.

Specialty Debt.

A mortgage deed, made to secure an antecedent debt, recited the debt, and contained a proviso for redemption and a power of sale, but no covenant to pay the debt or interest. The mortgaged estate was insufficient to cover the debt. *Held*, that the deed did not convert the debt into a specialty debt.—*Isaacson* v. *Harwood*, Law Rep. 3 Ch. 225.

Specific Performance.

A person agreed to purchase a leasehold house for his own residence, and contracted that he should have possession by a certain day. The vendor, though he tendered possession, failed to show a good title by the day named. *Held*, (1) that "possession" must be understood to mean possession with a good

title shown; (2) that time was of the essence of the contract, and that a bill by the vendor for specific performance should be dismissed.—*Tilley* v. *Thomas*, Law Rep. 3 Ch. 61.

See Contract, 2; Equity Pleading and Practice, 3.

Stamp.

A deed assigning a debtor's property may be given in evidence as proof of an act of bankruptcy, though not stamped. — *Ponsford* v. *Walton*, Law Rep. 3 C. P. 167.

Statute.

1. The 30 & 31 Vic. cap. 142, sec. 10, enacts that, on the affidavit of a defendant in an action of tort, brought in a superior court, that the plaintiff has no visible means of paying costs, either the plaintiff must give security for costs, or the cause shall be remitted to the county court. *Held*, that the statute was retrospective, and applied to an action commenced before its passage. — *Kimbray* v. *Draper*, Law Rep. 3 Q. B. 160.

2. In 1854, W., as surety, joined in a bond with C. In July, 1856, was passed the 19 & 20 Vic. cap. 97, which provides, in sec. 5, that every surety for the debt of another, who shall pay such debt, shall be entitled to have assigned to him any security held by the creditor in respect of such debt, and to stand in the place of the creditor. In December, 1856, the condition of the bond was broken, and W. paid the amount due on it. *Held*, that W. was entitled to rank as a specialty creditor of C.—*In re Cochran's Estate*, Law Rep. 5 Eq. 209.

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

Survivorship.—*See* Will, 3.

Tail, Estate in.

Testator devised all his estate of land, situate, &c., to his wife for life, and after her death to his daughter M., "to her and her children forever." At the date of the will, and of the testator's death, M. had no children born, but at those times she was *enceinte* of a child who was born after the testator's death. *Held*, that M. took an estate tail.—*Roper* v. *Roper*, Law Rep. 3 C. P. 32.

See Will, 2.

Tax.

Commissioners were incorporated with powers to construct a bridge, and to borrow from the Treasury £120,000 on an assignment of the tolls: they were authorized to take tolls, to be applied to pay the expenses of the bridge, and then in repayment of the sum borrowed. *Held*, that they were not liable to the poor-rate, as they were in occupation of the bridge as servants of the crown, deriving no benefit from the tolls, and therefore exempt from the operation of 43 Eliz. cap. 2, sec. 1.—*The Queen* v. *McCann*, Law Rep. 3 Q. B. 141.

Tenant for Life and Remainderman.

Shares in a company were given on trust to pay A. during her life "the interest, dividends, share of profits, or annual proceeds," and after her death over. The articles of the company provided, that, out of the half-yearly profits, a dividend might be declared and a sum reserved for contingencies. During A.'s life, three new shares were added to those held in trust, pursuant to a vote of the company to apply a portion of the earnings during the half-year to necessary works, and issue new shares to represent the money so applied, a dividend being declared out of the remainder. *Held*, that the new shares were capital, not income as between A. and those in remainder.—*In re Ezekiel Barton's Trust*, Law Rep. 5 Eq. 238.

Tenant in Common.—*See* Executory Trust.

Trover.—*See* Ship, 2.

Trust.—*See* Charity; Executory Trust; Priority; Vendor and Purchaser of Real Estate, 1.

Usage.—*See* Custom.

Vendor and Purchaser of Real Estate.

1. If trustees of real estate are empowered to sell by the direction of the tenant for life, upon a sale under the power, the tenant for life must enter into the ordinary covenants for title.—*Earl Poulett* v. *Hood*, Law Rep. 5 Eq. 115.

2. An agreement to purchase a house provided as follows: "As earnest, the purchaser has paid to the vendor £50, which is to be allowed in part payment at the completion of this agreement. If the vendor shall not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated; and if the purchaser shall fail to perform his part, then the deposit shall become forfeited in part of the following damages; and if either of the parties neglect or refuse to comply with any part of this agreement, he shall pay to the other £50, hereby mutually agreed on to be the damages ascertained and fixed, on breach hereof." Instead of depositing the £50, the purchaser gave an I.O.U. for the amount. The purchaser failed to complete the purchase, and the vendor sold the house for £10 less than the purchaser agreed to pay. In an action by the vendor against the purchaser for breach of the agreement and on the I.O.U., *held*, that the plaintiff was not limited to the amount of damage actually sustained, but

might recover the £50. *Semble*, that, except for the clause of the forfeiture of the deposit, the £50 would have been a penalty and not liquidated damages.—*Hinton* v. *Sparkes*, Law Rep. 3 C. P. 161.

See Specific Performance.

Warranty.

Under a contract to sell certain described goods, which the buyer has no opportunity of inspecting, the goods must not only answer the description, but must be salable or merchantable under that description. The plaintiffs, at Liverpool, contracted with the defendant to purchase a quantity of Manilla hemp, to arrive from S. by certain ships. The ships arrived, and the hemp was delivered to the plaintiffs and paid for; on examination, it was found that the bales had been wetted through with salt water, afterwards unpacked and dried, and then repacked and shipped at S. The hemp retained its character of hemp, but it was so damaged as not to be "merchantable." The defendant did not know the state in which the hemp had been shipped at S. The plaintiffs sold the hemp at auction as "Manilla hemp, with all faults," and it realized seventy-five per cent. of the price which it would have brought if undamaged. *Held*, that there was an implied warranty to supply Manilla hemp, of the particular quality of which the bales consisted, in a merchantable condition, and that the plaintiffs were entitled, as damages, to the difference between the value of the hemp when it arrived, and what would have been its value if it had been shipped in a state in which it ought to have been shipped —*Jones* v. *Just*, Law Rep. 3 Q. B. 197.

Wife's Equity.—*See* Husband and Wife, 1.

Will.

1. J. L., by will, dated in 1849, gave the interest of a fund to Charlotte Lee, but if she should marry, or die unmarried, then over. Charlotte Lee was the maiden name of J. L.'s daughter. She had been married in 1828. J. L. knew of her marriage, but it was not shown under what circumstances. Charlotte's husband had, in 1849, not been heard of for many years. After J. L.'s death, the husband appeared, and, on Charlotte's death, claimed the fund. *Held*, that it sufficiently appeared that J. L. believed his daughter's husband to be dead, that he intended that no husband of hers should be benefited by the fund, and that accordingly on her death it went over. —*Crosthwaite* v. *Dean*, Law Rep. 5 Eq. 245.

2. Testator declared that his property should be inherited by his nephews, A. and B., during their lives, and, after their death, that their eldest sons should inherit the same during their lives, and so on,—the eldest son of each of the two families to inherit the same forever. *Held*, that A. and B. took estates for their lives, remainder to their eldest sons respectively for their lives, remainder to A. and B. in tail male—*Forsbrook* v. *Forsbrook*, Law Rep. 3 Ch. 93.

3. Gift of an annuity to the child or children of A. equally, for the term of their joint lives, or the life of the survivor or longer liver of them. *Held*, that the children took, as tenants in common, an annuity to last till the death of the survivor, and that the share of those dying within the period went to their representatives —*Bryan* v. *Twigg*, Law Rep. 3 Ch. 183.

4. Bequest to the descendants of the brothers and sisters of A., living at testator's death, "such descendants to take *per stirpes*, and not *per capita*." *Held*, that the fund was primarily divisible into as many equal shares as there were brothers and sisters of A. of whom any descendant was living at the testator's death; that such shares respectively were divisible into as many equal shares as there were children of such brothers and sisters of A. respectively living at testator's death, or having died and left any descendant then living, and so on; and that no descendant should share concurrently with a living ancestor.—*Gibson* v. *Fisher*, Law Rep. 5 Eq. 51.

See Administration; Charity; Power; Tail, Estate in.

Words.

"*Damage*."—See Admiralty.
"*Default*."—See Parol Evidence.
"*Explosion*."—See Insurance.
"*Gas*."—See Insurance.
"*Money*."—See Embezzlement.
"*Per stirpes and not per capita*."—See Will, 4.
"*Possession*."—See Specific Performance.
"*Signing*."—See Signature.
"*Wound*."—See Malicious Wounding.

GENERAL CORRESPONDENCE.

To the Editors of the Canada Law Journal.

Conveyancing—Uniformity of charges—Quack conveyancers.

Messrs. Editors,—I do not recollect to have seen any article in your Journal on the subject of conveyancing in Ontario. I propose to offer a few remarks on the subject, referring to conveyancers (meaning lawyers) and their charges. It is well known to the profession that there is no statute in force in Ontario

directly regulating the responsibility—the *licensing* or *fixing*—of the charges of conveyancers, as such.

The business of conveyancing is incidental to that of the practice of the law among lawyers, and is a large perquisite among the profits of a class not lawyers. It is discretionary now with lawyers to charge just what they think proper. The laity who act as conveyancers work *very cheap* generally, and are under *no responsibility*, *legally*, to do their work correctly. On the other hand, lawyers are legally responsible for correct searches and conveyances. Many think this state of things wrong, and I do myself; for a person taking the money of another for legal work ought to have skill and knowledge, and be responsible for palpable mistakes. I will refer to this part of the subject again. It may not be very generally known that the members of the bar of two of the leading cities of Ontario—Hamilton and Toronto—in or about 1855 established a tariff of charges relating to conveyancing and kindred subjects, for work not included in the table of fees established in the Common Law Courts. Such was the case. This tariff is followed by some (it should be by all) professional men. I think a uniformity of practice should exist in this matter, and a uniformity of responsibility among conveyancers should be maintained. The case of *Ross* v. *Strathy*, reported in the December number of your U. C. L. J. for 1858, page 277, shows how closely the law scans the conduct of lawyers in investigating titles. Mr. Strathy narrowly escaped a heavy verdict for not searching the treasurer's office for tax liens. I think, too, that a *purely conveyancing* bill should be liable to taxation in Canada, which, however, is not the case. In England such a bill can be referred; but in Canada it cannot, as was expressly decided by Mr. Justice Burns in the case of *Re Lemon & Peterson*, two, &c., reported in your July number of the U.C.L.J. for 1862. There had been other cases before this, in which it was decided that, where conveyancing charges are mixed in with law charges, for business done in courts, they can be taxed. See *In re Eccles*, U. C. L. J. for March, 1860; *Exparte Glass*, U. C. L. J. for April, 1863.

But the practice seems different in England. I believe that Mr. Hemings, the Chancery taxing officer, will tax conveyancing charges according to the tariff I have alluded to.

In England (as I understand it) conveyancing is a regular branch of the legal profession, and not as in Canada, where any one may act as conveyancer and, I presume, recover reasonable compensation for his work. Schoolmasters, magistrates, clerks of Division Courts, and (until the Act of last Session) registrars, members of Parliament, township officers and some others, have monopolized the principal part of the conveyancing business in this country. In towns and cities it has not been so. Special conveyances have generally been drawn by lawyers. Efforts have been made to get a law passed by our Canadian legislature to give this business to lawyers exclusively; but the effort has failed, the legislature not being willing even to make the laity following the business of conveyancing responsible, legally, for their mistakes. But I think the time will soon come when our Ontario legislature will (as they certainly should) give the legal professidn the entire business of conveyancing, and a tariff with it. At all events, conveyancers should take out a license, and be held legally responsible for errors in their work.

I have for many years, in Canada, been in the habit of noticing the style of conveyances, particularly deeds, leases, wills, partnership deeds, chattel mortgages and agreements, written by the persons above named (not lawyers), and the errors in form, want of proper covenants, erasures, interlineations and other defects observable in, perhaps, a majority of the papers, were very great, and often ludicrous in the extreme. Of course such errors and defects are sure to cause law-suits, and it is often said that it is a question whether lawyers do not make more by the mistakes than they would by the exclusion of such persons as are unlearned from drawing them. In this case, however, the public have a right to be protected, as they have to be from mere *quacks in medicine* or unskilful physicians.

In none of the American States have the Legislatures ever passed a law giving peculiar privileges to lawyers as conveyancers, and the popular prejudice is the same in Canada. Indeed, Canadians are in many things essentially a democratic people. One can see no reason, however, why even in a democracy, *pro bono publico*, the community should not be protected from *cheats*, from persons taking their money for doing work that they cannot under-

stand—at least, why they should not be responsible for legal errors.

Now, I chiefly commenced this letter with a view of trying to fix the attention of the profession upon the necessity of having some uniform understanding as to charges for conveyances. I think "A," a lawyer, has no right—no legal or moral right—because he is the next-door neighbor of "B," another lawyer, to charge only $4 for drawing two long *farm leases*, or $4 for drawing two deeds and affidavits, and so on, when "B," following a tariff fixed on by the profession, charges $4 for one lease or deed. I say it is wrong for the members of the profession to be *beating each other down* at the instance of some niggardly client, who will go *from office to office* to see in which he can get his work done the cheapest. There should be a *known* and *uniform* standard of charges; it is the interest of all practicing lawyers that it should be so, just as it is with the medical men to observe their tariff. And if medical men can receive their fees why not lawyers theirs, in cases not provided for by law? If all adopt the tariff it is the duty of courts of law to allow such charges to be recovered upon a "*quantum meruit*." At common law no costs are allowable at all; then in all cases where professional men, or persons performing duties or works requiring skill, are employed, they certainly have the right to meet and fix a tariff of charges, and those persons who employ them are, after a reasonable time, presumed to know their charges.

In some of the Western American States the tariff of lawyer's charges is fixed on this principle in all the courts.

The tariff charges established by the members of the legal profession in Hamilton, at a meeting held at Norton's hotel on the 28th September, 1855, over which Wm. Proudfoot, Esq, presided as chairman, and Wm. Leggo, Esq., as secretary, fixes the amounts the profession are to charge for business not included in the ordinary tariff fixed by the Judges. About the same time a similar tariff—or somewhat similar, a copy of which I have not been able to find—was establisbed by the bar in Toronto. These tariffs relate to conveyancing in all its branches, searches in the registry office, counsel fees at Courts of Oyer and Terminer, at the Quarter Sessions and Recorders' Courts, Courts of Appeal, County Courts, Courts of Probate and Surrogate, Police Court, Division Court, for advice, and for commission and business done in Parliament as lawyers. Since that time, in some of these courts—for instance in the Surrogate Court—a tariff of fees has been established for lawyers, and also in the Bankrupt Court. I do not propose (at least in this letter, which is already too long) to allude at length to the items of these tariffs, but will only refer to a few. For instance, I find that the Hamilton tariff allows $4 for every common deed, and one-half for all duplicates. It allows $1 for all common affidavits, including attendance and commissioner; and for every special affidavit, per folio of 72 words (the English way of calculating folios) 20 cents per folio. At this rate, a common deed would now cost not less than $7, including duplicate and affidavits; and if an extra affidavit, $1 more. A charge of 50 cents is made for every attendance at a public office, and every special attendance $1 in the city, and if out of the city, $2, to be increased $1 for every extra hour where more than one mile out of the city. It charges $1 for every letter and attendance upon special matters. For every common bond for a deed, or to secure money, $4. For a lease with ordinary covenants, $4—copies extra. For common chattel mortgage and affidavits, $6. For certificate of mortgage, $3, including affidavit. Fee on every examination of title, per hour, $1. Instructions for special conveyance, $2. Drafting special conveyances, per folio, 30 cts. Engrossing same, 15 cents per folio, on paper; on parchment, 25 cents. Fee on settling same, $2, to be increased if very long or important. Fee on settling same with opposite counsel, $5, to be increased in intricate cases. Opinion on validity of title, $5, to be increased if important case. Entering satisfaction on judgment, &c., $4. Advice in no case less than $2, to be increased to $10 if case important.

Now, just looking at these few charges, how many lawyers, it may be asked, are governed by the tariff? Not long since a person in Toronto called upon a lawyer to draw two farm leases, of five year's duration, for a large farm, and was told the charge would be six dollars, including a short bond to secure rent. The applicant or client turns upon the lawyer and says: "*I can get it done for four dollars by a certain firm of lawyers.*" Not long since, in Toronto, two long leases, for a property worth ten thousand dollars, were drawn, with

special covenants, amounting in length to about sixty folios, and it was objected that, in such a case, instructions, consultation fee, &c., should not be allowed; and about one-half the sum chargeable by the Hamilton tariff was only allowed by a professional man, who is a large practitioner! If, in such cases, each professional man is to charge what he pleases —is to *beat down* the prices of his fellow-practitioners—and, in other words (to use a vulgar phrase), act upon the "*dog eat dog*" system, conveyancing, which ought to be an honorable and remunerative part of a lawyer's business, will be degraded.

I wish to see fair and remunerative prices paid for conveyancing, and a tariff of charges, such as the Hamilton tariff, complied with. This is the more needed now, since titles are becoming more intricate, property more valuable, and the "collecting" system is dwindling away.

C. M. D.

Toronto, July 17, 1868.

[We have had occasion frequently to refer to the unsatisfactory state of the law in this Province, as to conveyancing, and have expressed views in great part in unison with those of our correspondent. In the *Law Journal*, at as early a period as 1859, under the heading "Liability of persons practising as conveyancers," we pointed out that in respect of property as well as health, the quack is often preferred to the educated practitioner, and suggested that none but licensed conveyancers should be allowed to draw deeds or instruments for fee or reward. We, in the *Law Journal* for February, 1859, under the heading "Conveyancing fees," also argued for a uniform tariff. In the *Law Journal* for December, 1861, under the heading "*Ne sutor ultra crepidam*," we pointed out the penny wise and pound foolish consequences of the present system, or rather want of system. In the *Journal* for October, 1864, p. 279, we demanded legislation of some kind not merely for protection of the profession, but of the public, and by reference to p. 277 of the same volume, our correspondent will also find that Judge Hughes, much to his credit, in a case before him, is reported to have said, "It is much to be regretted that no means are provided to protect the public or that the public will not protect themselves against those persons who exist in every community, invading the rights of the legal profession, by presuming to act as legal advisers, conveyancers, &c., to and for ignorant people. Their acts and ignorance to such, lead to great losses and hardships, and very often to inextricable difficulties which are ever the fruitful sources of litigation and trouble." Now that we have a local house for the Province of Ontario, containing several members of the profession, who are fully alive to the importance of legislation on the subject, it is hoped that another session will not be allowed to pass, without some attempt being made to provide the legislation required.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—I take the liberty of writing to you for information on the following points:

The attorney for the defendant, in an action in the County Court, has the plaintiff's declaration set aside as being irregular, by order of the judge, with costs of the application to be paid by the plaintiff.

Without service of the bill of costs, or notice of taxation, an allocatur is served upon the plaintiff's attorney, certified by the Clerk of the County Court; *but no demand of payment is made.*

Subsequently the defendant's attorney has the order setting aside the declaration made a "rule of court," with further costs to be paid by the plaintiff.

The affidavits in support of the motion as filed do not state that any demand has been made for payment of the costs of setting aside the declaration, but merely that the costs have been taxed at a certain sum, and the order disobeyed, as no payment has been made.

Quære? Must not the affidavits show that a demand has been made for payment of the costs of setting aside the declaration, before further costs can be inflicted of making the order a rule of court? In *Thompson* v. *Belling*, 11 M. & W. 360, Parke, B., says, "The costs that were due under the judge's order were *demanded* of the proper party, and not paid by him." And in *R.* v. *Jamieson*, 6 M. & W. 603, "a *demand* was made." In Arch. Ch. Practice, 1508, are other cases cited, which I am unable to lay my hands on at present.

Our judge, of Kent, William B. Wells, intimates that he will grant a rule to show cause why so much of the rule of court as relates to costs should not be rescinded; but he

General Correspondence.

would advise me not to incur further costs, as he will certainly discharge it.

However, preferring to take the advice of the *Law Journal* as to what is law on the subject, I write for the necessary information.

I may state that the plaintiff was always ready and willing to pay the costs of the application to set aside the declarations (there being two cases) whenever a demand was made; but he objects to paying $20 more for making the order a rule of court, as taxed against him, in both cases.

Yours truly, G. O. Freeman.

Chatham, Aug. 3, 1868.

[Costs can only be given, in such a case, "provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, and *disobeyed*." (Har. C. L. P. A. 649, Rule 129). If a judge's order have not been disobeyed at the time it is made a rule of court, the court must rescind so much of the rule as relates to the costs of making the order a rule of court. (2 Chit. Prac. 11th ed., 1595, 1596.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—I inclose the following as a case that has really arisen, for your consideration and judgment, trusting you will kindly answer the same.

A. owned lot 7 in the 4th concession, township of ——, through or rather across which has been open for twenty or thirty years a road for public use, in consequence of the allowance for road on the south end of said lot being such that it cannot be made fit for travel as a highway. In 1858, A. made his will devising the whole of said lot to his son B. Afterwards, in 1860, A. got a deed of that portion of the said road allowance that butted on said lot, from the Council of the township. A. subsequently died (in 1863), without revoking or altering his will, and owning said lot 7. A. left other children besides B., who dispute B.'s title to the said portion of road allowance, on the ground that no mention of the said portion was made in the will; that the deed for it was given by the Council subsequent to the making of the will, &c.

Is B. entitled to the said portion of road allowance, or are the other children entitled to equal shares of the same? If so, supposing A. had never taken out a deed, who would be entitled to obtain a deed from the Council? B., as owner of lot 7 under will?—or should the deed have been made to all A.'s children as heirs-at-law? Also, should the deed for said portion of road allowance express that it was given in lieu of road opened across lot 7?

Yours truly,

A Subscriber.

P. S.—In a deed, part of the description of a farm, consisting of parts of several different lots, that is to say, a line between two points, was omitted, so that the description does not really inclose the land. Does the deed containing the defective description give the purchaser a title to the land intended to be conveyed by the deed?

[We are not disposed to answer questions of this kind. Even if we were so disposed we would not undertake the task without having the entire will mentioned in the letter, and the entire deed mentioned in the "P. S." before us. Our correspondent had better hand both with a proper fee to some counsel, and get his opinion on the questions submitted. —Eds. L. J.]

A Welsh Jury.—At the Montgomery Quarter Sessions, held at Newton, last week, before Mr. C. W. Wynne, M. P., and a bench of Magistrates, a tailor, named John Welsh, was placed in the dock charged with stealing a milk can, the property of David Davies, residing at Melford. The prisoner was undefended, and the jury, after hearing the evidence, handed in a verdict of guilty, and Welsh was sentenced to three months' imprisonment, with hard labour. According to the local *Express* it has since transpired that, so far from finding the prisoner guilty, the jury were unanimous in the belief that he was innocent, and the foreman was charged with a delivery of a verdict accordingly, but that when he stood up to reply to the formal question of the clerk of the court the unfortunate man lost his presence of mind and delivered a verdict of "Guilty," and the prisoner was consigned to gaol in the presence of the jury, who were too freightened to interfere.—*Law Times.*

Intelligent Jurymen.—Sir. W. Erle in the course of his evidence on juries was asked whether it would be advisable to give juries desks and writing paper on which they might take notes. The learned gentleman made no direct reply to this inquiry, but said that 'the most intelligent and the best juries with whom he had been brought in contact, patiently listened in silence to all the evidence and all the speeches, and then found a verdict for the plaintiff or the defendant.' A talkative juror is fortunately rarely met with, but Sir. W. Erle evidently thought that the temptation to cross-examine would prove irresistible if once juries got into a habit of taking copious notes.—*Law Times.*